From: **Hew Dundas [dundas.energy@btinternet.com]**
Sent: 03 November 2001 09:48
To: Undisclosed List
Subject: ARBITRATION NEWS UPDATES 1-7 (COMBINED)

I am resuming distributing items of interest to the arbitral community, particularly where they might not be readily available in the UK.

The attached short note on a recent Hong Kong case may be of interest.

If you would prefer not to receive such notes, please advise

With best wishes

Hew R. Dundas FCIArb

Difficulties in challenging an arbitral award

A clear philosophy behind the Hong Kong Arbitration Ordinance is the perceived need to preserve the autonomy of arbitrators and give finality to their Awards. The Hong Kong Ordinance severely restricts the rights of parties to appeal against arbitral awards. Consequently, applications for leave to appeal are relatively rare.

The recent decision of the Hong Kong Court of First Instance in *Zen Pacific Civil Contractors Ltd v Wellead Construction & Engineering Co Ltd* provides an example of an application for leave to appeal against an arbitral award. The decision illustrates the difficulties in passing the stringent test applied by the Hong Kong Courts before leave to appeal against an arbitral award will be given.

The parties were respectively sub-contractor and sub-sub-contractor on a major construction project. In the arbitration, Wellead had been awarded HK$ 12m. Zen Pacific applied for leave to appeal.

The main issue in the application concerned the arbitrator's interpretation of the word "claim" in a supplementary agreement between the parties. The supplementary agreement concerned the distribution of proceeds received from Zen Pacific's Employer in respect of "claims" made by Wellead relating to the sub-sub-contract works and "passed up the line" to Zen Pacific's employer. If there was a "claim" any proceeds from it were to go to Wellead.

The supplementary agreement defined "claims" as "work done and/or additional costs incurred and/or extra income on top of BoQ rates which will not be automatically certified by the [Zen Pacific's] Employer without initiation, putting forward argument and further substantiation by [Zen Pacific] to justify its entitlements."

In interpreting the meaning of this definition, the Arbitrator stated that either:

(i) the appointment of external claims consultants and lawyers to handle the dispute; or

(ii) the taking of formal arbitration proceedings to resolve the dispute

would suffice.

Zen Pacific argued that such interpretation was an arbitrary test which, if applied rigidly, would lead to unjust results. For instance, sometimes an external lawyer might be consulted very early in the claim procedure but on other occasions there could be months of negotiation about a claim without any consultation of such lawyer. In practice the first example would not have yet become a "claim" whereas the second one probably would have.

However, the Court found that the Arbitrator had not created an inflexible test. The Arbitrator recognized that there was a need to define "claims" and said that engaging external lawyers or consultants "would suffice": this was not a rigid formula. Having clarified his approach to the meaning of "claims" he then could then apply it to each issue in the case. The Arbitrator had examined each issue on its own facts and he had not blindly adopted an inflexible test.

The Court affirmed the legal requirement for a successful application for leave to appeal on "one off" issues: i.e. the applicant:

(i) must demonstrate that the arbitrator was plainly wrong in his decision; and

(ii) must be able to so quickly and without elaborate argument

In this case the Arbitrator's careful and considered approach had been sufficiently well-removed from being plainly wrong and therefore leave to appeal on this ground was refused.

Arbitration Update 2 – 21st November 2001 @ 1135

Dear Colleagues,

1. "Arbitration Law Monthly" Vol. 1/8 carries an interesting report on a case (not yet formally reported) *Bay Hotel & Resort Limited v Cavalier Construction Co Ltd*, concerning construction of a hotel in the Turks & Caicos Islands (TCI) in which the Privy Council (hearing an appeal from the Court of Appeal of the TCI) considers inter alia:
   (i) issues regarding the Seat of the arbitration, the requirement for reasons in the Award and joinder of 3rd parties;
   (ii) the interface between the curial law and the institutional Rules (in this case the AAA Construction Industry Arbitration Rules), not least because of the US connection both through application of AAA rules but also that the hearing took place in Miami.

   The first instance Court in the TCI decided that the procedural law was that of the USA since the hearing took place in Miami; this was upheld by the Appeal Court but rejected by the Privy Council; I have to observe that, on the brief facts presented in the article, the two TCI Courts' decisions in this regard are incomprehensible.

2. The question of the role and responsibilities of Party-Appointed Arbitrators was one of the two discussion topics at the 15th November meeting of the Oil & Gas Branch of the Arbitration Club and was also raised at the ClArb's CPD Day for International Arbitrators the very next day. I attach some brief notes I made for the Oil & Gas Branch meeting which may be of interest.

