

C/M/S/ Cameron McKenna



The heavyweight

Comprehensive coverage of this
month's banking and insolvency law

November 2009

Looking forward

Developments scheduled for December 2009 and after

Date	Item
7 December 2009	Regulation on credit rating agencies comes into force, providing a registration and surveillance system for agencies that issue ratings intended for use for regulatory purposes.
14 December 2009	EC consults on draft guidance for SEPA Direct Debit scheme.
23 December 2009	Probable amendment by negative resolution of Companies Act 2006, s 413(8), bank disclosure of loans to directors in company's accounts.
15 January 2010	Consultation ends on "Disclosure guidelines: Lessons learnt from the financial crisis" by the Committee of European Banking Supervisor.
25 January 2010	LMA launch of combined par and distressed documentation.
10 February 2010	Deadline for responses to FSA consultation on credit unions.
15 February 2010	FSA closes consultation on extending mortgage regulation.
6 April 2010	Coming into force of Insolvency (Amendment) (No 3) Rules 2009.
July 2010	Single Customer View – formal verification required.

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Asset management

Asset management: the UK as a global centre

This report sets out findings and recommendations for the asset management industry, regulator and Government to consider.

http://www.hm-treasury.gov.uk/d/fin_assetmanagement_091109.pdf

AMWG, November 2009

Bank notes

Scotland and Northern Ireland

Debate in House of Lords

The House of Lords considered the Scottish and Northern Ireland Banknote Regulations 2009, on 9 November 2009. The Regulations, which came into force on 23 November, are designed to offer holders of such banknotes a similar level of protection to holders of Bank of England banknotes.

The text of the debate is here:

<http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/91109-gc0001.htm#0911099000144>

The Scottish and Northern Ireland Banknote Regulations 2009

No 3056

These Regulations bring holders of Scottish and Northern Irish banknotes a similar level of protection to holders of Bank of England banknotes. They are made under Parts 6 and 8 of the Banking Act 2009. They make provision about the treatment, holding and issuing of banknotes by the banks who are authorised to issue banknotes in Scotland and Northern Ireland (other than the Bank of England).

The Explanatory Memorandum is available at

http://www.opsi.gov.uk/si/si2009/em/uksiem_20093056_en.pdf

The full text is available at http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093056_en.pdf

Date in force: 23.11.09

Capital markets

Derivatives activity

The Bank for International Settlements has issued a report on the OTC derivatives market activity in the first half of 2009. Notional amounts of all types of OTC contracts were 10% above the level six months before. In contrast, gross market values decreased by 21%.

<http://www.bis.org/press/p091111.htm?sent=091112>

BIS Press Release 11 November 2009

Consumer

Bank charges

Supreme Court allows banks' appeal in test case

OFT v Abbey National Plc & Others [2009] UKSC6

The Supreme Court has delivered its decision in the test case overturning the decisions of the High Court and the Court of Appeal and finding unanimously for the Banks. The Justices held that charges for unauthorised overdrafts are part of the price or remuneration of the services provided under the current account contract. These charges are not subject to an assessment of fairness under Regulation 6(2) of the Unfair Contract Terms in Consumer Contracts Regulations 1999 ("UCTCCR").

Law-Now: <http://www.law-now.com/law-now/2009/bankcharges25nov.htm>

Bank Law Blog: <http://banklawblog.wordpress.com/2009/11/25/supreme-court-allows-banks-appeal-in-test-case/>

The FSA's waiver relating to complaints about unauthorised overdraft charges has lapsed.

Lloyds Banking Group has said (FT, 30 Nov, page 2) that it will be asking county and district judges to dismiss consumer claims following the result of the bank charges case. Other banks are expected to follow suit.

Test case fact sheet

The BBA has published a fact sheet in respect of the OFT bank charges case, before judgment was handed down by the Supreme Court.

http://www.bba.org.uk/content/1/c6/01/68/88/Test_Case_Fact_Sheet.pdf

Commercial cards

“Opportunities for commercial card schemes”

This article comments that more complex commercial relationships in the B2B sector have changed the way commercial card schemes work. The multiplicity of end-users and suppliers in most organisations calls for a more efficient and flexible system for processing commercial payments – a system that could rely on the implementation of commercial card schemes. The author shares views on how the B2B sector could benefit from the further development of commercial card schemes.

F B Martien: EFL&P, 10.09, 08 09.46.069

Credit and store card webchat

The Government's Number 10 website has published the transcript of a "webchat" undertaken by the Consumer Minister, Kevin Brennan.

<http://www.number10.gov.uk/Page21401>

Interest on charge for credit

Southern Pacific Personal Loans Ltd v Walker & or

[2009] EWCA Civ 1176

In this case, the court held on appeal that s 9(4) of the Consumer Credit Act 1974 did not prohibit interest on any charge for credit. A broker administration fee, the payment of which was required together with the repayment of a loan provided for under a fixed sum credit agreement, was an item entering into the charge for credit, but was prevented from being treated as 'credit' or part of credit (but interest thereon could be charged), and that the true 'amount of credit' was the loaned amount, exclusive of the fee.

Mortgage not governed by CCA

Southern Pacific Mortgage Ltd v Heath

[2009] All ER (D) 77 (Nov) [2009] EWCA Civ 1135 Waller, Dyson and Lloyd LJ 5 November 2009

In this case, the Court of Appeal held that the defendant's appeal against possession orders made against her was dismissed. She had appealed on the basis that the underlying mortgage was unenforceable under s 18 of the Consumer Credit Act 1974. The court ruled that on the basis of the language of s 18 and consideration of the mortgage documents, the mortgage could not be regarded as an agreement in two

separate parts so as to bring the value of each part within the definition of a consumer credit agreement not exceeding £25,000.

