



# Dispute resolution

e-alert

## Issue 28 – November 2008

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## Cases

### 1. [IPCO \(Nigeria\) Ltd v Nigerian National Petroleum Corporation](#)

**Cite:** [2008] All ER (D) 197 (Oct)

**Court:** Court of Appeal, Civil Division

**Judges:** Tuckey, Wall and Rimer LJJ

**Hearing Date:** 21 October 2008

**Summary:** Arbitration - Award - Enforcement - Part enforcement of award - Whether enforcing court restricted to enforcing all or nothing of award - Whether enforcing court permitted to enforce part of order - New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts 3, 5 and 6 - Arbitration Act 1996, sections 100, 101 and 103.

Section 100 of the Arbitration Act 1996 provides, so far as material: " (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made and may accordingly be relied on by those persons [...] in any legal proceedings in England and Wales or Northern Ireland" .

The claimant company was a Nigerian subsidiary of a Hong Kong registered company. In March 1994 it entered into a turnkey contract with the defendant, the state oil company of Nigeria, to design and construct a petroleum export terminal. The progress of the project was delayed by 22 months because, as the claimant contended, the defendant had required substantial variations to the contract works. The claimant's section disputed claims to be paid substantially more than the contract price was referred to arbitration in Nigeria in accordance with Nigerian law as the contract provided. The arbitrators issued their award in favour of the claimants. In November 2004, the defendant applied to the

Federal High Court in Nigeria to set aside the award, and the claimant applied to the High Court of England and Wales to enforce it.

The claimant's section without notice application was successful, but on the defendant's section application, the High Court adjourned enforcement on terms that the defendant pay the claimant a smaller amount, which it admitted was owing, and provided security to the claimant in a further sum (see [2005] All ER (D) 385 (Apr)). The claimant renewed its application to enforce the award. The second judge decided (see [2008] All ER (D) 249 (Apr)) that certain factors justified revisiting the first decision. In the event, he gave judgment for the amounts awarded by the arbitrators on two of the claimant's section six heads of claim, less credit for part of the \$13m paid under the judge's section order. The defendant appealed.

It submitted that the second judge had had no jurisdiction to enforce part of the award in such a way and that he should not have revisited the first judge's section evaluation of the merits of its challenge to the award which in any event was correct. The principal issue which arose, a matter on which there was no domestic authority, was whether part of a New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) arbitration award could be enforced. Sections 100 to 103 of the Arbitration Act 1996 reflected the obligations which the United Kingdom assumed as a signatory to the Convention, to which Nigeria was also a party (for arts 3, 5 and 6 of the Convention and the material provisions of the 1996 Act, see [6] of the judgment).

The defendant submitted that neither the Convention nor the 1996 Act expressly provided for part enforcement of an award where an award was challenged before the competent authority, in the instant case, the court in Nigeria. On the contrary, it contended that the Convention and Act in such a case allocated jurisdiction between the enforcing court and the home court so that it was for the home court to decide whether there was a viable challenge to the whole or any part of the award and the enforcing court was left with the largely mechanistic task of deciding whether to enforce the award as it stood. It submitted that the enforcing court might only do so "in terms of the award" as an indivisible whole, and it was not entitled to pick and choose which parts of the award it would enforce because that was for the home court to decide.

The appeal would be dismissed.

The word "award" in sections 100 to 103 of the Act should be construed to mean the "award" or part of it". To be enforceable, it had to be possible to enter judgment "in terms of the award". Accordingly, a judge enforcing an award made in a New York Convention arbitration was entitled to order part enforcement of an award (see [18] and [20] of the judgment).

(1) The purpose of the Convention was to ensure that effective and speedy enforcement of international arbitration awards. An all or nothing approach to the enforcement of an award was inconsistent with that purpose and unnecessarily technical. There was no objection in principle to enforcement of part of an award, provided that the part to be enforced could be ascertained from the face of the award and judgment could be given in the same terms as those in the award (see [14] of the judgment).

(2) The purpose behind the Convention was reflected in the language of the 1996 Act, under which enforcement "shall not be refused" except in the limited circumstances listed in section 103(2) where the court was not required to refuse by "may" do so. Under section 103(5), the court might adjourn but only if it considered "proper" to do so. The enforcing court's section role was not therefore entirely passive or mechanistic. The mere fact that a challenge had been made to the validity of an award in the home court did not prevent the enforcing court from enforcing the award if he considered the award to be manifestly valid (see [15] of the judgment).

(3) There was nothing which expressly prevented part enforcement in the language of the Convention or the Act. A construction of the Act which led to the enforcement of whole or the award and nothing but the whole of the award would have absurd commercial consequences and could not have been intended (see [16] of the judgment).

It followed that the judge had been entitled to order part enforcement of the award in the way that he had. In the instant case, there was no difficulty about entering judgment "in terms of the award" as the exact correspondence between the award and the judgment showed (see [18] of the judgment).

