

**CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE**

**Minutes of a meeting held at the office of Simmons & Simmons, City Point, One Ropemaker
Street, London EC2Y 9SS**

on Wednesday 19 September 2012 at 1pm

Present: Dorothy Livingston (Herbert Smith – Chairman)
Richard Calnan (Norton Rose)
Charles Cochrane (Clifford Chance)
John Davies (Simmons & Simmons – Host)
Matthew Dening (Sidley Austin)
Mark Evans (Travers Smith)
Roy Griggs (Cameron McKenna) (alternate for John Naccarato)
Alan Newton (Freshfields)
Simon Roberts (Allen & Overy)
Philip Snell (Slaughter and May) (alternate for Sarah Paterson)
Jeremy Stokeld (Linklaters) (alternate for David Ereira)
Andrew Taylor (Lovells) (alternate for Geoffrey Yeowart)
Nigel Ward (Ashurst)
Presley Warner (Sullivan & Cromwell)

In attendance: Rachael Hoar (Herbert Smith – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which took place on 16 May 2012 had previously been circulated and were approved.

Apologies for absence were received from Victoria Read (Eversheds) (alternate for Nick Swiss) and Philip Wood (Allen & Overy).

2. REGISTRATION OF CHARGES

2.1 Reform of the law on registration of charges

It was reported that the Committee's latest response to the consultation on the reform on the law of registration of charges had been sent to BIS on 6 September 2012 and that revised regulations were awaited.

2.2 Forms of discharge MG02 and MG04

The Committee was informed that an exchange of correspondence had taken place between Norton Rose, Travers Smith and Herbert Smith regarding Companies House forms MG02 and MG04. The concern which had been raised [by a PSL from Travers Smith] relates to the wording of section 872(1)(a) and the form MG04. In short, where a charge is fully released by a chargee without any accompanying discharge of debt, a form MG04 appears to be the requisite form that should be filed at Companies House, which then results in Companies House noting on the Register either that the whole property is released or part of the [charged] property has been released, i.e. it does not note that the charge is "satisfied". The difficulty is that market expectation is that when a charge has been fully released, it should be noted as satisfied regardless of whether the underlying

debt has been paid off or not. Some discussion had also taken place between Companies House and Norton Rose from which Companies House appeared to be at least partially aware of the issue and were also aware of a technology problem which results in a "part" notation appearing on the Register whenever a form MG04 is filed even where the "whole property released" box has been ticked. It was reported that Companies House was aware of this internal system error and that they were investigating a solution. They had also explained that MG04 images available for public record clearly show the correct information on the forms. It was hoped that these anomalies would be rectified by the redrafting of the relevant forms for the new regulations and also by rectification of Companies House information technology systems in the future.

2.3 **Scottish Floating Charges: implementation of the Bankruptcy and Diligence etc (Scotland) Act 2007**

The Committee was reminded that its response to the Scottish Government consultation on Scottish floating charges had been sent on 20 June. Further developments were awaited.

2.4 **Work with FMLC on Financial Collateral Exceptions**

Nothing to report.

3. **SECURED TRANSACTION REFORM: REPORT AND DISCUSSION ON WORKING PARTY WORK**

The Committee was informed that the working party on secured transaction reform had met the previous day. Key areas ripe for reform had now been identified. The next step would be to prepare a revised draft paper which would be circulated to the full Committee, following which it would be sent to various banking bodies plus selected others (e.g. the Bar) for comment.

4. **FINANCIAL STABILITY**

4.1 **EU discussion paper on bail-in powers**

The Committee was reminded that it had responded to the working document of the European Commission, DG internal market, on Bail-In as a debt write down tool in April this year.

4.2 **EU Proposal for a Directive establishing a framework in the recovery and resolution of credit institutions and investment firms**

This includes a comprehensive bail-in power following the consultation referred to at 4.1. This is not practical in the Committee's view. Further opportunities to comment will arise.

4.3 **Consultation by the High-level Expert Group on Reforming the Structure of the EU Banking Sector**

It was noted that the Committee's work on bail in fed into this exercise.

Afternote: the EU Liikanen Report on EU Banking Structure was released on 2 October 2012 and expressed views on bail-in closer to those of the Committee.

4.4 **Treasury/BIS consultation on Banking Reform Law Society Response, CLLS letter of support**

The Committee was reminded that a response to the White Paper on Banking Reform had been sent to HM Treasury on 7 September. This letter briefly set out the Committee's concerns that the proposed restrictions on contractual choice of law provisions that in future would be available to ring-fenced banks would have potentially serious adverse effects, would be unnecessary and counterproductive. It also stated the Committee's concern at the possible other unintended consequences and costs to UK regulated banks and their customers and indeed the economy as a whole if the ring-fencing arrangements

were to take the shape proposed. Further submissions would be made as the opportunity arises.

4.5 Future of Building Societies

The Committee was reminded that in July HM Treasury had issued a consultation paper on the Future of Building Societies in which it asked for views on whether the current proposals issued in relation to ring-fencing of banks and bank activities should be extended to apply to building societies. The Committee would prepare a response (now on the CLLS website).

