

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

**Minutes of a meeting held at the office of Allen & Overy, One Bishops Square, London, E1  
6AD**

**on 16 September 2015 at 1.00pm**

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Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)  
Nigel Ward (Ashurst LLP)  
Nick Swiss (Eversheds LLP)  
Penny Angell (Hogan Lovells LLP)  
Andrew McClean (Slaughter and May)  
John Davies (Simmons & Simmons LLP)  
Jeremy Stokeld (Linklaters LLP as alternate for David Ereira)  
Matthew Denning (Sidley Austin LLP)  
Charles Cochrane (Clifford Chance LLP)  
Richard Calnan (Norton Rose Fulbright LLP)  
Ken Baird (Freshfields Brukhaus Deringer LLP)  
Simon Roberts (Allen & Overy LLP)  
Presley Warner (Sullivan & Cromwell LLP)  
Sarah Smith (Akin Gump LLP)  
Mark Evans (Travers Smith LLP)

In attendance: Emily Barry (Herbert Smith Freehills LLP)

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

Ken Baird was welcomed to the meeting, his first since his appointment to the Committee.

It was noted that the minutes of the last meeting which took place on 19 May 2015 had been circulated and were now approved.

Apologies were received from David Ereira (Linklaters LLP) though it was noted that Jeremy Stokeld was in attendance as his alternate.

**2. SECURED TRANSACTION REFORM**

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

It was noted that the Government has announced that the proposed ban on non-assignment clauses is to be pursued. There will be an exception for financial services contracts, and the Committee understands that the Government intends to limit the effect of the ban to contracts which are governed by English law, and those with a link to England and Wales.

The draft implementing regulations have not yet been circulated, but it was further noted that the Committee has offered to review them before they are distributed more widely, in particular with a view to ensuring that contractual counterparties are not inadvertently indirectly prejudiced as a result of the ban being implemented.

The Committee will produce a letter to the Department of Business, Innovation and Skills which will suggest some limitations on when the ban should take effect, in particular where contracts are cross-border.

**2.2 Secured Transactions Code**

It was noted that the draft code has been circulated to a wide ranging group of academics and practitioners, both in private practice and in-house. Comments have been requested by the end of September, and the Committee would welcome any further interested parties who would like to be included in the wider distribution of the Code.

### 2.3 **Secured Transactions Law Reform Project**

It was noted that certain papers had been added to the updated web page.

### 2.4 **Bills of Sale**

It was noted that, following publication of the Law Commission consultation papers on Bills of Sale in September 2015, it is proposed that mortgages over goods other than vehicles should continue to be required to be registered at the High Court. The Committee noted that, particularly where unincorporated businesses are concerned, it might be more efficient for any register to be maintained by Companies House, rather than the High Court. It was further noted that the Committee would respond to the Law Commission Consultation Paper by the deadline of 9 December 2015.

### 2.5 **Cape Town Treaty Ratification (Aircraft)**

It was noted that further developments are awaited.

### 2.6 **Financial Collateral Arrangements (No. 2) Regulations 2003**

Following submission of the Financial Markets Law Committee's letter to HM Treasury ("HMT") on 13 April 2015 and a meeting between HMT representatives and the Financial Markets Law Committee on 30 July 2015, the Financial Markets Law Committee has been asked to submit a memorandum summarising the issues arising as a result of the legal uncertainty regarding the meaning of "possession", "control" and "excess financial collateral".

It was noted that this only deals with the main issue of legal uncertainty and not other points that the Committee is aware of. It was therefore agreed that the Committee would submit a further letter seeking clarity on these additional points following submission of the Financial Markets Law Committee's memorandum.

### 2.7 **Releases of security (no payment of debt) and Companies House Forms MR04 and MR05**

It was noted that problems have been arising in practice where, for example, one chargor is released from its obligations under a multi-chargor debenture but there is no repayment of debt, since the wording of the current Companies House forms does not allow for this. The Committee is collecting practical examples of this, with a view to addressing the problem.

### 2.8 **Response to G McCormack Questionnaire**

The Committee noted that it will submit its comments by the end of the month as requested.

### 3. **INSOLVENCY – INSOLVENCY SERVICE CALL FOR EVIDENCE: EUROPEAN COMMISSION RECOMMENDATION ON A NEW APPROACH TO BUSINESS FAILURES AND INSOLVENCY**

It was noted that the call for evidence has closed, and the UK response, following consultation, suggested that no changes were needed in the UK to meet the concerns raised in the EU Commission's consultation paper. Further developments awaited.

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

Further developments awaited.

### 5. **SECURITISATION MARKET**

#### 5.1 **Commission Consultation on a Framework for High Quality Securitisation**

Further developments awaited.

## 5.2 **Capital Markets Union**

Further developments awaited.

## 6. **FINANCIAL STABILITY**

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

#### 6.1.1 **EU Banking Recovery and Resolution Directive ("BRRD")**

It was noted that responses had been requested by 26 August and that further developments are now awaited.

#### 6.1.2 **Article 55 BRRD**

The Committee noted that there is considerable uncertainty in relation to the impact of this article on banks, for example in relation to its application to secured transactions. The Committee further noted that it would be useful for a working group to be formed to try to achieve a consensus on this point.

#### 6.1.3 **EBA Final Guidelines on when an institution shall be considered as failing or likely to fail**

Further developments awaited.

## 7. **FCA**

### 7.1 **FCA wholesale market study into investment and corporate banking**

The Committee noted that the FCA will be investigating:

- the transparency of process in relation to new issues of debt and equity securities and in IPOs;
- client choice and behaviour and the impact of syndication;
- how bundling and cross-subsidisation affect competition; and
- the potential benefits of reducing regulatory barriers to firms entering or expanding into primary markets.

Also, on 29 May 2015 the Payment Systems Regulator (a division of the FCA with its own competition law powers) published terms of reference for a market investigation of the supply of indirect access to payment systems by clearing members, covering all the main UK payment systems. The Committee understands that it is also planning a market investigation into the ownership and competitiveness of infrastructure provision for the UK systems since much of this infrastructure is currently owned by the clearing members.

Further developments awaited.

### 7.2 **Competition concurrency**

The Committee noted that new powers came into force on 1 April 2015 giving the FCA the ability to enforce infringements of competition law; additional powers to conduct market studies and powers to refer markets to the Competition and Markets Authority ("**CMA**") for in-depth investigation with regard to financial services. The CMA can also exercise these powers. The Committee further noted that further developments are awaited following final FCA guidance being published 15 July 2015.

## 8. **E-SIGNATURES**

The Committee noted that Linklaters has been pioneering the use of e-signatures for signings on a number of recent financing transactions. They have consulted Mark Hapgood QC who has provided a very positive opinion to support the initiative. They would

like to see e-signatures gain wider acceptance in the market and note that some firms still have reservations about their use.

The Committee agreed that a joint working party should be established, ideally formed of members of the Committee, the Law Society and the CLLS Company Law Committee, to look at the issues arising out of e-signatures.

9. **ANY OTHER BUSINESS AND CLOSE**

The Committee noted that following the publication of the judgment in the Hong Kong case, *Charmway Hong Kong Investment Ltd & Ors v Fortunesea (Cayman) Ltd & Ors* [2015] HKCU 1717, the APLMA and the LMA are considering adding further wording to their recommended forms of facility agreement. Further developments are awaited.

The Committee further noted that a second position paper has been issued in relation to ICE LIBOR, which may affect the use of definitions in older transactions to refer to current ICE LIBOR. Further developments are awaited.

There being no further business the meeting closed.

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