

CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of CMS Cameron McKenna, Mitre House, 160 Aldersgate Street, London EC1A 4DD on Wednesday 30 May 2007 at 12.45 p.m.

Present: Dorothy Livingston (Herbert Smith - Chair) (DL)
Geoffrey Yeowart (Lovells) (GY)
John Davies (Simmons & Simmons)
David Ereira (Freshfields)
Robin Parsons (Sidley Austin)
John Naccarato (CM Cameron McKenna)
Richard Bethel-Jones (Allen & Overy)
James Curtis (Denton Wilde Sapte)
Mark Campbell (Clifford Chance)
Sarah Paterson (Slaughter & May)
Mark Evans (Travers Smith)
Nigel Ward (Ashursts)
Phillip Wood (Allen & Overy)

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

1. OPENING OF MEETING, APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

DL opened the meeting. It is noted that the minutes of the last meeting, which had taken place on 8 February 2007, had been approved.

Apologies for absence: Richard Calnan (Norton Rose), Anthony Humphreys (Allen & Overy) and Claire Watson (Linklaters).

2. COMMITTEE MEMBERSHIP

It was reported that since David Ereira had moved to Linklaters, Claire Watson had resigned from the Committee. The Committee thanked Claire for her contribution and hoped that she would stay involved in its work by continuing to participate in its working parties.

It was also reported that Anthony Humphrey (Allen & Overy) had resigned and that new membership applications had been received from Simon Hall (Freshfields) and Simon Roberts (Allen & Overy). The Committee decided to accept these applications.

3. WORKING PARTIES

A list of the Committee's current working parties had been circulated prior to the meeting.

At the meeting the Committee decided to form an additional working party on the Unidroit Project on intermediated securities, to be chaired by Mark Evans (Travers Smith).

The current list of working parties is as follows:

- Companies Act 2006 – financial assistance
- Companies Act 2006 – registration of company charges
- Trustee exemption clauses and new Law Society rule 2.07
- Uncitral security laws
- Unidroit project on intermediated securities
- Insolvency Rules Modernisation (joint working party of this Committee with the CLLS Insolvency Law Committee)
- Administration – Insolvency Act Questionnaire (joint working party of this Committee with the CLLS Insolvency Law Committee)
- Financial Collateral Directive and UK Implementation
- International Law Issues (Rome 1, Rome 2 and review of Brussels Regulation)

4. COMPANIES ACT 2006 – FINANCIAL ASSISTANCE

Since the last meeting, it had been announced that the repeal of the financial assistance provisions in the Companies Act 1985 in relation to private companies would not come into force under the Companies Act 2006 until 1 October 2008.

It was also noted that since the last meeting, [the Financial Assistance working party had taken part in discussions with the DTI and the CLLS Company Law Committee on the drafting of the saving provision relating to the old common law, and] a draft of the saving provision had been issued by the DTI in its February Consultation paper[, which the Committee largely felt dealt with the concerns]. The consultation period ended on 31 May following which a further or final draft was expected to be issued.

The Committee would await further developments.

5. COMPANIES ACT 2006 – OVERSEAS COMPANIES AND CHARGE REGISTRATION

It was noted that since the last meeting the DTI had issued its Consultation Paper on the Companies Act 2006. The Committee's working party had responded to the consultation on overseas companies and charge registration.

The Committee would keep a watching brief of further developments.

6. FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE

The Committee was reminded that the EU Commission had published its report on the Financial Collateral Arrangements Directive at the end of December 2006 and had proposed some amendments to the Directive. The key proposals are:

- extending the scope of the directive to include "credit claims" (not defined but probably some kind of receivable);
- extending the EU framework for netting (beyond close-out netting);
- amending article 9 on conflict of laws such that where financial collateral is in the form of book entries certain matters would be determined by the law of the country in which the book entry account is held, including the legal nature of and proprietary rights in such book entry collateral.

The Committee was also reminded that English law floating charges may not benefit from the Directive due to "control"-related issues.

Following the last meeting, Robin Parsons, Dorothy Livingston and Mark Evans had met with HM Treasury and the Insolvency Service (in April) to discuss the Committee's concerns on the "control" requirements. As a result of that meeting it had been agreed that the Committee would provide a list of the key discrepancies between the Directive and the workings of Crest.

7. INSOLVENCY RULES MODERNISATION

7.1 European High Yield Association

It was reported that a working party of the European High Yield Association had issued a paper to HM Treasury containing its views on insolvency law reform.

The Committee did not agree with the recommendations. Philip Wood said he would be sending observations to the Treasury.

7.2 Leyland Daf Reversal – Companies Act 2006

It was reported that the draft secondary legislation in relation to the reversal of the decision in Leyland Daf (payment of expenses in a winding up) was still awaited. The Committee agreed that it should be involved in the consultation process in relation to this secondary legislation.

7.3 Consolidation and modernisation of Insolvency Secondary Legislation

The Committee was reminded that the Insolvency Service had issued draft consolidated versions of various parts of the Insolvency Rules in February (which had previously been circulated by GY).

A joint working party of the Committee and the CLLS Insolvency Law Committee had prepared a detailed response and sent this to the Insolvency Service in April.

The next draft of the consolidated Rules was expected in June.

7.4 Evaluation of the Enterprise Act 2002

The Committee was reminded that the Insolvency Service had issued a questionnaire on the use of administrative receiverships within the exceptions in the Enterprise Act since that Act came into force in September 2003.

