CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes of a meeting held at the office of Ashurst LLP, 5 Appold Street, Broadwalk House, London EC2A 2HA on 19 July 2018 at 1.00pm

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Present: Dorothy Livingston (Herbert Smith Freehills LLP – Chairman)
Andrew Taylor (Hogan Lovells LLP) (alternate for Penny Angell)
Ken Baird (Freshfield Bruckhaus Deringer LLP)
James Bresslaw (Simmons & Simmons LLP)
Charles Cochrane (Clifford Chance LLP)
Matthew Dening (Sidley Austin LLP)
David Ereira (Paul Hastings (Europe) LLP)
Caroline Phillips (Slaughter & May) (alternate for Andrew McClean)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Akin Gump LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Craig Jones (Sullivan & Cromwell LLP) (alternate for Presley Warner)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP)

1. **APOLOGIES FOR ABSENCE, MINUTES OF LAST MEETING AND MATTERS ARISING**

The Chairman opened the meeting and reported that apologies had been received from Penny Angell (Hogan Lovells LLP), Richard Calnan (Norton Rose Fulbright LLP) and Mark Evans (Travers Smith LLP), Andrew McClean (Slaughter & May) and Presley Warner (Sullivan & Cromwell LLP).

It was noted that the minutes of the last meeting which took place on 11 April 2018 had been circulated and were now approved.

2. **SECURED TRANSACTION REFORM**

2.1 **Small Business, Enterprise and Employment Act 2015 sections 1 and 2 – ban on non-assignment clauses in some business to business contracts regarding receivables**

It was reported that a revised version of The Business Contract Terms (Assignment of Receivables) Regulations 2018 had been laid before Parliament on 4 July 2018. They are expected to be debated in October or November under the positive procedure.

Generally, the Regulations are now much narrower in effect than originally proposed but are quite complex. They include a longer list of contracts which are outside the regime, including contracts for prescribed financial services, derivative contracts, contracts concerning land and contracts entered by project companies, and contracts under which the supplier is a special purpose vehicle which hold assets or finances commercial transactions which in either case involves it incurring a liability of £10m or more and contracts under which the supplier is a "large enterprise", broadly defined as a company or limited liability partnership (**"LLP"**) which is not classed as small or medium-sized under the Companies Act 2006 or corresponding LLP legislation. The time for testing the status of the entity is the time of the assignment (not the time of entering into the contract) based on the latest filed accounts where available, which could give rise to some uncertainty for parties who have included prohibitions on assignment in contracts with SMEs, but provides a relatively simple analysis for invoice discounting financiers.

As regards territorial scope, the revised Regulations do not apply if none of the parties has entered into the contract in the course of carrying on a business in the UK. As regards governing law, unless anti-avoidance provisions apply, the legislation will not apply to contracts governed by Scottish law or the law of any non-UK jurisdiction, only English law and Northern Irish law contracts should be affected. Introduction of similar legislation in Scotland is a devolved matter which the Scottish Parliament will decide upon.

2.2 **European Commission (EC): Proposed Regulation on effects of assignment of claims on third parties**

The Chairman reminded the meeting that in March 2018, the EC had announced that it is proposing to adopt a new rule that, subject to certain exceptions, the law of the country where the assignor (creditor of original debtor) has its habitual residence will govern the third party effects of the assignment of claims. The exceptions relate to cash held at a credit institution, claims arising from financial instruments and securitisations.

The Committee strongly believed that the proposed rule would be likely to be contrary to the parties' intentions as it would potentially introduce an additional law into their agreed contractual arrangements, would be difficult to apply, would lead to unnecessary complications, particularly for secondary loans trading, and appeared to be at odds with other conflict of law rules. The Committee had therefore written to the relevant UK Government departments to urge the UK to opt out of the Regulation if the proposal proceeds.

Following this, on 9 July 2018, both Houses of Parliament had issued JHA statements confirming the UK Government's decision not to opt into the Regulation.

In the event that the rule that the proprietary effect of all assignments would be governed by that law of the original debt were to be adopted, then the UK could adopt this rule. A number of bodies, including the LMA, have suggested that this rule needs to apply – or be available to be chosen in relation to most financial transactions (with the possible exception of assignments in the course of invoice discounting transactions, where financiers favour the proposed habitual residence of the assignor rule – possibly not appreciating the complexities if there are successive assignments of the same debt, which may not be known to subsequent assignees).

