

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Minutes

for the 320th meeting
at 9:00 a.m. on 29th March 2023

1. **Welcome and apologies**

In attendance: Mark Austin; Sam Bagot; Edward Baker; Adam Bogdanor; Tom Brassington; Lucy Fergusson; Chrissy Findlay; Kevin Hart; Nicholas Holmes; James Innes (alternate for Chris Horton); Sharon Jenman (alternate for John Adebisi); Vanessa Knapp; Stephen Mathews; Juliet McKean (Secretary); Jon Perry; David Pudge (Chair); Caroline Rae; Lucy Reeve (Chair of the Law Society Company Law Committee (**LSCLC**)); Richard Spedding; Patrick Speller; Allan Taylor; Liz Wall and Victoria Younghusband.

Apologies: John Adebisi; Robert Boyle; Chris Horton; John Papanichola; Matthew Rous; and Simon Wood.

2. **Approval of minutes**

A draft version of the minutes of the meeting held on 25 January 2023 was circulated to members on 21 February 2023. The Chair asked members to send any comments on the minutes to the Secretary by the end of this week, otherwise the minutes would be considered settled.

3. **Matters arising**

3.1 *ROE regulations.* The Chair reported that on 15 March 2023 a draft of the Register of Overseas Entities (Definition of Foreign Limited Partner, Protection and Rectification) Regulations 2023 was published, along with a draft explanatory memorandum. The Chair noted that the explanatory memorandum states that the instrument is one of several regulations to improve the effectiveness of the ROE post-implementation, including by providing a definition of "foreign limited partner" and inserting provisions that allow for the rectification of the ROE through the removal of information submitted to the registrar that is factually inaccurate, forged or submitted without the consent of the overseas entity. The Chair also reported that the Register of Overseas Entities (Disclosure and Dispositions) Regulations 2023 were made on 20 March 2023, which (amongst other things) specify to which public authorities and under what circumstances Companies House may disclose protected date of birth and residential address information (as well as the required information about trusts) submitted to it for the purposes of the ROE regime, noting that such provisions come into force on 11 April 2023.

3.2 *Industry Working Group on eSignatures Final Report.* The Chair reported that on 14 March 2023 the Ministry of Justice announced that the expert Industry Working

Group on Electronic Execution of Documents had published its final report which considers the challenges arising from the use of electronic signatures in cross-border transactions and how to address them, and how best to use electronic signatures to optimise their benefits when set against the risk of fraud. The Chair noted that the final report also sets out the Industry Working Group's recommendations for reform including recommendations for enhanced certification and self-certification, and a uniformity of approach to e-signing and online identification.

3.3 *UKJT Legal Statement on Digital Securities.* The Chair reported that on 9 February 2023 the UKJT of LawtechUK announced the publication of a legal statement on the issuance and transfer of equity or debt securities using a system deploying blockchain or DLT under English law. Members of the Committee noted that the legal statement concludes that English law can accommodate digital bonds circulated on a public blockchain without custodians, and the on-chain transfer of digital equity securities, even if a fully decentralised blockchain cannot currently be used as a register of members.

3.4 *Call for evidence on information sharing by the ISU.* The Chair reported that on 2 February 2023 the BEIS Sub-Committee on National Security and Investment announced the publication of a call for evidence in relation to information sharing by the Investment Security Unit (ISU) and that Sam Bagot led a working group that prepared the Committee's response to this call for evidence which was submitted on 24 February 2023. It was also noted that on 23 March 2023, the Government and the BEIS Committee had agreed an MoU that gave the BEIS Committee access to information that it needed in order to be able to scrutinise the work of the ISU.

In addition, the Committee noted that the responsibility for National Security and Investment policy, and the associated teams, has moved from (what was) BEIS to sit under the Chancellor of the Duchy of Lancaster in the Cabinet Office.

3.5 *FRC consultation on audit committees standard.* The Chair reported that on 3 February 2023 a working group of the Committee led by Patrick Speller submitted a response to the FRC's consultation on its draft proposal for a minimum standard for audit committees, a draft of which had been considered by the Committee at the meeting held on 25 January 2023.

