

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

Minutes of the meeting held on 14 October 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)
Matthew Denning (Baker & McKenzie LLP)
David Ereira (Paul Hastings (Europe) LLP)
Mark Evans (Travers Smith LLP)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Dechert LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell 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 Flora McLean (Freshfields Bruckhaus Deringer LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 15 July 2020 had previously been circulated and were now approved.

2. COVID-19 AND FINANCE TRANSACTIONS

It was reported that relatively few issues were now arising in practice as regards transaction execution as a consequence of the pandemic. It was reported that bond holder meetings by teleconference were common place, although it was noted that some older bond documents did not provide for electronic meetings.

3. SECURED TRANSACTION REFORM

3.1 CLLS Secured Transactions Law Reform/Code

The Chairman reported that work was continuing on the revised draft of the Secured Transaction Code and Commentary, led by Richard Calnan.

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

Whilst there was nothing to report on this matter and it remains unlikely this law will be in force in time for it to become retained EU law in the UK. In this respect, therefore, it was noted that there is a prospect of early divergence between EU and UK conflicts law, although this would also have been possible if the UK had stayed in the EU, as a result of the UK having exercised its opt-out rights.

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

It was reported that progress continues to be made in the loans market by the various sterling/UK working groups to prepare for LIBOR cessation, including the publication of a compounded SONIA index (August 2020), the publication by the LMA of a Risk Free Rate transaction tracker and the publication by the LMA of an exposure draft of its multicurrency term and revolving facilities agreement incorporating rate switch provisions (lookback without observation shift) and commentary.

However significant practical and legal issues remain, including issues relating to credit adjustment spread, uncertainty around possible legislative fixes for “tough legacy” contracts and divergence of approaches in different markets and jurisdictions. It was also noted that there still appears to be little support for a hard-wired approach in loan agreements.

AFTER NOTE: October 2020 – LMA published a notice “Revised Screen Rate Clause and pre-cessation trigger” which provides suggested drafting to address Screen Rate not being representative of the underlying market or economic reality (and to be consistent with approach taken by other bodies); ISDA published its 2020 IBOR Fallbacks Protocol and IBOR Fallbacks Supplement (which introduce hard wired fallbacks from IBORS to relevant risk free rates for new and legacy products).

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

The Committee was reminded of the HM Treasury/HMRC consultation (January 2020) on changes to the Trust Registration Service to transpose the trust registration requirements of MLD 5 into UK law. The consultation had included draft regulations to amend Part 5 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, including new obligations on trustees of all express trusts to register beneficial ownership information unless an exception applies. There were no “grandfathering” provisions. Both the CLLS and the LMA had responded expressing concerns about such an overly burdensome regime for trusts used in financial products and transactions. It was noted that HM Treasury/HMRC had issued its response to the consultation in July, but it was not clear from this whether any amendments would be made to address the concerns raised in relation to finance products and transactions.

AFTER NOTE: The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 were laid before Parliament on 15 September and (mostly) came into force on 6 October 2020. Excluded Trusts are much wider than originally proposed - see Schedule 3A (Excluded Trusts) which includes financial markets infrastructure trusts (para 10), professional services trusts (FSMA and escrow) (para 11), capital markets trusts (para 13) and commercial transaction trusts (para 14 – the carve out for commercial loans/security trust arrangements).

6. **INSOLVENCY**

6.1 **Corporate Insolvency and Governance Act 2020**

It was reported that this may require review of insolvency qualifications in legal opinions issued in relation to lending transactions. There was nothing further to report on this item.

6.2 **Re-introduction of crown preference**

The Committee noted that The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 had been made on 11 September 2020.

The Committee was also reminded that crown preference (eg PAYE income tax and NI contributions) would be re-introduced from 1 December 2020.

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**

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

AFTER NOTE: Section 36 of the Financial Services Bill (currently before Parliament) is seeking to address the vires question regarding the scope of the Financial Collateral Arrangements (No 2) Regulations (as highlighted in United States v Nolan [2015] UKSC 63). Dorothy Livingston and Mark Evans are discussing the drafting with the Treasury.

7. **TAX: DAC6 REPORTING RULES**

The Committee was reminded that new reporting obligations had come into force in August under the DAC6 EU Directive (2018/822) and UK Regulations (The International Tax Enforcement (Disclosable Arrangements) Regulations 2020 (SI 2020/25)). This requires UK intermediaries to report certain cross-border arrangements to HMRC. Practice in the context of finance transactions was still developing.

