

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

Minutes of the meeting held on 13 October 2021 at 12.45pm, 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)
David Ereira (Paul Hastings (Europe) LLP)
Mark Evans (Travers Smith LLP)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Simon Porter (Baker & McKenzie LLP, substitute for Matthew Denning)
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) (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 Chair opened the meeting and reported that apologies had been received from Matthew Denning (Baker & McKenzie LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 14 July 2021 had been previously circulated and were approved.

1.3 Matters arising

None.

2. ESG

In view of the increasing amount of ESG related regulation, in particular the EU Taxonomy which establishes a list of environmentally sustainable economic activities and the EU Taxonomy Regulation (in force 12 July 2020) and subsequent delegated acts, and the effect this may have on finance and lending (e.g. lending policy, loan documentation, pricing, capital treatment for lenders etc.), the Committee felt this was now an area in respect of which it should keep a watching brief.

It was also noted that the UK had not yet published an ESG Taxonomy, but had published a UK Green Financing Framework (June 2021).

The LMA had published various principles and guidance e.g. Green Loan Principles and related Guidance, and a Sustainable Lending Glossary.

Emma Giddings volunteered to form a new working group in readiness for any future activities on ESG and to explore linking up with other CLLS Committees already active in this area.

3. **SECURED TRANSACTION REFORM: CLLS SECURED TRANSACTIONS LAW REFORM/CODE**

It was reported that, as agreed at the last meeting, the draft Code and Commentary (dated March 2020) was put forward to the Law Commission for consideration as a project in their 14th Programme of Law Reform.

Dorothy Livingston and Mark Evans were assisting Dr. Hamish Patrick of Shepherd and Wedderburn, Edinburgh, in working on the Scottish Law Commission proposals on taking security over moveables, which included a draft Moveable Transactions Bill.

Currently Scottish law does not have a form of charge for moveables, so this reform is needed. The Scottish proposals would create a separate register for security over moveables. One concern was whether it would be necessary to register charges in that register even when the moveables were not present in Scotland at the time or were future moveables in order to protect rights on enforcement.

4. **LIBOR DISCONTINUATION**

The main developments in the UK since the last meeting were:

- the introduction of the Critical Benchmarks (References and Administrators' Liability) Bill – this introduces a legal “safe harbour” within UK’s LIBOR legislative solution, the Financial Services Act 2021 and will provide legal certainty as to how contractual references to a critical benchmark should be treated where the FCA exercises its powers under the Benchmarks Regulation to provide for continuity of an unrepresentative critical benchmark (i.e. references to LIBOR treated as references to synthetic LIBOR, once designated as an Article 23A benchmark by the FCA and the new synthetic LIBOR methodology has commenced); and
- the publication of an FCA Consultation (CP21/29*) on the proposed decision on which legacy contracts can use synthetic LIBOR rates – the proposal is to permit legacy use of synthetic 1-, 3- and 6-month sterling and Japanese yen LIBOR in all contracts except cleared derivatives until the end of 2022 (ie it is temporary only). The FCA will however consider continued restrictive permission to use synthetic LIBOR if this would help progress towards an orderly cessation. (NB Synthetic LIBOR will not be available for new contracts.) Responses are due by 20 October and an FCA decision due to be announced in Q4 2021.

In addition, the UK's Infrastructure and Projects Authority guidance note (October 2021) was noted, which states the expectation that in the majority of cases, SONIA will be implemented for PFI transactions as an appropriate and robust alternative benchmark interest rate to LIBOR and that for most projects the transition should be straightforward, but noting that in a limited number of PFI projects there may be more complicated financing arrangements which will require greater scrutiny by authorities. The guidance also included a form of consent letter confirming that there would be no "Refinancing Gain".

In the US, the most significant recent development was the ARRC recommending the use of term SOFR for dollars i.e. a forward looking term rate, for business loans. However it appeared not to be recommending term SOFR for derivatives, so query how this sits with hedging strategy.

Overall, there was concern that the different approaches between the UK, the EU and the US might lead to differences between markets in the future, which would be an unwelcome development.

5. **INSOLVENCY: CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020**

There was nothing to report, except that measures related to the COVID pandemic had been extended to spring 2022.

6. **DEEDS, ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS**

6.1 **Law Commission's 14th Law Reform Programme – Deeds**

It was noted that the Committee had submitted a response to the Law Commission's 14th Law Reform Programme as regards deeds. The response outlined various areas of legal uncertainty, many highlighted by the recent rapid changes in working practices due to the coronavirus pandemic. The response (dated 30 July) is available on the Committee's page of the CLLS website. The outcome of the Reform Programme was awaited.

6.2 **Electronic Signatures**

Following publication of the Law Commission's report on the Electronic Execution of Documents (September 2019), a revised draft of the CLLS/Law Society 2016 paper on electronic signatures had been prepared by Nigel Ward earlier this year and had been commented on by the Committee.

A further revised version would be circulated following the meeting for final comment. It was agreed that the Chair of the Committee would then send the final version to the Chairs of the other Committees involved to see if they wish to be associated with this revision.

6.3 **Digital assets and electronic trade documents**

The Committee was reminded that it had submitted responses to (i) the Law Commission's consultation paper on law related to electronic trade documentation (e.g. bills of lading and bills of exchange) and (ii) a call for evidence on digital assets (April 2021).

The Committee's response papers explained concerns with the concept of "possession" in relation to digital assets and the detailed response on Electronic Trade Documents noted similar issues, as well as a concern that financiers would need confidence that they could take security over electronic trade documents. This was not achieved by the Law Commission's proposals as they stood, particularly as they did not tackle key conflict of law issues relating to whether the law of the location of the electronic document would be relevant and, if so, where that might be deemed to be. These concerns needed to be addressed to make the proposals robust and an international solution was needed.

Both responses (August 2021) are available on the Committee's page of the CLLS website.

The outcomes of the consultation and call for evidence are awaited.

7. **COMPETITION: NEW NATIONAL SECURITY CONTROLS – NATIONAL SECURITY AND INVESTMENT ACT 2021**

The Committee was reminded that the UK's National Security and Investment Act 2021 had received Royal Assent on 29 April 2021 and would enter into force in early January 2022. This was in general alignment with the direction of travel on external investment globally. It was noted that key UK Government guidance is still awaited, but BEIS has started to offer talks to interested bodies.

The Committee expressed concern that failure to obtain clearance for a notifiable transaction would automatically result in the transaction being deemed void, and how in reality transactions could be unwound. There was also concern about the effect where security had been taken over assets of the target or its subsidiaries particularly in group financing arrangements or in the context of an acquisition.

There was also some discussion whether or not legal opinions might need to address the Act.

8. **BREXIT**

Private international law

It was reported that the EU Commission had so far thwarted the UK's request to join the Lugano Convention, although Member States have not voted on the proposal. It was also

reported that the UK is looking at the 2019 Hague Convention, which the EU has announced it intends to ratify on behalf of all Member States.

Data transfer

It was reported that there is now a longer term EU equivalence decision relating to personal data transfer, which is helpful for UK based back-office operations of banks operating in the EU or with EU customers.

9. **NEXT MEETING**

The next meeting will be held in January 2022. Joanne High will fix meetings for the year ahead on the basis that the Committee will recommence meeting in person.

10. **ANY OTHER BUSINESS AND CLOSE**

There being no further business, the meeting ended.