Strategic report

Precious plastic 2010 - Consumer credit in the UK

In this report, PricewaterhouseCoopers LLP says the credit card market must innovate to survive. It criticises the lenders' business model as unsustainable with increasing bad debts, funding constraints and the toughest macro-economic climate in a generation. Although UK consumers' debt levels have not increased, the levels remain high in comparison to the rest of Europe.

<http://www.ukmediacentre.pwc.com/imagelibrary/downloadMedia.asp?MediaDetailsID=1569>

The report hasn't gone down well with the Government:

<http://nds.coi.gov.uk/clientmicrosite/content/Detail.aspx?ReleaseID=408409&NewsAreaID=2&ClientID=431>

9 November 2009

Unsolicited cheques

Clause on unsolicited credit card cheques

The Department for Business Innovation And Skills has published revised draft clauses in respect of unsolicited credit card cheques which will insert new sections 51A and 51B into the Consumer Credit Act 1974 to give effect to the prohibition.

<http://www.berr.gov.uk/whatwedo/consumers/consumer-white-paper/page52784.html>

<http://www.berr.gov.uk/files/file53644.pdf>

Contract

Legally bound even in absence of signatures

Maple Leaf Marco Volatility Master Fund & or v Rouvroy & or

[2009] All ER (D) 199 (Nov)

In this case, the court ruled that a funding agreement was legally binding and enforceable where, although signatures were missing, the parties had shown an intention to be contractually bound. The court commented that it would be slow to find that a

commercial agreement intended to have contractual effect and performed in good faith, was not in law a binding contract. The case has been decided on its particular facts but the court said in response to the defendant's claim that there was no subjective intention on their part to create legal relations that intention to create legal relations in a contractual context was to be assessed objectively.

Corruption

Bribery Bill

The Bill and Explanatory Notes have been published:

<http://www.publications.parliament.uk/pa/ld200910/ldbills/003/10003.i-ii.html>

Anti-corruption Zone

A "one-stop shop" on Law-Now, for legal resources and news on corruption issues.

- An introduction to the Anti-Corruption Zone
- The Evolving Laws on Bribery and corruption in England and Wales
- Prosecution Policy and Trends: Chronology

<http://www.law-now.com/anticorruptionzone/>

Managing the risk

"Overseas bribery and corruption: a practical guide for corporations and individuals"

In this article, the author comments that as of 1 October 2009, BAE Systems, the UK's biggest manufacturer, faces bribery charges and possible confiscation of potentially hundreds of millions of pounds. He explores the accountability of both individuals and corporations with regard to overseas bribery and corruption, the relevant legislation and how considering the potential outcomes should influence a business in managing this risk.

<http://www.inhouselawyer.co.uk/index.php/component/content/article/683-random/7520-overseas-bribery-and-corruption-a-practical-guide-for-corporations-and-individuals>

J Carlton: IHL, 11.09, 32 09.47.031

Credit Unions

FSA Sourcebook

Review

In this paper, the FSA proposes to increase capital and liquidity requirements for credit unions; reduce the submission period for annual returns from seven months to four months; and provide additional guidance on provisioning requirements. The FSA will increase its supervisory focus on governance issues. The FSA notes the forthcoming Legislative Reform (Industrial and Provident Societies and Credit Unions) Order 2010 that will affect the FSA's prudential rules. Responses are required by 10 February 2010

http://www.fsa.gov.uk/pubs/cp/cp09_27.pdf

FSA Consultation Paper 09/27, November 2009

Data protection

Data exports

"Data exports to processors and sub-processors"

This article considers the EU approach to data exports. It postulates an example of data protection law being topsy-turvy.

R Jay: 2009, C&L, 20(3), 22 09.45.075

IP Snapshot

November 2009

Key developments in intellectual property law in the past few weeks.

http://www.law-now.com/DirectMail/{74F82E0F-9B24-482E-B4EE-929F1CC1A499}_ipsnapshotnov09.htm

Deposit protection

Financial Services Compensation Scheme

FSA to review

The FSA, reported by the Times, has confirmed it will begin a comprehensive review of the FSCP, and would consult on possible changes, including the way in which the FSCS is funded, in 2010. New rules could be finalised in 2011. This is in line with the Government's July 2009 White Paper on reforming financial markets.

http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article6900197.ece

2 November 2009

Environment

Emissions Trading

"Emission Allowances - Creating Legal Certainty"

Emissions (or carbon) trading is the buying and selling of the right to emit carbon dioxide. It is a growing market, which worries both the Financial Markets Law Committee and Friends of the Earth although they make their arguments from, naturally, very different positions. The FMLC are concerned about legal uncertainties in the carbon emission allowances which underlie this market and have published a paper on this. The FMLC believes that unless there is some clarification, the issues they identify could impede the development of the market in carbon emission allowances.

See my blog post for a slightly fuller coverage.

<http://banklawblog.wordpress.com/2009/11/10/emissions-trading-schemes/>

The FMLC paper:

www.fmlc.org/papers/Issue116Oct09.pdf

FMLC October 2009

The Friends of the Earth report "A dangerous obsession"

http://www.foe.co.uk/resource/reports/dangerous_obsession.pdf

“Five year plan to reduce business carbon emissions”

The Environment Agency have announced a five year plan to reduce greenhouse gas emissions and also plan to develop low carbon technologies, reduce methane emissions from landfill sites and impose “world class environmental standards” on new nuclear power stations <http://www.environment-agency.gov.uk/news/113124.aspx>

EAEW, 10/11/2009

Financial crime

Attorney General guidance

On asset recovery powers

The Attorney General's Office has issued guidance that advises prosecutors on the exercise of their asset recovery powers under the Proceeds of Crime Act 2002 s.2A which requires the Serious Organised Crime Agency and specified prosecuting authorities to exercise their functions under the Act in the way which they consider is best calculated to contribute to the reduction of crime.

