

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

MINUTES of the Committee meeting held at 5pm on 23 November 2017 at the offices of Travers Smith, 10 Snow Hill, London EC1A 2AL, UK

Present: Mr Oliver Bray, RPC (Chairman)
Mr Rohan Massey, Ropes & Gray (Secretary)
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 Andrew Crawford, Devonshires
Mr Stephen Sidkin, Fox Williams
Mr Jeremy Sivyler, Bishop & Sewell
Mr Richard Marke, Bates Wells Braithwaite
Mr Andrew Shindler, Locke Lord

Apologies: Mr Mark Dewar, DLA Piper

In attendance: Miss Victoria Srivastava, 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:

- (a) suggestions for new Committee members following previous discussions on Committee membership diversity and numbers; and
- (b) consideration as to whether the Committee should formally comment on issues identified in respect of the European Union (Withdrawal Bill).

4. Matters arising

4.1 The Committee briefly discussed Committee membership diversity and numbers again. 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. Mr Marke mentioned that he had somebody in mind and

will follow this up. My Bray commented that at the CLLS Committee's Chairs' meeting held on 15th November the issue of diversity among committee members was raised and is a point they are keen to address not only at a CLLS Committee level but also at a trainee level and across the industry.

- 4.2 Mr Massey mentioned that as a stepping stone the committee could invite more in house lawyers to be members and see whether their perspective adds any benefit to the Committee
- 4.3 Mr Hart mentioned that a new data protection committee and international committee were going to be formed and asked everyone to propose potential names. Mr Hart mentioned that he would like to get a chair in place for each committee by mid December, 2017.
- 4.4 Mr Sidkin asked whether a constitutional law committee would be formed on the basis of Henry VIII clauses potentially being implemented into contracts. Mr Hart said that this is something that the CLLS should consider and also something that they should consider talking directly to the relevant minister about.

5. **CLLS Committees Chairs' Meeting update**

- 5.1 Mr Bray mentioned that the feedback from senior partners has been that the work that the CLLS are undertaking has been excellent. The only drawback that was mentioned was that the Committees may not sell themselves sufficiently and they need to be more proactive with Government than reactive. It was raised that there should be an effort to undertake this across the board at CLLS level, as well as at specialist Committee levels.
- 5.2 It was suggested that Committees could occasionally have guest speakers about particular topics to encourage more feedback from individuals in Government positions. Mr Bray mentioned that this is something that the Construction Law committee have already implemented whereby they do a training session once a year. It was mentioned that we should increase contact with civil servants to better understand their thoughts.
- 5.3 Mr Bray said that the chair reported on two committees liaising with the MOJ in relation to Brexit, however nothing has come from these discussions yet. It was mentioned that the CLLS are finding that their views are not being reflected in Government decisions that come out.
- 5.4 Mr Joukador commented that there is a difficulty in forming a view on Brexit when one is representing both their own firm and the CLLS to which Mr Hart responded that as the CLLS haven't formed a view on Brexit he doesn't see this as an issue. Mr Hart said that specialists should keep focusing on how Brexit is affecting their areas and feed back any perceived issues to the chair.

6. **Brexit update**

- 6.1 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.

7. **Commissioner vacancies**

Mr Massey mentioned that the relevant link was on the agenda and as follows: <https://jac.judiciary.gov.uk/news/applications-open-3-jac-commissioner-vacancies>.

Mr Massey said that he had not received any comments on this matter.

8. **Interesting cases and/or practice points**

8.1 Mr Sidkin mentioned that (*The Software Incubator Ltd v Computer Associates Ltd* [2016] EWHC 1587 (QB)) was being heard in the Court of Appeal this week, but that no judgment had been handed down yet. Computer Associates Ltd were appealing the fact that Software was held to be a "good" in the context of a commercial agency agreement, such that a software supplier was liable to pay damages, compensation and post-termination commission to its commercial agent following termination of the agency agreement.

8.2 *W Nagel (a firm) and Pluczenik Diamond Company NV*[1] was mentioned. It was held that even though Nagel was not considered to be a commercial agent, the fact that diamonds are commodities meant that damages were awarded as if Nagel had in fact been a commercial agent.

8.3 *ERGO Poist'ovňa, a.s. v Alžbeta Barlíková* was also briefly mentioned. This case concerned the interpretation of Article 11 of Council Directive 86/653/EEC and was noted to not say anything particularly outstanding.

8.4 Mr Crawford discussed the issues arising out of emergency relief appeals, such as those arising in the wake of the Grenfell tower disaster. It was mentioned that the way in which these appeals are initiated have not always followed the UK Government Disaster Appeals guidelines, resulting in a lot of money being held in funds that cannot be used or distributed. Questions are arising around appeals that fail and what subsequently happens to the money. It was discussed that it is not always obvious whether or not this money would be deemed *bona vacantia* or deemed frozen in perpetuity.

8.5 Mr Shindler raised a couple of issues for discussion on the GDPR. It was mentioned how the GDPR could be interpreted as not being wider in certain respects. Firstly, with regard to territoriality he discussed the new market test that has been incorporated into the Regulation. Secondly, with regard to the international data transfer rules, the GDPR refers to "third countries", which could refer to countries outside of the EU instead of the EEA. Mr Massey mentioned that another overview of the GDPR guidance had been issued this week. Mr Purton discussed how the GDPR poses real issues when assisting clients on separation exercises and when providing transitional support, as to the roles of the parties involved.

8.6 Mr Massey gave an update on the upcoming e-Privacy Regulation. He noted that it is currently in trilogue and that the opinions that have been released discussed the inconsistencies between the GDPR. Mr Bray discussed how the e-Privacy Regulation would be detrimental to the tech industry.

9. **AOB**

9.1 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.

9.2 Please see proposed dates for next year:

(a) 15 March 2018 - 1pm

(b) 23 June 2018 - 1pm

(c) 20 September 2018 - 1pm

(d) 15 November 2018 – 5pm meeting with drinks to follow