

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

**Minutes of a meeting held at the office of
Norton Rose Fulbright, 3 More London Riverside, London SE1 2AQ
on 11 October 2017 at 1.00pm**

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Penny Angell (Hogan Lovells LLP)
Ken Baird (Freshfield Bruckhaus Deringer LLP)
Richard Calnan (Norton Rose Fulbright LLP)
Charles Cochrane (Clifford Chance LLP)
John Davies (Simmons & Simmons LLP)
Matthew Denning (Sidley Austin LLP)
Craig Jones (alternate for Presley Warner) (Sullivan & Cromwell LLP)
Richard Kitchen (alternate for David Ereira) (Paul Hastings (Europe) LLP)
Andrew McClean (Slaughter & May)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Akin Gump LLP)
Jeremy Stokeld (Linklaters LLP)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

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

- 1.1. The Chairman opened the meeting and reported that apologies had been received from David Ereira (Paul Hastings (Europe) LLP), Mark Evans (Travers Smith LLP), Nick Swiss (Eversheds LLP), Nigel Ward (Ashurst LLP), Presley Warner (Sullivan & Cromwell LLP) and Philip Wood (Allen & Overy LLP).

It was noted that the minutes of the last meeting which took place on 17 May 2017 had been circulated and (subject to minor corrections) were now approved

- 1.2. The Chairman then informed the Committee that John Davies was retiring from private practice later this month and would also, therefore, be retiring from the Committee. The Chairman and the rest of the Committee thanked John for his contribution as a member of the Committee over many years and wished him well in his retirement.

2. SECURED TRANSACTION REFORM

- 2.1 **Small Business, Enterprise and Employment Act 2015 (sections 1 and 2) and draft Regulations – ban on non-assignment clauses in some business contracts regarding receivables**

It was reported that, following a consultation carried out in 2015, it had recently become known that the Government was planning to go ahead with proposals to nullify prohibitions on assignment of receivables in certain business to business contracts.

A revised draft of The Business Contract Terms (Assignment of Receivables) Regulations 2017 had been laid in mid-September 2017 and it was understood that the Regulations were expected to receive Parliamentary approval in November or December this year.

The Committee had previously raised concerns about the proposals and had responded to an earlier draft of the Regulations. Those concerns were increased by the uncertainty created by the new draft and therefore it was agreed that the Committee should write to relevant bodies to explain those concerns as a matter of urgency.

A draft submission (which had been prepared for this purpose and which had previously been circulated) was approved (subject to one amendment) and would be sent to relevant bodies as soon as possible.

2.2 **European Commission Consultation (April 2017): Effects of assignment of claims on third parties**

It was noted that this consultation of the European Commission was potentially very wide in scope. In particular, it was noted that the outcome of the consultation could result in changes being made to Article 14 (Voluntary assignment and contractual subrogation) of the Rome 1 Regulation (regarding the law applicable to contractual obligations).

The Committee was reminded that it had sent a response to this consultation on 29 June 2017 and would keep watch on further developments.

2.3 **Goods Mortgages Bill – proposed replacement of Bills of Sale with Goods Mortgages**

It was reported that following earlier consultations and a draft bill, a revised version of a draft Goods Mortgages Bill had been issued by the Law Commission on 22 September, together with an update report.

Also the Treasury had issued a short targeted consultation which was due to end on 13 October which set out the government's proposals on registration of goods mortgages and asked stakeholders about their support for the aims of the Bill and its suitability for the Law Commission's special Parliamentary procedure for uncontroversial bills.

The Committee continued to be of the view that whilst reform in this area of law would be useful, it is not pressing. Furthermore, the Committee did not support the approach set out in the Bill and did not agree that the Bill would be suitable for the special Parliamentary procedure. The main concerns are that:

- It will encourage secured consumer debt of a type which the UK has not experienced in the last 100 years, but there has been little consultation on the likely effects. The social repercussions of allowing non-monetary obligations to be secured has not been the subject of adequate consideration;
- It will create a registration system where the costs of the system outweigh the benefits;
- It impinges on consumer rights and does not interact well with existing bankruptcy legislation.

The Committee would therefore respond to the consultation in the form of a draft letter previously circulated before the deadline of 13 October.

2.4 **CLLS Secured Transactions Law Reform/Code**

Nothing to report.

3. **LIBOR – POSSIBLE PLANNED END FOR END OF 2021**

It was noted that Andrew Bailey (Chief Executive of the FCA) had delivered a speech on 27 July which explained that the absence of active underlying markets raises serious questions about the sustainability of LIBOR and announced that, from the end of 2021, the FCA would no longer use its powers to persuade or compel panel banks to make submissions to LIBOR.

In view of the impact which any change to or discontinuance of LIBOR would have on the syndicated loan markets, the Committee had already set up a working party, chaired by Charles Cochrane, to consider, when market thinking has developed further, legal issues which may arise as a result.