<http://www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneralissuedguidancetoprosecutingbodiesontheirassetrecoverypowersunder.aspx>

Attorney General's Office, November 2009

AML screening, monitoring and searching

Wolfsberg Group paper

The Wolfsberg Group have published a revised paper (the first was in 2003) suggesting how financial institutions can develop suitable anti-money laundering screening, monitoring and searching processes and procedures. The revised paper of 9 November provides more guidance on the design, implementation and ongoing maintenance of transaction monitoring frameworks.

If you were wondering what the Wolfsberg Group is, it's an association of eleven global banks, “which aims to develop financial services industry standards for Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies”. The Group came together in 2000, at the Château Wolfsberg in north-eastern Switzerland with two board members of the Basel Institute on Governance, to work on drafting anti-money laundering guidelines for private banking.

http://www.wolfsberg-principles.com/pdf/Wolfsberg_Monitoring_Screening_Searching_Paper-Nov_9_2009.pdf

HM Treasury statement

Money laundering controls in overseas jurisdictions

This is a notice of advice about risks posed by unsatisfactory money laundering controls in some jurisdictions: Iran, Pakistan, Uzbekistan and Azerbaijan.

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=408449&NewsAreaID=2>

http://www.hm-treasury.gov.uk/press_103_09.htm

Freezing order

JSC BTA Bank v Ablyazov and others

The Commercial Court held that a freezing order granted in favour of a bank in respect of a defendants' assets should be continued on the basis that the bank had a good arguable case that the defendants had misappropriated the banks funds and there was a risk of dissipation of assets.

SOCA

Parliamentary report

The Commons Home Affairs Committee recommends in its latest report that the Serious and Organised Crime Agency should be more accountable than it is currently.

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/730/73002.htm>

Governance

Bank disclosure of loans to directors in company accounts

Government response to consultation

The replies to consultation on the disclosure of loans to bank's directors in a bank's company accounts lead the Government to conclude the Companies Act 2006 needs amendment. s.413(8) of the Act will be modified so that banks are required to disclose the total amount of loans, the total amount of guarantees and the total amount of credits to their directors, even if made on normal commercial terms. The Government will amend the Act by negative resolution regulations in time for the 2009 accounts for the majority of banking companies. It will apply to financial years ending on or after December 23.

<http://www.berr.gov.uk/files/file53630.pdf>

URN 09/1475: BERR, November 2009

House of Commons Treasury Committee

Sir David Walker gives evidence

The Committee have published an uncorrected (i.e., not formal) transcript of evidence given by Sir David Walker in a hearing on 3 November 2009 in relation to his review of corporate governance in UK banks and other financial institutions. The transcript is highly readable and includes discussion on bank remuneration; reporting obligations for banks, non-execs; market abuse and the FSA's role in screening senior appointments.

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/uc1089-i/uc108902.htm>

5 November 2009

The Walker Review

A review of corporate governance in UK banks

The recommendations of the final report include amongst many other points:

- Overhauling the boards of banks by strengthening the role of non-executives to monitor risk and remuneration.
- "Stewardship duty" on institutional shareholders to play a more active role as owners of businesses; Stewardship Code, sponsored by FRC and monitored by the FSA.
- Banks should have board level risk committees chaired by non-execs.
- Risk committees to scrutinise and if necessary block big transactions
- Chief Risk Officer to have reporting line to risk committee - he/she can only be sacked with agreement of board.

http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf

The British Bankers' Association says the Walker Report is right to focus on changing the patterns of behaviour within boards and on substantive improvements to financial firms' corporate governance.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=16933>

Human rights

Constitutional law

Enpresa Nacional De Telecomunicaciones SA v Deutsche Bank AG

Compulsory purchase of a private business did not constitute a public policy exception to the 'act of state' principle. The court held that only the grossest infringement of human rights or gravest breaches of international law would qualify. The English courts would not interfere with the act of the Bolivian state in nationalising a telecommunications company.

Industrial & Provident Societies

Co-operative and Community Benefit Societies and Credit Unions Bill

The Bill and Explanatory Notes have been published.

<http://services.parliament.uk/bills/2009-10/cooperativeandcommunitybenefitsocietiesandcreditunions.html>

Insolvency

"Encouraging Company Rescue"

No US-style DIP finance yet

The Government have dropped the idea of introducing rescue finance, with super-priority for new lenders to troubled companies, for the time being. The Insolvency Service announced this in response to the consultation, "Encouraging Company Rescue". There was a more positive reaction to the suggestion of a moratorium for companies that need a breathing space in order to agree restructuring proposals with their creditors. We can expect more detailed proposals to be published in due course.

<http://banklawblog.wordpress.com/2009/11/11/rescue-financing-abandoned/>

http://www.law-now.com/DirectMail/{11080A13-B08C-4645-9233-4ABEBC70B524}_governmentresponesenov09.htm

OFT market study

Corporate insolvency

The OFT has launched a market study into corporate insolvency to see whether insolvency practitioners are charging fair fees for closing down businesses. The study will look at the structure of the market, the appointment process for insolvency practitioners and any features in the market which could result in harm, such as higher fees or lower recovery rates for certain groups of creditors. The OFT will analyse data from accountancy firms, law practices, government, regulators and trade bodies and if the study does proceed to a second stage, the OFT expects to complete this by the end of 2010.

