

C/M/S/ Cameron McKenna



The heavyweight

Comprehensive coverage of this month's
banking and insolvency law

May 2009

Looking forward

Developments scheduled for the month ahead

Date	Item
11 June 2009	Comments due to EC: consultation on new legal framework for intermediated securities
12 June 2009	Comments due to Land Registry: consultation on proposed amendments to rules relating to registration of charges created by overseas companies (Land Registration Rules 2003 (SI 2003/1417))
15 June 2009	The Financial Markets and Insolvency Regulations 2009 comes into force.
18 June 2009	Comments deadline on Turner Review and related Discussion Paper.
19 June 2009	The Short Selling and Bank Accounts Bill that would require banks to provide accounts for no charge while in credit, will be given a second reading.
30 June 2009	APACS require changes to consumer credit summary box.
July 2009	OFT to launch consultation on "irresponsible lending." Financial guidance in December 2009/January 2010.
10 July 2009	Comments on the issues and questions in HM Treasury's report on improving the resolution regime for failing investment banks
10 July 2009	Comments due on HMRC draft guidance on the new tax definition of Offshore Fund.
15 July 2009	Comments due on the EC's communication on stronger European financial supervision.
17 July 2009	End of ISDA consultation period for the Takeover Code Committee's consultation paper, PCP 2009/1 ("Extending the Code's disclosure regime").

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Aircraft finance

“Market disruption: banks share distress with airlines”

This article considers difficulties faced by banks active in the aviation industry in raising liquidity for their operations and how this is having a significant effect on aircraft financing transactions.

(P Ng: *Jane's Transport Finance*, 30.4.09, 25)

Bank Charges

Bank charges for unauthorised overdrafts

Abbey National plc v Office of Fair Trading [2009] EWCA Civ 116

Held that unauthorised overdrafts of current accounts were not part of the essential principles of the bargain between the bank and customer; thereby not exempting the banks from an assessment of fairness as governed by reg 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999.

The Court of Appeal dismissed the banks claims, having found the charges to be contingent and not bargained for by the customer in a sense which would exempt them from a fairness assessment.

To be fair

This article examines the chance, however slim, that the banks have of winning the overdraft bank charges case in the House of Lords. The author questions if the banks should continue running the risk and increasing legal expenses with their claim.

(F Blakeborough: *SJ*, 12.5.09, 6)

Banking Crisis

Dealing with the failure of the UK banks

Seventh Report of Treasury Select Committee Session 2008-09

A 120-page paper by the TSC that contains the following points:

Recommends brands be licensed

- The Financial Services Compensation Scheme is praised for its response to the failure of several UK banks. The TSC suggests that financial institutions must make clear to their customers if they are subsidiaries of other institutions where this is relevant in terms of deposit protection. Ideally, it would like to see each brand holding a separate banking licence.

Northern Rock's lending policy

- The paper welcomes the Government's decision to allow Northern Rock to expand lending. It asks the Government to set out how this change of policy would change the timescale over which the taxpayer loans to Northern Rock would be fully repaid and, in turn, the timescale over which a new ownership structure, whether by trade sale, privatisation or re-mutualisation, could be achieved.

Lloyds to blame for problems from merger with HBOS

- The TSC concludes "if the merger has had injurious consequences for Lloyds TSB, we consider that the responsibility for this lies primarily with the Lloyds Board".

Bank recapitalisation

- The TSC supports the decision to implement a recapitalisation programme, but is concerned about "the contradictions of the Government's objectives for the banking sector especially with regard to the part-nationalised banks. There is a pressing need for the Government to clarify its strategic objectives and priorities with respect to the banking sector.

Toxic Assets and the Asset Protection Scheme

- The TSC welcomes the approach taken in the Asset Protection Scheme, but is concerned about the need for greater clarity over the possible impact on the public purse. It urges the Government to complete the due diligence on assets in the scheme as quickly as possible. It recommends making public the proportion of assets, by value, in each category covered by the scheme, and to disclose as soon as possible the mechanism for determining and the projected timeline for the crystallisation of any losses. It asks whether more analysis should have been instituted by the regulators earlier to clarify the nature and value of assets on which banks were relying. It asks for clarity over whether the bank intends to introduce a bad bank

Bank Lending

- The TSC suggests that there is no clear picture on how the government efforts to encourage bank lending are working.

UKFI

- The TSC urges the Government to publish a strategy for UKFI addressing how it will use its control of the investee companies, and what role it envisages for UKFI in promoting change within the banking sector more generally, adding "we do not think it is in the national interest for UKFI to remain so enigmatic a

body" and recommends that HMT provides details of an exit strategy for the taxpayer's investment in the banking sector.

