

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

**Minutes of a meeting held at the office of Sullivan & Cromwell, 1 New Fetter Lane, London,  
EC4A 1AN**

**on Tuesday 4 December 2012 at 12:30 pm**

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Present: Dorothy Livingston (Herbert Smith Freehills – Chairman)  
Richard Calnan (Norton Rose)  
Charles Cochrane (Clifford Chance)  
John Davies (Simmons & Simmons)  
Richard Levitt (Slaughter and May) (alternate for Sarah Paterson)  
John Naccarato (Cameron McKenna)  
Simon Roberts (Allen & Overy)  
Jeremy Stokeld (Linklaters) (alternate for David Ereira)  
Nick Swiss (Eversheds)  
Nigel Ward (Ashurst)  
Presley Warner (Sullivan & Cromwell - Host)  
Philip Wood (Allen & Overy)  
John Woodhall (Sidley Austin) (alternate for Matthew Dening)  
Geoffrey Yeowart (Hogan Lovells)

In attendance: Morag Murray (Herbert Smith Freehills – taking minutes)

**1. APPROVAL OF MINUTES, APOLOGIES FOR ABSENCE AND MATTERS ARISING**

- 1.1 The minutes of the last meeting which took place on 19 September 2012 had been circulated. The Committee was asked to provide any comments by 7 December 2012 and are now approved.
- 1.2 Apologies for absence were received from Mark Evans (Travers Smith) and Alan Newton (Freshfields) and from those represented by alternates.
- 1.3 Geoffrey Yeowart reported that the Chair of the American Bar Association ("**ABA**") had contacted him regarding the "Guide to the questions to be addressed when providing opinion letters on English law in financial transactions" issued by the Committee in November 2011. This raised the possibility for the Committee and the ABA to liaise in respect of practical issues that arise in respect of legal opinions in cross-border transactions.

**2. REGISTRATION OF CHARGES**

**2.1 Reform of the law on registration of charges**

It was reported that officials from BIS had met with practitioners and academics regarding the new charge registration regime. The regulations to implement the new regime have not yet been issued, but BIS intend that the new regime will come into force in April 2013.

*Afternote: the Regulations have been issued and is expected to take effect to all charges created on or after 6 April 2013.*

## 2.2 **Forms of discharge MG02 and MG04**

There was nothing new to report.

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

There was nothing new to report. Further developments are awaited.

## 2.4 **Work with FMLC on Financial Collateral**

Geoffrey Yeowart reported that the FMLC's working party on financial collateral was considering the need for greater clarity in the application of the "control" and "possession" tests and in defining what is "excess financial collateral" for the purpose of permitted withdrawals under the Financial Collateral Arrangements (No 2) Regulations 2003. This was making good progress. Their work was now being reviewed in light of the recent High Court decision in the Lehman "Extended Liens" case (*Re Lehman Brothers International (Europe) (in administration)* [2012] EWHC 2997) which considered several aspects of the Financial Collateral Arrangements (No 2) Regulations.

*Afternote: Paper available on FMLC website dated December 2012.*

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

Richard Calnan reported that the working party on secured transaction reform had circulated its paper on areas for reform and had received expressions of interest from a range of academics and practitioners. Representatives from the working party were due to meet with Professor Goode's working party on 14 December 2012 to discuss any areas of common ground. The Committee then considered holding an open meeting in the New Year for an initial discussion on its paper on secured transaction reform. Committee members were asked to contact recipients of the paper to gauge their interest in attending such a meeting.

*Afternote: The meeting was held on 1 February 2013.*

## 4. **FINANCIAL STABILITY**

### 4.1 **EU discussion paper on bail-in powers**

The Committee noted that the FMLC had sent a response dated 8 November 2012 focussing on legal uncertainty with regard to the bail-out and ring-fencing proposals of the Commission's proposal.

### 4.2 **EU Proposal for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms**

The Committee was reminded of the proposed EU directive establishing a framework for the recovery and resolution of credit institutions and investment firms. The Committee noted that the directive proposed to include safeguards for partial business transfers, but members were concerned by the proposals for a short moratorium on the exercise of set-off rights, a longer moratorium on the enforcement of security, and the comprehensive bail-in power. The Committee noted that the FMLC intended to comment on these matters.

*Afternote: See Paper on FMLC website 1 February 2013.*

The Committee was informed that the Treasury had invited certain bodies including the FMLC and the Law Society to comment on aspects of banking reform, including the type of derivative products that ring-fenced banks should be able to offer customers. Dorothy Livingston reported that she had given evidence to the Parliamentary Commission on Banking Standards on this matter on 8 November 2012. The Committee agreed that the most relevant aspects of the Commission's remit for the Committee were bail-in and shadow banking. The Committee agreed to monitor developments and respond to opportunities for consultation as appropriate.

*Afternote: See FMLC paper dated 5 February 2013. The Law Society working with the CBI and ACT has had further discussions with the Treasury.*

#### 4.3 **Future of Building Societies**

Relevant matters had been discussed as part of item 4.3.

#### 4.4 **Criminal Sanctions for Directors of Failed Banks**

The Committee had sent a response to HM Treasury's consultation paper "Sanctions for the directors of failed banks". The Government's response is awaited.

### 5. **EUROPEAN BANKING UNION**

It was confirmed that this proposal was more political than legal and was therefore outside the Committee's remit.

