

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

**Minutes of a meeting held at the office of Hogan Lovells, Atlantic House, Holborn Viaduct,  
London EC1A 2FG**

**on 26 February 2014 at 1.00pm**

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Present: Dorothy Livingston (Herbert Smith Freehills – Chairman)  
Simon Roberts (Allen & Overy)  
Nigel Ward (Ashurst)  
John Naccarato (Cameron McKenna)  
Toby Mann (Clifford Chance – alternate for Charles Cochrane)  
Nick Swiss (Eversheds)  
Alan Newton (Freshfields)  
Penny Angell (Hogan Lovells)  
Jeremy Stokeld (Linklaters – alternate for David Ereira)  
Richard Calnan (Norton Rose Fulbright)  
Matthew Dening (Sidley Austin)  
John Davies (Simmons & Simmons)  
Andrew McClean (Slaughter and May)  
Presley Warner (Sullivan & Cromwell)  
Mark Evans (Travers Smith)

In attendance: Rachael MacKay (Herbert Smith Freehills – taking minutes)

**1. MINUTES OF LAST MEETING, MATTERS ARISING**

The minutes of the last meeting were approved.

The following matters referred to in the minutes of the last meeting were noted or reported:

- Competition Commission and UK Criminal Cartel offence: oral representations had been made to the Commission and DBIS at the CLLS Competition Law Committee meeting in December.
- Transparency & Trust paper (regarding a Government proposal to create a register of beneficial owners of shares): since the proposal was aimed at individual owners (not corporates), it was felt that this should be a watching brief item until draft legislation was available, at which time it should be possible to assess if there was any impact on share security.
- CLLS Land Law Committee protocol for discharging commercial mortgages: this had been finalised and was now on the CLLS website.

**2. SECURED TRANSACTION REFORM**

It was reported that the Committee's Discussion Paper 2 "Fixed and Floating Charges on Insolvency" (dated February 2014) had been finalised and had been posted onto the CLLS website. It had also been sent to a number of interested people who had been invited to provide comments. It was proposed that a meeting to discuss views and further steps would be held in the next few months.

The chairman of the working party, Richard Calnan, reminded the meeting that the working party had previously identified a second topic, restrictions on assignment, which merited further debate, and that now might be the time to commence work on this.

It was also reported that another member of the Committee, Alan Newton, had been invited to chair a working party B (Priorities) of the Secured Transactions Law Reform Project which had been started by Professor Roy Goode. It was felt that liaison with this group could lead to a useful exchange of views.

### 3. **CHANGE OF LIBOR ADMINISTRATOR**

It was noted that ICE Benchmark Administration Limited had replaced the BBA as the administrator of Libor on 1 February 2014 and that ICE had issued a revised Code of Conduct for Contributing Banks at around the same time.

### 4. **COMPETITION COMMISSION FINAL REPORT ON REMEDIES IN STATUTORY AUDIT SERVICES MARKET INVESTIGATION**

The Committee was reminded that the Competition Commission's final report on the Statutory Audit Services Market (published 15 October 2013) included a proposal for a ban on loan agreements restricting the choice of auditor to lists or categories but that it would be possible to specify in loan agreements that an auditor should satisfy objectively justified criteria.

The Committee was informed that due to EU developments, the Competition Commission had revised its timetable to implement remedies (which would be an order under the Enterprise Act 2002) and that implementation was now likely to be at the end of 2014. This would also ban "big four only" clauses imposed on companies by third parties. Further review would be needed when the final text became available.

### 5. **FINANCIAL STABILITY**

#### 5.1 **The Financial Services (Banking Reform) Act 2013, EU Recovery and Resolution Directive proposal and Liikanen Report**

- a. The Committee was informed that the Financial Services (Banking Reform) Act 2013 had been passed on 18 December 2013 and, further, that the Financial Services (Banking Reform) Act 2013 (Commencement No. 1) Order 2014 (dated 19 February 2014) had been published. Provisions relating to ring-fencing and the introduction of a bail in tool come into force on 1 March 2014 for the purpose of making rules, orders or regulations. Provisions relating to ring-fencing transfer schemes come into force on 1 March 2014 for all purposes.

