

**CITY OF LONDON LAW SOCIETY (“CLLS”) COMMERCIAL LAW COMMITTEE
(THE “COMMITTEE”)**

Minutes of the Committee Meeting Held at 1:00 p.m. on 30 March 2023 via Zoom (the “Meeting”)

Present:

Mr. Oliver Bray, RPC (“OB”) (Chairman)

Mr. Rohan Massey, Ropes & Gray (Secretary) (“RBM”)

Mr. Stephen Sidkin, Fox Williams (“SS”)

Mr. Kevin Hart, City of London Law Society (“KH”)

Mr. Mark Dewar, DLA Piper (“MD”)

Mr. Richard Marke, Bates Wells (“RM”)

Ms. Helen Brown, Baker McKenzie (“HB”)

Ms. Julia Hemmings, Baker McKenzie (“JH”)

Ms. Megan Paul, CRS (“MP”)

Mr. Jonathan Davey, Addleshaw Goddard (“JD”)

Mr. Jeremy Sivyver, Bishop & Sewell (“JS”)

Mr. Adam Woolich, HFW (“AW”)

In attendance: Ms. Robyn Annetts, Ropes & Gray (Minutes)

Apologies:

Ms. Jo Farmer, Lewis Silkin

Mr. Richard Brown, Travers Smith

Ms. Jane Finlayson-Brown, Allen & Overy

Mr. Richard Shaw, Bryan Cave Leighton Paisner

1. Welcome from the Chair

OB gave a short introduction and welcome. RM apologized that the meeting had to be rescheduled and was taking place by Zoom and not in person.

2. Minutes of last full meeting (November 2022) (RM)

As there were no comments, the minutes were approved and will be sent to the CLLS.

3. Apologies (RM)

Apologies from the individuals identified above have been received.

4. AI Discussion (OB/KH)

OB asked how the group feels about taking on AI in this Committee.

KH commented, for background, that as it becomes more of a topical issue, it is hard to know which community the topic will best slot in to. The Data Law Committee already has a full in-tray. It is also a topic that would take over the Data Law Committee, in the same way that Data overtook this Committee that then led to the Data Law Committee being set up in the first place. Would this Committee want to take on AI? Does it fit in with the work that is being done?

OB said he does a little bit on liability issues arising out of AI. He asked those present how everyone feels about this and queried putting a line around what is done so this Committee does not disappoint. Watching everything on the topic of AI would swamp this Committee, so his suggestion was focusing in on a specific aspect of AI (i.e., AI: narrow scope).

RBM attended a think tank meeting recently on generative AI, mainly driven by privacy lawyers. He commented that at the end of the two-hour discussion – having touched on IP, antitrust, contract law, public and international law as well as geopolitics – the consensus was that the topic of AI is too broad to be covered purely from a data or a privacy perspective and the same is likely true for commercial law. There are over 50 pieces of EU and UK legislation in discussion that touch on AI and data more broadly, so doing anything other than a narrow subset of AI would be challenging for this Committee.

OB commented that as this group is the Commercial Committee, with distinct elements of more specialist tags (e.g., IP, competition), it feels like there needs to be a coordinated approach. It was agreed that the Commercial Committee cannot swallow the whole of AI, it is like thinking of the whole of e-commerce 30 years ago. It leaves this Committee with a stranger touch point, because it is not one of those niche areas.

HB asked if AI would justify its own committee. AW said it probably warrants its own committee with a delegate from each other Committee (one from Data, Commercial, etc.).

JD reiterated that AI is far broader and touches on everything, adding that the Commercial Committee should not shirk out of their bit of it, but it is too big to follow whole. OB agreed, adding that there will be so much commentary on it (e.g., building ethical programs) going forward that following all would be impossible.

KH added that they are exploring how to deal with this. It may well be that it needs its own specialist committee (as the Data Law Committee was set up). KH liked the idea of other specialist committees lending someone or dipping in, so that there is a coordinated approach to this huge subject. In relation to Brexit, there was a committee that expanded to “international law” – it was not the swamp that was expected though.

