

EU CLEARING AND SETTLEMENT LEGAL CERTAINTY GROUP

MINUTES OF A MEETING OF THE LEGAL RESEARCH SUB-GROUP HELD ON MONDAY 11 JULY 2005 AT THE OFFICES OF CLIFFORD CHANCE IN LONDON

PRESENT: Martin Thomas (MT)
Klaus Loeber (KL)
Grazia Bonante (GB)
Jan Christoph Kobbach (JCK)
Irene Martinez-Calcerrada (IMC)
Eva Micheler (EM)
Oliver Peters (OP)
Marianne Sandel (MS)
Nadia Tryfonidou (NT)
Pavlos Maris (PM)
Aranzazu Ullivarri (AU)
Dermot Turing (DT)

1. **PROGRESS REPORT**

The meeting commenced at 10 am with a progress report of the Legal Certainty Group. At its first meeting, the Legal Certainty Group decided that the best way to tackle the Giovannini report's concerns with inefficiency in EU cross-border settlement resulting from discrepancies in legal landscapes was to ask lawyers from all relevant jurisdictions to respond to a questionnaire on their country's laws relating to clearing and settlement. All countries except Sweden, Ireland and Austria have so far answered the relevant sections of the questionnaire.

At a subsequent meeting held on 21 April, the Legal Certainty Group discussed the effects of the draft Unidroit Convention, focusing on the potential effects of Unidroit on existing laws.

The progress report was followed by a discussion of the purpose of the Legal Certainty Group's work, which can be summarised as an attempt to tackle inefficiencies of EU cross-border clearing and settlement.

2. **OVERVIEW OF OUTSTANDING RESEARCH NOTES**

The progress report was followed by a discussion of the research notes prepared by members of the Research Sub-Group prior to the meeting. It was decided that the following steps would be taken going forward:

- (1) GB would start to build a priority diagram of holding patterns, aiming to identify patterns that have not been previously discussed.
- (2) A note on the US regulatory regime on providing securities accounts would be produced by September.

- (3) IMC would incorporate KL's suggested changes into her note on dematerialisation, as well as an explanation of the distinction between dematerialisation and immobilisation.
- (4) OP would ensure that legal experts re-validate their answers to the questionnaire.
- (5) DT would revise his note on omnibus accounts to contain a more basic explanation of what constitutes an omnibus account (as compared with a nominee account), and include a section outlining the advantages and disadvantages of the use of omnibus accounts. DT asked other members of the sub-group to send him a short email containing their views of the advantages and disadvantages of omnibus accounts.
- (6) Academics would comment on NT's note on relevant academic work currently being undertaken at the EU level.
- (7) The two surveys of company law that are currently being undertaken at EU level and have a potential cross-over with the current project would need to be reviewed by members of the sub-group.

3. **DISCUSSION OF THE SUGGESTED OUTLINE OF THE MAIN LEGAL CERTAINTY GROUP'S FIRST REPORT**

The Research Sub-Group discussed the 5 proposed sections of the first report.

In answer to the questions posed in **Section 1**, it was decided that, rather than just identifying differences in any existing laws, the Legal Certainty Group's task is to (i) identify whether the fact that the existing laws relating to securities accounts differ from EU member state to EU member state matters, and (ii) if so, create a harmonised solution. Instead of radical changes to existing laws, the aim is to achieve a re-alignment of rights in domestic and cross-border situations. Furthermore, the point was made that, because legal systems are cherished, any proposed changes will have to be supported by overwhelming evidence of the necessity for change. There could potentially be a cascade of different solutions, depending on the amount of evidence at hand.

In relation to **Section 2**, the sub-group discussed existing initiatives, such as MiFID, the Commission's work as improving shareholders' rights (which forms part of the Commission's Company Law Action Plan) etc. In relation to **Sections 3 to 5**, it was discussed whether the Unidroit Convention could provide a potential solution, whereas **Section 4** would provide a bucket for any remaining issues, such as omnibus accounts or settlement finality.

4. **THE QUESTIONNAIRE**

There was general consensus amongst members of the Research Sub-Group that legal experts from different jurisdictions answered questions differently from each other, or used terminology differently, or have applied different interpretations to questions contained in the questionnaire.

It was decided that the best way to tackle the answers to the questionnaire would be as follows:

- (1) Read the relevant answers.
- (2) Draft horizontal analysis of the relevant answers in an agreed model format (a description of the model format is given at paragraph 5 below).
- (3) Identify answers needing moderation.
- (4) Prioritise discussion topics (a list of which to be sent to main Legal Certainty Group **by 6 September**).
- (5) Meet and discuss discussion topics, own expertise and "other 19" (to take place in Brussels at the offices of Freshfields **on 5 or 6 September**).
- (6) Follow-up with counsel.
- (7) Write report.

5. **AGREED FORMAT OF HORIZONTAL ANALYSIS**

A discussion took place on what format the horizontal analysis should take. It was agreed that each note should be structured as follows:

- (1) Repeat of the question.
- (2) Introductory paragraph addressing why the question is relevant.
- (3) Summary of mainstream responses.
- (4) Summary of unusual answers.
- (5) Editorial responses outlining answers requiring moderation.

6. **CONCLUSION**

The meeting concluded with a discussion of settlement finality. It was agreed that, for the purposes of the current project, it would be useful to create a synonymous concept, which can be used to refer both to transfer orders and transfers per se.

The meeting concluded at 5pm.