

C/M/S/ Cameron McKenna



The heavyweight

Comprehensive coverage of this month's banking and insolvency law

January 2010

Looking forward

Developments scheduled for the month ahead

Date	Item
1 February 2010	House of Lords request evidence by this date for inquiry into the European Commission's stance on derivatives markets.
15 February 2010	FSA closes consultation on extending mortgage regulation.
10 February 2010	Deadline for responses to FSA consultation on credit unions.
15 March 2010	Replies to consultation on ban on using bills of sale to secure consumer lending required.
6 April 2010	Coming into force of Insolvency (Amendment) (No 3) Rules 2009.
21 April 2010	Replies required to OFT consultation paper on duty to give information to debtors.
July 2010	Single Customer View – formal verification required.

Table of Contents

Attorney	5
Powers of attorney for banking	5
Law Society practice note	5
Banking.....	5
Relationship between bank and customer	5
“What is the Extent of the Customer's Duty not to Facilitate Fraud?”	5
Capital markets	6
Stock Lending.....	6
Global Master Securities Lending Agreement 2010	6
Company	6
Strike off, dissolution and restoration	6
Companies.....	6
Limited liability partnership.....	6
Consumer	7
Duty to give information to debtors.....	7
OFT Consultation paper.....	7
Contract.....	7
Jurisdiction clause.....	7
Cinnamon European Structured Credit Master Fund v Banco Commercial Portugues SA	7
Data	7
Single Customer View	7
“Single Customer View: impact on data protection”	7
Discrimination	8
Equality Bill	8
“Making it work - ending age discrimination in services and public functions”	8
Environment.....	8
Adapting to Climate Change	8
“The adaptation imperative”	8
Fraud.....	8
Annual fraud indicator.....	8
Recording interviews	9
“Digital revolution”	9
Insolvency.....	9
Bank insolvency	9
Memorandum of understanding.....	9
Clients' accounts	9
Failure to segregate.....	9
Hedging contracts	9
“Hedging insolvency – key issues and considerations”	9
Overseas.....	10
“I pledge to thee my shares: taking share security in England, France and Germany”	10
Schemes of arrangement.....	10
“The current state of play”	10
Mortgages	10
Consultation.....	10
Power of sale and residential property.....	10
Payments	11
Bank of England	11
Oversight of Payment Systems.....	11
Regulation	12
Capital Requirements Directive	12

Implementing amendments to the Capital Requirements Directive	12
Shadow banking	13

Attorney

Powers of attorney for banking

Law Society practice note

The purpose of this practice note is to provide information about the different powers of attorney that can be used when dealing with a bank. This practice note is for solicitors who have been appointed as an attorney under an Ordinary Power of Attorney, Enduring Power of Attorney or a Lasting Power of Attorney and are authorised to manage a donor's financial affairs. The Law Society says attorneys have difficulties with banking institutions accepting power of attorney documents as evidence of an attorney's authority to act on behalf of a donor.

<http://www.lawsociety.org.uk/productsandservices/practicenotes/powersattorneybanking/4286.article>

Law Society, 20.1.10

Banking

Relationship between bank and customer

"What is the Extent of the Customer's Duty not to Facilitate Fraud?"

This article considers how, with the introduction of the Payment Services Regulations 2009 that take over the role of the Banking Code, the banking relationship between bank and customer have changed. In particular, it looks at the duty of a customer not to facilitate fraud on their account and how Regulation 57 imposes an obligation on the customer to notify the bank if he becomes aware of the loss, theft or unauthorised use of the payment instrument. It argues the statutory nature of these provisions clarifies the law on this area.

Bill Davies Business Law Review, November 2009

Capital markets

Stock Lending

Global Master Securities Lending Agreement 2010

The International Securities Lending Association have published the Global Master Securities Lending Agreement 2010. This supersedes an earlier version of the GMSLA, of 2009, as the industry standard master agreement for international stock (or “securities”) lending transactions.