The future of the banking sector

- The TSC notes "We do not lightly dismiss the Governor of the Bank of England's instinct that a separation of retail from investment banking functions is "very attractive". We believe that this is a live issue which requires further debate, and one to which we will return. We acknowledge that the toxic shock that major financial institutions have been exposed to by securitisation is likely to result in changed business practices. We expect that one such change will see banks returning to the practice of keeping a greater portion of the loans they originate on their own balance sheets. But we also believe that a regulatory response may be required and recommend that the FSA coordinate efforts with its international counterparts to require that those undertaking securitisation retain a tranche of the commodities they trade. It raises concerns re OTC trading transparency.

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/416/416.pdf>

BBA's comment:

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=15902>

SEC Announces New Initiative to Identify and Assess Risks in Financial Markets

The Securities and Exchange Commission have announced a new effort to identify and assess risks in the financial markets by attracting seasoned industry professionals to the agency's Office of Risk Assessment.

<http://www.sec.gov/news/press/2009/2009-98.htm>
(SEC, 30/04/2009)

Creating a template for banking insolvency law reform after the collapse of Northern Rock: Part 1

This article examines the response of the UK Government to the collapse of Northern Rock and the subsequent financial crisis, tracing the legislative course which has culminated into The Banking Act 2009. The article also questions how far the drafters were concerned with internationally accepted policy objectives of insolvency legislation in the development of the Act.

(Roman Tomasic: *Insolvency Intelligence*, 05.09) 22(5), 65-70

The Banking Act 2009 (Commencement No.2) Order 2009 No 1296

Published on 21st May 2009 the Order will bring into force various sections of Part 7 (Miscellaneous) of the Banking Act 2009, including:

Section 238 of the Act, which confers a new statutory objective on the Bank of England (BoE) to contribute to protecting and enhancing the stability of the UK financial system.

The full text is available at:

http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091296_en.pdf

A sign of the times...

This article examines two cases as repercussions of the banking crisis.

- ▶ *Jefferies International Ltd v Landsbanki Islands HF*: Highlights the importance of understanding local insolvency legislation, as this debt claim became a jurisdictional stand-off.
- ▶ *Emerald Supplies Ltd & Anor v British Airways Plc*: An emphasis on more class actions.

Jonathan Cohen, 159, NLJ, 783 2009

HM Treasury publishes plans to strengthen resolution arrangements for investment banks

The proposals reflect the Government's initial idea of strengthening the ability to deal with the failure of a UK investment bank. Possibilities of how this could be done include; changes to market practice, regulation and insolvency law to make the process of insolvency more effective. This report is one of the package of initiatives aimed at renewing the financial services sector.

The full text is available at:

http://www.hm-treasury.gov.uk/d/consult_investmentbank110509.pdf

Banking Liaison Panel

The Treasury has established the Banking Liaison Panel as required under section 10 of the Banking Act 2009.

One function of the Panel is to provide advice to the Treasury on the impact of the special resolution regime established by the Act on financial markets. The Panel's advice represents the views of non-government stakeholders.

Members

Under section 10 of the Act, the Panel must include a member appointed by the Treasury, a member appointed by the Bank of England, a member appointed by the FSA, a member appointed by the scheme manager of the Financial Services Compensation Scheme, one or more persons who in the Treasury's opinion represent the interests of banks, one or more persons who in the Treasury's opinion have expertise in law relating to the financial systems of the United Kingdom, and one or more persons who in the Treasury's opinion have expertise in insolvency law and practice.

Industry members:

- Peter Beales, London Investment Banking Association (LIBA)
- Roger Brown, British Bankers Association (BBA)
- Catherine Burton, Association of Recovery Professionals (R3)/Richard Heis, R3 alternate
- Adrian Coles, Building Societies Association (BSA)/Jeremy Palmer, BSA alternate
- Dorothy Livingston, City of London Law Society (CLLS)
- Michael McKersie, Association of British Insurers (ABI)

- Ed Murray, International Swaps and Derivatives Association (ISDA)
- Guy Sears, Investment Management Association (IMA)
- Bill Tudor John, Financial Markets Law Committee (FMLC)/Joanna Perkins, FMLC alternate

Government members:

- Victoria Cleland, the Bank of England
- Alex Kuczynski, Financial Services Compensation Scheme (FSCS)/James Darbyshire, FSCS alternate
- Tom Huertas, Financial Services Authority (FSA)/Peter Smith, FSA alternate
- Stephen Leinster, the Insolvency Service (IS)/Graham Horne, IS alternate

Meetings and minutes

The Panel meets quarterly, and the Treasury will publish summaries of the minutes.

Advice

The Panel gives formal advice to the Treasury at its meetings which will be published.

