

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

Minutes of the meeting held at 1pm on Wednesday 16 September 2007, at the office of  
Travers Smith, 10 Snow Hill, London EC1A 2AL

Present:

Dorothy Livingston (Herbert Smith)  
Geoffrey Yeowart (Lovells)  
John Davies (Simmons)  
Robin Parsons (Sidley Austin)  
James Curtis (Denton Wilde Sapte)  
Mark Campbell (Clifford Chance)  
Richard Bethell-Jones (Allen & Overy)  
Sarah Paterson (Slaughter & May)  
Mark Evans (Travers Smith)  
Philip Wood (Allen & Overy)  
Nigel Ward (Ashursts)  
Simon Hall (Freshfields)

1. The minutes of last meeting were approved. Apologies for absence were received from David Ereira, Mark Campbell, John Naccarato, Richard Calnan, Simon Roberts and the Committee Secretary, Rachael Hoar.
2. Simon Hall was welcomed to his first meeting as a member of the Committee.
3. The list of working parties was reviewed and updated. It was agreed it would be useful to place this on the CLLS website.
4. Companies Act 2006 – charge registration and overseas companies; Scottish register of floating charges:

This was discussed briefly in Richard Calnan's absence. It looked as implementation would be delayed in key areas because of the need for Companies' Registry to prepare for change – this meant it was likely that changes relating to charges would be delayed until 2009 at least.

5. Insolvency:
  - Draft statutory instrument re: Leyland Daf reversal
  - Insolvency Rules Modernisation - update on joint working party activities

- Administration – Insolvency Act Questionnaire

Geoffrey Yeowart provided an update on each of the above topics. Except on Leyland Daf, we worked jointly with the Insolvency Law Committee. The Leyland Daf proposals had come out as well as could be expected, although they still seemed to run counter to the claimed purpose of an administration to rescue the company. The Insolvency Rules submission was due in October [see CLLS Website for Paper dated 19<sup>th</sup> October].

- Re-organisation and winding up of credit institutions – review of EC directive 2001/24, consultation document of May 2007

Dorothy Livingston reported that a working party was considering this jointly with the Insolvency Law Committee.

#### 6. Covered Bonds Consultation

Robin Parsons explained that work was well advanced on a response, which would be circulated for consideration before submission [see CLLS Website for Paper dated 17<sup>th</sup> October 2007].

#### 7. Proposal to implement the United Nations Convention on Sale of Goods (the Vienna Sales Convention) – scope of application; FMLC concerned re: carve out in Article 2(d) (DL)

DL explained that "goods" for the purposes of the Convention was thought to possibly include services and choses in action. There was no relevant carve out available which went further than that in Article 2(d): which applied to stocks, shares, investment securities, negotiable instruments or money. This could cause uncertainty for more modern financial products including derivatives. However, Article 6 allowed an express exclusion or derogation (save as to requirements of writing in States which had made a declaration under Article 96) and contracts could be adapted to take account of this. It was noted that a very large number of countries had acceded to the Convention without apparent difficulties.

#### 8. UNIDROIT Project on Investment Securities – further draft convention published on 09.08.07 - and UNCITRAL Draft Legislative Guide to Secured Transactions

Mark Evans provided an update. The situation was not ideal, but the text was improving. There might be some useful guidance on the meaning of "control" which could help in achieving clarity in the meaning of the word in the Financial Collateral Directive, which was under review.

#### 9. Trustee Exemption Clauses – the Standards Board had declined to change the wording in the guidance to Rule 2.7 of the Solicitor's Code of Conduct, but had observed that it did not raise any obligations beyond those in the rule itself, which applied to limitation of liability as between solicitor and client. So far as Guidance paragraph 66<sup>1</sup> is concerned, where a solicitor drafts a limitation of liability in favour

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<sup>1</sup> 66. Where you are preparing a trust instrument for a client and that instrument includes a term or terms which has or have the effect of excluding or limiting liability in negligence for a prospective trustee, you should take reasonable steps before the trust is created to ensure that your client is aware of the meaning and effect of the clause. Extra care will be needed if you are, or anyone in or associated with, your firm is, or is likely later to become, a paid trustee of the trust.

of another party (eg a commercial trustee company which was not associated with the drafting solicitor and not a client of that solicitor), the view of the Standards Board appears to be that the guidance would not apply, although it would apply if the solicitor preparing the trust deed were to be the proposed trustee, as may occur in private client work. Firms will have to take their own view on this matter. [Since this meeting, further representations seeking greater clarity have fallen on stony ground].

10. European Contract law reform – update on proposal for a Common Frame of Reference

Dorothy Livingston reported that the academic experts report was expected at the end of the year and also something on the consumer acquis. Policy, except in the consumer area, was that the project was to assist in the drafting of European Union legislation, but it was possible that it would be taken further. The City Corporation and the FMLC were also following this closely.

11. Hague Conference on Private International law: feasibility Study on the Choice of Law in International Contracts: Dorothy Livingston reported that work on a submission to the UK Government suggesting that Rome 1 was sufficient in this area for the EU and that another Convention on this topic would not be best use of Hague resources was well advanced. That sentiment was echoed. [See paper of 21<sup>st</sup> September 2007 on CLLS website].

12. Rome I – Negotiations on this remained hotly contested, particularly with regard to whether a mandatory rule was to be introduced in relation to assignments based on the habitual residence of the assignor. It was thought this was not the right rule for most assignments, but was favoured by the factoring industry. English interpretation of the Rome Convention had concluded that the law of underlying debt/obligation was more appropriate. A final text was expected by the end of the year and the UK would then consider whether to opt in.

13. Rome II – the Regulation will apply from 11 January 2009 to define the law applicable in relation to tort/delict. This was a new set of rules, not replacing an existing Convention.

14. Brussels Regulation – the report of academic experts was due very shortly: this would consider the problems that had arisen for the jurisprudence of the ECJ – the "court first seized" rule demonstrably encourage forum shopping which could prevent the parties choice of court being able to exercise its jurisdiction and force an unwilling

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67. Where you or another person in, or associated with, your firm is considering acting as a paid trustee you should not cause to be included a clause in a trust instrument which has the effect of excluding or limiting liability for negligence without taking reasonable steps before the trust is created to ensure that the settlor is aware of the meaning and effect of the clause.

It would be prudent to ensure both that:

- (a) there is evidence that you have taken the appropriate steps; and
- (b) that evidence is retained for as long as the trust exists and for a suitable period afterwards.

68. Subrule 2.07 is subject to the position in law. The points which follow should be noted. The Solicitors Regulation Authority is entitled to expect you to undertake your own research and/or take appropriate advice as to the general law in this area. Relying upon this guidance alone may not be sufficient to ensure compliance with the law.

- (a) Liability for fraud or reckless disregard of professional obligations cannot be limited.
- (b) Existing legal restraints cannot be overridden. In particular, the courts will not enforce in your favour an unfair agreement with your client... {continued}

party to submit to the jurisdiction of another court, because of cost and delay considerations. It was hoped that change could be achieved.

15. There being no further business the meeting closed