

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

Minutes of the meeting held on 15 July 2020, via Microsoft Teams

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)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Nick O'Grady in place of Matthew Denning (Baker & McKenzie LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Dechert LLP)
Nigel Ward (Ashurst LLP)

Attending: Rachael MacKay (Herbert Smith Freehills LLP)
Joanne High (Herbert Smith Freehills LLP) (providing PA/technical support)

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 Mark Evans (Travers Smith LLP), Nick Swiss (Eversheds LLP), Matthew Denning (Baker & McKenzie LLP), Jeremy Stokeld (Linklaters LLP) and Presley Warner (Sullivan Cromwell LLP).

1.2 Welcome to new Committee member

The Chairman welcomed its newest member, Ed Fife (Slaughter & May).

1.3 Minutes of last meeting

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

2. COVID-19 AND FINANCE AGREEMENTS

It was noted that there had been a deluge of facility waiver requests arising from the Covid-19 pandemic. Difficulties with the availability of government schemes eg CLBILs scheme were also noted. Issues which had been experienced early on in lockdown, eg execution formalities, had eased.

It was also noted that the Land Registry had recently announced an intention to allow e-signatures in the near future.

Afternote: HMLR started accepting platform e-signed documents (only) at the end of July, subject to additional HMLR requirements.

3. SECURED TRANSACTION REFORM

3.1 CLLS Secured Transactions Law Reform/Code

The Chairman reported that useful working party meetings had been taking place, including discussions on conflict of law issues and intermediated securities, and that discussions were ongoing.

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

There was nothing to report on this matter.

4. **LIBOR – PLANNED END AT END OF 2021**

It was reported that the Bank of England continued to confirm that firms must continue to press ahead with planning for Libor cessation before the end of 2021 and that there should be no Libor products being offered next year.

It was noted that significant progress was being made in the loans market by the various sterling/UK working groups, for example, a SONIA index was due to be published from early August 2020, but there were still significant issues which had yet to be resolved. For example, different products appearing to be taking different paths, there were problems with compounding, issues with syndicated loans, potential mismatches between loans and derivatives, lack of new suitable IT systems, competition law concerns etc.

It was felt that official statements about possible legislative fixes for “tough legacy” contracts had resulted in some confusion in the markets. It was also noted that there appeared to be little support for the “hard-wired” approach from the market or lawyers.

Work to resolve these issues and to ensure user acceptance would need to be stepped up if the proposed timetable were to be met and transfers to new rates were to be carried out effectively and without legal challenges.

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

There was nothing to report on MLD5 at the time of the meeting.

Afternote: 15 July 2020 - Treasury/HMRC published a summary of responses to its consultation paper on changes to the Trust Registration Service to transpose the trust registration requirements of MLD 5 into UK law. It is not clear from this whether any amendments have been made to address the concerns raised by the Committee in relation to trusts used in financial products and transactions. It remains to be seen if the draft legislation and official guidance will address these concerns.

6. **INSOLVENCY**

6.1 **Corporate Insolvency and Governance Act 2020**

It was noted that emergency legislation, the Corporate Insolvency and Governance Act 2020, had come into force on 26 June 2020, which provides some temporary reliefs from insolvency processes and sanctions for companies affected by the COVID 19 Pandemic and their directors.

The new Act 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).

It was also noted that legal opinions issued in relation to lending transactions may need to be updated in light of the new Act.

6.2 **Re-introduction of crown preference**

It was noted that the Government had recently announced that the reintroduction of crown preference would come into effect on 1 December 2020. See above.

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

There was nothing to report on this item.

6.4 **Financial Collateral Arrangements Regulations**

It was reported that a dialogue with HM Treasury had commenced regarding possible changes to the Regulations, but substantive work was not likely until 2021.

7. **TAX: DAC6 REPORTING RULES**

It was reported that from August 2020, UK intermediaries will be required to report certain cross-border arrangements to HMRC due to DAC6 EU Directive (2018/822) and UK Regulations (The International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (SI 2020/25)).

In summary, an arrangement may be reportable if it falls within one of the regime's "hallmarks" (set out in the Annex to the EU Directive) and the "main benefit test" (person may reasonably expect to derive a tax advantage from an arrangement).

There were concerns about the wide scope of the new rules and in particular how intermediaries would satisfy the new reporting obligations in practice.

8. **ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS**

8.1 **Electronic Signatures**

As previously reported, the Chairman is working with representatives of the Law Society Company Law Committee and CLLS Company Law Committee to prepare a supplement to the CLLS/Law Society 2016 paper on electronic signatures.

Also, as noted above, the Land Registry developments on e-signatures were to be welcomed.

8.2 **Cryptocurrency and Smart Contracts**

It was reported that Tolek Petch had kindly prepared a further submission for the UK Judicial Task Force on dispute resolution issues and that the Chairman had also contributed. Further developments are awaited.

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

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

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

The Chairman reminded the meeting that she had been appointed to the advisory panel for the Law Commission's Scoping Study and there had been one round of discussion with the Law Commission, in which Mark Evans had made a major contribution. Further developments were awaited, but the Law Commission was planning a consultation paper this year.

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

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

12. **COMPETITION: NEW NATIONAL SECURITY CONTROLS**

There was nothing to report on this item. It was noted that the UK Government is due to publish a Bill on this topic in the autumn.

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

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

The meeting was reminded that Directive (EU) 2019/879 (BRRD II) entered into force at the end of June 2019 and that Member States must legislate by 28 December 2020. This Directive is accompanied by Regulation (EU) 2019/877 on the loss absorbing and recapitalisation capacity of credit institutions and investment firms (SRMR II) which will apply from 28 December 2020. Both these are likely therefore to be reflected in UK law before the UK's period of transition from the EU comes to an end.

The Treasury is consulting on the implementation of this Directive. The Chairman would consider how best to respond.

Afternote: submissions were made via participation in the Banking Liaison Panel and work of UK Finance on new SIs.

13.2 **Loan origination and monitoring**

Nothing to report.

13.3 **Ring-fencing**

Nothing to report.

14. **BREXIT EXIT DAY, SIS, JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

The Chairman reported on various things of note:

- The transition period has not been extended, however negotiations for a new deal were now taking place.
- On choice of law etc, the UK has applied to join the 2007 Lugano Convention (similar to the unreformed Brussels Regulation in effect). Also 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**

15.1 There were some general discussions about the emergency Government funding schemes (mixture of bank and Government lending) and the potential for complex issues to arise due to future non-repayment.

15.2 There being no further business the meeting closed.