CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

MINUTES of a meeting held at the offices of Herbert Smith LLP, Exchange House, Primrose Street, London EC2A 2HS on Thursday 29 May 2008 at 12.45pm.

Present: Dorothy Livingston (Herbert Smith LLP - Chair) (DL)

Geoffrey Yeowart (Lovells LLP) (GY)

David Ereira (Linklaters LLP)

Kate Gibbons (Clifford Chance LLP – substitute for Mark Campbell)

Richard Bethel-Jones (Allen & Overy)

Matthew Dering (Sidley Austen LLP – substitute for Robin Parson)

Nigel Ward (Ashursts)

Simon Buckingham (Travers Smith – substitute for Mark Evans)

Alan Newton (Freshfields Bruckhaus Deringer LLP – substitute for Simon Hall)

In attendance: Rachael Hoar (Herbert Smith LLP – taking minutes)

1. APPROVAL OF MINUTES AND APOLOGIES FOR ABSENCE

The minutes of the last meeting, which had taken place on February 2008, had previously been circulated and approved.

Apologies for absence were received from Richard Calnan, Simon Hall, Robin Parsons, Sarah Paterson, James Curtis, Mark Evans, Mark Campbell, Simon Roberts, John Naccarato, John Davies and Philip Wood.

2. COMPANIES ACT 2006

2.1 Repeal of financial assistance for private companies and maintenance of capital issues

The joint working party of the Financial and Company Law CLLS Committees had met to discuss issues which may arise from the repeal of financial assistance for private companies and on going capital maintenance rules. It was reported that they were close to agreeing a joint paper. This would be circulated when available.

2.2 Charge registration and overseas companies

The Committee was reminded that the consultation on the draft Overseas Companies and Charge Registration Regulations had closed on 7 March.

The Committee also noted that the Chairman of the working party on charge registration, Richard Calnan, would be on sabbatical for a few months. John Naccarato had kindly agreed to act as temporary Chairman in the interim.

2.3 Scottish register of Floating Charges

The Committee was reminded that BERR was seeking views as to the likely impact of the provisions in the Bankruptcy and Diligence (Scotland) Act 2007 on lenders to UK companies. It was noted that under the new Scottish law (which is understood to be due to come into force in April 2009), any company, regardless of its place of incorporation, will be required to register a Scottish floating charge on the new Scottish floating charge register. Potential issues, therefore, include double registration and priority. There may also be problems arising under English insolvency law where, in order to appoint an administrator, a charge holder must have security over all or substantially all of the chargor's assets.

Overall it was felt that there could be uncertainty in this area under the current drafting until a Scottish or EU Court considers this.

Views were requested to be sent to John Naccarato in order that a response could be sent to BERR.

3. FINANCIAL COLLATERAL ARRANGEMENTS (NO.2) REGULATIONS 2003

The Committee was reminded of the BVI case, Alfa Telecom v Cukurova, concerning the exercise of the remedy of appropriation (which had been introduced by the above Regulations) under an equitable mortgage governed by English law over shares in a BVI company. It was reported that the East Caribbean Court of Appeal had recently overturned the first instance decision that appropriation had not been effectively exercised because the collateral-taker had not become the registered holder of the mortgaged shares. The Court of Appeal held that:

- the exercise of the remedy of appropriation over the mortgaged shares had the effect of making the mortgagee the full beneficial owner of the shares by extinguishing the equity of redemption, even though the mortgagee did not thereby become the legal owner of the shares (which required registration of the shares in the mortgagee's name in the company's register of members);

- a pragmatic interpretation required that the concept of "full ownership" referred to in the Financial Collateral Directive be construed as meaning full ownership of the beneficial interest (and that no particular difficulty would arise by virtue of a separation of legal and beneficial title on enforcement as this had been the position under the English law of foreclosure for many years);

- uniformity of interpretation does not justify the conclusion that appropriation cannot take effect in equity alone merely because the concepts of a legal estate and a beneficial interest in property do not exist in EU member states with civil law systems;

- since the Regulations expressly refer to the remedy of appropriation being available under an equitable mortgage, it could not be correct that the remedy was not exercisable by an equitable mortgagee;

- forming a mere intention to retain the collateral was sufficient to appropriate an equitable interest, although in this case the collateral-taker had in any event done so by written notice to the collateral-provider.

