

Finance Update

May 2009

OLSWANG



General Finance

General Finance News

Banking Act 2009: The Special Resolution Regime

As previously reported in the [March 2009 Finance Update](#), a new special resolution regime (SRR) for ailing banks came into effect on 21 February 2009, the provisions of which are set out in the Banking Act 2009 and related legislation. The statutory objectives of the SRR are, among other things, to protect and enhance the stability of the financial systems of the UK and public confidence in them, and to protect depositors.

The SRR is comprised of three "stabilisation options": the sale of all or part of the bank's business to a private sector purchaser, the transfer of all or part of the bank's business to a bridge bank wholly owned by the Bank of England, or temporary public ownership. The SRR also includes a new bank insolvency procedure (with a principal function to, among other things, ensure that depositors have their accounts transferred, or achieve compensation from the Financial Services Compensation Scheme, as quickly as possible) and a new bank administration procedure to deal with a situation whereby there is a partial sale or transfer of the bank's business.

Budget

The Chancellor delivered his budget on 22 April – for a short summary and an analysis of the main provisions please see the Olswang Analysis – [here](#). Following the Budget, the Finance Bill 2009 was published on 30 April.

Companies Act 2006

On 6 April, the Department for Business, Enterprise and Regulatory Reform (BERR) published revised draft regulations for the registration of charges created by overseas companies, [The Overseas Companies \(Company Contracts and Registration of Charges\) Regulations 2009](#). The consultation period for these regulations ended on 5 May and they are due to come into force on 1 October this year. The main changes include:

- the creation of a single regime for overseas companies creating a charge on property in England and Wales;
- removal of provisions to decide whether property is situated in the UK; and
- rules for inspection of records will also apply to the inspection of overseas companies' records in relation to the register of charges.

[The Companies \(Shares and Share Capital\) Order 2009](#) has been published. This order makes certain provisions in relation to shares and share capital under the Companies Act 2006, including: (i) specifying the information that must appear in a return of allotment, to be filed following an allotment of shares; and

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(ii) the information that must be set out in a directors' statement, in connection with the redemption or purchase by a private company of its own shares.

Consumer Credit Directive

On 14 April, the BERR launched a **review into the Consumer Credit Directive** (CCD). The CCD was adopted by the European Commission on 8 May 2008 and must be implemented in all Member States by June 2010. It aims to protect consumers and to set out their rights in relation to unsecured credit transactions. The consultation will consider, among other things, consumers' rights to withdraw from contracts within 14 days without any penalties, the pre-contractual, contractual and post-contractual advice which must be given to consumers and the explanations which lenders will have to make about their products to consumers. The consultation is due to close on 10 June.

Financial Services Authority (FSA)

On 24 April, it was **announced** that the FSA will take over all retail banking conduct regulation for deposit taking and payment services in November 2009. At present the Banking Code Standards Board carries out this function and enforces the voluntary Banking Codes which control the relationships between banks and their customers. From November, the Banking Codes will be replaced by new rules from the FSA which banks and other financial institutions will have to adhere to.

The FSA has begun investigations into the banking problems that led to the government bailouts of RBS and HBoS, examining executive and director contributions to their failures as well as reviewing each banks' internal controls.

International Monetary Forum (IMF)

On 21 April, the IMF published its semi-annual **Global Financial Stability Report**. These semi-annual reports assess key risks in the global financial system, aiming to prevent financial crises and thereby strengthen global financial stability. This report looks at the sources of the current financial crisis and looks at measures to normalise market conditions and restore public confidence. It also looks at the areas where regulatory reform is required and considers the outcome of the recent G20 summit.

Office of Fair Trading (OFT)

On 7 April, the OFT announced its review into the consumer credit sector as part of its wider Financial Services Strategy. The review will focus on the unsecured consumer credit market and will look at the fair treatment of consumers, transparency in pricing and how risk-based pricing operates, among other things. Comments were invited by 8 May, with the results of the review being published over the course of the next few months.

