

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

**Minutes of a meeting held at the office of Sidley Austin LLP, Woolgate Exchange,
25 Basinghall Street, London EC2V 5HA**

on 14 December 2016 at 12.30pm

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Penny Angell (Hogan Lovells LLP)
James Bresslaw (Simmons & Simmons LLP) (alternate for John Davies)
Charles Cochrane (Clifford Chance LLP)
Matthew Dening (Sidley Austin LLP)
David Ereira (Paul Hastings (Europe) LLP)
Andrew McClean (Slaughter & May)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Akin Gump LLP)
Jeremy Stokeld (Linklaters LLP)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

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

It was noted that the minutes of the last meeting which took place on 14 September 2016 had been circulated and were now approved.

Apologies were received from Ken Baird (Freshfield Bruckhaus Deringer LLP), John Davies (Simmons & Simmons LLP), Richard Calnan (Norton Rose Fulbright LLP), Mark Evans (Travers Smith LLP), Nick Swiss (Eversheds LLP), Nigel Ward (Ashurst LLP), Presley Warner (Sullivan & Cromwell LLP) and Philip Wood (Allen & Overy LLP).

2. SECURED TRANSACTION REFORM

2.1 Small Business, Enterprise and Employment Act 2015 – future proposed ban on non-assignment clauses in some business contracts regarding receivables

There was nothing new to report in relation to the Government's previous proposals to nullify non-assignment provisions in certain business to business contracts. The Committee will continue to watch for developments.

2.2 CLLS Secured Transactions Law Reform/Code

It was noted that progress continues to be made by the security reform working party in relation to this project, including the draft code which was last circulated in July.

2.3 Bills of Sale

The Committee was reminded that a Law Commission Consultation Paper No. 225 on Bills of Sale had been published in September 2015, and to which the Committee had responded in December 2015.

It was also noted that more recently, on 12 September 2016, the Law Commission had published its recommendations on the future of bills of sale which included repealing the Bills of Sale Acts 1878 and 1882 and replacing them with a new Good Mortgages Act, and replacing the concept of bills of sale, personal chattels etc, with "goods mortgages" and "vehicle mortgages".

The Committee's overall view, as set out in its response letter in more detail, was that while some aspects of the recommendations were to be welcomed (eg those in relation to unincorporated businesses creating security), the remainder of the recommendations were unnecessary. Generally it was felt that an opportunity to abolish this outdated and cumbersome area of law was at risk of being missed.

2.4 **Financial Collateral Directive – first CJEU ruling**

The Committee noted the first CJEU ruling on the meaning of "possession or control" under the Financial Collateral Directive had been delivered on 10 November. Unfortunately it was felt that the ruling did not provide much by way of assistance in this rather uncertain area of financial law.

2.5 **European Commission: Effects of assignment of claims on third parties**

It was noted that on 29 September the European Commission had adopted a report on the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person (the "**Report**"). The Report identifies the main problems related to the lack of uniform rules and presents three approaches to address this which are based on: (i) the law of the contract between assignor and assignee, (ii) the law of the assignor's habitual residence or (iii) the law applicable to the assigned claim.

It was also noted that the European Commission plans to launch a public consultation by the end of 2016 and is aiming to complete a study on the law applicable to securities and claims traded on financial markets by mid-2017.

The Committee's security working party is continuing to consider the issues raised by the Report.

3. **HM TREASURY CONSULTATION: RULES ON ENSURING THE EFFECTIVE FUNCTIONING OF A FINANCIAL MARKET INFRASTRUCTURE SPECIAL ADMINISTRATION REGIME**

It was noted that a new Treasury consultation had been opened on 11 November, seeking views on the rules that are needed, including modifications of general insolvency rules, to ensure the effective functioning of an administration of a financial market infrastructure ("**FMI**") company. The draft rules for FMI administration (for England and Wales) have also been published. The consultation closes on 15 January 2017. It was felt that it would be more appropriate for other Committees to consider this consultation.

