

**CITY OF LONDON LAW SOCIETY**

**FINANCIAL LAW COMMITTEE**

Minutes of a meeting held at the office of Allen & Overy, 1 Bishops Square, London E1 6AD

on Wednesday 22 February 2012 at 1:00pm

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Present: Philip Wood (Allen & Overy – Host)  
Dorothy Livingston (Herbert Smith – Chairman)  
Charles Cochrane (Clifford Chance)  
John Davies (Simmons & Simmons)  
Matthew Denning (Sidley Austin)  
Mark Evans (Travers Smith)  
John Naccarato (Cameron McKenna)  
Alan Newton (Freshfields)  
Sarah Paterson (Slaughter and May)  
Tom Pritchard (Eversheds) (alternate for Nick Swiss)  
Stuart Thomas (Linklaters) (alternate for David Ereira)  
Nigel Ward (Ashurst)

In attendance: Morag Murray (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 14 December 2011 had previously been circulated and were approved.

Apologies for absence were received from Richard Calnan (Norton Rose), Simon Roberts (Allen & Overy), Presley Warner (Sullivan & Cromwell) and Geoffrey Yeowart (Hogan Lovells).

**1.2 Committee Membership**

It was reported that the Committee had received two new applications for membership. Details were circulated for consideration.

*Afternote: it was decided that the Committee size and range was right at present and those expressing interest would be advised. Opportunities to expand membership of working groups to non-members would be sought.*

## **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.

*Afternote: these have not yet emerged from Parliamentary Draftsman, who have been consulted.*

### **2.2 Scottish Charges: implementation of the Bankruptcy and Diligence (Scotland) Act and Scottish Law Commission paper regarding moveables**

The Committee was reminded that Geoffrey Yeowart and Dorothy Livingston are members of a group advising the Scottish Government on these issues. There was nothing new to report in relation to those issues since the Committee's previous meeting.

*Afternote: The report has now been published and the Scottish Government intend to consult stakeholders. [www.scotland.gov.uk/Resource/Doc/254430/0121799.pdf](http://www.scotland.gov.uk/Resource/Doc/254430/0121799.pdf)*

### **2.3 Secured Transaction Reform working party**

A CLLS working party led by Richard Calnan has been established to consider secured transaction reform. A list of questions on the creation and registration of security had been circulated to the working party members, who were due to meet on 27 February 2012.

### **2.4 Secured Lending Reform Bill 2010-11 (Private Members' Bill sponsored by George Eustice)**

The Committee was reminded that the premise of this Bill was to stop banks foreclosing on property. Government support of the Bill would be required for it to proceed any further. The second reading had moved to 30 March 2012.

*Afternote: this bill appears to have fallen away.*

## **3. FINANCIAL STABILITY**

### **3.1 Euro issues**

A general discussion was held regarding the eurozone crisis and its impact on financial institutions and finance documents.

### **3.2 Independent Commission on Banking (ICB)**

The Committee noted the Government's announcement in December 2011 that it intended to implement most of the recommendations in the ICB report. The Committee was particularly concerned about the proposed "bail-in" mechanism. Whilst there may be some scope for some bank debt being subject to bail-in, the current proposals do not provide enough certainty for banks or for potential investors in banks. The Committee was concerned that the uncertainty could have severe cost implications for banks, with adverse consequences for the availability of funds to the wider economy.

Dorothy Livingston reported that she was the chairman of a Law Society cross-disciplinary group which was reviewing the impact of the ICB recommendations.

*Afternote: The Committee has commented to the European Commission which issued a discussion paper on this topic: the response is available on the CLLS website. A Bill has been announced in the Queen's speech but there will be a further round of consultation before this is put forward for legislation. EU implementation of Basle III and its moves on pre-insolvency measures for banking groups may limit the scope of UK legislation.*

## 4. INSOLVENCY

### 4.1 Insolvency Service consultation on Petition Reform (Nov 2011)

In November the Insolvency Service had issued a consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up. Following discussions between David Ereira and Hamish Anderson, chairman of the CLLS Insolvency Law Committee, the Insolvency Law Committee's response (now available on the CLLS website) to the consultation covered the following areas of concern to the Financial Law Committee:

- 4.1.1 **Section 127 Insolvency Act:** This provision, rendering void any disposition of the debtor's property made after the commencement of winding-up proceedings, will continue to apply, but as there will be no filing at court of the winding-up application under the proposed regime, and no advertisement of the application, counterparties will not have any way of knowing whether or not section 127 applies. This could be an issue for business sales, banks running current accounts etc;
- 4.1.2 **Scope:** The proposals (such as the requirement to accompany a statutory demand with a notice telling the debtor where to get "free, independent debt advice") could be inappropriate where debts are owed by large companies;
- 4.1.3 **Test of Insolvency:** The proposals seem to assume that compulsory winding-up petitions are served on the basis of a statutory demand or unsatisfied judgment. Statistically, this is normally the case, but there is no real consideration of how applications based on impending illiquidity (section 123(1)(e)) or balance sheet insolvency (section 123(2)) would be treated; and
- 4.1.4 **Provisional Liquidation:** The proposals do not contemplate the circumstances in which provisional liquidation becomes necessary, in order to preserve the company's assets.

### 4.2 Cross Border Insolvency

It was reported that the Financial Markets Law Committee ("FMLC") is monitoring a number of EU initiatives relating to cross-border insolvency. Dorothy Livingston, who sits on the FMLC Committee, offered to update the Committee of further developments in due course.

*Afternote: see 3.2 above.*

**5. FSA CONSULTATION ON COLLECTIVE INVESTMENT SCHEMES**

The Committee was reminded that in the FSA's proposed changes to the Collective Investment Schemes sourcebook published in September 2011, a question had been posed as to whether a loan participation may be a transferable security or a debenture. The Committee considered whether to make any further representations on this matter to the FSA and decided that this was not necessary at this time.

**6. INSOLVENCY SERVICE CONSULTATION ON REFORMS TO THE REGULATION OF INSOLVENCY PRACTITIONERS**

The Committee was reminded of the Consultation, which contained a proposal to increase the prescribed part of an insolvent company's assets that is set aside for its unsecured creditors. The Committee had responded to the Consultation in May 2011, expressing its view that the prescribed part should not be increased. The Committee noted the Insolvency Service's announcement in a letter dated 20 December 2011, that all the responses to the consultation which addressed that point unanimously stated that the prescribed part should not be increased.

**7. LEGAL OPINIONS GUIDE**

It was reported that the Committee had agreed to a request from the America Bar Association ("ABA") for a link to the Committee's Legal Opinion Guide to appear on the ABA website and the CLLS had approved this.

**8. ANY OTHER BUSINESS AND CLOSE**

8.1 **FATCA:** The Committee noted that this US legislation would affect the large number of banks which have some connection with the United States of America, but that the analysis of FATCA fell within the remit of the CLLS tax committee.

8.2 There being no further business, the meeting closed.