

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Ashursts at Broadwalk House, 5 Appold Street,
London EC2A 2HA on Wednesday 15 September 2010 at 12.45pm.

Present: Nigel Ward (Ashursts – Host)
Dorothy Livingston (Herbert Smith LLP – Chairman)
Geoffrey Yeowart (Hogan Lovells– Deputy Chairman)
John Davies (Simmons & Simmons)
Claire Watson (alternate) (Linklaters)
Robin Parsons (Sidley Austin)
Mark Campbell (Clifford Chance)
Sarah Paterson (Slaughter & May)
Mark Evans (Travers Smith)
Simon Roberts (Allen & Overy)
Look Chan Ho (alternate) (Freshfields)

In attendance: Alexander Fong (Herbert Smith LLP – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which had taken place on 9 May 2010, had previously been circulated and, subject to minor amendments, were approved.

Apologies for absence were received from David Ereira (Linklaters), John Naccarato (Cameron McKenna), James Curtis (Denton Wilde Sapte), Richard Bethell-Jones (Allen & Overy), Richard Calnan (Norton Rose), Philip Wood (Allen & Overy), and Alan Newton (Freshfields).

2. FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (2002/47/EC)

2.1 Gray/Re F2G Realisations Ltd (in Liquidation) [2010] All ER (D) 80

It was noted that the judgment in the case raised issues on control tests in relation to floating charges, as the tests described in the judgment as negative control tests were in substance not truly "negative" in nature. The case indicated that floating charges could rarely, if ever, benefit from the UK implementation of the FCD and therefore raised issues whether the implementation met the intentions/purpose of the Directive since charges given

to custodian banks and market operators to directly support market operations either were or might be recharacterised as floating charges under English law.

It was reported that the CLLS FCD working party had been formulating representations on points which should be clarified or changed following the judgment for submission to the Treasury. Robin Parsons is leading the FCD working party.

2.2 Treasury consultation on UK implementation of Directive 2009/44/EC amending the Settlement Finality Directive (98/26/EC) and the FCD

It was reported that the Treasury had launched a consultation on 13 August 2010 on the UK's implementation of the 2009 Directive. The consultation was due to close on 29 October 2010. It was noted that the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (as amended) and the Financial Collateral Arrangements (No.2) Regulations 2003 (as amended), which implemented the SFD and FCD respectively, would be amended by a new statutory instrument to implement the new Directive.

Afternote: submission on consultation available.

3. FINANCIAL STABILITY

3.1 Government proposals on Effective Resolution Arrangements for Investment Banks

The Committee was reminded that under a sunset clause in the Banking Act 2009, the effective resolution arrangements regime was due for a review in March 2011. Following the government's earlier consultation, a summary of responses was published on 29 July 2010 and the government's conclusions and further proposals would be published in September 2010.

Afternote: since the last meeting a working party headed by Dorothy Livingston has commented on the consultation and the submission is available on the CLLS website.

3.2 Treasury recent thinking on management of the cost of resolution

It was noted that the Treasury appeared to be paying close attention to developments in the EU's process on cross-border insolvency. A communication, to be launched in mid-October 2010, would mark the beginning of the EU process, which is expected to last for five years.

3.3 Banking Liaison Panel

It was reported that a small number of responses were received on the topic of small companies or small subsidiaries belonging to large groups in response to the Treasury's Banking Liaison Panel's consultation on the Code of Practice.

4. INSOLVENCY

4.1 Insolvency Law Reform Consultation

It was noted that the Insolvency Service consultation on restructuring moratorium was launched on 26 July 2010 and the deadline was on 18 October 2010. It was reported that Geoffrey Yeowart was invited to attend a stakeholder group meeting earlier in which the moratorium proposals were discussed. A number of points raised were discussed:

Afternote: a working party, headed by Geoffrey Yeowart has commented on the consultation and the submission is available on the CLLS website.

4.2 Insolvency Rules Modernisation

It was reported that a stakeholder focus group meeting on Insolvency Rules Modernisation was held in July and the draft Rules which would bring further changes to the substance of the provisions under the new Insolvency Rules, which came in force in April 2010 (and subject to further change in April 2011), would be published in the coming months for the public to comment. It was noted that the deadline for consultation was expected to be at the end of January 2011 and the rules would be expected to come in force in April 2012. It was noted that it was envisaged that there would be more time for practitioners to consider the implementation of the new Rules.

