

CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE
Minutes of a meeting held at the office of
Linklaters LLP, 1 Silk Street, London, EC2Y 8HQ
on 11 April 2018 at 1.00pm

Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Penny Angell (Hogan Lovells LLP)
Nick Brittain (alternate for Matthew Dening (Sidley Austin LLP))
Charles Cochrane (Clifford Chance LLP)
Mark Evans (Travers Smith LLP)
Emma Giddings (alternate for Richard Calnan) (Norton Rose Fulbright LLP)
Andrew McClean (Slaughter & May)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Akin Gump LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell LLP)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

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

The Chairman opened the meeting and reported that apologies had been received from Ken Baird (Freshfield Bruckhaus Deringer LLP), Richard Calnan (Norton Rose Fulbright LLP), Matthew Dening (Sidley Austin LLP), David Ereira (Paul Hastings (Europe) LLP) and Philip Wood (Allen & Overy LLP).

It was noted that the minutes of the last meeting which took place on 10 January 2018 had been circulated and were now approved.

The Committee agreed that James Bresslaw of Simmons & Simmons LLP should be invited to join the Committee.

2. SECURED TRANSACTION REFORM

2.1 The Business Contract Terms (Assignment of Receivables) Regulations 2017 and The Small Business, Enterprise and Employment Act 2015 sections 1 and 2 – ban on non-assignment clauses in some business to business contracts regarding receivables

The Committee was reminded that the revised draft of The Business Contract Terms (Assignment of Receivables) Regulations 2017 had been withdrawn in November 2017, largely due to the Committee's paper dated 13 October 2017, which had been supported by ISDA and the LMA. Philip Wood had provided a valuable in depth legal analysis which supported the Committee's approach.

It was reported that members of the Committee and others were now involved in dialogue with DBEIS on a potential revised, narrower, version of the regulations. It was likely this would lead to revised regulations being laid before Parliament when Parliamentary time allowed.

2.2 European Commission Proposal for a Regulation on the law applicable to the third party effects of assignments of claims (dated 12 March 2018)

It was reported that, following a consultation in 2017 to which the Committee responded, a Proposal for a Regulation on the law applicable to the third party effects of assignments of claims had been published by the European Commission.

Contrary to the Committee's view that the law of the assigned claim would be the most suitable law to govern effects on third parties, the European Commission was proposing that (subject to some specific exceptions, for example, securitisations), the governing law should be the law of the country in which the assignor has its habitual residence at the material time.

The Committee strongly believed that if the proposal proceeds as drafted, this would be likely to be contrary to the parties intentions as it would potentially introduce an additional law into their agreed contractual arrangements, would be difficult to apply, would lead to unnecessary complications, particularly for secondary loans trading, and appeared to be at odds with other conflict of law rules. It was therefore agreed that the Committee should write to the relevant Government department to urge the UK to opt out of the Regulation if the proposal proceeds.

A European Commission communication (dated 12 March 2018) on the law applicable to the proprietary effects of transactions in securities was also noted. This referred to differences in drafting and national interpretation between the Financial Collateral Directive, the Settlement Finality Directive and the Credit Institutions Winding-up Directive in relation to proprietary effects of cross-border transactions in securities, in particular determining where a securities account or financial collateral is "located" or "maintained". Further legislation in this field may result.

2.3 Goods Mortgages to replace Bills of Sale

The Committee was reminded that the final form Goods Mortgages Bill had been issued by the Law Commission in November 2017, together with a report and proposal for the Treasury to sanction putting the Bill through Parliament using the "uncontroversial" short form process for Law Commission Bills, following which some members of the Committee had met with the Treasury and the Law Commission to discuss the Bill. The Committee did not believe this Bill to be suitable for the short form procedure. Further developments are awaited.

2.4 CLLS Secured Transactions Law Reform/Code

It was noted that work on the proposed code was continuing.

2.5 UNCITRAL Model Law on Secured Transactions: Guide to Enactment

The Uncitral Model Law on Secured Transaction: Guide to Enactment was noted.

3. LIBOR – POSSIBLE PLANNED END DECEMBER 2021

It was reported that the Committee's working party was due to meet again at the end of April and would continue to focus on discussing the impact on legacy contracts of a possible end to LIBOR.

In the meantime, it was noted that various Bank of England LIBOR Committees had been set up.

4. INTRAGROUP GUARANTEES, INTRAGROUP LOANS AND ICAEW AND ICAS GUIDANCE ON DISTRIBUTIONS (TECH 02/17BL APRIL 2017 – SECTIONS 9.45 TO 9.68)

It was reported that draft papers prepared by the CLLS Company Law Committee and Law Society joint working party had recently been sent to the ICAEW for review. Next steps for this Committee would be discussed once the outcome of this was known. Amendments to the papers to make them suitable for publication were discussed.

