CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Minutes for the meeting held at 12.45 pm on 23 April 2025

at the offices of Travers Smith LLP and also by Teams.

Present: Sarah Smith (Baker & McKenzie LLP) (Chairman) – in person
Penny Angell (Hogan Lovells International LLP) – in person
Edward Fife (Slaughter and May) – in person
Nick May (Herbert Smith Freehills LLP) – in person
James Bresslaw (Simmons & Simmons LLP) – in person
Natalie Lewis (Travis Smith LLP) – in person
Flora McLean (Freshfield Bruckhaus Deringer LLP) – in person
Adam Pierce (Dentons UK and Middle East LLP) - in person
Alexander Shopov (Linklaters LLP) – in person
Presley Warner (Gibson, Dunn & Crutcher LLP) – in person
Avril Forbes (Clifford Chance LLP), as alternate for Matt Dunn – in person
Nick Swiss (Eversheds Sutherland (International) LLP) – by Teams
Emma Giddings ((Norton Rose Fulbright LLP) – by Teams

Attending: Kevin Hart (CLLS) (Legal Policy Analyst) – in person
Natalie Butchart (Baker & McKenzie LLP) (Secretary) – in person

1. **APOLOGIES FOR ABSENCE**

The Chairman opened the meeting and reported that apologies had been received from Nigel Ward (Ashurst LLP) and Simon Roberts (A&O Shearman Sterling LLP).

2. **WELCOME NEW COMMITTEE MEMBERS**

The Chairman welcomed Adam Pierce and Alexander Shopov, as new members, to the Committee.

3. **RESIGNATION AND ELECTION OF NEW COMMITTEE MEMBER(S)**

The Chairman reminded the Committee that at the last meeting Simon Roberts had notified the Committee of his intention to resign from the Committee after this meeting and that an advertisement for the position on the Committee had been posted on the CLLS website.

The Chairman reported that an application had been received from Fiona Fitzgerald (A&O Shearman Sterling LLP). A copy of this application was provided by email to all members of the Committee for consideration ahead of the meeting. Having reviewed the application of Fiona Fitzgerald the Chairman recommended her appointment to the Committee and asked if there were any objections to this appointment. No objections were raised and the appointment of Fiona Fitzgerald to the Committee was confirmed.

The Chairman reported that one other application had been received, but from a person who did not meet the eligibility criteria for membership of the CLLS Specialist Committees, as specified in the Procedures for Specialist Committees and Guidelines for Specialist Committee Chairs, published on the CLLS's website. As a consequence, this application could not be considered.

4. **APPROVAL OF MINUTES**

The minutes of the last meeting, held on 15 January 2025, were approved.

5. **DIGITAL ASSETS (S. SMITH)**

Further to the agreement reached at the meeting of the Committee in January 2025, a working group to continue the Committee's work on digital assets has been established, and the Chairman reported to this meeting that Natalie Lewis of Travers Smith LLP has agreed to lead this working group. The Chairman reminded the Committee that the remit of the working group will be on those aspects of digital assets that are relevant to the Committee's focus on financial law (noting that digital assets are relevant to many other areas of law). The Chairman requested that Committee members communicate to her, Natalie Lewis and Natalie Butchart the contact details of the member(s) of their firm who they wish to nominate to join this working group; and that a contact list of members nominated so far had been circulated to the Committee members ahead of this meeting. She reminded the Committee that the maximum number of members of the working group per firm represented on the Committee will be two people.

Natalie Lewis noted that there was no immediate work for the working group but envisaged that the first item on the working group's agenda would be the anticipated Law Commission Paper following the Call for Evidence it issued in February 2024 entitled "Digital assets and ETDs in private international law: which court, which law?", to which the Committee submitted a response on 16 May 2024.

CLLS Financial Law Committee_Respons

The Chairman further reported that on 12 March 2025, Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice, delivered the keynote speech to the LawTech UK Conference. The speech highlighted three new initiatives on which the UKJT will be working:

- **control in relation to third category digital assets** - an expert group, led by Lord Justice Zacaroli, has been established to produce non-binding guidance on the legal concept of 'control' in relation to digital assets (noting that they are, by definition, intangible);
- **liability for harms caused by AI** – a fourth legal statement will be produced on this topic, with a particular eye on whether or not statutory intervention or underpinning is required. The focus will be on harms caused to third parties by the use of artificial intelligence and whether the existing English common law of torts can adequately respond; and
- **the international jurisdiction taskforce (IJT) –** the establishment of a taskforce bringing together legal thinkers in the digital space from the main private law jurisdictions around the world (those named by the Chancellor were New York law, English law, Singapore law, Dubai law, French law and German law) with a view to understanding how much common ground exists between their approaches to digital assets and digital trading.

