

CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE
Minutes of the meeting held on 24 July 2019
at the office of Allen & Overy LLP, One Bishops Square, London E1 6AD

Present: Dorothy Livingston (Herbert Smith Freehills LLP Chairman)
Penny Angell (Hogan Lovells LLP)
David Ereira (Paul Hastings (Europe) LLP)
Matthew Dening (Baker & McKenzie LLP)
Charles Cochrane (Clifford Chance LLP)
Richard Calnan (Norton Rose Fulbright LLP)
Emma Giddings (Norton Rose Fulbright LLP)
Jennifer Marshall (Allen & Overy LLP) (alternate for Simon Roberts)
Sarah Smith (Dechert LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell LLP)

Attending: Rachael MacKay (Herbert Smith Freehills LLP)

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

1.1 **Apologies**

The Chairman opened the meeting and reported that apologies had been received from Ken Baird (Freshfields Bruckhaus Deringer LLP), James Bresslaw (Simmons & Simmons LLP), Mark Evans (Travers Smith LLP), Andrew McClean (Slaughter & May), Simon Roberts (Allen & Overy LLP) and Jeremy Stokeld (Linklaters LLP).

1.2 **Committee Changes**

The Chairman reported that due to the retirement of two Committee members (Richard Calnan and Ken Baird), two new members had recently joined the Committee – Emma Giddings and Flora McLean. The Chairman welcomed Emma to the Committee (Flora was unable to attend). The Chairman also thanked Richard and Ken for their valuable contribution to the work of the Committee for many years, noting in particular Richard's contribution in chairing the Committee's Security Reform working party. The Chairman went on to confirm that Richard would continue to chair the Security Transaction Reform working party on behalf of the Committee.

The Chairman also reported that two members of the Committee had agreed to take on the position of joint Deputy Chairs, namely Penny Angell and Charles Cochrane.

1.3 **Minutes of last meeting**

The minutes of the last meeting held on 10 April 2019 had been circulated and were now approved.

2. SECURED TRANSACTION REFORM

2.1 CLLS Secured Transactions Law Reform/Code

Richard Calnan reported that the conference which had taken place in April to discuss the Security Transaction Code had been well attended and had been very useful in further refining ideas and the draft. Since the Conference, a further meeting had taken place to discuss the treatment of assignments of book debts and which had concluded that practitioners saw no advantage in making such assignments registrable. This was therefore being removed from the Code.

A revised draft of the Code had recently been circulated by Richard to the Committee for comment. The next meeting of the working party was planned for the autumn.

2.2 European Commission (EC): Proposed Regulation on effects of assignment of claims on third parties

There was nothing to report on this. The Committee would continue to keep a watching brief.

3. LIBOR – PLANNED END AT END OF 2021

The Committee's working party chairman (Charles Cochrane) reported on recent developments and key issues. As previously discussed, legacy contracts are particularly at risk of unexpected consequences. The Committee would continue to keep a watching brief.

4. UK JURISDICTION TASKFORCE OF THE LAWTECH DELIVERY PANEL CONSULTATION REGARDING CRYPTOASSETS, DISTRIBUTED LEDGER TECHNOLOGY AND SMART CONTRACTS

The Committee was reminded that a paper principally written by Tolek Petch (Slaughter & May) responding to a UK consultation dated 9 May issued by the LawTech Delivery Panel on crypto-assets, distributed ledger accounts and smart contracts, had recently been supported and submitted by the Committee.

The Committee was grateful to Tolek and Slaughter & May for this contribution and would watch for further developments.

5. INTERPRETATION CLAUSES IN COMMERCIAL CONTRACTS

Richard Calnan addressed the Committee to explain his suggestion that it might be useful and might create greater certainty, for contracting parties to include an interpretation clause in commercial contracts, rather than leaving interpretation largely in the hands of the courts. The proposed clause would be much broader than the type typically seen currently and suggested drafting was circulated.

There was a lively debate about the idea, with both advantages and disadvantages being expressed. There was particular concern about the loss of flexibility this approach would have and also whether this would be a suitable approach for highly technical or specialist contracts (*cf* a set of standard terms).

Members were asked to suggest colleagues who might be keen to discuss the suggestion further with Richard.

6. ELECTRONIC SIGNATURES

The outcome of the Law Commission's consultation on e-signatures was awaited (expected summer 2019). The Committee would continue to keep a watching brief.

7. BEIS CONSULTATION ON CORPORATE TRANSPARENCY AND REGISTER REFORM (COMPANIES HOUSE)

It was noted that the Committee is contributing to the work of the Company Law Committee, which intends to respond to the BEIS Consultation on Corporate Transparency and Register Reform (Companies House) and that responses were due by 5 August 2019.

8. **GOVERNMENT PROPOSALS FOR A NEW REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES WHICH OWN UK PROPERTY**

The Committee was reminded that the draft Registration of Overseas Entities Bill were published in July 2018. The Government had recently issued its response to the Joint Committee Report (May 2019), from which it appeared that few changes to the Bill would be made. Issues for lenders therefore remained. The timing for taking this forward is uncertain.