5. PROPOSAL FOR A NEW REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES WHICH OWN UK PROPERTY OR PARTICIPATE IN UK GOVERNMENT PROCUREMENT

It was reported that, following a call for evidence in April 2017, the Government had recently announced its intention to publish, before the summer recess, a draft Bill regarding

a new register of beneficial owners of overseas companies, with the intention of the register being operational in 2021. The Committee was reminded that it had supported the LMA's response to the call for evidence. The Committee would review the draft Bill when available with a view to assessing the impact on lenders and security.

6. **PRA CONSULTATION PAPER CP6/18 (DATED FEBRUARY 2018): CREDIT RISK MITIGATION: ELIGIBILITY OF GUARANTEES AS UNFUNDED CREDIT PROTECTION**

It was reported that the PRA had recently launched a consultation on proposed changes to Supervisory Statement (SS) 17/13 "Credit risk mitigation" to clarify what contracts are eligible to be treated as guarantees for credit risk mitigation under Part Three Title II Chapter 4 of the Capital Requirements Regulation (575/2013).

It was explained that the main issue was the proposal that eligibility would be linked to payment under a guarantee being made "in a timely manner", meaning that the pay out should be made without delay and within days (not weeks or months). It was noted, however, that there are strong guarantees (eg ECAs and credit insurance) which typically will only pay out after a few months.

Whilst it was acknowledged that the PRA's proposal may cause issues for the market, this was largely a matter of policy, not a legal issue. Therefore, it was felt that other industry bodies may be better placed to respond to the consultation and that this Committee might consider supporting other responses.

It was also noted that the PRA consultation appeared to include proposals which could widen the scope of legal opinions required in this context. This would be considered further to see if it merited a separate response from the Committee.

It was noted that the consultation closes on 16 May 2018.

7. **BREXIT**

7.1 **UK Withdrawal from European Union**

It was noted that the Withdrawal Agreement and Implementation Bill is expected to be passed in April or May 2018 and that statutory instruments on financial services are expected to be released from the time the bill reaches the statute book.

7.2 **Financial Markets Law Committee letter dated 19 March 2018 to the Ministry of Justice regarding judicial interpretation**

A letter from the Financial Markets Law Committee (**FMLC**) to the Ministry of Justice dated 19 March which draws attention to potential legal uncertainties arising from provisions in clause 6 of the European Union (Withdrawal) Bill, which will, post-Brexit, govern the interpretation by the UK courts of EU concepts, was noted.

8. **COMPETITION**

8.1 **European Commission Management Plan 2017 – Syndicated lending**

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

9. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE, ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN**

9.1 **Resolvability of Too Big to Fail Financial Institutions – BRRD Proposed Moratoria**

Proposals changed with changes in the EU presidency. The Committee supported ISDA's view that the prospect of longer or multiple moratoria would be counter-productive both for the individual reconstruction and for the markets, in which the affected institution traded.

9.2 **Article 55 and EBA Regulatory Technical Standards**

The Committee would continue to support ISDA's work on this point.

10. **ELECTRONIC SIGNATURES AND EXECUTION OF DOCUMENTS**

It was noted that the Committee had been contacted by the Law Commission, following the Law Commission's announcement in December 2017 to launch a project looking into electronic signatures.

The Committee was also reminded that the FMLC had established a working group to look at execution of documents in all ways.

The Committee's working party planned to engage with the Law Commission when appropriate and would continue to keep a watching brief on developments.

11. **INSOLVENCY**

11.1 **New UK insolvency and corporate governance consultation dated 20 March 2018**

It was reported that a new DBEIS consultation entitled "Insolvency and Corporate Governance", had been launched which sets out a number of proposed changes to the corporate insolvency, company law and corporate governance regimes in the UK. It was noted that the consultation closes on 11 June 2018.

The Committee agreed that enquiries should be made with the CLLS Insolvency Law Committee as to whether it would be responding to the consultation and with a view to this Committee offering its support in the formulation of a combined response. To this end, it was agreed that the Chairman of this Committee would contact the chairman of the Insolvency Law Committee.

11.2 **European Commission Proposal for a Directive on Preventive restructuring frameworks, second chance and measure to increase efficiency in restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU**

The Committee was reminded that the European Parliament Committee in Legal Affairs had issued a draft report on the European Commission's Proposal for a Directive on preventive restructuring frameworks, second chance and measure to increase efficiency in restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU in September 2017.

As with the item above, since this proposal was more relevant to the CLLS Insolvency Law Committee, the Chairman would contact the chairman of that Committee to offer assistance in considering issues and possibly in preparing a response.

11.3 **Insolvency Service Review on Corporate Insolvency Framework dated May 2016**

Nothing to report.

12. **ANY OTHER BUSINESS AND CLOSE**

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