The Chairman and Natalie Lewis also expect that these initiatives will be of interest to the newly established working group.

6. **FRISCHMANN V. VAXEAL HOLDINGS S.A. & ORS [2023] EWHC 2698 (CH) (M.DUNN)**

Avril Forbes reported that the final form note, prepared by a working group of the Committee on certain key issues raised by this case, had been tabled and approved by the CLLS Company Law Committee at their meeting held on 29 January 2025.

The final form note was then published on the Committee's page on the CLLS's website on 30 January 2025. It was also published on the websites of FromCounsel and Practical Law.

7. **CLLS GUIDE ON ENGLISH LAW OPINION LETTERS**

At the Committee's meeting in January 2025, it was agreed that a working group of Committee members should be formed to consider possible updates to the Guide.

The Chairman noted that she had sent an email to the Committee members asking them to send to her and Natalie Butchart the contact details of the member(s) of their firm who they wished to nominate to join this working group.

A contact list of members nominated so far had been circulated to the Committee ahead of the meeting. The Chairman noted that the list was not closed and members could still make further nominations should they wish to.

8. **REPORT OF THE UK INDEPENDENT EXPERT PANEL ON CORPORATE RE-DOMICILIATION**

The Chairman reminded the Committee that the Department for Business and Trade (DBT) had published a Report of the UK Independent Expert Panel on Corporate Re-Domiciliation on 14 October 2024; and that in a DBT press release attached to the Report had indicated that the Government intends to consult in due course on the details of the proposed regime for re-domiciled entities.

At the last Committee meeting, the Chairman advised that the Committee should consider responding to any such consultation, including in conjunction with other CLLS specialist committees.

The Chairman reported that the Government had not yet published details of the consultation but that the Committee continued to retain a watching brief on this item.

9. **UPDATES/CURRENT STATUS**

9.1 **National Security and Investment Act 2021 (P. ANGELL)**

Penny Angell reminded the Committee that in December 2024, the UK Government published a report on the National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021 and that some opaque language had been included in that report indicating that the Government would be considering some further small changes. However, her interpretation was that these would be in regards to the definition of the sectors covered by the Act. There was no reference to further guidance being provided on any of the issues previously raised by this Committee, for example, exempting historic transactions and delaying the trigger for notification to the exercise of voting rights rather than acquiring the right to exercise votes.

Since the last meeting, Penny had consulted with the other members of the Committee working group on this matter and reported that there was agreement that there would be no real appetite from the Government to reopen a conversation on these points.

At this point the Chairman reported that Colin Passmore had met with the Solicitor General at a roundtable meeting at which she had requested that each of the specialist CLLS Committees provided a short list of issues that they would wish to table at a meeting with the Solicitor General. It was noted that the Committee's continued issues with the Act might be an item for that list. This matter would be considered further alongside other potential issues.

9.2 **CLLS ESG COMMITTEE (E. GIDDINGS)**

Emma Giddings, who had coordinated the response to the UK Green Taxonomy Consultation on behalf of the CLLS ESG Committee and in conjunction with the CLLS Environment Committee, reported that the response had been submitted on 6 February 2025.

UK Green Taxonomy Consulta

9.3 **CLLS AI COMMITTEE (P. WARNER)**

Presley Warner reported that the agreed focus of the CLLS AI Committee was to consider AI legislation in the context of how it affects the business practices of law firms.

10. **ANY OTHER BUSINESS AND CLOSE**

10.1 **Macdonald Hotels Ltd and another v Bank of Scotland plc [2025] EWHC 32 (Comm)**

This High Court considered several interesting issues in this case, including whether a Braganza-style term should be implied into a lender's decision to withhold consent to the disposal of assets and the nature and legal effect of a prohibition on assignment where the 'assignor' may have ceased to be an "Obligor"/group member. However, the issue that has generated the most discussion arose from *obiter dicta* of the judge regarding the status of a document (in this case an LMA-style Facility Agreement), as a deed or simple agreement, where that document was executed as a simple agreement by one party and as a deed by the other, and included a statement that the party that had executed it as a deed intended it to be and delivered it as a deed. The judge's view was that since, there was a failure by the Finance Parties to show an intention that the Facility Agreement should be a deed, it did not "pass" the first requirement in section 1.2(a) of the Law of Property (Miscellaneous Provision) Act 1989, which states that

"An instrument shall not be a deed unless—

it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)"

The Committee discussed whether the issues raised by the comments of the judge in this case, with respect both to the requirements for the valid execution of a deed and the relevance of Law Commission working papers to the construction of statutory provisions considered by the Law Commission, warranted the issuance of a paper by the Committee. Avril Forbes noted that she would be attending a meeting with the FMLC the morning after this meeting and would be willing to ask whether that body would be interested in co-authoring such a paper should the Committee agree that one was necessary. Members of the Committee noted that potential issues raised by the *obiter* remarks in this case were also being discussed by the Loan Market Association (LMA), including in the context of its template Intercreditor Agreement.

