

Constitution of the CMP

Which accounts?

1. Does the term 'client bank account' include:

(a) the core bank accounts in relation to which LBIE operated its client segregation system;

Direction sought: yes, the term 'client bank account' does include the core bank accounts in relation to which LBIE operated its client segregation system

(b) those bank accounts and money market deposits which were identified by LBIE's designation of the account as a client cash segregated account or alternatively were designated in LBIE's books and records as such and:

(i) in relation to which LBIE complied with CASS 7.8.1R;

(ii) in relation to which LBIE did not comply with CASS 7.8.1R;

(c) a bank account other than an account falling within the description in (a) or (b) above which included only client money (whether or not LBIE appreciated this);

(d) a bank account other than an account falling within the description in (a), (b) or (c) above which contains identifiable client money, and if so, to the extent of that identifiable client money, or to some other extent;

(e) any other bank account, and if so, which account(s), and to what extent?

2. Do the answers to question 1 above change where the accounts in question are held not in LBIE's name but in the name of a nominee of LBIE?

Direction sought: no, accounts held not in LBIE's name but in the name of a nominee of LBIE are nonetheless client money accounts.

3. Does the term 'client transaction account' include:

(a) those accounts maintained by LBIE with an exchange, clearing house or intermediate broker, as the case may be, in respect of transactions in contingent liability investments undertaken by LBIE solely with or for its clients;

Direction sought: the term 'client transaction account' includes those accounts maintained by LBIE with an exchange, clearing house or intermediate broker in

respect of transactions in contingent liability investments undertaken by LBIE solely with or for its clients

[HLBB maintains that the words “with and for” in the final line mean, in this context, “for and on behalf of”]

- (aa) transaction accounts of clients maintained in LBIE’s books, not being accounts maintained by LBIE with an exchange, clearing house or intermediate broker;

Direction sought: the term ‘client transaction account’ does not include transaction accounts of clients maintained in LBIE’s books

- (b) any other account, and if so, which account(s)?

4. Does the reference to ‘client money accounts’ in CASS 7.9.6R(1)¹ include:

- (a) the client bank accounts that LBIE maintained as at the Time of Appointment;

Direction sought: yes, the reference to ‘client money accounts’ in CASS 7.9.6R(1) includes the client bank accounts that LBIE maintained as at the Time of Appointment

- (b) the client transaction accounts that LBIE maintained at the Time of Appointment;

Direction sought: yes, the reference to ‘client money accounts’ in CASS 7.9.6R(1) includes the client transaction accounts that LBIE maintained as at the Time of Appointment

- (c) any other account, and, if so, which account or accounts, and to what extent?

¹ 7A.2.4R(1)

Treatment of identifiable client money outside the CMP

4A. When LBIE was obliged to segregate money in respect of a debt due from LBIE to a client but failed to do so, does the client, without more, have a proprietary interest in a sum in the amount of the debt?

4B. When LBIE opens a back to back position on a principal to principal basis with a third party, and funds its margin obligation to the third party with money which had been paid to LBIE by its clients as margin for their positions with LBIE (and assuming that LBIE has not already reimbursed the client or otherwise segregated client money for the client in respect of such transaction):

(a) is the corresponding balance on a transaction account held at that third party in connection with that back to back position held on trust by LBIE for the client?

(b) is a payment received by LBIE from the third party from a transaction account held at the third party in connection with that back to back position held on trust by LBIE for the client?

5. ~~If the answer to question 1(b), 1(c) and/or 1(d) and/or 1(e) above is "no" or the answer to question 4(c) is "yes"~~ If there are accounts containing client money which is not pooled pursuant to CASS 7.9.6R, is LBIE obliged to transfer any **such** identifiable client money held by it at the Time of Appointment in an account other than a client money account to the client for whom it was held pursuant to CASS 7.7.2R(2) (subject to an appropriate deduction for costs in accordance with CASS 7.7.2R(4))?

5A. Is the success of any proprietary claim founded on conventional equitable principles dependent upon (inter alia) the claimant establishing:

(a) the existence of a prior beneficial interest in money or property;

(b) the money (or some part of it in the case of its payment into a mixed fund) or property in question or any substitute property being acquired with the same still being identifiable?

5B. In connection with Issue 5A, is the burden on the client to prove:

(a) in which money or property the client has a beneficial interest; or

(b) to which money or property an equitable charge attaches?

5C. In connection with Issue 5A, is it sufficient for the purposes of establishing a prior beneficial interest for the client to establish that LBIE was obliged to segregate money in respect of a debt due to that client but had failed to do so?

