

CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE
Minutes of a meeting held at the office of Clifford Chance LLP
10 Upper Bank Street, London E14 5JJ
on 25 February 2015 at 1.00pm

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Nigel Ward (Ashurst LLP)
Charles Cochrane (Clifford Chance LLP)
Nick Swiss (Eversheds LLP)
Alan Newton (Freshfields Bruckhaus Deringer LLP)
Penny Angell (Hogan Lovells LLP)
David Ereira (Linklaters LLP)
Matthew Cahill (alternate for Matthew Denning, Sidley Austin LLP)
Andrew McClean (Slaughter and May)
Mark Evans (Travers Smith)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

1. APOLOGIES FOR ABSENCE, MINUTES OF LAST MEETING, MATTERS ARISING

It was noted that the minutes of the last meeting which took place on 3 December 2014 had been circulated and (subject to the correction of one typographical error) were now approved.

Apologies were received from Richard Calnan (Norton Rose Fulbright LLP), John Davies (Simmons and Simmons LLP), Matthew Denning (Sidley Austin LLP), Simon Roberts (Allen & Overy LLP), Presley Warner (Sullivan & Cromwell LLP) and Sarah Smith (Akin Gump LLP).

The Chairman informed the Committee that one of its longstanding members, Philip Wood (Allen & Overy), had been awarded a CBE and was to be congratulated.

In relation to potential competition law issues affecting syndicated loan agreements, it was noted that the LMA had recently made some amendments to its documentation. Firms should consult their own competition law experts on this topic.

In relation to the UK's opt out of the Regulation concerning the new European Account Preservation Order, the Chairman reminded the Committee that, as agreed at the last meeting, a letter had recently been sent to the Ministry of Justice confirming the Committee's view that the UK should continue to be opted out.

2. SECURED TRANSACTION REFORM

Unfortunately Richard Calnan (chairman of the working party on secured transaction reform) was unable to attend the meeting. However, prior to the meeting, he had provided members with an update on the status of various matters. In summary:

2.1 Small Business, Enterprise and Employment Bill ("SBEE Bill") – proposed ban on non-assignment clauses in some business contracts regarding receivables

The Committee had sent a response to the consultation on Part 1 of the SBEE Bill regarding assignment of receivables and contract law. In short, the Committee was critical both of the underlying policy and the proposed draft form of the subsidiary legislation, which was uncertain in effect and seemed likely to have adverse unintended consequences.

The Committee's response (dated 2 February 2015) is available on the CLLS website. Richard Calnan is keeping a watching brief and will update the Committee on developments.

Afternote: some member firms had sent letters in support of the CLLS Financial Law Committee response, as had the CLLS Litigation Committee.

2.2 **Secured Transaction Reform**

This matter had been on the back burner due to the working party's more pressing need to consider the SBEEL Bill, which it has now done. A meeting of the working party would be arranged for the spring to take matters forward.

2.3 **Insolvency – Insolvency Service Call for Evidence: European Commission Recommendation on a new approach to business failures and insolvency**

In March 2014 the European Commission had issued a Recommendation considering a new approach to business failure and insolvency, with the objective of encouraging member states to put in place a framework to enable the efficient restructuring of viable enterprises. The Insolvency Service had recently issued a Call for Evidence asking for views on business failure and rescues. The Insolvency Law Committee would be responding but this Committee would consider whether to make a submission.

Afternote: The Call for Evidence closed on 12 March 2015. The Committee did not make a submission and members are referred to the Insolvency Law Committee's submission on the CLLS website. It debates the values of a statutory framework for a short moratorium but does not consider specifically any impact on secured lending.

2.4 **Questionnaire on Security Rights and the European Insolvency Regulation**

The working party was looking at Professor McCormack's Questionnaire (sponsored by the EU) and may respond.

2.5 **Issues regarding fixed and floating charges**

Further developments awaited.

