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

Minutes of the Committee Meeting held at 1:00 p.m. on 20 June 2024 at the offices of Baker McKenzie, 280 Bishopsgate, London EC2M 4RB (the "Meeting") hosted by Julia Hemmings and Helen Brown

Present:	Mr. Oliver Bray, RPC ("**OB**") (Chairman)
	Mr. Rohan Massey, Ropes & Gray (Secretary) ("**RBM**")
	Ms. Julia Hemmings, Baker McKenzie ("**JH**")
	Ms. Helen Brown, Baker McKenzie ("**HB**")
	Mr. Salome Coker, *CLLS Committee Bridge Person* ("**SC**")
	Mr. Jonathan Davey, Addleshaw Goddard ("**JD**")
	Mr. Richard Marke, Bates Wells ("**RM**")
	Mr. Richard Shaw, Bryan Cave Leighton Paisner ("**RS**")
	Mr. Richard Brown, Travers Smith ("**RB**")
	Ms. Jo Farmer, Lewis Silkin ("**JF**")
	Mr. Anthony Woolich, HFW ("**AW**")
	Ms. Megan Paul, Charles Russell Speechlys ("**MP**")
	Mr. Mark Dewar, DLA Piper ("**MD**")
	Mr. Jeremy Sivyer, Bishop & Sewell ("**JS**")
In attendance:	Mr. Iain Fox, Ropes & Gray (minutes)
Apologies:	Mr. Stephen Sidkin (Fox Williams) ("**SS**")
	Mr. Kevin Hart, City of London Law Society ("**KH**")

1. Welcome from the Chair (OB)

OB gave a short introduction and welcome.

OB thanked SC for her attendance and asked her to provide an introduction to the committee. SC informed the committee of her position, which involves attending specialist CLLS

committees, to provide feedback to the main CLLS committee. SC also set out she is the editor of the City Solicitor magazine, which can showcase the work of the CLLS.

2. Minutes of last full meeting and other comments (September 2023) (RBM)

No comments on the minutes of the last meeting. Minutes from the last meeting were approved.

3. Apologies (RBM)

Apologies from the individuals above had been received.

4. CLLS update/AI committee link (KH)

OB updated the committee that KH usually provides a CLLS update but has sustained an injury. As a result, KH was not in attendance for the meeting.

RBM stated the CLLS Annual General Meeting ("AGM") is due to take place on Wednesday 26th June. The AGM will give the committee a chance to understand what can be improved and what members want more of.

RBM also updated the committee regarding correspondence he had received from KH in relation to a proposed change to the corporate structure of the CLLS, in connection with a proposal that the CLLS becomes a company limited by guarantee. RBM noted that a review of the CLLS website disclaimer will be required to see if such a change presents any issues.

Next steps: RBM to circulate the CLLS website disclaimer for review in relation to the change in the company becoming a company limited by guarantee.

5. LinkedIn page (OB)

OB shared an update with the committee on recent activity of the LinkedIn page. In particular, there have been five posts to date with two more posts expected to be submitted (including one from Addleshaw & Goddard), and there has been a good flow of content from around six firms. If members want to submit content to the LinkedIn page, that they should let RB and HB know. It was noted that content should also be made available on CLLS central page itself.

MD asked if the committee's LinkedIn activities are working well. OB stated that the committee was getting as much readership on the LinkedIn page as it could, although it could benefit from more engagement with content published. MP proposed that that the link for the committee's LinkedIn page should be re-circulated to members of the committee. These points regarding the promotion of content on the LinkedIn page were well received by multiple members of the committee. OB also noted that the LinkedIn page provides an opportunity for lawyers in the City to promote content.

OB proposed the scheduling of an event with senior associates, perhaps as a drinks event in an afternoon or evening. RBM responded that the next meeting, on 15 November 2024, may be a good opportunity to schedule such an event. OB asked whether associates are invited for the meeting or just the drinks. The consensus amongst the members was that the associates should be invited to drinks, rather than the meeting. The rationale for this, amongst other reasons, was that there may be challenges in identifying a meeting room of a suitable size. MP stated that she will be responsible for organising the drinks, as the next meeting will be held

at their firm. OB asked whether it was best these drinks were at the office or at an external venue. MP responded that the drinks can be held at her firm's new offices.