5. REGISTRATION OF CHARGES

5.1 Consultation on registration of charges under the Companies Act 2006

It was reported that there had been further communication with DBIS following the submission of the Committee's paper in response to the consultation. It was noted that it was uncertain whether registration requirements for charges created by overseas companies would be reduced. With regard to the scope covered by charging requirements, it was noted that the proposed rules would seem to extend to any security interest subject to exemptions; it was noted that only charges should be subject to the requirements to avoid extension of the requirements to security interests such as solicitors' liens, which would create problems with regulation and enforcement. The working party, led by Richard Calnan, would continue dialogue with DBIS.

5.2 Scottish floating charges and the BAD Act 2007

It was noted that proposals on cross-registration would avoid the need for separate registration in England and Wales / Scotland. However, it was noted that there would potentially be issues on re-characterisation of charges that initially did not appear to be floating charges. The BAD Act is based on the assumption that it is known what the assets are from the outset, which is not usually the case. Dorothy Livingston and Geoffrey Yeowart are on a Committee with DBIS and Companies House, the FMLC, the Scottish Registrar and Scottish Experts considering the issues involved and preparing a report for the Scottish Government. The next meeting would be in Edinburgh on 30th September following which it was hoped the report would be finalised.

Afternote: the revised draft report is still awaited.

6. COMPANIES ACT 2006 (S39) AND ULTRA VIRES DOCTRINE

It was reported that the working party note on the effect of the Companies Act 2006 on the ultra vires doctrine had been completed and was ready to be published. It was noted that the CLLS Company Law Committee and the Law Society and Bar Company Law Committee had been studying the potential restrictive effects of the objects clauses in legacy company memoranda. However, it was noted that this should not pose great problems as newly incorporated companies would now adopt new-style articles of association and existing companies could simply amend their articles.

Afternote: this Note is now available on the CLLS website. [Anne to check]

7. BRUSSELS 1 REGULATION – GREEN PAPER

It was noted that there was nothing new to report.

8. ROME I REGULATION – ARTICLE 14 ASSIGNMENTS

It was reported that questions had been raised on the proposed mandatory application of the law of the assignor's jurisdiction under the assignment provisions (Article 14) of Rome I. In particular points were raised on the principle of freedom of contracts and legal certainty.

It was noted that the European Commission was considering conducting a further survey of EU and EEA states.

Afternote: a consortium led by BIICL has been appointed to carry out a survey for the Commission.

9. PENALTY CLAUSES UNDER SCOTS LAW-SCOTTISH GOVERNMENT CONSULTATION ON THE PENALTY CLAUSES (SCOTLAND) BILL

It was reported that the consultation had been closed and that the Scottish Law Society had submitted a majority view and minority view in response to the consultation. It was the majority view that the proposed mandatory rule under which manifestly unfair penalty clauses would be automatically unenforceable would be damaging to business, whereas the minority view was that clauses would be unenforceable only if grossly unfair. The Committee agreed with the majority view of the Scottish Law Society.

10. CONSERVATIVE/LIBERAL COALITION GOVERNMENT AGENDA

It was noted that there are various banking items which may be of interest to the Committee including:

10.1.1 Government Consultation. A new approach to financial regulation: judgement, focus and stability (Close date 18 October 2010). It was resolved that the Committee would not provide comments on this; and

10.1.2 Secured Leading Reform Bill 2010-11 (Private Members' Bid sponsored by George Eustice. It was noted that no draft had been published yet.

Afternote: the bill has been published and would impede enforcement of fixed charges over land.. Progress will be watched and observations made if it reaches an appropriate stage.

11. AOB

11.1 Ministry of Justice consultation on European Contract Law

It was reported that the Ministry of Justice had started a consultation on the European Commission's Green Paper on a European Contract Law for consumers and businesses and that the consultation process would end on 26 November. It was noted that the Committee would provide a response.

Afternote: Committee representatives have contributed to multi-committee submissions by both the CLLS and the Law Society which will shortly be available on the CLLS and Law Society websites respectively.

11.2 Survey on pan-EU attachment orders for the enforcement of civil judgments

The difficulties associated with legal certainty, length of appeal process and time required to lift freezes on assets made following such attachment orders were noted. Some member firms had responded to the survey conducted by consultants for the EU Commission.

11.3 Bond covenant project

It was reported that there had not been new developments.

12. CLOSE

There being no further business, the meeting was closed.