9. **EBA CONSULTATION PAPER: DRAFT GUIDELINES ON LOAN ORIGINATION AND MONITORING (EBA/CP/2019/04)**

It was noted that an EBA Consultation Paper: Draft Guidelines on Loan Origination and Monitoring had been issued on 19 June 2019 (with responses due by 30 September 2019). Overall, the Committee felt that the proposals were very bureaucratic. It was also thought that this fell more within the remit of the LMA and therefore that enquiries should be made with the LMA to see if this Committee could contribute to or support its response.

10. **COMPETITION: NEW NATIONAL SECURITY CONTROLS - COMPETITION LAW COMMITTEE'S SUBMISSION AND COOPERATION WITH COMPANY LAW COMMITTEE**

The Committee was reminded that a new interim UK national security regime is already in force in relation to high tech and defence companies and that the Government's response to the consultation on the new regime is awaited.

The Committee was also reminded that the new EU framework law has come into force but will not apply until 11 October 2020. It may not impact on the UK, depending on the circumstances in which the UK ceases to be bound to apply EU law. The Regulation is mainly concerned with transactions affecting more than one Member State.

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

11.1 **Resolvability of Too Big to Fail Financial Institutions – BRRD Proposed Moratoria and amendments to Article 55: BRRD II**

It was reported that Directive (EU) 2019/879 (**BRRD II**) entered into force at the end of June 2019 and Member States must legislate by 28 December 2020. The Directive is accompanied by Regulation (EU) 2019/877 on the loss absorbing and recapitalisation capacity of credit institutions as investment firms (**SRMR II**). This will apply from 28 December 2020. It was noted that if the UK has left the EU without any transitional period, it may require primary legislation to adopt BRRD II and SRMR II.

12. **INSOLVENCY (ALL)**

12.1 **Insolvency and Corporate Governance – Government Response to Consultation**

The Committee was reminded of the radical changes to English insolvency law currently being proposed, including:

- a new restructuring plan to facilitate a cross-class cram down;
- a new restructuring moratorium; and
- a new prohibition in insolvency termination clauses in contracts for goods or services.

The Committee benefitted from receiving an overview and update on the status of this consultation from Jennifer Marshall (Chair of the CLLS Insolvency Law Committee) and hearing about that Committee's main concerns with the proposals, in particular the new moratorium and new monitor proposals. The Committee will continue to keep a watching brief.

12.2 **EU adoption of Commission proposal for a Directive on preventive restructuring frameworks, second chance and measures etc. ((EU 2019/1023))**

It was reported that Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications and measures to increase the efficiency of procedures concerning restructuring insolvency and discharge of debt and amending Directive (EU) 2017/1152 has now appeared in the Official Journal and came into force on 16 July 2019. It requires Member States to implement changes by 17 July 2021 (extendable by a year in certain circumstances). It seems unlikely this will come into force in the UK as EU law, although this could happen if there is a transition period which is extended to end 2021 or 2022.

12.3 **Financial Collateral Arrangements (No. 2) Regulations**

Nothing to report on this. Further developments are awaited.

13. **BREXIT**

It was noted that Exit Day under The European Union (Withdrawal) Act 2018 and EU law is now 31 October 2019, and that the Withdrawal Agreement's status is unchanged due to the political situation.

It was also noted that UK Finance has had analyses prepared and has provided summaries on key issues to its members. It is now considering a second round to legislation, some of which corrects errors in the first round.

The UK is due to adhere to the Hague Convention on choice of court on 1st November 2019 if the UK leaves the EU without a deal on 31st October (at which point the Brussels Regulation would cease to apply as between the UK and continuing EU countries).

It was also noted that a second Hague convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters of wider scope than the first convention has recently been finalised and that the EU has announced its intention to adopt this Convention. The UK can only join independently once it has left the EU. Any two independent countries adopting this Convention will bring it into force between contracting parties. The EU only counts as one country for this purpose as the Convention will not apply between EU Member States: they apply the Brussels Regulation Rules.

It was also noted that the UK National Archives has recently launched two new services:

- EU Exit Web Archive – this comprises a wide selection of documents from EUR-Lex up to the point of exit and aims to provide an official UK reference point for EU law at exit day.
- Legislation originating from EU – this EU legislation and EU Directives published before exit day and will include a full timeline of changes pre-exit and will incorporate annotated amendments made by UK legislation post-exit.

14. **ANY OTHER BUSINESS AND CLOSE**

14.1 **US QFC Stay Rules**

It was reported that the relevance or otherwise of the US QFC (qualified financial contracts) Stay Rules to syndicated loans were causing some issues in practice. The Rules are designed to improve the resolvability and resilience of US global systemically important banking organisations. The Committee was reminded that the LSTA had produced a briefing note on the QFC Stay Rules which had been circulated by the LMA to its members. It was also noted that the LMA were keeping this under review.

14.2 **Close**

There being no further business that meeting closed.

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