

**CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE**

**Minutes for the meeting held at 12.45pm on 11 October 2023
at the offices of Sullivan & Cromwell LLP, 1 New Fetter Lane, London, EC4A 1AN and also
by Teams**

Present: Sarah Smith (Baker & McKenzie LLP) (Chair) – in person
Presley Warner (Sullivan & Cromwell LLP) – in person
Emma Giddings (Norton Rose Fulbright LLP) – in person
Penny Angell (Hogan Lovells International LLP) – in person
Nick Swiss (Eversheds Sutherland (International) LLP) – in person
Matt Dunn (Clifford Chance LLP) – in person
Edward Fife (Slaughter and May) – in person
David Ereira (Paul Hastings (Europe) LLP) – in person
Jeremy Stokeld (Linklaters LLP) – in person
Nigel Ward (Ashurst LLP) – in person
Flora McLean (Freshfields Bruckhaus Deringer LLP) – by Teams
Simon Roberts (Allen & Overy LLP) – by Teams
James Bresslaw (Simmons & Simmons LLP) – by Teams
Jake Jackaman (Hebert Smith Freehills LLP) – by Teams

Attending: Natalie Butchart (Baker & McKenzie LLP) (Secretary) – in person

1. APOLOGIES FOR ABSENCE, MINUTES OF LAST MEETING, PROPOSED DATES FOR MEETINGS IN 2024 AND CLLS UPDATE

1.1 Apologies for absence

The Chair opened the meeting and reported that apologies had been received from Mark Evans (Travers Smith LLP).

1.2 Minutes of the last meeting

The minutes of the last meeting, held on 12 July 2023, were approved.

1.3 Proposed dates for Committee meetings in 2024

The Chair asked the representatives from the relevant host firms to confirm that the following dates remained acceptable for the Committee meetings to be held in 2024:

- 16 January – Paul Hastings (Europe) LLP
- 17 April – Baker & McKenzie LLP
- 10 July – Norton Rose Fulbright LLP
- 16 October – Hogan Lovells International LLP

1.4 Update on certain CLLS matters

The Chair reported that the CLLS had announced an initiative to have a member of the main CLLS Committee attend the meetings of each specialist Committee in order to observe their work. The Chair had been contacted by Kevin Hart of the CLLS who had suggested Laura Uberoi, Senior Counsel at Macfarlanes LLP, attend the meetings of this Committee in that capacity.

The Chair reported that the CLLS was in the process of forming a new specialist Committee to focus on AI and that it would be chaired by Minesh Tanna of Simmons & Simmons LLP. Anyone interested in joining this new Committee should contact Kevin Hart. Presley Warner noted his interest in joining.

The Chair reported that the CLLS was also planning to revive the IP Law Committee.

The Chair reported that the CLLS was launching a new website.

2. DIGITAL ASSETS (M. EVANS, D. LIVINGSTON, S. SMITH)

It was reported that in September 2023, Dorothy Livingston attended a UK Finance roundtable meeting with the Law Commission and spoke about the remaining uncertainties related to taking security over digital assets and the importance of the Law Commission's forthcoming work on Private International Law issues to resolving these difficulties.

It was noted that a representative of a central counterparty, who also attended the meeting, had approached a member of the Committee to express his concerns on the interaction of issues raised in regard to the Law Commission's Final Report on Digital Assets and the proposals on the abolition of certificated securities, which are the subject of a separate consultation by the Digitalisation Taskforce (refer to item 3 of this Agenda for further details).

It was reported that the Chair, Mark Evans and Dorothy Livingston, with help from Richard Calnan of Norton Rose Fulbright, had held discussions with an academic who holds similar concerns to those of the Committee with respect to the Law Commission's Final Report, which has resulted in an article that is scheduled to be published in several academic journals in January 2024.

It was noted that the Committee has also been approached by the head of Infrastructure & Exchanges – MI Capital Markets, Supervision, Policy & Competition – Markets at the FCA and a call has been scheduled for later in October 2023.

Postscript: The call took place on 2 November 2023 with the Chair, Mark Evans and Dorothy Livingston in attendance and Helen Boyd from the FCA leading the call. A number of points were put forwards for the FCA to consider in the context of its various regulatory roles. The FCA has taken all of these points away for consideration.

It was agreed that the Committee should continue to be involved in any ongoing work in this area.

3. DIGITALISATION TASKFORCE INTERIM REPORT (M. EVANS, S. SMITH)

It was reported that on 10 July 2023, the Digitalisation Taskforce published an [interim report](#) setting out a number of potential recommendations and questions for industry to consider. On 25 September 2023, the Company Law Committee of the CLLS, the Financial Law Committee of the CLLS and the Company Law Committee of The Law Society provided their joint response to the Digitalisation Taskforce Interim Report. Members of this Committee who contributed to the joint response were James Bresslaw, Matt Dunn, Mark Evans, Emma Giddings, Jeremy Stokeld and Sarah Smith.