20 January 2010

Company

Strike off, dissolution and restoration

Companies

Companies House guidance explains how companies can be removed from and restored to, the register of companies. The guidance explains: how the registrar may remove a company from the register if it is no longer carrying on business or in operation; how the court can restore a company to the register; and how a former director or member may apply to the registrar to have the company restored.

<http://www.companieshouse.gov.uk/about/gbhtml/gpllp3.shtml>

GP4: Companies House, January 2010

Limited liability partnership

A Companies House guidance note explains how a limited liability partnership can be removed from and restored to the register. The guidance explains: how the registrar removes LLPs from the register; how the registrar may remove an LLP from the register if it is no longer in operation; how the court can restore the LLP to the register; and how a former member may apply to the registrar to have the LLP restored.

<http://www.companieshouse.gov.uk/about/gbhtml/gp4.shtml>

GPLLP3: Companies House, January 2010

Consumer

Duty to give information to debtors

OFT Consultation paper

The OFT has published a consultation paper on ss 77-79 CCA 1974 which cover a creditor's duty to give information to debtors. This follows the recent court judgment. This sets out the OFT's views of relevant practices which would be considered to be unfair under s25 CCA 1974. There are concerns that debtors are being misled as to the meaning of ss77-29. Some creditors appear not to understand the nature and extent of their obligations under these sections. Responses must be received by 21 April 2010.

http://www.of.gov.uk/shared_of/consultations/OFT1175con.pdf

Contract

Jurisdiction clause

Cinnamon European Structured Credit Master Fund v Banco Commercial Portugues SA

[2009] EWHC 3381 (Ch) Ch D (Sir William Blackburne) 18/12/2009

A holder of loan notes backed by a securitised mortgage portfolio was entitled to pursue a claim in the English courts against the mortgage servicing agent domiciled in Portugal. This was because the claim was subject to an agreement conferring jurisdiction on the English courts and was within the scope of the Regulation 44/2001 art.23.

Data

Single Customer View

"Single Customer View: impact on data protection"

The Financial Services Authority has published its final Policy Statement on how financial institutions must verify their compliance with the FSA's new Single Customer View rules. Estimates suggest that this could cost the industry over one billion pounds to implement. The author reviews what the rules mean and what issues they raise..

J Worthy: E-finance & payments law & policy, 12.09, 08 10.04.048

Discrimination

Equality Bill

“Making it work - ending age discrimination in services and public functions”

The Government Equality Office has issued a policy statement, which at section 3, financial services, discusses specific exceptions from the age discrimination ban. They propose an exception for referring to age where this is fair and reasonable – pricing of financial products must be a proportionate response to risks or costs associated with age. A financial services firm would be in breach if they decline to provide a service because of a person’s age, and fails to help find an alternative.

http://www.equalities.gov.uk/pdf/GEO_EqualityBillAge_acc.pdf

Environment

Adapting to Climate Change

“The adaptation imperative”

This article summarise the first report of its kind on the case for adaptation and reflects that companies will not only increasingly have to mitigate climate change, they will also have to adapt to it. It asks what questions should their shareholders be asking?

R Sullivan, D Russell & S Beloe: Environmental Finance, 12.09, 46 10.03.062

Fraud

Annual fraud indicator

A report by the National Fraud Authority (25 January 2010) presents the findings of its annual fraud indicator which suggests that fraud costs the UK over GBP 30 billion each year. Based on 2008 data, the fraud loss figure was based on information from a cross-section of public and private sector agencies.

http://www.attorneygeneral.gov.uk/nfa/GuidetoInformation/Documents/NFA_fraud_indicator.pdf

Recording interviews

“Digital revolution”

This article examines the advances made in digital recording and explains how this could help investigators cut fraud bills.

S Jones: Post Magazine, 14.1.10, 21 10.03.069

Insolvency

Bank insolvency

Memorandum of understanding

Between the United States and the United Kingdom

The US Federal Deposit Insurance Corporation and the Bank of England have agreed this, on “further co-operation when acting as resolution authorities for distressed deposit-taking financial institutions with activities in both jurisdictions.”

