

6/4/18

CITY OF LONDON LAW SOCIETY COMMERCIAL LAW COMMITTEE (THE "COMMITTEE")
MINUTES of the Committee meeting held at 1pm on 15 March 2018 at the offices of HFW,
Friary Court, 65 Crutched Friars, London EC3N 2AE

Present: Mr Oliver Bray, RPC (Chairman)
Mr Rohan Massey, Ropes & Gray (Secretary)
Mr Kevin Hart, City of London Law Society
Mr Richard Shaw, Berwin Leighton Paisner
Mr Andrew Crawford, Devonshires
Mr Stephen Sidkin, Fox Williams
Mr Jeremy Sivyler, Bishop & Sewell
Mr Richard Marke, Bates Wells Braithwaite
Mr Andrew Shindler, Locke Lord
Mr Anthony Woolich, HFW

Apologies: Mr Paul Joukador, Hogan Lovells
Mr Mark Dewar, DLA Piper
Mr Tom Purton, Travers Smith
Mr Jonathan Davey, Addleshaw Goddard
Mr Duncan Reid-Thomas, Baker & McKenzie

In attendance: Mr William Moore, Ropes & Gray

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 Mr Massey had not yet received any suggestions for new Committee members following previous discussions on Committee membership diversity and numbers.

4. **Matters arising**

4.1 The Committee discussed in depth the Committee membership diversity and numbers. Given that Mr Massey had not yet received any suggestions for new Committee members, it was agreed that Committee members would continue to consider this issue as an open action point and, where relevant, propose suggestions for additional members.

- 4.2 Mr Hart put forward the suggestion that the Committee consider inviting in-house General Counsel to become members in order to broaden diversity. Mr Bray mentioned that members who had been in the Committee for a certain period of time or were unable to make meetings regularly may consider making way for other partners within that firm to join the Committee.
- 4.3 The Committee reached a broad consensus that it would continue to actively seek new members in order to improve the diversity of the Committee.
- 4.4 Mr Hart informed the Committee that the new City of London Law Society Data Protection Committee would be launched in late March 2018. Following this announcement a period of advertising for members would occur with the intention of holding the first meeting in mid-April. Mr Hart requested names of any potential partners who would be interested in joining this committee be sent to him.
- 4.5 Mr Hart informed the Committee that the proposed Constitutional Law Committee would be discussed in mid-April and that he would revert with details at the Committee's next meeting in June.
5. **Brexit subcommittee update**
- 5.1 The Committee reached a broad consensus that its efforts to provide the market with a Brexit checklist/flowchart/roadmap and Brexit clause should be put on hold until there was better clarity on the Government's strategy on Brexit and its likely impact.
- 5.2 Mr Massey queried whether a Brexit clause would even be necessary once the Government had provided the requisite clarity on the UK's position following Brexit.
- 5.3 Mr Sidkin informed the Committee that some companies in continental Europe (particularly France and Germany) were requesting a Brexit clause in contracts, and that the Dutch Government were providing 60,000 SME's with Brexit advice. However, Mr Sidkin went that on to state that UK retailers were refusing to allow a Brexit clause.
- 5.4 The Committee then debated whether a request for a Brexit clause is an attempt to invoke a right to terminate the contract due to frustration. In response, Mr Bray raised the ruling in *The Flying Music Company Ltd v Theater Entertainment SA & Ors [2017] EWHC 3192* (where the judge ruled that the Greek riots did not amount to frustration) and queried whether this case would serve as the authority in assessing if Brexit amounted to frustration.
- 5.5 Mr Woolich commented that as a result of Brexit the EU rules on Public Procurement are currently under review as the UK becomes a 'third country'. This will impact the purchase of supplies from utility services, procurement in the defence industry and security clearance.
- 5.6 Mr Massey went on to add that under GDPR the UK would also become a third country, impacting the regulation of international data flows of personal data, following Brexit.

- 5.7 Mr Marke questioned whether in the UK the Competition and Markets Authority (the “**CMA**”) will be the body in charge of regulating state aid in order to keep the UK in line with EU laws.
6. **New committee members and attendee invitations (in-house)**
- 6.1 It was suggested that the Committee invite guest speakers for the June meeting who could provide useful feedback from individuals with experience in Government positions.
- 6.2 Mr Marke suggested that an invitation be sent to Mr Christopher Graham, who was the UK Information Commissioner between 29 June 2009 and 28 June 2016, as he could provide a useful insight into the Information Commissioner’s Office’s (the “**ICO**”) stance in relation to the GDPR.
- 6.3 Mr Bray suggested extending an invite to Mr Jason Freeman, Director of Consumer Law at the CMA, to provide an insight into the regulator’s role going forward after Brexit.
7. **Interesting cases and/or practice points**
- 7.1 Mr Bray mentioned the Court of Appeal’s decision in *Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd [2017] EWCA Civ 2196* in which the Judges considered the meaning and effect of a limitation clause. The CA overturned the original decision and found that the limitation clause imposed two separate caps for defaults, not one aggregate cap.
- 7.2 Mr Crawford mentioned the case of *Al Nehayan v Kent [2018] EWHC 333 (Comm)* in which the Judge commented that the test for finding duress, such as to entitle a party to rescind a contract, should incorporate the elements of the offence of blackmail transposed into objective requirements. A demand coupled with a threat to commit a lawful act would be illegitimate if (a) there were no reasonable grounds for the demand and (b) reasonable people would not consider the threat to be a proper means of reinforcing the demand.
- 7.3 Mr Bray mentioned the draft guidance published by the Article 29 Working Party on transparency under the GDPR. Mr Bray went on to comment that the guidance had stipulated that qualifications such as 'may', 'might', 'some', 'often' and 'possible' should be avoided. Mr Massey added to this by mentioning that Ms Helen Dixon, the Data Protection Commissioner for Ireland, has been reported as stating her enforcement team would be focusing on regulating and enforcing transparency in relation to the GDPR, come May 25th.
- 7.4 There was a discussion on GDPR consent in relation to marketing emails and the different approaches taken by firms and clients, with some sending out required confirmation opt-in emails. With the GDPR coming into effect in May, Mr Massey commented that the regulations would be unworkable if emails sent seeking consent from individuals already on the database were considered “marketing”, which has been set out previously by the ICO. Further guidance and clarity would therefore be needed from the ICO on this matter.

- 7.5 On the scope of application of the GDPR to non-EU established organizations and the scope of “offering goods or services to data subjects”, Mr Woolich stated that he had sought clarification from the ICO in relation to corporate clients. The ICO confirmed that if a non-EU based company’s only EU clients were corporate clients then processing their data would not be governed by the GDPR as their processing was not linked to the offering of goods or services to data subjects. However, Mr Woolich went on to say that other EU regulators were not in agreement with this assessment.
- 7.6 Mr Marke mentioned the ICO’s decision to fine Carphone Warehouse £400,000 in January 2018 for a data breach. The ICO commented that there were rudimentary security failures by the company which included using old software and failing to carry out routine security testing. Mr Marke commented that with the GDPR coming in to force in May, the company’s systemic failures may be used as a benchmark for how not to protect personal data.

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- 7.7 With the agreement of the other Committee members, Mr Massey confirmed that, given recent lateral moves, he intended to update each Committee member’s contact details with the City of London Law Society in due course.

Next meeting

- 7.8 The next meeting of the CLLS will be held on 21 June 2018 at Fox Williams.

Additional events

- 7.9 On Monday the 21 May 2018 the Annual Service will be held at the Tower of London followed by a reception and a dinner.
- 7.10 The CLLS AGM and reception will be held on Monday 11 June 2018.