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Remuneration Policies

Under the **Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008** (Schedule 8, paragraph 4), from 6 April, quoted companies are required to add a statement to the directors' remuneration report, setting out how they have taken employee pay into account when setting directors' pay each year.

On 20 April, the Committee of European Banking Supervisors (CEBS) published **principles for setting remuneration policies** throughout an organisation. These principles deal with transparency, internally and externally, performance measurement, types of remuneration and alignment of the organisation's objectives with the objectives of the employees. These principles should be implemented by institutions within the ambit CEBS during the third quarter of this year.

The FSA has published a **draft code of practice on remuneration policies** for all FSA regulated firms. The general principle of this code is that relevant firms must ensure that their remuneration policies are consistent with risk management i.e. are intended to avoid excessive risk-taking by employees.

Interest Rates

On 9 April, the Bank of England announced that interest rates would be maintained at 0.5% and that it would continue with the programme of asset purchases of £75 billion financed by the issuance of central bank reserves (both of these proposals were unanimously agreed by the Monetary Policy Committee). On 7 May, the Bank of England announced that interest rates would again be held at 0.5% and that it would continue with the programme of asset purchases, but that this would be increased by £50 billion to £125 billion.

On 2 April, the European Central Bank cut interest rates by 0.25% to 1.25% across the euro-zone and on 7 May, cut interest rates again by 0.25% to 1.00% from 13 May.

On 29 April, the US Federal Reserve announced that interest rates would remain on hold at their current rate of between 0% and 0.25%. It also said it would continue its present level of purchases of long-term government debt, aimed at increasing lending and money supply.

World Markets

During the course of April, the IMF predicted that the recession across the world is likely to be worse than previously thought and it forecast that the UK economy would shrink by 4.1% this year (compared with the forecast in the Budget, of a drop of 3.5% this year). It also expects the recession in the UK to carry on into 2010. This is backed up by the results from the first quarter of this year, as UK gross domestic product fell by 1.9% (more than the predicted 1.5% and an increase on the 1.6% fall in the last quarter of 2008). Figures from Candeover have shown that the value of European buyouts in the first quarter of this year have fallen to levels last seen in 1995, down by 90% on the same period in 2008.

In the US, the number of repossessions increased by 44% during March and the US economy also recorded its first yearly fall in inflation during March for more than 50 years, causing deflationary fears to

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increase on both sides of the Atlantic. However, the Standard & Poor's / Case-Shiller housing index recorded a slower fall in house prices in the US than those recorded for the past year, perhaps indicating that the recession in the US is easing. The Chinese economy has reported growth of only 6.1% during the first quarter of this year, the slowest growth since records started in 1992.

In the UK, Moody's has downgraded the ratings of many of the largest building societies, many from AAA-ratings, although none have been downgraded below Baa3 (i.e. downgraded to junk status). Meanwhile, some banking institutions have begun to offer 90% mortgages and HBoS is offering to lend 100% mortgages to certain borrowers.

Finally, volatility on global stock markets continued in April, as markets fell again, after six weeks of gains, after the announcement of large unexpected losses by Bank of America in the middle of the month.

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General Finance Case

Funding Agreements – legally binding and enforceable

In the case of (1) *Maple Leaf Macro Volatility Master Fund (2) Austin Capital Management Ltd v (1) Jacques Rouvroy (2) Krzysztof Trylinski* [2009] EWHC 257 the issue of when a funding agreement becomes legally binding and enforceable was considered.

Facts: The claimants (a hedge fund and an investment manager) were seeking damages for breach of contract. The defendants claimed that the funding agreement they had made with the claimants was not legally binding and was not enforceable. They also contended that the commercial court did not have jurisdiction to hear the claim.

Decision: The court did have jurisdiction to hear the claims, under Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, as the defendants had entered an appearance and under the wording of the jurisdiction clause of the funding agreement itself.