## **2. Sykska and Another v Vivendi and Others**

**Cite:** [2008] All ER (D) 34 (Oct)

**Court:** Queen's Bench Division, Commercial Court

**Judge:** Christopher Clarke J

**Hearing Date:** 2 October 2008

**Summary:** Arbitration - Jurisdiction - Arbitration agreement providing for arbitration in England - Parties entering into agreement for acquisition of interest by defendant companies in company in which second claimant having substantial shareholding - Defendant companies subsequently commencing arbitration in England - Second claimant subsequently becoming bankrupt - Second claimant claiming arbitral tribunal lacking jurisdiction on basis that arbitration agreement annulled - Arbitral tribunal rejecting second claimant's objections - Whether arbitration agreement annulled - Whether arbitration award should be set aside - Council Regulation (EC) 1346/2000, arts 4.1, 4.2(e), (f), 15.

Council Regulation (EC) 1346/2000 (on Insolvency Proceedings) provides, so far as is material: " 4 (1) Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the " State of the opening of proceedings" [...] (2) The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular [...] (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending [...] 15 The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending".

The second claimant was a Polish company, which at one time owned a substantial shareholding in PTC, a Polish mobile telephone company. On 3 September 2001, it entered into an agreement known as the Third Investment Agreement (TIA) with the first and second defendants (the defendant companies), which was one of a series of agreements by which those companies were intended to acquire an interest in PTC. Article 5.11(c) of the TIA contained an agreement to arbitrate (the arbitration agreement), which provided for arbitration in London under LCIA rules. It was common ground that the arbitration agreement was governed by English law (although the rest of the TIA was governed by Polish law). On 22 August 2003, the defendant companies commenced an arbitration pursuant to the arbitration agreement. In the arbitration, they advanced claims that the second claimant had breached its obligations under the TIA by interfering with, or failing to secure, the interest that was supposed to obtain in PTC.

In early 2007, the LCIA arbitral tribunal fixed a hearing on liability issues for 15-19 October 2007. The claims made were of the order of EUR 1.9b. On 21 August 2007, the second claimant was declared bankrupt by an order of the Warsaw District Court

pursuant to its own petition of 9 August 2007. As a result of that order, it became a "bankrupt" for the purposes of the Polish Bankruptcy and Reorganisation Law (the Law). The order: (a) declared the second claimant bankrupt; (b) appointed, the first claimant, as court supervisor; and (c) provided for the second claimant's own management to retain control over all of its own assets, and to take any actions within the ordinary scope of its business. On 5 February 2008, about four months after the proceedings before the tribunal were closed, the Warsaw court revoked the second claimant's self-administration, and appointed the first claimant as administrator over the second claimant's assets. Article 142 of the Law provided that any arbitration clause concluded by the bankrupt should lose its legal effect as at the date bankruptcy was declared and that any pending arbitration proceedings should be discontinued.

It was common ground that if article 142 of the Law was applicable, it had the effect of annulling the arbitration agreement. However, that was subject to the provisions of Council Regulation (EC) 1346/2000 (on Insolvency Proceedings) (the Regulation), particularly arts 4.1, 4.2(e), (f) and 15. On 22 August 2007, the second claimant wrote to the tribunal and the defendant companies stating that, as a result of the bankruptcy, the arbitration agreement had been annulled. On 15 October 2007, the arbitration hearing began in London. At that hearing, the tribunal heard argument from both parties as to whether the arbitration agreement had been annulled and from the defendant companies on the liability issues.

The tribunal, by a majority, rejected the second claimant's objections to the tribunal's jurisdiction, taking the view that the reference was a "lawsuit pending" and that article 15 required it to apply English law to determine the effect of the bankruptcy on the reference. It went on to assume that, taken by itself, article 4.2(e) would apply Polish law to the question of whether the arbitration agreement remained valid or not. However, that would give rise to a conflict between article 4.2(e) and article 4.2(f). In respect of that conflict, the tribunal decided that the article 4.2(f) exception should prevail, inter alia, on the basis that it was more specific as it concerned "pending proceedings", the very subject matter of the arbitration agreement. Having decided that it had jurisdiction, the tribunal declared that the second claimant had breached the terms of the TIA. On 20 March 2008, the tribunal issued its Interim Partial Award (the award) on the relevant issues. On 16 April 2008, the claimants issued an application under section 67 of the Arbitration Act 1996 whereby they sought an order setting aside the award on the grounds that the arbitration agreement ceased to have effect as from 21 August 2007.

The issue for determination was what law governed the effects of the Polish bankruptcy order. If, as the second claimant contended, the law was that of Poland, the arbitration agreement was at an end and the tribunal ceased to have any jurisdiction to make an award. If, as the defendant companies contended, the applicable law was that of England and Wales, the arbitrators had retained and continued to retain jurisdiction. The second claimant contended that the phrase "lawsuit(s) pending" in arts 4.2 (f) and 15 of the Regulation was limited to individual execution actions against the debtor's assets. In particular article 4.2 (f) referred to: (i) a principal category being "proceedings brought by individual creditors", which meant proceedings by way of execution or enforcement against the debtor's assets either with or without the assistance of the court; and (ii) a sub-category of such proceedings, being "lawsuits pending", which meant proceedings by way of execution in which the assistance of the court was required.