KH said the ESG Committee is starting up again, and this may impact multiple committees, to deal with the E and G bits of this. With AI it feels, because of the huge range of legal topics implicated, a separate Committee should maybe be set up with links to others. OB said CLLS has the ability to reach across to relevant experts: is it the case you would want a committee full of AI specialists? Idea of one of us volunteering in AI, which is in itself a specialism,

indicates a huge amount of work. Might be better to have people come in and add rather than distract from this Committee.

KH to check what Bar Council, Law Societies and others are doing.

MD added that there are references to the AI Act, new Product Liability Regulations and other Regulations, so others will look at this too – this Committee needs to have its own input, as AI is going to affect all of us. There is a difference between thought leaders and practitioners that implement. OB asked how to progress that part of it – should this Committee just have a watchful eye on AI, or is it to have a standing agenda item so we can share? MD suggested we all keep our eyes and ears open and be willing to upskill.

OB concluded: AI should be kept as an agenda item, to track the best quality output and begin to hone everyone's eye on this area. Perhaps someone could also come in and do a 20-minute slot on what to look out for, too.

KH requested feedback whether we look at setting up a specialist "AI Committee" as well.

5. LinkedIn Page (OB)

OB said the LinkedIn page is almost ready to go. This is being raised to discuss the purpose and requirements for posts on this page, along with logistics and how we do it: are we looking at commercial contracting and that sphere? What is our gravitational pull towards? Commercial law advisory contracts or broader topics (e.g., data)? If we are too broad with the posts, it could flood the platform, which might be right, but we need to establish what the guardrails are and the views of those on the Committee.

SS said that it should be about what works for the Committee. OB commented that the Committee could commit to posting on commercial contract updates rather than international data transfers. OB added that the new data framework with the U.S. might relate to the work of this Committee, but asked where the line is. Why are people coming to our page? What things impact our world?

JD commented that posts should start wide and look at the readership for the posts. If the page puts something up and three people read it, either we are not getting the word out or the content is not that attractive. If we find material in three or four areas and get good readership from that, we should focus on that. It depends on the time available from people on the Committee to commit to this. We need to be quick and relevant, the fifth or sixth firm might as well not have bothered. We could say *what we think*, "is it helpful", "any critique", rather than "here is a summary".

OB likes the broader approach; there is more opportunity for posts and a chance for content to come through. Practically, he does quarterly updates, and it is a sweep of what has been happening. OB said if this content was reconfigured rather than specifically written for CLLS, it would speed things up massively. Could it be a short LinkedIn intro (i.e., why relevant to commercial lawyers), then a link to firm website?

JH similar to the AI discussion, our world is only getting broader. If we do not think it falls into other Committees, where does it fall? It would be for us (DSA, for example), so we should embrace rather than keep too black letter on this. Getting things out there is the main thing. RM added that the only possible limitation was data privacy information – we should not blur the distinction or brand. OB said if you cannot summarize why the content is useful to a commercial lawyer, it should not be posted there.

KH noted the CLLS was to follow this Committee's implementation and monitor its success, with the intention that the CLLS will roll out other specialist pages.

OB raised the issues of what images should be used when posting. Does the page need a stylized "CLLS" image so that it is not confusing the audience with what it is? The stylization reinforces who is posting, even though it then reroutes to a firm's website. OB added that the aim is to make the content as easy as possible to engage with.

KH will look into this and said a new logo is incoming. KH added that if we can establish who will post content, we can get that up and running soon. KH to discuss with George and revert, with George to send through a proposed image.

Everyone will have access to the LinkedIn page to maximize the posting opportunities.

6. Commercial Committee Seminar Update (OB)

Supply chain: Covered by RM and MP. There is currently not a whole lot of progress to report. They are picking this back up in April, with KH to be added to the group.

RBM and KH went to the Data Law Committee event with the Information Commissioner. It was a successful event, with 165 people showing up and it was very well received.

JD and MD are responsible for the other seminar. JD had a date (TBC), bravely going for a date in June, which is now rapidly approaching. There is a shape for the event and a starting point for materials. They have an idea on duration, etc., with the idea of splitting it into two and having a price escalation – i.e. one price for private participants and another for public participants. They have a title and scope, so there is no reason why it could not be delivered, but just need to double-confirm the date and value. If they do not do the event in first half of June, it will likely be pushed into the second half of September.

