

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

Minutes of the meeting held on 1 April 2020, via conference call

Present: Dorothy Livingston (Herbert Smith Freehills LLP)
Penny Angell (Hogan Lovells LLP)
James Bresslaw (Simmons & Simmons LLP)
Charles Cochrane (Clifford Chance LLP)
David Ereira (Paul Hastings (Europe) LLP)
Mark Evans (Travers Smith LLP)
Andrew McClean (Slaughter & May)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Dechert LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)

Attending: Rachael MacKay (Herbert Smith Freehills LLP)
Richard Calnan (Norton Rose Fulbright LLP)
Kenneth Gray in place of Emma Giddings (Norton Rose Fulbright LLP)

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

1.1 Apologies for absence

The Chairman opened the meeting and reported that apologies had been received from Matthew Denning (Baker & McKenzie), Emma Giddings (Norton Rose Fulbright LLP), Jeremy Stokeld (Linklaters LLP) and Presley Warner (Sullivan & Cromwell).

1.2 Minutes of last meeting

The minutes of the last meeting, which had been circulated previously, were now approved.

New Member

It was agreed that Edward Fife (Slaughter & May) would be invited to join the Committee when Andrew McLean retires at the end of April. The meeting expressed good wishes to Andrew for his retirement and thanks for his considerable contribution to the work of the Committee.

2. COVID-19 AND FINANCE AGREEMENTS

It was agreed that numerous issues were arising from the COVID-19 crisis, including:

- execution of documents, witnessing, e-signing (see Electronic Signatures below);
- HMLR requiring wet ink originals and requiring documents executed by two directors to sign same piece of paper;
- Considering using a contract rather than a deed wherever possible;
- Issues with requirements for apostilles;
- MAC/MAE;
- suspension of business event of default vs suspension of “operations”;
- frustration (more in commercial contracts, less likely to be raised in context of loan agreements);
- signing of notices;

- Bank's internal policies as regards signing arrangements and differences of approach among syndicates;
- differences in execution requirements between jurisdictions in cross-border deals;
- customs vs legal requirements.

3. SECURED TRANSACTION REFORM

3.1 CLLS Secured Transactions Law Reform/Code

A revised draft of Code and Commentary was circulated by R Calnan and would be placed on the CLLS Website for comments (March 2020). Further work is being organised.

There are a few matters which still need to be discussed and an approach decided upon, namely:

- financial collateral: a working party meeting to discuss this is scheduled for 2 April;
- cross-border issues: a working party meeting to discuss this is scheduled for later in April.

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

There was nothing new to report on this. It looks unlikely to come into force before the UK leaves the EU.

4. LIBOR – PLANNED END AT END OF 2021

It was noted that various consultations were ongoing. Compounding is an ongoing issue.

It was also noted that the Bank of England had recently announced that it will publish a SONIA Index which should be helpful.

It was also noted that in the US, legislative intervention had been proposed for US\$ LIBOR fall backs, but that this was limited in scope, applying only when there is no contractual fall back.

It was felt that the previous timing as regards stopping writing new loans based on LIBOR announced by Regulator would be extremely difficult to meet, especially in view of the current COVID-19 crisis.

Afternote: The Bank of England confirmed that firms cannot rely on LIBOR rates continuing to be available after end 2021 and the Working Group on Sterling Risk-Free Reference Rates confirmed in its April Statement that it is working to this timetable. It remains to be seen if the targets for end Q3 2020 set out in that Statement will be met.

5. FIFTH MONEY LAUNDERING DIRECTIVE (MLD 5) – TRUSTS

The Committee was reminded that the Treasury/HMRC had issued a consultation (dated 24 January 2020) on changes to the Trust Registration Service to transpose the trust registration requirements of MLD 5 into UK law. The response deadline was 21 February 2020.

The consultation included draft regulations to amend Part 5 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

One of the major changes is an extension of the registration obligations to trustees of all express trusts, regardless of whether they have taxable consequences. Under Article 31 of MLD 5, trustees will need to register beneficial ownership information on all express trusts unless an exception applies. There are no "grandfathering" provisions.

The Committee had concerns about the effect of the new requirements in relation to trusts in financial products and transactions, there being numerous contexts where trusts are used. It was felt that an overly burdensome registration regime would be seriously detrimental to the market eg security trustees in loans and bonds, bond trustees, turnover trusts under various subordination and intercreditor arrangements.

It was noted that whilst the drafting in the consultation document had attempted to address some of the concerns, the drafting was widely thought to be deficient eg referring only to authorised persons as defined by FSMA (which is too narrow and would only catch the UK after Brexit).

The CLLS had sent a response (21 February 2020). The LMA response (dated 20 February 2020) had included a suggestion to use a “relevant supervised person” test.