4. **DRAFT BANK RECOVERY AND RESOLUTION ORDER 2016 PUBLISHED**

It was noted that on 3 November 2016, a draft version of the Bank Recovery and Resolution Order 2016 had been published, together with a draft explanatory memorandum. The draft Order makes amendments to the Banking Act 2009 and the Financial Services and Markets Act 2000, as well as related statutory instruments, relating to the UK special resolution regime and the transposition of the Bank Recovery and Resolution Directive (2014/59/EU).

5. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE 2014/59/EU (BRRD), ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN**

The Committee was reminded that the European Commission had adopted the EBA regulatory technical standards in March and that these do not address concerns regarding the breadth of Article 55 of the BRRD.

The Committee noted that on 23 November the Commission had published a "Communication on the call for evidence: EU regulatory framework for financial services", in which it proposes an adjustment to Article 55 which is intended to ensure that the requirement for contractual recognition of bail-in provisions for non-EU creditors can be applied pragmatically. The Committee was informed that since the proposed adjustment contains drafting errors, which the Commission was aware of, it may make matters worse. It was thought and hoped that further amendment was likely.

6. **FCA CONSULTATION PAPER CP16/31: INVESTMENT AND CORPORATE BANKING: PROHIBITION OF RESTRICTIVE CONTRACTUAL CLAUSES**

It was noted that the FCA report into investment and corporate banking had been issued in October, together with FCA consultation paper 16/31. The consultation paper proposes a ban on the use of restrictive contractual clauses in investment and corporate banking engagement letters and contracts where these clauses cover future corporate finance services carried out from an establishment in the UK, although there would be an exception for bridging loans.

The ban on restrictive clauses was discussed and it was decided not to respond to the consultation.

7. **INSOLVENCY (ALL)**

7.1 **European Commission Proposal for a Directive on Insolvency, Restructuring and Second Chance**

The Committee noted that on 22 November 2016, the European Commission had announced that, for the first time, it is proposing a set of European rules on business insolvency. (The rules will not apply to financial institutions.)

Article 16, concerning protection for new and interim financing, was noted.

The security reform working party would review relevant aspects and consider matters further.

7.2 **Insolvency Service Review on Corporate Insolvency Framework (25 May 2016)**

The Committee was reminded that it had responded to the Insolvency Service consultation on the Corporate Insolvency Framework in July, and that next steps were awaited.

8. **E-SIGNATURES**

The Committee was reminded that the guidance note on electronic signatures prepared by a joint working party of the Law Society, the Committee and the Company Law CLLS Committee, had been published at the end of July.

This should be kept under review in light of the work the Land Registry is doing regarding section 91 of the Land Registration Act 2002. The Chairman will liaise with the chair of the Joint Working Party.

9. **EUROPEAN ACCOUNT PRESERVATION ORDER**

The Committee was reminded that the Regulation establishing a European Account Preservation Order (EAPO) will come into force across EU member states on 18 January 2017, and that Denmark and the UK have opted out. The final version of the EAPO Regulation does not include financial instruments, but this will be revisited in the first evaluation report by the EU Commission due in 2022. The Committee would therefore keep a watching brief.

10. **CMA FORMAL CONSULTATION ON DRAFT RETAIL BANKING ORDER**

It was noted that the Competition and Markets Authority ("**CMA**") envisages implementing a package of remedies to remedy or prevent findings of adverse effects on competition, namely: the draft Retail Banking Market Investigation Order 2017, undertakings to be entered into by Bacs Payment Schemes Limited; and recommendations to HM Treasury, the Department for Business, Energy and Industrial Strategy, and the FCA. It was further noted that representations must be made to the CMA by 23 December.

11. **CLLS GUIDE TO LEGAL OPINIONS**

The Committee noted that its guide to legal opinions had been issued in November 2011. Consideration was given as to whether the guide should be updated and it was decided that, since practice was largely unchanged, this was not currently necessary.

12. **BREXIT**

The Committee would continue to keep a watching brief on developments.

13. **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.