CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes of the meeting held on 1 April 2021, via Microsoft Teams

Present: Dorothy Livingston (Herbert Smith Freehills LLP)
Penny Angell (Hogan Lovells LLP)
James Bresslaw (Simmons & Simmons LLP)
Charles Cochrane (Clifford Chance LLP)
Matthew Dening (Baker & McKenzie 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)
Sarah Smith (Dechert LLP)
Jeremy Stokeld (Linklaters LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst 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 Chairman opened the meeting and reported that apologies had been received from Simon Roberts (Allen & Overy) and Presley Warner (Sullivan & Cromwell LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 13 January 2021 had previously been circulated and subject to subsequent amendments were approved.

1.3 Matters Arising

It was noted that the Law Commission had just published a consultation on its 14th Programme of Law Reform. Committee members were asked to consider areas suitable for reform. Suggestions made at the meeting included the treatment of unlawful dividends and tidying up corporate law to allow the use of e-seals (including the removal of the criminal offence)

After note: It was noted that "Deeds and variations of contracts" were listed in the Programme as possible areas suitable for reform.

2. SECURED TRANSACTIONS LAW REFORM/CODE

There was nothing to report on this project.

3. LIBOR DISCONTINUATION AT END OF 2021

The Committee noted various developments relating to the discontinuation of LIBOR at the end of 2021, including the following:

- the FCA announcement on 5 March 2021 of the future unrepresentativeness of LIBOR settings such that most LIBOR settings will cease permanently on 31 December 2021 (while some US$ settings will cease 30 June 2023);

- as of 1 April 2021 no new LIBOR linked loans are to be issued;
- new LMA recommended form single currency compounded risk free rate facilities agreements had been published (one based on observation shift and one without);
- in relation to tough legacy contracts and synthetic LIBOR, the Committee had recently responded to the HM Treasury Consultation "Supporting the wind-down of critical benchmarks" (including legal safe harbour). Further, it was noted that whilst the Financial Services Bill did not include safe harbour provisions, it was unlikely that the UK Government would not legislate as the EU and US had already done.

As regards US developments, it was noted that the New York State legislature had just passed a statutory solution to tackle New York law governed tough legacy US dollar LIBOR loan agreements. The legislation largely adopted recommendations made by the Alternative Reference Rates Committee.

4. INSOLVENCY

4.1 Prepacks

It was noted that new legislation in relation to prepacks is due to come into effect later in April.

4.2 Corporate Insolvency and Governance Act 2020 (CIGA)

It was reported that in the recent case of *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), the High Court had considered whether proceedings relating to a restructuring plan under Part 26A of the Companies Act 2006 was an insolvency process, and not a scheme. The court decided that a restructuring plan involved a compromise or arrangement within the meaning of Part 26A which meant that it would fall within the insolvency exclusion in the 2007 Lugano Convention and meant that the court had jurisdiction to sanction the plan.

(Notes: (i) Part 26A was inserted by CIGA. (ii) The hearing took place before the UK left the EU, meaning that the Lugano Convention applied to the UK at the time of the hearing.)

The decision was of note as it was felt this could give rise to conflicts issues in future. This might be pursued by writing to the Insolvency Service/Department for Justice.

The Committee would keep watching brief. It was noted that the UK seemed likely to be excluded from the Lugano Convention for some time and the Hague Convention on Choice of Court Agreements (if relevant), which was in force between the UK and EU countries, also contained (at Article 2(e) an exclusion for insolvency processes.

4.3 EU adoption of Commission proposal for a Directive on preventive restructuring frameworks, second chance and measures etc

There was nothing to report on this item.

4.4 Financial Collateral Arrangements (No 2) Regulations

The Committee was reminded that clause 36 of the Financial Services Bill 2020 was designed to address *vires* concerns regarding the scope of the Regulations (which implement Directive 2002/47/EC) (and as per cases *Cukurova* and *Nolan*). It was reported that the Financial Markets Law Committee had written to HM Treasury expressing concerns about the standard required for retrospective legislation, established by the European Court of Human Rights (**ECHR**) and urging the Government to consider adding a provision to establish a cut-off date to ensure that the ECHR standard is met.

5. TAX: DAC6 EU DIRECTIVE (2018/822) AND UK REGULATIONS (THE INTERNATIONAL TAX ENFORCEMENT (DISCLOSABLE ARRANGEMENTS) REGULATIONS 2020 (SI 2020/25))

There was nothing to report on this item. It was decided that this should be moved to "watching brief" in future.

6. ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS

6.1 Electronic Signatures Note

A revised draft of the CLLS/Law Society 2016 paper on electronic signatures had been prepared by Nigel Ward to take account of the publication of the final report of the Law Commission on the Electronic Execution of Documents in September 2019. The draft had been circulated to the Committee for comment with a view to finalising and publishing the updated version in the near future. The Chairman would liaise with other relevant CLLS and Law Society Committees before publication of the revised version.