Postscript: Avril Forbes reported back to the Chairman that the FMLC did not intend to take up this case and deferred to this Committee as to whether a note would be helpful to practitioners. The Chairman followed up with the Committee's members, who confirmed their support for this Committee to produce a note. A working group has been established to this end and Avril Forbes of Clifford Chance LLP has kindly offered to prepare a first draft for review by the working group.

10.2 **Natwest Markets NV and another v CMIS Nederland BV and another [2025] EWHC 37 (Comm)**

In this case the High Court considered two key issues (i) the distinction between a guarantee and an indemnity; and (ii) the question of when the underlying debt was considered to be due.

The claimants entered into swap agreements with several special purpose vehicle (SPV) companies established by the defendants in connection with a mortgage receivables securitisation. The claimants and the defendants entered into separate agreements, each entitled "Deed of Indemnity", whereby the defendants covenanted to pay the claimants certain amounts under the swaps in the event the SPV issuers failed to pay these amounts when due. When the claimants sought payment from the defendants, the defendants argued that:

- the SPVs had exercised their right under the swap agreements to *defer payment*; therefore, the relevant amounts were *not due or payable*; and
- as the Deeds of Indemnity constituted guarantees rather than true indemnities, the *principle of co-extensiveness applied*. Consequently, no liability attached to the defendants unless and until the SPVs failed to pay the relevant amounts on the deferred payment date.

The Court rejected the defendants' arguments and found in favour of the claimants holding that:

- the Deeds of Indemnity did constitute indemnities and not guarantees. In reaching this conclusion the Court considered the title of the documents, the language used and the fact that they had been prepared by skilled professionals who understood the implications of the language; and
- the amounts claimed by the claimants were 'due'. The Court considered that the word 'due' in the context of the documentation involved was used to refer to sums which had accrued due creating an obligation in debt, the fact that the payment of the accrued amount had been deferred did not affect the accrual of the debt or the fact that the debt was owed.

The case is a useful reminder of the difference, at common law, between the concept of a debt being "due" and of a debt being "payable", the judgment expressly noting (in paragraph 93 of the judgement) that, "There is a well-recognised distinction in English law between the date on which a debt accrues (i.e. is due) and the date upon which a debt is payable. Although the two dates may often coincide, they are conceptually distinct…". The judgement also noted, among other things, that this distinction is reflected in the drafting of the standard form ISDA Master Agreement.

10.3 **Società Italiana Lastre SpA (SIL) v Agora SARL** Case C 537/23 ECLI:EU:C:2025:120

This ECJ case concerned a dispute between French and Italian parties where the French party brought proceedings in France in breach of an asymmetric jurisdiction clause in favour of the Italian courts, but allowing the Italian party only to commence actions in "another competent court in Italy or abroad".

It was decided that (a) the lawfulness of asymmetric jurisdiction clauses should be evaluated under the Brussels Regulation (Regulation (EU) No. 2015 of 2012) (and not applicable national law) and (b) under the Brussels Regulation an asymmetric jurisdiction clause is acceptable provided that the clause identifies objective factors enabling any court seised to determine whether it has jurisdiction. A clause referring to "another competent court in Italy or abroad" met these requirements. However, the ECJ went on to limit its recognition of the validity of asymmetric clauses to those that can be interpreted to limit competent courts to the courts of EU Member States or Members of the Lugano Convention.

It was noted that a number of firms represented on the Committee were discussing the potential implications of this decision for the drafting of jurisdiction clauses with their European colleagues.

Postscript: On 1 July 2025, the UK formally acceded to the 2019 Hague Convention which provides a reciprocal recognition framework to facilitate and enforce certain judgements handed down by courts of contracting states, including in the EU. In particular, it affords recognition in cases where the parties to a dispute have included a non-exclusive or asymmetric jurisdiction clause in the documentation.

11. **NEXT MEETING**

The Committee was reminded that the next meeting will be held at 12:45 pm on 16 July 2025 at the offices of Clifford Chance LLP.

There being no further business, the meeting closed.