European Commission approves UK subsidised interest rates scheme

Approved under Article 87(3)(b) of the EC Treaty, the scheme is in accordance with the Commission's temporary framework for state aid measures supporting access to finance in the current economic crisis which was adopted December 2008. The scheme allows national and local authorities to grant aid in the form of reduced interest rates on loans concluded by 31 December 2010. The proposal is aimed at firms experiencing financial difficulty as a result of the credit crisis therefore only applies to companies that were not in difficulties on 1 July 2008.

Financial Markets Law Committee raises concerns about Banking Act 2009

In a letter sent to the Banking Reform Team at HM Treasury the Committee raised the following concerns with regards to the Banking Act 2009:

- The Act potentially applies to insurance companies as well as banks
- The protection for netting and set-off arrangements under the The Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009 (Order) is insufficient in not covering every type of derivative transaction currently covered under master netting arrangements.
- The possibility of conflict between the Act and (1) the new insolvency rules proposed for investment banks (2) the planned amendments to the insolvency rules.

OFT refers Stagecoach's Preston Bus acquisition to Competition Commission

The Office of Fair Trading has referred the acquisition to the Competition Commission since, following the acquisition, Stagecoach has become the predominant provider of commercial bus services in this area.

The full text is available at:

<http://www.of.gov.uk/news/press/2009/62-09>

Competition

OFT and CC publish joint merger guidelines

The OFT and Competition Commission have issued draft joint guidelines on how they assess the competitive impact of mergers, and have called for comments on the document from interested parties.

<http://www.of.gov.uk/news/press/2009/49-09>

OFT, 30/04/2009

Consumer finance

The effect on the UK economy of the Consumer Credit Directive

This report considers the benefits of the Consumer Credit Directive for consumers in the UK, arguing that although "heavy touch" implementation could bring about additional benefits to consumers it may also impose significant extra costs on UK providers which "could push some of the high risk consumers toward more expensive or illegal loans".

<http://www.berr.gov.uk/files/file51406.pdf>

Consumer Credit (Advertisements) Regulations 2004 - FAQ

OFT has updated this document.

http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/oft746.pdf

A simple solution to debt? Cork revisited – again.

This article analyses the range of debt relief available through statute and repayment procedures as alternatives to personal bankruptcy. Examining the rise in consumer debt and the use of individual voluntary arrangements, the article compares the solutions available now to those proposed by the Cork Committee in 1982.

(Peter Joyce: *Insolvency Intelligence*, 05.09) 22(5) 71-73

Financial Ombudsman Service (FOS) publishes annual review of personal finance disputes

The report from the independent organisation reveals that during 2008/09 the ombudsman recorded a 34% rise in consumer complaints about mortgages, consumer credit and credit cards. Other results include half of all disputes relating to six of the UK's largest financial services groups and a three fold rise in claims about payment protection insurance.

Remarking on the results, Sir Christopher Kelly, Chairman of the FOS related the rise in complaints to the current economic climate, 'As businesses tighten their belts – and the credit crunch leads to increased financial difficulty for many consumers – we are gearing up to deal with further volatility in complaint volumes.'

<http://www.financial-ombudsman.org.uk/news/updates/annual-review-2009.html>

(FOS, 28/05/2009)

FSA and BCSB publish review of savings advertising

The FSA and BCSB jointly reviewed 116 promotions for cash savings accounts which appeared in the national media between December 2009 and March 2009. The review was intended to assess compliance with the principle that financial promotions must be clear, fair and not misleading. Generally the level of compliance was found to be high though there were some important failings; including promotions that were unclear about the level of the advertised bonus or reward; certain important information, including information on withdrawal restriction, was in the small print and promotions for regular savings accounts that did not include a worked example of AER.

The review is available at:

http://www.fsa.gov.uk/pages/Doing/Regulated/Pro/ thematic/fsa_bcsb.shtml

Contracts

Limitation periods – proposals for reform

A bill is to be published later this year which will propose a "primary" 3-year period for contract (and other) claims starting from, broadly, the date on which the claimant knows of the facts which give rise to the action and a "longstop" 10-year period starting from, broadly, the date of accrual of the cause of action.

The 'Limitation Bill' will be published in draft as part of the provisions of the Civil Law Reform Bill later this year (2009) for pre-legislative scrutiny. The draft Limitation Bill is expected to follow the terms of the draft Bill that was published by the Law Commission in 2001 following their consultation on reform of the Limitation Act 1980.

The 2001 report

[http://www.lawcom.gov.uk/docs/lc270\(2\).pdf](http://www.lawcom.gov.uk/docs/lc270(2).pdf)

Draft Limitation Bill

[http://www.lawcom.gov.uk/docs/lcr270bill\(1\).pdf](http://www.lawcom.gov.uk/docs/lcr270bill(1).pdf)

Executive summary

[http://www.lawcom.gov.uk/docs/lc270sum\(1\).pdf](http://www.lawcom.gov.uk/docs/lc270sum(1).pdf)

Taking security High Court decision

Bank of Scotland plc v (1) Constantine Makris (2) Ben O'Sullivan

Not yet reported ChD, 2009

The High Court found that conditions precedent to a loan not being met and the lender subsequently agreeing the loan to slightly different terms meant that the loan made on the second set of terms was a separate obligation rather than a variation of the original loan. This dismissed the claim that the guarantee had been discharged by a variation of the original loan as claimed by the guarantors. The cases serves as a useful reminder of the distinction between a variation of contract and a new obligation.