3. While Adjudication may not be of universal interest, the recent TCC case C&B Scene Concept Design Limited v Isobars Limited is interesting in that the Court refused to enforce the Adjudicator's Decision on the grounds that he had (following the test laid down in *Bouygues v Dahl-Jensen*) " answered the wrong question" in that he misconstrued the contractual provisions and his decision based thereon was 'answering the wrong question'. One commentator has suggested that the C&B/Isobars decision indicates a significant widening of the Court's willingness to review Adjudicators' decisions. Further there appears to be a substantial inconsistency between the C&B/Isobars decision and that in the Scottish case S&L Timber Systems Limited v Carillion Construction where the Court of Session enforced an Adjudicator's decision notwithstanding his making an error of law in reaching his decision.

4. There has been an interesting case, *Pearce-v-Ove Arup Partnership Limited*, concerning the consequences for expert witnesses who fail to fulfil the duty laid on them by CPR Part 35 that their overriding duty is to the Court; this supports and extends the earlier pair of cases Stevens v Gullis and Gullis v Pile where an expert was thoroughly trashed by the Court. In *Pearce*, the Judge observed that the evidence given by an expert witness was so biased and irrational that it significantly failed to meet the Part 35-required standards. The expert appeared to see his role as arguing his appointor's case irrespective of the strength of his argument and without taking an objective view. Since the expert was substantially responsible for the case coming to Court at all (with consequent wasted time and costs) the Judge stated that if any Judge concluded that any expert had seriously failed to meet his Part 35 duty, the matter should, in appropriate cases, be referred to the expert's professional body. YOU HAVE BEEN WARNED

With best wishes

Hew

ARBITRATION CLUB

OIL & GAS BRANCH

"Excellence Through Sharing"

"The Party-Appointed Arbitrator ("PAA"):
Differing Perceptions and Expectations of the Role"

Basic Issue

- "It is a fundamental principle in international commercial arbitration that an arbitrator must be and shall remain independent" [Redfern/Hunter];
- R+H "English perspective" - is this always the case everywhere ?

Examples of PAAs as advocates

- State to State arbitrations eg UK vs Saudi Arabia in the Buraimi Oasis case;
- US-Iran Claims Tribunal despite being (in theory) conducted under UNCITRAL Rules;
- US Uniform Arbitration Act 1955; however the Federal Arbitration Act 1950 applies the same standards to both PAA and non-PAA (9 USC §10(b));
- some US State laws eg the presumption of non-neutrality in New York [*Statewide Insurance Co v Klein 482 NYS 2d 307*]; an award can be vacated only if a party's rights were prejudiced by bias of an arbitrator required to be neutral (ie the sole or a presiding arbitrator);
- US practice to regard PAA as non-neutral unless otherwise agreed; refer AAA/ABA Code;
- some Labour Relations arbitrations;
- some trade association rules (eg LMAA Terms (1987) Art 2(b): these state that if the PAAs are not to act as advocates then they must be wholly impartial);

General Observations

- "When I am representing a client in an arbitration, what I am really looking for in a [PAA] is someone with the maximum disposition towards my client but with the minimum appearance of bias" [Hunter]
- "It is also a truism that a party will strive to select an Arbitrator who has some inclination or disposition to favour that party's side of the case such as by sharing that party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with that party's case" [Bishop/Reed]
- "There is a distinction to be drawn, however, between a general sympathy of disposition and a positive bias or prejudice" [Bishop/Reed];
- "Each side's selection of "its" Arbitrator is perhaps the single most determinative step in the arbitration" [Bishop/Reed];
- "The ability to appoint one of the decision-makers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party" [Bishop/Reed];
- heavy interface with considerations of impartiality/independence (I+I)

Model Law/Institutional Rules

- Model Law (Art. 12(2)), UNCITRAL (Art.10.1), ICC (Art 2.8), ICSID (Rule 6.2), LCIA (Arts 5.2, 10.3), AAA International Rules (AAAIR) 1997 Art. 7), LMAA Terms either
  - expressly require independence and/or impartiality; and/or
  - give as a ground for challenge any justifiable doubt as to the arbitrator's impartiality and/or independence;

  LMAA Terms (1997 – see above re1987) state at Art. 3 "an original arbitrator is in no sense to be considered as the representative of his appointer"
- hence non-neutral PAAs arise only in ad hoc arbitrations; but NB US-Iran Claims Tribunal;

Possible Problem Areas for Discussion

- dichotomy if one party sees its PAA as advocate, the other sees its as Hunter's model;
- misunderstanding the role of the PAA gives rise to a possible necessity to abandon the arbitration as fatally compromised (R+H quote the Buraimi Oasis case);
- extent (if any) of communication Party to/from its PAA;
  - AAAIR (Art 7(2)) regulate this – other Rules leave it to I+I provisions;
  - addressed in IBA Code of Ethics (§ 5.3) and AAA/ABA Code
- pre-appointment interviews:
  - common in USA but generally refused in England;