<http://www.offt.gov.uk/news/press/2009/132-09>

Insolvency (Amendment) (No. 3) Rules 2009

Draft amendments published

The Insolvency Service has published a draft of the Amendment Rules that will make changes to the Insolvency Rules 1986. They modernise insolvency practice and increase the efficiency of insolvency procedures. The key changes are:

- To allow an insolvency office-holder to pay costs and expenses incurred before his appointment as an expense of the relevant insolvent estate. This will allow, for example, an administrator to recover the costs incurred in negotiating a pre-pack sale of the assets of an insolvent company.
- To allow for the remuneration of insolvency practitioners on a fixed fee basis.
- To allow for electronic communication between an insolvency office-holder and the creditors of an insolvent company or individual.
- To bring insolvency court proceedings more into line with the Civil Procedure Rules.

The Rules come into force 6 April 2010.

Lehman's CVA not sanctioned

In The Matter Of Lehman Brothers International (Europe) (In Administration)

[2009] EWCA Civ 1161 CA (Civ Div) (Lord Neuberger of Abbotsbury, Longmore LJ, Patten LJ) 6/11/2009

The Companies Act 2006 did not give the courts jurisdiction to sanction a scheme of arrangement that could alter creditors' rights over property held by a company on trust for them, as it gave no power to compromise or remove rights which creditors did not hold as creditors.

Shadow directors

“New legal risks for banks in business workouts: corporate law, banks and liquidators”

This article analyses the extent to which banks that work with distressed corporate clients in putting in place a business workout agreement, could put themselves in the position of being a *de facto* director of the client company. Such a position would expose them to potential liability to a liquidator should the workout, and the company, fail. It examines the definition of a *de facto* director and the type of activity undertaken by banks involved in business workouts with clients. It looks in particular at conditions imposed by banks on their continued support for customers.

Martin Markovic (University of Adelaide Business School) *Company Lawyer* (2009) Vol.30 No.12 Pages 377-379

Consultation

Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy

The Insolvency Service and Department for Business, Innovation And Skills have issued a consultation on what improvements can be made to secure better access to bankruptcy by debtors for whom other forms of debt relief are not appropriate. It also examines whether granting early discharge from bankruptcy is beneficial, and makes recommendations for reform.

http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%202009.pdf

Insolvency Service and Department for Business, Innovation And Skills, November 2009

Role of administrators

Duty of administrators to perform functions in interests of creditors as a whole

Re Zagna III Holdings Inc Sub Nom & ors v Mark Batten & ors [2009] EWHC 2994 (Ch) Ch D (Norris J) 20/11/2009

The duty of administrators under the Insolvency Act 1986 Sch.B1 para.3(1)(b) to perform their functions in the interests of the creditors as a whole did not mean that the obligation had to be performed in an identical way in relation to each creditor, and unequal treatment of creditors was not necessarily unfair treatment where there were sound commercial reasons for treating the creditors differently.

Insurance

Payment protection insurance

The assessment and redress of PPI complaints

The FSA has published a statement that it has received a large number of replies to the consultation and will issue the Policy Statement early in the new year. The FSA will consider any further comments received until the end of the year, thus extending the deadline from 30 October 2009.

http://www.fsa.gov.uk/pages/Library/Communication/Statements/2009/cp0923_update.shtml

Enhanced Capital Notes

The FSA has published the text of a letter from Paul Sharma to the ABI clarifying the position on the regulatory treatment that would apply for insurance companies that may hold the new Enhanced Capital Notes recently issued by Lloyds Banking Group.

http://www.fsa.gov.uk/pubs/other/abi_16nov09.pdf

IT systems

Single customer view

Financial Services Compensation Scheme reform

This Policy Statement reports on the main issues arising from Consultation Paper 09/16 *"Financial Services Compensation Scheme: Verification of the single customer view and changes to deposit compensation"* (June 2009) and publishes policy, feedback to consultation responses and rules on how FSA will verify and supervise a deposit-takers SCV system. Deposit-takers will need to be able to store the SCV information electronically, and submit it electronically to the FSCS and the FSA. The FSA considers that deposit-takers are likely to need to make a lot of systems changes to implement the SCV requirements. Formal verification requirements will start from July 2010 and the SCV must be implemented by 31 December 2010.

http://www.fsa.gov.uk/pubs/policy/ps09_18.pdf

FSA Policy Statement 09/18, November 2009

Lending

Debt buy-backs

Draft legislation

HMRC have published draft legislation intended to:

- Implement the changes to the debt buy-back rules mostly with effect from 14 October 2009;
- Prevent the debtor avoiding the tax charge on the (previously) untaxed discount imposed under the new debt buy-back rules, by the creditor accepting ordinary shares in the debtor as consideration for the release, with effect from, broadly, 9 November 2009.

The corporate rescue exception is more restrictive than anticipated and is likely to prove difficult to satisfy in practice. HMRC seeks comments on the draft legislation by 18 December 2009.

<http://www.hmrc.gov.uk/drafts/draft-changes-to-debt-buy-backs.pdf>

9 November 2009

The Lending Code

LSB set standards for banks

The Lending Standards Board has published the new Lending Code for dealings with personal and small business customers. It came into force on 1 November 2009 when the FSA assumed responsibility for regulating retail banking conduct of business. The Lending Code replaces the elements of the Banking Code and Business Banking Code that related to lending. It is a voluntary code of practice that sets out the standards for financial institutions to follow when dealing with personal and small business customers. It covers good practice in relation to unsecured loans, credit card lending and current account overdrafts, and sets out the details on how customers should be dealt with throughout the product life cycle.

