

THE CITY OF LONDON LAW SOCIETY

INSOLVENCY LAW COMMITTEE

(the **Committee**)

Minutes of a meeting of the Committee held at Norton Rose LLP, 3 More London Riverside, London SE1 2AQ, on 16 September 2008 at 12.45 pm

Present: Hamish Anderson, Norton Rose LLP (Chairman)
Stephen Gale, Herbert Smith LLP (Deputy Chairman)
Paul Sidle for Tony Bugg, Linklaters LLP
Margaret Kemp for Stephen Foster, Lovells LLP
Lynda Elms for Ian Hodgson, Slaughter and May
Jennifer Marshall for Gordon Stewart, Allen & Overy LLP

Apologies: Mark Andrews, Denton Wilde Sapte LLP
Ken Baird, Freshfields Bruckhaus Deringer
Mark Hyde, Clifford Chance LLP
Chris Mallon, Skadden, Arps, Slate, Meagher & Flom (UK) LLP
James Roome, Bingham McCutchen LLP
Sandy Shandro, University College London

In attendance: Susan McFetrich, Norton Rose LLP

1 Opening of meeting

The Chairman opened the meeting and explained that, despite the fact that several members of the Committee had had to excuse themselves from the meeting at short notice (due mainly to the exceptional market events occurring that week), it had been decided to continue with the meeting in view of various impending deadlines, the most imminent of which being the consultation on the special resolution regime.

2 Minutes of the meeting held on 20 May 2008

The draft minutes of the meeting held on 20 May 2008 were approved.

3 Financial stability and depositor protection

Consultation on the special resolution regime

On 21 April 2008, the Committee had submitted a response to the tripartite authorities' January 2008 "Strengthening the Framework" consultation paper.

Since then, during the summer, the tripartite authorities (HM Treasury, the Bank of England and the Financial Services Authority) had published two further consultation papers, the latter of which contained draft legislative clauses for a special resolution regime for a failing UK bank or building society.

The working party's draft response to this latter paper (which had been distributed to Committee members the previous week) was approved, and the working party were thanked for their hard work in reviewing the consultation documents and preparing the paper on behalf of the Committee. The broad conclusion remains exactly the same - i.e. a special resolution regime is neither necessary nor desirable.

It was agreed to submit the response promptly following the meeting. (It was noted that HM Treasury had kindly permitted the Committee a short extension of time within which to respond.)

In passing, the Chairman reported that, just the day before the meeting, the European Commissioner for the Internal Market had announced that the European Commission is to publish (a) later in September, amendments to the Capital Requirements Directive on "colleges of supervisors", to increase the efficiency of supervision of cross-border banking groups; and (b) in 2009, a White Paper on financial stability, setting out early intervention tools for dealing with ailing banks.

Set-off

One of the issues arising from the financial stability and depositor protection proposals is that of set-off (and, in particular, whether payments by the Financial Services Compensation Scheme are to be made on a net or a gross basis).

The Committee had discussed the possibility of submitting a supplemental paper dealing with the potential impact of any changes to the insolvency set-off rules in this regard. It was noted that the summer 2008 consultation papers had not contained any detailed provisions about this.

It was reported that the working party had received an offer to speak to an HM Treasury representative about what is being proposed. So far, due to diary constraints, it had not been possible to do this, but it was agreed that this would be a worthwhile meeting. The working party will look out for an opportunity to do this when possible.

FSA consultation paper CP08/13: proposed ability to delay disclosure of liquidity support

The Chairman reported that the Company Law Committee of the City of London Law Society intended to submit a response to this consultation paper.

It was suggested that the issue (and the sensitivities involved in balancing the relevant interests) fell more squarely within the remit of the Company Law Committee (and possibly that of other CLLS Committees too). It was resolved to keep an eye on the responses submitted and perhaps to endorse those responses if appropriate.

4 Financial Markets Law Committee: Administration set-off and expenses

This had become Committee business as a result of the publication by the Financial Markets Law Committee (FMLC) of a paper¹ identifying areas of uncertainty in relation to rule 2.85 of the Insolvency Rules 1986 (dealing with set-off in administration) and its interplay with other insolvency provisions in respect of post-administration liabilities owing to counterparties.

The Chairman reported that, as a result of his informing the FMLC of the Committee's interest in the paper, he had been invited to attend a small meeting convened by the FMLC Secretary on 26 August 2008 at the Bank of England, at which representatives of the Insolvency Service had also been present. The purpose of the meeting was not to discuss the substantive issues at this stage, but to discuss the possibility of a co-ordinated approach to addressing them.

There had been a useful initial exchange of views at the FMLC meeting about the practical effect of the legal uncertainty and the legislative priority for addressing it. It had become apparent during those discussions that any proposal to deal with administration set-off is likely to need to address also the broader question of what constitutes an administration expense.

The Committee will keep this under observation, and will look out for any proposed legislative consultation.

¹ Financial Markets Law Committee Issue Paper 108, available on www.fmlc.org.

5 Proposal not to require insolvency office-holders to obtain the consent of creditors as a pre-condition to sending reports and other documents via a website

It was reported that the Insolvency Service had published a consultation paper on 15 August 2008 (distributed to Committee members with the agenda for this meeting) setting out this proposal as a revision to its September 2007 consultation paper proposing changes to modernise the Insolvency Act 1986 generally.