4.6 Setting the strategy for UK payments

The Committee was informed that HM Treasury had issued a paper called "Setting the strategy for UK payments" in July which considered the regulation and government of payment networks in the UK. Following a brief discussion it was noted that whilst the consultation raised important regulatory issues these were not within the Committee's remit and accordingly the Committee would not respond to the consultation.

4.7 Criminal Sanctions for Directors of Failed Banks

The Committee was reminded that HM Treasury had issued a consultation paper called "Sanctions for the directors of failed banks" in July. In this paper the Government sets out its proposal to introduce a rebuttable presumption that the director of a failed bank is not suitable to be approved by the regulator to hold a position as a senior executive in a bank and also considers the introduction of criminal sanctions for serious misconduct in the management of a bank. The Committee felt strongly that serious misconduct in the management of a bank was not an appropriate misdemeanour for criminal treatment unless the misconduct amounted to fraud. It was noted that any individual falling short of required standards was already subject to FSA sanctions, e.g. being banned by the FSA.

It was decided that a short response would be sent if at all possible, although responses were required to be submitted by 30 September.

Afternote: The response is available on the CLLS website. See also 4.3 above.

5. EUROPEAN BANKING UNION

It was decided that this proposal was more political than legal and was therefore outside the Committee's remit.

6. SCOTTISH BONDS PROPOSAL

The Committee was reminded that the Scottish Government was consulting on the potential benefits and disadvantages of bond issuance by Scotland. The Committee felt that the suggestion of bond issuance was a bad idea, not least in view of the expected devolution referendum due to take place in 2014. A draft response had previously been circulated to the Committee for comment and the final response had been sent to HM Treasury on 14 September.

Afternote: Now available on the CLLS website.

7. INSOLVENCY

7.1 Revised Insolvency Rules

It was noted that a draft of the revised Insolvency Rules was expected in 2013 with the new Rules expected to come into force from 2014. It was also recognised that any detailed review of the revised Rules would be for the CLLS Insolvency Committee but that this Committee should watch for any changes applicable to the set-off rule.

7.2 **European Commission consultation on the future of the EC Insolvency Regulation**

It was noted that the CLLS Insolvency Committee had sent a response to the consultation on the future of the EC Insolvency Regulation which was broadly in line with this Committee's views.

7.3 **Financial Sector Resolution: Broadening the Regime**

The Committee was reminded that HM Treasury had issued a consultation called "Financial Sector Resolution: Broadening the Regime" in August. In this paper the Government had set out its proposals and questions on enhancing the mechanisms available for dealing with the failure of systemically important non-banks, e.g. investment firms and parent undertakings, central counterparties, non-central counterparty financial market infrastructures and insurers. It was noted that as currently drafted, very small businesses could be caught. It was agreed that a short response to the consultation would be prepared.

Afternote: The Committee's response is available on the CLLS website.

7.4 **Client assets regime: EMIR, multiple pools and the wider review**

The Committee concluded this was largely a regulatory matter and would not comment itself.

8. **LIBOR ETC**

8.1 **Consultation on reform of LIBOR**

The Committee was reminded that the Wheatley Review of LIBOR: An Internal Discussion Paper had been issued in August. The Wheatley Review had been tasked with reporting on the following:

- Necessary reforms to the current framework for setting and governing LIBOR;
- The adequacy and scope of sanctions to appropriately tackle LIBOR abuse; and
- Whether analysis of the failing of LIBOR has implications on other global benchmarks.

As the Wheatley Review was due to report in the next week or so, the Committee did not feel it was appropriate to comment at this stage. However, concerns as to unintended consequences and the potential frustration of existing contracts were voiced if the outcome of the review proposed alternatives to LIBOR rather than reforming it.

Afternote: The Wheatley Review Report was released on 28 September and was recommending reform rather than a wholesale replacement of LIBOR.

8.2 **Consultation on a Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts**

The Committee was reminded that the European Commission had recently issued a consultation on a possible framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts. Responses are due by 29 November. The Committee felt that it should reply to this consultation and several members volunteered to prepare a draft response.

Afternote: due to pressure of work this has not proved possible.

8.3 **Request from ICAEW**

No action to be taken.

9. **EUROPEAN CONTRACT LAW**

Nothing to report.

Afternote: The UK Government has published a paper concluding the proposal is unnecessary and unlikely to contribute to achievement of its stated aims.

10. **EUROPEAN ACCOUNT PRESERVATION ORDER PROPOSALS**

Nothing to report.

Afternote: The proposal is scheduled for a European Parliament committee vote at first reading on 21 January 2013.

11. **DATE OF NEXT MEETING**

It was noted that the date of the next meeting had changed and would now take place on 4 December.

12. **ANY OTHER BUSINESS AND CLOSE**

12.1 **Assenagon Asset Management SA v Irish Bank Resolution Corporation Limited [2012] EWHC 2090 (Ch)**

It was decided that this case should be put on the Committee's watching brief list.

12.2 There being no further business, the meeting closed.