The LSB will monitor and enforce the Lending Code. The other elements of the Banking Codes will be covered by the FSA's new banking conduct of business regime.

<http://www.lendingstandardsboard.org.uk/docs/lendingcode.pdf>

LSB, October 2009

Asset finance documents

“Financing Assets in a Brave New World”

This article says the key question in the current market is: what changes should be made to asset finance documents to address lender insolvency?

[Journal of International Banking and Financial Law, October 2009](#)

LMA

Loan trading documents

The Loan Market Association have published a revised set of loan trading documents combining the documents for trading par and distressed debt. The LMA intend to launch these on 25 January 2010. The result is a single set of terms and conditions for par and distressed trades, consolidation of the representations and warranties, a single trade confirmation for par and distressed trades and a new provision allowing for termination of a trade on the insolvency of one of the parties between the Trade Date and the Settlement Date.

[23 November 2009 LMA website “Pending Documents”](#)

Intercreditor, financial covenants and leveraged facilities

Following discussions between the LMA and a group of mezzanine lenders, the Loan Market Association have published revised versions of the:

- Intercreditor agreement,
- Users' guide for the Intercreditor Agreement, and the
- Financial Covenants Provisions.

As the changes to the Financial Covenants Provisions needed also to be reflected in the *senior multicurrency term and revolving facilities agreement for leveraged acquisition finance transactions*, the LMA has updated this document too to reflect the implementation of the remaining provisions of the Companies Act 2006 on 1 October 2009. In particular, the provisions include a form of representation to ascertain whether foreign obligors have registered a UK establishment under the Overseas Companies Regulations 2009. They also include, as a possible condition precedent, a form of officer's certificate for each foreign obligor confirming its registration position under the OCRs. Some provisions in the Intercreditor Agreement are now highlighted as ones that will require commercial negotiation.

[LMA 25 November 2009](#)

Subordination

"The consequences of subordination: understanding the junior/senior debt divide"

This article considers the case of (IMO) Car Wash, an LBO financing (2006) in which junior creditors unsuccessfully challenged the right of senior creditors to exclude them on a restructuring of the group's business. The article examines the contractual relationship between junior and senior creditors and their relative negotiating positions on an LBO restructuring.

Adrian Cohen, Catherine Bridge (2009) 9 JIBFL 526 1 October 2009

Mortgages

FSA

Extending mortgage regulation

HM Treasury are consulting on the extension of regulation by the FSA of consumer mortgages. The FSA began to regulate first-charge residential mortgages in October 2004 but the regulation of other credit business, including second-charge mortgages, remained the responsibility of the Office of Fair Trading under consumer credit legislation.

The paper proposes

- The regulation of second-charge mortgages will be transferred from the OFT to the FSA
- The FSA will become responsible for regulating buy-to-let mortgages
- A new regulated activity, "managing a regulated mortgage contact". The Government is concerned borrowers may be treated unfairly as a result of their mortgages being sold by a regulated firm to an unregulated firm. "Managing a mortgage" is not intended to catch SPVs used in securitisations that have no role in any decision making process, such as changing interest rates, which affects borrowers. FSA authorisation would only be required for the firm, usually the originating lender, who retains the power to make such decisions.

The Consultation closes on 15 February 2010.

25 November 2009, HM Treasury

OFT

Home buying market study

The OFT has published four research reports as part of its market study into home buying and selling. These are a survey of estate agents, a survey of trading standard services and both qualitative and quantitative consumer research.

<http://www.oft.gov.uk/news/press/2009/131-09>

Mortgage arrears and access to mortgage finance

Government and FSA replies to Treasury Committee

The House of Commons Treasury Committee has published the Government's and the FSA's replies to the Committee's report on mortgage arrears and access to mortgage finance. The Report is part of the Committee's inquiry in this area, launched on 17 June 2009.

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/1068/1068.pdf>

HC 1068: TSO, November 2009

Home Repossession (Protection) Bill

This Bill, that would have amended the Law of Property Act 1925 to require a mortgagee to obtain the court's permission before exercising the power of sale on residential property was dropped by Parliament before the end of the last session on 13 November 2009.

5 November 2009

October figures

New mortgage lending and house purchase approvals increased slightly as mortgage lending continued to grow from the low levels at the end of 2008. In contrast, consumer credit continued to be weak and lending to non-financial corporates fell.

<http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=16915>

BBA, 24/11/2009

Payments

SEPA Direct Debit scheme

Cross-border direct debits a reality

Banks can offer customers, consumers and businesses, direct debit transactions between different countries in the euro area by using the new Single Euro Payments Area Direct Debit scheme from 2 November 2009.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1665&format=HTML&age d=0&language=EN&guiLanguage=en>

CEC, 03/11/2009

EC consults on draft guidance for SEPA Direct Debit scheme

The European Commission wants to issue guidance to participants in the SEPA Direct Debit scheme to ensure that collective financing arrangements applied within this scheme comply with EC Treaty competition rules. It has invited comments on a working document. Comments can be submitted until 14 December 2009. Following consultation the Commission may, if appropriate, decide to adopt final guidance.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1666&format=HTML&age d=0&language=EN&guiLanguage=en>

CEC, 03/11/2009

"SEPA: where do we stand and what needs to be done"

This article reviews the achievements and the challenges of a harmonised European payments area. The SEPA Credit Transfer scheme and the SEPA Direct Debit scheme have been implemented to harmonise financial transfers in the EU by replacing national 'legacy' payment systems. However, questions remain regarding the existence of a 'single' payment area in the EU.

