



FINANCIAL MARKETS LAW COMMITTEE

Date: 7 October 2021

Time: 4.30pm to 6.00pm

Venue: Linklaters LLP, One Silk Street, London EC2Y 8HQ (and via videoconference)

MINUTES

Attendees:

Lord Thomas (Chair)	FMLC Chairman
David Greenwald (Deputy Chairman) (dial in)	Fried Frank Harris Shriver & Jacobson LLP
Sir William Blair	Queen Mary University of London
Claude Brown (dial in)	Reed Smith LLP
Paul Double	City of London Corporation
Kate Gibbons	Clifford Chance LLP
Simon Firth	Linklaters LLP
Carolyn Jackson (dial in)	Katten Muchin Rosenman LLP
Mark Kalderon (dial in)	Freshfields Bruckhaus Deringer LLP
Rachel Kent (dial in)	Hogan Lovells International LLP
Peter King	HM Treasury
Sir Robin Knowles	Royal Courts of Justice
Jon May (dial in)	Marshall Wace LLP
Oliver Moullin (dial in)	AFME
Rob Price (dial in)	Bank of England
Barney Reynolds	Shearman & Sterling LLP
John Tribolati (dial in)	JP Morgan
Brian Gray	Interim CEO
Venessa Parekh	Research Manager
Chhavi Sinha (dial in)	Researcher

Registered Charity Number: 1164902.

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CHAIRMAN'S COMMENTS

The Chairman noted that the third and final videoconference, hosted as part of the 2021 Quadrilateral Conference by the Financial Markets Lawyers Group (“FMLG”) had been a great success. It had included a “fireside chat” with Benoît Coeuré of the Bank for International Settlements about the extensive work being done worldwide on Central Bank Digital Currencies. This was followed by panels on LIBOR transition—on which Claude Brown participated—and on conduct and stability issues facing the financial markets. The Chairman provided closing remarks.

The FMLC's annual Judicial Seminar will be held on Monday, 29 November 2021 on the topic of climate-related litigation. The Chairman urged Members to attend.

CHIEF EXECUTIVE'S COMMENTS

The Chief Executive updated Members on the Secretariat's move into its new premises in Guildhall. He also informed Members of staff changes which have recently occurred in the Secretariat.

He noted that the Secretariat very much hopes to hold the annual Festive Drinks as originally scheduled after the next Committee meeting on 9 December.

Members noted that the following have been published on the FMLC website:

- [Response to Consultation: Law Commission 14th Programme of Law Reform:](#) consultation to ascertain the topics which might constitute its 14th Programme of Law Reform (30 July 2021)
- [Response to Law Commission: Call for Evidence on Digital Assets:](#) review undertaken to consider and ensure that the law can accommodate digital assets (30 July 2021)

ACTIVE PROJECTS

Law Commission Call for Evidence on Digital Assets (Chair: John Salmon)

A Working Group was established to draft a response to the Law Commission's [Call for Evidence on digital assets](#), which sought views about how the law might accommodate digital assets now

and in the future, and on the potential consequences of digital assets being “possessable”. The Working Group produced a response to the Call for Evidence, offering the view that digital assets ought to be recognised under English law as capable of being in possession and proposing the recognition of a Third Category of property recognising digital assets (cryptoassets) as both intangible and yet capable of possession. Following the submission of the response, the FMLC was invited to attend a roundtable event, hosted by the Law Society, with Professor Sarah Green of the Law Commission on smart contracts and digital assets. The Chief Executive attended, together with FinTech Scoping Forum members, Sian Jones (XReg) and John Taylor (Queen Mary University of London).

The Chief Executive reported that the Law Commission expects to recommend that legislation be introduced to enable the recognition in English law of a new category of possessory digital assets, which is in line with the analysis of the Committee in its response to the Call for Evidence. Professor Green had explained that the proposals had not been finalised yet but the Law Commission intends to propose legislation which adopts a similar approach to its proposals for electronic trade documents.

The Chairman suggested that the Secretariat monitor developments in this area.

Article 3 of the RAO—Definition of contract of insurance (Chair: Peter Bloxham)

This Working Group is considering uncertainties which arise owing to the inclusion in the definition of a “contract of insurance” as set out in the (in Article 3 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001) of the clause “or similar contracts of guarantee”. The extension has been considered by market participants to make the definition broad and difficult to interpret. A paper has been drafted examining the uncertainties in this context and proposing possible mitigants.

Following the last meeting, the Secretariat had discussed the draft paper and the solutions proposed in it with Lloyds of London, as well as ensured that the scope of the paper remained narrow and focused on the regulatory question, rather than the enduring broader uncertainty around the definition of a contract of insurance. The Secretariat reported that Lloyds had raised questions in relation to the legislative change suggested by the Working Group, which it was liaising with Working Group members to resolve. Members discussed whether the comparison to the definition of contracts of insurance under New York law was sufficiently helpful. The Chairman suggested that the report be finalised for approval at the December meeting.

Good faith and financial contracts

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, Members had resolved to establish a Working Group to draft a report expressing a nuanced view on this issue, under the FMLC's educational remit. Professor Ewan McKendrick (Oxford University) has agreed to chair the Working Group. A first meeting of the Working Group has been scheduled for 19 October 2021.

A Member stated that it was important that the Working Group was careful not to increase uncertainty; those Members on the Working Group gave assurances that the Working Group would focus on good faith in performance—i.e., the implications of having a duty of good faith in the context of financial contracts. The Secretariat was urged to ensure that a comparative approach with New York law was taken.