2.3 **Goods Mortgages and Bills of Sale**

The Committee was reminded that the final form Goods Mortgages Bill had been published by the Law Commission in November 2017, together with a report and proposal for the Treasury to sanction putting the Bill through Parliament using the "uncontroversial" short form process for Law Commission Bills. Following this, some members of the Committee had met with the Treasury and the Law Commission to repeat its concerns about the Bill and explain that they did not believe it was suitable for the short form procedure.

The Chairman reported that, following this, in May 2018, the UK Government had announced that it will not bring forward the Bill in the near future. This accorded with the submissions made on behalf of the Committee that the potential social consequences of the Bill made it unsuitable for this process and that there were aspects of the draft bill that required further consideration (eg the provisions for surrender of the charged asset to the chargee to extinguish the secured debt apparently with no account to the chargor for any excess value in the asset (taken from consumer credit legislation related to conditional sale and hire purchase where the principal amount financed is generally the arm's length purchase price of the goods); this approach seemed inappropriate for security transactions, where the amount borrowed on the security of the asset might be very much less than the true value of the asset (eg in the case of a work of art or an antique already owned by the chargor).

2.4 **CLLS Secured Transactions Law Reform/Code**

It was noted that work on the proposed code was continuing.

3. **LIBOR – POSSIBLE PLANNED END FOR END OF 2021**

The Committee's working party chairman reported that the Bank of England/FCA Working Group on Sterling Risk-Free Rates had met with the working party. The issues for the loan markets are complex and market discussions are ongoing: the utility of fixed prospective rates for significant periods (eg 3/6/12 months) was an area that had not been fully explored.

4. **INTRAGROUP GUARANTEES, INTRAGROUP LOANS AND DISTRIBUTIONS**

The Committee was reminded that papers written by a joint CLLS/Law Society company law committee working party containing guidance on when intra-group loans and guarantees will not involve a distribution, had been published on 5 June 2018.

These papers were published in response to updated Guidance on Realised and Distributable Profits under the Companies Act 2006 (Tech 02/17BL) published by the ICAEW in April 2017.

5. **PRA CONSULTATION CP6/18: CREDIT RISK MITIGATION, INCLUDING LEGAL OPINIONS**

The Committee was reminded that a consultation had recently been held by the PRA on proposed changes to Supervisory Statement (SS) 17/13 "Credit risk mitigation" to clarify what contracts are eligible to be treated as guarantees for credit risk mitigation under Part Three Title II Chapter 4 of the Capital Requirements Regulation (575/2013).

The Committee was reminded that the main issue was the proposal that eligibility would be linked to payment under a guarantee being made "in a timely manner", meaning that the pay-out should be made without delay and within days (not weeks or months). It was noted, however, that there are strong guarantees (eg ECAs and credit insurance) which typically will only pay out after a few months.

It was noted that whilst the PRA's proposal may cause issues for the market, this was largely a matter of policy, not a legal issue. Therefore, it had been felt that other industry bodies were better placed to respond to the consultation.

The Committee was also reminded that the PRA consultation appeared to include proposals which could widen the scope of legal opinions required in this context.

It was noted that the consultation had closed in May with strong submissions from a number of industry bodies regarding strong guarantees that would be ineligible under the proposed approach and that the Committee would watch for further developments.

6. **ELECTRONIC SIGNATURES**

It was reported that the outcome of the Law Commission project was awaited. In the meantime, the Chairman would contact the Law Commission to explore assisting with the project, in particular having regard to the CLLS guidance on electronic signatures which had been published in July 2016. Other bodies, including the FMLC, where making a contribution to this debate.

7. **GOVERNMENT PROPOSALS FOR A NEW REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES WHICH OWN UK PROPERTY**

The Committee was reminded that the Government was proposing to publish, before the summer recess, a draft Bill regarding a new register of beneficial owners of overseas companies which own property in the UK, with the intention of the register being operational in 2021. The Committee was reminded that it had supported the LMA's response to the previous call for evidence. The Committee would review the draft Bill when available with a view to assessing the impact on lenders and security.

Afternote: Draft Bill published on 23 July (see in particular Schedule 3).

8. **COMPETITION - EC MANAGEMENT PLAN 2017 – SYNDICATED LENDING**

Nothing to report. The Committee continues to keep a watching brief.

9. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE (BRRD), ARTICLE 55 (CONTRACTUAL RECOGNITION OF BAIL-IN), RESOLVABILITY OF TOO BIG TO FAIL FINANCIAL INSTITUTIONS AND PROPOSED MORATORIA**

The Committee was reminded that new moratoria powers under the BRRD proposed by the EC could trigger opt-out rights for entities that have adhered to the ISDA 2015 Universal Resolution Stay Protocol. The proposal continues to wind its way through the co-operative process in the European Parliament (**"EP"**). The current text would allow for a 2 day pre-resolution moratorium and continuation of Article 69 provision for in-resolution moratorium, but only after a gap of 10 days where there has been a pre-resolution moratorium. It was noted that ISDA continues to push against the sequential use of moratoria provisions.

It was also reported that Article 55 now includes some unpracticability language in the latest EP text.

10. **INSOLVENCY – DBEIS CONSULTATION ON INSOLVENCY AND CORPORATE GOVERNANCE**

The Chairman referred to the Consultation on Insolvency and Corporate Governance published by DBEIS in March 2018 and the response submitted by the CLLS Insolvency Law Committee dated 13 June. In summary, the CLLS Insolvency Law Committee response cautioned against further sweeping reforms without giving due consideration to their potential implications and stated that the current laws should be applied more effectively and, in relation to the conduct of directors, suggested the production of codes of conduct, instead of legislation which might impose conflicting duties on Directors of holding companies.

The Chairman proposed supporting the CLLS Insolvency Law Committee response and asked members to consider this after the meeting.

11. **BREXIT**

It was noted that The European Union (Withdrawal) Act 2018, which will establish the framework for the UK's withdrawal from the EU (expected to be on 29 March 2019) had been passed in June. In particular, the Act repeals the European Communities Act 1972, and ends the supremacy of EU law in the UK, although this may be postponed to the end of any transitional period agreed with the EU. The Act also retains EU law at the moment of exit as part of UK law (so that the UK retains a functioning statutory framework after Brexit) and creates powers for the UK Government to make relevant secondary legislation, broadly to make it fit for purpose once the UK is not an EU Member State.

Accordingly, a deluge of statutory instruments (**"SIs"**) in many areas, including financial services, is expected to be released very soon in order to adapt relevant laws to operate in the UK, once the EU and its institutions can no longer exercise their powers within the UK. This will be needed in case of a "crash-out" Brexit with no agreed transitional measures at the end of March 2019: Government have stressed legislation in this form will not be needed immediately if there is transition and what will be needed at the end of any transitional period (provisionally in January 2021) may well be different, taking account any free trade arrangements agreed with the EU by that time.

In view of the unprecedented scale of the task of reviewing the SIs and timing pressures, this Committee should consider assisting the CLLS Regulatory Committee with its efforts. It was also noted that a possible co-operative review was being orchestrated by the FMLC with a view to minimising legal uncertainty.

Views were expressed that the lack of official consolidated versions of relevant UK legislation would make the task even more challenging and time-consuming and that the Committee should press the Government to ensure UK legislation is publically available in

current form, including retained EU law. It is deeply regretted that the UK fails to meet the standards of the EU in the accessibility of its domestic legislation, a failure which will be felt all the more acutely when EU legislation ceases to be the source of significant amounts of UK law and its excellent public legislative database is no longer relevant.

12. **FINANCIAL STABILITY AND EU PROPOSALS REGARDING NON-PERFORMING LOANS**

The proposed EU Directive on credit servicers, credit purchases and the recovery of collateral was noted. It was also noted that the LMA, AIMA and AFME had made submissions.

The Committee would keep a watching brief on developments.

13. **LIFETIME ACHIEVEMENT AWARD PAPER**

The Chairman reminded the Committee about the City of London Law Society lifetime achievement award, nominations for which were now invited. The closing date for submissions is close of business on Friday 14 September.

14. **PHILIP WOOD RETIREMENT DINNER**

The Chairman reported that Philip Wood had retired from Allen & Overy after a long and illustrious career of more than 50 years. Although he is not entirely leaving the law, the Chairman proposed that a dinner in his honour should be held in September, to which some former Committee members would also be invited. There was a generally positive response to this suggestion and it was agreed that if the dinner proceeds, the costs would be shared between members.

15. **ANY OTHER BUSINESS AND CLOSE**

There being no further business the meeting closed.

Nothing in these minutes should be considered as legal advice or relied upon as such.