The application would be dismissed.

(1) When arbitration proceedings had not been commenced, the general choice of law rule in article 4.1 of the Regulation, together with article 4.2 (e), applied.

It could not be not accepted that article 4.2(e) should be confined to procedural as opposed to substantive contracts, a distinction itself not without difficulty. So to hold would introduce a qualification to the words that the draftsman had not seen fit to include and which was not necessary in order to give effect to the policy of the Regulation.

(2) Where arbitration proceedings were pending at the date of the insolvency, arts 4.2 (f) and 15 of the Regulation applied, so that the effects of the insolvency on the reference contract, and on the arbitration agreement insofar as it concerned the pending reference, were governed by the "law of the Member State in which the lawsuit [i.e. the arbitration] was pending". Further, there was no reason why article 15 should be limited to the question of whether there should be a stay and did not also apply to provide that the law of the state in which the arbitration was pending should determine all questions which affected whether the arbitration should re-main pending, including any question as to whether the effect of the insolvency was to annul the arbitration agreement, or the reference contract, and hence the reference.

Were it otherwise the effects of the Polish insolvency proceedings on the English arbitration would in fact be determined by the law of the state of the opening and not by the law specified in article 15. That was because the annulment of the arbitration agreement would inevitably and necessarily bring with it the cessation of the arbitration. Such a conclusion resolved the conflict between article 4.2(e) and arts 4.2(f) and 15, and gave effect to the policy of the Convention. It was also consistent with the wording of article 4, taken as a whole.

It was clear that there was a conflict between article 4.2(e) and arts 4.2(f) and 15. If article 4.2(e) governed the arbitration agreement and the contract requiring the parties to arbitrate the instant dispute, the arbitration pending in August 2007 had come to an end on the second claimant" section bankruptcy. If arts 4.2(f) and 15 governed, it did not. The tribunal was essentially correct when it stated that the countervailing policy of the Regulation regarding the protection of legitimate expectation and security of transactions warranted the equal treatment of court proceeding and arbitral proceeding, and thus the application of *lex fori processus* in accordance with the exception of article 4(2)(f) also in the case of arbitration. An application of article 4(2) (e) would not only denude the exception of article 4(2)(f) in the case of arbitration. It would also not be in line with the policy objective of the Regulation. Consequently, with regard to arbitration, article 4 (2)(f) should be considered as the *lex specialis* in relation to article 4(2)(e) (see [66], [99], [100], [102]).

The award would not be set aside.

### **3. Business Environment Bow Lane Ltd v Deanwater Estates Ltd**

**Cite:** [2008] All ER (D) 78 (Oct)

**Court:** Queen" section Bench Division, Technology and Construction Court

**Judge:** Judge Toulmin QC

**Hearing Date:** 31 July 2008

**Summary:** Costs - Order for costs - Indemnity costs - Exaggeration of claim - Unreasonable pre-trial conduct - Whether costs to be awarded to claimant succeeding in action following consent order - Claimant recovering significantly less than sum claimed - Whether costs to be awarded to defendant - Whether indemnity costs to be ordered - CPR 44.3(5)(d), 44.4(1)(b).

The claimant was the assignee of a cause of action pursuant to a deed of assignment dated 6 April 2005 in connection with its acquisition of a long lease of the property at issue from the landlords. The defendant was the tenant under the 2002 lease granted by the claimant" section predecessor in title which included a tenant" section covenant to

pay terminal dilapidations and a tenant" section break clause. The claimant did not receive a schedule of dilapidations or a request to reinstate the premises from their landlord at the time when it had vacated the premises in 2004.

In April 2005, the claimant served a schedule of dilapidations, which set out a claim which amounted to £557,483.97 plus other unliquidated mesne profits. In August 2005, the defendant" section solicitors raised the issue of a collateral contract, stating that the previous landlord had agreed that at the end of the term there would be no dilapidation liability, so that " our clients do not regard themselves as being under any liability whatsoever in respect of the schedule of dilapidations" .

A further letter asserted in general terms that the schedule of loss relating to the dilapidations claim was "inflated and exaggerated". In September 2005, a revised schedule of dilapidations was produced on the basis of tenders, which amounted to a claim for a total of £356,769.45 including VAT, but excluding a further claim to be made for service charges during the loss of rent period, loss of rates and insurance on the building during the loss of rent period. The defendant instructed a surveyor, C, to inspect the premises. He expressed fundamental reservations with the way in which the claim was being presented, in respect of both internal and external condition of the property. In November 2005, the claimant served a revised terminal schedule of dilapidations, which claimed the sum of £209,849.19 for the cost of the work, to which was added £41,160.87 for professional fees and £63,109.45 for VAT.

The claim for the loss of rent remained unchanged at £109,615.38, making a total of £423,734.89. In February 2006, the claimant issued proceedings. The defendant denied liability for the repairing obligations in reliance upon the existence of the collateral contract and estoppel. It was directed that those issues should be tried as preliminary issues. The High Court ruled in favour of the defendant (see [2006] All ER (D) 61 (Dec)); however, the Court of Appeal allowed the claimant" section appeal (see [2007] All ER (D) 317 (Jun)). The action was then transferred to the Technology and Construction Court, whereupon an order by consent was made that the defendant should pay the claimant the sum of £1,073.50 in full and final settlement of the claim. The remaining issue was costs.

