

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Slaughter & May, One Bunhill, London, EC1Y 8YY on Wednesday 17 September 2008 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith LLP - Chair) (DL)
Geoffrey Yeowart (Lovells LLP) (GY)
John Davies (Simmons and Simmons)
David Ereira (Linklaters LLP)
Robin Parson (Sidley Austen LLP)
Mark Campbell (Clifford Chance LLP)
Sarah Paterson (Slaughter & May)
Richard Calnan (Norton Rose)
Philip Wood (Allen & Overy)
Simon Roberts (Allen & Overy)
Nigel Ward (Ashursts)
Alan Newton (Freshfields Bruckhaus Deringer LLP)

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

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting, which had taken place on 29 May 2008, had previously been circulated and were approved.

Apologies for absence were received from James Curtis, Mark Evans, Richard Bethel-Jones and John Naccarato.

2. FINANCIAL STABILITY AND DEPOSITOR PROTECTION

It was noted that two further consultations had been issued by the Treasury in July (i) on Financial Stability and Depositor Protection and (ii) on a proposed Special Resolution Regime for banks ("**SRR**"). Key concerns with the proposed SRR include:

- Interference with existing contractual relationships;
- "Cherry picking" of assets (by only partial transfers of assets out of the failing entity);
- Interference with netting and set-off arrangements;

- Potential non-compliance with the requirements of EC law.

It was noted that the BBA had recently responded to the SRR consultation and that the CLLS Insolvency Law Committee were expected to respond shortly.

The working party of the Committee had a well-advanced draft response. Final comments were discussed. DL agreed to circulate the final version for approval after the meeting.

[Post meeting comment: The Committee's response was sent to the Treasury on 19 September. Responses from the Insolvency Law and the Regulatory Law Committees were sent on 17 and 19 September respectively. The CLLS Chairman sent a letter to the Treasury offering the services of CLLS members to assist in the consideration of the legislation. The Banking Bill is now before Parliament and DL has been asked to represent the CLLS on the Experts Liaison Group established by the Treasury to consider the subsidiary legislation that will (as presently framed) protect netting under master agreements, collateral within the meaning of the Financial Collateral Directive and security arrangements from partial transfer "cherry-picking". David Ereira is to act as alternate for DL on the Experts Liaison Group.]

3. COMPANIES ACT 2006

3.1 Repeal of financial assistance for private companies and maintenance of capital issues

A final form of the paper on the repeal of financial assistance for private companies and on going capital maintenance rules which had been prepared by the joint working party of the Financial and Company Law CLLS Committees was tabled at the meeting and approved.

3.2 Charge registration and overseas companies - consultation

It was noted that the Committee's response to this consultation had been sent to BERR on 7 March 2008. Further developments were awaited.

3.3 Scottish register of Floating Charges

The Committee was reminded that under a new Scottish law, the Bankruptcy and Diligence (Scotland) Act 2007 (relevant parts of which are expected to come into force in 2010), any company, regardless of its place of incorporation, would be required to register a Scottish floating charge on the new Scottish floating charge register. Potential issues, therefore, include double registration and priority. There may also be problems arising under English insolvency law where, in order to appoint an administrator, a charge holder must have security over all or substantially all of the chargor's assets.

Overall it was felt that there could be uncertainty in this area under the current drafting until a Scottish or EU Court considers this.

GY volunteered to prepare a draft letter setting out the Committee's concerns.

4. MODERNISATION OF PART 7 OF COMPANIES ACT 1989 - CONSULTATION

It was reported that a new consultation on Part 7 (Financial Markets and Insolvency) of the Companies Act 1989 had been issued by the Government. (Part 7 modifies general insolvency law to protect clearing houses and recognised investment exchanges if a member defaults, and is intended to safeguard the integrity of financial markets.) In summary, the consultation proposes expanding the scope of market contracts to which Part

7 would apply. Responses to the proposals were invited by 16 October 2008. A working party had already met to discuss the proposals and would prepare a response.

[Post meeting comment: the Committee's response had been sent on 17 October 2008.]

5. FINANCIAL COLLATERAL ARRANGEMENTS (NO.2) REGULATIONS 2003

The Committee was reminded of the BVI case, Alfa Telecom v Cukurova, which was the first case to consider the above Regulations. (See May minutes for full details.) In short, the case concerned the exercise of the remedy of appropriation (which had been introduced by the Regulations) under an equitable mortgage governed by English law over shares in a BVI company. The East Caribbean Court of Appeal had overturned the first instance decision and held that Alfa Telecom (the security holder) had exercised its right of appropriation effectively. The Committee was also reminded that Cukurova's application to the English Court for the judicial review of the Regulations (on the ground that HM Treasury had exceeded its powers under the European Communities Act 1972 in implementing the Financial Collateral Directive) had been heard in July. Judgment on that application had been reserved.

It was also reported that Cukurova had lodged an appeal to the Privy Council in relation to the BVI proceedings, the hearing for which was expected to take place in February 2009.

[Post meeting comment: the judicial review application before the English court was rejected because it was out of time and the arguments put forward did not reach the threshold to overcome that limitation. Leave to appeal was also refused.]

6. INSOLVENCY

6.1 Administration set-off and expenses

Nothing to report.

6.2 Insolvency Law Reform

Nothing to report.

6.3 Re-organisation and winding up of credit institutions

Nothing to report.

6.4 Proposed Amendment to Settlement Finality Directive and Financial Collateral Arrangements Directive

It was noted that the Committee's response to the proposed amendments to these Directives has been sent to the Treasury on 14 July.

7. ROME I - APPLICABLE LAW IN CONTRACTS

It was noted that the Committee had responded to the Government's consultation on whether the UK should opt in to Rome I on 25 June, and had expressed the view that it should. Further developments awaited.

8. UNIDROIT CONVENTION ON INTERMEDIATED SECURITIES

Not discussed.

[Post meeting comment: Unidroit has made a recent announcement that progress continues to be made and that the revised text of the draft Convention will be available on 13 October. Work on finalising and adopting the Convention will continue in 2009.]

9. COVERED BONDS CONSULTATION

Nothing to report.

10. PROPOSED CHANGES TO EU CAPITAL REQUIREMENTS DIRECTIVE – SYNDICATED LOANS AND NEW ARTICLE 122A

The Committee was reminded about the potential impact of proposed changes to the EU Capital Requirements Directive 2006/48 on syndicated loans. The effect of proposed new Article 122a would prohibit a credit institution from being exposed to the credit risk of an obligation or a pool of obligations unless, if it did not act as arranger of the deal, the arranging bank holds 10% in positions having the same risk profile.

It was agreed that a small working group should be set up to review and comment on the proposals. Volunteers include Simon Chadney (Herbert Smith), Mark Campbell (Clifford Chance) and Simon Roberts (Allen & Overy).

[Post meeting comment: In the revised draft Article 122a that has gone to the European Parliament, the retained originator exposure has been dropped from 10 to 5%, and syndicated loans and credit default swaps are expressly excluded. In light of this, Committee to maintain a watching brief on any further developments.]

11. CONSULTATION ON TRANSFERS OF INCOME STREAMS AND DISGUISED INTEREST – REVENUE LAW COMMITTEE'S RESPONSE (6 MARCH 2008)

It was considered that the Revenue Law Committee should take the lead on this and would be aware of the issues for lending transactions.

12. CLOSE

There being no further business the meeting was closed.