CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes of the meeting held on 13 January 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)
Edward Fife (Slaughter & May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Simon Roberts (Allen & Overy LLP)
Sarah Smith (Dechert LLP)
Nick Swiss (Eversheds LLP)
Nigel Ward (Ashurst LLP)
Presley Warner (Sullivan & Cromwell LLP)

Attending: Kevin Hart (The City of London Law Society)
David Hobart (The City of London Law Society)
Edward Sparrow (Ashurst LLP)
Emily Barry (Herbert Smith Freehills LLP) (acting 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 Mark Evans (Travers Smith LLP) and Jeremy Stokeld (Linklaters LLP).

1.2 Minutes of last meeting

The minutes of the last meeting held on 14 October 2020 had previously been circulated and were now approved.

2. SECURED TRANSACTION REFORM

2.1 CLLS Secured Transactions Law Reform/Code

Nothing to report. Work is ongoing.

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

Nothing further to report, and since it will no longer affect UK law, this will be dropped from the agenda in future.

3. LIBOR – PLANNED DISCONTINUANCE AT END OF 2021

Work by various bodies continued to progress to prepare for the discontinuation of LIBOR at the end of 2021 and to transition to alternative reference rates. It is clear that this will become reality, despite continued areas of legal uncertainty.

Afternote: the Working Group has responded to the HMT consultation on Supporting the wind-down of critical benchmarks (Safe Harbour) and this is available on the Committee page of the CLLS web-site.

4. FIFTH MONEY LAUNDERING DIRECTIVE (MLD 5) – TRUSTS

The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 were laid before Parliament on 15 September and (mostly) came into force on 6 October 2020. Excluded Trusts are much wider than originally proposed - see Schedule 3A (Excluded Trusts) which includes financial markets infrastructure trusts (para 10), professional services trusts (FSMA and escrow) (para 11), capital markets trusts (para 13) and commercial transaction trusts (para 14 – the carve out for commercial loans/security trust arrangements). Generally the view is that the exemptions in the final legislation are helpful, and this is partially as a result of the responses to the Consultation.

5. INSOLVENCY

5.1 Corporate Insolvency and Governance Act 2020

It was reported that some restructuring plans under the new legislation are starting to be seen, which should assist in setting parameters around what is permissible. The clarification will be welcome.

It was also noted that the moratorium on winding up has been extended again to 31 March 2021.

Furthermore it was noted that the level of priority of unsecured creditors ranking ahead of floating charge holders has been increased, and it was noted that it can be unclear as to the order in which those unsecured creditors rank as between themselves.

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

Nothing to report.

5.3 Financial Collateral Arrangements (No 2) Regulations

It was noted that section 36 of the Financial Services Bill 2020 seeks to address the vires question regarding the scope of the Financial Collateral Arrangements (No 2) Regulations (cases *Cukurova* and *Nolan*).

Dorothy Livingston and Mark Evans were attempting to include additional wording to remove any risk that the new legislation might itself be open to further challenge, based on statutory precedent. The Financial Markets Law Committee are doing the same.

Afternote: the legislation was not changed.

6. TAX: DAC6 REPORTING RULES

It was reported that following the end of the Brexit implementation period, the UK had adopted legislation which made significant changes to the DAC6 hallmarks which had resulted in the UK having a much reduced approach to the reporting requirements, which is divergent from the requirements in the EU. The Committee would keep a watching brief.

7. ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS

7.1 Electronic Signatures

It was reported that following publication of the final report of the Law Commission on the Electronic Execution of Documents (4 September 2019), an addendum to the CLLS/Law Society 2016 joint paper on electronic signatures had been prepared by Nigel Ward and was circulated with the Agenda. When Members had had an opportunity to comment, it would be sent to the other Committees to see if they would like to be associated with it, failing which it would be published as a work of this Committee only.

7.2 CryptoCurrency and Smart Contracts

It was reported that a Commission Scoping Paper was open for responses until 31 March 2021. The paper reflects some points the Committee have made in informal dialogue.

There are some concerns about an over-conceptual approach when a practical approach is needed.

Afternote: the UK Judicial Task Force working group on smart contracts and arbitration is consulting on model forms of arbitration clause and process, with accompanying guidance. The Chairman is a member of the working group. The Committee is now considering further consultations from the Law Commission with a view to responding.

8. CLLS LEGAL OPINION GUIDE

The Committee was reminded that an updated version of the CLLS Legal Opinion Guide had been published in December 2020 (with assistance from retired member Geoffrey Yeowart). This includes amendments relating to e-signatures, disclosure, documents governed by a non-English law or written in a non-English language, opining on documents drafted by another law firm and the SRA Code of Conduct etc.

Afternote: this is now available on the Committee page of the CLLS website.

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

Nothing to report.

10. INTERMEDIATED SECURITIES – LAW COMMISSION REVIEW

It was reported that a Law Commission Scoping Paper: "Intermediated Securities: who owns your shares ?" had been published on 11 November 2020 which outlines problems with the system of intermediated securities and possible solutions. The paper reflects much of the Committee's input. The Government now needs to decide if further work should be undertaken. The Committee would continue to keep a watching brief.

