

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes of a meeting held at the office of Clifford Chance, 10 Upper Bank Street, London E14 5JJ

on Wednesday 14 September 2011 at 1:00pm

Present: Dorothy Livingston (Herbert Smith – Chairman)
Mark Campbell (Clifford Chance)
Charles Cochrane (Clifford Chance)
John Davies (Simmons & Simmons)
Matthew Denning (Sidley Austin)
David Ereira (Linklaters)
John Naccarato (Cameron McKenna)
Sarah Paterson (Slaughter and May)
Presley Warner (Sullivan & Cromwell)
Philip Wood (Allen & Overy)
Geoffrey Yeowart (Hogan Lovells)

In attendance: Rachael Hoar (Herbert Smith – taking minutes)

1. APPROVAL OF MINUTES, APOLOGIES FOR ABSENCE AND WELCOME

1.1 Minutes

The minutes of the last meeting which took place on 11 May 2011 had previously been circulated and were approved, subject to minor amendments.

Apologies for absence were received from Richard Calnan (Norton Rose), James Curtis (SNR Denton Wilde Sapte), Mark Evans (Travers Smith), Alan Newton (Freshfields) and Simon Roberts (Allen & Overy).

1.2 Welcome

The Committee welcomed two guests to the meeting: David Hobart, Chief Executive, City of London Law Society and Robert Leeder, Policy & Committees Coordinator, City of London Law Society. David said a few words about the support of the CLLS for the work of the specialist Committees and his role as CEO, and thanked us for inviting him and Robert to join us. Dorothy responded by saying that we hoped they would enjoy the meeting and expressing appreciation for the role of the CLLS and its staff in ensuring the voice of City firms is heard on important legislative developments.

1.3 **Committee Membership**

Mark Campbell and James Curtis would retire from the Committee at the end of the meeting. The Committee thanked them both for their contributions. Charles Cochrane (Clifford Chance) and Presley Warner (Sullivan & Cromwell) were welcomed as new members.

Afternote: Nick Swiss of Eversheds has now also accepted our invitation to join the Committee.

2. **REGISTRATION OF CHARGES**

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

The working party were continuing to draft a response to the latest BIS consultation on registration of company charges. One of the main issues is the proposal for the new regime to apply across the whole of the UK, despite England and Scotland having separate legal systems.

It was further reported that there is an ongoing dialogue on whether there is value in defining the "creation" of a charge. It was noted that this definition was not necessary from an English law perspective, but was an effort to get a unified approach for the whole of the UK, having regard to the fact that Scottish law does not have the concept of "creation".

2.2 **Scottish Charges: implementation of the B&D Act – update**

Geoffrey Yeowart and Dorothy Livingston are members of a group advising the Scottish Government on this. The discussions are gradually moving towards finalisation.

Afternote: The report has been sent to the Scottish Government but not yet published.

3. **LEGAL OPINIONS GUIDE**

It was reported that work on the Committee's new Legal Opinions Guide was nearing completion.

Afternote: The Guide has been finalised and is now available on the CLLS website.

4. **FINANCIAL STABILITY**

4.1 **Independent Commission on Banking (ICB)**

It was noted that the ICB report had been released on 12 September which included recommendations for:

- ring fencing of domestic and investment banking operations
- more stringent capital requirements
- (insured) depositor preference in bank insolvencies
- new bail-in powers.

It was thought that the proposals would be legislated later this year with full implementation in 2019 to coincide with Basel III. There were potentially very significant effects on transactional matters which would require considerable adjustment to documentation and to the type of fundraising used by UK regulated banks. This would require careful consideration.

4.2 **Secured Lending Reform Bill (Private Members' Bill sponsored by George Eustice MP)**

It was noted 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 16 September.

Afternote: it has now been moved again to 20 January 2012. We should also note the Financial Services (Regulation of Deposits and Lending) Bill (second reading 30 March 2012), another private member's bill.

4.3 **Banking Liaison Panel (sub groups: code of practice, small companies, building societies)**

It was reported that suggestions had been made by the Panel for the Code of Practice to be incorporated into primary legislation and that this may be addressed in a new Bill on financial regulation. Members had at the last meeting an opportunity to raise concerns about the ICB proposals (see above) which centred on concerns about regulatory enforced bail-in.