The claimant submitted that the instant case was straightforward and that it was the winner. It contended that it had not misled the defendant, but rather, the defendant had realised the position at an early stage, and could have made a part 36 offer to safeguard its position. The defendant submitted that the claim had commenced in respect of a claim of £414,933.56 plus statutory interest, which included a claim for breach of covenant on the basis that it had taken 20 weeks and costs £246,000 to carry out the work. That was to be contrasted with the end result, where the claimant accepted £1,073.50 in final settlement of the claim and agreed that costs should be at large. Accordingly, it submitted that, on any view, it was the successful party and thus entitled to its costs.

Furthermore, it submitted that it should have its costs on an indemnity basis. It stated that the claimant" section conduct of the litigation was such as to take the situation away from the norm, that the claimant had, at best, been reckless in its presentation of its claim and, at worse, less than scrupulous, and that it had had no business to authorise its legal representative to sign inaccurate statements of truth on the claim form and at the end of the particulars of claim. The result was that the claim had been presented and persisted in on a wholly misleading basis. Consideration was given to CPR 44.3(5)(d) and 44.4(1)(b).

The court ruled: (1) The effect of exaggerating a claim might be to prevent parties having realistic discussions at an early stage to resolve a dispute or prevent a successful mediation. In such cases, the result of the exaggeration might be to prevent a settlement of the dispute at an early stage. Similarly, if a case was not merely exaggerated but was put on a wholly unsustainable basis, it might prevent an early

settlement. It might also prevent a defendant from being able to assess realistically the value of the claimant's section case and to make an appropriate part 36 offer. That would be particularly the case when only the claimant was able in the first instance to evaluate its own losses. In appropriate cases, the defendant should not be left at such a disadvantage. The situation might, of course, be different if the defendant was in a position at an early stage fully to evaluate the claimant's section case (see paragraph [104] of the judgment).

In the instant case, the case had been put on the basis that the defendant was liable to pay as dilapidations the cost of the very substantial internal remedial works carried out to the property under the terms of the lease. In the end, the claimant had been forced to concede that the work which was carried out was, except for a trivial sum, not referable to dilapidations but to the claimant's section wholesale refurbishment of the building as offices. Equally, in relation to external works, the claimant had claimed for very substantial works which had not in fact been carried out. The claimant's section dilapidation schedules bore no resemblance to the position which they were forced to concede shortly before the trial took place. It was clear, therefore that the claimant had lost on the issue of dilapidations. In the circumstances, there was a clear winner and loser on the instant litigation. The claimant was the clear loser and should realistically have realised that that was the result (see paragraph [105] of the judgment).

(2) Before an order for indemnity costs could be made, there should normally be a significant level of unreasonableness or otherwise inappropriate conduct in that a party's section pre-litigation dealings with the successful party at the pre-litigation stage or in relation to the institution and conduct of the litigation (see paragraph [107] of the judgment).

In the instant case, the claimant, both before and after the institution of proceedings, had acted in a way which had taken the case out of the norm. The claimant had represented to the defendant, both before and after the start of the litigation, that it had a very substantial dilapidations claim. The claimant had known what work it intended to carry out from the time when it made its initial claim for over £500,000 for dilapidations. The scope of the work had no doubt been refined in the summer of 2005 and during the tendering stage. The claim had been persisted in at the time of the service of the particulars of claim. The statement of truth, made on its behalf on the claim form and in the statement of claim, had attested to the fact that the claim was a genuine claim for dilapidations and that the work claimed for had been carried out. Any proper investigation of the claim both before the particulars of claim had been served and afterwards, would have revealed (a) that the external works had not been carried out; and (b) that the claim was not a genuine claim for dilapidations. Even in the schedule of dilapidations, the claimant had persisted in a substantial claim which it knew or ought to have known was unsustainable. (see paragraphs [107] to [109] of the judgment). It followed that the appropriate order was that the claimant pay the defendant's section costs, other than those subject of the order of the Court of Appeal, on an indemnity basis.

#### **4. *Simmons Gainsford LLP v Shah***

**Cite:** [2008] All ER (D) 237 (Oct)

**Court:** Chancery Division

**Judge:** Sales J

**Hearing Date:** 24 October 2008

**Summary:** Contract - Construction - Settlement agreement - Defendant being partner in claimant accountancy partnership - Relationship between parties breaking down - Parties entering into settlement agreement following mediation - Whether terms of settlement agreement precluding claimant's section claim in respect of entitlement to

benefit of life insurance policy.

The claimant partnership was established in 2003 to take over the assets, liabilities and practice of an accountancy firm (the firm). The defendant had joined the firm in 1979, and became an equity partner in 1989. In 1991, the firm had been interested in expansion. In those circumstances, it sought extended banking facilities, in the sum of £150,000, from one of its banks (the bank). The bank required security in relation to the facility in the form of a legal mortgage to it of a life insurance policy to be taken out by one of the partners.