Sunday 22.11.09

6. Is money which was due to LBIE or which LBIE would have been entitled to withdraw from the CMP at the Time of Appointment and which would, in the ordinary course, have been swept into LBIE's house accounts during a daily reconciliation in due course, had the administration not intervened, notionally pooled pursuant to CASS 7.9.6R² or should it be excluded from the notional pooling?

Adjustment of the CMP

Adjustments in respect of events occurring prior to the Time of Appointment

8. Is LBIE required to adjust the CMP (whether by way of segregating funds standing to the credit of LBIE's general accounts or by transferring sums from the CMP to LBIE's general accounts) to take account of:-
- (a) movements in the notional value of margined transactions between the close of business on 11 September 2008 (by reference to which LBIE conducted its final daily reconciliation exercise prior to the Time of Appointment) and the Time of Appointment; and/or
 - (b) a client's equity balance as at the Time of Appointment, in circumstances where LBIE had previously wrongly not segregated any client money for the client?
9. Save as required by the answer to question 8 above, is LBIE not now required to adjust the CMP (whether by way of segregating funds standing to the credit of LBIE's general accounts or by transferring sums from the CMP to LBIE's general accounts) to take account of events between the close of business on 11 September 2008 (by reference to which LBIE conducted its final daily reconciliation exercise prior to the Time of Appointment) and the Time of Appointment which, in the ordinary course absent administration, would have led to an adjustment by LBIE of the amount of money segregated by it as client money?
10. Save as required by the answers to questions 8 and/or 9 above, is LBIE not now required to adjust the CMP to take account of any money which, prior to administration, LBIE should already have segregated as client money but had not?
- 10A. In relation to any payments which LBIE is required to make into the CMP pursuant to the answers to questions 8 and/or 9 and/or 10 above:
- (a) is the payment payable as an expense of LBIE's administration within the meaning of Rule 2.67(1)(a) or Rule 2.67(1)(f) of the Insolvency Rules 1986 and, if so, which Rule;
 - (b) is any payment LBIE is obliged to make:

² 7A.2.4R

- (i) subject to CASS 7.9.6R(1)³;
 - (ii) to be paid to the client for whom the money should have been held pursuant to CASS (subject to an appropriate deduction for costs in accordance with CASS 7.7.2R(4))?
7. If the answer to question 6 or 8 or 9 above is that such money should be excluded from the notional pooling or removed from the CMP:-
- (a) is the amount which may be withdrawn from the client money accounts on account of such sums:
 - (i) the full amount of the money;
 - (ii) the traceable amount (if any) of such money; or
 - (iii) a pro-rata proportion (taking into account any shortfall in the CMP), and, if so, of the entire amount, of the traceable amount, or of some other amount; or
 - (iv) some other amount and, if so, what amount; and
 - (b) is LBIE obliged or permitted to transfer the sum or sums established by the answers to question 7(a) above from the client money account in which it is at present held to a general account of LBIE (such that such sums become available to the general estate)?

Adjustments in respect of events occurring since the Time of Appointment

11. Is LBIE not now required to adjust the CMP or to segregate further funds to take account of any events (including fluctuations in rates of exchange between the currency in which client money is held and the currency of receipt (or LBIE's liability, if different)) occurring since the Time of Appointment which, absent administration, would otherwise have led to an adjustment by LBIE of the client money segregated by it?
12. In relation to any payments which LBIE is required to make into the CMP pursuant to the answers to question 11 above:
- (a) is the payment payable as an expense of LBIE's administration within the meaning of Rule 2.67(1)(a) or Rule 2.67(1)(f) of the Insolvency Rules 1986 and, if so, which Rule;
 - (b) is any payment LBIE is obliged to make:
 - (i) subject to CASS 7.9.6R(1)⁴;

³ 7A.2.4R(1)

⁴ 7A.2.4R(1)

- (ii) to be paid to the client for whom the money should have been held pursuant to CASS (subject to an appropriate deduction for costs in accordance with CASS 7.7.2R(4))?

12A. If the answer to question 11 above is that money should be transferred from the CMP:

- (a) is the amount which may be withdrawn from the client money accounts on account of such sums:
 - (i) the full amount of the money;
 - (ii) the traceable amount (if any) of such money; or
 - (iii) a pro-rata proportion (taking into account any shortfall in the CMP), and, if so, of the entire amount, of the traceable amount, or of some other amount; or
 - (iv) some other amount and, if so, what amount; and
- (b) is LBIE obliged or permitted to transfer the sum or sums established by the answers to question 11(a) above from the client money account in which it is at present held to a general account of LBIE (such that such sums become available to the general estate)?

