

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Clifford Chance (30th Floor), 10 Upper Bank Street, London, E14 5JJ on Wednesday 20 February 2008 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith - Chair) (DL)
John Davies (Simmons & Simmons)
David Ereira (Linklaters)
John Naccarato (CS Cameron McKenna)
Mark Campbell (Clifford Chance)
Richard Bethel-Jones (Allen & Overy)
Phillip Wood (Allen & Overy)
Nigel Ward (Ashursts)
Simon Roberts (Allen & Overy)
Paul Lyons (Travers Smith – substitute for Mark Evans)

In attendance: Rachael Hoar (Herbert Smith – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting, which had taken place on 12 December 2007, had been circulated and were approved.

Apologies for absence were received from Geoffrey Yeowart, Richard Calnan, Simon Hall, Robin Parsons, Sarah Paterson, James Curtis and Mark Evans.

2. WORKING PARTIES

A new joint working party had been formed by members of the Financial and Company Law CLLS Committees to consider the repeal of financial assistance for private companies and maintenance of capital issues. The members of the committee working party are led by David Ereira and Dorothy Livingston (alternate Chris Fanner). The Company Law Committee members include William Underhill and James Palmer.

3. COMPANIES ACT 2006

3.1 Repeal of financial assistance for private companies and maintenance of capital issues

The new joint working party of the Financial and Company Law CLLS Committees had recently met to discuss the repeal of financial assistance for private companies (which will come into force on 1 October 2008) and ongoing maintenance of capital issues. It was reported that there had been a high degree of consensus at the meeting. A note of the

working party meeting was being prepared and would be circulated to the Committee when available.

3.2 Charge registration and overseas companies

The Committee was reminded that a working party meeting had been arranged to discuss the draft Overseas Companies and Charge Registration Regulations. Comments are due by 7 March. [*Afternote: comments have now been submitted to DBERR*]

3.3 Foreign Companies (Execution of Documents) Regulations 1994

It was explained to the meeting that there was a mismatch between the repeal of most of section 36A of the Companies Act 1985 in April and its replacement with new section 44 of the Companies Act 2006, in essence because the Foreign Companies Regulations adapt section 36A. [*Afternote: Richard Bethel-Jones reported that DBERR had taken on board the issue and that a saving provision would be made in the consequential amendments order which will come into force on 6 April 2008 such that section 36A will remain alive for the purposes of the Foreign Companies (Execution of Documents) Regulations 1994 for the time being.*]

4. **FINANCIAL COLLATERAL ARRANGEMENTS (NO.2) REGULATIONS 2003**

The Committee was reminded of the BVI case, Alfa Telecom v Cukurova, concerning BVI share security, rights of appropriation and the Financial Collateral Arrangements (No. 2) Regulations 2003. It was reported that the outcome of both the appeal lodged in the BVI and the application in the UK were still awaited.

5. **BANKING REFORM CONSULTATION – FINANCIAL STABILITY AND DEPOSITOR PROTECTION**

It was reported that the January consultation paper issued by the Treasury on Financial Stability and Depositor Protection was much broader than the original paper issued in October.

A working party meeting had been arranged for 21 February to discuss the latest paper. The Committee was also reminded that the Treasury had set up a series of workshops in the following week to discuss matters.

6. **INSOLVENCY**

6.1 Insolvency Law Reform

It was noted that the Committee's response to a paper by the European High Yield Association (dated April 2007) on insolvency law reform, had been sent to the Treasury on 18 January 2008.

6.2 The prescribed part

It was noted that there had been 2 recent first instance decisions considering whether the prescribed part was available to fixed and floating charge holders, where the charge holder had a shortfall after enforcing its security (*Thorniley and another v Revenue and Customs Commissioners and another* [2008] All ER (D) 47 (Feb) and *Permacell Finesse Limited (in Liquidation)* (30 November 2007, Birmingham District Registry 4792 of 2007). In both

cases it was held that the charge holder did not have any right to share in the prescribed part with the unsecured creditors.

6.3 Re-organisation and winding up of credit institutions

It was noted that the results of the Commission's consultation document (from May 2007) had been published in December 2007. However, this topic was not discussed as it was felt that it would be preferable to discuss when Geoffrey Yeoward was present.

6.4 Insolvency Rules Modernisation

It was noted that commencement had been delayed until October 2009.

6.5 FMLC Papers

The Committee was reminded that the FMLC had issued two papers recently: one on administration set off (published November 2007) and the other proposing a mandatory insolvency set-off rule for building societies and friendly societies (published December 2007).

7. **ROME I - APPLICABLE LAW IN CONTRACTS**

The Committee was reminded that a new draft of Rome I had been issued on 29 November 2007 (but had not yet been adopted). Since the latest draft deals reasonably satisfactorily with the UK's previous concerns it is anticipated that the Ministry of Justice will soon publish a consultation document considering whether the UK should now opt in. The Committee would watch for further developments.

8. **ROME II – APPLICABLE LAW IN NON-CONTRACTUAL OBLIGATIONS**

The Committee was reminded that the Rome II Regulation will apply from 11 January 2009.

9. **COVERED BONDS CONSULTATION**

Nothing to report. [*Afternote: a summary of responses to the Treasury Consultation had just been issued (February) and also the Regulated Covered Bonds Regulations 2008 had been laid before Parliament on 14 February and come into force on 6 March 2008*].

10. **EUROPEAN CONTRACT LAW REFORM**

The meeting was informed that a further paper had been issued regarding the Proposal for a Common Frame of Reference for Contract Law in Europe. The Committee would keep watch for further developments.

11. **LAW COMMISSION REVIEW OF RIGHTS OF CONSUMERS IN CONTRACTS FOR THE SALE OF GOODS**

DL informed the Committee that she had met with the Law Commission in January; the aim of the review was to try to clarify uncertainty, particularly around the remedy of rejection. It would be important for finance companies specialising in the financing of the purchase of goods and for credit card businesses that are liable for defective goods and for factors, but had no direct impact on the wholesale markets, particularly as there did not appear to be any intention to deal with issues related to services or incorporeal rights or licences.

12. CLOSE

There being no further business the meeting was closed.