

**City of London Law Society
Commercial Law Committee (“the Committee”)**

Minutes of extraordinary meeting held at 1pm on 14 July 2016 at the offices of Travers Smith, 10 Snow Hill, London EC1A 2AL

Present:

Mr Stephen Sidkin, Fox Williams (deputy Chairman)
Mr Andrew Crawford, Devonshires
Mr Jonathan Bartley, Penningtons Manches
Mr Mark Dewar, DLA Piper
Mr Rohan Massey, Ropes & Gray
Mr Richard Marke, Bates Wells Braithwaite (Secretary)
Mr Tom Purton, Travers Smith
Mr Anthony Woolich, Holman Fenwick Willan
Mr Paul Joukador, Hogan Lovells
Mr Jeremy Sivyler, Russell Cooke
Mr Rob Johnson (replacing Mr Oliver Bray), Reynolds Porter Chamberlain
Mr Duncan Reid-Thomas, Baker & McKenzie
Mr Jonathan Bartley, Penningtons Manches
Ms Charlotte Pham (replacing Mr Richard Shaw), Berwin Leighton Paisner
Mr Jeremy Schrire (replacing Mr Andrew Shindler), King & Wood Mallesons

In Attendance:

Mr Kevin Hart, City of London Law Society (Legal Policy Analyst)
Mr David Duhig, Bates Wells Braithwaite

1. Apologies

It was reported that apologies had been received from the following:

Mr Oliver Bray, Reynolds Porter Chamberlain

Mr Rupert Casey, Macfarlanes LLP

Mr Jonathan Davey, Addleshaw Goddard

2. EU Referendum Result

- 2.1 In the absence of Mr Bray, Mr Sidkin took the chair. Mr Sidkin began the meeting by thanking Mr Purton for the provision of the venue for this extraordinary meeting of the Committee. Mr Sidkin explained that the meeting was convened to discuss the effect and consequences of the result of the UK’s referendum to leave the European Union. In particular, Committee members were invited to share their opinions and thoughts of the short and long-term effects of the referendum result. It was accepted by the Committee that the opinions and thoughts expressed in this meeting would be somewhat speculative given the level of uncertainty post-referendum.

- 2.2 Mr Hart informed the Committee that the CLLS had written a letter to Mr Oliver Letwin, Chancellor of the Duchy of Lancaster (now replaced by Mr David Davis as Secretary of State for Exiting the European Union) offering pro bono assistance. The letter had also proposed the possibility of seconding associates to work in the Department for Exiting the European Union (“**the Department**”). Mr Hart further informed the Committee that he was aware that some law firms may be contacted to assist the Government on a private (and perhaps paid) basis to provide advice but welcomed Committee members to contact Mr Hart directly if they would like to put forward individuals to be seconded to the Department.
- 2.3 Mr Hart also communicated to the Committee Mr Oliver Letwin’s comments concerning the bill to repeal the European Communities Act, which may not be law until 2020. Mr Hart commented that it was proposed that such a bill would contain a provision that all case law prior to that date (using, applying or based on EU law) would continue to be valid law, with such law evolving in time through the normal process. The Committee generally welcomed this approach.
- 2.4 With respect to the repeal of the European Communities Act, it was questioned whether the two year period from triggering Article 50 to leaving the EU could be extended, particularly if the repeal of the Act does not go through in time. It was felt that this would be unlikely given that the EU might want to set a precedent and appear resolute, in addition to the fact that such a decision would require the consent of all members of the EU (which would also be unlikely).
- 2.5 Mr Joukador also noted that whilst still a member of the European Union, the UK is prohibited from signing any new trade deal on its own with, for example, Australia or the US; even preparatory talks with such countries might put the UK into technical breach of its EU Treaty obligations.
- 2.6 The Committee discussed the recent events regarding the quick replacement of the Prime Minister and the movements in and out of the Cabinet. Mr Purton noted that the new Prime Minister Theresa May – despite stating that ‘Brexit means Brexit’ - has indicated that she may not trigger Article 50 until next year. The Committee considered that by not triggering Article 50, the UK government is causing uncertainty both internally with its electorate and business, and within the EU and between EU members.
- 2.7 The Committee also discussed other large cities within the EU which may step-up to try and fill the role that London has , with cities such as Dublin, Edinburgh and Amsterdam mentioned. It was noted, however, that the infrastructure of Dublin is likely not developed enough. Mr Purton noted that many competition lawyers are already registering in the Republic of Ireland with UK-qualified competition lawyers concerned about losing their rights to EU professional legal privilege and the right to plead before the Court of Justice of the European Union.
- 2.8 The Committee went on to discuss the effects that the referendum is having on current advice to clients, particularly when drafting /negotiating commercial contracts. Clauses which might require additional scrutiny included, in particular, change control, force majeure and pricing clauses (given the depreciation of sterling). Mr Bartley made reference to material adverse change clauses in commercial contracts and speculated that these may now be seen more frequently. The impact on jurisdiction clauses was also discussed particularly in light of EU Regulation (EU) 1215/2012 on jurisdiction and the recognition and

enforcement of judgments (Recast Brussels Regulation), which has direct effect in the UK but would cease to apply to the UK following Brexit.

- 2.9 There was also speculation about how the government would deal with the various references to “EU” in statutes etc. It might be difficult to deal with this in a new “one size fits all” statutory definition.
- 2.10 There was some discussion about how Brexit might impact on the developing case law concerning ‘good faith’. In this context, Mr Purton mentioned the case of BT Cornwall Ltd v Cornwall Council [2015] EWHC 3755 (Comm) which concerned the termination of an outsourcing contract where there was an argument advanced that a termination for material breach in relation to KPIs must be made in good faith.
- 2.11 Mr Massey noted that the ICO had published a notice on its website on 24 June 2016 regarding the GDPR and Brexit (broadly suggesting business as usual) but that this had subsequently been taken down without further explanation by the ICO. Mr Bartley also commented that at a recent conference he attended, an ICO representative was unexpectedly tight-lipped about the GDPR and Brexit. One of the key issues for privacy law was whether the UK, outside of the EU, would swiftly receive an adequacy decision from the European Commission. It was noted that businesses would likely lobby the European Commission to ensure that the UK receives such a decision as soon as possible.
- 2.12 Mr Sidkin suggested that there be a working committee on Brexit and asked for Committee members to volunteer to be part of such committee. Mr Sidkin, Mr Woolich, Mr Schrire, Mr Bartley and Mr Hart nominated themselves to be on the working committee [Subsequent to the meeting, Mr Bray also volunteered himself]. Mr Sidkin suggested also that ‘Brexit issues’ be a standing agenda item going forward for all the Committee’s meetings.

3. **Close**

The date of the next meeting was confirmed as 29 September 2016, to be hosted by Rupert Casey from Macfarlanes.

The meeting closed at 2.05pm.