4.4 **Professor Goode's working party**

The Committee decided to continue liaising with the ad-hoc group established by Professor Goode to consider further the UK system of corporate security on mutually relevant topics, such as floating charges and financial collateral. The standing working group on Registration of Charges would take the lead. At an initial meeting with the group it was established it intended to seek to develop the proposals made in the Law Commission's report on the Registration of Charges in 2005. The Committee had strongly opposed that approach at the time and it had not been taken forward in the Companies Act 2006. The Committee confirmed that its current view was that changes occasioned by the implementation of the 2006 Act need to bed down and that radical change was not needed. Liaison with Professor Goode's group would enable that matter to be kept under review.

5. **INSOLVENCY**

5.1 **Prepacks**

The recent consultation and new draft regulations on prepacks were noted. It was further noted that the CLLS Insolvency Law Committee were more suitably placed to consider this.

5.2 **Consultation on proposals to reform regulation on Insolvency Practitioners and to increase incentives to keep their costs down, submission circulated for approval.**

The Committee was reminded that this consultation had, rather surprisingly, included a proposal to increase the prescribed part. It was noted that the Committee's response had been submitted to the Insolvency Service and is available on the CLLS website.

5.3 Insolvency Rules Modernisation

It was reported that Geoffrey Yeowart was working with the Financial Markets Law Committee on this subject, with a particular focus on Rule 2.85 (set-off in administration).

5.4 EU Communication – latest developments on Cross Border Crisis Management

Nothing to report.

6. EAPO

It was reported that the European Commission had published a legislative proposal to create a new European Account Preservation Order (**EAPO**) to facilitate cross-border debt recovery in civil and commercial matters. The proposal would be an alternative to existing domestic freezing orders in cross-border cases.

A draft response to the proposal had been circulated to the Committee before the meeting setting out serious concerns and was approved for submission to the MoJ, subject to any final drafting comments on the next day or so. A revised draft of the response would be circulated after the meeting.

Afternote: The Committee's response was finalised and sent to the Ministry of Justice. It is available on the CLLS website. The CLLS Litigation Committee response, which makes many of the same points, is also on the CLLS website. The Government has now decided that the UK should exercise its right to opt out of the proposal, but should continue to negotiate to see if the proposal can be made acceptable for later opt-in. This was in line with the representatives of both CLLS Committees and several other bodies, including the BBA, and is to be welcomed.

7. POSSIBLE SCOTTISH INDEPENDENCE

It was noted that some interesting issues may arise in the future as regards the definition of sterling (being the lawful currency of England and Wales and Northern Ireland) if Scotland became a fully independent nation.

8. FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (2002/47/EC)

The underlying Directive to the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amending) Regulations 2010 came into force on 6 April 2011. It was noted that it was increasingly important to markets to establish better rules in the light of the risk of further erosion of the value of floating charges and the lack of recognition of their importance in financial markets. It was reported that attempts at engaging the Treasury on this issue had so far been unsuccessful.

9. EUROPEAN CONTRACT LAW REFORM – COMMON FRAME OF REFERENCE

The European Commission had produced a paper and feasibility study on an optional European Contract Law, and this reform had been included in the next Single European Act agenda. The Committee was also reminded that it was represented on the CLLS and Law Society working groups and did not need to comment separately.

Afternote: A regulation for a European Sales Law has been published. This would make this an optional choice to national law in the legal systems of each Member State but, as it would not deal with transfer of title or related tort or delict issues, it would still require a choice of a national law in the ESL option. In other words, it is not a complete code, even as regard sales. It would not apply to financings, but the status of conditional sale arrangements was unclear. It was not intended to apply to purely domestic contracts. For some purposes SMEs would be equated with consumers. The drafting was in civil law style and UK lawyers would require substantial training to apply it. There was some doubt about the legal basis proposed for adoption.

10. INTERMEDIATED SECURITIES –EU PROPOSALS ON LEGAL CERTAINTY. FATE OF UNIDROIT CONVENTION ON SUBSTANTIVE RULES FOR INTERMEDIATED SECURITIES

Following submission of the Committee's paper to the European Commission in January (available on the CLLS website) there had been no new developments.

11. ROME I REGULATION – ARTICLE 14 ASSIGNMENTS

It was reported that the British Institute of International Comparative Law (**BIICL**) were due to report to the Law Commission on the law of assignment. The Committee had already responded to BIICL.

12. CLOSE

There being no further business, the meeting closed.