Primary and secondary pooling

11A. Is the firm obliged ahead of the unsecured creditors to make good the shortfall arising from what would, but for CASS 7.9.13R, have been a secondary pooling event within CASS 7.9.14R (“the secondary pooling event”), and does that, in turn, depend on:-

- (a) whether the secondary pooling event occurred before or after the primary pooling event; or
- (b) whether the firm had failed to exercise due diligence in connection with the transfer of client money held by the firm to a third party pursuant to CASS 7.4.1R(1) to CASS 7.4.1R(2) or CASS 7.5.2R?

11B. Second, if the firm is not obliged to make good the shortfall ahead of unsecured creditors, do the clients affected by the shortfall have personal claims against the firm for the shortfall, or does that depend on whether the firm had failed to exercise due diligence in connection with the transfer of client money held by the firm to a third party pursuant to CASS 7.4.1R(1) to CASS 7.4.1R(2) or CASS 7.5.2R?

Existence and scope of client money entitlements

15. Does a client for whom LBIE should have held client money on a segregated basis have a client money entitlement in relation to:-

- (a) a position or instrument in respect of which there is client money in the CMP as constituted according to the directions given by the Court on this Application;

Direction sought: a client for whom LBIE should have held client money on a segregated basis has a client money entitlement in relation to a position or instrument in respect of which there is client money in the CMP

- (b) a position or instrument in respect of which there is no client money in the CMP as constituted according to the directions given by the Court on this Application and in relation to which LBIE has at no time held client money on a segregated basis;
- (c) a position or instrument in respect of which there is no client money in the CMP as constituted according to the directions given in relation to Issues 1 to 4 above but in relation to which LBIE at one time held client money on a segregated basis.

Sunday 22.11.09

16. Does a client for whom LBIE was neither required nor had agreed to hold client money on a segregated basis but for whom LBIE had segregated money in its client money accounts at the Time of Appointment have a client money entitlement in relation to:-
- (a) a position or instrument in respect of which there is money in the CMP as constituted according to the directions given by the Court on this Application;
 - (b) a position or instrument in respect of which there is no money in the CMP as constituted according to the directions given by the Court on this Application and in relation to which LBIE has at no time held client money on a segregated basis;
 - (c) a position or instrument in respect of which there is no money in the CMP as constituted according to the directions given in relation to Issues 1 to 4 above but in relation to which LBIE at one time held client money on a segregated basis.

16A. If the client for whom the money was segregated does not have a client money entitlement in respect of it, what is the client's right?

- (a) Is the money held on trust for him outside the CMP or is the money part of the CMP?
 - (b) If money is held on trust for him outside of the CMP, is the client entitled to payment in the full amount of the money segregated for him?
 - (c) If the money forms part of the CMP, does the client have a proprietary interest in, and is he entitled to receive a distribution from, the CMP and, if so, how should the Administrators give effect to that interest? In particular, does the client share in the shortfall on the CMP? Or does the client have no more than a personal claim in debt?
20. Does a client for whom LBIE should have held client money on a segregated basis but did not in respect of that client's proprietary positions, but for whose underlying clients LBIE did hold client money on a segregated basis, have a client money entitlement in respect of its proprietary positions?

Calculation of client money entitlements

Sunday 22.11.09

21. Is LBIE obliged to calculate client money entitlements as at the Time of Appointment, and, if not, at what time should client money entitlements be calculated?
22. Is LBIE permitted to calculate client money entitlements (and consequently the rateable share to which each client entitled to a distribution from the CMP is entitled) in a common currency of its choice, by applying a spot exchange rate as at close of business on the date of administration or alternatively at the Time of Appointment?
23. Is the client money entitlement of a client entitled to a distribution from the CMP calculated by reference to or affected by the amount in fact contained in the notional CMP in respect of him at the Time of Appointment and/or subsequently transferred to the CMP as required by the answers to the questions above? If so, what is the client money entitlement of a client in respect of whom there is no client money contained in the notional CMP at the Time of Appointment or subsequently transferred to the CMP as required by the answers to the questions above?
- 23A. How is each client's client money entitlement (as referred to in CASS 7.9.6R⁵) to be calculated? [In particular, is it to be calculated, for each client, as:-
- (a) the aggregate of (i) in the case of the core bank accounts, the amount which represented the funds in fact segregated for or on behalf of that client immediately following the Point of Last Segregation; and (ii) in the case of any other client money account (as determined in accordance with Q1-4 above), the amount which represented the funds standing to the credit, or paid into, the account on behalf of that client as at the Time of Appointment, in each case including any adjustment to the CMP as required by the answer to the questions above; or
 - (b) the amount which would have been segregated (or otherwise held in a client bank account determined in accordance with Q1-4 above) for or on behalf of that client if a calculation of the amount which LBIE was required to hold as client money for on behalf of that client had taken place as at the Time of Appointment; or
 - (c) the amount which would or ought to have been segregated for that client if a calculation of the amount which LBIE was required to hold as client money for that client had taken place as at the Time of Appointment as though all such client's open