Digitisation Interim
Report - CLLS_LS Res

Keep a watching brief.

4. **FINANCIAL SERVICES AND MARKETS ACT – IMPLEMENTATION OF THE CENTRAL COUNTERPARTIES (CCP) RESOLUTION REGIME, CCP RESOLUTION LIAISON PANEL (M. EVANS; DELEGATE: PETER HUGHES)**

It was reported that Peter Hughes of Travers Smith LLP had been contacted for an update on this item and had confirmed that there was nothing further to report since the last Committee meeting.

5. **PROSPECTUS REGIME (E. FIFE)**

It was reported that Matt Dunn has spoken with those working with ICMA on its response to the consultation on Engagement Paper 4 and their view was that the revised final draft prospectus regime legislation largely addresses the concerns raised by ICMA, LMA, CLLS and others. ICMA did provide technical comments (attached below) and other organisations, for example City UK, chose to rely on this response rather than providing their own.



ICMA published
letter - 21 Aug - HM

Keep a watching brief.

6. **NATIONAL SECURITY AND INVESTMENT ACT 2021 (D. LIVINGSTON)**

It was reported that Dorothy Livingston had confirmed that there was nothing further to report since the last Committee meeting.

The issues raised previously with regards to this Act continue to be of concern.

The Chair asked for a volunteer from the members of the Committee to take over as chair of the working group on this Act following the retirement of Dorothy Livingston.

Postscript: Penny Angell has agreed to lead this workstream.

7. **LIBOR CESSATION AND RFR TRANSITION (M. DUNN)**

It was noted that following the statement by IOSCO that CSRs Ameribor and BSBY do not meet its 2013 Principles for Financial Benchmarks, Bloomberg had announced on 13 September that it is [consulting](#) on a plan to for the cessation of BSBY. It was further noted though that any cessation of these rates would have little impact on the European market as they are rarely used as reference benchmarks in European financing transactions.

Matt Dunn noted the ongoing work of the Loan Market Association on the transition of other IBORS, in particular the work they are doing in regards to ESTR fallbacks and Term ESTR.

8. **ESG (E. GIDDINGS)**

Emma Giddings (who also sits on the CLLS ESG Committee) reported that the CLLS ESG Committee is currently responding to the International Regulatory Strategy Group's consultation on the development of a draft code of conduct for ESG ratings and data providers; and that it had responded to the UK DBT consultation on non-financial reporting in the UK. The responses to that consultation so far indicate an overall desire to avoid multiple reporting standards - particularly where companies are subject to other non-financial reporting regimes such as the Corporate Sustainability Reporting Directive (which requires non-financial reporting by reference to the new European Sustainability Reporting Standards).

The question was raised whether there was anything that this Committee could sensibly discuss with regards to ESG issues. It was agreed that there was nothing specific at the moment but members would keep a watch for any relevant consultations papers that the Committee may wish to respond to.

9. **ELECTRONIC TRADE DOCUMENTS ACT**

It was noted that the Bill became an Act on 20 July 2023 when it received Royal Assent and came into force on 20 September 2023.

It was reported that the joint UNCITRAL/UNIDROIT draft Model Law on Warehouse Receipts was approved by the UNIDROIT Governing Council on 10 May 2023 for submission to intergovernmental deliberations at UNCITRAL, which are scheduled for the period of September 2023 to May 2024.

The Committee awaits the Law Commission's report on Digital Assets and Private International Law, which is expected to be delivered in 2024.

Keep watching brief.

10. **SECURITY: MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 (M EVANS)**

It was noted that there was nothing further to report on this matter since the last meeting.

11. **RING-FENCING AND PROPRIETARY TRADING INDEPENDENT TRADING REVIEW FINAL REPORT (D LIVINGSTON)**

It was reported that on 28 September 2023, H.M. Treasury published a [summary of responses](#) to its call for evidence (1 March 2023) in relation to the alignment of ring-fencing with the Resolution regime. The Treasury intends to publish its formal policy response to the call for evidence and any proposals for further reform in the first half of 2024.

On the same date H.M. Treasury also published a [consultation paper](#) on near-term reforms relating to the bank ring-fencing regime. The reforms are intended to improve the functionality of the ring-fencing regime and reflect recommendations made by the Independent Panel on Ring-fencing and Proprietary Trading in its final report published in March 2022. The consultation paper sets out specific proposals for implementing the near-term reforms, as well as new proposals to facilitate investment by ring-fenced banks (RFBs) in SMEs. H.M. Treasury has also published a draft version of the statutory instrument that would make the relevant amendments to the Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014 (RBCAO) and the Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 (EAPO): the [Financial Services and Markets Act 2000 \(Ring-fenced Bodies, Core Activities, Excluded Activities and Prohibitions\) \(Amendment\) Order 2023](#). The deadline for responses to the consultation is 26 November 2023, with plans to lay secondary legislation implementing near-term reforms in Parliament in early 2024.