3.6 *Audit and Corporate Governance Reform – Draft reporting regulations.* The Chair reported that on 27 January 2023 a working group of the Committee submitted comments on the draft reporting regulations that (what was) BEIS shared with the Committee for comment. For further information, please see minute 4.7 below.

4. **Discussions**

4.1 *Reforms to the prospectus regime.* Nicholas Holmes informed the Committee that a call had been held with HM Treasury on 8 February 2023 to discuss the illustrative statutory instrument (The Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023) and the policy note on public offers and admissions to trading regime, which were both published as part of the Edinburgh Reforms. It was noted that Chris Pearson and Kathy MacDonald have also been leading a working group (drawn from the Joint CLLS/Law Society Takeovers Working Group) that has prepared comments on the takeovers exemption for submission to HM

Treasury. In addition, it was noted that the FCA has published Primary Market Bulletin 44 (see item 5.4(a) below) which states that the FCA is now intending not to publish the proposed new Technical Note relating to the requirement to publish a public offer prospectus where securities are issued pursuant to a scheme of arrangement (Primary Market/TN/606.1 – When a prospectus is required where securities are issued pursuant to Schemes of Arrangement).

The Chair commented that, in Primary Market Bulletin 44, the FCA states that while its own analysis remains unchanged, it recognises that the question of whether a prospectus is required where securities are issued pursuant to a scheme of arrangement is a question of law and ultimately is for the courts to decide and that it is not proceeding with the proposed Technical Note 606.1.

- 4.2 *Updated IA Share Capital Management Guidelines.* The Chair reported that in February 2023 the Investment Association (**IA**) published a revised version of its Share Capital Management Guidelines, which have been updated to reflect certain recommendations in the Secondary Capital Raising Review and that subsequently a working group of the Committee held a call on 1 March 2023 to discuss the implications of the revised guidelines on AGM resolutions and explanatory notes.
- 4.3 *Retained EU Law (Revocation and Reform) Bill.* Lucy Fergusson (**LF**) updated the Committee in respect of a call with the Department for Business and Trade (**DBT**) held on 6 March 2023.
- 4.4 *EU Foreign Subsidies Regulation.* The Chair reported that on 6 February 2023 the European Commission announced that it is seeking feedback on the draft implementing regulation on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market.
- 4.5 *BEIS consultation on the duty to report on payment practices and performance.* The Chair reported that on 31 January 2023 (what was) BEIS published a consultation paper on proposals to amend the Reporting on Payment Practices and Performance Regulations 2017 and the Limited Liability Partnerships (Reporting on Payment Practices and Performance) Regulations 2017 following a statutory review of these regulations. The Chair noted that the consultation closes on 28 April 2023 and the Government intends to publish a response covering the policy proposals and potential amendments to these regulations within 12 weeks of the closing date. The Chair also noted that Julie Farley of Herbert Smith Freehills is leading a small working group that is preparing a response to this consultation.
- 4.6 *Better Business Act campaign.* LF updated the Committee in respect of a call with DBT held on 15 March 2023.
- 4.7 *Audit and Corporate Governance Reform – Draft reporting regulations.* The Chair updated the Committee on further engagement with DBT in relation to the draft reporting regulations being prepared by the Government and also the Government's current thinking on how the commitment to extend the definition of "public interest entity" (for audit purposes) to cover very large private companies and LLPs should be implemented.

- 4.8 *Economic Crime and Corporate Transparency Bill - Changes to registers of members.* The Chair reported that tabled amendments to the Economic Crime and Corporate Transparency Bill (**ECCT Bill**) include a proposed new clause to be inserted after clause 46 (amending section 113 of the Companies Act 2006 (**CA 2006**) and inserting new sections 113A to 113I CA 2006) which, amongst other things, would require companies to include old information in respect of members and former members on the register of members and impose criminal sanctions on members of companies who fail to inform the company of their details (name/address) or that their details (name/address) have changed within two months of becoming a member or the change occurring (see pages 10 to 13 of the tabled amendments).

5. Recent developments

The Chair commented on the cases at item 5.9. The Committee noted the following additional items in sections 5.1 to 5.8 which time did not allow them to consider in the meeting.