Credit cards

US interchange: time is right for a change

This article reflects the views of the author on a number of interchange issues that need resolving, and proposed legislative solutions to them.

Interchange fees involve a minimum charge set by card schemes as a proportion of each cross-border payment which a retailer's bank must pay to a purchaser's bank if it wishes to accept payments using the card scheme.

(J Hatcher: E.F.L &P, 4.09, 11) 09.19.020

Derivatives

OTC derivatives market activity in the second half of 2008

Report on OTC derivatives market activity in the second half of 2008

<http://www.bis.org/press/p090519.htm>

BIS Press Release 19 May 2009

ISDA on Takeover Code

ISDA is taking comments from its membership on the Takeover Code Committee's consultation paper, PCP 2009/1 ("Extending the Code's disclosure regime"). The consultation period expires on Friday, 17 July 2009.

US Treasury Proposes Regulatory Reform for Over-the-Counter Derivatives

Sonnenschein's report that on May 13, 2009, Treasury Secretary Timothy Geithner proposed a comprehensive regulatory framework for over-the-counter (OTC) derivative contracts.

The derivatives proposal is intended to achieve four principal objectives:

- preventing activities in the OTC derivatives markets from posing risk to the financial system;
- promoting the efficiency and transparency of the OTC derivatives markets;
- preventing market manipulation, fraud, and other market abuses;
- and ensuring that OTC derivatives are not marketed inappropriately to unsophisticated parties.

The proposal was met with cautious optimism by key industry trade organizations and received an enthusiastic response from congressional leaders whose committees have jurisdiction over derivatives.

http://www.sonnenschein.com/practice_areas/capital_markets/pub_detail.aspx?id=51587&type=E-Alerts

e-commerce

Customer-to-bank security: good practices guide

This European Payments Council report is to help financial institutions implement security controls in their e-banking services. It sets out best practice in relation to specific risk profiles and identifies security principles and guidelines to address the enhanced security challenges posed by e-banking.

<http://www.europeanpaymentscouncil.eu/documents/EPC397-08%20v1%201%20C2Bsecurity%20good%20practices%20guide.pdf>

(EPC397-08: European Payments Council, May 2009)

EU report identifies barriers to cross-border e-commerce

This article examines the recently released report by the European Commission identifying barriers to cross-border e-commerce and how the Commission is planning to address them.

(M Farrell: E-commerce law and policy, 04.09, 03)

Employment

Equality Bill

The Government introduced the Equality Bill to the House of Commons on 27 April 2009.

The Bill is to strengthen existing equality law and introduce new measures against discrimination. The Bill makes it unlawful to discriminate against someone aged 18 or over when providing services, which will include the provision of financial services.

Financial crime

Share Sale Fraud (Boiler Rooms)

SOCA have widely circulated a copy of a new alert on Share Sale Fraud (Boiler Rooms) for training and awareness purposes.

The Alert is in three parts

- 1) SOCA Alert A8D940) - Share Purchase and Reseale Fraud;
- 2) Annex A - an information report on boiler room fraud; and
- 3) Annex B - a customer advice document.

The Alert is in support of "Operation Archway" and has been sponsored by the City of London Police, NFSA, FSA and OFT.

FSA taking action on financial crime

This article reports on a seminar held about FSA initiatives in the area of financial crime.

(L Booth: Insur Day, 8.5.09, 6)

Fraudulent misrepresentation

(1) Parabola Investments Ltd (2) Aria Investments Ltd (formerly Tangent Investments Ltd) v (1) Browallia Cal Ltd (Formerly Union Cal Ltd) (2) MF Global UK Ltd (Formerly Man Financial Ltd) (3) Matthew Bomford

[2009] EWHC 901 (Comm) QBD (Comm) (Flaux J) 6/5/2009

Where a company which traded in derivatives had been induced by fraudulent misrepresentations made by its broker to enter into loss making transactions, it was entitled to recover all its losses which flowed directly from that fraud, consisting not only of the depletion of its trading fund and loss of profits it would otherwise have made on that fund in the period of the fraud, but also the loss of profits it had suffered until trial.

Wolfsberg Group guidance

The Wolfsberg Group has published global anti-money laundering guidance on credit & charge card issuing and merchant acquiring activities and on private banking, correspondent banking, the suppression of terrorist financing, transaction monitoring and pooled vehicles.

http://www.wolfsberg-principles.com/pdf/WG_Credit_Cards_AML_Guidance_April-28-2009.pdf

Dilemma resolved

This article considers a bank's conflicting obligations when it suspects money laundering.