6.2 CryptoCurrency and Smart Contracts

Following a call for evidence last year, a Law Commission Scoping Paper on smart contracts had been published and had been open for responses until the end of March.

The Chairman had already written to the Law Commission to offer assistance with this work although it was felt that a formal response was not within the Committee's remit, as this project was still at the fact finding stage.

7. BEIS CONSULTATION ON CORPORATE TRANSPARENCY AND REGISTER REFORM (COMPANIES HOUSE)

There was nothing to report on this item.

8. INTERMEDIATED SECURITIES – LAW COMMISSION REVIEW

There was nothing new to report on this item since the publication of the Law Commission Scoping Paper: Intermediated Securities: who owns your shares ? issued on 11 November 2020. The matter was relevant also to more general work that the Law Commission was doing on crypto-assets on which the Committee would be commenting.

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

There was nothing to report on this item.

10. COMPETITION

10.1 New National Security Controls - Competition Law Committee's submission and cooperation with Company Law Committee

It was noted that the UK's National Security and Investment Bill was expected to be implemented in autumn 2021, with some retrospective effect back to November 2020. Following consultations on the scope of the various classes in which foreign direct investment will require prior clearance, the Government had published a response (2 March 2021) which had included narrower and clearer sector definitions.

The CLLS Competition Law Committee continues to lead work on this and has ongoing dialogue with DBEIS. Issues had been raised about the extraordinary breadth and extra-territoriality of the provisions, their impracticality and legal and practical problems, particularly with regard to financing.

It was noted that the Government has emphasised that commercial lending arrangements were not generally intended to be caught when a lender is taking security. It seemed more likely, therefore, that issues could arise, however, at the point of enforcement of security over shares.

Due to the Bill's extra-territorial scope, it was felt that foreign transactions were most likely to be caught unawares.

Afternote: the Bill is now an Act, but has not yet come fully into force. This is expected to happen in the Autumn. Some guidance is available on transactions at risk of being called

in which may be completed before then. This will be an important item for financing due diligence.

10.2 **Takeover Panel – Change to Competition Investigation Provisions**

The Committee was reminded that the current takeover rules allow an offeror to lapse its offer on a second stage merger investigation in the EU or the UK, while other regimes are dealt with by a materiality requirement.

The Takeover Panel propose to replace this rule with a materiality requirement covering all merger situations within its jurisdiction. The result would be that offers may need to be kept open through the second stage process (up to 18 months in the UK) and in the last resort the Panel could require completion even where it was illegal for the offeror to do this and there would be severe penalties on the company and, potentially, its directors, as well as the offeror being unable to exercise control over the acquired business and potentially being ordered to sell it again immediately.

From the point of view of this Committee, the extended timetable and the financing implications were the most significant aspect, as well as consideration of what conditions lenders might wish to impose so as to ensure that they cannot be regarded as facilitating or encouraging breaches of the law.

The consultation closed on 15 January 2021 and a response statement was awaited. The Committee would continue to keep a watching brief.

Afternote: the Takeover Panel has proceeded with these changes to its rules and they became effective at the beginning of July 2021. This is another item for due diligence on financings of transactions subject to these rules.

11. **FINANCIAL STABILITY: EU BANK RECOVERY AND RESOLUTION DIRECTIVE, ARTICLE 55 – CONTRACTUAL RECOGNITION OF BAIL-IN, ISSUES WITH RING FENCED BANKING**

There was nothing new to report on this item.

12. **BREXIT**

There was nothing significant to report since the last meeting. It was noted that the UK was still waiting for the outcome of its application to rejoin the 2007 Lugano Convention (similar to the unreformed 2001 Brussels Regulation). The UK's application has the formal support of Norway, Iceland and Switzerland, but the EU Commission (acting for 26 Member States) had declined to approve the UK becoming a party. The matter has not been debated at EU Council level (including by Denmark (which is a separate adherent)) although it appears a number of Member States recognise it would be in their citizens' interests if the UK were a party.

Afternote: the EU Commission has lodged a "no consent" letter with the Convention administrator, and there has still been no debate at Council level, although legally Member States have the final word.

13. **ANY OTHER BUSINESS AND CLOSE**

13.1 The New York case, *Re Citibank August 11, 2020 Wire Transfers*, which concerned a mistaken payment of US$900m made by a facility agent to certain lenders (relating to a loan made to Revlon Inc), was discussed, as well as the claw back provisions in the LMA facility agreement. It was felt that under English law, the New York case would have had a different outcome.

13.2 There being no further business, the meeting ended.