In relation to whether the funding agreement was held to be legally binding and enforceable, the judge stated that the test was objective, i.e. would a reasonable business man consider himself bound in the circumstances in question. It was held in this case, that on an objective basis, the parties had evidenced an intention to be bound and the agreement was not considered to be too uncertain.

Comment: This is a commercial decision and in the current climate means that funders may not be able to extract themselves from contractual relationships on a technicality.

Real Estate Finance

Real Estate Finance News

Homeowners' Mortgage Support Scheme

This scheme began on 21 April in order to assist homeowners who suffer a temporary loss of income to cut their mortgage interest payments for up to two years and to ensure that repossession is seen by lenders as a last resort. Under the scheme, the government will guarantee up to 80% of the interest deferred but will only pay out on this guarantee where, once the principal is repaid, the proceeds of repossession will not cover the guaranteed interest. The scheme has been approved by the European Commission under EC Treaty state aid rules. However, some lenders, such as HSBC and Abbey, have refused to join the scheme. The government has produced a guide to the scheme – see [here](#).

Land Registry

On 7 April, the [Land Registration Fee Order 2009](#) was published. It will come into effect from 6 July 2009 and increases the fees payable to the Land Registry for inspection, copying, fixed fee applications, searches, registration of title, registration of a rent charge and other applications.

The Land Registry has registered its first mortgage to be signed electronically. It was made in favour of Coventry Building Society, was signed electronically by the borrower and was registered on 24 March 2009.

From 3 August 2009, the Land Registry will be making a change to the process for registering a discharge of a seller's mortgage. Currently, the Land Registry will not register the purchase of a property and the buyer's mortgage until the discharge of the seller's mortgage has been produced. From 3 August, the Land Registry will register the purchase and new mortgage even if the discharge of the previous mortgage has not been produced. Therefore, until the discharge is produced, the buyer's title will continue to refer to the seller's mortgage and the new mortgage will rank behind this.

Real Estate Finance Market

According to IPD, UK commercial property values fell 3.1% in March, meaning the fall in values was 8.9% in the first quarter of this year, compared with 15% in the last quarter of 2008. According to IPD, the value of commercial rental income has also fallen every month since last August. Research from Cushman and Wakefield indicated that the value of commercial property deals in central London fell by 76% in the first quarter of 2009, compared with the same period last year. However, figures from the Investment Management Association show that investment outflows from UK commercial property fell to £49m in March, compared with outflows of £87m in February.

According to the Council of Mortgage Lenders, mortgage lending rose 16% during March to £11.5bn. This was an increase from £9.9bn in February but a 52% drop from March 2008. Figures from the Department of Communities and Local Government indicate that the fall in British house prices was 12.3% in the three months to February 2009. However, according to RICS, the number of enquiries from new buyers has risen for the past six months and the number of sales per agent has also risen to 3.5 in April, compared with 3.2 sales per agent in March.

Real Estate Finance

Real Estate Finance Case

Undertakings

The case of *Angel Solicitors (A Firm) (Applicant) v Jenkins O'Down & Barth (A Firm) (Respondent) v (1) Barclays Bank plc (2) Close Brothers Ltd (3) Ellenwell Properties Ltd (Third Parties)* [2009] EWHC 46 (Ch) illustrates the problems of giving a solicitor's undertaking to redeem existing charges over a property being sold, without first obtaining a redemption statement and the mortgagee's agreement to release the properties from the existing charges, on payment of a certain sum. The High Court in this case made some interesting (obiter) comments on this issue.

The Court suggested that, in this scenario, if a mortgagee were to insist on its entitlement to receive, by way of redemption, a payment considerably in excess of any sum that could have been contemplated at the time that the undertaking was given and the present unencumbered market value of the property, then the Court might refuse to enforce the order for summary enforcement of the undertaking and order payment of compensation for breach of the undertaking instead.

This case shows that when giving an undertaking in these circumstances it is important to think through the implications of the undertaking thoroughly, to obtain relevant up-to-date redemption statements and to get acceptance that the mortgage will be released on payment.