Shah v HSBC Private Bank (UK) Ltd [2009] EWHC 79 (QB); *K Ltd v NatWest*

(D Allen & N Marsh: NLJ, 1.5.09, 627) 09.19.006

POCA: difficulties in reading Parliament's hand: exactly what mischief is s328 POCA intended to address?

This article examines the broad construction of s328 of Proceeds of Crime Act 2002 which applies where a bank becomes suspicious that a customer account will receive monies which comprise of existing criminal property. The authors examine the lack of clarity and the practical difficulties when dealing with future criminal property, suggesting that deposit-taking bodies apply a broader construction than intended by Parliament.

Andrew Hill & James Irvine (2009) 5 JIBFL 273

Insolvency

CVAs: the future?

JJB Sports plc have announced that 99% of the retailer's unsecured creditors had approved a company voluntary arrangement which will facilitate a restructuring of JJB's business. JJB is the first listed UK company to use a CVA successfully. KPMG believe that the restructuring will protect around 12,000 jobs by allowing JJB to survive as a corporate entity, while implementing a managed store closure programme.

This CVA is the first of this scale to pass without challenge or opposition from landlords who appear to have been persuaded by the fact the CVA provides for landlords to receive around £10,000,000 (or six months rent) and the landlords will accept rent on a monthly, rather than a quarterly basis.

Pre-packed administration

This notes a report from HoC business and enterprise committee over the UK insolvency regime, arguing that pre-pack deals mean that unsecured creditors recover less than they would in a normal administration.

FT 6 May 2009 page 4

Charge it to the dust

This article examines the implications of the new administration regime and argues that as the flexible approach to expenses on rented property is no longer applicable to rates, the chance of a successful review is harder.

(G Clark: SJ Supp Guide to the Bar, 5.09, 26)

Lehman administrators sign unprecedented cross-border insolvency protocol

The agreement was signed by administrators in Europe, Asia and the US and its intention is to help coordinate proceedings for the Lehman corporate bankruptcy to avoid proceedings conflicting with each other.

This article is available at:

http://www.thebanker.com/news/fullstory.php/aid/6625/Lehman_protocol_divides_administrators.html

(28.05.2009)

Property/Landlord & Tenant: Rent in administration

This article discusses how in rental default cases landlords are often caught in the middle and examines the extent to which rent can be regarded as an expense in a liquidation.

(Mark Sefton & Cameron Lawes, 159 NLJ 661)

Insolvency Rules Modernisation: Draft order published

Proposals to modernise the Insolvency Act 1986 and the Insolvency Rules (SI 1986/1925) have been formalised by the publication of a draft Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2009. The aim of the reform is to reduce costs and the administrative burdens for users of the legislations, thus benefiting the creditors of insolvent companies and individuals through increased dividends. Proposals include allowing the use of websites as a means of communication.

The changes are due to come into force 6 April 2010.

Lending

Loan Market: Default ratings unintended consequences

This article examines rating agencies treatment of distressed buybacks and the consequences for obtaining value in the current loan market.

Text available at:

<http://www.euromoney.com/Article/2192311/Category/19/ChannelPage/8949/Loan-market-Default-ratings-unintended-consequences.html>

(28/05/2009)

(1) Berghoff Trading Ltd (2) Gea Holdings Ltd (3) Caspian Energy Group Lp v (1) Swinbrook Developments Ltd (2) Rosserlane Consultants Ltd (3) Zaur Leshkasheli

[2009] EWCA Civ 413 CA (Civ Div) (Sir Anthony Clarke MR, Rix LJ, Arden LJ) 19/5/2009

A counterclaim seeking an indemnity or contribution or repayment of an alleged loan had no real prospect of success.

Hidden Wealth

This article explores how asset based lending could be a solution for companies looking to expand or stay afloat in the current climate.

Barry Doherty, *Building* May 2009, 44

LIBOR on Twitter

The BBA now publish the key benchmark figure (three-month sterling LIBOR) on Twitter every afternoon. To view the BBA's 'tweets', please go to www.twitter.com/BritishBankers and www.twitter.com/BBALIBOR

Letters of credit

Guaranteed reimbursement - consultation

Consultation on a product that guarantees reimbursement of UK confirming banks under letter of credit arrangements has started. The Export Credits Guarantee Department seeks views on such a scheme. Export finance has recently become harder to obtain and more expensive. The ECGD propose to launch the Letter of Credit Guarantee Scheme (provisional title). The LCGS would take the form of a master guarantee issued to participating UK banks, under which those banks cede to the guarantee potential exposure which they would incur by virtue of confirming letters of credit issued by overseas banks in favour of UK exporters. In respect of individual transactions ceded within the limits of the master guarantee, ECGD would guarantee repayment to the confirming bank of sums owed to it by the issuing bank. Replies to the consultation paper are sought by 3 July 2009.

http://www.ecgd.gov.uk/consultation_-_letter_of_credit_guarantee_scheme.pdf

ECGD, May 2009

Economic crisis presents new issues to LOC tight

This article examines the use of letters of credits in light of the current financial crisis.

