

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Allen & Overy, One Bishops Square, London, E1 6AD on Tuesday 10 February 2009 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith LLP - Chair) (DL)
Geoffrey Yeowart (Lovells LLP) (GY)
Clare Watson (Linklaters – alternate for David Ereira)
John Naccarato (Cameron McKenna)
Richard Bethel-Jones (Allen & Overy)
Sarah Paterson (Slaughter & May)
Mark Evans (Travers Smith)
Simon Roberts (Allen & Overy)
Nigel Ward (Ashursts)
John Davies (Simmons and Simmons)
Mark Campbell (Clifford Chance)
Alan Newton (Freshfields Bruckhaus Deringer)

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

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting, which had taken place on 3 December 2008, had previously been circulated and (subject to minor comments) were approved.

Apologies for absence were received from David Ereira, Richard Calnan, Philip Wood, Robin Parsons and James Curtis.

2. FINANCIAL STABILITY – BANKING BILL

It was noted that since the last meeting the Committee had sent various responses to the Consultations on the Banking Bill and related secondary legislation, including:

- Amendments recommended by the CLLS to Clause 48 of the Banking Bill - the amendments seek to clarify the definitions of netting, set-off, security interest and title transfer arrangements;
- Response regarding Banking Bill: Impact on cash management systems for corporate customers – discusses netting and set off, need to report on a net basis (dated 11 December 2008);

- Response regarding the efficacy of planned subsidiary legislation relating to the Banking Bill (dated 22 December 2008);
- Comments regarding Clause 75 (the Henry VIII clause) (dated 22 December 2008);
- Joint Response of the CLLS Insolvency, Regulatory and Financial Law Committees on the Banking Bill regarding subsidiary legislation under the Banking Bill, with particular reference to the draft Order on the Restriction of Partial Transfers and the Draft Order on Third Party Compensation (dated 23 December 2008);
- Supplemental note on amendments recommended by the CLLS to Clause 48 of the Banking Bill - focuses on netting, set-off and title transfer collateral arrangements (and use of terms defined in the Financial Collateral Arrangements (No 2) Regulations 2003) (dated 15 January 2009).

Dorothy Livingston (with David Ereira as alternate) had participated in the Treasury Expert Liaison Group on the subsidiary legislation.

It was noted that industry bodies e.g. LIBA and the BBA had also been very active.

It was noted that the Bill was expected to receive royal assent later the same week and come into force on 20 February.

It was noted that there were still significant concerns with the latest drafting and the Committee is still actively commenting on the draft secondary regulations.

It was also noted that the Bill includes a power to amend the Financial Collateral Regulations.

Since the Bill now included a section on investment banks, a new sub-group of the Treasury Experts Liaison Group was being set up to consider issues when appropriate. David Ereira had agreed to participate.

Post meeting note: The Bill received royal assent on 12 February 2009 and came into force on 21 February 2009. It has been used in relation to Dunfermline Building Society.

3. AMENDMENTS TO PART 7 OF THE COMPANIES ACT 1989

The Committee was reminded that a Summary of Responses to the consultation on Part 7 of the Companies Act and a draft of new Financial Markets and Insolvency Regulations had been issued by the Treasury in December 2008.

Post meeting note: the CLLS Working Party was inadvertently omitted from the circulation list for the revised draft of the Regulations and did not have a sufficient opportunity to review them. However, it is understood from the Treasury that the revised Regulations are very similar to the original draft Regulations on which the Working Party had commented, and that a full review of Part 7 is planned in due course. The final version of the Regulations was laid before Parliament on 3 April and will come into force on 15 June.

4. EXECUTION OF DOCUMENTS

It was noted that in light of a recent case (R (on the application of (1) Mercury Tax Group Limited and (2) Darren Neil Masters) v (1) HMRC, (2) the Crown Court, (3) James Michael Preston and (4) David Cook [2008] EWHC 2721 (Admin)), a new joint working

party with the Law Society Company Law Committee and the CLLS Company Law Committee had recently been formed to consider legal and practical issues of execution of documents and completion mechanics.