5.1 Company law

- (a) *Impact of recent CJEU ruling on PSC register and ROE.* On 30 January 2023, the Government published a supplementary European Convention on Human Rights (**ECHR**) memorandum in respect of amendments made to parts 1-3 of the Economic Crime and Corporate Transparency Bill. The memorandum considers the impact of a recent CJEU ruling on the UK's PSC register and ROE. The memorandum states that having analysed the relevant CJEU ruling and re-evaluated the ECHR compatibility of the PSC and ROE regimes, the Government continues to assess that these regimes are compliant with Article 8 of the ECHR (Right to respect for private and family life).
- (b) *Companies House blogs on changes to accounts.* On 10 February 2023, Companies House published: (i) a blog which discusses its plans to introduce software-only filing of annual accounts under new powers proposed in the ECCT Bill; and (ii) a blog on the reforms in the ECCT Bill that seek to streamline the accounts filing options available to small and micro companies and other accounts-related changes being brought about by the ECCT Bill.

5.2 Corporate governance

- (a) *New Parker Review targets.* On 13 March 2023, the Parker Review announced new targets for December 2027 to improve further ethnic diversity of FTSE 350 senior management teams and large private businesses. The new developments are that: (i) each FTSE 350 company will be asked to set a percentage target for senior management positions that will be occupied by ethnic minority executives by December 2027; and (ii) 50 of the UK's largest private companies have been set the target of having at least one ethnic minority director on the main board by December 2027 and will also be asked to set a target for the percentage of ethnic minority executives within its senior management team by December 2027. The Parker Review committee has also published the results of its latest voluntary census on the ethnic diversity of FTSE 350 company boards, carried out in 2022 jointly with DBT.

- (b) *Second FTSE Women Leaders Review report.* On 28 February 2023, the FTSE Women Leaders Review announced the publication of its second report on achieving gender balance in FTSE leadership. The press release states that "*FTSE 350 companies have met target of 40% Women on Boards three years ahead of 2025 deadline*" and "*British business on-track to meet target of 40% Women in Leadership teams by end of 2025, with UK's 50 largest private companies keeping pace*".
- (c) *QCA Corporate Governance Code – 10 years on.* On 23 February 2023, the Quoted Companies Alliance published a report entitled "The QCA Corporate Governance Code – 10 years on" to mark the 10th anniversary of the QCA Corporate Governance Code.
- (d) *PERG 15th Annual Report.* On 20 February 2023, the Private Equity Reporting Group published its fifteenth annual report on the private equity industry's conformity with the Walker Guidelines and an updated version of its guide to good practice reporting by portfolio companies.
- (e) *FRC Corporate Governance and Stewardship mythbuster.* On 20 February 2023, the FRC announced the publication of a mythbuster to dispel common misconceptions about corporate governance and stewardship.
- (f) *Signatories to the UK Stewardship Code.* On 15 February 2023, the FRC announced an increase in the number of signatories to the UK Stewardship Code following the publication of its updated list.
- (g) *IA shareholder priorities for 2023.* On 13 February 2023, the Investment Association published its shareholder priorities for 2023.

5.3 Reporting and disclosure

- (a) *Treasury Sub-Committee request for written submissions on financial services regulation consultations.* On 8 February 2023, the House of Commons Treasury Sub-Committee on Financial Services Regulations announced that it is accepting written submissions on certain financial services regulation consultations, including the FCA's consultation paper on streamlining its transparency rules on structured digital reporting of annual financial statements by companies (CP23/2). The closing date was 21 February 2023.
- (b) *FRC updates 2021 Statement of Intent on ESG.* On 30 January 2023, the FRC announced the publication of an update to its 2021 Statement of Intent on ESG. The update sets out areas where there remain ongoing challenges in ESG reporting, suggests actions for preparers to produce decision relevant information and the FRC's plans to engage with the market to ensure that stakeholder needs are being met as demand for ESG information continues to evolve.

5.4 Equity capital markets

- (a) *PMB No. 44.* On 20 March 2023, the FCA published Primary Market Bulletin 44. In this edition, the FCA reminds companies of the new Listing Rules and

amended DTRs in respect of diversity and inclusion on company boards and executive management that came into force for accounting periods beginning on or after 1 April 2022. The FCA notes that the first annual financial reports including disclosures subject to the new rules will be published from April 2023. The FCA sets out both its expectations in respect of the new disclosure requirements, including by providing some steps to help companies get ready for making the relevant disclosures, and also its supervisory strategy for monitoring and enforcing compliance with the new rules. The FCA also states that it is not proceeding with the proposed Technical Note 606.1 (see minute 4.1 above). In addition, the FCA highlights some potential risks around the use of multimedia content, including audio and video content, in regulatory news announcements and sets out its expectations for mitigating these risks.