Dr S Schuster: EFL&P, 10.09, 04 09.46.063

BoE oversight

Response by the Payments Council

The Payments Council has published its response to the Bank of England's September 2009 paper outlining its approach to its payment systems oversight role under Part 5 of the Banking Act 2009.

http://www.paymentscouncil.org.uk/files/payments_council/minutes_of_payments_council_board/pc_response_to_oversight_of_interbank_payment_systems_301009_public_version.pdf

Payments Council, October 2009

PFI

Lords investigation

Lords Committee hear from academic experts

The House of Lords Economic Affairs Committee are continuing their inquiry into Private Finance Projects and off-balance sheet debt. They took evidence on 10 November 2009 from academics in the Universities of Edinburgh and of East Anglia as well as from the Chairman of UCL Hospital. The academics were asked for their views on how the scheme has operated in the NHS, whether it has provided value for money and what alternative systems of funding public infrastructure procurement might be available. The Chairman of UCL Hospital was asked about his experience of the PFI project used to build the new University College London Hospital and how the use of private finance in public infrastructure projects might be influenced by the credit crunch.

Video and audio: <http://www.parliamentlive.tv/Main/Player.aspx?meetingId=5115>

Scope of the enquiry:

http://www.parliament.uk/parliamentary_committees/lords_economic_affairs/privatefinanceprojectsinquiry.cfm

Projects

JCT contracts and accounts

"The problem with project bank accounts"

This article comments that project bank accounts are an admirable idea, but their inclusion in JCT contracts require some scrutiny.

S Lewis: Contract J, 28.10.09, 30 09.45.090

Onshore wind farms

£1.4 billion in new loans

Three UK-based banks will start offering new loans to eligible onshore wind farms. Wind farm developers and the banks will have an opportunity to start brokering the deals at a forum in the city.

<http://europa.eu/rapid/pressReleasesAction.do?reference=BEI/09/217&format=HTML&age=0&language=EN&guiLanguage=en>

CEC, 10/11/2009

Reform of banking

Reforming financial markets

Summary of responses

HMT has published a summary of replies to its July consultation and notes that all views have been incorporated into the policy development process, in some cases leading to changes to the proposals suggested in the consultation. It is noted that over 100 responses were received and the non-confidential ones are available to download.

<http://www.hm-treasury.gov.uk/7644.htm>

Financial Services Bill

The Bill had its first reading in the Commons on 19 November 2009. The second reading is scheduled for 30 November. The Bill:

- Establishes a Council for Financial Stability.
- Strengthens the FSA's powers to curb bankers' pay to discourage excessive risk taking.
- Forces banks to set up a "living will" to make them easier to wind down if necessary. (See next item).
- Bans unsolicited credit card cheques.
- Allows groups to bring court actions against financial institutions.

<http://services.parliament.uk/bills/2009-10/financialservices.html>

Living Wills

Or “recovery and resolution plans”

The FT has an article on these, “Bank sets out ideas on living wills for lenders”. Andrew Bailey, head of banking services at the Bank of England (whose signature is printed on bank notes) commented on the deficiencies in practice at the time of the Lehman’s case and said the elements that would be required in living wills, or what the Bank prefers to call recovery and resolution plans were:

■ Recovery

- Board responsibility for detailed plans for recovery in a crisis (“a lender’s internal blueprint”)
- proposals for an orderly death
- forcing lenders to hold more capital
- contingency funding plans
- use of contingent capital instruments
- sale of assets and/or business lines

■ Resolution

- a detailed balance sheet
- a clear mapping of relationships with affiliates
- wind-down plans for all parts of the business
- a contact plan for stake-holders

<http://www.ft.com/cms/s/0/cc660ef4-d3e3-11de-8caf-00144feabdc0.html>

FT 18 November 2009

Banking crisis: regulation and supervision

Responses from the Government and FSA

Further to Treasury Select Committee’s July report, this report comprises the responses from the Government and from FSA to the TSC’s Fourteenth Report of Session 2008-09. The Government’s response includes references to primary legislative proposals in the Financial Services Bill while the FSA updates the TSC on work it has undertaken since the July report.

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/47/47.pdf>

Statement on banking reform

The Chancellor of the Exchequer, Alistair Darling, made a House of Commons statement on 4 November 2009 on banking reform, focusing on changes to the structure of banks where there is a government shareholding.

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091103/debtext/91103-0004.htm#091103125000002>

EBF policy recommendations

Advancing the integration of European financial services markets

A European Banking Federation report “Overcoming the crisis and moving beyond” reviews the progress made in integrating the European financial services markets. The impetus for this was the difficulty faced by the banking industry since the global financial crisis. The report calls for more transparency of financial services and products, elimination of fiscal barriers and the integration of retail financial markets.

<http://www.ebf-fbe.eu/DocShareNoFrame/Common/GetFile.asp?PortalSource=1049&DocID=19842&mfd=off&pdoc=1>

European Banking Federation, November 2009

Review of the legislative reaction to the crisis

“Legal impact of the financial crisis: a brief list”

This article contains a list of about 100 measures or proposals as a result of the financial crisis so far. These are divided into: measures taken during the crisis, such as government bail-outs and central bank financing; post-crisis regulatory proposals, such as those relating to bank capital and liquidity and to securitizations; current and future proposals regarding insolvency law in relation to banks, corporates and sovereign states.

