

CITY OF LONDON LAW SOCIETY
FINANCIAL LAW COMMITTEE
Minutes for the meeting held on 26 April 2023 by Teams

Present: Dorothy Livingston (Herbert Smith Freehills LLP) (Chair)
Penny Angell (Hogan Lovells LLP)
James Bresslaw (Simmons & Simmons LLP)
Charles Cochrane (Clifford Chance LLP)
Edward Fife (Slaughter and May)
Emma Giddings (Norton Rose Fulbright LLP)
Flora McLean (Freshfields Bruckhaus Deringer LLP)
Simon Roberts (Allen Overy LLP)
Sarah Smith (Baker & McKenzie LLP)
Jeremy Stokeld (Linklaters LLP)
Presley Warner (Sullivan & Cromwell LLP)

In attendance: Rachael MacKay (Herbert Smith Freehills LLP) (Secretary)

1. APOLOGIES FOR ABSENCE, MINUTES OF LAST MEETING, COMMITTEE MEMBERSHIP AND MATTERS ARISING

1.1 Apologies for absence

The Chair opened the meeting and reported that apologies had been received from David Ereira (Paul Hastings (Europe) LLP), Nick Swiss (Eversheds LLP), Nigel Ward (Ashurst LLP) and Mark Evans (Travers Smith LLP).

1.2 Minutes of the last meeting

The minutes of the last meeting held on 11 January 2023 were approved.

1.3 Committee membership

The Chair reminded the Committee that applications to join the Committee had been received. The Committee discussed the applications and it was agreed the Chairman would go round the members when they had an opportunity to think further about the discussion and the shape of the committee going forward.

Afternote: Matt Dunn (Clifford Chance LLP) and Jake Jackaman (Herbert Smith Freehills LLP) were confirmed as members.

1.4 Retirement of Chair and Vice Chairs, and election of new Chair and Vice-Chairs

As announced at the last meeting, after 25 years as chair, Dorothy Livingston, confirmed her intention to retire as Chair and as a member of the Committee, with effect from 30 April 2023.

In addition, it was announced that Charles Cochrane would be retiring as Vice-Chair and as a member of the Committee, and that Penny Angell would be retiring as Vice-Chair, also with effect from 30 April 2023. The Chair thanked both Charles and Penny for their support and contributions to the Committee.

The Chair then moved to the election of a new Chair and Vice-Chairs from among the continuing Committee members. Accordingly, it was proposed and agreed that, with effect from 1 May 2023, Sarah Smith would become the new Chair of the Committee and Emma Giddings and Edward Fife would become the new Vice-Chairs. The Chair wished the new Chair and Vice-Chairs every success in their roles.

The Chair and Committee also expressed their thanks to Rachael MacKay (Secretary) who would also be standing down with effect from 30 April 2023.

2. LIBOR CESSATION AND RFR TRANSITION

In relation to USD LIBOR, it was noted that the FCA had made an announcement on 3 April 2023 that:

- the FCA intends that publication of 1, 3 and 6 month synthetic USD LIBOR settings will cease on 30 September 2024;
- the IBA will be required to calculate these settings using the relevant CME Term SOFR Reference Rate plus the respective ISDA fixed spread adjustment;
- use of these USD LIBOR settings will be permitted in all legacy contracts except cleared derivatives; and
- from 1 July 2023, any new use of the synthetic USD LIBOR settings will not be permitted (Benchmarks Regulation).

The chair of the working party also reported that the regulators were trying to make clear that there will be an aggressive stop to USD synthetic LIBOR, so market participants should not delay in transitioning.

The chair of the working party also reported that, on 21 April, the ARRC had published an updated summary and limited refinement of its Term SOFR Scope of Use recommendations which now recognised the ability of end users to enter into Term SOFR-SOFR basis swaps (but not other Term SOFR derivatives) in a wider set of circumstances, even when they do not hold Term SOFR cash assets that they are seeking to hedge.

Afternote: FSB [statement](#) (27 April 2023) issued to encourage final preparations for USD LIBOR transition.