A joint working party of the Committee and the CLLS Insolvency Law Committee had prepared a response and sent this to the Insolvency Service in May.

8. UNIDROIT PROJECT ON INVESTMENT SECURITIES

The Committee was reminded that UNIDROIT had published a further preliminary draft convention on rules regarding intermediated securities on 15 December 2006 and that a key issue in the Convention was the concept of "control" in taking charges over securities.

Mark Evans had attended a final meeting of the intergovernmental group the previous week and a final version of the Convention was awaited. Once finalised the Convention will be sent to the UNIDROIT council for approval before ratification by UNIDROIT's members.

9. UNCITRAL – DRAFT LEGISLATIVE GUIDE ON SECURED TRANSACTIONS

Since the last meeting a working party had been set up to follow the progress of an UNCITRAL initiative which is aiming to produce a draft legislative guide for secured lending transactions to assist developing States. The Committee was reminded that the FMLC had concerns that the draft guide would conflict with various EU Directives as drafted.

It was also noted that the next UNCITRAL meeting was due to take place at the end of June.

10. LACK OF CENTRAL ADMINISTRATION SEARCH FACILITY

It was agreed that the lack of a central administration or winding up search facility continued to be unsatisfactory and, accordingly, DL would write to the Department for Constitutional Affairs again in an effort to highlight the problem and help formulate a solution.

11. EUROPEAN CONTRACT LAW REFORM PROJECT

It was reported that proposals to reform and harmonise European contract law, which have been brewing since about 2001, were being re-ignited. DL had attended a meeting at the Guild Hall on the project in April.

The project has two aspects:

- a consumer forum;
- an academic group looking at producing a "Common Frame of Reference" (CFR).

The academic CFR is expected to be submitted to the Commission by the end of 2007. A White Paper is anticipated in mid 2008 to include proposals for a final CFR and adoption of the final CFR is proposed by the end of 2008.

In relation to the consumer forum, the Commission has launched a review of the consumer *acquis* with publication of a Green Paper on 8 February 2007. This sets out various options for reform of the eight key Directives in relation to consumer contracts.

The concern for English lawyers is that the CFR could lead, to a greater or lesser extent, to the harmonisation of European contract law with loss of principles of legal certainty essential for major financial centres. The development of the CFR into an "optional instrument" is seen as one step along this road.

This will need to be followed closely.

12. ROME I (CHOICE OF LAW IN CONTRACTUAL OBLIGATIONS) AND ROME II (CHOICE OF LAW IN NON-CONTRACTUAL OBLIGATIONS)

The Committee was reminded of the proposals for a Rome I Regulation (on the law applicable to contractual obligations) and a Rome II Regulation (on the law applicable to non-contractual obligations).

In relation to Rome I, the areas of concern (as detailed in the December minutes and accompanying paper) were still prevalent and there had been no material developments since the last meeting.

In relation to Rome II, again there had been no material developments recently.

The Committee agreed to keep a watching brief on future developments.

13. ROME I INSURANCE

It was reported that a working party had prepared and sent a response to the Consultation on the insurance provisions of Rome 1 on 5 April (previously circulated).

The Committee would keep a watching brief on future developments.

14. ANY OTHER BUSINESS

Trustee Exemption Clauses – New Solicitors Code of Conduct

DL reported that there had been no response to the Committee's letter to the Law Society on this issue.

Past-meeting note: The new Solicitors Code of Conduct came into force on 1 July 2007 and no amendments had been made to new Rule 2.07 or the guidance relating to that rule. Extracts of Rule 2.07 and the guidance are attached to these minutes. The CLLS is taking further steps at central level.

FMLC Quadrilateral meeting

It was noted that the FMLC's Quadrilateral meeting would be taking place on 19 June.

15. CLOSE

There being no further business the meeting closed.

APPENDIX – SOLICITORS CODE OF CONDUCT 2007

2.07 Limitation of civil liability by contract

If you are a principal in a firm you must not exclude or attempt to exclude by contract all liability to your clients. However, you may limit your liability, provided that such limitation:

- (a) is not below the minimum level of cover required by the Solicitors' Indemnity Insurance Rules for a policy of qualifying insurance;
- (b) is brought to the client's attention; and
- (c) is in writing.

Guidance to Rule 2.07:

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65. The details of any limitation must be in writing and brought to the attention of the client. Because such a limitation goes to the heart of the agreement between you and your client, you should ensure that your client knows about the limitation and, in your opinion, understands its effect. Consequently, it would not be appropriate to include the limitation within a "terms of business" letter without specifically drawing your client's attention to it.

66. Where you are preparing a trust instrument for a client and that instrument includes a term or terms which has or have the effect of excluding or limiting liability in negligence for a prospective trustee, you should take reasonable steps before the trust is created to ensure that your client is aware of the meaning and effect of the clause. Extra care will be needed if you are, or anyone in or associated with your firm is, or is likely later to become, a paid trustee of the trust.

67. Where you or another person in, or associated with, your firm is considering acting as a paid trustee you should not cause to be included a clause in a trust instrument which has the effect of excluding or limiting liability for negligence without taking reasonable steps before the trust is created to ensure that the settlor is aware of the meaning and effect of the clause.

It would be prudent to ensure both that:-

- (a) there is evidence that you have taken the appropriate steps; and
- (b) that evidence is retained for as long as the trust exists and for a suitable period afterwards.

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72. You will not breach 2.07 by a term limiting or excluding any liability to persons who are not your client under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. However, any such term will be subject to section 60(5) of the Solicitors Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, where appropriate.