

**City of London Law Society  
Commercial Law Committee**

Minutes of a meeting held at 1pm on Thursday 25 April 2013 at the office of RPC, Tower Bridge House, St Katharine's Way E1W 1AA.

**Present:**

Mr Oliver Bray, Reynolds Porter Chamberlain (Chairman)  
Mr Richard Marke, Bates Wells & Braithwaite (Secretary)  
Mr Andrew Crawford, Devonshires  
Mr Tom Purton, Travers Smith  
Mr Jeremy Sivyver, Russell Cooke  
Mr Duncan Reid-Thomas, Baker & McKenzie  
Mr Richard Shaw, Berwin Leighton Paisner  
Mr Jonathan Bartley, Manches  
Mr Paul Joukador, Hogan Lovells

**In Attendance:**

Ms Lucy Rhodes, Bates Wells & Braithwaite

**1. Minutes from the Previous Meeting**

- 1.1 No matters were raised in respect of the minutes from the previous meeting.

**2. Apologies for Absence**

- 2.1 It was reported that apologies have been received from the following:

Mr Jonathan Davey, Addleshaw Goddard  
Mr Mark Dewar, Simmons and Simmons  
Mr Andrew Shindler, SJ Berwin  
Mr Anthony Woolich, Holman Fenwick and Wilan  
Mr Stephen Sidkin, Fox Williams  
Mr Rupert Casey, Macfarlanes

**3. Matters Arising**

- 3.1 Mr Bray reported that Nick Mallet's position on the committee had been advertised and that there have not been any responses. Nick Tall is moving to Keystone Law and will no longer be on the committee. Peter Crockford is retiring and will also no longer be on the committee.
- 3.2 Mr Marke suggested Mark Bailey, a previous member of the committee from Speechly Bircham, as a potential new member.
- 3.3 Mr Bray suggested Rohan Massey from McDermott Will & Emery as a potential new member.
- 3.4 Mr Bray suggested that the committee consider other potential new members.

- 3.5 Mr Bray provided an update on the Common European Sales Law (CESL). Mr Bray reported that the committee had responded to the government's Call for Evidence. The government published its response in December. It was apparent that the government had taken on board the committee's opinions. The Ministry of Justice convened a meeting, which Mr Bray and Mr Dewar attended, after the European Parliament's legal affairs committee pushed through some amendments to the CESL. Mr Bray reported that there was generally negative sentiment – in particular that B2B contracts were still within scope.
- 3.6 Mr Joukador noted that the criticism relates more to implementation rather than principle, the lack of consistency in the CESL and the mismatch of civil and common law principles, for example, the civil law concept of "good faith".
- 3.7 Mr Bray added that the Internal Market and Consumer Protection Committee had also proposed amendments.
- 3.8 Mr Bray reported that the City of London Stakeholder Group has organised a meeting on 1 May 2013. Mr Bray reported that Mr Dewar might be going to the meeting and invited other committee members to attend.
- 3.9 Mr Reid-Thomas noted that the CESL is voluntary and there was some debate around which companies would adapt it. Mr Bartley noted that the lack of jurisprudence will be off-putting for many businesses.
- 3.10 Mr Reid-Thomas queried whether there was a business or consumer lobby behind the CESL. Mr Bray said that he had not heard of any particular body pushing for it, although there are many academics in favour.
- 3.11 Mr Joukador felt that it was likely that pan European companies that adopted it would still end up with unwieldy contracts with addendums to deal with perceived gaps in particular jurisdictions. Mr Joukador also speculated that the small business definition was open to abuse potentially – with the prospect of large corporates creating "small businesses" to take advantage of the applicable provisions.
- 3.12 Mr Bray reported that there was talk of insurance law being harmonised across Europe.
- 3.13 Mr Bray reported that the Consumer Rights Directive is on its way and that the consultation is closed on the Consumer Bill of Rights. Mr Shaw noted the early implementation of a provision in the Consumer Rights Directive on above-cost payment surcharges.
- 3.14 Mr Bray commented that Mr Bartley's article "*Making consumer law fit for purpose*" is referenced in the government's briefing papers.
- 3.15 Mr Bartley asked the committee members what they thought of the Law Commission's Advice Paper on Unfair Terms in Consumer Contracts. Mr Bartley commented that he thought the advice on price variation clauses was unclear.
- 3.16 Mr Bartley referred to the ECJ ruling in **RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen e.V. (Case C-92/11)**. In this case, the

provisions on changes to gas prices in the general terms and conditions referred to the national legislation (which allowed the supplier to vary gas prices unilaterally without stating the grounds, conditions or scope of the variation). The ECJ ruled that it is of fundamental importance that “*the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges*”.