The firm proposed the defendant as the beneficiary of the required policy on the basis that he was at that time the youngest partner in the firm, and the premiums payable in respect of the policy on his life would therefore be correspondingly lower. The policy was duly entered into on 24 May 1991. The defendant executed the legal mortgage in respect of the policy in favour of the bank on the same day. The premiums on the policy were paid by the firm, which treated the policy as an asset for the purposes of its accounts. The defendant took out the policy on the express understanding that he held the benefit of it on behalf of the claimant. On 1 April 2003, the partners in the firm executed documents to convert it into the partnership.

In early 2004, there was an acrimonious falling out between the defendant and the other parties. Arbitration proceedings were commenced by the claimant, and a mediation took place on 20 January 2005. At an early point in the meeting, the defendant was told that the claimant had resolved to reorganise its banking arrangements in late 2004 and that, as a result, it had ended its relationship with the bank. The defendant assumed that this meant that the bank had been repaid. The mediation was successful, and a settlement agreement was signed by the parties (see [18] of the judgment). Clause 1 provided that: "

The following terms are in full and final settlement of (a) all claims by [the defendant] against the [claimant] and/or the members and (b) all claims by the [claimant] and/or the members against [the defendant] whether contractual or at law, whether known or unknown at the date hereof arising out of the LLP Members" Agreement made between them and dated 30 April 2003, or arising out of [the defendant] ceasing to be a member of the LLP [...]" The agreement made no mention of the insurance policy.

Subsequently, the defendant surrendered the policy to the insurance company, having been released from the charge by the bank, and received a cheque for £57,734.31 as the surrender value. By a letter dated 3 October 2005, the claimant alleged that the defendant held the benefit of any proceeds of the policy as bare trustee for it.

Subsequently, the instant proceedings were issued, whereby the claimant sought the proceeds of the policy from the defendant.

Two principal issues fell to be determined, namely: (i) the basis upon which the defendant had held the policy; and (ii) whether, properly construed, clause 1 of the settlement agreement precluded the claimant from making any claim in relation to the policy or its proceeds.

The claim would be dismissed.

Properly construed, the word "claims" as used in clause 1 of the settlement agreement had been intended by the parties to have a wide meaning. It clearly did not simply refer to any claim made in proceedings which were on foot at the time of the agreement, since there was express reference to "claims [...] whether known or un-known at the date hereof [...]" The commercial objective of the settlement agreement on both sides had been to achieve final resolution of what had been a long-running and acrimonious dispute between them, and to provide for a clear and definitive end to the relationship between them. On an objective reading of clause 1, the parties had meant to include, resolve and extinguish all matters in relation to the affairs of the claimant which could

have provided any basis for the assertion of claims by one side against the other. In those circumstances, notwithstanding the fact that the defendant had held the benefit of the policy on trust for the claimant, the latter, by clause 1 of the settlement agreement, had released any claims which it might have had against the defendant in relation to the policy. Once the settlement agreement had been entered into, the defendant was free to deal with the policy in his own name free of any obligations owed to the claimant (see [27], [28] and [32] of the judgment).

## Features

### **1. Arbitration clauses require careful drafting to be consumer friendly**

A recent High Court case shows care must be taken to ensure that the implications of an arbitration clause are properly explained when dealing with consumers, says Michelle Radom, a solicitor at Clyde & Co.

In *Mylcrist Builders Ltd v Buck* the claimant applied under the Arbitration Act 1996, section 66, to enforce an arbitration award in its favour. Clyde & Co Solicitor Radom explains that the court had to decide whether the arbitrator had been validly appointed and, since Buck was a consumer, whether the arbitration clause was an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations).

The arbitration clause provided no mechanism for the appointment of an arbitrator and after taking legal advice Buck refused to take part in the arbitration process. In such a situation, the claimant could have asked the courts to appoint an arbitrator under section 18 of the Act but instead the claimant unilaterally appointed a sole arbitrator which it claimed it was entitled to do under section 17 of the Act.

Section 17 provides that: "Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party refuses to do so [...] the other party [...] may give notice [...] that he proposes to appoint his arbitrator to act as sole arbitrator."

Ramsey J, however, held that section 17 only applies where there is a provision for each party to appoint an arbitrator and does not apply where the Act requires the parties jointly to appoint a sole arbitrator. The arbitrator, therefore, had not been properly appointed and the award was not enforceable.

The judge also concluded that the arbitration clause caused a serious imbalance in the parties' rights and obligations, to the detriment of Mrs Buck and hence was unenforceable.

The clause, he said, was not set out "fully, clearly and prominently" and a term excluding or hindering a consumer's section right to take legal action is potentially vulnerable to being unfair. The fact that the claim is small and the fees payable to the arbitrator are comparatively significant is further evidence of unfairness, the judge said.

Radom says: "If parties wish to limit the intervention of the courts in the appointment process, they should ensure that their arbitration clauses are drafted so as to ensure that the mechanism for appointment is clearly defined.

