

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

Minutes of the meeting held on 12 January 2022 at 12.45 pm, 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)
Mark Evans (Travers Smith LLP)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Matthew Dening (Baker & McKenzie LLP)
Simon Roberts (Allen & Overy LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell LLP)

Attending: Kevin Hart (City of London Law Society)
Matthew Rous (City of London Law Society)
Edward Sparrow (Ashurst LLP)
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 David Ereira (Paul Hastings (Europe) LLP) and Sarah Smith (Dechert LLP).

1.2 Minutes of the last meeting

The minutes of the last meeting held on 13 October 2021 had previously been approved and were available on the CLLS website.

1.3 Additional attendees

The Chair welcomed the following additional attendees to the meeting, in particular Matthew Rous who has just taken up his post. She had sent thanks and good wishes to the retiring Chief Executive, David Hobart:

- Edward Sparrow (Chair, CLLS, Ashurst LLP)
- Matthew Rous (Chief Executive of City of London Law Society)
- Kevin Hart (Committee Liaison, City of London Law Society).

2. ESG

Emma Giddings reported that an ESG working group of this Committee was being established and that a first working group call would be arranged soon.

In the meantime Emma provided an overview of initiatives post COP26 which were relevant to bank lending transactions. In summary:

- The current regulatory themes are (i) the expansion of non-financial reporting to cover climate and other sustainability risks (ii) the labelling of financial products –

what do we really mean by “sustainable finance/investment” particularly regarding transitioning industries.

- Broad principles have been established and in some cases framework legislation (such as the EU Taxonomy Regulation) has been passed, however delays have arisen when trying to define technical criteria – i.e. the detailed criteria against which the sustainability of the product or transaction should be measured.
- Other complications have arisen due to (i) the desire to try to establish consistency between various regulatory initiatives and (ii) the desire to align on a more international basis.
- The continued development and impact of these reporting standards will impact loan documentation – lenders will need certain information from borrowers in order to comply and there is also the potential for exposure to ESG risk to affect capital treatment in future.

Kevin Hart also reported that the CLLS is looking into setting up a separate CLLS ESG Committee.

3. **LIBOR END 31 DECEMBER 2021**

It was noted that 1, 3 and 6 month LIBOR for Sterling, Swiss Franc, Yen and euro (and some USD) had ceased on 31 December 2021, although Sterling and Yen LIBOR were continuing on the basis of a changed (synthetic) methodology (see below). Most USD LIBOR tenors will continue until the end of June 2023.

It was reported that the UK market had made considerable progress in the last 9 months of 2021 to transition to "risk free" rates.

Noteworthy developments in the UK since the last meeting were:

- The Critical Benchmarks (References and Administrators' Liability) Act 2021 had come in force which provides legal certainty as to how contractual references to a critical benchmark should be treated where the FCA exercises powers under the UK Benchmarks Regulation to provide for continuity of an unrepresentative critical benchmark i.e. references to LIBOR treated as references to synthetic LIBOR, deemed from inception, once designated as an unrepresentative critical benchmark. This deeming of synthetic LIBOR has retrospective application regardless of when the contract was formed and is intended to protect against claims of frustration or force majeure. It applies to English law contracts or "arrangements".
- FCA notices (under Articles 23B, C and D of the UK Benchmarks Regulation) had been published on 1 January 2022 relating to the temporary use of synthetic LIBOR. The FCA will permit temporary use of synthetic 1, 3 and 6 month Sterling and Yen LIBOR in all legacy contracts (except cleared derivatives) that have not been amended at or before end 2021.
- FCA notice that USD LIBOR will not be permitted for use in new contracts from 1 January 2022 with very limited exceptions (specified in notice) published.
- ICE Benchmark Administration first publication of synthetic LIBOR rates took place on 4 January 2022.

It was also reported that the LMA had published further documentation which included drafting for risk free rates, for example the LMA leveraged suite of documentation and the LMA secondary trading documents.

As regards international developments, it was reported that the Financial Stability Board had published a statement on 22 November 2021 to support preparations for LIBOR cessation. This stated that after the end of 2021, the FSB will monitor the effort to continue reducing the stock of legacy contracts which are using synthetic LIBOR, any continuing new issuance of USD LIBOR contracts after the end of 2021, and the size and resolution of legacy contracts referencing USD LIBOR that are due to mature after end-June 2023. The

FSB will review these issues in mid-2022 and assess the implications for any further supervisory and regulatory co-operation that may be required.