Structured Finance

Structured Finance News

Credit Rating Agencies

The International Organisation of Securities Commissions (IOSCO) has published a report detailing the implementation of the voluntary **IOSCO Code of Conduct Fundamentals for Credit Rating Agencies**. Implementation of the Code by credit rating agencies amounts to a public statement of the extent to which they agree with the international regulatory consensus. The report found that more of the agencies reviewed were aware of the Code and have taken steps to incorporate its provisions into their codes of conduct than when the previous survey took place in 2007. The review also found that seven out of the 21 credit rating agencies reviewed had implemented the Code's provisions (including the three largest agencies – Fitch, Moody's and Standard & Poor's) and two intend to implement the Code in the near future.

Hedge Funds

On 29 April, the European Commission published a new hedge fund Directive entitled '**Directive on Alternative Investment Fund Managers**'. The Directive proposes more demanding regulatory standards for all funds over the value of €100m. Funds will have to become more transparent and new rules are to be imposed in relation to marketing hedge funds within the European Union. They will also have to maintain certain levels of capital on their books. This Directive forms part of the European Commission's response to the current financial crisis and will now go to the European Parliament and Council for consideration.

Restructuring and Insolvency

Restructuring and Insolvency News

Insolvency Legislation

There has been a variety of insolvency legislation published over the course of the last month, including the following:

- The **Legislative Reform (Insolvency) (Advertising Requirements) Order 2008**, which came into force on 6 April. This Order amends the Insolvency Act 1986 by removing the mandatory requirement for advertising in a newspaper, in addition to the Gazette, a creditors' meeting for a company in a members' or creditors' voluntary liquidation, replacing this requirement with discretion to undertake additional advertising.
- On 8 April, **the Financial Markets and Insolvency Regulations 2009** were published. These regulations amend a variety of legislation to change the insolvency regime which applies to any exchange which is a recognised investment exchange and any central counterparty clearing house which is a recognised clearing house. They will come into force on 15 June 2009.
- The **Insolvency (Provision of Information to Employment Agencies) Bill** had its first reading in the House of Commons on 21 April. This is a bill which would require insolvency practitioners to provide information about redundancies, within a certain time period, to employment agencies when a company goes into administration.

Budget News: Insolvency Service Consultation

In the Budget speech, it was announced that the Insolvency Service will be starting a consultation in June 2009 to discuss the following proposals:

- allowing large and medium sized companies time while they seek legally binding CVAs with their creditors without first having to put their companies into administration; and
- prioritising any new money lent to companies in a CVA or administration.

Restructuring and Insolvency Market

According to Standard & Poor's, the default rate among western speculative-grade companies rose in the fourth quarter of 2008 and 22 companies, out of those it rates publicly and where it provides a private 'credit estimate', defaulted. Deloitte has also reported that 113 retailers have gone into administration in the first quarter of 2009, double that in the same period in 2008.

The value of restructurings in the first quarter of 2009 is €4.4bn, double that during the whole of 2008, according to Debtwire. Also, figures from Debtwire show five European portfolio companies have filed for bankruptcy in the last year, which is more than those filing for bankruptcy in the whole of 2008.

Restructuring and Insolvency

According to the Insolvency Service, in the first quarter of this year the number of people declared bankrupt hit a record high of 19,062 bankruptcies and 10,713 individual voluntary arrangements. However, the number of companies entering some form of insolvency proceedings has fallen over the same period, although it is still 54% higher than the figure for the first quarter in 2008.

Restructuring and Insolvency

Restructuring and Insolvency Cases

Administration – Data Protection

In the matter of Bernard L Madoff Investment Securities LLC sub nom in the matter of Madoff Securities International Ltd [2009] EWHC 442 (Ch) the High Court ordered that pursuant to section 112 of the Insolvency Act 1986 and Schedules 1 and 4 of the Data Protection Act 1998, it was in the public interest that large-scale fraud should be investigated and therefore, the information which was in the possession of the joint provisional liquidators of a UK subsidiary of a US company should be transferred to the parent company's trustee in bankruptcy.