<http://www.bankofengland.co.uk/publications/other/financialstability/srrmou.pdf>

Bank of England, January 2010

Clients' accounts

Failure to segregate

Re Lehman Brothers International (Europe) (in administration) [2010] All ER (D) 143 (Jan)

The Chancery Division considered the application of the Client Assets Sourcebook issued by the Financial Services Authority rules to the insolvency of Lehman Brothers. The issues the court considered involved the constitution of a client money fund for clients whose money should have been segregated by Lehman Brothers from its own accounts into separate client money accounts. The court further considered the results of the failure by Lehman Brothers to comply with the terms of the CAS S7.

Hedging contracts

“Hedging insolvency – key issues and considerations”

This article discusses how hedging contracts impact on insolvencies and work-outs, the impact of insolvency laws on hedging, and notes some legal and documentation issues to be considered before moving to enforcement.

M Daley: Corporate Rescue and Insolvency, 12.09, 243 10.01.005

Overseas

"I pledge to thee my shares: taking share security in England, France and Germany"

Taking security over shares as part of a security package granted to financial creditors is a common feature of domestic and cross-border financings. In England, share security takes the form of a mortgage or charge. In Continental Europe, share security is in the form of pledges. This article highlights common problems in taking share security and in enforcing it in England, Germany and France.

M Rutstein, L Assaya & C Staps: *Corporate Rescue and Insolvency*, 12.09, 253 10.01.009

Schemes of arrangement

"The current state of play"

This article considers how significant the High Court's decision is in *re Bluebrook Ltd and others* [2009] EWHC 2114 (Ch) (the 'IMO Car Wash' case) in deciding what constitutes an appropriate methodology for valuing a distressed business in a restructuring, which involves a scheme of arrangement. It wonders if the use of schemes of arrangement in distressed situations might increase in light of this decision?

A Katz & A Wood: *Corporate Rescue and Insolvency*, 12.09, 247 10.01.006

Mortgages

Consultation

Power of sale and residential property

The Ministry of Justice has issued a consultation paper seeking views on proposals to oblige mortgage lenders to obtain a court order, or the consent of a borrower, before repossessing and selling residential owner-occupied homes.

Readers might recall the Private Members' Bill, the Home Repossession (Protection) Bill introduced early in 2009 and subsequently dropped, that sought to put the requirement for a court order for repossession on a statutory footing. For this background, see my Bank Law Blog at:

<http://banklawblog.wordpress.com/2009/02/06/home-repossession-protection-bill/>

The proposed alterations in the current consultation would place lending practice on a statutory footing, and ensure borrowers can use protections made available by the courts. Comments are requested by March 28, 2010.

HM Treasury will issue a separate consultation document on the regulation of the mortgage industry generally.

<http://www.justice.gov.uk/consultations/docs/mortgages-power-sale.pdf>

MoJ, December 2009

Payments

Bank of England

Oversight of Payment Systems

The Bank of England has assumed statutory responsibility for oversight of payment systems under Part 5 of the Banking Act 2009. As provided for under Section 188 of the Act, the Bank has published, with the approval of HM Treasury, the Principles that will constitute a core element of the statutory oversight regime.

The 14 Principles are:

- Principle I. The system should have a well-founded legal basis under all relevant jurisdictions.
- Principle II. The system's rules and procedures should enable participants to have a clear understanding of the system's impact on each of the financial risks they incur through participation in it.
- Principle III. The system should have clearly defined procedures for the management of credit risks and liquidity risks, which specify the respective responsibilities of the system operator and the participants and which provide appropriate incentives to manage and contain those risks.
- Principle IV. The system should provide prompt final settlement on the day of value, preferably during the day and at a minimum at the end of the day.
- Principle V. A system in which multilateral netting takes place should, at a minimum, be capable of ensuring the timely completion of daily settlements in the event of an inability to settle by the participant with the largest single settlement obligation.
- Principle VI. Assets used for settlement should preferably be a claim on the central bank; where other assets are used, they should carry little or no credit risk and little or no liquidity risk.
- Principle VII. The system should ensure a high degree of security and operational reliability and should have contingency arrangements for timely completion of daily processing.