(E Barrett & G Brown: *Insur Day*, 8.5.09, 7)

Government announces changes to the Enterprise Finance Guarantee Scheme (EFG)

The announcement made on 12 May 2009 by Lord Mandelson is the allowance of the EFG Scheme to guarantee up to £20 million of lending made by lenders of the EFG Scheme to Community Development Finance Institutions (CDFIs). CDFIs are independent financial institutions that lend to individuals and businesses in disadvantaged areas who would otherwise not gain access to mainstream lenders. The EFG Scheme is one of the Government's 2009 initiatives to aid the financing of small and medium enterprises.

Litigation

Jurisdiction and the recognition and enforcement of judgments

The European Commission recently published a review, accompanied by a Green Paper, on the Brussels I Regulation on the review of council regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Government, at this stage, are still considering the contents of the report and the questions posed in the Green Paper and has yet to form a view. The European Commission have asked for a response to their review and Green Paper by the end of June.

Developing effective resolution arrangements for investment banks

This report lays out the Government's initial thinking as to the reforms which may need to be considered in developing effective resolution arrangements for investment banks. It responds directly to the issues that were highlighted in the Lehman Brothers case; including the treatment of investment banking clients after default, the future of their assets, and the treatment of their open or unreconciled trading positions. It also examines what can be done to make the process of insolvency itself more effective, and limit the damage that may be done by a failing investment bank. HMT notes that it is working with a specialist Advisory Panel of investment banking, insolvency, legal and other experts, as well as FSA and BoE. The Government, in consultation with the Advisory Panel, is considering whether any changes to market practice, regulation or legislation would help any future failures in the investment banking sector to be dealt with more smoothly. This report presents a high-level overview of the issues under consideration, and will be followed by more detailed consultation as appropriate. Responses are required by 10 July 2009.

http://www.hm-treasury.gov.uk/d/consult_investmentbank110509.pdf

Mortgages

The future of mortgage regulation

The AIB comment on Lord Adair Turner (Chairman of the FSA)'s announcement that a discussion paper will be launched in September 2009, focussing on the regulation of the mortgage market. The Mortgage Conduct of Business Sourcebook is likely to be amended

MCOB has remained relatively unchanged until now. September's paper will provide a starting point for detailed discussion to take place on the future regulation of the mortgage market.

This paper aims to set the scene for this regulatory shift. AIM wishes to engage with their members, in a debate around the current and future regulatory structure of the mortgage market, in order to provide a unified and cohesive view to FSA.

<http://www.a-m-i.org.uk/news/The-Future-of-Mortgage-Regulation-CP.pdf>

Association of Mortgage Intermediaries, May 2009

Overseas

EU

The European Union facing the global arena: standard-setting bodies and financial regulation

This article considers how the European Community deals with global standard-setting bodies operating within the financial sector.

(G Bertezolo: *E.L.Rev.*, 4.09, 257)

Negotiating with bondholders across multiple European jurisdictions: what are the key issues?

This article examines fundamental issues to be aware of when negotiating with bondholders across Europe, including:

- The wide range of differing bond restructuring procedures both pre-insolvency and insolvency available to issuers.
- Whether the issuer can reach the necessary approval thresholds of the governing jurisdiction's laws and regulations

Raj Karia and Kate Hargreaves: (2009) 5 JIBFL 259

Germany

European Commission endorses rescue aid for German HSH Nordbank

Under EC Treaty state aid rules, the Commission has endorsed a €3 billion recapitalisation and €10 billion risk shield for the German bank which Germany viewed as urgent aid to rescue financial stability. Within three months Germany is required to submit a viable plan for the future of HSH Nordbank.

Russia

Dealing with defaulted bonds

This article explains why default by Russian corporate bond issuers creates a whole range of issues, none of which are simple to solve.

(S Sorokin and L Prava: *IFLR Supplement*, 04.09, 25) 09.18.109

Ukraine

Creating the right landscape

This article is an overview of the judicial protection of foreign companies in Ukraine.

