

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

**MINUTES** of the Committee meeting held at 1pm on 7 September 2017 at the offices of Ropes & Gray International LLP, 60 Ludgate Hill, London EC4M 7AW

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**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 Jeremy Sivyver, Bishop & Sewell

**Apologies:** Mr Jon Bartley, RPC  
Mr Stephen Sidkin, Fox Williams  
Mr Rupert Casey, Macfarlanes  
Mr Anthony Woolich, Holman Fenwick Willan  
Mr Richard Marke, Bates Wells Braithwaite  
Mr Mark Dewar, DLA Piper  
Mr Andrew Shindler, Locke Lord

**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 Mr Massey had not yet received any:

- (a) suggestions for new Committee members following previous discussions on Committee membership diversity and numbers; and
- (b) nominations for suitable colleagues/team members to assist in preparing the initial draft of the checklist/flowchart of key Brexit contractual considerations, incorporating the Brexit clause.

#### 4. **Matters arising**

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, prior to an advert being placed via the City of London Law Society. To assist Committee members in such consideration, Mr Hart agreed to provide the Committee with a list of law firms that currently have no City of London Law Society representation.

#### 5. **Brexit update**

5.1 **General:** Committee members were asked for their views on Brexit progress, how the Committee should respond and whether the Committee should continue with its efforts in respect of a Brexit checklist/flowchart/roadmap and the Brexit clause (or if there was anything else the Committee should be doing). Discussions focussed on the following points:

- (a) **Lack of Clarity:** Mr Massey commented that since the previous Committee meeting on 8 June 2017, little additional detail had been published with respect to Brexit, creating difficulties for the Committee to make any clear proposals. There were comments that any Brexit details were still only at a macro level or otherwise too high level to be of any practical use. For example, Mr Purton confirmed that although there had been some discussions in respect of transitional arrangements, these were still also unclear. It was also confirmed that this lack of clarity had begun to impact client work – for example, the drafting of certain legal opinions had become increasingly difficult.
- (b) **Government Strategy:** In the context of apparent increased EU political instability, Committee members raised concerns that:
  - (i) the Government had not demonstrated any clear strategy regarding Brexit, and in particular, very little progress on Brexit was made by the Government in the nine months prior to triggering Article 50, suggesting this was potentially a politically-motivated tactical move prior to general election;
  - (ii) little Government consideration appears to have been given to Brexit other than calling a referendum, and that certain politicians may be prioritising their career aspirations over national interests;
  - (iii) although Government Brexit committees had been established, and with the exception of publishing a paper on the mutual recognition of judgments, such committees had not appeared to have actively engaged with the public or business/legal communities, nor provided any useful information on Brexit; and
  - (iv) insufficient consideration had been given to the European Union (Withdrawal) Bill – in particular, that grandfathering all existing EU law into UK law is likely to be problematic without reciprocal amendments

being made or input generally at an EU level. Furthermore, concerns were expressed that this could be used as a bargaining position for both the Government and the EU (and in either case, to the potential detriment of the UK).

Questions were also raised as to whether the Government had sufficient resources to successfully navigate Brexit. For example, it was noted that the Information Commissioner's Office (ICO) had lost a number of individuals to Cobbetts LLP, at a time when the ICO clearly needed resources for preparations in respect of the forthcoming General Data Protection Regulation.

(c) **Practical Steps:** in terms of practical steps taken or seen by Committee members, Mr Purton commented that he had seen a number of clients implement material adverse change clauses in anticipation for Brexit, and that these clauses had generally been accepted by both EU and non-EU counterparties. Other Committee members noted that there had been an increase in corporate reorganisations and internal restructuring, with the expectation that certain functions would begin to move from the UK to the EU prior to or after Brexit.

(d) **Impact on UK Legal Market:** the Committee discussed concerns around the ability of the UK legal profession to operate efficiently following Brexit. In particular, banking, competition and procurement were identified as some of the key legal sectors most likely to be impacted by Brexit. Mr Davey suggested that a failure to be qualified to practise law in an EU Member State could create issues of legal professional privilege in the future. On this issue, Mr Davey confirmed that he was seeking a certificate of good standing from the SRA and intended to gain admittance to the Roll of Solicitors in Ireland. Other Committee members confirmed that they were aware of colleagues or other solicitors who were doing the same.

5.2 **Agreement:** 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.

5.3 **Next steps:** Mr Bray agreed to update Mr Sidkin on the Committee's discussions and decision with respect to the Brexit clause.

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

6.1 Mr Crawford mentioned that on 13 July 2017, the Charity Commission replaced their existing governance publication with a new governance code for large charities and a new code for small charities. Copies of the new codes can be found at <https://www.charitygovernancecode.org/en/pdf>.

6.2 Mr Davey mentioned the following two cases of interest:

(a) *Agro Foreign Trade & Agency Ltd v Petersime NV* (ECJ) 16 February 2017, Case C-507/15, in which it was held that that the Commercial Agents Directive (86/653/EC) (the "Directive"), as well as the relevant agreements between the EU and Turkey, did not preclude an EEA member state from implementing

the Directive in terms which excluded from its scope an agency agreement between a principal established in that member state and a commercial agent established in Turkey and carrying on its agency activities in Turkey. The only way in which the Directive or the relevant national implementing legislation might apply in this situation would be if the parties specifically agreed, as a term of the contract, that they apply; and

- (b) *Persimmon v Ove Arup* [2017] EWCA Civ 373, in which the Court of Appeal held that an exclusion clause providing that “liability for any claim in relation to asbestos is excluded” should not be read as “liability for causing any claim in relation to asbestos is excluded”, due to the language used and the application of business common sense. The Court of Appeal also considered the construction of exemption clauses generally, commenting that “*exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree*”. The Court of Appeal also held that the *contra proferentem* rule now has a very limited role where the contract is a commercial contract, negotiated between parties of equal bargaining power.

## 7. AOB

- 7.1 **RPC Committee representation:** the Committee discussed what course of action should be taken (if any) following Mr Bartley’s recent move to RPC. Mr Hart confirmed that this potentially presented a Committee constitutional issue, and that the Committee should avoid having two voting members from the same law firm. Discussions focussed on how Mr Bartley could continue to attend Committee meetings, given his valued contributions to date. Suggestions included appointing Mr Bartley as (non-voting) Secretary of the Committee, or Mr Bartley attending Committee meetings as Mr Bray’s alternate from time to time. Alternatively, consideration was given as to whether Mr Bartley could be permitted to join Committee meetings as a non-voting attendee only. It was decided that this issue required further consideration and an appropriate course of action would be determined in due course.
- 7.2 **Contact details:** 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.