Cukurova is expected to appeal to the Privy Council in the above case. It was also noted that Cukurova's application to the English Court for the judicial review of the Regulations on the ground that HM Treasury had exceeded its powers under the European Communities Act 1972 in implementing the Financial Collateral Directive was due to be heard on 15 and 16 July.

4. BANKING REFORM CONSULTATION – FINANCIAL STABILITY AND DEPOSITOR PROTECTION

It was reported that the January consultation paper issued by the Treasury on Financial Stability and Depositor Protection was much broader than the original paper issued in October last year. A working party response had been sent to the Treasury on 23 April 2008 (previously circulated).

5. INSOLVENCY

5.1 Administration set-off and expenses

The Committee was reminded that the FMLC had prepared a paper on Administration set-off and expense in November 2007 which addressed two main points:

- there is no certainty for a counterparty trading with a company which is in an insolvent administration as to when set-off will apply;
- the treatment of contingent claims i.e. that contingent claims owing to an insolvent company may turn out to have a different value to the one given to it by the administrator for set-off purposes.

It was noted that the Insolvency Service had recently responded to the FMLC (by letter dated 19 February 2008), saying they would consider whether to consult on the operation of the set-off provisions as part of their ongoing evaluation of the Enterprise Act.

It was noted that the CLLS Insolvency Law Committee were considering the FMLC paper.

5.2 Insolvency Law Reform

GY reported that the reform of insolvency law had been delayed until 1 October 2009. It was envisaged that changes would be made to the Insolvency Act and also to the Directors Disqualification Act.

GY also reported that a revised draft of the Insolvency Rules were with the Insolvency Rules Committee and that a new draft was expected to be available later in the year. Accordingly, the Committee would keep a watching brief, on developments.

5.3 Re-organisation and winding up of credit institutions

The Committee was reminded that the results of the EC Commission's consultation document (from May 2007) had been published in December 2007.

It was noted that the Commission intended to preserve the rule that a credit institution should only be wound up in the place where it is regulated (which would usually be the

place of incorporation or (for non-EU incorporated bodies) the place of their European headquarters. The Commission would consider specific measures to deal with cross-border banking groups. It would also consider the extension of the regime to cover subsidiaries of banking groups, investment firms and some other bodies concerned with the financial markets.

6. ROME I - APPLICABLE LAW IN CONTRACTS

DL informed the Committee that the Rome I working party had met on 22 April to discuss the latest consultation issued by the Ministry of Justice on whether the UK should now opt in to Rome I. The general consensus was to recommend that the UK should now opt in and a response would be sent accordingly.

7. ROME II – APPLICABLE LAW IN NON-CONTRACTUAL OBLIGATIONS

The Committee was reminded that the Rome II Regulation will apply from 11 January 2009. It was noted that this may give rise to the potential for change in practice, such that lenders may wish to specify a governing law for non-contractual obligations in their loan documentation.

8. PRINCIPLES-BASED LEGISLATION

The Committee was reminded that the Government had announced that the introduction of principals-based legislation (to tackle schemes involving disguised interest and transfers of income streams) would be deferred until the Finance Bill 2009 to allow more time for consultation. It was felt that this topic fell within the expertise of the CLLS Revenue Law Committee rather than the Financial Law Committee and accordingly further action would be limited (the Revenue Committee already being aware).

9. FINANCIAL COLLATERAL ARRANGEMENTS - ISDA PROPOSAL FOR EUROPEAN NETTING DIRECTIVE (APRIL 2008)

It was noted that a further proposal for a European Netting Directive had been sent jointly by ISDA and the European Financial Markets Lawyers Group to the European Commission urging them to harmonise netting laws across the EU.

10. UNIDROIT CONVENTION ON INTERMEDIATED SECURITIES

Nothing to report other than to note that the Law Commission's report was expected in September.

11. COVERED BONDS CONSULTATION

Nothing to report.

12. EUROPEAN CONTRACT LAW REFORM

The Committee was reminded of the EU proposal for a Common Frame of Reference in relation to contract law and that a further paper had been issued December 2007. The Committee should continue to keep a watching brief on this matter.

13. CLOSE

There being no further business the meeting was closed.