

THE CITY OF LONDON LAW SOCIETY

COMPANY LAW SUB-COMMITTEE

**Minutes of the 230th meeting held at 9.00 a.m. on Thursday 18 October, 2007
at Slaughter and May, One Bunhill Row, EC1Y 8YY**

1. Introduction and apologies for absence

Apologies for absence were received from Richard Brown, Mark Curtis, James Palmer, Christopher Pearson, and David Pudge. It was noted that alternates attending were: Karen Wedekind (for Richard Brown), Margaret Coltman (for Christopher Pearson) and Kate Norgett (for David Pudge).

2. Approval of minutes

It was noted that the minutes of the 229th meeting would be approved at the next meeting of the Sub-Committee.

3. Matters Arising

3.1 Companies Act 2006

The documents referred to in the Appendix of the agenda were noted.

Board minutes – promoting the success of a company

The Sub-Committee discussed their respective firms' practices in relation to board minutes and the form of words to be used to show that directors had considered whether a particular action "promoted the success" of the company. It was noted that in some firms there appeared to be pressure from banking colleagues to include the list of factors set out in section 172 Companies Act 2006 in board minutes. This was contrary to the approach the Sub-Committee had previously discussed and recommended. The Sub-Committee continued to hold the view that this should be resisted, which was consistent with advice some members had received from counsel.

Listing Rules 13.3.1

It was also noted that the UKLA had considered whether it should conform Listing Rule 13.3.1(5) (R) (inclusion of board recommendation in circulars where voting required) so that it refers to "promoting the success of the company". It was decided that this was not necessary – the Companies Act 2006 test and Listing Rule requirements were not inconsistent as the Companies Act standard was applicable to decisions of directors while the recommendation was addressed to shareholders.

Section 172(2) Companies Act 2006

The Sub-Committee considered whether it might be helpful for directors to include statements of the purposes of the company in their directors' report as a way of defining how "success" should be determined relying on s172(2). For example, it might be helpful for a subsidiary to state that promoting the success of the company included promoting the success of the group as a whole. The Sub-Committee was divided on the usefulness of section 172(2) for commercial companies. It was noted that section 172(2) was introduced in order to allow for not-for-profit and charitable companies where the measure of "success" will be quite different from that of a commercial company and that for intra-group arrangements it was likely that the existing approach (including, where appropriate, shareholder approvals) would continue to be applicable.

There was concern that if directors were to seek to set out the purposes of a company in their directors' report, the effect might be to limit the board's ability to act outside those purposes (i.e. effectively reintroducing an objects clause). Furthermore, it was considered a matter for shareholders, not directors, to determine the purposes of a company – directors could and should only set objectives to achieve those purposes.

The alternative view was that such statements were a helpful way of setting a minimum threshold for success (which could be adjusted over time). The practice could be useful, in particular, in the context of joint ventures where statements of purpose may, given the diversity of interest of joint venture partners, provide an opportunity to protect directors in a manner not available previously.

Written approvals by public limited companies

The view of the Sub-Committee was sought as to whether firms recommended that public companies (who are not permitted to pass written resolutions) may nevertheless approve transactions "by agreement" rather than at a meeting, relying on *Re Duomatic*. The Sub-Committee agreed that, whilst *Re Duomatic* remained good law, members would not be comfortable recommending that it be used when there was a proper mechanism for passing a resolution at a meeting on short notice. It should be relied upon as a last line of defence only.

Proxy voting – obligations of the chairman

The Sub-Committee considered the nature of a chairman's obligations in relation to proxy voting on a show of hands. The Sub-Committee was aware that certain counsel have advised that chairmen must vote all proxy votes unless discretion not to do so is contained within the relevant company's articles of association. Accordingly, the same counsel have advised that the safest route for a chairman who has received proxy votes for and against a resolution is to put the resolution to a poll, even if he has many more votes for a resolution than against. The Chairman noted that ICSA Guidance provides that a chairman should call a poll in circumstances where he receives conflicting votes. The Sub-Committee agreed that this would generally be the best course of action, if the show of hands did not reflect the underlying voting. Furthermore, there would be specific cases where it would be essential to call a poll - for example, where a public

company converts to a private company where it was necessary to receive every vote in order to preserve a shareholder's right to object to conversion if they voted against the resolution.

Sections 323 and 152 Companies Act 2006

The Sub-Committee discussed the interaction between sections 323 and 152 Companies Act 2006 in light of ICSA Guidance and the new DBERR FAQ regarding the on the subject. It was noted that this issue has caused debate in the context of custodian voting.

The DBERR FAQ states that section 323 is subject to an implied exception for section 152. However, some members of the Sub-Committee were strongly of the view that this was an incorrect interpretation of the Act and that a custodian seeking to reflect the different votes of its clients should appoint proxies rather than corporate representatives to attend a meeting.