The LMA's response to the Bank of England's White Paper (dated 29 September 2017) was also noted.

4. **INTRAGROUP GUARANTEES, INTRAGROUP LOANS AND ICAEW AND ICAS GUIDANCE ON DISTRIBUTIONS**

The Committee was reminded that the Institute of Chartered Accountants in England and Wales ("**ICAEW**") and the Institute of Chartered Accountants of Scotland had published an updated version of their Guidance on Realised and Distributable Profits under the Companies Act 2006 (Tech 02/17BL) in April 2017.

The Guidance contains new commentary on intragroup transactions. Sections 9.45 – 9.68 consider what intragroup transactions might involve a distribution and include a statement that "*a distribution can also arise from a subsidiary guaranteeing a liability of its parent or fellow subsidiary if the subsidiary does not receive a fee at market rates*".

A meeting of representatives of the ICAEW, the joint working party of this Committee and the CLLS and Law Society Company Law Committees, and Martin Moore QC had taken place on 20 June 2017, following which the work of the CLLS joint working party was ongoing.

5. **CONSULTATION ON ISDA MASTER AGREEMENT JURISDICTION PROVISIONS**

It was noted that in August, ISDA had published a consultation on the jurisdiction provisions in the ISDA master agreement, which had now ended. The consultation concerned private international law issues and the Committee had not responded.

6. **CALL FOR EVIDENCE ON GOVERNMENT PROPOSALS FOR A NEW REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES WHICH OWN UK PROPERTY OR PARTICIPATE IN UK GOVERNMENT PROCUREMENT**

Nothing to report. The Committee would keep a watching brief on developments.

7. **E-SIGNATURES AND EXECUTION OF DOCUMENTS**

The Committee was reminded that, following a change in law in July 2016 pursuant to the eIDAS Regulation and the UK's Electronic Identification and Trust Services for Electronic Transactions Regulations 2016, the Joint Working Party Guidance note on electronic signatures had been issued on 25 July 2016.

It was further noted that the FMLC were active in this area and considering execution of documents generally.

It was felt that further consideration by this Committee of legal issues arising from electronic signatures and execution of documents generally was likely in the future and that the Committee should keep a watching brief on developments.

8. **COMPETITION**

8.1 **European Commission Management Plan 2017 and FCA Round-Up – syndicated lending**

The Committee was reminded of the European Commission Management Plan 2017 and the FCA Round-up (February 2017) which both referred to a possible study on potential competition issues in loan syndication. It was understood that the Commission was appointing consultants to assist with their study. Information requests to market participants should be expected.

9. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE ("BRRD"), ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN**

9.1 **Resolvability of Too Big to Fail Financial Institutions – BRRD Proposed Moratoria**

It was reported that the European Commission had recently consulted on proposals for harmonisation of the BRRD moratorium tool. The Committee had decided to support ISDA's submissions, advocating either banning this tool or curtailing its use to no more than a few days (less than five) in total for all phases of resolution. The Chairman reported

that once the ISDA supplemental submission was finalised she would write to the EU Commission in support of the ISDA approach, as previously agreed in an email exchange.

9.2 **EBA Regulatory Technical Standards adopted by Commission (March 2016) – do not address concerns regarding breadth of Article 55 BRRD**

Nothing to report.

9.3 **EU proposal to require all Member States to have a statutory tier of "non-preferred" senior debt**

Nothing to report.

10. **INSOLVENCY**

10.1 **New European Commission (EC) Proposal for a Directive on Preventive restructuring frameworks, second chance and measure to increase efficiency in restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU**

It was noted that given the minimum implementation period of two years, the UK's withdrawal from the European Union will have occurred before this takes effect. The UK may, therefore, be under no legal obligation to implement these proposals.

10.2 **Insolvency Service Review on Corporate Insolvency Framework (25 May 2016)**

Nothing to report.

11. **CLLS GUIDE ON ENGLISH LAW OPINION LETTERS IN FINANCE TRANSACTIONS**

It was noted that the CLLS Opinion Guide (originally published in November 2011) had recently been updated, largely to update statutory and other references, and also to incorporate helpful amendments suggested by the American Bar Association (see in particular footnotes 27 and 31). The amended version had been published on 19 September 2017. Thanks were due to Geoffrey Yeoward (retired Committee Member) for continuing to work on this.

12. **BREXIT AND THE EUROPEAN UNION (WITHDRAWAL) BILL**

It was agreed that there are opportunities for issues of legal uncertainty relevant to this Committee's remit to arise, and that the Committee would, therefore, keep a watching brief as matters develop.

13. **ANY OTHER BUSINESS AND CLOSE**

13.1 The High Court case of *Maxted and another vs Investec Bank 2017 EWHC 1997 (Ch)* on guarantees was noted.

13.2 It was noted that the European Commission had published a consultation on non-performing loans on 10 July 2017.

13.3 There being no further business the meeting closed.

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