CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Miniutes of a meeting held at the office of Freshfields at 65 Fleet Street, London, EC4Y 1HT

on Wednesday 11 May 2011 at 1:00pm

Present: Alan Newton (Freshfields - Host)

Dorothy Livingston (Herbert Smith – Chairman)

John Davies (Simmons & Simmons)

John Naccarato (Cameron McKenna)

Matthew Dening (Sidley Austin)

James Curtis (SNR Denton Wilde Sapte)

Mark Campbell (Clifford Chance)

Sarah Paterson (Slaughter and May)

Mark Evans (Travers Smith)

Simon Roberts (Allen & Overy)

Andrew Taylor (alternate) (Hogan Lovells)

In attendance: Celine Chan (Herbert Smith – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting which took place on 16 February 2011 had previously been circulated and were approved, subject to minor amendments.

Geoffrey Yeowart was represented by Andrew Taylor.

Apologies for absence were received from Geoffrey Yeowart (Hogan Lovells), David Ereira (Linklaters), Richard Calnan (Norton Rose) and Nigel Ward (Ashurst).

1.1 Committee Membership

Mark Campbell would be retiring from the group after the next meeting, and it was suggested that Charles Cochrane should take his place. This was unanimously agreed.

David Ereira's nomination, in his absence, of Presley Warner from Sullivan & Cromwell was supported by other members and his experience will be valuable. Representation from another US firm was seen as a positive step for the Committee.

An application from Nick Swiss of Eversheds had been received and it was decided that an invitation would be extended to him. The representation of National firms within the Committee was welcomed.

It was noted that the new additions represented an increase in the absolute size of the Committee and that there would not be capacity for significant further expanse in numbers.

2. FINANCIAL STABILITY: BANKING ACT 2009, SPECIAL RESOLUTION REGIME

2.1 New Legislation in Force

It was noted that the new regime for Investment Banks, as encapsulated in the Investment Bank Special Administration Regulations 2011 and the Investment Bank (Amendment of Definition) Order 2011 was, as yet, untried: it was hoped it would stay that way, even though this would mean the planned review in 2 years time would serve little purpose.

2.2 Banking Liaison Panel – (sub groups: code of practice, small companies, building societies)

A meeting of the Banking Liaison Panel occurred shortly after the last CLLS meeting.

It was noted that the work on the Code of Practice would be revisited at a later stage. Further amendments would be considered concerning netting arrangements, and these would be covered at the next Panel meeting.

It was noted that the Committee had already commented to the European Commission proposed European law on banking reconstruction which would affect the UK Banking Act.

3. INSOLVENCY

3.1 Insolvency Rules Modernisation – Order amending IA and Modernisation Rules 2010 in force on 06.04.10 (final phase of project is April 2011 when new Rules should be issued)

It was reported that the consultation on the Rules would be going ahead, albeit following an extended timetable. It was noted that amendments to UK or EU law may require a further amendment to the Rules.

3.2 EU Communication – latest developments on Cross Border Crisis Management

There was nothing to report on this.

3.3 Consultation on proposals to reform regulation on Insolvency Practitioners and to increase incentives to keep their costs down, submission circulated for approval.

DL had circulated a document concerning the proposal to increase the prescribed part in an undefined way which had been inserted into this consultation although it did not derive from the underlying Oft report, but from a suggestion by un-named stakeholders.

It was noted that floating charge holders were already successful at ensuring they were not overcharged by Practitioners and the Committee considered a measure of this sort could not assist in control of IP fees.

The proposal seemed calculated to create legal uncertainty and run counter to the Government's primary policy to encourage bank lending to business on a product bases. Any increase in the prescribed part would be likely to be expropriatory unless justified by the policy behind the creation of the prescribed part in 2002. Any significant increase would have a chilling effect on lending and on business activity and investment.

Any change would also increase costs and risk reducing activity in the financial markets.

The Committee approved the draft paper subject to incorporation of comments.

Afternote: The submission to the insolvency service is now available on the CLLS website.

4. FINANCIAL COLLATERAL ARRANGEMENTS DIRECTIVE (2002/47/EC)

The underlying Directive to the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amending) Regulations 2010 came into force on 6 April 2011.

A document co-authored by Robin Parsons and Matthew Denning, reflecting the accepted Committee recommendations, would be circulated.

It was noted that the Treasury should be reinvigorated on this issue, by a recent new appointment. It was increasingly important to markets to establish better rules in the light of the risk of further erosion of the value of floating charges and the lack of recognition of their importance in financial markets.

5. REGISTRATION OF CHARGES

5.1 Reform of the law on registration of charges

It was noted that BIS had indicated further changes in it thinking. There was an ongoing dialogue including on whether there was value in defining the "creation" of a change. It was noted that this definition was not necessary from an English law perspective, but was an effort to get a unified approach for the whole of the UK, having regard to the fact that Scottish law did not have the concept of "creation".

The dialogue was expected to be continued.

5.2 Scottish Charges: implementation of the B&D Act – update

Geoffrey Yeowart and Dorothy Livingston are members of a Group advising the Scottish Government on this. The report is gradually moving towards finalisation.