Further on the same date the PRA issued a [consultation paper](#) setting out proposals relating to the revisions to the RBCAO and the EAPO that would enable an RFB to establish branches and subsidiaries outside the UK or the EEA. The deadline for responses is 27 November 2023 with plans for the implementation date for the amendments proposed to coincide as closely as possible with the removal of the legislative prohibition on non-EEA branches and subsidiaries. It expects this will occur in the first half of 2024.

Following the retirement of Dorothy Livingston from the Committee, it was agreed that David Ereira would take over as chair of the working group on this issue and would review the Treasury's and the PRA's consultation papers and advise whether the Committee should submit any responses to them.

Postscript: It was agreed that the Committee would not make submissions with respect to either of the consultation papers.

12. **BREXIT (D LIVINGSTON / D EREIRA)**

There was nothing further to report on this matter since the last meeting.

It was noted that the outstanding issue was approval of the UK's application to re-join the Lugano Convention. No further progress has been made in this regard and it is not anticipated that it will in the short term.

13. ANY OTHER BUSINESS AND CLOSE

- The Chair noted that following the retirement of Dorothy Livingston there was a need to review the leadership of some of the workstreams and working groups and asked for volunteers. This issue is also addressed under some of the specific workstreams reported in these Minutes.
- Members of the Committee were invited to suggest new agenda items for the Committee to consider ahead of the next meeting by emailing them to the Chair and Secretary.
- It was reported that on 10 October 2023 the Financial Stability Board had published its [preliminary lessons learnt for resolution following the 2023 bank failures](#). It was agreed that David Ereira would lead a review of the findings.
- It was noted that in September 2023 IOSCO has published a [consultation report](#) on Leveraged Loans and CLOs Good Practices for Consideration.

IOSCO notes that the consultation report intends to:

- provide an overview of the Leveraged Loans (LL) and CLO markets and their evolution since the GFC;
- explain why the vulnerabilities identified in the LL and CLO markets could impact IOSCO's objectives of (i) protecting investors, (ii) ensuring that markets are fair, efficient and transparent, and (iii) reducing systemic risk; and
- describes in detail proposed good practices grouped into five themes: i) origination and refinancing based on a sound business premise; ii) EBITDA and loan documentation transparency; iii) strengthening alignment of interest from loan origination to end investors; iv) addressing interests of different market participants throughout the intermediation chain; and v) disclosure of information on an ongoing basis.

IOSCO requested responses to this consultation report by 15 December 2023.

Matt Dunn agreed to speak with his colleagues who work with the Loan Market Association (LMA) and report back to the Committee on whether or not the LMA plan to respond to the consultation. This Committee will then give consideration to whether it should provide a response.

Postscript: Penny Angell later reported to the Chair that given that it had been confirmed that the LMA would be preparing a coordinated industry-led response and that the points raised in the report were almost entirely commercial, and that as they did not give rise to any areas of legal uncertainty, this Committee should not submit a response.

- ***Galapagos Bidco SARL v Kebekus & Ors [2023] EWHC 1931 (Ch)***

The High Court found in favour of the Galapagos Group and upheld that the Group's restructuring concluded in 2019, via reliance on the Distressed Disposals regime in its Intercreditor Agreement, was valid.

This is considered to be an important and positive judgement for the industry.

- ***CPF ONE Ltd and another company v OSF (UK) II Ltd and another company [2023] EWHC 2102 (Ch)***

The High Court summary judgment in this case dismissed the claims of a junior creditor that the senior creditor and the security trustee had acted in breach of various fiduciary and equitable duties in accepting a settlement with the borrower and releasing security that left the junior creditor with no recovery.

- ***R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others***

The Supreme Court decision in this case concluded that the Litigation Funding Agreement (LFA) in question, pursuant to which the funder was to receive a percentage of any awarded damages recovered by the funded parties, constituted a Damages Based Agreement (DBA) within the statutory definition of that term (s. 58AA Courts and Legal Services Act 1990 – (CLSA 1990)). Subsequent commentary has indicated that parties to existing similar agreements are amending the terms to ensure that they are compliant with s.58AA of the CLSA 1990 and the Damages-Based Agreements Regulations 2013, otherwise they risk being unenforceable. An alternative would be to make the reward to the funder a multiple of the amount invested so as not to constitute a DBA.

The Department for Business and Trade (DBT) has issued a statement in response to the Supreme Court's decision in this case as follows: "The Department is aware of the Supreme Court decision in PACCAR and is looking at all available options to bring clarity to all interested parties."

14. **NEXT MEETING**

- 14.1 The Committee was reminded that the next meeting will be held on 16 January 2024 at the offices of Paul Hastings (Europe) LLP.
- 14.2 There being no further business, the meeting closed.