4. **COMPETITION: NATIONAL SECURITY AND INVESTMENT ACT 2021**

The Committee was reminded that the UK's National Security and Investment Act 2021 had commenced on 4 January 2022. The relevant SI and Guidance on the Act had not been published until late November 2021. From these publications, the Committee had identified legal issues of significant concern regarding the application of the Act to existing and proposed in-scope finance transactions where security is taken over substantial holdings of shares in companies in any of the 17 specified sectors. These legal uncertainties relate to provisions which give rise to the prospect of criminal liability and voidness for the transaction concerned, as well as regards steps to be taken on enforcement.

The Committee had therefore sent a letter (dated 16 December 2021 and a follow up sent 11th January 2022) to BEIS raising these concerns as to legal uncertainty. In summary, these concerns relate to:

- (a) the status of security over the shares in companies in any of the 17 specified sectors: uncertainty as regards the initial creation of security and also changes in lenders/secondary market in secured loan participations and quoted debentures/secured bonds, as well as on enforcement of such security;
- (b) uncertainty as regards the identity of the holder: could this term include the security agent and/or the lenders, also query the effect of changes in those roles and secondary market issues, effect of provisions on "common purpose" to lenders in syndicated deals, noting that BEIS is of the view that the holder means the registered holder of shares and a limited category of indirect holders, but not equitable chargees; and
- (c) issues arising from automatic enforcement provisions in such share security, including issues arising from joint venture agreements.

The Committee's letters had been copied to the Infrastructure Projects Association, the Bank of England and the Treasury, as well as to the Chairs of interested CLLS Committees. The Chairs of the Insolvency and Regulatory CLLS Committees are part of the working group on this and the Company Law Chair had written in support.

The Committee would continue to work on this to try to achieve the necessary standards of legal clarity and had a useful dialogue with the DBEIS team. It was intended to publish any guidance from BEIS.

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

5.1 **Electronic Signatures**

Following publication of the final report of the Law Commission on the Electronic Execution of Documents (4 September 2019), a revised draft of the CLLS/Law Society 2016 paper on electronic signatures had been prepared by Nigel Ward and had been commented on by the Committee. A further revised version had been circulated to the Committee before this meeting and any final comments were requested to be sent after the meeting.

If the Committee approves this draft, the Chair of this Committee will then send the paper to the Chairs of the other Committees involved to see if they wish to be associated with this revision. Subject to dealing with some comments from Charles Cochrane and Penny Angell, the draft was approved.

5.2 Digital assets and electronic trade documents

(NB The Committee working party includes representatives from the Regulatory Committee.) The Committee was reminded of the Law Commission consultation paper (April to July 2021) on the law related to electronic trade documentation (eg bills of lading and bills of exchange) and a call for evidence on digital assets (April to July 2021) and the Committee's response papers (13 August 2021) (which are available on the Committee's page of the CLLS website).

Since the Committee's last meeting in October 2021, it was noted that the Law Commission had issued an interim report (24 November 2021) and had identified some key points which will be consulted on further:

- Whether certain digital assets are factually different from, and operate in different ways to, both things in action and things in possession, which may mean that the automatic application of legal rules developed for assets that fall within those two existing categories of personal property would be unsuitable in the context of digital assets. Therefore the consultation will consider whether a “third category” of personal property would better allow the law to reflect the particular features of certain digital assets.
- The principal areas that need to be considered for recognition and protection of digital assets, which are:
 - Acquisition, disposition, derivative transfer of title and competing claims in relation to digital assets;
 - Taking security over digital assets;
 - Custody relationships in respect of digital assets; and
 - How legal remedies or actions can protect digital assets
- Recognition that when considering digital assets, while it may sometimes be appropriate to draw analogies between existing concepts of personal property law and existing types of personal property (including both things in action and things in possession), such analogies are likely to be informative but not wholly applicable, given the idiosyncrasies of digital assets.
- Recognition that any suggested law reform should aim to be as consistent with international legal developments as possible.

It was also noted that on 25 November 2021, the Law Commission had published an Advice to Government on smart legal contracts which includes a detailed analysis of the current law of contract as it applies to smart legal contracts and concludes that existing English law is clearly able to facilitate and support the use of smart legal contracts, without the need for statutory law reform.

Finally, it was noted that a Law Commission Consultation Paper on digital assets is expected to be issued in mid-2022 and that the Law Commission will also start a project in mid-2022 looking at the rules relating to conflict of laws as they apply to emerging technology, including smart legal contracts and digital assets.

The Committee would continue to monitor developments.

6. BREXIT

There was nothing new to report on this item.

7. NEXT MEETINGS

It was noted that dates for the 2022/23 meetings had been circulated. The next meeting is due to be held on 6 April 2022, hopefully in person, at Freshfields office.

8. **ANY OTHER BUSINESS AND CLOSE**

There being no further business, the meeting ended.