

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

Minutes of the meeting held on 14 July 2021 at 12.45pm, via Microsoft Teams

- Present: Dorothy Livingston (Herbert Smith Freehills LLP)(Chair)
Charles Cochrane (Clifford Chance LLP) (Joint Vice-Chair)
Penny Angell (Hogan Lovells LLP) (Joint Vice-Chair)
James Bresslaw (Simmons & Simmons LLP)
Matthew Denning (Baker & McKenzie LLP)
David Ereira (Paul Hastings (Europe) LLP)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer 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) (Secretary)
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) and Simon Roberts (Allen & Overy LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 1 April 2021 had previously been circulated and subject to subsequent amendments were approved.

1.3 Matters Arising

None.

2. SECURED TRANSACTION REFORM: CLLS SECURED TRANSACTIONS LAW REFORM/CODE

It was noted that extensive work had been undertaken over a number of years on a draft Secured Transaction Code which was intended to be a simplification, modernisation and codification of current English security law. This work had been driven by retired Committee member, Richard Calnan, and Richard was congratulated for his efforts.

The Committee agreed with Richard's suggestion to put forward the Code to the Law Commission asking them to consider taking it forward as a Law Commission project.

Afternote: This was duly submitted to the Law Commission at end July 2014 as part of the Committee's response to the Law Commission's call for suggestions in relation to its 14th Law Reform Programme.

3. LIBOR DISCONTINUATION AT END OF 2021

The Committee noted various developments relating to the discontinuation of LIBOR including:

- LMA Recommended forms of facility agreement (single and multi-currency, term and revolver) - lookback without observation shift and lookback with observation shift (published 28 May 2021)
- LMA Drafting Guide for use in relation to the Incorporation of Provisions Relating to the Use of Compounded Risk-Free Rates into LMA Documentation
- Updated LMA Reference Rate Selection Agreement for use in legacy transactions (compounded risk free rates) published (June 2021)
- FCA consultation: Benchmarks Regulation: how we propose to use our powers over use of critical benchmarks on its enhanced powers under the UK's legislative solution for transition of tough legacy LIBOR contracts (28 May 2021) - provides very little insight as to approach likely to be taken. Closed 17 June 2021
- FCA Consultation (CP21/19) (24 June 2021) which proposes a decision under UK Benchmarks Regulation to require synthetic LIBOR for 1, 3 and 6 month sterling and Japanese yen LIBOR settings immediately after end of 2021 (Article 23A benchmarks) for 12 month period. Closes 27 August 2021. FCA decision to be announced in Q4 2021
- European Commission joint statement with the EBA, ESMA and ECB strongly encouraging all market participants to cease their use of all LIBOR settings (24 June 2021)
- New York law passed to tackle New York law governed tough legacy US dollar LIBOR loan agreements (May 2021)

It was felt that it was unlikely that there would be anything further that the Committee could contribute at this stage.

The Committee would, however, continue to keep a watching brief.

4. **LMA ERRONEOUS PAYMENTS CLAUSE**

The Committee noted that, in response to concerns by some European market participants, the LMA had recently issued a new optional form of Erroneous Payment Clause following the decision in the New York courts in the *Revlon* case (August 2020). Market practice on whether to include the optional new clause is still evolving.

5. **FINANCIAL COLLATERAL ARRANGEMENTS (NO 2) REGULATIONS 2003 (SI 2003/3226) AND FINANCIAL SERVICES ACT 2021**

It was noted that section 41 of the Financial Services Act 2021 (which section had come in to in force on 29 April 2021) addresses the vires question regarding the scope of the Financial Collateral Arrangements (No. 2) Regulations 2003 (note cases *Cukurova* and *Nolan*) and that the Banking Act 2009 had been amended accordingly.

6. **INSOLVENCY**

6.1 **Insolvency Service Conference – 19 November 2021**

It was reported that the Insolvency Service had announced that it was launching a new academic research and technical conference: "Forward Thinking: Insolvency strategies for a post-pandemic economy" in November. Those interested were invited to submit papers and ideas.

6.2 **Corporate Insolvency and Governance Act 2020 (CIGA)**

The Committee was reminded that CIGA had introduced a new restructuring plan (**RP**) (including new cross-class cram down provision) under Part 26A of the Companies Act 2006. The recent outcomes in RP applications to the court made by Virgin Active and Hurricane Energy were noted.

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.

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

7.1 **Electronic Signatures**

Further refinement of a revised draft of the CLLS/Law Society 2016 paper on electronic signatures was being prepared by Nigel Ward. The revised draft would be circulated to the Committee for final comments, following which the Chairman would liaise with the Chairs of the other relevant CLLS and Law Society Committees before publication of the revised version.

7.2 **Crypto-assets and Trade Documents**

It was noted that the Law Commission had published a consultation paper on the digitisation/dematerialisation of trade documents and a scoping paper relating to the law on crypto-assets, both for response by end July 2021. The Committee had formed a working party on which the Regulatory Committee is also represented. A first draft paper on concerns related to intermediated securities had been prepared by Mark Evans and would be recirculated to the Committee for final comments before being submitted.

Afternote: With the benefit of short extensions of time, both a response to the scoping paper prepared from Mark's draft and a detailed response on electronic trade documents were prepared by the working group and submitted to the Law Commission in early August. These are available on the Committee's page of the CLLS website.

8. **COMPETITION**

8.1 **New National Security Controls – National Security and Investment Act 2021 - Competition Law Committee's submission and cooperation with Company Law Committee**

It was noted that the UK's National Security and Investment Act 2021 had received Royal Assent on 29 April 2021 and was expected to be implemented in late 2021 or early 2022. Guidance was awaited.

Other than that there was nothing further to report.

8.2 **Takeover Panel – Change to Competition Investigation Provisions**

It was noted the new Code rules had come into force on 5 July.

The new Rules were expected to affect due diligence processes in affected transactions in order to minimise the risk of adverse decisions of the Takeover Panel.

The Committee would keep a watching brief.

9. **BREXIT**

There was nothing of significance to report since the last meeting which was of particular relevance to finance.

10. **ANY OTHER BUSINESS AND CLOSE**

10.1 **Insolvency Regulation**

David Ereira raised issues in relation to conflict of law issues and the impact of the Insolvency Regulation. In particular, whether the English court can hear a (pre-existing)

claim under an English law loan agreement, given extra-territorial protection for French *sauve-garde* proceedings under the Restated Insolvency Regulation.

10.2 **Law Commission 14th Law Reform Programme - deeds**

As discussed at the last meeting, the Committee was reminded of the Law Commission's 14th Programme of Law Reform which included a possible area of reform on "Deeds and variations of contracts". Committee members were asked to consider areas suitable for reform and Penny Angell undertook to collate responses.

Afternote: The Committee's response was duly submitted to the Law Commission at the end of July and is available on the Committee's page of the CLLS website.

10.3 **No further business and close**

There being no further business, the meeting ended.