

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes of a meeting held at the office of Slaughter and May, 1 Bunhill Row, London EC1Y 8YY
on Wednesday 16 May 2012 at 1:00pm

Present: Dorothy Livingston (Herbert Smith – Chairman)
Richard Calnan (Norton Rose)
Charles Cochrane (Clifford Chance)
John Davies (Simmons & Simmons)
Matthew Dening (Sidley Austin)
Ian Johnson (Slaughter and May – Host) (alternate for Sarah Paterson)
John Naccarato (Cameron McKenna)
Jeremy Stokeld (Linklaters) (alternate for David Ereira)
Nick Swiss (Eversheds)
Presley Warner (Sullivan & Cromwell)
Geoffrey Yeowart (Hogan Lovells)

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

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

1.1 Minutes

The minutes of the last meeting which took place on 22 February 2012 had previously been circulated and were approved (subject to correction of minor typographical errors).

Apologies for absence were received from Mark Evans (Travers Smith), Alan Newton (Freshfields), Simon Roberts (Allen & Overy), Nigel Ward (Ashurst) and Philip Wood (Allen & Overy).

1.2 Committee Membership

It was reported that Geoffrey Yeowart has recently become a member of the Financial Markets Law Committee ("FMLC") and the Committee offered its congratulations.

2. REGISTRATION OF CHARGES

2.1 Reform of the law on registration of charges

It was noted that revised regulations for the registration of charges were awaited from BIS. It was thought that BIS was still aiming to issue the new regulations this year and that they would come into force in April 2013.

Afternote: Further discussions with DBiS have taken place.

2.2 Scottish Floating Charges: implementation of the Bankruptcy and Diligence etc (Scotland) Act 2007

The Committee noted that the report produced for the Scottish Executive by the Technical Working Party (dated August 2011) had recently been made publicly available and that the Scottish Government was now consulting stakeholders. Accordingly, a draft response was in progress.

Afternote: the Committee's response was finalised and sent on 20 June.

2.3 Work with FMLC on Financial Collateral Exceptions

It was reported that the FMLC working party considering the adequacy of the exception to the Financial Collateral regime were considering two issues:

2.3.1 "control" for the purposes of the definition of a Security Financial Collateral Arrangement; and

2.3.2 clarifying how to determine "excess" in relation to the withdrawal of excess collateral allowed by the Regulations.

The Committee was well aware of these issues and would await further developments.

3. SECURED TRANSACTION REFORM: REPORT AND DISCUSSION ON WORKING PARTY WORK

It was reported that the working party considering secured transaction reform had met to discuss issues in February and April. A number of points had arisen which would be explored further.

Afternote: a draft paper had been circulated by Richard Calnan on 7 June for the working party to review and a further meeting planned for 18th September.

4. FINANCIAL STABILITY

4.1 EU discussion paper on bail-in powers

The Committee was reminded that the European Commission had issued a working document on bail-in as a debt write-down tool and that the working party of the Committee had submitted its response on 20 April 2012 (available on CLLS website). In addition, the Law Society of England and Wales had sent a letter in support of the Committee's response to the European Commission on 26 April.

Afternote: the Commission has published a draft Regulation on banking group resolution which includes extensive bail-in powers. The UK Government is consulting further on bail-in in the context of the ICB recommendations (see next item).

4.2 Independent Commission on Banking ("ICB")

The Committee was reminded that the ICB's final report of recommendations on reforms to improve stability and competition in UK banking had been issued in September 2011. Following this, the Queen's speech (on 9 May 2012) included details of a new Banking Reform Bill which will require banks to ring-fence certain services vital to the UK's economy, provides for depositors currently benefiting from the Financial Services Compensation Scheme to be treated as preferred creditors (and be paid before other unsecured creditors on insolvency) and sets out a new bail-in power which is aimed at ensuring that costs of bank resolution falls upon banks' shareholders and creditors (not taxpayers). It was anticipated that difficult issues may arise from the proposals and that the Committee could continue to engage in the consultation process.