- 3.17 Mr Bray said that he would follow up with Mr Dewar on the issue of the Trading Standards Institute gaining powers from the Office of Fair Trading and the proposed meeting that Mr Dewar was supposed to be setting up.
- 3.18 Mr Bray queried whether the committee was still interested in hearing from Victoria Latham from the Ministry of Justice (she had not been able to make the previous meeting owing to a busy schedule). The committee said that it would like to hear from her and Mr Bray agreed to arrange this.
4. Mr Joukador raised The Late Payment of Commercial Debts Regulations 2013. Mr Joukador noted that the legislation has already been amended once because PLC raised an issue. Mr Joukador said that the legislation had some cross-border anomalies. For example, if a company in Northern Ireland contracts with a company in France and chooses the law of England and Wales to govern the contract, the late payment legislation would not apply because there is no connection to England and Wales, whose law governs the contract.
5. Mr Joukador said that these concerns were worth highlighting and he would put together a draft paper, which the committee could progress.
6. **Interesting Cases and/or Practice Points**
- 6.1 Mr Crawford referred to the decision in **Compass v Mid Essex Hospital Services NHS Trust [2012] All ER (D) 230** which had been overturned on appeal. The High Court had held that the parties’ contract contained a general obligation on both parties to act in good faith. The Court of Appeal in **Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200** held that the contract did not impose upon the parties a general duty of good faith but only a duty to act in good faith in two particular respects which could be found in an express term of the contract.
- 6.2 Mr Bartley referred to the Court of Appeal case of **Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd [2013] EWCA Civ 38** in which the Court of Appeal gave a restrictive interpretation to a clause excluding all liability for loss of profits.
- 6.3 Mr Shaw referred to the Court of Appeal case of **John Grimes Partnership v Gubbins [2013] EWCA Civ 37**. In this case, the Court of Appeal confirmed that a designer may be liable for losses caused by a fall in property values, where there had been a significant delay in delivering the designs for the property in breach of contract. This was reasonably foreseeable.
- 6.4 Mr Reid-Thomas referred to the Court of Appeal case of **Cavendish Square Holdings BV and Team Y&R Holdings Hong Kong Ltd v Talal El Makedssi**

**[2012] EWHC 3582 (Comm)**. Mr Bartley commented that that case reminded him how widely the penalty rule could be applied (i.e. not just to payments but also to other consequences of default such as deprivation of an asset). Mr Marke referred to the early case which had established this, namely **Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti [1989] 1 Lloyd's Rep 239**.

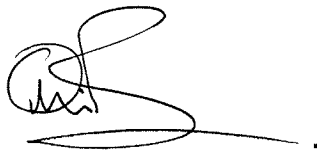
6.5 Mr Bartley referred to the High Court case of **E-Nik Limited v Department for Communities and Local Government [2012] EWHC. 3027 (Comm)** which confirmed that a take-or-pay clause may, in principle, amount to a penalty clause. Mr Joukador mentioned an alternative to discount the required payment where the customer does not take the required quantity.

6.6 Mr Bray referred to the High Court case of **Fairstar Heavy Transport NV v. Phillip Jeffrey Adkins and Claranet Ltd [2012] EWHC 2952 (TCC)** which confirmed that there is no proprietary right in an email. The issue arose because Mr Adkins, who was not an employee, refused to hand over his emails after he was dismissed. Mr Bray noted the importance of employers ensuring that consultants are obliged to deliver up their emails.

## 7. Any other Business

7.1 Mr Bray reported that on 20 May 2013 there is a service at the Chapel Royal in the Tower of London and on 6 June 2013 there is a wine tasting event for CLLS members.

**Meeting Closed.**



OLIVER BRAY