P R Wood: 2009, CMLJ, 4(4), 436 09.46.003

Insurers are not banks

The Banking Act 2009 (Exclusion of Insurers) Draft Order 2009

This Order excludes insurers from the definition of “bank” in Parts 1 and 2 of the Banking Act 2009, ensuring that they fall outside the scope of the provisions of that Act in relation to the special resolution regime and bank insolvency.

http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111487532_en.pdf

The UK bank resolution regime

Speech by Andrew Bailey

Andrew Bailey of the Bank of England gave this speech at the ICAEW Financial Services Faculty, discussing the history and framework of the UK bank resolution regime and issues arising, including funding of FSCS and UK banks with subsidiaries abroad/foreign banks with subsidiaries in the UK.

<http://www.bankofengland.co.uk/publications/speeches/2009/speech414.pdf>

BoE 26 November

Regulation

Banks face change to loan losses rule

Proposals for reporting expected losses

Banks outside the US would have to report expected losses on their lending much earlier, under proposals published on 5 November 2009 by the International Accounting Standards Board. This is the second phase of the project to replace the unloved IAS 39. The FT reports the plans are a virtual U-turn from the current system for banks. They would allow banks to provide for expected losses over the duration of a loan, rather than, as now, waiting until the losses have occurred – a practice criticised for exacerbating the crisis by increasing the cyclical nature of bank accounting. The second link below provides FT comment on the proposals.

<http://www.ft.com/cms/s/0/0e10c710-ca3c-11de-a3a3-00144feabdc0.html>

<http://www.ft.com/cms/s/3/303d755a-ca18-11de-a5b5-00144feabdc0.html>

The IASB statement is here:

<http://www.iasb.org/News/Press+Releases/IASB+publishes+proposals+on+the+impairment+of+financial+assets.htm>

Capital Requirements Directive

Amendment

The Council of the European Union has announced it has agreed a general approach on a draft directive amending the CRD (CRD 3). The amendments are :

- higher capital requirements for some riskier assets that banks hold in the trading book and for re-securitisation instruments;

- enhanced disclosure requirements in several areas such as securitisation exposures in the trading book and sponsorship of off-balance sheet vehicles;
- a requirement that the remuneration policies of financial institutions be subject to supervisory oversight
- a binding obligation on credit institutions and investment firms to have remuneration policies and practices that are consistent with effective risk management.
- penalties, including fines, against firms that fail to comply with the obligation.

Parliament still needs to be persuaded of the general approach, but if it is, it will adopt the new directive at first reading. It is intended that Member States should implement the revised directive by 31 December 2010. This is the same deadline as implementation for CRD 2 (covering colleges of supervisors, maximum exposure of 25% of capital or EUR 150m for large exposures, 5% retention of securitisation and harmonisation of hybrid capital).

Capital Requirements Directive (2006/48/EC and 2006/49/EC)

10 November 2009

Credit rating agencies

New EU requirements

The Regulation on credit rating agencies that provides for a legally binding registration and surveillance system for agencies that issue ratings intended for use for regulatory purposes has been published in the Official Journal of the European Union. The Regulation will enter into force on 7 December, 20 days after its publication in the OJ when it will be directly applicable in all Member States.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0001:0031:EN:PDF>

17 November 2009 (EC 1060/2009) OJ 2009, L302/1

Financial stability

New Directive

A Directive regarding banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management has been published in the Official Journal.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0097:0119:EN:PDF>

2009/111/EC amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC; OJ 2009, L302/97

Future of regulation and supervision

EC's reaction to report on future of EU financial regulation

The House of Lords' European Union Committee has published the European Commission's reply of 26 October 2009 to the Committee's report on the future of EU regulation and supervision.

<http://www.parliament.uk/documents/upload/CommissionResponseufrs1.pdf>

European Commission, November 2009; (COM(2009)252)

Proposals for European financial supervision: further report

The House of Commons Treasury Committee has published this further report outlining its concerns about the European Commission's proposals for reform of the European financial regulation and supervision. The report draws attention to evidence from a number of trade bodies submitted after the previous report was finalised on November 11, 2009. The debate on the EU proposals will be held on December 1, 2009 and the Committee suggests it will have taken evidence from the Bank of England and the Financial Services Authority before this date, which means the uncorrected transcripts of these sessions should be available. The Committee also wishes to reiterate its earlier view that the timetable proposed for agreeing the proposals is too hasty.

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmtreasy/37/37.pdf>

HC 37: TSO, November 2009

Intensive supervision

FSA pleased with new system

Hector Sants, the CEO of the FSA delivered a speech at Bloombergs and gave a pat on the back to the FSA: "Intensive supervision: delivering the best outcomes". He firmly asserted that intensive supervision is working, though clearly any problems do not lie with the FSA: "banks have yet to learn the lessons of the past". We were told to expect a Discussion Paper on senior management: getting the culture right is crucial to putting ethical frameworks in place.

http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/1109_hs.shtml

9 November 2009

Investments in repackaged loans

Draft CEIOPS' Advice for Level 2 Implementing Measures on Solvency II

Repackaged Loans Investment

A Committee of European Insurance and Occupational Pensions Supervisors consultation seeks views on advice for Level 2 measures with regard to investments in repackaged loans or similar financial arrangements as required by art.133 of the general approach on the Solvency II Directive.

<http://www.ceiops.eu/media/files/consultations/consultationpapers/CP63/CEIOPS-CP-63-09-Draft-L2-Advice-Repackaged-loans-investment.pdf>

CEIOPS-CP-63/09: CEIOPS, November 2009

Liquidity risk

"Liquidity risk management - policy conflict and correct"

This article shows the recent financial crises have confirmed the importance of both individual bank liquidity management and inter-bank liquidity support. A number of different types of liquidity risk can be identified which must be managed on an integrated, complete and coherent basis. Various papers have been published at the international, European and national levels that take forward separate aspects of liquidity risk management oversight and control. A residual policy dilemma remains in balancing the costs of liquidity support between private financial operators and sources of public finance and market support.