3. **FINANCIAL STABILITY**

3.1 **Banking Reform Act 2013, Bail-in, EU Recovery and Resolution Directive proposal and Structural Regulation**

3.1.1 **EU Banking Recovery and Resolution Directive ("BRRD")**

It was noted that the deadline for transposing the EU BRRD into national law had passed on 31 December 2014 (to apply from 1 January 2015) and that the deadline for applying the bail-in tool provisions is 1 January 2016.

3.1.2 **UK: BRR, Bail-in Safeguards Order and Depositor Preference etc**

In the UK, it was noted that the various new statutory instruments were now in force.

3.2 **Bank Recovery and Resolution – other Consultations**

The Committee was reminded that there had been numerous consultations on bank recovery and resolution.

The Committee had responded to some of these:

3.2.1 Financial Stability Board ("**FSB**") consultative document published on 10 November 2014 on total loss-absorbing capacity ("**TLAC**") for global systemic banks: This sets out the FSB's policy proposals consisting of a set of principles and a detailed term sheet on the adequacy of loss-absorbing and recapitalisation capacity of global systemically important banks ("**G-SIBs**"). The Committee has not responded, but noted that, if the FSB proposals are adopted, some further changes in relation to implementation of the BRRD may be needed.

- 3.2.2 PRA Consultation Paper on the implementation of ring fencing: legal structure, governance and continuation of services and facilities: The Committee has responded jointly with the Insolvency Law Committee and the submission is available on the CLLS website.
- 3.2.3 The EBA has issued a large number of consultation papers that have been considered by the joint working group: Submissions have been made by the Committee jointly with the Insolvency Law Committee on EBA/CP/2014/38 on technical standards for valuations and EBA/CP/2014/39 on rates of conversion from debt to equity in bail-in. These are available on the CLLS website. The Regulatory Law Committee has commented on EBA/CP/2014/33 on write down and conversion powers with some input from members of the working group.
- 3.2.4 Other EBA consultation papers: The Joint working party of the Committee and the Insolvency Law Committee will consider which consultations it can most usefully respond to and will prepare comments on those where legal input appears most useful.

Afternote: no further responses were thought necessary.

3.3 **Structural Reforms**

Nothing to report.

4. **CSD REGULATION 2014 – ARTICLE 3(2)**

It was reported that following correspondence and discussions between Mark Evans and the FCA on the financial collateral provisions of Article 3(2) of the CSD Regulation and equitable mortgages over shares and other securities, the matter had been referred to the European Commission and a response was expected soon.

Mark Evans would keep the Committee informed of developments.

5. **EBA CALLS FOR IMPROVING THE WELL-FUNCTIONING OF THE SECURITISATION MARKET**

It was reported that, on 22 December 2014, the EBA had published an opinion setting out ways to improve the well-functioning of the securitisation market. The Committee would keep a watching brief on future legal issues arising from this in respect of which it may wish to comment.

The chairman asked for more volunteers to join a working party who might look at this.

Afternote: While the Committee did not respond to the EBA, it has recently responded to the rather broader consultation by the European Commission on an EU Framework for Simple, Transparent and Standardised Securitisation and this is on the CLLS website.

6. **EU GREEN PAPER ON BUILDING A CAPITAL MARKETS UNION**

It was reported that on 18 February, the EU had issued a green paper on building a capital market union. The Committee would keep a watching brief on future legal issues arising from this in respect of which it may wish to comment.

7. **CHOICE OF AUDITORS**

The BIS discussion document on Auditor Regulation (dated December 2014) and implications of the EU and wider reforms was noted.

8. **FCA MARKET STUDY INTO INVESTMENT AND CORPORATE BANKING**

It was reported that on 19 February the Financial Conduct Authority (FCA) had announced in a Feedback Statement in relation to Wholesale Sector Competition Review 2014-15 (FS15/2) that it plans to launch its first wholesale market study into investment and

corporate banking to assess whether competition in the sector is working properly. The terms of reference for the market study will be published in the spring.

The Committee would keep a watching brief on developments.

9. **ANY OTHER BUSINESS AND CLOSE**

There being no further business the meeting closed.

Nothing in these minutes should be considered as legal advice or relied upon as such.