The ABI was not happy with this approach primarily, it seems, because the consequence would be to require custodians to deliver proxy appointments at least 48 hours before the start of the meeting. Custodians' current practices are not able to accommodate this.

Other members of the Sub-Committee considered that it should be possible to appoint multiple corporate representatives to vote in different ways provided that the same shares are not voted twice. It was noted that there was ongoing discussions on this point with the ABI and DBERR. [*Note: The DBERR FAQ on this issue has subsequently been removed from their website.*]

Companies House filings

It was noted that section 29 Companies Act 2006 does not seem to provide a complete list of resolutions to be filed with the Registrar of Companies. In particular, it does not include ordinary resolutions to grant section 80 authority. However, Companies House seem to be of the view that section 80 resolutions should still be filed. DBERR have not responded to requests for guidance on this issue. Accordingly, the safest approach seems to be to continue to file such resolutions.

Limited liability

It was noted that due to a lacuna in the drafting of sections 3, 7 and 8 Companies Act 2006, it appeared that companies incorporated under Companies Act 2006 must state in their articles of association that the company is "limited by shares". If they fail to do so, they may be treated as an unlimited liability company. The draft Model Articles do not currently contain such a statement but proposals to address this have been made to DBERR.

3.2 Shareholder Voting Rights

It was noted that the European Commission's response to its consultation on shareholder voting rights had been published:

http://ec.europa.eu/internal_market/company/docs/shareholders/consultation3_report_en.pdf. Further proposals may be made in January 2009.

3.3 Cross-border mergers

Items 3.3(A) and (B) of the agenda were noted. It was noted that the Cross-Border Merger Regulations would come into force in December 2007.

3.4 Market Abuse Directive

The CESR work programme on the Market Abuse Directive was noted. The Sub-Committee's attention was drawn, in particular, to the proposal to revisit the use of the same definition of "inside information" to define both the information that issuers must disclose and the information that would render a dealing in shares market abuse.

4. Discussions

4.1 Dealing with inside information within law firms

It was noted that the proposal for this discussion item flowed from the FSA Market Watch comments on inside information and that the Solicitors Regulatory Authority is now in discussion with the FSA on this topic.

4.2 Companies Act 2006 – articles of association changes

The Chairman explained that he had invited Nilufer von Bismarck of Slaughter and May to attend the meeting to explain an initiative that she and representatives of other city law firms had been undertaking in relation to changes to companies' articles of association as a result of the Companies Act 2006.

Nilufer von Bismarck explained that an ad hoc working group had been established towards the beginning of 2007 to agree a common approach to (i) the types of changes that companies may wish to make to their articles of association and (ii) some of the more difficult aspects of the Companies Act 2006, such as directors' conflicts.

The working group had, with the assistance of the Sub-Committee's UKLA Liaison Group, discussed with the UKLA whether it would be prepared to review a pro forma circular on articles changes. The purpose was to obtain the UKLA's confirmation that companies making the changes contemplated in the circular, and other types of similar changes, would not be required to have their circulars pre-approved by the UKLA. A pro forma circular had been prepared and reviewed by the UKLA. The UKLA confirmed that companies making the changes summarised in the pro forma circular would not need to have their circulars approved by the UKLA. The UKLA intends to make a public statement in List! on this subject.

The working group were seeking the Sub-Committee's consent to inclusion of the pro forma circular on the Sub-Committee's website (which would provide a convenient way to publicise its existence). The working group were not seeking endorsement of the drafting in the circular, as it would be open to companies to make changes.

It was noted that the draft pro forma circular had also been provided to the ABI for comment.

The working group has also discussed the issue of directors' conflicts of interest with the GC100.

The Sub-Committee agreed that the pro forma circular should be noted and that a copy should be posted on its website.

5. Current problems and recent developments

5.1 Company law and legislation

DBERR's request for views on the EC consultation on simplification of EU company law and auditing regulation (item 5.1(C) of the agenda) was noted. DBERR has suggested that the whole of the Second Directive should be repealed. It was noted that the Law Society Company Law Committee had prepared a response stating that it was in favour of wholesale repeal. However, the Company Law Committee is aware that some bodies are keen to retain the pre-emption rights provisions. However, if wholesale repeal was not accepted, the regulation should nevertheless be simplified significantly, including in relation to the repeal of capital maintenance and distribution provisions. The Sub-Committee noted that it was aware that the ABI wished the concept of payments of dividends out of distributable profits to be retained.

The Sub-Committee noted the draft Companies (Reduction of Capital) Regulations 2008, which will implement the Simplification of Capital Maintenance Directive: <http://www.berr.gov.uk/files/file41627.PDF>. It was noted that the draft regulations require creditors to "*show that there is a real likelihood that the proposed reduction will put at risk the due discharge of the debt or claim*". The combination of "real likelihood" and the rather vague phrase "put at risk" left the position unclear. It was suggested that the Sub-Committee prepare a response making this point and suggesting alternative language.

