

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

**Minutes of a meeting held at the office of Linklaters, 1 Silk Street, London EC2Y 8HQ  
on 27 February 2013 at 12:30pm**

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Present: Dorothy Livingston (Herbert Smith Freehills – Chairman)  
Charles Cochrane (Clifford Chance)  
John Davies (Simmons & Simmons)  
Matthew Denning (Sidley Austin)  
David Ereira (Linklaters – Host)  
Mark Evans (Travers Smith)  
John Naccarato (Cameron McKenna)  
Alan Newton (Freshfields)  
Simon Roberts (Allen & Overy)  
Nick Swiss (Eversheds)  
Nigel Ward (Ashurst)  
Geoffrey Yeowart (Hogan Lovells)

Apologies: Richard Calnan (Norton Rose)  
Sarah Paterson (Slaughter & May)  
Presley Warner (Sullivan & Cromwell)  
Philip Wood (Allen & Overy)

In attendance: Rachael MacKay (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 4 December 2012 had been circulated and were now approved.
- 1.2 Apologies for absence were received from Richard Calnan (Norton Rose), Sarah Paterson (Slaughter & May), Presley Warner (Sullivan & Cromwell) and Philip Wood (Allen & Overy).
- 1.3 The Chairman announced that Geoffrey Yeowart would be retiring from practice and therefore retiring from the Committee at the end of April. The Chairman thanked Geoffrey for his outstanding contribution to the work of the Committee during his time as a member and as deputy Chairman. A suitable celebration would be organised. The Committee would advertise for a new member and consider appointment of a new deputy Chairman.

**2. CHARGES**

**2.1 Regulations on the law on registration of charges expected to come into force 6 April 2013**

The Committee was reminded that the Companies Act 2006 (Amendment of Part 25) Regulations 2013 were expected to come into force on 6 April. One aspect of the new regime was a new facility to file charges electronically using the Companies House web filing service. Some Committee members had identified practical and risk management issues with the web filing system (eg a time out function after 30 minutes and no ability for a draft of the on-line "form" to be saved or checked) and had raised concerns with

Companies House. A conference call was due to take place to discuss these matters further with Companies House later that day.

*Afternote: Conference call took place 27.02.13. A note of the call had been circulated to members on 26.03.13.*

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

Nothing new to report. Further developments awaited.

## 2.3 **Work with FMLC on Financial Collateral exceptions**

Nothing new to report since FMLC paper of December 2012 published.

## 3. **SECURED TRANSACTION REFORM**

It was reported that the open meeting which had been held on 1 February had been very productive and that the committee should continue to undertake further work on this project. Proposals for next steps were awaited from Richard Calnan (who was not present).

## 4. **FINANCIAL STABILITY**

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

Nothing new to report.

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

It was noted that since the last meeting the FMLC had commented on the proposals in a paper dated 1 February 2013. Further developments were awaited.

### 4.3 **Treasury/DBis Banking Reform**

It was noted that since the last meeting the FMLC had commented on the proposals in a paper dated 5 February 2013. Further developments were awaited.

*Afternote: Bill and sample subsidiary legislation are now before Parliament.*

## 5. **INSOLVENCY**

### 5.1 **European Commission ("EC") proposals regarding the EU Insolvency Regulation and UK Call for evidence on those proposals**

It was reported that in December 2012, the EC had issued proposals for the reform of the EU Insolvency Regulation which included:

- extending the scope of the Regulation to include pre-insolvency and hybrid proceedings (including a proposal to include an English law scheme of arrangement as a pre-insolvency procedure);
- clarifying jurisdictional rules and the procedural framework for choosing jurisdiction;
- changing aspects of the rules on secondary proceedings to allow more efficient administration of insolvency proceedings;
- requiring Member States to publish relevant court decisions in a publicly-accessible register; and
- allowing greater co-ordination of insolvency proceedings for group companies.

Following this, the Insolvency Service had issued a call for evidence to which the CLLS Insolvency Law Committee had prepared an initial response (dated 14 March 2013) jointly with the Insolvency Lawyers Association and R3. The response focussed in particular on the questions of whether the UK should opt-in to negotiations on the proposed

amendments (to which the response was affirmative) and the listing of schemes of arrangement as a pre-insolvency procedure in the Regulation (to which the response was negative). Member firms were invited to draft letters of support for that submission was now available on the CLLS website and the Chairman was authorised to write on behalf of the Committee.

*Afternote: The UK government has decided to opt in to the revised regulation. Passage of the amending regulation appears to be a high priority for the current EU Presidency. The FMLC has done some further work on Article 5 and proposed amendments to Article 2(g) (to become 2(f)). This is still in progress.*

#### 5.2 **Financial Sector Resolution and Financial Services Act 2012 Part 8**

It was noted that provisions of the Financial Services Act 2012 Part 8 would amend the Banking Act 2009 so as to extend the special resolution regime to investment firms and UK clearing houses. Subsidiary legislation is expected soon with a view to bringing the amendments into force in June or July.

