

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

Minutes of meeting held at 1pm on 23 June 2016 at the offices of Addleshaw Goddard, Milton Gate, 60 Chiswell Street, London, EC1Y 4AG

**Present:**

Mr Oliver Bray, Reynolds Porter Chamberlain (Chairman)  
Mr Richard Shaw, Berwin Leighton Paisner  
Mr Richard Marke, Bates Wells Braithwaite (Secretary)  
Mr Andrew Shindler, King & Wood Mallesons  
Mr Tom Purton, Travers Smith  
Mr Jonathan Davey, Addleshaw Goddard  
Mr Jonathan Bartley, Penningtons Manches  
Ms. Clare Sellars (on behalf of Mr Rohan Massey), Ropes & Gray  
Mr Andrew Crawford, Devonshires  
Mr Stephen Sidkin, Fox Williams  
Mr Jeremy Sivyver, Bishop and Sewell LLP

**In Attendance:**

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

**1. Minutes of last full meeting**

The minutes of the last full meeting were reviewed and approved subject to the following amendments:

- Mr Sivyver is now at Bishop and Sewell LLP and the minutes are to be amended to reflect this.
- Mr Sidkin wished to make an amendment to paragraph 6.3 (regarding **Quenon K. SPRL v Beobank SA**) and, having explained it, confirmed that he would email this to Mr Bray in due course.
- Mr Sidkin asked that the comment attributed to him at paragraph 6.5 regarding questions from his clients on the EU referendum related to the Scottish referendum.

Mr Sidkin recommended that the Committee read the judgement of **Alan Ramsay Sales and Marketing Ltd v Typhoo Tea Limited [2016] EWHC 486 (Comm)** which deals with the nature of ‘without prejudice’ communications in the context of the termination of an agency agreement and allegations of repudiatory breach.

Mr Hart advised that the CLLS will be placing the minutes of Committee meetings onto its website and that if any discussions were not for publication, these could be placed into separate minutes. Mr Marke advised that the Committee’s minutes currently provide for matters not for publication, as and when such matters arise.

## 2. Apologies

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

Mr Rohan Massey, Ropes & Gray  
Mr Duncan Reid-Thomas, Baker & McKenzie  
Mr Anthony Woolich, Holman Fenwick Willan  
Mr Paul Joukador, Hogan Lovells

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

3.1 The Committee discussed the action points from the previous meeting:

3.1.1 Mr Hart informed the Committee that a response from BIS on the **Consultation on Late payment: challenging ‘grossly unfair’ terms and practices** was published on 18 June 2016. Mr Hart will email the Committee with a link to the response, but noted that there will be further engagement with stakeholders later this year.

3.1.2 With respect to the Committee placing articles in **The City Solicitor**, Mr Hart informed the Committee that the editor tries to apply a theme to each edition. Mr Sidkin commented that it would be worthwhile to find out what future themes of the journal and Mr Hart agreed that he will circulate a list of upcoming themes. If there was an issue that the Committee felt was worth an article Mr Hart would do what he could to get it published in **The City Solicitor**. The Committee discussed whether it would be worthwhile providing comment on the GDPR by way of an article in **The City Solicitor**. Mr Bartley stated that he had written an article for the **Surrey Lawyer** titled ‘The growth of cybercrime: how well is your client data protected?’ Mr Bartley stated that he could repurpose this article for **The City Solicitor** and will contact the **Surrey Lawyer** to see if they would be amenable to this.

3.1.3 Mr Hart informed the Committee that they should be receiving a soft copy of **The City Solicitor** by email and to contact Mr Hart if they were not.

3.1.4 Mr Shaw stated that he had not received an update on **Counsel’s opinion on the validity of electronic signatures for overseas companies and the formalities required in respect of deeds and guarantees** and would chase on this and provide the Committee with an update.