(O Kharytonov and S Silchenko: *IFLR Supplement*, 04.09, 45) 09.18.110

U.S

Term Asset-Backed Securities Loan Facility Expanded

Sonnenschein (US law firm) report that "On Friday, May 1, 2009, the Federal Reserve Board (the "Board") announced a significant expansion of the Term Asset-Backed Securities Loan Facility ("TALF"). Starting in June 2009, newly issued commercial mortgage-backed securities ("CMBS") and securities backed by insurance premium finance loans will be "eligible collateral" authorized to be pledged to the Federal Reserve Bank of New York (the "NY Fed") to secure a TALF loan. The Board determined that the extension of "eligible collateral" to include CMBS was necessary in order to ease the current gridlock in the CMBS market which has occurred since mid-2008. The Board expects that the inclusion of CMBS as "eligible collateral" will help to prevent defaults on economically viable commercial properties, increase lending capacity for commercial mortgages and facilitate the sale of distressed properties."

<http://marketing.sonnenschein.com/reaction/RSPProcess.asp?RSID=869E08E7CAE81F8686582622CB0F1CA7D1234860C1F57C43CD6&>

Payment Systems

Basel Committee publishes guidance on cross-border wire transfer messages

The guidance has been published in support of the Committee's commitment to provide supervisory guidance to help combat money laundering and the financing of terrorism. As the process of cross-border wire transfers often involve several financial jurisdictions, the paper offers advice on when one of the intermediary banks is not in the same jurisdiction as either the originator or beneficiary's banks. The guidance includes information expectations and has been published to support transparency in payment messages.

Regulation

House of Lords report on banking supervision and regulation

The House of Lords Select Committee on Economic Affairs have published a report on banking supervision and regulation. The report examines why the regulatory framework in Britain and elsewhere failed to fulfil its purpose of avoiding or mitigating the current financial crisis. The main areas of criticism detailed are:

- The Tripartite – The Committee argues that the roles of the three parties were not clearly defined and there was confusion as to who had superiority.
- Although management failure at some banks is argued to have helped cause the crisis, the report also raises concerns over the failures in regulation and supervision, together with the inadequacy of the rating agencies.

The report recommends that the Government should revisit the tripartite system immediately and return responsibility for macro-prudential supervision to the Bank of England, with executive powers to be governed through a broader-based Financial Stability Committee. The report also calls for more vigorous stress-testing of bank models by regulators, including an increase in minimum regulatory capital requirements for assets on banks' trading books.

The full text is available at:

<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeconaf/101/101i.pdf>

Definition of Tier 1 capital

The FSA has published the text of a letter it has sent to BBA setting out the definition of Tier 1 capital that banks should use for specific reporting and disclosure purposes.

http://www.fsa.gov.uk/pubs/other/bba_letter.pdf

What lessons from the 1930s?

This paper explores areas in which the experience of the Great Depression might be relevant today, including the systemic stability of the banking system. It notes that its investigation of the US banking system showed that commercial banking operations (deposit-taking and lending) remained profitable even during the worst years and argues that "to prevent future crises of this type, one should make sure that losses from the investment banking arms cannot impair commercial banking operations. At least a partial separation of commercial and investment banking thus seems justified by the greater stability of commercial banking operations".

Another reason to rue the abolition of the Glass-Steagall Act in 1999.

http://shop.ceps.eu/downfree.php?item_id=1839

FSA Board minutes (January)

The FSA has published the minutes of its 22 January 2009 meeting. Topics include: retail and wholesale management updates; Management Information report and update on value for money indicators; FSA's 2009/10 Business Plan; Regulatory Fees and Levies 2009/10; Assessing Conduct Risk Outcomes: the example of PPI; December Reports from the Consumer and Practitioner Panels.

<http://www.fsa.gov.uk/pubs/board-minutes/jan09.pdf>

Policy framework for effective financial regulation

OECD has published a draft consultation which contains a checklist of principles that should be considered to further an effective framework for government intervention and regulation in the financial system.

<http://www.oecd.org/dataoecd/61/57/42772017.pdf>

Supervision of credit rating agencies: the role of credit rating agencies in finance decisions

This article examines the current role of credit rating agencies in finance decisions and explores whether it should be modified. Their role in the current financial crisis is reviewed as are the key features of proposed regulatory measures in the EC and US.

(Deniz Coskun: J.I.B.L.R) 2009 24(5) 252-261

European Commission publishes reform proposals on financial supervision in Europe

The proposals include restructuring of current financial services committees and the establishment of a European Systemic Risk Council (ESRC) and a new European System of Financial Supervisors (ESFS). The principle behind the proposals is to enhance co-ordination between Member States thereby reducing the risk of regulatory shortcomings in addressing systemic potential of financial failures.

The Commission has opened the communication to public consultation with a deadline of 15 July 2009.

Securitisations

“Retained securitisations: accessing liquidity through central bank repurchase schemes”

This article comments investor demand has contracted severely as a result of turbulence in the global financial markets. Despite this, securitisation has not ceased completely. Instead, many financial institution originators are issuing and retaining asset backed securities to access various central bank liquidity schemes made available by, for example, the European Central Bank and the UK's Bank of England.