- (b) *PMB No. 43*. On 20 February 2023, the FCA published Primary Market Bulletin 43. In this edition, the FCA highlights: (i) the launch of multi-factor authentication for FCA systems, including the Electronic Submission System; (ii) that third country issuers that report their annual and half-yearly consolidated financial statements following Chinese GAAP are exempt from certain of the DTR 4 financial reporting rules – the FCA considers that Chinese GAAP is equivalent for these purposes; and (iii) that the closing date for responding to the FCA's consultation on streamlining its transparency rules on structured digital reporting of annual financial statements by companies (CP23/2) was 24 February 2023.
- (c) *Updated ESMA Q&A on the Prospectus Regulation*. On 3 February 2023, ESMA published a revised version of its Questions and Answers on the EU Prospectus Regulation. The updated version includes a new Q&A 15.10 concerning whether the purchase of securities via a joint account may be considered as a purchase by one investor for the purposes of the Article 1(4)(d) exemption from the requirement to publish a prospectus.

5.5 **MAR**

- (a) See item 5.4(a) above.

5.6 **Auditing and accounting**

- (a) See minute 3.5 above.

5.7 **Takeovers**

- (a) *Panel Statement 2023/3*. On 20 February 2023, the Takeover Panel published Panel Statement 2023/3 announcing the publication of a revised version of the Takeover Code reflecting the amendments made by Instrument 2022/6 (Presumptions of the definition of "acting in concert" and related matters) and that Practice Statement No 12 has been withdrawn and minor consequential amendments have been made to Practice Statement No 22 (Irrevocable commitments, concert parties and related matters) and Practice Statement No 33 (Purchases of shares in the offeree company by an offeror during an offer period).

5.8 Miscellaneous

- (a) *FCA discussion paper on finance for positive sustainable change*. On 10 February 2023, the FCA announced the publication of a discussion paper on finance for positive sustainable change that seeks views on sustainability-related governance, incentives and competence in regulated firms. The closing date is 10 May 2023.
- (b) *Revised BVCA model documents for early stage investments*. On 10 February 2023, the BVCA announced the publication of revised versions of its standardised documents for early stage venture capital investment i.e., articles of association, a subscription agreement and a shareholders' agreement.

5.9 Cases

- (a) *Euro Securities & Finance Ltd v (1) Mr Stephen Barrett (2) Mr Matthew Brereton (3) Mr John Mason [2023] EWHC 51 (Ch)*. In determining whether a guarantee had been properly executed as a deed, the High Court had to consider the proper interpretation of section 1(3)(a)(i) of the Law of Property (Miscellaneous Provisions) Act 1989, which provides that "*an instrument is validly executed as a deed by an individual if... (a) it is signed (i) by him in the presence of a witness who attests his signature...*". The High Court held that section 1(3)(a)(i) does not: (i) require a witness to attest in the signatory's presence; (ii) preclude a single witness attesting multiple signatures by a single signature of the witness; and (iii) prescribe any forms of wording for attestation. In addition, the Judge did not consider that section 1(3)(a)(i) includes a requirement that the witness's attestation must be contemporaneous with the signature attested. However, even if it did, the Judge noted that "contemporaneous" did not mean "simultaneous" with the signatories signing. As such this requirement would be satisfied by the witness attesting on the same day – the Judge did not explore the outer boundary of "contemporaneous".
- (b) *MetalNRG plc v (1) BritENERGY Holdings LLP (2) Pierpaolo Rocco (3) BritNRG Limited [2022] EWHC 2528 (Ch)*. On an application for summary judgment in respect of a claim under the substantial property transaction provisions in section 190 CA 2006, the High Court held that a conditional share purchase agreement and a conditional share option agreement were arrangements under which the company was to acquire a substantial non-cash asset for the purposes of section 190. The High Court held that section 190 applies to conditional agreements (and not just conditional agreements where there is a high degree of certainty that the condition will be fulfilled and the acquisition will take place, as was argued by the defendants) and that the share option agreement created a right over shares which amounted to an acquisition of a non-cash asset within the meaning set out in section 1163 CA 2006. The High Court also held that, on the facts, the agreements should be considered as one composite arrangement, which was a key issue when determining whether the value of the right acquired under the share option agreement met the "substantial" threshold set out in section 191 CA 2006.
- (c) *Drax Smart Generation Holdco Limited v Scottish Power Retail Holdings Limited [2023] EWHC 412 (Comm)*. The High Court granted summary