Request to keep OB and KH in the loop.

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

SS said that in the last minutes, the Committee discussed the Court of Justice, the case of *NY v. Herios* and the position of a sub-agent. That decision of the Court of Justice was referred and found its way to the Belgian Supreme Court, where it was found as a matter of Belgian law that a sub-agent is entitled to an indemnity against the agent. JD commented that he thinks this is where it ended in the English courts too, but it seems wrong as a matter of principle. If it is about authority, it should come from the principal, not the agent; he understands the expediency, but reiterated that it seems wrong. SS agrees that it is wrong as a matter of principle. Where this gets us is no further on from the past Court of Bills *White* decision.

JD mentioned the following cases:

- *JAMES KEMBALL LTD V. "K" LINE (EUROPE) LIMITED*. The claimant is a company transporting shipping containers by road to and from UK ports that tried to terminate a service agreement on the grounds that the defendant was in "willful, persistent or material breach" because of an alleged anticipatory repudiatory breach of contract. However, the claimant did not refer to termination at common law, which was an issue as the provision in the contract for willful termination for breach did not apply for

anticipatory breach. The clause essentially did not allow for termination in the circumstances. Repudiatory breach at common law could have relied on common law if the claimant remembered to put this in the letter before action or termination notice.

- *HIJOS DE J BARRERAS V. HAVILA KYSTRUTEN*. Another shipping-related case, this time about ship building. The agreement between the parties involved one of them producing a written connected statement from the bank evidencing financing to buy a ship. It was held that the other party must have “committed”, “financing” evidence alone did not mean all of the relevant documents were in place – there are all of the broader commercial points to consider too. The Court commented that if it was intended to be legally binding, the parties could have said so.
- *MARANELLO ROSSO LTD V. LOHOMIJ BV & OTHERS*. This case regards the interpretation of settlement agreements. When settling a matter and “all claims” are referred to, what if there is an unknown claim? We always question why it is referred to this way. “All claims” were broadly defined in the agreement, but the definition did not specifically refer to claims in fraud or conspiracy. It was held that the usual principals of contractual construction apply to settlement agreements and that there is no rule of law that express words are required to release claims in fraud.

8. AOB

Upcoming dates

MD owes an email about 13th June, but has booked at DLA provisionally.

Thursday 15th June hosted by RM at Travers Smith. Subject to no strikes!

Retained EU Law Bill

SS noted that the Retained EU Law Bill is moving through Parliament. Last week, it had its last day in the House of Lords and questioned whether the CLLS put in any comments to the Government about what an appalling piece of legislation it is – not least because of the rule of law issues. KH to check and revert. JD added there was a Law Society event on this, so the assumption was that the CLLS would be contributing to the Law Society submission.

SS added that the root of his indignation came from the ability of the Government to decide what stays/what does not stay and on what terms. Before we get to that stage, with the abilities exhibited to date, there are going to be a host of laws affected across multiple practice areas.

RM asked if the group thought the Commercial Agent Regulations will survive.

JD noted that there are a number of suggestions and that although it is in scope of exemptions, it will be exempted. JD shared two thoughts on this:

1. there is a danger of duplicating the inequality and unfairness that the Regulations caused when they came in: if you formally pay 10% commission to agents, you now consider paying a lower rate so you have funds to pay compensation. Agents agree, as on termination, they are going to be due a hefty payment. If this is no longer there, the agreements will look less agent friendly; and
2. there is an option on whether to go the compensation or the indemnity route: it is worth the Committee looking at standard clauses and considering this (i.e., if they say that on

termination the agent is entitled to be INDEMNIFIED rather than COMPENSATED, after sunset, you might have baked in a right to a sum of money – might have to be “if Commercial Agent Regulations are still in force, X is entitled to be compensated”).

AW wonders whether Regulations are so well established and now an integral part of English law, it might play a role in what is repealed.

Are comments being submitted by the CLLS? KH said that no comments have been submitted. SS to check if things are still open to comments.

No other business was raised.