CITY OF LONDON LAW SOCIETY COMMERCIAL LAW COMMITTEE (THE "COMMITTEE")

MINUTES of the Committee meeting held at 1pm on 8 June 2017 at the offices of Addleshaw Goddard LLP, Milton Gate, 60 Chiswell St, London EC1Y 4AG

Present:	Mr Oliver Bray, RPC (Chairman)
	Mr Rohan Massey, Ropes & Gray (Secretary)
	Mr Richard Marke, Bates Wells Braithwaite
	Mr Duncan Reid-Thomas, Baker & McKenzie
	Mr Paul Joukador, Hogan Lovells
	Mr Jonathan Davey, Addleshaw Goddard
	Mr Kevin Hart, City of London Law Society
	Mr Richard Shaw, Berwin Leighton Paisner
	Mr Tom Purton, Travers Smith
	Mr Mark Dewar, DLA Piper
	Mr Andrew Crawford, Devonshires
	Mr Andrew Shindler, KWM
Apologies:	Mr Jon Bartley, Pennington Manches
	Mr Stephen Sidkin, Fox Williams
	Mr Rupert Casey, Macfarlanes
	Mr Jeremy Sivyer, Bishop & Sewell
	Mr Anthony Woolich, Holman Fenwick Willan
In attendance:	Mr Robert Lister, Ropes & Gray

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1. **Minutes of last full meeting**

The minutes of the last full meeting were reviewed and approved.

2. **Apologies**

It was reported that apologies from the individuals identified above had been received.

3. **Review of the action points from the last meeting**

3.1 It was reported that:

(a) Mr Massey had been appointed as Secretary of the Committee;

(b) Mr Bray had been in contact with Mr Sidkin to discuss the latest on the Brexit clause and the potential for Mr Sidkin to join the main CLLS Brexit Committee; and

(c) Mr Sidkin was keen for the Committee to review the Brexit clause.

4. **Special thanks**

Mr Bray extended his and the Committee's thanks to Mr Marke, for Mr Marke's hard work during his seven-year tenure as Secretary of the Committee.

5. **Matters arising**

The Committee briefly discussed Committee membership diversity and numbers. Whilst numbers were reported as currently being "good", it was requested that Committee members propose suggestions for additional members, prior to an advert being placed via the City of London Law Society.

6. **Brexit update**

6.1 Committee members were asked to review the draft Brexit clause prepared by Mr Sidkin. Discussions focussed on the following points:

(a) **Purpose**: clarification was requested on the context and purpose of the clause and whether it was intended to be party neutral. It was suggested that the intention behind the clause was similar to that of a change control or material adverse change (MAC) clause (i.e. to allow the parties to renegotiate terms or terminate the contract due to unanticipated adverse effects of Brexit). It was understood that the clause was also intended to be party neutral (although it was acknowledged that if exercised, the party relying on the clause may necessarily be put at an advantage).

(b) **Current or New Contracts**: questions were raised as to whether the Brexit clause was intended to be implemented as an amendment into existing contracts, or whether it should be used solely for new contracts going forward. It was anticipated that clients would have little desire to make such a substantial amendment to their existing contracts. Some Committee members also felt that the fact one party would likely be put at a disadvantage would also make it less likely for counterparties to agree to such an amendment.

(c) **The Expert**: there was discussion around whether, in practical terms, it may be difficult for the parties to find an independent third party willing to act as an expert (whose role is broadly to determine, absent of agreement between the parties, whether a change has occurred, what the effect of that change is, and whether/what amendment to the contract is reasonably required). In addition, questions were raised as to whether Committee members' clients would actually want an independent third party to determine such issues. It was suggested that given that the expert would be paid for his or her role, there should not be a shortage of individuals willing to take on this role.

(d) **Alternatives to Brexit Clause**: questions were raised as to whether the Committee should be taking a different approach, more in line with PLC. In particular the following approaches were discussed:

(i) like the PLC approach, not suggesting a specific Brexit clause, but instead highlighting key contractual provisions that may require reconsideration in light of Brexit (e.g. provisions dealing with exchange rates, labour supply, licensing etc.). Drafting

points/commercial considerations could then be suggested for those clauses;

(ii) suggesting contracts should be drafted with short (e.g. one-year) terms – although it was acknowledged that this may not be practicable or desirable for some of the Committee members' clients; and

(iii) putting forward a neutral MAC which is not specific to Brexit.

6.2 **Agreement**: the Committee reached a broad consensus that providing the market with a checklist/flowchart/roadmap (similar to the PLC approach), together with the Brexit clause would be the safest approach and would likely be best received by and most useful to Committee members' clients.

6.3 **Next steps:** it was agreed that we need to keep an eye on timing and that we should proceed with drafting a checklist (or similar) as soon as possible, with a view to then finalising the end product (ie checklist/similar plus the Brexit clause). As such, Committee members were asked to nominate suitable colleagues/team members, to assist in preparing the initial draft. Mr Bray also agreed to update Mr Sidkin on the Committee's discussions with respect to the Brexit clause.

7. Interesting cases and/or practice points

7.1 Mr Shindler mentioned the recent High Court case of Associated *British Ports v Tata Steel UK Ltd* [2017] EWHC 694 (Ch), in which it was considered whether an arbitration clause contained in a port licence agreement was void for uncertainty. In brief, it was held that the arbitration clause recognised that the terms between the parties might need to be rebalanced due to certain trigger events (i.e. a major change of physical or financial circumstances), if necessary by an independent third party imposing a fair solution. As such, the judge found that the clause imposed a binding obligation to refer disputes to arbitration.

7.2 Mr Davey also mentioned a past case involving discussion around material adverse change clauses, Decura v UBS (HC) (30 January 2015) (which followed Urvasco [2013] EWHC 1039 (Comm)), which he thought might be useful for future consideration if the Committee is to give further consideration to material adverse change clauses.

8. AOB

The Committee had no other business to discuss.