"It is a clear warning to companies to ensure that--when dealing with consumers--they, for example, clearly point out arbitration clauses and take care to ensure that arbitration is not imposed on the parties where potential claims are likely to be of low value, in relation to the fees which are likely to be payable to the arbitrator(s)."

She stresses that the part of the judgment relating to the appointment of the arbitrator is not confined to consumer cases but applies to all cases where there is no mechanism

in the arbitration clause. "It is therefore important to give some thought to this issue when drafting the arbitration clause as having to resort to the courts will increase costs," she says.

(16/10/2008)

## **2. CEDR tackles personal injury**

The Centre for Dispute Resolution has launched a special unit aimed at personal injury cases, an area of the law that has so far proved resistant to alternative dispute resolution. Tony Allen, CEDR director, and Maurice Nichols, a mediator and former president of the Forum of Insurance Lawyers, discuss the new initiative with Jon Robins.

The Centre for Dispute Resolution (CEDR) has spent the last nine months piloting mediation in accident claims with an insurer and has launched a dedicated personal injury unit headed by Tony Allen, CEDR director, and Maurice Nichols, a mediator and former president of the Forum of Insurance Lawyers. CEDR argues that conventional litigation "fails the parties". "In personal injury cases claimants who have suffered the shock and disruption to their lives feel angry and powerless at being kept out of their damages while the claims process runs its course; in turn defendants pay out significant sums of money in costs," it says. However CEDR reckons that the benefits of alternative dispute resolution (ADR) are "well known". "With an open and sensible dialogue between the parties in a voluntary and protected environment the claimant feels that they have been fairly heard while defendants see an end to their liabilities," it says. "There is closure for both on the terms that they select as right for them."

So why has mediation so far not taken off in personal injury (PI)? There are two reasons why there hasn't much enthusiasm from either the legal profession or the insurance industry, says Nichols. 'something like 97 per cent of all PI claims are for less than £25,000 and mediation can be relatively expensive if all the parties have to be in one place and everyone's time committed.' Nichols says that issue is being addressed by a number of mediation service providers through services such as telephone mediation and the CEDR evaluation scheme (where retired district judges make a preliminary assessment of cases).

He says there is 'still some education needed about what ADR can provide, how it works and why it is beneficial'. "There is the attitude from insurers that they do "mediate" because they have roundtable settlement meetings--but that" section not mediation, parties are not assisted by a mediator and it does not have the benefit of involving the claimant as part of the settlement process."

Allen says: "There has been a lot of pressure generated in PI because of the great difficulty of making a living for lawyers." As he points out, legal aid and the extension of conditional fee agreements have made life less predictable for claimant lawyers. He says: "People talk about ADR meaning an "Alarming Drop in Revenue". I'm not sure about that but PI lawyers on both sides are not comfortable with spreading the load around with mediators.

"The thing that strikes me about PI mediation is that it brings claimants and defendants right into the heart of the case, which after all belongs to them and not to the legal profession," continues Allen, a PI lawyer for 30 years who in practice acted on both sides of the fence. He reckons the recent CEDR pilot with the insurers Allianz demonstrates that parties will buy into the process. That pilot dealt with--in Allen's section words-- 'slippers and trippers and road traffic cases with mostly £5,000 or less at stake".

"Our model is to allow us to become involved in approaching the claimant and bringing them on board," says Nichols. "That has been very successful--I have spoken to a number of insurers who say that telephone mediation doesn't work because they cannot

bring the claimant lawyers on board. However, in the pilot, in 95 per cent of cases we were successful in bringing the claimant in."

(8/10/2008)

### **3. Caution advised when contacting adjudicator prior to appointment**

A recent high court case provides valuable guidance on the adjudication process Simon Tolson, a partner at Fenwick Elliott Solicitors, tells Lucy Trevelyan.

Mr Justice Akenhead" section decision in the case of Makers UK Ltd v Camden London Borough Council [2008] All ER (D) 378 (Jul), serves as a stark reminder that parties should be cautious about contacting a potential ad-judicator prior to their appointment, says Simon Tolson, a partner at Fenwick Elliott Solicitors. Otherwise the "losing" party may try to set the judgment aside on the grounds of apparent bias and/ or invalid nomination of adjudicator.

In this case, Camden engaged Makers UK Limited (Makers) under a 1998 JCT Intermediate Form of Building Contract to carry out refurbishment works in an estate in Highgate, London. Issues arose between the par-ties over variations and delays.

Camden claimed that Makers was in default of its contractual obligation to proceed regularly and diligently and issued a default notice. The council later issued a determination notice in a bid to determine Makers" employment under the contract. Makers then commenced an adjudication.

Camden Council challenged the enforceability of the adjudicator" section decision because Maker had unilaterally applied to RIBA (the adjudicator nominating body under the contract) requesting the nomination of a specific individual to act as adjudicator. Makers" solicitor also contacted the adjudicator prior to his appointment.

Camden argued that there was an implied term of the contract whereby "neither party may seek to influence unilaterally the nominator" section determination regarding the identity of an adjudicator [...]" and the appointment was as such null and void.