6. **ELECTRONIC SIGNATURES**

Following publication of the final report of the Law Commission on the Electronic Execution of Documents (4 September 2019), an addendum to the CLLS/Law Society 2016 paper on electronic signatures is being prepared. The Law Commission's conclusions are in line with the approach taken in that paper, so no major revision is necessary, but it will be important to note that the Law Commission has addressed and dismissed the view that an electronic signature cannot be witnessed.

The Chairman reported that she was preparing a supplement to this effect and would try to pick up practical issues as well as legal issues. Practical issues which were being magnified by the current situation.

Afternote; at the request of the Law Society, this work will be done jointly with representatives of the Law Society Company Law Committee and the CLLS Company Law Committee.

7. **CENTRAL BANK DIGITAL CURRENCY (CBDC)**

It was noted that the Bank of England had issued a discussion paper on central bank digital currency (12 March 2020). The paper stated that CBDC would be an electronic form of central bank money that could be used by households and businesses to make payments. The Bank has not yet made a decision whether to introduce CBDC and intends to engage widely with stakeholders on the benefits, risks and practicalities of this. Feedback on the paper is invited by 12 June 2020.

The Committee would watch for further developments.

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

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

9. **INTERMEDIATED SECURITIES – LAW COMMISSION REVIEW**

It was reported that Dorothy Livingston had been appointed to represent the CLLS on the Law Commission's advisory panel for their Scoping Study during 2020. Dorothy will consult with the joint working party, comprising representatives of the Financial, Company, Regulatory and Insolvency Law Committees. Work will be led by Professor Sarah Green of Bristol University who is taking over as Commissioner for Commercial and Common Law. The initial meeting had been set for 1 April but this had been cancelled and a questionnaire circulated instead.

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

There was nothing new to report on this item. The Committee would continue to keep a watching brief (it being noted that this may be of more relevance to Corporate law colleagues)

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

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

Afternote: the UK Government is due to publish a Bill on this topic shortly.

12. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE, ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN, ISSUES WITH RING FENCED BANKING**

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

There was nothing new to report.

Afternote: the Treasury is now consulting on the implementation of these measures.

12.2 **Loan origination and monitoring**

There was nothing new to report.

12.3 **Ring-fencing**

There was nothing new to report.

13. **INSOLVENCY**

13.1 **Insolvency**

It was noted that one of the responses to the COVID-19 crisis was a recent announcement by the Government to temporarily suspend the laws on wrongful trading. The detail of this was still awaited.

Afternote: The Corporate Insolvency Act 2020 provides some temporary reliefs from insolvency processes and sanctions for companies affected by the the COVID 19 Pandemic and their Directors. It also introduces a long term change to insolvency law to allow for a court supervised debtor-in-possession moratorium. It remains to be seen how much this will be able to be used and whether it will prove a better alternative than administration. The value of saving the company, as opposed to saving the business, has always seemed doubtful. As the legislation was prepared in a great hurry, without effective consultation, it seems likely Henry VIII powers in the Act will need to be used to remove a number of legal uncertainties, particularly surrounding the position where a moratorium fails and a different order of priority applies to debts accrued during and, in some cases before, the moratorium. In addition, super-preference for tax claims of the UK Government has been restored and is likely to result in large distortions in new insolvencies (especially as VAT payment has been deferred during the COVID 19 Crisis).

13.2 **Insolvency – reintroduction of crown preference – 1 December 2020**

It was noted that the Government had recently announced that the reintroduction of crown preference would not come into effect until 1 December 2020.

Afternote: see comment above.

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

There was nothing new to report on this item. The Committee will keep a watching brief.

13.4 **EU adoption of Commission proposal for a Directive on preventive restructuring frameworks, second chance and measures etc**

There was nothing new to report on this item.

13.5 **Financial Collateral Arrangements Regulations**

There was nothing new to report on this item.

14. **BREXIT**

Exit Day, SIs, Jurisdiction and Enforcement of Foreign Judgments

The Chairman reported on two things of note:

- The transition period has not been extended yet and due to the current crisis, a new deal is not yet being negotiated.
- On choice of law etc, the UK had now applied to join the Lugano Convention (similar to the unreformed Brussels Regulation in effect).

Afternote: The Private International Law (Implementation of Agreements) Bill 2019-20 is now on its way through Parliament. This provides for the UK to implement the Hague Convention on Choice of Court 2005 (which covers agreements with exclusive jurisdiction clauses) and various other Hague Conventions. These will apply as between the EU and the UK to the extent that the Lugano Convention does not. The EU has not said whether it will support the UK joining Lugano, although its application is supported by Norway, Iceland and Switzerland, who are also parties. The EU has announced that it intends to consider ratification of a new Hague Convention of Choice of Court and Enforcement of Judgments which is wider in scope than the 2005 Convention

15. **ANY OTHER BUSINESS AND CLOSE**

There being no further business the meeting closed.