

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Linklaters, One Silk Street, London, EC2Y 8HQ on Wednesday 23 September 2009 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith LLP - Chair) ("DL")
Geoffrey Yeowart (Lovells) ("GY")
John Davies (Simmons and Simmons) ("JD")
David Ereira (Linklaters) ("DE")
John Naccarato (Cameron McKenna) ("JN")
Robin Parsons (Sidley Austin) ("RP")
Mark Campbell (Clifford Chance) ("MC")
Richard Bethel-Jones (Allen & Overy) ("RBJ")
Sarah Paterson (Slaughter & May) ("SP")
Alan Newton (Freshfields Bruckhaus Deringer) ("AN")
Mark Evans (Travers Smith) ("ME")

In attendance: Charles Smith (Herbert Smith LLP – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which had taken place on 13 May 2009, had previously been circulated and were approved.

Apologies for absence were received from Richard Calnan, Nigel Ward, Philip Wood, James Curtis and Simon Roberts.

2. EFFECT OF COMPANIES ACT 2006 ON THE ULTRA VIRES DOCTRINE

The Committee discussed this item, and the Committee decided that a working group would be formed to explore this issue further. The working group would be comprised of MC (as chair), RBJ, JN and DL; with GY and SP both to nominate a member each.

3. FINANCIAL STABILITY: BANKING ACT 2009, SPECIAL RESOLUTION REGIME

3.1 Amendments to Safeguard Order (in force 09.07.09) and Code of Practise

It was noted that amendments had been made to the Safeguard Orders in July. The following issues were noted as being relevant in respect of the Order:

- The right to exclude assets and liabilities of small companies from the "keep together" protections of the Order
- Regulation 4 of the Order
- The Compensation Scheme Procedures

It was noted that the Code of Practice was being revised with a view to publication of an amended version at the end of the year. Issues could be raised with the Banking Liaison Panel ("BLP"), on which DL sits. She is chairing the working party on the Order.

3.2 **Small company netting**

It was noted that the FSA had indicated that banks could continue to report net where arrangements for group netting were in place, notwithstanding the inclusion in the arrangement of small companies, not protected by the "keep together" provisions of the Safeguards Order. The Committee noted that there were difficulties in relation to recognising a small company in a very large group and considered that the BCP work on small companies would continue to be worthwhile.

3.3 **Consultation on investment banks – joint working party response**

The Committee noted that the joint working party response was sent on 17 July 2009. The reaction of the authorities was awaited. The interaction with the issues raised in the Lehman scheme of arrangement case (Appeal pending) was noted.

4. **INSOLVENCY**

4.1 **Insolvency consultation**

It was noted that the response to the Consultation on encouraging company rescue had been submitted to the Insolvency Service on 14 September 2009. GY told the Committee that our consultation response had received support from a number of parties, including ISDA and BBA. GY informed the Committee that he had been invited to a meeting at the Insolvency Service next week.

4.2 **Insolvency Rules Modernisation – draft Order published in May**

The Committee noted that the draft Order was published in May, to come into force on 6 April 2010. GY informed the Committee that he had been invited to a stake-holder meeting in relation to the draft Order, and that he would ensure a representative from the Insolvency Committee was also invited to attend.

5. **RECENT DIVESTITURE CASES AND THE CHALLENGE TO THE ENFORCEABILITY OF SECTION 2(A)(III) OF THE ISDA MASTER AGREEMENT IN THE US**

The Committee noted that there was a public policy issue in relation to the challenge to Section 2(a)(iii) of the ISDA Market Agreement in the US. The Committee noted the position in respect of the Woolworths case, and that divestiture and deprivation of assets was a theme that was currently being explored before the Court of Appeal in a number of cases.

6. COMPANIES ACT 2006 – CHARGES OVER UK ASSETS OF OVERSEAS COMPANIES WITH A REGISTERED ESTABLISHMENT IN THE UK

The Committee noted that the Regulations come into force on 1 October 2009 and that consultation on further changes to the charge registration regime would follow early in 2010.

7. EXECUTION OF DOCUMENTS – MERCURY TAX GROUP CASE

The Committee noted that the CLLS Land Law Committee had held a conference with Counsel (Charles Harpum and Jonathan Gaunt QC) on 7 July 2009.

The Committee discussed the two outstanding issues, being the question of original documents and late amendments. It was noted that the guidance might be subject to minor adjustment in the light of the further work on these issues.

8. SETTLEMENT FINALITY DIRECTIVE AND FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE – EU AMENDMENTS RE: CREDIT CLAIMS

The Committee noted that there had been a number of amendments, but not in relation to credit claims and that the credit claims implementation should be in place at the beginning of 2010.

GY said that he would circulate a note on the Scottish Law deficiencies in relation to the Regulations.

9. EU PROPOSALS ON HEDGE FUNDS AND INVESTMENT COMPANIES (ALTERNATIVE INVESTMENT FUND MANAGERS – AIFM)

The Committee noted that this was not currently set as a high priority for the Committee, but other City bodies, including FMLC, were working on this.

10. UPDATE ON REGISTRATION OF SCOTTISH FLOATING CHARGES

The Committee noted that the latest email correspondence with the Scottish Government in relation to the registration of Scottish floating charges was in August, and that the Scottish Government had indicated that it was looking at this issue further and would revert back with proposals after the summer recess.

11. CONSULTATION ON DEBT RELIEF FOR POOR COUNTRIES

The Committee noted that the Treasury were carrying out a consultation on possible legislation to extend commercial participation in debt relief for Heavily Indebted Poor Countries. The Committee noted that the Government's proposals included putting a bar on proceedings against countries in the debt relief programme in relation to the recovery of old commercial debts. The Committee agreed that DL would raise concerns with the use of retrospective legislation.

12. FINANCIAL REGULATION – TURNER REVIEW AND TREASURY PROPOSALS

The Committee noted that DL would review the consultation responses in relation to this. The Committee agreed that there would not be a need for a response from the Committee in relation to this point.

13. EUROPEAN CONTRACT LAW REFORM – COMMON FRAME OF REFERENCE

The Committee noted an update in relation to this item: that DL had attended a meeting with the City Corporation and that the Corporation would be making submissions.

14. BRUSSELS I REGULATION – GREEN PAPER

The Committee noted that responses to the Green Paper had been submitted in June.

15. BASEL COMMITTEE CONSULTATION ON BANKING SUPERVISION

DL informed the Committee that she would be happy to circulate the consultation paper on banking supervision, which had recently been published. The Committee noted that the consultation was technical in nature, but picked up a number of themes considered in relation to the Banking Act 2009.

16. CEBS: CONSULTATION PAPER ON THE EXTENSION OF CEBS'S SUPERVISORY DISCLOSURE FRAMEWORK

The Committee noted that this consultation paper was also of a technical nature and did not consider the Committee would want to make detailed comments, although it might wish to review this in the light of work by the Regulatory committee and other City bodies.

17. ANY OTHER BUSINESS

17.1 The Committee discussed the recent case of *Re Global Trader Europe Limited* [2009] EWHC 602, in relation to the failure of the investment fund to segregate client funds which resulted in the clients' claim only ranking as an unsecured claim in the insolvency.

17.2 The Committee noted that the definition of a "Company" in the Companies Act 2006 had been imported into the Insolvency Act 1986, as the relevant definition in that Act.

18. CLOSE

There being no further business, the meeting was closed.