Items 5.1(A), (B), (D) and (E) of the agenda were noted.

5.2 FSMA/FSA

Items 5.2 (A) - (D) of the agenda were noted.

5.3 Listing rules, DTRs and Prospectus Rules

The publication of List! 16 was noted. The Sub-Committee noted, in particular, the clarifications regarding the contents of prospectuses in limited access situation. The

UKLA is of the view that responsibility statements may not be qualified, but risk factors may be included in the prospectus. The Sub-Committee expressed some concern that this approach could act as a constraint on hostile share-for-share transactions. Section 2.9 (frequently asked questions) of List! 16 was also noted and, in particular, the response that the UKLA considers that a share purchase agreement for a Class 1 transaction should be put on display (relying on Annex I paragraph 24 (b) of the Prospectus Regulation).

The AIC commentary on public dissemination of periodic financial information for an investment companies was also noted, in particular, its disclosure of the UKLA's view that it has no discretion under the DTRs to grant dispensation from the requirement to publish an interim report in the first six months of a financial year, even where the company is newly incorporated and its first financial period would be for less than a full year. The Chairman was aware of an instance where this question had arisen in relation to a new holding company interposed by scheme of arrangement above an existing trading group. In that particular case the UKLA agreed that the interim report could relate to the first six months of the financial period of the trading group and not to the first six months of existence of the new holding company. However, the UKLA had confirmed that where a financial period was shortened there was no flexibility to avoid an interim report for the first six months.

Items 5.3 (B) – (G) and (I) – (L) of the agenda were noted.

5.4 AIM

The LSE announcement on the concept of an AIM primary market registered organisation was noted.

5.5 EU/US Overseas security laws in practice

Legislation on U.S. National Security Review of Foreign Investments in U.S. Companies

It was noted that the "Foreign Investment and National Security Act of 2007" has passed the U.S. House of Representatives and Senate and will be signed by the President. This legislation revises U.S. national security reviews of foreign investments in U.S. companies, making reviews more rigorous, particularly for transactions in certain sensitive sectors, including critical infrastructure and critical technologies, as well as transactions where the foreign company is controlled by a foreign government. Filing with CFIUS remains voluntary. However, because (i) the safe harbour from future scrutiny initiated by CFIUS and a possible divestiture or suspension order attaches only to those transactions that have filed for and received CFIUS clearance, and (ii) critical infrastructure and critical technology assets are now statutorily considered to affect the national security, foreign entities seeking to purchase or merge with U.S. companies in these sectors can be expected to file with CFIUS with greater frequency than they have in the past.

Arbitration of securities claims directed to proceed as a class action based on deposit agreement governing American Depositary Receipts

Foreign issuers with American Depositary Receipt programmes should be aware that if their deposit agreement contemplates AAA arbitration, they risk being subject to class action arbitration on claims (such as securities fraud). Accordingly, foreign issuers may wish to consider adding a provision requiring any class action claims against the issuer to be filed in a federal court in the U.S. or amending the arbitration provision to provide that disputes be settled in accordance with rules and/or by arbitral institutions (such as UNCITRAL, ICC or LCIA).

5.6 Accounting Items

Items 5.6 (A) – (G) were noted. Particular attention was drawn to the Financial Reporting Review Panel's announcement that it would pro-actively review directors' reports and the ICAEW guidance on distributable profits, including the effect of requirements for marking-to-market financial instruments.

5.7 Mergers and Acquisition (Public)

Items 5.7 (A) and (B) of the agenda were noted.

In addition, the Sub-Committee discussed the Panel's requirements in relation to syndication of debt and the interaction with Rule 20.1 of the City Code on Takeovers and Mergers in circumstances where a potential syndicate bank is a shareholder in the target. It was noted that in one particular transaction the Panel had asked a law firm to confirm the efficacy of the Chinese walls in place within potential syndicate banks. The law firm refused but there were difficult debates with Panel on this issue. In other circumstances, the Panel has required confirmations from bidders that they understand that the appropriate Chinese walls are in place within potential syndicate banks. The Sub-Committee was of the view that the Panel should publish a standard form of confirmation which should be used by bidders in appropriate circumstances.

The Sub-Committee also considered the Panel's views on competing offers which were being implemented by way of schemes of arrangement. It was noted that in a situation where Company A makes an offer for a target and is then outbid by Company B, the Panel would not allow Company A to withdraw its scheme until the Company B scheme had become effective. This meant that Company A was locked into the process and required to maintain certain funds for a number of months after it become apparent that its bid would not succeed. The Sub-Committee concluded that the best means of addressing this would be for the merger agreement to provide that Company A may force the target board to hold the shareholder meetings in relation to its scheme, notwithstanding the existence of the scheme of arrangement in relation to Company B's bid.

6. CPD Credit: portion of meeting eligible

It was noted that the time qualifying for CPD credit would be 2 hours.

7. Close

There being no further business, the meeting was closed.

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Chairman