3. COMPETITION: NATIONAL SECURITY AND INVESTMENT ACT 2021

There was nothing to report on the National Security and Investment Act 2021. Efforts to clarify uncertainties arising from the Act had been held up by changes in Government last year. Most recently, it was reported that ultimate responsibility for the Act had been transferred to the Cabinet Office Minister (also the Deputy PM) so it was very much hoped that renewed efforts would achieve a more sensible approach based on the Committee's proposals and reduce the burden on lenders.

The Chair confirmed that she would be happy to continue chairing the working group on the Act until the end of the calendar year and would restart dialogue with DBEIS and the Cabinet Office.

4. ELECTRONIC SIGNATURES AND OTHER TECHNICAL DEVELOPMENTS

4.1 Electronic Signatures

It was reported that the Industry Working Group final report on Electronic Execution of Documents had been published in February. In summary, the report:

- Addresses challenges in using electronic signatures in cross-border transactions: includes recommendations for the UK to consider adopting the UNCITRAL Model Law on Electronic Signatures and notes ongoing need for education and reinforcement of positive aspects of e-signing (noting particular reluctance amongst financial institutions to insist on wet ink signings in certain transactions)
- Provides potential solutions to protect signatories to deeds from risk of fraud: highlights various protections for users which are or could be offered by e-signature platform providers eg time limits on signing and express power to reject a deed
- Recommends that consideration be given to whether e-signature platform providers should be certified and that minimum standards be introduced to bolster public confidence in, and integrity of, the e-signing experience and process.

The current uncertainty as regards the future status of the eIDAS Regulation on electronic identification and trust services for electronic transactions in the internal market as regards English law and the Retained EU Law (Revocation and Reform) Bill, was also noted (see also paragraph 8 (*Brexit*) below).

Afternote: it is now clear that the eIDAS Regulation is not one of the 600 pieces of retained EU law that will be repealed at the end of 2023.

4.2 Digital assets etc

The Committee noted the following developments in this area:

4.2.1 Digital assets

The Committee's response to the Law Commission Consultation Paper (no 256) on Digital assets (published 28 July 2022) had been submitted on 4 November 2022 and was available on the CLLS website. The Law Commission's recommendations were awaited.

UNIDROIT had published a draft consultation: Principles on Digital Assets and Private Law (10 January 2023). The working group decided not to put in a formal response, having endorsed the proposals in its comments on the Electronic Trade Documents Bill (see below).

4.2.2 Digital securities

Following a consultation: The issuance and transfer of digital securities under English private law (1 August 2022), to which the Committee had responded, the UK Jurisdictional Taskforce had published a second legal statement on the issuance and transfer of digital securities in February 2023.

The statement concluded that there is: "*no difficulty in principle in Digital Securities (whether debt, proprietary or equity securities) being issued, by UK or foreign companies, and governed by English law, using a blockchain or DLT-based system*", nor in a contractual security being stapled to a digital token, nor in using a blockchain as a register of Digital Securities (with the possible exception – subject to system architectures – of a register of members).

The statement does not amend English law, but explains how it applies in this context. It is intended to be persuasive eg to stakeholders, courts and regulators.

There remain uncertainties in relation to the market practice of using paper transfer forms (even though electronic forms are acceptable to HMRC for stamping) and related to aspects of the conflict of laws.

4.2.3 Electronic Trade Documents Bill

On the Electronic Trade Documents Bill, it was reported that the Chairman had given evidence to the Special Committee of the House of Lords and proposed changes to address an important lacuna in the Bill which leaves legal uncertainty as to how the effect of English law rules related to the location of possessory items will be addressed in relation to electronic trade documents and how this might affect validity or applicable law of events such as creation of security, presentment and transfer of digital trade documents. The Special Committee decided to leave this to be dealt with in the next phase of the Law Commission's work which will look at Digital Assets and Private International Law and which will report in 2024.

The Bill has been sent to the Commons in substantially unchanged form and seems likely to be passed in the current Parliamentary session.

4.2.4 **General.**

The Chair expressed her gratitude to Mark Evans for his input on digital asset issues.

The Chairman confirmed her willingness to continue to chair the working group on digital assets, until the end of the calendar year and would consider continued involvement in the Law Commission's work on conflict of laws.

