

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

**Minutes of a meeting held at the office of Herbert Smith Freehills LLP, Exchange House,
Primrose Street, London EC2A 2EG
on 2 December 2015 at 1.00pm**

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Penny Angell (Hogan Lovells LLP)
Charles Cochrane (Clifford Chance LLP)
John Davies (Simmons & Simmons LLP)
Matthew Dening (Sidley Austin LLP)
David Ereira (Linklaters LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Akin Gump LLP)
Nick Swiss (Eversheds LLP)
Matthew Tobin (Slaughter and May)
Nigel Ward (Ashurst LLP)

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 16 September 2015 had been circulated and were now approved.

Apologies were received from Ken Baird (Freshfield Bruckhaus Deringer LLP), Richard Calnan (Norton Rose Fulbright LLP), Presley Warner (Sullivan & Cromwell LLP), Mark Evans (Travers Smith LLP), Philip Wood (Allen & Overy LLP) and Andrew McClean (Slaughter & May) although Matthew Tobin 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 working party had sent comments on the draft implementing regulations to the Department of Business, Innovation and Skills and further developments were awaited.

2.2 Secured Transactions Code

It was noted that there had been a lot of support for the concept of a code based on the current law and that the Government were also looking at secured transactions reform. A meeting of the advisory group was planned for the new year.

Afternote: A very constructive meeting took place in early January and further work is in progress.

2.3 Secured Transactions Law Reform Project

Nothing additional to report.

2.4 Bills of Sale

The Committee was reminded that, following publication of the Law Commission consultation paper on Bills of Sale in September 2015, it is proposed that a new and comprehensive system of goods mortgages be established to replace the little-used bills of sale process. This could lead to much greater use of security over goods owned by individuals, but the Law Commission had not considered the implications. In particular it 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 and in any event the High Court was not set up to deal with a large number of Registrations.

It was further agreed that the Committee would send a response to the Law Commission Consultation paper by the deadline of 9 December 2015.

Afternote: A full response was submitted and representatives of the Committee have since met with the Law Commission working group.

2.5 Cape Town Treaty Ratification (Aircraft)

It was noted that the Cape Town Treaty had been implemented in the UK by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 on 1 November 2015.

2.6 Financial Collateral Arrangements (No. 2) Regulations 2003 (FCARs)

It was noted that the Committee had submitted a letter explaining some additional points of concern as a supplement to a memorandum requested by and sent to the Treasury by the FMLC which summarised issues of legal uncertainty regarding the FCARs.

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

Nothing to report.

2.8 Response to G McCormack on Security Rights and European Insolvency Regulation Questionnaire

It was noted the working party had sent its response to Mr McCormack in October.

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

Nothing to report.

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

Nothing to report.

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.

5.3 EU proposal for a Regulation on Securitisation

The Committee was reminded of this EU proposal for a regulation on Securitisation and noted that various volunteers had expressed an interest in joining a working party.

The Chairman would therefore proceed with taking the next steps in getting this working party together.

5.4 Consultation on Covered Bonds in the EU

It was noted that this consultation closes on 6 January 2016.

5.5 **EU Securities Financing Transactions Regulation**

The Committee was informed that a new EU Regulation on Transparency Securities Financing Transactions and of Reuse and Amending Regulation (EU) No 648/2012 had been adopted by the Council of the EU on 16 November 2015 but was not yet in force, and which is aimed at making the shadow banking market more transparent by various new rules on reporting, record keeping and whistle-blowing.

The Committee decided that it should keep a watching brief of developments.

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 this was due to come into effect throughout the EU by end 2015.

6.1.2 **Article 55 BRRD – contractual recognition of bail-in**

The Committee was reminded that there is considerable uncertainty in relation to the impact of this article on banks and banking transactions. It was noted that the PRA had issued a "Modification by Consent" on 25 November 2015 under which firms can take up the modification of the bail-in rules (1.2 and 2.1) and that any such modification would be valid until the earlier of 30 June 2016 or when the relevant rules are amended or revoked.

The Committee agreed that it would be useful for the working group to meet and to try to achieve a consensus in relation to the application of article 55 to secured transactions.

Afternote: It appears that the authorities are well aware of the issues. The EBA proposed guidance has not been adopted by the EU Commission and it is feared the situation will remain uncertain for a considerable time.

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

It was noted that final guidelines were issued on 26 May 2015 and are available on the EBA website.

6.1.4 **EBA MREL Technical Standards**

It was noted that this was an area of contention between the EBA and the EU Commission.

Afternote: See EBA dissenting opinion on EU Commission's proposed changes to the technical standards originally proposed by the EBA.

7. **FCA**

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

Further developments awaited.

7.2 **Competition concurrency**

The FCA's Concurrency Guidance was published on 15th July 2015 and is available on the FCA website.

8. **E-SIGNATURES**

The Committee noted that a joint working party of members of this Committee, the Law Society and the CLLS Company Law Committee, had met on 25 November to discuss issues arising out of e-signatures.

The agreed outcome from that meeting was that Linklaters (who had initiated the working party project) would amend its existing paper on e-signatures to reflect those discussions and formulate it as a set of guidelines, which would be circulated to the working party for comment before being sent to counsel.

Afternote: A first draft was produced which took no account of changes to the law effective 1st July 2016. Further developments awaited.

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, regarding lenders' rights, the APLMA and the LMA had added clarificatory wording into their recommended forms of facility agreement (in the clause covering several rights and obligations of the Finance Parties).

The obiter comments on execution of charges in *In the Matter of Armstrong Brands Limited (in Administration)* [2015] EWHC 3303 (Ch) was also noted.

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