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

8.1 **Electronic Signatures**

Following publication of the final report of the Law Commission on the Electronic Execution of Documents (September 2019), an addendum to the CLLS/Law Society 2016 paper on electronic signatures is in progress.

It was also noted that due to the Covid-19 pandemic, HM Land Registry had announced temporary changes to its requirements regarding execution of documents, such that it was temporarily accepting for registration certain documents which had been signed following the *Mercury* protocol and (subject to other HM Land Registry requirements) documents executed using an e-signature platform, which was a welcome development.

8.2 **Cryptocurrency and Smart Contracts**

The Committee was reminded that Tolek Petch and the Chairman were working with the UK Judicial Task Force to consider dispute resolution issues in relation to cryptocurrency and smart contracts. Further developments are awaited.

It was also noted that, on 21 September 2020, the Law Commission had announced a new project: Adapting English law for the digital revolution, covering smart contracts and digital assets (including “possession” of these assets). A call for evidence was expected later in the year.

9. **CLLS LEGAL OPINION GUIDE**

An updated version of the CLLS Legal Opinion Guide had been prepared and circulated by Geoffrey Yeowart (21 September 2020). The amendments addressed, for example, e-signatures and the SRA Code of Conduct. Comments had been requested by 5 October 2020.

AFTER NOTE: A revised version of the Guide had been circulated by Geoffrey Yeowart on 22 October. Final comments were requested by 9 November.

10. **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.

11. **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 that she and Mark Evans were contributing to

discussions. Further developments were awaited and a Law Commission consultation paper was expected before the end of the year.

AFTER NOTE: A Law Commission Scoping Paper: Intermediated Securities: who owns your shares ? was issued on 11 November 2020 which outlines problems with the system of intermediated securities and possible solutions. It is now for the Government to decide if further work should be undertaken.

12. **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.

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

It was noted that the new EU law (Regulation 2019/452) is now in force (11 October 2020), but the European Commission had confirmed it did not affect the United Kingdom.

The UK Government is due to publish a bill on a new UK regime soon.

AFTER NOTE: The National Security and Investment Bill was published on 11 November. It is expected to become law in spring 2021. The legislation will introduce for the first time a separate regime and powers for the review of foreign direct investment in the UK (replacing the existing public interest merger regime in the Enterprise Act 2002). The new regime will apply to any acquisition of a "material influence" (15% shareholding or more) in a company, assets (including land) or intellectual property which potentially gives rise to UK national security concerns. 17 specified sectors will be subject to a mandatory notification requirement as regards acquisitions of controlling interests in shares. The right of review (but not the pre-clearance requirement) will apply to share acquisitions after the presentation of the Bill to Parliament.

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

14.1 **Resolvability of Too Big to Fail Financial Institutions – BRRD Proposed Moratoria and amendments to Article 55: BRRD II (EU 2019/879)**

The Committee was reminded that BRRD II which will amend Article 55 (contractual recognition of bail-in requirement), provide a new moratorium tool and introduce a new MREL (minimum requirements for own funds and eligible liabilities) regime reflecting G20 commitments is due to be implemented by 28 December 2020.

HM Treasury had consulted on the implementation of this Directive and submissions had been made via Committee members' participation on the Banking Liaison Panel and the work of UK Finance on new statutory instruments.

14.2 **Loan origination and monitoring**

There was nothing to report on this item.

14.3 **Ring-fencing**

There was nothing to report on this item.

15. **BREXIT – END OF TRANSITION, EQUIVALENCE, JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

The Committee was reminded that the end of the transition period and the date on which EU law will cease to be directly effective in UK, was fast approaching - 31 December 2020.

The Chairman reported on various things:

- Negotiations for a new deal between the UK and the EU were continuing.
- Some further UK equivalence legislation has been made (The Equivalence Determinations for Financial Services (Amendment etc) (EU Exit) Regulations 2020 - 30 Sept 2020) – which makes provision for UK regulators to establish cooperation arrangements with relevant regulatory authorities in EEA states and to take regulatory decisions concerning EEA firms or products before the end of transition for certain retained EU law financial services regimes.
- On jurisdiction etc, the Private International Law (Implementation of Agreements) Bill 2019-20 continues 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 2007 Lugano Convention (which the UK has applied to join) does not. It is still not known if the EU will support the UK joining the Lugano Convention, although the application is supported by Norway, Iceland and Switzerland.
- A second Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (July 2019), which is of wider scope than the first Convention, has been finalised. 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 or trading blocks adopting this Convention will bring it into force between contracting parties.

16. **ANY OTHER BUSINESS AND CLOSE**

There being no further business the meeting closed.