- AAAIR (Art 7(2)) prohibit communication with only very limited exceptions; IBA Code of Ethics has same effect (§ 5.1);
- Other Rules and/or general practice limit scope of contact Part/PAA;
- The ICC refused to confirm appointment of a PAA who had spent 40-50 hours with 'his' Party but in a 1991 US case a 2-hour meeting was held not to establish partiality

- role of PAA in selecting Tribunal Chairman;
  - refer IBA Code § 5.2, AAAIR Art 7(2);
  - general practice worldwide to permit PAA to consult with Counsel for 'his' Party i.r.o. nominations for Chairman;
- self-policing role of other members of tribunal, particularly Chairman;
- fine dividing line between acting as advocate and assisting the tribunal to understand better 'his' party's case;
- appearance of bias vs actual bias; contrast ***Pinochet № 2*** with ***AT&T v Saudi Cable***

A Conclusion – Discussion May Give Rise to Others

- "The role of a PAA in modern ICA is an extremely difficult one, requiring great knowledge, ability and integrity to ensure that all is properly and necessarily required to be done in protecting the integrity and outcome of the arbitral process is done without stepping over the fine line leading to impropriety and disqualification or removal" (de Fina)

Hew R. Dundas FCIArb

References

- "Law and Practice of International Commercial Arbitration" 3rd ed; Alan Redfern & Martin Hunter ("R+H");
- AAA/ABA Code of Ethics reproduced in [1985] Yearbook Commercial Arbitration 131 (subsequently updated)
- "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" by R Doak Bishop and Lucy Reed; ARBITRATION INTERNATIONAL [1998] 395;
- "The Party-Appointed Arbitrator in International Arbitration: Role and Selection" by AA da Fina; ARBITRATION INTERNATIONAL [1999] 381;
- "Ethics of the International Arbitrator" by Martin Hunter in [1987] 53 ARBITRATION 219;
- "A Code of Ethics for Arbitrators in International Commercial Arbitration" by Martin Hunter and Jan Paulsson [1985] INTERNATIONAL BUSINESS LAW REVIEW 153.

Arbitration Update 3 – 8th March 2002 @ 1102

Dear Colleague,

Further to my newsletters of 3rd and 21st November 2001, I set out below issue 3 of my informal newsletter, the pause since #2 deriving from several factors including absence abroad and pressure of other commitments. The e-mailing list for these newsletters consists of professional colleagues such as yourself with common or overlapping interests, particularly those who may not have ready access to research facilities, technical support departments etc or who may not have the time to scour legal websites, read journals etc. As before, if you do not wish to receive these newsletters, please advise and I will immediately remove you from the distribution list.

I would be happy to take in contributions on the understanding that since these newsletters (a) are wholly gratis and (b) go out in my name I may exercise appropriate editorial rights.

The following matters have crossed my path in recent weeks

1. Arbitration: Interface between Law of the Arbitration and Party-Agreed Procedures/Rules

English law is clear and simple on the interface between statute and any agreement between the parties as regards procedure, whether by institutional rules or otherwise; in particular (a) the mandatory provisions of the 1996 Act itemised in Schedule 1 cannot be ousted and (b) where an agreement between the parties is silent on a matter then the default provisions of the 1996 Act kick in. The equivalent interface is less distinctly expressed elsewhere.

In Singapore, the Model Law applies to international arbitration (Singapore International Arbitration Act 1994); at least the legislators intended it to do so. However, the recent case John Holland Pty Ltd v Toyo Engineering Corporation revealed an anomaly in the law in that the parties' choice of ICC Rules was held to exclude the Model Law in its entirety; such was evidently never the intent of the Model Law draftsmen and not of those of Singapore either. A recent amendment to the legislation has corrected the anomaly.

However, some commentators have seized on the case as being the equivalent of the approaching Yucatan asteroid in 65,000,000 BC "Death of the Model Law", "Death of the ICC" etc were the implications of some of the headlines. The Singaporeans, being commendably rational people, took the obvious step of amending the law to remove the unintended anomaly. The case does throw up some other interesting facets – see J.Int.Arb. Vols18/4 and 19/1.

As postscript, note that the back-to-back articles in J.Int.Arb are by Toyo's Solicitors; I am becoming concerned at the proliferation of articles in journals about such cases written by one party's Solicitors, not least because another recent such article in an otherwise highly reputable publication appears to me to be so disgracefully partisan as to be wholly unprofessional and does the journal in question no credit at all.

2. Arbitration: How NOT to Do It

As we all know, Arbitrators, certainly including those that lecture on the CIArb and other courses, are all-seeing paragons of distinction, are giants of human intellect, possess the Wisdom of Solomon and apply more brain power than the entire 12-man House of Lords Appellate Committee combined in solving everyday problems in arbitration. Well, almost and perhaps not always.