RBM revisited the conversation on LinkedIn engagement and proposed that associates could assist in reposting committee LinkedIn posts on their LinkedIn feeds as this may improve engagement. This suggestion was well received by members of the committee. OB also added that more associates could follow the committee's page on LinkedIn. RB supported encouraging associates to follow the page, stating this could rapidly grow the page and increase engagement. OB noted the LinkedIn page may also provide senior associates with the opportunity to gain contacts and get to know each other, and that there should be a push to ensure more associates follow the page and repost.

Next Steps: Committee members should encourage associates to engage with the committee's LinkedIn page, including reposting content and following the page.

6. Promotion of English Law abroad (OB)

OB updated the committee that he attended a meeting on the promotion of English Law abroad and sought suggestions from the group on how to best approach the topic.

MP asked if OB could explain more about title and roles of people involved in the meeting. OB provided the names of some of the people in attendance at the meeting and set out that he had a list of attendees. The meeting did not have a specified name or purpose. OB noted he understood that the meeting concerned empowering ministers and diplomats to have information they can use to promote English law.

The discussion centred on the benefit of the use of English law in international commercial settings – but OB also pointed out that he suggested English lawyers should be included in the promotion of English Law, as amongst other factors, they have exposure to international work. OB's point regarding English lawyers was well received by Colin Passmore (*Chair of CLLS*), who proposed that he and OB write a paper concerning the promotion of English law abroad, with Colin Passmore writing the first draft and OB reviewing and providing further detail. The initial paper was very thorough, and OB mentioned he distilled it into a more practical and useful resource. OB said he would bring the paper to the committee for review by the members, as he felt the members would be able to provide useful insights.

RBM mentioned that in his experience, geography has been a driver for increased uptake of English law as there is a beneficial time zone difference (such as between Asia and US clients).

AW noted it was a good paper, and that the promotion of English law abroad is an important topic for self-preservation and for the UK's soft power. He also flagged that the topic should be approached sensitively, and there should be due regard for the audience entertaining the promotion of English law, such as governments and foreign lawyers who may not necessarily agree with such promotion or the merits of English law.

MP pointed out that we must be mindful of a wider perspective concerning ESG, and that topic must not be approached in terms of lecturing the rest of the world.

JD noted that in some instances parties see advantages of using other legal systems in the world and provided an example of an increasing number of deals being done in Munich using the German civil law rather than relying on English common law.

MD said that a strong position for English law is that it could take the place of a reasonable voice between the US and the EU.

MP emphasised the topic is a difficult landscape to try and traverse. In particular, some may opine we are the leading system, whilst others may not necessarily believe this to be the case.

JF asked who the audience for this paper is. OB responded that he took it to mean ministers and diplomats. JF said this is an important point and queried whether OB could get any assurances on audience. In light of this information, AW noted that a briefing paper for diplomats is a good proposal, but there needs to be caution over what is discussed and the approach diplomats take.

MD proposed that scope of the arguments raised regarding the advantages of English law can be tested with international offices, given a lot of lawyers in attendance are at firms which have an international presence.

MP raised the issue of whether it should be specific elements of English law rather than English law in general that should be promoted. RS noted that in contract law, English law typically provides more certainty than other legal systems. MD noted there are benefits of English law from a regulatory angle. MP furthered the regulatory point, and stated English law has statutory and regulatory codes which enable English law to be more sophisticated than other jurisdictions.

JF set out that that academic organisations must have published a detailed comparison study of the English legal system compared to others. OB responded that the paper had a lot of input, and funding, with different sources of law.

AW revisited the topic of understanding the audience more precisely, and stressed the need that the end-product must be concise, or it will not be utilised.