The working party had met on 3 February 2009 after which a draft protocol had been circulated for comment to members of the working party.

DL agreed to forward the draft to the rest of the Committee for review, following which the Committee would no doubt comment.

Post meeting note: A joint working party of the Financial and Corporate Law CLLS committees had been formed to consider the impact of the Mercury case on execution of documents in virtual/electronic completions. The working party had instructed leading counsel about the case and had asked him to consider the draft guidance which the working party had prepared. A conference with counsel took place on 27 March and a fairly final form of the Guidance is with counsel for review.

5. SECURITISATIONS AND SUBORDINATION OF SWAP COUNTERPARTY

John Davies drew attention to the Ballyrock litigation which was about to commence in the United States. The insolvency officers of Lehman were seeking to overturn a provision in the documentation for the transaction which provided that the swap counterparty would be subordinated in the event of termination of the swap where the swap counterparty was the defaulting or affected party. The documents were it seemed governed by US law.

6. COMPANIES ACT 2006

6.1 Scottish Register of Floating Charges

Nothing to report (see September 2008 minutes for details). GY would aim to prepare a draft letter explaining the Committee's concerns as soon as time allows. DL was looking at European Law concerns.

6.2 Overseas Companies Regulations and charge registration

The Committee was reminded that a draft of the Overseas Company Regulations had been issued in June 2008, including the new charge registration regime for registered overseas companies.

The Committee had some concerns about the drafting of some of the new registration provisions e.g. those in relation to incorporeal and intangible assets governed by English law. DL agreed to prepare a draft paper to be sent to BERR to explain the Committee's views.

Post meeting note: this was overtaken by a consultation meeting at DBERR, attended by DL, RC, GY and JD and others including Roger Brown, BBA and Joanna Perkins FMLC. Although the Committee members and Joanna Perkins were strongly in favour of excluding intangibles from registration requirements immediately because their inclusion would be costly, would continue legal uncertainty and would be of little or no practical value, DBERR were reluctant to do this before changes to the UK regime occur in 2011. A further short consultation is now in progress, to which the committee is responding.

7. ROME I

It was noted that the UK had announced that it would be opting in to Rome I (EU Regulation on the applicable law in contractual obligations) and that Rome I will come into force on 17 December 2009.

8. FINANCIAL COLLATERAL ARRANGEMENTS (NO 2) REGULATIONS AND ALFA TELECOM V CUKUROVA APPEAL

Nothing new to report but the Committee was reminded that the appeal to the Privy Council was due to be heard at the end of February.

Post meeting note: the appeal was heard by the Privy Council on 23 and 24 February and a decision is awaited.

9. INSOLVENCY RULES MODERNISATION

Nothing to report. The Committee was reminded that a draft version of the new Insolvency Rules were expected to be available shortly.

10. EU CAPITAL REQUIREMENTS DIRECTIVE (ARTICLE 122A)

The Committee was reminded that in the revised draft Article 122a (issued in December 2008), the retained originator exposure had been dropped from 10 to 5%, and syndicated loans and credit default swaps had been expressly excluded. It was now reported that there may be a further EU proposal to re-introduce the retained originator requirement in relation to syndicated loans. Mark Campbell would investigate further and report back.

11. SETTLEMENT FINALITY DIRECTIVE (SFD) AND FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (FCAD)

It was reported that the amendments to the SFD and FCAD were expected to come into force some time in to 2010. Drafts had not yet been published.

12. EUROPEAN CONTRACT LAW REFORM – PROPOSAL FOR A COMMON FRAME OF REFERENCE

It was reported that the final form of the academic Common Frame of Reference (CFR) had been released in December and that a European Commission initiative on the CFR was expected to be underway by the end of 2009.

13. CLOSE

There being no further business, the meeting was closed.