*Afternote the timetable for the subsidiary legislation has slipped.*

#### 6. **EUROCLEAR UK & IRELAND CONSULTATION ON CREST RULE 13**

The Committee was reminded that the FSA had asked the CLLS Financial and Insolvency Law Committees for views on the proposal contained in the CREST consultation document (dated November 2012) on Rule 13 (settlement finality in respect of complex transactions) for Euroclear UK & Ireland Limited to continue to apply a "relation back" concept to complex products such as self-collateralising repo arrangements, stock lending and term DBVs (a multi-day repo-type product), and whether this concept would be consistent with the Financial Markets and Insolvency (Settlement Finality) Regulations 1999. A joint response (dated 29 January 2013) had been prepared by the two Committees and sent to the FSA and others, which was available on the CLLS website.

#### 7. **BRUSSELS REGULATION (NO 44/2001)**

The Committee was informed that amendments to the Brussels Regulation (which governs jurisdiction issues between all EU member states) had been announced in December 2012 which would apply from 10 January 2015 (EU Regulation 1215/2012 OJ L 351/1 of 20.12.2012). The amendments include strengthening jurisdiction agreements by requiring member states to stay proceedings where there is an exclusive jurisdiction agreement in favour of another member state's court and that court has also been seised (thereby defusing "torpedo" actions). The amendments were therefore to be welcomed.

#### 8. **EUROPEAN ACCOUNT PRESERVATION ORDER ("EAPO") - EC PROPOSAL**

The Committee was reminded that an EAPO was a new and additional kind of bank freezing order which was intended to be available throughout the EU which had originally been proposed by the EC in July 2011. The Committee was also reminded that (due to concerns raised by various UK bodies (including the CLLS Insolvency Law Committee) the UK had opted out of the EAPO proposals at the end of October 2011 but had stated its intention to participate in the EC negotiations. It had consulted further on amendments, but response contrived to favour opt out.

*Afternote: On 5 February 2013, the rapporteur of the European Parliament's Committee on Legal Affairs had published a report setting out proposed amendments to the draft EAPO legislation. The European Parliament's Committee first vote and reading is scheduled for 30.05.13 and first or single reading plenary session is scheduled for 09.09.13.*

#### 9. **EUROPEAN CONTRACT LAW**

Nothing new to report. The Committee would keep a watching brief.

10. **PRIVY COUNCIL DECISION ON THE FINANCIAL COLLATERAL ARRANGEMENTS (NO.2) REGULATIONS 2003 AND APPROPRIATION (CUKUROVA FINANCE INTERNATIONAL V ALFA TELECOM TURKEY LIMITED [2013] UKPC 2)**

The Committee noted the recent Privy Council decision in *Cukurova* in which the Privy Council ("PC") had found that equitable relief from forfeiture was an available remedy in the context of an appropriation of collateral which had been made under the Financial Collateral Arrangements (No. 2) Regulations 2003.

Some of the Committee felt that the PC had failed to appreciate the material distinction between forfeiture/foreclosure on the one hand (where the property is taken *in substitution* for a debt and not towards payment of it); and appropriation – where the creditor is not prevented from pursuing the debtor for any shortfall in the value of the appropriated financial collateral; and is required to account for any surplus in value of the secured obligations (see Regulation 18(2)). Some Committee members also expressed the view that the Regulations should be amended to make clear that the remedy of relief from forfeiture was excluded. It was also noted that the decision was not binding on the English courts (although would be highly persuasive) and having been based on very unusual facts, may be distinguishable.

11. **UPDATE ON FURTHER DISCUSSION ON THE WORKING PARTY ON OPINION LETTERS**

It was reported that a working party meeting had been held on 30 January, and that there had been an exchange of email correspondence with the American Bar Association. It was agreed that further work on this project would be worthwhile. Geoffrey Yeowart would continue to chair the working party after his retirement.

12. **SPECIAL ADMINISTRATION REGIME REVIEW**

The Committee was reminded that a review of the special administration regime relating to investment firms was due. It was anticipated that some substantive discussions and proposals might be issued later in the summer, which the Committee may wish to consider.

It was also reported that the International Organisation of Securities Commissions (IOSCO) had issued a paper on client assets earlier this month.

*Afternote: Peter Bloxham's interim report was published shortly after the meeting and a number of Committee Representatives will be meeting Mr Bloxham to comment on the way forward.*

<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD401.pdf>

13. **ANY OTHER BUSINESS AND CLOSE**

13.1 It was noted that the Competition Commission had recently issued a paper on the big 4 audit firms which contained proposals which could impact on the drafting of audit provisions in loan agreements in the future.

13.2 There being no further business the meeting was closed.

**Nothing in these minutes should be considered as legal advice or relied upon as such.**