RM emphasised the clear business expectations and clarity with English law. RM provided an example of situations he has come across regarding choice of law – where he has found himself promoting English law as the option, as it "*does what it says on the tin*". The disadvantage may be that an English law contract is longer, but the client knows what they have signed. RM noted that businesses require certainty and English law provides this. RB set out that as English law is cross-border in nature, it is well placed as a legal system.

OB noted that a comparative study may be helpful. AW responded that the Law Society or Bar Council may have provided input to such a study. MP commented that, to the extent such comparative resources exist, the committee may be best placed to only talk about commercial contracting, and we need further clarification on the extent of assistance required.

OB noted that to help move this along in a practical way, there would be a benefit of input from those writing English contracts. It was mentioned by a member of the committee that DLA Piper's global contract laws website is a good resource for understanding how a comparative assessment may work in terms of content and format. Concerns were also raised that if ministers / diplomats were given too much complexity, then the report may not be effective.

JF set out that the final section for the report merits particular consideration, particularly on whether there is a recommendation for actions the UK government does in order to maintain the position of English law. An example provided by JF was in relation to jurisdiction and judgment conventions, and asked whether assurances could be provided to ensure that these

legal frameworks would not make the position of English law worse. MD said that, to ensure this is done with the maximum benefit, an audience with the AG or Justice Minister would be helpful. AW noted that the next prime minister should be alert to these issues.

RBM asked when the meeting took place, and, whether it was before or after announcement of the general election. OB responded that the meeting took place in April 2024.

OB set out that a next step could be to have a conversation with the Chair of the CLLS to confirm the audience and what proposals in terms of content may be most effective. He emphasised that there needs to be a condensed version of pros and cons, so when presenting to foreign lawyers, they can promptly grasp the benefits of English law. To this end, a suggestion of a five-pointer sheet with a briefing page behind it was put forward.

RB asked whether the CLLS Corporate and Finance committees were involved. OB confirmed it is just the CLLS Commercial Law committee for the time being. AW added that this initiative should be coordinated with the Law Society and Bar Council, as for some, there may be people involved in these organisations whose responsibilities include the promotion of English law abroad.

MD asked about next steps on this project. OB summarised the conversation and ideas proposed by the committee. He emphasised that knowing who the audience is important. He stressed the government must be informed of the economic value of lawyers. He particularly liked the idea of a comparator guide, and giving credit of foreign systems, however looking at how English law is better, and said this work must have been done as a study. MP also noted a next step ought to be getting other committees involved for particular input. In relation to this, JF proposed that other CLLS committees should be consulted and asked to each provide "three good points" on how English Law is comparatively better than other legal systems.

MD asked whether the cons of English law also warrant consideration. JF, in response, said he assumed that both pros and cons were needed. OB said that he will need to get Colin Passmore in the room to have a free conversation on this topic. MD proposed that a design workshop be set up, the members could each come up with five pros and cons, send them to OB, meet to reconvene where we distil them into a diagram and go through each of them and distil them down to the key five with the reasoning behind it. MD said this does mean an extra meeting.

Next steps: Check what impact, if any, the general election has on timing of the production of the report/briefing paper. Reach out to other CLLS committees (such as Corporate and Finance) to check if they can contribute to the project. Consider the creation of a design workshop to allow members of the committee to put forward points that can be put in the report. Investigate comparative studies, or online tools, of English law against other legal systems.

7. Commercial Committee Seminar Update (JD)

There was no discussion regarding the Commercial Committee Seminar Update.

8. Interesting cases and/or practice points (JD/ALL)

RTI Ltd v MUR Shipping BV [2024] UKSC 18

The Supreme Court overturned the Court of Appeal on the question of whether force majeure intervened to prevent a party obliged to pay in dollars, and whether the supplier could be forced to accept euros, albeit on the basis that the customer said they will pay conversion charges.