Two recent TCC judgements have addressed cases where arbitrations have gone badly wrong and in both cases the arbitrators have come in for powerful, even ferocious judicial criticism.

In RC Pillar & Sons Ltd v Mr & Mrs G Edwards, a £95,000 house-building dispute involving no significant legal or technical complexities was so badly handled (inter alia the arbitrator was either unaware of his powers under s.30(1)(c) or was unable to interpret correctly the arbitration agreement (which was worded in a wide form)) that the parties combined costs totalled more than £320,000 and the arbitrators fees >£40,000; the Award gave it to Pillar in almost the full value of its claim then, pursuant to s.57, the award was corrected to remove some evident blunders and amended to £10,000 in the Edwards' favour. Further, the 212-page award included 147 pages reproducing in full (photocopies) the parties' respective pleadings but omitted reasoning in many areas. The key to the TCC decision is the likely effect on costs, there being sealed offers on the table. The Judge (the admirable and forthright HHJ Thornton QC) had quite a lot to say about the handling of the arbitration and this "How Not To Do It " case study might be of relevance to CIArb training courses.

In Wicketts and Sterndale v Brine Builders Ltd and Siederer, the handling of the arbitration was, if anything, worse and recent FCIArb graduates may well be shocked (as I was in Pillar) at the gulf between what is taught/examined and what appears to happen in practice. The Judge (HHJ Seymour QC) has even more

to say about the arbitrator's conduct – this does NOT make pleasant reading, rather the opposite – quite painful. Counsel for the winning Wicketts/Sterndale duo was none other than the legendary Ms Karen Gough, better known to the CIArb as Madam President.

I am preparing an article covering these two cases for "ARBITRATION".

3. Discain v OpecPrime – The Sequel

Last year, the case Discain v OpecPrime was widely covered in the construction press since the Adjudicator had engaged in telephone discussions with an adviser to one of the parties to the exclusion of the other party. Although there was no impugning of the Adjudicator's motives, the Court refused to enforce his decision because of the prejudice thereby caused. I do not propose to comment further on this first case.

The dispute, concerning steelwork included in the redevelopment of a block of flats, which was the centre of Discain v OpecPrime then went to Court and, in an unusually full judgement, HHJ Seymour QC had, inter alia, to address two key issues.

First, it was very difficult to establish what the contract between D and O actually was given D's initial quotation, O's counter-proposal, variations both real and alleged, generally poor record-keeping, the involvement of a second contractor carrying out part of the steelwork, the design/build interface etc etc. The Judge sets out his analysis of what the contract was with great care and it is a model analysis in this tricky area.

Second, the evidence given by D and O's respective witnesses was often wholly contradictory and the Judge sets out his reasons for preferring one witness to another or one part of evidence to another with equally great care; the case forms a model of how to deal with conflicting evidence.

I will be preparing an article on these two (and other) issues shortly.

4. Confidentiality in Arbitration

The topic of Confidentiality in Arbitration has been a hot one since the 1995 decision by the High Court of Australia (ie the supreme Federal Court) in *Esso v Plowman* that there was no implied confidentiality obligation in the law of Victoria governing arbitration; contrary to much of the commentary and discussion, the decision is binding only on the state of Victoria and, although very persuasive elsewhere in Australia, is not binding on any other State and I have been advised that it is unlikely that NSW would follow it. Sir Patrick Neill QC (as he then was) shredded the Australian judgement in Arbitration International Vol. 12/3 and in a 1998 decision (*Ali Shipping v Shipyard Trogir*) the English Court of Appeal rejected the Australian view so far as English law was concerned (again the commentaries often misrepresent *Ali Shipping* in this regard, implying that *Ali Shipping* either predated *Esso* or somehow ignored it; rest assured – the latter is emphatically not the case).

In December 2000, the Swedish Supreme Court decided in *A.I. Trade Finance v Bulgarian Trade Bank* that there was no such implied obligation in Swedish law. The case has a number of curious twists and many of these are revealed in an outrageously partisan narrative of events written by AITF's US Counsel in J.Int.Arb Vol. 19/1 at p.1-32.

Key facts of the story are that (1) AITF's Counsel arranged publication in Mealey's of a crucial Interim award on jurisdiction (2) the Chairman of the Tribunal then copied the award from Mealey's to the Swedish Supreme Court and (3) the Supreme Court then gave a crucial ruling on another related matter in the case, largely based on the award, thereby creating a circular chain of reasoning. Bulbank's case was, in part, based on (a) the breach of confidentiality in AITF's publishing the interim award (b) the Chairman's actions in (in effect) disclosing the award to the Court; you may not be surprised either that the Chairman was a former Justice of the Swedish Court or that Bulbank felt that it had been stitched up.