Tolson says that one of the big ticket points that the court commented upon when dismissing the council" section case was that "it is better for all concerned if parties limit their unilateral contacts with adjudicators both be-fore, during and after an adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party, even if entirely innocent".

The judge continued: "If any such contact, it is felt, has to be made, it is better if done in writing so that there is a full record of the communication. Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstances, the institutions might wish to consider whether notice of the suggestions must be given to the other party."

Tolson says: "I am not so sure we did not know that from a best practice point of view-- but all these points make sense. However in the real world it is not uncommon to call a possible adjudicator to simply sound availability as one tends to know who the clowns and who the good eggs are."

The judge, Tolson says, was clear about there being nothing in the contract whether express or implied that barred the party seeking an appointment from making representations to the appointing body as to the attributes or even the name of the appointee.

He says: "When a party suggests a name, it is entirely up to the appointing body whether it pays any attention; it can take it or leave it. Go further, it is not wrong or unhelpful for a party to make representations--it might even be sensible. So the idea of there being mischief and therefore a rule to prevent unilateral representations by the party seeking a nomination has no obvious support in commercial or practical terms."

Tolson adds: "On the facts, I would say the right decision was made. The evidence revealed there was no good ground for complaint. It is a useful decision and parties would be well advised to follow Akenhead J" section guidance in such situations in the future."

(26/09/2008)

#### **4. New stream of legal service funding promised by pro bono costs orders**

A brand new pro bono initiative, the Access to Justice Foundation, was launched last week with statutory powers to unlock a new source of money. Michael Napier QC, the Attorney General" section Pro Bono Envoy, discusses how the new scheme will work and its significance

The launch of the Access to Justice Foundation has been heralded as a "milestone" in the development of measures to improve access to justice. "This is a historic launch," commented the Attorney General, Baroness Scotland QC last week. She said that, as "guardian of the public interest", it was of great importance to her that the Foundation had been created. "With its charitable status it owes no obligation or affiliation to any one cause, save the overriding cause of improving access to justice," she continued. "The key to its work will be to distribute funds strategically to where they are needed."

"It is a particularly important milestone establishing a link between pro bono activity by lawyers and the frontline advice agencies connecting with people" section otherwise unmet needs," explains Michael Napier, who is a senior partner at the claimant law firm Irwin Mitchell as well as the Attorney General" section pro bono envoy. "The Access to Justice Foundation has the ability to channel money down through to the regional legal support trusts to the not-for-profit sector. That" section a good example of the sharp focus of what the Foundation is able to do." The organisation will work with the regional trusts whose task it will be to locate local need. They will be modelled on the London Legal Support Trusts.

The Foundation will be the beneficiary of money raised through the Legal Services Act 2007, section 194. As Napier explains, this unprecedented statutory arrangement effectively allows courts in England and Wales to require a party who loses a legal case against a party with pro bono help to make a payment to the Foundation in an amount equal to an order for costs. Previously, such a party would have had no liability to cover costs despite the fact that, if successful, they would have been able to recover costs.

How much money does the solicitor-QC anticipate will be raised this way? "It will no doubt start as a little acorn and hopefully grow into an oak tree. It will be a gradual process. We have to educate the profession and pro bono coordinators in firms should be informing fee earners that section 194 exists and that it should be used."

Napier also points out that the Foundation will be available as the "natural preferred destination of choice" for funds raised through future schemes designed to raise money to improve access to justice.

Is there a danger that the raising of funds will lessen the government" section commitment to providing adequate publicly-funded legal services through legal aid? "No," he replies; repeating the familiar refrain that legal pro bono is "an adjunct to and not a substitute for legal aid". "It is a completely separate stream of new money that will

reach the peripheral nerve endings of unmet need arising in the not-for-profit sector and it is parallel to legal aid," he explains. "Neither pro bono nor the Foundation has any intention of supplanting legal aid. This is an ingenious and a fair method of finding new money."

## **5. Third party litigation funding likely to rise**

Third party litigation funding is a growth market, particularly in commercial litigation, but is still much misunderstood, Bob Gordon, founder of First Class Legal, tells Elizabeth Davidson.

The subject of third party litigation funding, or financing legal cases for profit, has suffered its fair share of controversy. For example, in the Moore Stephens (a firm) v Stone & Rolls Ltd (in liquidation), the Court of Appeal struck out an "astounding" multi-million pound negligence claim, backed by IM Litigation Funding, by the creditors of Stone & Rolls against its auditors, chartered accountants Moore Stephens. Some experts considered this case to have inflicted a serious blow on third party litigation funding, or at least a sharp rap on the knuckles.

However, Bob Gordon, founder of third party litigation and after-the-event insurance provider First Class legal, claims third party funding is widely misunderstood, even among solicitors, and denies the "Moore Stephens" case will have any significant impact.

"That" section like saying "because there was a hurricane are you going to stop storm insurance?" This is about access to justice, and it" section a broader and deeper subject than people think.