judgment dismissing a buyer's warranty claims because its notice of claim failed to satisfy the requirements of the relevant notification clause in the SPA. The High Court found that, where damages are claimed, a requirement to provide "*reasonable detail of the nature of the claim*" requires the buyer to state how loss is alleged to have been suffered, not merely to identify (as the buyer had) that the claim is a claim in contract, for breaches of specific provisions, that it relates to breaches arising out of the relevant facts and a statement of the remedy (i.e. damages). Further, in order to satisfy the requirement to state in reasonable detail "*the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered)*", the buyer would have had to explain that the calculation of its loss was the difference between the warranted value of the shares in the target company, and the actual value of the shares, and either state those two values, or otherwise explain the basis on which a figure had been arrived at for the difference. Instead, the buyer's notice of claim merely identified particular heads and items of loss which the target company would suffer and for which the buyer bore a liability, rather than set out a loss suffered directly by the buyer or by way of reflective loss of reduction in the value of the buyer's shareholding in the target company.

- (d) *Musst Holdings Limited v (1) Astra Asset Management UK Limited (2) Astra Asset Management LLP [2023] EWCA Civ 128*. In a dispute over whether an agreement had been novated (with the 'new party' arguing that the agreement had not been effectively novated), the Court of Appeal found that a clause providing that "*neither party shall assign, transfer, mortgage, charge, subcontract, or deal in any other manner with any of its rights and obligations under this Agreement without the prior written consent of the other party*" was relevant to the purported novation, observing that arguably what occurred in this case could be construed as some form of attempted dealing by the original party when it agreed with the new party that the latter should take over its role and thereafter dropped out of the picture. However, the Court of Appeal found that it was clearly open to the continuing party to waive the requirement for prior consent and instead provide consent after that dealing occurred. By reference to existing case law, the Court of Appeal also agreed that the High Court judge was entitled to conclude that there was an estoppel by convention as an alternative to a contractual novation on the basis that the parties had acted on the common assumption that the agreement had been novated and that this assumption had 'crossed the line' (i.e., the party seeking to rely on an estoppel must know that the person against whom the estoppel is raised shares the common assumption). There was also conveyance to the continuing party of an expectation of reliance, actual reliance and the necessary element of unconscionability for the new party to deny that there was a novation (or at least that it had taken on the original party's liabilities).
- (e) *(1) Ventura Capital GP Limited (Acting for and on behalf of Ventura Capital LP Fund IV) (2) Ventura Capital GP Limited (Acting for and on behalf of Ventura Capital MG1 LP Fund) v DnaNudge Limited [2023] EWHC 437 (Ch)*. The High Court held that the conversion of preferred shares into ordinary shares pursuant to a provision of the company's articles of association, which provided for their automatic conversion on notice in writing from an investor majority (constituted by the ordinary shareholders), was invalid, void and of no effect.

The High Court held that the conversion of preferred shares into ordinary shares constituted a variation or abrogation of the rights attached to the preferred shares and, therefore, the company should have obtained the consent of the affected class of shareholders in order to vary or abrogate their class rights, as required under a separate article that required written class consent for a variation or abrogation of class rights.

6. **Any other business**

6.1 *FCA request for secondees.* A reminder that the FCA is looking for secondees for legal and policy advisor roles.

6.2 *Engagement with Ministry of Justice.* The Chair of the CLLS, Colin Passmore, has emailed all Senior Partners in CLLS Corporate Member Firms regarding two opportunities to engage with the Ministry of Justice which has offered to support law firms in promoting UK legal services in overseas markets.

17 May 2023