Although the Swedish Supreme Court dismissed all of Bulbank's objections, I am left with a distinctly unsatisfactory impression from the whole story. In particular and had this been an English case, I would be unable to reconcile the Chairman's actions with his obligation under s.33(1)(a) and would be equally unable to reconcile AITF's with s.40(1); my impressions in these regards are wholly supported by the overall self-justifying tone of the article in J.Int.Arb.

5. Contracts (Right of Third Parties) Act 1999 (the "Act")

A recent Seminar on the effect of the Act on shipping industry (s.6(5) substantially excludes application of the Act to contracts for the carriage of goods by sea) reminded me that it also applies to arbitration agreements; S.8 addresses these.

Per s. 8(1) of the Act, where a right under s.1 (ie the right of a 3rd party to enforce a term in a contract to which it is not party) of the Act to enforce a term is itself subject to an arbitration agreement (the "AA") then, for purposes of the Arbitration Act 1996 ("AA96") and provided that the AA is in writing per s.5 AA96, the 3rd party shall be treated as a party to the AA.

Per s.8(2) of the Act, where a 3rd party has a right under s.1 to enforce an AA and the AA is in writing and the 3rd party does not fall into s.8(1), then it will still be treated as party to the AA.

These provisions will cover a number of cases which arise in practice, eg where one of the parties to a building contract such as a property developer in fact 'delegates' all or part of the work to an affiliate construction company

6. CPR Changes

It is tempting for arbitrators to believe that "CPR does not apply to me" and, post the 1996 Act, there has been a conscious move away from application of the White Book/CPR in arbitration; such move is not, however, universal – I still hear of White Books being brought into recent arbitrations and I look forward to the circumstance in which I can issue an Order requiring its removal from the hearing room. However, the CPR does affect arbitrations in, inter alia, two main ways.

First, CPR Part 35's provisions as to the use of Experts in litigation offer very helpful guidance to arbitrators and in many cases it will be difficult for an arbitrator to diverge too far from Part 35 principles, not least that, to the (substantial) extent they have been derived from Cresswell J's dicta in *Ikarian Reefer*, they constitute the law.

Second, Practice Direction 49G had hitherto addressed the procedures governing arbitration claims in Court (ie anything in the 1996 Act allowing reference to the Court) but will be replaced w.e.f. 25th March 2002 by a new CPR Part 62 and Practice Direction 62. PD49G has been substantially re-enacted in PD62 but there are a number of changes which cannot be ignored. These have been amply addressed in the appropriate legal press and it is not appropriate to consider them here. The new additions to CPR are available f.o.c. on the Lord Chancellor's Department website.

7. Jurisdiction and Conflict of Laws

An EC Regulation effective 1st March 2002, implemented by the Civil Jurisdiction and Judgements Order 2001 and having direct effect, has amended the Civil Jurisdiction and Judgements Act 1982 which had incorporated the Brussels Convention 1968 into English law. . The most significant effect of the amendment is on the cross-border English/Scottish regime which will now be broadly (but not completely) in line with the Regulation.

8. Professor William Tetley QC

Professor Tetley, a Canadian, is one of the world's most eminent jurists, particularly in respect of shipping law but he has been involved in arbitration, UNCITRAL etc etc; he has a website at http://tetley.law.mcgill.ca including glossaries at http://tetley.law.mcgill.ca/glossarymaritime.htm. This is well worth a visit

With best wishes

Hew R. Dundas

Arbitration News Update 4 – 29th April 2002 @ 1151

Dear Colleague,

Further to my newsletters of 3rd and 21st November 2001 and 8th March 2002, I set out below issue 4 of my informal newsletter. The e-mailing list for these newsletters consists of professional colleagues such as yourself with common or overlapping interests, particularly those who may not have ready access to research facilities, technical support departments etc or who may not have the time to scour legal websites, read journals etc. As before, if you do not wish to receive these newsletters, please advise and I will immediately remove you from the distribution list.

I would be happy to take in contributions on the understanding that since these newsletters (a) are wholly gratis and (b) go out in my name I may exercise appropriate editorial rights.

Since it ties in with my deadlines for "ARBITRATION", I will seek to issue quarterly, on or around 31st January, 30th April, 31st July and 31st October unless major developments suggest interim issues.

The following matters have crossed my path in recent weeks; items marked ¶ denote cases upon which I have submitted an article for ARBITRATION but you would be welcome to have an advance copy.

1. Gannet v Eastrade (¶)

In an LMAA documents-only arbitration arising out of a voyage charterparty, the Arbitrator inadvertently made a mistake in awarding $21,858 in respect of one item of Gannet's claim when in fact that item had previously been agreed by the parties at $860. On application by the parties under s.57, the Arbitrator corrected his Award, reducing the total awarded to Gannet from $35,330 to $15,120 against $261,768 claimed; so far, so simple. However, the original Award gave Gannet its costs ("costs follow the event") but, in correcting his Award, the arbitrator issued a revised costs award giving Gannet only 50% of its costs; in both cases Eastrade was to pay its own and the Arbitrator's costs. Two issues arose: (1) did the Arbitrator have jurisdiction to vary his costs award [s.57 refers] and (2) if so, was he entitled to decide that costs should NOT follow the event [s.61(2) refers].