- Principle VIII. The system should provide a means of making payments that is practical for its users and efficient for the economy.
- Principle IX. The system should have objective and publicly disclosed criteria for participation, which permit fair and open access.
- Principle X. The system's governance arrangements should be effective, accountable and transparent.
- Principle XI. The system should manage its business risks so that its users can rely on continuity of its services.
- Principle XII. The system should regularly review the risks it bears from, and poses to, other infrastructures as a result of interdependencies, and implement controls adequate to manage those risks.
- Principle XIII. The system should understand and manage risks that are brought to the system as a result of participants' relationships with indirect participants.
- Principle XIV. The system should manage its outsourced relationships prudently, ensuring that contractual and risk management arrangements are clear, appropriate and robust.

<http://www.bankofengland.co.uk/publications/news/2009/141.htm>

BoE, 31/12/2009

Regulation

Capital Requirements Directive

Implementing amendments to the Capital Requirements Directive

HM Treasury are seeking views on Government proposals to implement the changes made to the recast Capital Requirements Directives 2006/48 and 2006/49 using an effective, proportionate, and risk-based approach. Their consultation paper includes a draft Regulatory Impact Assessment and drafts of the proposed Statutory Instruments. The Financial Services Authority is consulting separately on separate elements of the Directive.

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

HM Treasury, January 2010

Shadow banking

The Bank of England have published a speech by Paul Tucker, the Deputy Governor of the Bank of England for Financial Stability, on the nature of shadow banking, its role in the financial crisis and potential regulatory developments.

The speech includes examples of products developed prior to the recent financial crisis. He suggests: "We have not seen the last of regulatory arbitrage. So we need policies and principles that stand in the way of its weakening the resilience of the system, while allowing enterprise and our capital markets to flourish".

The following vehicles, instruments and markets are identified as used for shadow banking purposes:

- Money market mutual funds.
- Finance companies.
- Structured Investment Vehicles and Asset Backed Commercial Paper.
- The prime brokerage services of securities dealers.
- The use of securities lending markets as a financing market.
- The repo-financing of residential mortgage-backed securities.

<http://www.bankofengland.co.uk/publications/speeches/2010/speech420.pdf>

BoE 21 January 2010



Editor: Ruth Pedley, Client Counsel, CMS Cameron McKenna LLP.

Please contact Ruth for further information or feedback on this bulletin: Ruth.Pedley@cms-cmck.com

020 7367 2098

You are entitled to sign up to our free electronic information service, Law Now www.law-now.com

This bulletin is the property of the firm and must not be reproduced without consent.

© CMS Cameron McKenna LLP

Law-Now™

CMS Cameron McKenna's free on-line
information service

To register for Law-Now on-line go to our
home page www.law-now.com

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

T +44 (0)20 7367 3000

F +44 (0)20 7367 2000

CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices and/or member firms of the CMS alliance.

The associated international offices of CMS Cameron McKenna LLP are separate and distinct from it.

CMS Cameron McKenna LLP and its associated offices are members of CMS, the alliance of independent European law firms. Alliance firms are legal entities which are separate and distinct from CMS Cameron McKenna LLP and its associated international offices.

CMS offices and associated offices worldwide: Berlin, Brussels, London, Madrid, Paris, Rome, Utrecht, Vienna, Zürich, Aberdeen, Amsterdam, Antwerp, Arnhem, Beijing, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Buenos Aires, Casablanca, Chemnitz, Cologne, Dresden, Düsseldorf, Edinburgh, Frankfurt, Hamburg, Hilversum, Hong Kong, Leipzig, Lyon, Marbella, Milan, Montevideo, Moscow, Munich, New York, Prague, Sao Paolo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Warsaw and Zagreb.