(G O'Keefe & E Corley: *Cross-border Quarterly*, April-June 2009, 61) 09.18.108

Security

Bank Of Scotland Plc v (1) Constantine Makris (2) Ben O'Sullivan

Ch D (David Donaldson QC) 15/5/2009

There was no basis on which a signatory to a bank's revised facilities agreement could show that a subsequent reduction in the provision of facilities to the signatory's company was a material variation sufficient to discharge the bank's security, held by way of guarantee, over his property.

The Privy Council on “appropriation” under the FCA Regs

(1) Cukurova Finance International Ltd
(2) Cukurova Holding As V Alfa
Telecom Turkey Ltd

*[2009] UKPC 19 PC (BVI) (Lord Hope of
Craighead, Lord Scott of Foscote, Lord Walker of
Gestingthorpe, Baroness Hale of Richmond, Lord
Mance) 5/5/2009*

The Privy Council have decided that it is not necessary for the person taking security in the form of share charges to become the registered holder of the shares for there to be a valid appropriation within the meaning of "appropriation" in Directive 2002/47 and the Financial Collateral Arrangements (No.2) Regulations 2003. A pragmatic interpretation was required.

The case arose in the British Virgin Islands and Harney's have issued a report on it, below. They comment: "The case is the first known judicial decision anywhere on the interpretation of the Regulations ... [it draws] a definitive end to the vexed preliminary issue under British Virgin Islands law."

<http://www.harneys.com/files/news/appropriation%20of%20shares%20in%20bvi%20companies.pdf>

EU amends Directives: Settlement Finality and Financial Collateral Arrangements

The Council of the European Union has announced it has adopted a directive amending the Settlement Finality Directive (98/26/EC) (SFD) and the Financial Collateral Arrangements Directive (2002/47/EC) (FCD), following a first reading agreement with the European Parliament.

In broad terms, the SFD provides protection to both payment and securities settlement systems in the event of the default of a participant to those systems, and the FCD regulates and facilitates the cross-border use of financial collateral.

The amendments to the SFD and the FCD are meant to strengthen the tools available for managing stability in the financial markets. The amending directive:

- Extends the protection of the SFD to night-time settlement, and to settlement between inter-operable systems.
- Broadens the scope of the protection provided by both the SFD and the FCD to include credit claims, in order to facilitate their use throughout Europe.
- Introduces some simplifications and clarifications to facilitate the application of the SFD and the FCD.

27 April 2009

Draft Overseas Companies (Registration of Charges) Regulations 2009 - problems

The Financial Markets Law Committee has published a copy of the letter it has sent to BERR setting out what it sees as "inherent uncertainties" in the draft regulations. It concludes "given the uncertainties set out above, the impact of such a registration requirement for intangibles may, in the case of foreign banks, be more significant than set out in the Impact Assessment. The FMLC would suggest that BERR consider, as a matter of legal certainty, whether a more detailed and precise location test for foreign corporates could be drafted perhaps with a carve-out for overseas banks. If BERR feels that this is not feasible, BERR might also consider abolishing the requirement to register charges over intangible assets".

<http://www.fmlc.org/papers/Ltr2BERR.pdf>

Structured products

Lehman-backed structured products

FSA has published a statement saying that it has jointly concluded with FOS that Lehman Brothers' insolvency raises issues in the UK structured products market.

As a result, while FOS has been investigating a number of individual complaints, FSA has been actively looking at the wider issues raised in this market. They have agreed that FSA will now consider issues relating to Lehman-backed structured products under the "wider implications" process, in order to allow FSA to explore all options to achieve the best outcome for consumers.

<http://www.fsa.gov.uk/pages/Library/Communication/Statements/2009/lehman.shtml>

http://www.wider-implications.info/case_studies/wi_13.html

Tax and Accounting

New definition of Offshore Funds

Draft guidance has been published for consultation purposes and to assist in understanding the effect of the new tax definition of an offshore fund in the finance bill 2009. The guidance explains the definition in detail, and aims to provide non-UK funds, their managers and investors with greater clarity.

Responses are required by 17 July 2009.

The full text is available at:

<http://www.hmrc.gov.uk/collective/new-offshore-funds.pdf>

and statutory rules of apportionment for all new trusts; and a new statutory provision to make total return investment more easily accessible to charitable trusts with a permanent endowment.

<http://www.lawcom.gov.uk/docs/lc315.pdf>

And finally ...

Spotted in Insolvency News:

"E&Y confirm Wrekin £11m ruby valuation forged"

"One ruby (not natural). Make good paperweight. Offers sought."

Trusts

Capital and income in trusts: classification and apportionment

This paper reports on the rules governing the treatment of trust receipts and outgoings as capital or income and it recommends: receipts following tax-exempt corporate demergers should be classified as capital; the abolition of the equitable

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