G Walker: 2009, CMLR, 4(4), 451 09.46.004

Macro-prudential Policy

The Role of Macro-prudential Policy - Discussion Paper

In this discussion paper, the Bank of England contributes to emerging ideas on how macro-prudential instruments might be designed and deployed to help to restrain the build-up of risks within the financial system. The aim of doing so would be to make the financial system more resilient and the real economy more stable.

<http://www.bankofengland.co.uk/publications/news/2009/111.htm>

BoE, 21/11/2009

UCITS

New directive

The new *undertakings for collective investment in transferable securities directive* has been published in the Official Journal of the European Union. The UCITS Directive seeks to modernise the regulatory framework applicable to European UCITS investment funds. It must be implemented by Member States by 1 July 2011.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF>

17 November 2009 (2009/65/EC); OJ 2009, L302/32

RegZone

Law-Now

Remember the RegZone, which covers developments in the regulation of financial institutions, that helps you to keep up the vast volume of material on regulatory reform that is published by UK, EU and international bodies every day.

<http://www.law-now.com/regzone/>

Retail

Switching accounts

"Easier bank account switching from November"

Consumers in the European Union from 1 November 2009 should find it easier to switch their current account from one bank to another within their own Member State. The 'Common Principles for Bank Account Switching' were adopted by the European Banking Industry Committee last year and have been implemented in the Member states by the national banking associations. From now on, the new bank is to offer its assistance in the switching process.

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1667&format=HTML&aged=0&language=EN&guiLanguage=en>

CEC, 03/11/2009 (EBIC) (IP/08/1841)

The Saving Gateway Accounts Regulations 2009

These Regulations make detailed provision for Saving Gateway Accounts under the Saving Gateway Accounts Act 2009.

Explanatory Memorandum: http://www.England-legislation.hmso.gov.uk/si/si2009/em/uksiem_20092997_en.pdf

Full text: http://www.England-legislation.hmso.gov.uk/si/si2009/pdf/uksi_20092997_en.pdf

Date in force: (In accordance with regulation 1) Reg No 2997

Securitisation

Current use

“If securitization is dead, why do so many government schemes use it?”

This article says that when the credit crisis started in 2007, securitisations were identified as one of the main causes of banks' woes and the financial crisis itself. Notwithstanding the criticism, securitisation and securitisation techniques are still widely used.

Governments across the globe have recognized securitisation and securitisation techniques as necessary tools to be used in the short to medium term to stabilize the financial system and restart consumer and commercial lending. As a result, many of the government schemes put in place use securitisation and securitisation techniques. In conclusion, the article discusses the future role of securitisation in the post-credit crisis world.

K Ingram: 2009, CMLJ, 4(4), 462 09.46.005

Security

Guarantees

Enforcement and recovery

This article examines guarantees given by parent or sponsor companies to development project lenders, in the construction sector. It explains the formalities and types of performance and financial guarantee and reviews the situations where a guarantee might be unenforceable including non-consensual variations of liability, the winding up or dissolution of the borrower, and the expiration of time or judgment.

J Dakin and A Papakyriacou: PLJ, 19.10.09, 17 09.45.087

Settlement

Crest competitor

“High speed system for UK funds”

The FT report that Calastone, a transaction network for funds, plans to offer a settlement system to compete with Crest. It hopes to launch by the end of March 2010.

FT FM, p1 16 November

Calastone's website is at <http://www.calastone.com/>

Tax

Treatment of gilts

Revenue & Customs Commissioners v DCC Holdings (UK) Ltd

[2009] EWCA Civ 1165 CA (Civ Div) (Rix LJ, Moses LJ, Rimer LJ) 10/11/2009

In this case, five repurchase or "repo" transactions in gilts under which the taxpayer received more than it had paid, did not give rise to an entitlement to relief in respect of a non-trading deficit. On the correct interpretation of the Finance Act 1996 s.84 the deemed interest expense the taxpayer incurred would represent (and thereby cancel out) the interest to be credited in respect of the gilts.

Trade finance

Bonds were on demand guarantees

Rainy Sky SA & Ors v Kookmin Bank

[2009] EWHC 2624 (Comm) QBD (Comm) (Simon J) 29/10/2009

Buyers of a ship who had contracted to pay instalments before delivery were entitled to a repayment of those instalments from the bank where the shipbuilder had defaulted on the contract. The court gave summary judgment to the buyers for the money claimed under advance payment bonds issued by the bank on the shipbuilder's behalf. The bonds were properly characterised as 'on demand' guarantees.

Trusts

Perpetuities and Accumulations Act 2009

This Act that amongst other things, extends the perpetuity period from 80 to 125 years was passed on 2 November 2009. This is most likely to be relevant to English & Welsh readers of the Heavyweight in the context of Security Trust Deeds. The provision will come into force some time in 2010.

There is a House of Commons research report on the Bill prepared for the House of Commons Second Reading and Committee Stage of the Bill before it was passed, at <http://www.parliament.uk/commons/lib/research/rp2009/rp09-080.pdf>

House of Commons Research Paper 09/80, 28.10.09

And finally ...

Law destined for the bin

Statute Law Repeals

Consultation Paper: Courts and Administration of Justice - Proposed Repeals

This Law Commission and the Scottish Law Commission consultation seeks views on proposals to repeal 25 obsolete Acts relating to courts and administration of justice.

Your chance to suggest some Acts for disposal.

http://www.lawcom.gov.uk/docs/courts_consult.pdf

SLR04/09:Scottish Law Commission and Law Commission, November 2009



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