It was held that, although there was no provision in s.57 to vary a costs award when there had been no mistake in the original one, s.57 allowing only for correction of mistakes, it was common sense that, if the correction to the principal Award necessitated an amendment to the costs award, such should be within the power of the Arbitrator since the alternative, remittal under s.68(3), was expensive and would arrive at the same end-result. Further, the discretion in s.61(2) was clear and the Arbitrator was fully entitled to decide as he did that Gannet should recover only 50% of its costs, not least because his reasoning was clearly set out.

As postscripts:

(i) In contrast to my earlier reporting of near disastrous arbitrations, the Judge praised this Arbitrator for the admirable quality of his Award and his reasoning;

(ii) It is curious that such a lacuna could arise in s.57 but reassuring that the combination of the Act and the common-sense approach of the Judge comfortably papered over the gap.

2. ADR in the English Courts (¶)

In *Dunnett v Railtrack plc* (judgement delivered on 22nd February 2002) the Court of Appeal gave teeth to the CPR by disallowing costs in a case where the parties failed to use ADR, notwithstanding the outcome of the case itself, in an instance where the Court had strongly recommended that ADR should be tried. Mr Dunnett had been willing to try ADR if Railtrack would but the latter, presumably highly confident of its chances at trial, refused to play ball. Railtrack was proved correct in this in that Mr Dunnett's claim was dismissed but this victory proved partially pyrrhic in that the Court refused to award Railtrack its costs.

Confirming its earlier decision in *Frank Cowl & Ors v. Plymouth City Council*, the Court repeated that it was every lawyer's duty to further the CPR's objectives and that failure to try ADR would lead to adverse costs consequences.

3. Calderbank Letters/Without Prejudice Correspondence (¶)

In *National Commercial Bank Limited v. Kanishi (Far East) Limited*, a Hong Kong case, e Court addressed whether KFEL's without prejudice offer ("WPO") to settle could be considered i.r.o. costs. NCB won judgement in its favour, having rejected KFEL's offer, and the Court awarded costs to NCB. KFEL submitted that the judgement amount was little different to its WPO so that NCB should not be awarded costs. The Court refused to admit the WPO letter into evidence for consideration i.r.o. costs since clear and express language was necessary in making any such offer; in particular, "without prejudice" is insufficient

in isolation to permit the WPO letter to be admitted into evidence i.r.o. costs and also the letter must expressly state either "without prejudice *save as to costs*" and/or that the offeror reserves the right to submit the letter into Court i.r.o. costs. KFEL's letter failed in this regard, the WPO letter was refused admittance and KFEL's argument on costs was rejected.

4. On The Juridical Character of the Seat under the Arbitration Act 1996

There is an excellent article in the latest Lloyds Maritime and Commercial Law Quarterly with the above title (full reference LMCLQ [2002] 66) with particular reference to Dubai Islamic Bank v Paymentech case. It explains in detail the interface between the proper law of the contract, the law of the seat and the law of the arbitration. In that case, arising out of a dispute between two members of the international VISA credit card system, an award was made under VISA Rules and an appeal was heard by the VISA Appeals Board while In London and the final award issued by it in London; the English High Court held that the seat of the arbitration was in California.

5. The Proportionality Principle and the Award of Costs; Home Office v Lownds (¶)

A major statement of policy was made by the Lord Chief Justice, Lord Woolf, on 22nd March 2002, sitting in a very strong Court of Appeal; he gave the only judgement.

6. When is a Contract Evidenced in Writing ?

While this is significant in terms of the Arbitration Act 1996 (refer s.5(2)(c) and 5(3)), it is no less so in adjudication since HCGRA applies only to agreements in writing, the approach to definition matching that in s.5 AA96.

Construction Industry Law Letter (April 2002 issue) reports on the CoA case RJT Consulting Engineers Limited v. DM Engineering (Northern Ireland) Limited (judgement delivered 8th March 2002): DME had commenced adjudication proceedings against RJT who had contended that HCGRA did not apply since there was no written agreement nor one "evidenced in writing " (broadly the same definition as in s.5(2)(c) and 5(3) AA96). The Adjudicator held that there was and this was upheld in the TCC. The CoA reversed this decision albeit on the facts and with certain qualifications.