⁵

7A.2.4R

positions at that time had been liquidated and closed at the closing or settlement prices published by the relevant exchange or other appropriate pricing source at the Time of Appointment; or

(d) on some other, and if so what, basis?]

23B. How, if at all, do the provisions of CASS 7.9.7R affect the calculation of client money entitlement in accordance with CASS 7.9.6R?

23C. ~~Is a client's "individual client balance" as referred to in CASS 7.9.7R to be calculated in accordance with paragraphs 7 & 8 of Annex 1 to CASS 7 or on some other, and if so what, basis? If and to the extent that particular client money does not fall within paragraphs 7 & 8 of Annex 1, how is it to be taken into account in calculating client money entitlement?~~

(a) What is the individual client balance to which CASS 7.9.7R refers?

(i) Is it the individual client balance defined at paragraph 6(1)(a) of Annex 1?

(ii) If not, what is it?

(b) If it is the individual client balance defined at paragraph 6(1)(a) of Annex 1, is it subject to paragraph 12(2)? If so, is the debt to which paragraph 12(2) refers any debt or is it confined to debts arising in the course of MiFID business?

(c) If such a debt is not to be taken into account in the calculation of individual client balance should the debt nevertheless be taken into account by way of set-off or retention (see Issues 23D to F below)?

23D. To what extent, and at whose behest, can a debt owed by a client with a client money entitlement to LBIE be set-off against that client's claim against the CMP or an amount equivalent to that debt be retained by LBIE?

23E. Does the set-off or retention operate between the debt and:-

- (a) the client's total claim against LBIE;
- (b) the client's client money entitlement;
- (c) the amount of the client's distribution from the CMP;
- (d) some other sum, and, if so, what?

23F. Should the sum so set-off or retained:-

- (a) be distributed amongst those clients with a client money entitlement, ~~or~~
- (b) accrue to the benefit of the General Estate; or

(c) be held by LBIE and not distributed by the Administrators pending the application of IR 2.85, IR 4.90 or further order of the Court??

13. Should LBIE recalculate a client's client money entitlement by reference to, or take into account in calculating the amount to be distributed to a particular client, events occurring since the Time of Appointment which, absent administration, would otherwise have led to an adjustment by LBIE of the client money segregated by it?

14. If the answer to question 13 above is "no":

- (a) Is a client money entitlement defeasible by reason of events occurring since the Time of Appointment?
- (b) Can delivery of a security discharge the obligation on LBIE to pay (in whole or in part) a distribution from the CMP?

Distribution of client money

24. Is LBIE obliged or permitted to make a distribution from the CMP to those clients entitled to receive one in the currency of its choice and, if not, in what currency or currencies should distribution be made?

Sunday 22.11.09

25. If LBIE is obliged or permitted to make a distribution from the CMP to those clients entitled to receive one in the currency of its choice, is LBIE obliged or permitted to calculate the amount to be paid to each such client as follows:
- (a) by applying his rateable share of the CMP as established in accordance with the procedure proposed in question 22 above to the value of the CMP as at the date of distribution;
 - (b) by establishing the value of the CMP as at the date of distribution by reference to a spot exchange rate on that day.
- 25A. Where a client money entitlement is referable to an underlying obligation of LBIE (for example where, at the Time of Appointment, LBIE owed money to the client ("the Debt") but had segregated a sum equal to the amount of the Debt, does the client's distribution from the CMP discharge the Debt:
- (a) to the full extent of the client entitlement referable to the Debt;
 - (b) to the extent of the distribution made in respect of such entitlement;
 - (c) not at all; or
 - (d) to some other and, if so, what extent?

Affiliates

26. Is LBIE obliged under CASS 7 to treat money held for an affiliated company as money held in the course of or in connection with its MiFID business?

Direction sought: yes.

- 26A. Does it make any, and if so what, difference if the affiliated company has a contractual entitlement that money held for it will be held as client monies?

No direction sought as the question does not arise.