It was noted that the deadline for all relevant provisions to come into force is 1 January 2019.

- b. It was also reported that the EU Recovery and Resolution Directive is the subject of a "trialogue agreement" (the directive being the first step towards setting up an EU system to deal with struggling banks). The directive is to enter into force on 1 January 2015 and the bail-in system to take effect on 1 January 2016.
- c. It was also noted that on 29 January, the EU Commission had published a draft proposal on the Structural Reform of the EU Banking Sector. This, like Volcker, would require affected banking groups to dispose of their proprietary/own account operations completely, subject to a carve-out for existing national solutions of equivalent value. This is linked to transparency measures affecting shadow banking.

#### 5.2 **Financial Sector Resolution**

It was noted that the final Bloxham report on the special administration regime ("**SAR**") for investment banks had been published and (in line with the interim report published in April 2013), concludes that the SAR should remain in force but recommends reform.

### 5.3 **Non-bank Resolution Regimes**

It was noted that the consultation on draft SIs relating to a special resolution regime for investment firms, banking group companies and clearing houses, had now closed.

### 6. **INSOLVENCY**

It was reported that the European Parliament had approved the EU Commission's proposals for the revision of the EU Insolvency Regulation. Of most note to banking lawyers is the introduction of a new definition of "COMI" together with a new 3 month "look back" test, and new provisions on insolvencies of groups of companies.

It was also thought that the revisions may improve the enforceability of netting arrangements, since new Article 6a (Netting Agreements) provided that netting agreements shall be governed solely by the law of the contract governing such agreements.

### 7. **EUROPEAN ACCOUNT PRESERVATION ORDER PROPOSAL**

It was reported that the European Parliament had recently amended the EAPO proposal to prevent abuse and safeguard alleged debtors. The relevant press release states that amendments have been such that a creditor would have to compensate the recipient of an EAPO if it is found to be unjustified and that a debtor can now contest the EAPO immediately and oblige the creditor to set aside funds to cover compensation. However the amended text is not yet available. It was felt that whilst these amendments were to be welcomed, serious concerns regarding the EAPO proposal remained and the Committee's view remained that the UK should remain opted out.

### 8. **BALANCE OF COMPETENCIES CONSULTATION – FREE MOVEMENT OF FINANCIAL SERVICES AND FREE MOVEMENT OF CAPITAL**

It was noted that the Government is continuing to consult on EU rules and their impact on the UK economy.

### 9. **SCOTTISH INDEPENDENCE REFERENDUM**

The Committee's attention was drawn to the UK Parliament Lords Library Note (dated 3 January 2014) which summarises some of the key discussions regarding the possible implications that would follow a "Yes vote", including possible constitutional and EU issues and currency options.

The Committee's attention was also drawn to the Treasury paper (dated February 2014) which included an informative analysis of the issues related to the pound.

### 10. **CONFLICTS OF LAWS**

The Committee was informed that the Commission is proposing that the Council adopt the Hague Convention of 30 June 2005 on Choice of Court Agreements. This would bring the Hague Convention into operation, but the USA has not yet adopted it. Only Mexico has ratified the Convention. This would not affect the Brussels 1 Regulation, which is an intra-EU Regulation (excluding Denmark), except in the case of disputes involving one or more parties resident in a third country which is a party to the Convention. It is proposed that insurance contracts should be partially excluded from the application of the Hague Convention under an option available to signatories.

### 11. **CAPITAL REQUIREMENTS REGULATION (CRR) – ARTICLE 194(1)**

It was reported that Article 194(1) (Principles governing the eligibility of credit risk mitigation techniques) of the CRR has given rise to some uncertainty in practice and among some banks. For example, it is not clear if Article 194(1) requires a generic or deal by deal legal opinion to be provided to the competent authority (on request) and further the meaning of a "reasoned" legal opinion is not clear.

It was decided that, since the Committee has a standing working party on legal opinions, this was a topic which that working party might be best suited to look into, so an approach would be made to the chairman of the working party.

12. **ANY OTHER BUSINESS AND CLOSE**

There being no further business, the meeting closed.

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