

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

**Minutes of a meeting held at the office of Freshfields Bruckhaus Deringer LLP
65 Fleet Street, London EC4Y 1HT
on 3 December 2014 at 1.00pm**

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Sarah Smith (Akin Gump LLP)
Simon Roberts (Allen & Overy LLP)
Nigel Ward (Ashurst LLP)
Charles Cochrane (Clifford Chance LLP)
Nick Swiss (Eversheds LLP)
Alan Newton (Freshfields Bruckhaus Deringer LLP)
Penny Angell (Hogan Lovells LLP)
David Ereira (Linklaters LLP)
Andrew McClean (Slaughter and May)
Presley Warner (Sullivan & Cromwell LLP)
Mark Evans (Travers Smith)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

1. APOLOGIES FOR ABSENCE, MATTERS ARISING, MINUTES OF LAST MEETING, NEW COMMITTEE MEMBER

It was noted that the minutes of the last meeting which took place on 10 September 2014 had been circulated and were now approved. Apologies were received from Richard Calnan (Norton Rose Fulbright LLP), John Davies (Simmons and Simmons LLP) and John Woodhall (Sidely Austin LLP). The Chairman welcomed its new member, Sarah Smith (Akin Gump LLP).

2. SECURED TRANSACTION REFORM

The Committee considered the draft Secured Transactions Code and Explanatory Note drafted by Richard Calnan. It was noted that the proposals set out in the draft Code went further than the working party has previously envisaged, but it was agreed that this project should form part of the Committee's work.

3. BIG 4 AUDITOR CLAUSES IN CONTRACTS – FUTURE BAN AND NO GRANDFATHERING; LMA AMENDMENTS AND NOTE

The Committee was reminded of the Directive amending the Statutory Audit Directive which, when in force, will prohibit "Big four" auditor clauses in any contract such that any provision in an agreement between a company and a third party which restrict a company's choice of auditor to particular lists or categories will be void. It was noted that there are no grandfathering provisions so the prohibition, when in force, will apply to agreements being entered into now. It was also noted that the LMA had recently amended its relevant documentation and issued a note on the amendments to its members.

4. FINANCIAL STABILITY

4.1 Banking Reform Act 2013, Bail-in, EU Recovery and Resolution Directive proposal and Structural Regulation

4.1.1 Banking Recovery and Resolution Directive (BRRD)

The Committee was reminded that a joint response to the Treasury Consultation on the BRRD had been submitted by this Committee, the CLLS Insolvency Law Committee and the Banking Reform Working Group of the Law Society of England and Wales in October.

4.1.2 **UK: BRR, Safeguards Order and Depositor Preference etc**

It was reported that the Treasury had laid four of the six statutory instruments necessary to implement the BRRD in the UK.

Afternote: all now in force.

4.2 **FSB, PRA and EBA Consultations**

The Committee's attention was drawn to the numerous consultations by the FSB, the PRA and EBA in relation to total loss absorbency (TLAC), implementation of the BRRD, changes to the law on deposit guarantee schemes and bail-in, which are related topics. It was agreed that the joint working party with the Insolvency Law Committee on Bank Reform would review these and decide which to respond to.

Afternote: resulting responses are available on the CLLS website.

4.3 **Structural Reforms**

It was reported that the EU Council and European Parliament are still considering the EU Commission's proposals on a draft regulation for the structural reform of banks. It was anticipated that the final text would not be adopted before June 2015 and possibly much later. It was thought that its possible terms and uncertainty whether it would proceed could complicate the UK's preparation of legislation for ring-fencing of key banks.

The Committee would keep watch for further developments.

5. **SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL – PROHIBITION ON NON-ASSIGNMENT PROVISIONS RE: RECEIVABLES**

The Committee noted that the Small Business, Enterprise and Employment Bill contains a power for regulations to be made which would make ineffective any term of a relevant contract which prohibits or imposes a condition or other restriction on the assignment of receivables. It was understood that the aim of this part of the Bill is to assist small companies who wish to raise finance against invoices. The Committee would review the draft regulations when available.

Afternote: A draft SI was released for consultation on 6 December 2014 and the Committee's response is available on the CLLS website.

6. **BILLS OF SALE – LAW COMMISSION CALL FOR EVIDENCE**

The Committee was reminded that, in July, the Law Commission had announced a review of the law on bills of sale and that it expects to report and make recommendations for reform in late summer 2016. It was agreed that was appropriate for this matter to be considered by the security reform working party at the appropriate time. Until then, further developments were awaited.

Afternote: a consultation on possible reform is expected in Autumn 2015.

7. **FINANCIAL CONDUCT AUTHORITY: WHOLESALE MARKETS REVIEW**

Nothing to report. The Committee would keep a watching brief on further developments.

8. **THE UK'S NEW PAYMENT SYSTEMS REGULATOR TO LAUNCH A COMPETITION REVIEW**

Noted.

9. **COMPETITION AND MARKETS AUTHORITY MARKET REFERENCE ON PERSONAL CURRENT ACCOUNT AND SMALL BUSINESS BANKING**

It was reported that the CMA were undertaking a competition enquiry into the retail markets. The Committee should keep this under review in case of any future impact on the wholesale markets or structural reforms.

10. **CSD REGULATION 2014 AND MORTGAGES OVER SHARES**

The Committee was briefed about a potential issue arising due to the interplay between the Financial Collateral Arrangements (No. 2) Regulations 2003, Article 3(2) of the CSD Regulation (EU 909/2014) and the UK Central Securities Depositories Regulations 2014, and the way in which equitable mortgages over shares or other transferable securities (whether public or private, listed or unlisted, admitted to trading or not admitted to trading) are granted outside of the CREST system. It was explained that the concern, if well founded, would not impact on the validity of any such mortgage over such shares or other securities, but might result in the imposition of penalties by the FCA on any party which fails to comply with Article 3(2) of the CSD Regulation.

It was noted that Mark Evans had already written to the FCA on the matter and a response was awaited.

Afternote: Since the meeting, the FCA has indicated that it is currently in discussions with the European Commission on these and other issues raised by Mark Evans as to the proper scope of the financial collateral provisions of article 3(2). It is understood that, once its discussions with the European Commission are complete, the FCA intends to make public its views.

11. **EUROPEAN ACCOUNT PRESERVATION ORDER (EAPO)**

The Committee was reminded that the Regulation concerning the new EAPO had come into force in July, although the main provisions will not apply until January 2017. It was noted that the UK remained opted out. Further, the Committee was informed that a meeting had taken place at the offices of Herbert Smith Freehills in October to discuss the EAPO and which had been attended by representatives of the Ministry of Justice. At the meeting, the audience had voted 60-4 against opting in. The Committee agreed that the Chairman should write to the Ministry of Justice to confirm its view that the UK should continue to be opted out.

12. **ANY OTHER BUSINESS AND CLOSE**

There being no further business, the meeting was closed.

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