The Court of Appeal set out that reasonable endeavours, which are either express on the force majeure clause or implied in all cases, meant that alternatives needed to be considered. The Supreme Court set out this was not the case, and the unaffected party isn't obliged to accept non-contractual performance in response to the offence of force majeure. The Supreme Court seemed to go out of its way to say it isn't a judgment about this court/case but general principles.

Northamber v Genee ([2024] EWCA Civ 428 (CoA)

The Court of Appeal suggested a lower and less proactive bar for the tort of inducing breach of contract. Overturning the High Court, the Court of Appeal held that, where a party has knowledge of an exclusivity agreement and places an order and pays for that order in breach of the exclusivity agreement, then liability for the tort of inducing a breach of contract will follow. It will not matter if the supplying party in breach sold to other customers.

Interestingly, a director of a supplier was also found to have induced breach and breached his director duties. JD assumed the bar was somewhat higher than that and needed a measure of persuasion.

Costcutter v Vaish [2024] EWHC 152

There was an exclusion clause under a contract in which Costcutter supplied franchises. Costcutter fell out with several franchisees. Before this falling out, the basis of contract had changed. The exclusion clause cap was set based on a service fee which no longer applied (i.e., the cap was effectively zero). Franchisees alleged, when they refused to pay for the final tranche of goods supplied to them, that the exclusion clause applied to that failure and that therefore their liability was zero. The court knocked that over and said, in an echo of cases on liquidation damages and penalties, that this was a primary obligation and a debt, not a secondary obligation. On its construction the clause didn't apply as the clause was about liability for breach of contract.

Drax Smart Generation v Scottish Power (CA) [2024] EWCA 477

There has been a line of cases about notices required under contract to make a claim, for instance, in a warranty period. There was quite a worrying case in the past, *Dodika v United*, where the Court suggested that a notice giving the counterparty notice of a tax claim they were already fully aware of was insufficient. The Court of Appeal in *Dodika* turned that over. In *Drax v Scottish Power*, the Court took it a stage further and stated, "what is reasonable takes its colour from the purpose of the clause … [one] would not expect … detail which served no commercial purpose". Another interesting aspect of the case was that the court saw a notices provision setting out the detail of what had to be in the notice as an exclusion clause.

Innovate Pharmaceuticals v University of Portsmouth HE Corp [2024] EWHC 35 (TCC)

This case concerned a drugs trial run by a university on behalf of Innovate Pharmaceuticals. The losses were allegedly £100m and the university was paid £1m for the work. It was alleged that a paper published in a learned journal giving the results of this test was falsified or had included mistakes. Ultimately, fraud wasn't proved. However, the court decided there was no reason in principle why an exclusion clause couldn't exclude liability for fraud, meaning that had fraud been found here, the exclusion clause would have been valid to exclude that liability. The court differentiated between a claim for fraudulent misrepresentation, which was fraud leading to the formation of the contract, as opposed to fraud which was within the contract.

An interesting point, which allowed the court to reach its conclusion, was that fraudulent misrepresentation had been carved out of the exclusion, which enabled the defendant to argue that this meant they turned their minds to it but decided not to exclude fraud, having perhaps thought previously that courts wouldn't allow reliance on an exclusion clause in a fraudulent breach of contract.

Consultation on the repeal of Commercial Agents Regulations

JD informed the committee that the repeal consultation is underway on the Commercial Agents Regulations. The return date for submissions has a deadline of 1 August.

A. F. Kopp Limited v HSBC [2024] EWHC 1004 (Ch)

The Court declined to grant summary judgment on a challenge to the reasonableness of an exclusion clause under the Unfair Contract Terms Act 1977. *Obiter*, the judge said that he thought that the loss of profits sustained by third parties, rather than the claimant's own loss of profits, should be regarded as indirect or consequential loss as it fell in the second rather than first limb of *Hadley v Baxendale*. JD expressed he was not sure this correct.

9. AOB (OB)

OB thanked all attendees for another successful meeting.

Next meeting

Thursday September 19th – 1pm – Hosted by Jo Famer @ Lewis Silkin

Thursday November 14th – 5.30pm November – Hosted by Megan Paul @ CRS