7. Leave to Appeal

s.69 gives a party the right to appeal to the High Court on a question of law arising out of an Award but this right is severely restricted by s.69(3) whereas its predecessor section 21 of the 1950 Act allowed wide-ranging judicial review; in 1995 the DAC had rejected (para 285) a submission that such appeals should be entirely abolished. S.69(3) and the anti-interventionist approach is bolstered by s.69(8) further restricting the right of appeal to the Court of Appeal in requiring [HC] leave to appeal to the [CoA]. Court practice in recent years has generally (but not exclusively) been that applications for leave to appeal are granted or refused *without reasons*.

The recent CoA case North Range Shipping Ld v Seatrans Shipping Corporation (26th March 2002) arose out of a s.69 application (see my item 8 below) but its main interest is in respect of the examination by the CoA of the "without reason" practice in the context of Art. 6 HRA and also whether the brief reasons given by David Steel J in this case were adequate. The ECtHR has stated that "… The Court reiterates that Article 6(1) obliges the courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. … " but stated in a separate case that "… The limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the [parties] before the Court of Appeal." The CoA concluded in *North Range* that "S. 69(3) contains a variety of threshold tests. At the very least we think an unsuccessful applicant for leave should be told which of those tests he has failed. This … appears to be the current practice of commercial judges. But does the judge need to go further and explain in every case why the relevant threshold test has been failed ? We think the answer to this question is "No"."

Accordingly the CoA, rather wittily in my view, granted leave to appeal but immediately dismissed the appeal.

The current issue (19/2 – April 2002) of Journal of International Arbitration has an article in which the author asserts that " … arbitral awards are not reviewable for errors of law" and that " .. the USA stands as an exception". The first statement is, strictly, inaccurate (the author himself contradicts it) and the second, implying (at least at first sight) that the USA is the sole exception, is perhaps inadvertently misleading. Of course, Article 34 of the Model Law does not expressly provide for review by the Court of questions of law.

As a postscript, it should be noted that the judgement of Tuckey LJ includes the following crystal clear statements:

(i) "Parties to a consensual arbitration waive their Article 6 rights in the interests of privacy and finality."
(ii) "The arbitral process with its commercial advantages of privacy and finality does not involve [Art.6] hearings but that is what the parties have chosen."

thereby laying to rest one of the several myths in circulation concerning arbitration and the HRA.

8. North Range v Seatrans – the Other Issue

Two main points before the arbitrators related to the timing of an e-mail notice given by the vessel Owner in respect of termination consequent on late payment of hire by Charterers:

(i) Settled law requires that such notice be sent AFTER hire becomes due and unpaid; the e-mail was sent before hire was due and was therefore invalid (refer *The Afovos*)
(ii) the e-mail had apparently not been received (because of a systems glitch) until after the hire was due; this was irrelevant – it had been sent before.

9. International Comparative Law

A popular text for introducing International Comparative Law (e.g. as recommended by the CIArb for its International Diploma course) is "Introduction to International Comparative Law" by Kötz & Friedrich, a translation from the German. Although, relative to other translated German legal texts, it is not unduly heavy, it is certainly rather hard going and very comprehensive and not all arbitrators have the time to read 600 pages of such a book, however fascinating and authoritative. Also, on the CIArb course, (a) some of those with English as a 2nd language and (b) some non-lawyers found it too difficult

My attention has been drawn to an article by Professor William Tetley QC in Louisiana Law Review (Vol. 60/3 Spring 2000 pp.677-738) entitled "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodfied) which covers substantially similar ground but in 60 pages rather than 600 and at a broad summary level with concrete examples. I recommend this article strongly if you are interested in the topic. The article is available on Professor Tetley's admirable website http://tetley.law.mcgill.ca under "Comparative law".

10. Blyth & Blyth

The decision in the crucial appeal case Blyth & Blyth v Carillion Construction Limited is expected shortly.

The facts of this case are well-known: the contractor CC entered into contract with the Employer and assumed full design responsibility although that design (by B&B) had already commenced under a contract E/B&B. That latter contract was novated to CC with the intention of protecting it from matters arising out of B&B's work prior to the novation; however, B&B sued CC for its fees and the latter counterclaimed (under the novation) for deficiencies in B&B's work prior to the novation. It seemed self-evident that CC's counter-claim was, in principle, valid in law

Extraordinarily, the Court of Session, in a decision widely and heavily criticised, held that because B&B's breaches of contract could cause no loss to the Employer having dumped all its risk on CC pursuant to JCT/81, the same position applied to CC. Until this decision is reversed (which common sense suggests it must be) we cannot assume that any conventional Employer/Contractor/Subcontractor novation agreement will be adequate to protect the Contractor against pre-novation subcontractor defects.

What do we do ? There have been several suggestions (1) solve the difficulty through redrafting warranties and indemnities (2) seek to apply the Contracts (Rights of Third Parties) Act 1999 (3) nuke the court of Session. However, commentators generally hope that the decision will be overturned on appeal. If not, we will require to examine the Court's reasoning very thoroughly in order to determine an effective solution to the necessity to pass the risk.