5. **SECURITY: MOVEABLE TRANSACTIONS (SCOTLAND) BILL**

The Committee was reminded that this Bill had been introduced by the Scottish Parliament in May 2022 and proposes reforms to Scots law relating to the transfer of rights and security over moveable property, with the aim of making the process more efficient, less expensive, less complicated and more up to date.

Afternote: The Bill was passed on 4th May 2023, but various pieces of Westminster Legislation will need to be passed related to eg charges over securities before the Bill can be brought into force and the new Register begun.

6. **ESG**

Emma Giddings (working group chair) confirmed that the new CLLS ESG Committee was now up and running.

[The intended scope of the Committee had yet to be finalised but it appeared that, initially at least, the focus would be on ESG matters affecting the profession.

New Guidance on the Impact of Climate Change on Solicitors recently published by the Law Society was also noted.

It appeared there would be an on-going role for this Committee where ESG issues affected lending transactions.

7. **RING-FENCING AND RESOLUTION REGIMES**

Further to the announcement by the Government of the Edinburgh Reforms (in December 2022), it was noted that a Call for Evidence on Aligning the ring-fencing and resolution regime had recently been published (March 2023) with the aim of seeking views on:

- the ongoing benefits that ring-fencing provides to financial stability not found elsewhere in the regulatory framework; and
- what steps could be taken to better align the regimes without losing financial stability benefits or over burdening firms with new, alternative, regulatory requirements.

Also, as mentioned in the afternote to the January 2023 Committee minutes, the Committee was reminded that Sir John Vickers, the author of the concept of ring-fencing, had been vigorously defending the retention of strict ring-fencing rules following the recent failures of several US banks and the takeover of Credit Suisse, and it is possible that these developments would slow or limit the reform process, including the adoption of technical clarifications which had been proposed by the FMLC last year (2022).

The Committee would continue to monitor developments.

8. **BREXIT – RETAINED EU LAW (REVOCATION AND REFORM) BILL**

It was noted that the Bill is now in the Report Stage in the House of Lords and there appear to be many amendments outstanding. It remains to be seen whether there will be negotiated changes, acceptance of the Bill by the Lords in substantially its current form or a "ping-pong" Parliamentary process.

It was also noted that, in its current form, the Bill could lead to the loss of the retained Rome 1 and Rome 2 Regulations and the eIDAS Regulation on identification and trust services for electronic transactions, without replacement, as soon as the end of 2023,

which would be very unfortunate, and representations should be considered. The Chair indicated that she would be happy to keep the Committee apprised of developments.

Afternote: The Government made significant changes to the Bill, with the effect that only 600 identified pieces of retained EU law will be repealed at end 2023. These do not include the Rome I and Rome II Regulations or the eIDAS Regulation. The Bill with these changes incorporated, together with Lords amendments designed to improve Parliamentary scrutiny of statutory instruments replacing retained EU law (to be known as assimilated law after end 2023) and to prevent lowering of standards in environmental law, has returned to the Commons. Changes which will make the interpretation of retained EU law more legally uncertain remain part of the Bill and are likely to become law.

9. **NEXT MEETING**

The next meeting would be held on 12 July 2023 at the offices of Simmons & Simmons LLP.

10. **ANY OTHER BUSINESS AND CLOSE**

10.1 **Prospectus regime**

Illustrative Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023 – it was noted that the Committee had sent a letter dated 13 April 2023 to the Treasury explaining the Committee's concerns as to the unintended extension of the scope of these Regulations which could potentially include many financial products eg loans and OTC derivatives. (Letter is available on the CLLS website.)

10.2 **Case of note: *Avanti Communications Ltd, Re* [2023] EWHC 940 (Ch) (25 April 2023)**

Whilst the *Avanti* judgment had only just been released, the Committee's preliminary view was that this was a sensible pragmatic judgment about the characterisation of fixed vs floating charges.

10.3 **Final thanks**

Finally, on behalf of the Committee, the incoming Chair Sarah Smith gave final words of thanks to Dorothy Livingston remarking that she had been an exceptional Chair for a great many years and had made an extraordinary contribution to the Committee, the profession and the legal system, leaving extraordinarily big shoes to fill.