6. BRUSSELS I REGULATION – GREEN PAPER

Submissions had been made by the Committee (available on CLLS website) and a meeting had already taken place with the Ministry of Justice.

The Government had decided to opt in to discussions, which followed the Committee's recommendation.

7. ROME I REGULATION – ARTICLE 14 ASSIGNMENTS

The British Institute of International and Comparative Law had been appointed by the Commission to provide a study on the law of assignment on all 27 Member States.

It was noted that the Committee had responded to the non- financial questions in the questionnaire provided, stating it was satisfied with the law as it stands. This response is available on the CLLS website.

8. CONLIB GOVERNMENT AGENDA

8.1 Independent Banking Commission

The interim report by the Independent Banking Commission was discussed. It reflected the political concern that investment banking arms of groups would never be allowed to fail because their retail sides would always be supported.

The report suggested that retail activities should be placed in separate subsidiaries to investment banking ones. It was noted that:

(i) this would not be a means of controlling banks with EU passports from other EU Member States outside of the UK;

(ii) it was hard to envisage how consumer business could be insulated effectively when the majority of banking functions were needed for consumer and corporate banking business (e.g. clearing, branches); and

(iii) there was insufficient recognition that EU legislation might control in this area.

It was further noted that it was important not to put London at a competitive disadvantage due to regulatory overkill.

DL would be chairing the Law Society working group preparing a response to the interim report. The Law Society group would be meeting tomorrow, and DL would keep the Committee advised.

8.2 Secured Lending Reform Bill 2010-11 (Private Members' Bill sponsored by George Eustice MP)

It was noted that the premise of this Bill was to stop banks foreclosing on property. Government support of the bill would be required for it to proceed any further. The second reading had now moved to 11 June.

9. EUROPEAN CONTRACT LAW REFORM – COMMON FRAME OF REFERENCE: RESPONSE TO MOJ CONSULTATION AND WORK TO RESPOND TO EU CONSULTATION

It was reported that the European Commission had produced a paper and feasibility study on an optional European Contract Law.

It was noted that this reform had been included in the next Single European Act agenda.

Active commentators included the Law Society and the City Corporation (whose group had met on 10 May), European consumer groups (made up from National consumer and small business groups), who generally opposed the proposals, but they remained politically popular in Europe.

The Committee was represented on the CLLS and Law Society working groups and did not need to comment separately. This should be kept under review.

10. INTERMEDIATED SECURITIES – NEW EU PROPOSALS AND WORKING PARTY. FATE OF UNIDROIT CONVENTION ON SUBSTANTIVE RULES FOR INTERMEDIATED SECURITIES ADOPTED ON 09.10.09

It was noted that these proposals had UK, EU and international dimensions.

Despite the creation of the Geneva Securities Convention by Unidroit, the European Commission had their own proposals which the CLLS commented on in January (available on CLLS website).

Mark Evans reported on the debate about priority over controlled arrangements; a situation detrimental to the UK where the concept of earmarking does not exist. The UK would have to create a charge with greater rights than a floating charge, to avoid being disadvantaged.

Further proposals concerned the codification of the conflict of laws and the attempt to make the cost of cross border settlement the same as that of domestic settlement, which appeared now to be recognised as incorrect.

Responses were now available on the Commission website. The timetable was to have the Directive in place in 2012 for implementation in 2013.

11. ANY OTHER BUSINESS

It was noted that an afternoon session with Professor Goode on priorities in the charges system should be arranged.

12. WATCHING BRIEF ITEMS

12.1 **Perpetual Trustee Co Ltd v BNY Corporate Services Ltd (England) (appeal to Supreme Court expected to be heard early March 2011)**

The judgment was expected around June 2011.

12.2 **Case Law: Lehman Brothers/ Frith Rixson**

This judgment was expected on 14 December 2011.

12.3 **Enviroco Ltd v Farstad Supply A/S [2009] EWCA Civ 1399 – definition of Subsidiary in Companies Act, legal mortgage over shares, appeal to be heard on 19 January 2011**

The judgment in this case followed existing law which gave the charge-holder the rights of a member vis-à-vis the company.

12.4 **What is a Sovereign State: Pocket Kings Ltd v Safenames Ltd and Commonwealth of Kentucky [2009] EWHC 2529 (Ch)**

The facts and decision of the case were discussed.

It was noted that the case was unfortunate in that it seemed to focus on a legal and historical analysis that as US States had ceded powers to the Federal Government their

retained powers could not be regarded as delegated powers within the US Federation. While this might be wrong, the case had not been appealed, one solution to any further difficulty would be for the Foreign and Commonwealth Office to designate every US state as Sovereign, for the purposes of the Sovereign Immunity Act.

12.5 **EU Capital Requirements Directive (Art 122a) – 5% retention requirement for securitisations completed on or after 01.01.11, but may be increased in future**

Discussing the implementation of this Directive, it was reported that the Dodd- Frank Wall Street Reform and Consumer Protection Act creates a distinction between US and UK style loan participations that favours the US. Discussions were in progress on this.

13. CLOSE

There being no further business, the meeting was closed at 2:45pm.