Afternote: a white paper including these proposals was issued in June. The Committee chose to make a submission in support of a detailed paper prepared on behalf of the Law Society of England and Wales by a cross-disciplinary working group. This in turn picked up on the Committee's bail-in submission referred to at 4.1. Both papers are available on the CLLS website.

4.3 The Banking Act Safeguards Order and small companies

It was noted that the Banking Liaison Panel was still trying to have some changes implemented to the Banking Act Safeguards Order/and or Code of Conduct. It was not expected any changes would be made this year.

4.4 Consultation by the High-level Expert Group on reforming the structure of the EU banking sector

It was noted that the European Commission had set up a high level expert group in February 2012 whose mandate is to consider in-depth whether there is a need for structural reforms of the EU banking sector and to make any relevant proposals as appropriate. The group had launched a consultation on reforming the structure of the EU banking sector and responses were being sought.

Afternote: a draft Regulation has been published (see 4.1).

5. INSOLVENCY

5.1 Proposed abolition of section 51(2ZA) Insolvency Act 1986 – Scottish law restriction

The proposed abolition of section 51(2ZA) of the Insolvency Act 1986 which relates to the appointment of a receiver in relation to property situated in Scotland was noted. It was felt that any consideration of this purely Scottish law matter would be best dealt with by the CLLS Insolvency Law Committee.

5.2 Case law: Lehman/Firth Rixson (section 2(a)(iii) of ISDA)

The Committee was reminded of the recent Court of Appeal decisions regarding the effect of section 2(a)(iii) of the ISDA Master Agreement in the appeals of Lomas and others re *JFB Firth Rixson Inc and others* and *Lehman Brothers Special Financing Inc v Carlton*

Communications Limited, and others. In essence, the court had found that under section (2)(a)(iii) of the ISDA Master Agreement, each transactional payment obligation of a party is subject to the condition precedent that no event of default, with respect of the other party, has occurred or is continuing. This means that, following an event of default, section 2(a)(iii) has the effect of suspending, potentially indefinitely, the non-defaulting party's payment obligations until the default is cured or the non-defaulting party elects to terminate the transaction. The Committee would keep a watching brief for any further developments, either by way of appeal or by way of regulatory intervention.

5.3 European Commission consultation on the future of the Insolvency Regulation

The Committee was reminded that the European Commission was conducting a consultation in relation to the EC Regulation on Insolvency Proceedings, the closing date for which is 30 June. This was primarily a matter for the Insolvency Law Committee.

Afternote: The Insolvency Law Committee submission is available on the CLLS website.

6. EUROPEAN CONTRACT LAW – DRAFT CLLS RESPONSE TO MOJ CONSULTATION

The Committee was reminded that the Ministry of Justice's call for evidence in relation to EU proposals for a common European sales law were due shortly. The Committee continued to have deep concerns regarding the proposals and were in full support of the draft CLLS submission prepared by the CLLS Commercial Law Committee.

Afternote: the final form of the response prepared by the CLLS Commercial Law Committee, on behalf of the CLLS as a whole, has been submitted and is available on the CLLS website.

7. SHADOW BANKING

It was noted that the European Commission had issued a green paper on shadow banking (in March 2012). It was generally felt that this topic fell more within the remit of the Financial Regulatory Committee, but its potential impact needed to be borne in mind when considering banking reform proposals.

Afternote: The Regulatory Committee's submission is available on the CLLS website.

8. UNIDROIT CONVENTION ON CLOSE-OUT NETTING

Noting to report, it being felt that this topic was more relevant to ISDA specialists who unfortunately could not be present at the meeting.

9. ANY OTHER BUSINESS AND CLOSE

9.1 It was noted that the CLLS Legal Opinions Guide had generated some interest among US lawyers.

9.2 There being no further business, the meeting closed.