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

Nothing to report.

12. COMPETITION

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

The Committee was reminded that the UK's National Security and Investment Bill had been published on 11 November 2020. It is expected to become law in spring 2021 once it passes through Parliament and consultations on the scope of the various classes in which foreign direct investment (FDI) requires prior clearance has been assessed and the relevant classes better defined in subsidiary legislation. Once passed, this will introduce for the first time a separate regime and powers for the review of foreign direct investment in the UK (replacing the existing public interest merger regime in the Enterprise Act 2002). The new regime will apply to any acquisition of a "material influence" (15% shareholding or more) in a company, assets (including land) or intellectual property which potentially gives rise to UK national security concerns. 17 specified sectors will be subject to a mandatory notification requirement as regards share acquisitions, but not other sorts of property.

Once law, the Bill will have retroactive effect, in that transactions entered into since the first publication of the Bill may be called in for review within 6 months of the date of passage of the Bill into law, if DBEIS is aware of the transaction and within 5 years if they are not. The mandatory pre-clearance regime and associated voidness of uncleared transactions is expected to be introduced after a grace period of about 6 months.

The CLLS Competition Law Committee is leading work on this and has an ongoing dialogue with DBEIS, points about the extraordinary breadth and extra-territoriality of the provisions, their impracticality and problems from a legal and practical point of view, particularly with regard to financing, have been made. Dialogue is on-going.

Afternote: The Bill has now become law, but is to become active later in the year. Once active, certain transactions will require mandatory pre-clearance, while some transactions completed since 11th November 2020 could be called in for review, with risk of conditions being imposed that affect the merged businesses.

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

The Committee noted that 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. It was noted that the 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.

Although in practice the Panel would be unlikely to place an offeror in this position, Competition lawyers have objected on the basis that it is not the place of a self-regulatory body to reserve the right to force companies to breach the law of the country where the self-regulatory body operates. This also includes duties relating to competition law in the new UK/EU Trade Treaty. This has been conveyed in a joint submission with the Company Law Committee. Also the proposal takes no account of the new FDI regime and appears based on a mistaken belief that the UK regime does not enable the CMA to prevent completion of mergers. The proposal initially had considerable support from Corporate lawyers, so it is an uphill struggle to get any change of approach.

From the point of view of this Committee, it was felt that the extended timetable and the financing implications are 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.

Afternote: this change has been adopted and has become live at the beginning of July 2021. The implications will need to be considered on transactions going forward.

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

13.1 **Resolvability of Too Big to Fail Financial Institutions – BRRD Proposed Moratoria and amendments to Article 55: BRRD II**

It was noted that Directive (EU) 2019/879 (BRRD II) entered into force at the end of June 2019 which required EU Member States to implement by 28 December 2020. This Directive was accompanied by Regulation (EU) 2019/877 on the loss absorbing and recapitalisation capacity of credit institution as investment firms (SRMRII) which applied from 28 December 2020, with some changes in effect from 1 January 2021. (See The Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 https://www.legislation.gov.uk/uksi/2020/1350/contents/made for the extent of implementation forming part of retained EU law.)

13.2 **Loan origination and monitoring**

Nothing to report.

13.3 **Ring-fencing**

Nothing to report.

14. **BREXIT**

End of Implementation Period, Jurisdiction and Enforcement of Foreign Judgments

It was noted that the end of the Brexit implementation period had occurred at 11pm on 31 December 2020.

The UK has signed various free trade agreements with non-EU countries and has reached agreement with the EU on a new trade agreement but there is very little of any direct relevance to Financial Services Businesses.

Private International Law

Various developments were noted including the following:

The Rome Regulations now form part of retained EU law and the substance of UK rules on choice of law is not expected to change as a result of the UK leaving the EU.

The Recast Brussels Regulation on choice of court and enforcement of judgments continues to apply only to proceedings that commenced before the end of transition.

The UK has adopted the 2005 Hague Convention on Choice of Court (exclusive jurisdiction clauses) with effect from the end of transition.

The UK has also applied to join the 2007 Lugano Convention (similar to the unreformed 2001 Brussels Regulation). This has formal support of Norway, Iceland and Switzerland (the three countries whose arrangements on choice of court and enforcement of judgments as between them and EU countries are currently governed by this Convention). But it is still unclear if the EU (acting for 26 Member States) or Denmark (which is a separate adherent) will agree to the UK being admitted to the Convention or from what date this will be effective – indications are that agreement will not be given willingly or soon, even though a number of Member States see the value of admitting the UK to the Convention from the point of view of their own citizens.

15. **ANY OTHER BUSINESS AND CLOSE**

Edward Sparrow thanked the Committee for their work. The Chairman welcomed the attendance of the CLLS team and thanked Edward Sparrow for his kind remarks.

Kevin Hart mentioned the Chairman's meeting at the end of the month, where any issues, positive or negative, can be raised on behalf of any Committee members.

There being no further business the meeting closed.