Administration – Set-Off

In the matter of Kaupthing Singer & Friedlander Ltd (in administration) sub nom Newcastle Building Society v (1) Mill & Ors (2) Kaupthing Singer & Friedlander (Isle of Man) Ltd [2009] EWHC 740 (Ch) the issue of set-off in the context of an administration was considered by the High Court.

Facts: K had bought a certificate of deposit issued by N and N had obtained three instruments of deposit issued by K. K went into administration and the instruments issued by K were not paid on their maturity dates. N applied for set-off of the money owed by K under the three instruments of deposit against the money owed by N to K under the certificate of deposit. The certificate of deposit was a dematerialised security and was to be settled under the rules of CREST. In accordance with these rules, it was stated to be paid 'without set-off, counterclaim or other deduction, save as required by law'. N argued that the right to legal set-off could not be waived and that the deed should be construed to exclude only the equitable right of set-off.

Decision: The right to set-off could be excluded by agreement. Freedom of contract in English courts will only be restricted on grounds of public policy and/or statutory exemptions. There was no public policy issue in this case. Therefore, the exclusion of legal set-off was permitted. There was no difference in the wording in the certificate of deposit to differentiate between legal and equitable set-off and under the rules of CREST it was important that all transactions could be settled immediately, without considering any other transactions between the relevant parties. Therefore, N's application was dismissed.

Restructuring and Insolvency

Scheme of Arrangement

In the matter of Lehman Brothers International (Europe) (In Administration) (not yet reported) Ch D, 2009 it was held that the administrators could propose a scheme of arrangement to deal with client assets, which were frozen in September 2008 when the company went into administration.

Facts: The administrators applied to court for permission to propose a scheme of arrangement, as they were of the view that this would speed up the claims process for claims in relation to the trust property. A scheme of arrangement is a procedure under Part 26 of the Companies Act 2006, pursuant to which a company can enter into a compromise or arrangement with a class of creditors with the approval of the court.

Decision: It was held that the administrators could propose the scheme.

The information in this update is intended as a general overview only of the subjects covered. Detailed specialist advice should always be taken before taking or refraining from taking any action. For more guidance on the changes and their application, please get in touch with your usual Olswang contact.

About Olswang

Olswang is a leading business law firm with a distinctive approach. Our pioneering and problem-solving ethos has established a commanding reputation in the technology, media and real estate sectors, as well as a wide range of other industries.

Founded in 1981, our Firm has grown to a team of over 600, including 90 partners, across four European offices. In addition, Olswang has a formal alliance with a major US firm Greenberg Traurig LLP and a long-established best friends network of leading independent law firms throughout the world.

Our Firm continues to be acknowledged as a leading practice in many of our core areas: Olswang was voted TMT Team of the Year 2008 at the annual Legal Business Awards; Olswang's Corporate Group won M&A Law Firm of the Year at the M&A Awards 2008 in conjunction with M&A Magazine.

Resourceful drive and a climate of shared knowledge and empowerment are the hallmarks of our meritocratic, unstuffy culture. For the last four years Olswang has been ranked in The Sunday Times 100 Best Companies to Work For and our strong management team is dedicated to the personal and professional development of our people.

We recruit personalities with a genuine fascination and notable reputation in the sectors they focus on, which is reflected in the quality of our advice. We also understand the importance of achieving our clients' goals and ensure that our advice is, above all else, practical.

From world-class businesses to entrepreneurial startups, the rich diversity of our client base ensures a broader perspective and, as a result, deeper commercial insight. Transactional work is the most obvious feature of the role we perform. However, ongoing non-transactional support is an integral part of our business, and we focus on creating long-term relationships with our clients. We employ a range of proactive initiatives such as client care programmes, secondments, client training and feedback sessions to ensure our client relationships are strong.

At Olswang the passion of our lawyers, the confidence of our approach and the commercial edge to our advice provide a unique and compelling service.

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