U.K. Bank Ring-Fencing Legislation (Chair: Dorothy Livingston)

A Working Group was established to examine legal uncertainties in the context of the U.K.'s ring-fencing regime. Working Group members have drafted sections of the paper which the Secretariat has compiled. The draft paper has been sent to the Working Group for review and the Secretariat is organising a Working Group meeting to discuss next steps. Members noted that, for the report to feed into the work of the Independent Review Panel appointed by HM Treasury to review the operation of the ring-fencing legislation, it will need to published by the end of October.

Law Commission Consultation on its 14th Research Programme

Every few years, the Law Commission undertakes a public consultation with a view to submitting to the Lord Chancellor a draft Programme of Law Reform. A short letter was sent, drawing attention to the many topics that Members had identified which might benefit from the Law Commission's attention and pointing them in the direction of the relevant experts. Kate Gibbons stated that the Law Commission has asked to follow up regarding section 53(1)(c) of the Law of Property Act 1925.

RADAR

The New Consumer Duty

Members have raised with the Secretariat possible uncertainties in relation to the FCA’s proposal of a new Consumer Duty. The [Consultation](#), which closed on 31 July 2021, proposed package of measures intended to deliver better outcomes for consumers. These measures, referred to together as a new “Consumer Duty”, include:

- a new Consumer Principle that provides an overarching standard of conduct; and
- a set of Cross-cutting Rules and four Outcomes that support the Consumer Principle.

The Secretariat had put together a briefing note setting out the uncertainties which may arise in this context.

A Member noted that, setting aside the merits of the policy behind the FCA’s Consultation, the broad scope of the wording of the Consumer Duty raised an obvious issue of legal uncertainty. In addition, the proposed private right of action, which it was anticipated would be introduced in an upcoming consultation, would also give rise to legal uncertainty for financial institutions. The Member suggested that the FMLC draw attention to these concerns in response to the FCA’s next consultation. Another Member agreed that the wording of the Consumer Principle was very ambiguous. That Member expressed the view that, by the time the next consultation was published, it may well be too late to have any real impact on the inherent legal uncertainty arising with such a broad duty. Members generally agreed that principles-based regulation is inherently uncertain. Discussion followed on when the FMLC should comment. A Member queried whether writing a brief letter at this stage informing the FCA of the Committee’s views notwithstanding that the Consultation had closed but the meeting did not consider that the right approach.

The Chairman noted that this discussion was emblematic of a broader discussion the Committee must have on how and when it would comment on future regulation and the accountability of regulators. The Chairman suggested that the Committee consider its policy.

No Action Letters

Members of the Infrastructure Scoping Forum—amidst a discussion regarding the [FCA’s “no action” statement](#), issued on 19 March, with regard to reports on execution quality mandated under RTS 27 of MiFID II—raised queries in relation to the legal basis in the U.K. of “no action” letters. Attendees at the meeting noted that “no action” letters are used frequently in the US but

that there remain concerns among market participants about the level of protection they offer (particularly to those who aren't directly the subject of such an announcement). They recommended that the FMLC consider the legal basis and utility of "no action" letters in the U.K.

The Secretariat has conducted research and found that, while no action letters are especially common in the U.S. with agencies such as the Securities and Exchange Commission ("SEC"), their use in the E.U. and the U.K. has thus far been quite limited. Given the distinction between the FCA's no action statement—which was addressed generally to market participants rather than in response to a specific firm or set of circumstances—and the SEC-style no action letters and given that there seem no indications that the FCA will rely on no action letters/statements more frequently, the Secretariat would suggest that the issue be set aside for the moment. Should no action letters become a more frequently used part of the FCA's toolkit, the Secretariat suggests that it might be useful to examine the legal complexities in due course. Members agreed with the Secretariat's assessment.

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

Members have resolved that the FMLC should continuously monitor issues of uncertainty arising in the context of the U.K.'s post-Brexit financial services framework. The Secretariat proposed holding an event examining proposed post-Brexit amendments to the regulatory framework as relevant to three or four areas of the financial services. Possible areas the event might consider include the U.K. Investment Firm Prudential Regime; Lord Hill's Review of the U.K. listings regime and amendments to the regime which have already been proposed; and the anticipated ESG legislation which will complement and/or replace the "onshored" Sustainable Finance Disclosure Regulation and Taxonomy Regulation.

Distributed ledger technology in financial market infrastructures

The Secretariat has been in contact with HM Treasury to arrange a meeting with them and representatives from the FCA and Bank of England, to discuss the legal issues surrounding the adoption of distributed ledger technology ("DLT") in financial market infrastructures ("FMI"). The Chief Executive and Research Manager attended this meeting on 18 August and provided information on the various pieces of legislation which impacted the adoption of DLT by FMIs. The attendees at the meeting have requested that the Secretariat ascertain further detail from its stakeholders on questions such what obstacles HM Treasury should prioritise so as to make a

possible transition to DLT smoother and what types of entities would participate in a sandbox for FMIs. The Secretariat is liaising with select members of the FinTech Scoping Forum to gather this information.

A Member suggested that views of the Infrastructure Scoping Forum should also be sought on this topic.

The Artificial Intelligence Public Private Forum

The FCA and the Bank of England 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. A [letter](#) was sent in February to the AIPPF drawing attention to the risks posed by AI in the potential for algorithmic bias, herd behaviours and disruption of the level playing field. The Chairs of the AIPPF had been receptive to further engagement with the FMLC.

Subsequently, the Secretariat was approached by the Bank of England’s FinTech Hub with a request for a call to determine how the FMLC might help. The FinTech Hub suggested organising a roundtable event, for those at the Bank of England and FCA working with the AIPPF, focusing on the legal perspectives and uncertainties arising from the use of AI in financial services. The AIPPF requests participation from a variety of members. The Chief Executive requested members to volunteer to participate either themselves or their colleagues in this round table. A number of members expressed interest in participating.