"Third party funding is a menu," he says. "An awful lot of cases don" t need full funding. At the one end is before-the-event insurance, then there is after-the-event (ATE) insurance on its own, ATE plus disbursements, protection from costs and full funding. Not all items need to be insured, it is a menu. Someone might need £50,000 to pursue a claim but only have £30,000 and will come to us to ask if there is a way we can help them."

Gordon provides insurance mainly for serious commercial litigation, involving multiple defendants, and some personal injury. All cases progress through a screening process, and roughly a third of cases are accepted.

"About a third are patently not acceptable at all because the merits are not strong enough," he says. "A third are strong enough that we may be prepared to issue insurance, and the remainder are what we call " finfo" , that is, we like the idea but need more information such as another expert" section report.

"One of the benefits of commercial ATE is that we bring another opinion to the table. What we say concentrates the client" section mind on the potential outcomes. We get into the question of "what does winning mean?" Is it a Pyrrhic win? We create what we call "alerts" about certain issues in the case and we try to be as specific as we can. We can't insure or fund where there is an inability to enforce costs or damages. A person might win a case but be unable to get their damages. They may be claiming for a sum that is way beyond the resources of the other party. There may also be a situation where there are, for example, ten heads of claim and they are going to lose outright on two but win the rest. In that case, you have to consider the fact that, even if the client wins on some, the costs awarded against them outweigh what they get in their favour. Knowing what you can" t do is as important as knowing what you can."

There are currently about six third party litigation funders in the UK, and Gordon predicts the market will grow. "We are still not touching the top of the iceberg of this market, and we would welcome more competition, strange as that sounds," he says.

(10/10/2008)

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## Articles

### **1. ADR professional: the EU Mediation Directive: European encouragement for ADR**

**Journal:** Family Law

**Author:** David Hodson

**Citation:** [2008] Fam Law 930

**Issue Date:** 1 September 2008

**Summary:** All ADR professionals will rejoice at the implementation of a Directive encouraging resolution of family disputes by mediation.

Discusses a new EU directive applying to family law which has a 3-year timetable for implementation. It creates expectations that Member States will encourage mediation wherever possible. It is an incredible opportunity for all family law professionals committed to alternative dispute resolution (ADR) to bring about much-needed improvements and opportunities, both specifically in cross-border work but also in national family law work.

### **2. Arbitration: border crossing**

**Journal:** Law Society Gazette

**Author:** Kate Durcan

**Citation:** (2008) LS Gaz, 9 Oct, 18

**Issue Date:** 9 October 2008

**Summary:** Are claims for costs during international arbitration creating an expensive adversarial process more akin to litigation?

Discusses what is good and bad about international arbitration. The word "international" is of paramount importance, since the traditional courts remain the arena of choice for the vast majority of domestic commercial disputes in the UK and, indeed, in most jurisdictions. However, today's section global economy has ensured that trade is increasingly multi-national, and a neutral venue and impartial adjudicator can be crucial when cross-border commercial relations break down.

### **3. The power of the English court to order interim or protective measures in support of international arbitration revisited**

**Journal:** Journal of International Banking and Financial Law

**Author:** Geoffrey G Gauci

**Citation:** (2008) 9 JIBFL 463

**Issue Date:** 1 October 2008

**Summary:** The power of the English court to order interim or protective measures in support of substantive proceedings should not be over-looked.

Considers the recent Court of Appeal Judgment in ETI Euro Telecom International NV v Republic of Bolivia and Empresa Nacional de Telecomunicaciones SA (Entel), and in particular the question of the ability of the English court to order interim or protective measures in support of ICSID arbitration proceedings. The difference in approach of the

House of Lords was thought by the Advocate General to be attributable to a distinction between an Anglo Saxon approach in the broadest terms, and a continental approach of a narrow interpretation based on the substantive subject-matter of the claim. The final decision of the ECJ is eagerly awaited to see whether it will follow Advocate General Kokott's section opinion, precluding the ability of the courts of member states to order anti-suit injunctions, so as to ensure strict compliance with arbitration agreements.

#### **4. Left out in the cold**

**Journal:** Solicitors Journal

**Author:** Debra Wilson

**Citation:** 152 SJ 38, 14

**Issue Date:** 7 October 2008

**Summary:** The government-approved tenancy deposit schemes should provide a successful dispute resolution mechanism.

Warns solicitors should be involved in the on-going consultation over the actual effectiveness of tenancy de-posit schemes (TDS) as a dispute resolution mechanism. Solicitors are still very much involved with such issues, even though it is recognised that the TDS is a successful alternative dispute forum in directing such matters from the court.

#### **5. First dabs**

**Journal:** Building

**Author:** Paul Taylor and Anthony Page

**Citation:** Building, 3 October 2008, 64

**Issue Date:** 3 October 2008

**Summary:** Resolving construction disputes in Dubai can be complex, but dispute resolution boards can help prevent such wrangles arising in the first place.

Explains most construction contracts used in Dubai are based on the International Federation of Consulting Engineers (FIDIC) standard form. They invariably include an obligation to seek to settle disputes amicably before the commencement of arbitration. Although no definitive procedure is prescribed, "amicable settlement" will often include meetings between senior representatives of the parties in a final attempt to settle.