The reasons for this revised proposal appeared to be that a requirement to obtain consent would in practice be cumbersome to administer, and that it might reduce cost savings otherwise envisaged as a result of permitting insolvency office-holders to use websites for communication. An important aspect of the revised proposal is that the office-holder must send a notice in the conventional form before using a website, and that any intended recipient will be entitled to receive a hard copy of the relevant document, free of charge, upon request.

It was agreed that the Chairman will submit a short response expressing support for the revised proposal.²

In passing, the Chairman noted that the August 2008 consultation paper had confirmed the Committee's understanding that the Insolvency Service had decided not to proceed with proposal 1(a) (the proposal that creditors be required to "opt in" to participating in insolvency proceedings) of the September 2007 consultation paper.

6 Evaluation of the EC Insolvency Regulation

The Chairman reported that he had been approached (in his personal capacity) to contribute to an initial scoping exercise being carried out by the Insolvency Service on the questions to be included in a consultation paper to evaluate the effectiveness of the EC Insolvency Regulation at a national level in advance of a formal study by the European Commission in 2010.

The Committee will respond to the Insolvency Service's paper when it is launched. At this early stage, however, the Insolvency Service was seeking only an indication of the appropriateness of the draft questions. The Chairman advised that he will write to the Insolvency Service to express the view that the questions, broadly framed as they were, were "on the right lines", and thus the paper ought to be launched as soon as it is feasible to do so.³

7 HM Treasury's proposal to amend part 7 of the Companies Act 1989

Part 7 (*Financial markets and insolvency*) of the Companies Act 1989 modifies general insolvency law to protect clearing houses and exchanges recognised by the Financial Services Authority in the event that one of their members defaults.

HM Treasury has launched a consultation on proposals to amend Part 7. It has reported that the existing legislation does not reflect the range of contracts that are now cleared by central counterparties and does not explicitly recognise the use of "default funds" which have become an important means for clearing houses and exchanges to offset losses of a defaulting member. It is therefore proposing to update the legislation to reflect developments in market practice and legal changes since 1989.

The Chairman reported that he had contacted the CLLS Financial Law Committee to find out whether they would be forming a working party to respond to this. It was agreed to suggest to the chairman of the Financial Law Committee that a Committee member be seconded to their working party if so. The consultation closes on 16 October 2008.

8 HM Revenue & Customs - draft legislation on taxation of companies in liquidation or administration

² Letter subsequently (on 25 September 2008) sent to the Insolvency Service.

³ Letter subsequently (on 23 September 2008) sent to the Insolvency Service.

It was noted that HM Revenue & Customs had published for consultation draft clauses which re-write sections 342 and 342A of the Income and Corporation Taxes Act 1988. The issues were thought to be more pertinent to tax specialists, and so this will not be Committee business.

9 Building society insolvency

Financial Markets Law Committee: proposal for a mandatory insolvency set-off rule for building societies and incorporated friendly societies

The issues exposed by this paper⁴ were noted, and it was agreed to keep this under review.

HM Treasury consultation on the implementation of the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007

This consultation had been launched in September 2008, with a response date of 27 October 2008. Amongst other things, the Act gives HM Treasury the power to amend building society law so that, in the event of a building society insolvency, members' shares would rank equally with liabilities to creditors.

It was agreed to form a working party to respond to the consultation.

10 The draft UNIDROIT Convention on substantive rules regarding intermediated securities

This Convention establishes how ownership and security interests in intermediated securities are created and transferred; as well as dealing with the rights of, and protections for, account holders; the obligations of, and protections for, account providers; and a collateral regime.

It had not previously been Committee business, but the Committee had been invited to send a participant to attend an HM Treasury roundtable meeting on 30 June 2008 to discuss certain key open issues, notably the protection of an innocent purchaser, the effect on the general insolvency regime and priorities as between interested parties.

A colleague of one of the Committee members was understood to have attended the meeting, from whom feedback would be sought. It was noted that the CLLS Financial Law Committee had established a working party for this project.

11 Matters under observation

European High Yield Association insolvency law reform proposals

Nothing to report - but this will be kept under observation.

The European Commission's consultation on the reorganisation and winding up of credit institutions

The Chairman reported that he had been approached by a representative of the British Bankers' Association, who had communicated his understanding that ECOFIN had charged the European Commission with preparing a feasibility study by mid-2008, and that, to begin with, attention is being focused on legal constraints on the transfer of assets within a cross-border banking group. This will be kept under observation.

UNCITRAL's work on the treatment of enterprise groups in insolvency

To await an update by Sandy Shandro, who had sent apologies for being unable to attend the meeting.

12 Committee membership

⁴ Financial Markets Law Committee Issue Paper 118, available on www.fmlc.org.

With the recent resignations of Ian Fletcher and Peter Fidler, it was agreed that new Committee members were needed. Nominations were to be encouraged, and the vacancies would be advertised through the City of London Law Society.

13 Any other business

There was no other business to deal with.

14 Details of next meeting

The next meeting will be held at 12.45 pm on Thursday 20 November, at Lovells.

15 Close of meeting

There being no further business, the meeting closed.