3.1.5 Mr Bartley had been asked to join the Law Society’s working group to provide a response to the **online and distance sale of goods and supply of digital content**. As a result of its first meeting, the Law Society is preparing a skeleton response paper with the aim of publishing a full response in September. The Committee discussed whether the Committee could provide a separate response and pick out the key headline points, as it did with CESL. Mr Davey commented that, depending on the response given by the

Law Society, the Committee could simply state that it agreed with the response of the Law Society to give it more weight. Mr Bartley will try to involve the Committee with the draft proposal and will enquire with the Law Society as to whether this is possible.

#### **4. Review of Horizon Scanner**

- 4.1 Mr Shaw was thanked again by the Committee for preparing the Horizon Scanner.
- 4.2 Mr Bray referred to the Investigatory Powers Bill and questioned what the impact of Brexit might be on this.

#### **5. Matters arising**

- 5.1 Mr Purton initiated a discussion on the **EU Referendum** and what steps firms were taking to ready themselves for a Brexit vote. He noted that one firm had set up a 24 hour hotline to deal with Brexit queries. Various intractable difficulties were mentioned and briefly discussed, including how and to what extent EU directives would be repealed; whether Parliament would put through law reversing rulings where English courts had followed rulings of the European Court. There was also some discussion on the impact on contracts, including the impact of change control clauses, force majeure and material adverse change clauses. Given the complexities, it was agreed that if there is a Brexit then an extraordinary meeting should be held shortly after so that the Committee could analyse the issues. Mr Purton agreed to host such a meeting if needed.
- 5.2 The Committee also discussed that in the current climate there are a number of exceptional trainees who are unfortunately unable to obtain an NQ position within their current firm. It was discussed whether CLLS could provide a database on its website of such individuals to enable law firms to easily locate required individuals. Mr Hart stated that he would follow-up on this.

#### **6. Interesting cases and/or practice points**

- 6.1 Mr Davey mentioned the case of **Globe Motors Inc & ors v TRW Lucas Varity Electric Steering Ltd & ors [2016] EWCA Civ 396** in which the Court of Appeal was asked to consider the question of whether a clause stating that amendments are not valid unless in writing and signed by both parties prevents a contract from being varied orally or through conduct. The court expressed the obiter view that, in principle, a contract containing such a clause may nevertheless be varied informally.
- 6.2 Mr Davey also mentioned the case of **PST Energy 7 Shipping LLC & Anor v O.W. Bunker Malta Ltd & Anor [2016] UKSC 23**, a case concerning the correct interpretation of a contract for the supply of bunker fuel. In this case, it was held that a contract to supply bunker fuel, which included a retention of title clause plus a right to consume the fuel during the credit period, was not a contract to which the Sale of Goods Act (SGA) applied. Because the SGA did not apply the supplier could not

recover the price under S49 SGA and therefore had to rely on the express terms of the contract.

- 6.3 Mr Bartley referred to the Court of Appeal case of **Reveille Independent LLC v Anotech International UK (Limited) [2016] EWCA Civ 443**. The case concerned a “Deal Memo” that had been altered, signed and returned (by Anotech) to the other party (Reveille) (thus making a counter-offer), but later Anotech argued that there was no contract based on the amended document, because Reveille did not accept the terms as it had not signed it. The court held that a prescribed mode of contract acceptance (in this case signature) can be waived by conduct. Mr Davey noted that this followed **RTS Flexible Systems Limited v Molkerei Alois Müller GmbH [2010] UKSC 14**, where it was held that a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this.
- 6.4 Mr Davey noted that there had been an **Independent Review of Consumer Protection Measures concerning Online Secondary Ticketing Facilities** published in May 2016 which among other things calls on companies like Viagogo and StubHub to take more action to ensure sellers on their platforms comply with the Consumer Rights Act.
- 6.5 Mr Bray noted that the BIS had called for evidence seeking to gain a better understanding of how **T&Cs can be made more accessible for consumers**. BIS also proposed additional enforcement tools, including civil fining powers for breaches of the consumer protection legislation. The consultation period closed on 25 April.

**7. AOB**

None

**8. The next meeting**

The next meeting is due to take place at Macfarlanes on Thursday 29 September 2016.

The meeting closed at 2.15pm.

**9. Matters not for publication**

None