### 6. **SCOTTISH BONDS PROPOSAL**

The Committee's response to the Scottish Government's consultation on the potential benefits and disadvantages of bond issuance by Scotland had been sent to HM Treasury on 14 September (see CLLS website). The Government's response is awaited.

### 7. **INSOLVENCY**

#### 7.1 **Revised Insolvency Rules**

It was noted that a draft of the revised Insolvency Rules was expected in 2013 with the new Rules expected to come into force from 2014. Any changes would need to comply with the Government's "Red Tape Review". It was also recognised that any detailed review of the revised Rules would be for the CLLS Insolvency Committee but that this Committee should watch for any changes applicable to the set-off rule.

#### 7.2 **European Commission consultation on the future of the EC Insolvency Regulation**

It was noted that the CLLS Insolvency Committee had sent a response to the consultation on the future of the EC Insolvency Regulation which was broadly in line with this Committee's views. (see CLLS website).

#### 7.3 **Financial Sector Resolution: Broadening the Regime**

The Committee had responded to HM Treasury's consultation "Financial Sector Resolution: Broadening the Regime" on 28 September. (See CLLS website)

The Committee also noted that HM Treasury was reviewing Part VII Companies Act 1989 due to the rules regarding the portability of client accounts to be introduced by EMIR. In particular, certain provisions of insolvency legislation would need to be disapplied to allow a clearing house to act on the request of a client of a defaulting clearing member to transfer his account to a non-defaulting clearing member.

*Afternote: Part 8 of the Financial Services Act 2012 contains provisions for broadening the regime which are expected to be brought into effect later this year with accompanying subsidiary legislation.*

### 8. **LIBOR ETC**

#### 8.1 **Consultation on reform of LIBOR**

The Committee noted that the Wheatley Review Report was released on 28 September and was recommending reform of LIBOR. This was welcomed as it should lessen the possibility for the potential frustration of existing contracts, in contrast to the (discarded) alternative of replacing LIBOR wholesale.

8.2 **Consultation on a Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts**

The Committee noted that the European Commission's consultation on a possible framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts was now closed for responses.

9. **EUROPEAN CONTRACT LAW**

Nothing to report.

10. **UNILATERAL JURISDICTION CLAUSES**

The Committee discussed the decision of the French cour de cassation (Cass Civ 1ère, 26 September 2012) which held a one-way exclusive jurisdiction clause void on the basis of inequality. The Committee noted that this would impact finance agreements, where lenders usually have the flexibility to bring proceedings in the court of their choosing, despite an exclusive jurisdiction clause binding the borrower, and may also be relevant to the related legal opinions given by law firms. The Committee noted that the French Court expressed that it was applying the Brussels regulation (rather than applying a French mandatory rule of law) and that there are existing examples of national courts applying the Brussels regulation in different ways pending a ruling on that point by the ECJ.

11. **EUROPEAN ACCOUNT PRESERVATION ORDER PROPOSALS**

Nothing to report.

12. **DATE OF NEXT MEETING**

The dates for meetings in 2013 and suggested hosts would be circulated after the meeting. The first meeting of 2013 would be held on 27 February 2013 at the offices of Linklaters.

13. **ANY OTHER BUSINESS AND CLOSE**

13.1 Simon Roberts reported that he had been invited to attend the CLLS Land Law Committee's working group on a protocol for discharging mortgages on completion, an area that causes problems in practice. Simon agreed to keep the Committee updated on the progress of the Land Law Committee working party. It was also noted that the Land Law Committee was reviewing their pro-forma opinion letter.

13.2 Richard Levitt noted a lacuna in national legislation implementing the EC directive on the reorganisation and winding up of credit institutions 2001/24/EC (the "**Directive**"). Under Article 21 of the Directive, a creditor of a bank which is based in one Member State should be able to enforce security in a different Member State where the assets are located, free from any stay provided for by the law of the bank's home Member State. A liquidator in the home Member State should also be prevented from realising such assets. Further, Article 30 of the Directive provides that the choice of law rules in Article 10 shall not apply as regards the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole, where the beneficiary of these acts proves that the detrimental act is subject to the law of a Member State other than the home Member State and that law does not allow any means of challenging that act in the case in point.

Article 21 of the Directive is implemented in the UK by Article 26 of the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the "**Regulations**"), which provides that a "relevant reorganisation" or "relevant winding up" shall not affect rights in rem in respect of assets situated in an "EEA State". The terms "relevant reorganisation" and "relevant winding up" are restricted to proceedings in respect of UK credit institutions, while the expression "EEA State" is defined to exclude the UK. Thus, Article 26 of the Regulations applies only to proceedings in respect of UK credit institutions. The position is the same with Article 30 of the Regulations, which implements Article 30 of the Directive.

On reviewing the German implementation of the Directive, German lawyers advised that under Section 351(1) of the German Insolvency Act, the opening of insolvency proceedings

in a jurisdiction other than Germany shall not affect rights in rem of third parties in respect of assets belonging to the debtor which are situated within Germany. Thus, Article 21 of the Directive had been implemented only partially in Germany as well, but in exactly the opposite way to the UK Regulations.

Both the UK and Germany have made provision for a secured creditor of an English bank to enforce his rights in rem in Germany. However, neither provide for the converse situation of a secured creditor of a German bank seeking to enforce his rights in rem in the UK, thereby leaving a lacuna in the implementation of the Directive.

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.**