11. A recent case (Koninlijke Philips Electronics N.V. v Utran Technology Development Limited [2002] HKEC 476) in Hong Kong raises an issue of general importance concerning international enforcement of judgements (i.e. not arbitral awards). Where a foreign country is recognised in the applicable HK enforcement legislation, the HK Court will enforce that country's judgements irrespective of any lack of reciprocity between the two countries. In the instant case, concerning a Netherlands judgement, the enforceability of HK judgements in the Netherlands had lapsed on 1st July 1997. Other countries whose judgements may be enforced in Hong Kong absent reciprocity include: Australia, Belgium, Germany, France, Italy; Malaysia; New Zealand and Singapore.

12. A Paris based company, InterArb, maintains a free Virtual Library on www.interarb.com/vl which indexes materials available on the web. It also provides an electronic newsletter "European Arbitration" which offers 18 issues/year for only €100 i.e. £3.40 per issue in real money

13. IBC is putting on a conference on 21st May 2002 “Standard Forms of Construction Contract” chaired by Professor Phillip Cape and with a star cast of speakers; details at www.ibclegal.com.

14. The IVth International Conference of the WorldWide Mediation Forum takes place in Argentina in early 2003; I have details and will forward them on request

15. For those interested in the shadier end of international commerce as was seen in the Westacre and Hilmarton cases, Sweet & Maxwell have published an interesting book “Illegality and Public Policy” by Professor Richard Buckley; ISBN 0-421-64790-6; £125.

Some while ago, I was involved in advising on a case where my client belatedly discovered that there was some seriously “funny business” going on although, as its representative (inexperienced in international business) summarised the chronology of events to me, it was obvious from day one that that had been the case. The penny finally dropped for that individual only when, setting out from the office of the company’s local agent (in the capital city of the country in question) to visit the Vice-Minister of Natural Resources to discuss a possible oil exploration contract, he tried to pick up the agent’s small briefcase and could not easily do so since it weighed approx. 28kg. I offer no prize for guessing the contents.

Hew R. Dundas

Addendum to Arbitration News Update 4 – 29th April 2002 @ 1151

Today saw the publication on the Court Report Website of a judgement of potentially far reaching significance, affecting the award of costs by arbitrators. This judgment, in the case Fencegate v NEL Construction, by HHJ Anthony Thornton QC, has been set out at some considerable length (22,500 words) and with very thorough argument with a view to appeal to the Court of Appeal.permission for which was granted by the Judge.

The principal significance of the judgment is that errors of fact and reasoning made by the arbitrator forming part of his award of costs have been deemed to be errors of law and hence appealable under s.69 of the Act. The case has been reviewed briefly in Arbitration Law Monthly (issue of April 2002). I do not propose to consider the case in any detail at present since it is expected that it will go to appeal and the Court of Appeal may or may not confirm Judge Thornton's thorough and considered judgment.

The facts were relatively straightforward: FGL contracted NEL to carry out certain work on its premises and several related disputes arose thereafter, NEL claiming the unpaid balance of the contract price and FGL counter-claimed for various alleged costs plus substantial loss of profit.

Each of the parties, in addressing the Court on the disputed question of costs, phrased their submissions as though they were made under the RSC and the pre-96 Act, pre-CPR rules governing costs. Judge Thornton was dismissive of the conceptual irrelevance of the submissions but in particular, the Arbitrator had come to certain conclusions about FGL's behaviour during the arbitral proceedings such conclusions not being adequately founded on evidence and fact. Those erroneous conclusions had led him to make a costs award of a "costs do not follow the event" nature.

It is not appropriate in this short newsletter-style note to detail in full Judge Thornton's meticulously crafted judgement but, his conclusions (para 85ff) are worthy of repetition here as they state his view of the law in this significant area in a form designed for consideration by the Court of Appeal in due course.

1. An arbitrator, in considering and awarding costs, derives his powers and jurisdiction from section 61 of the Act and any procedural rules incorporated into the reference or agreed to by the parties concerned with the award of costs.
2. In considering whether an appeal will lie from an arbitrator's costs award, the court can only consider judicial intervention if the complaint about a costs award raises a question of law or one amounting to serious irregularity. It is no longer appropriate to consider whether or not the arbitrator acted judicially.
3. Neither an arbitrator not a court considering an application for judicial intervention should ordinarily consider judicial decisions as to costs nor the terms of the Civil Procedure Rules. The relevant matters to consider are the terms of the Act, any applicable procedural rules as to costs and any relevant material arising in the reference whose costs are the subject of the arbitrator's costs award.
4. A court should ordinarily only consider a complaint of serious irregularity in relation to a costs award if the subject-matter of the complaint cannot additionally be expressed as a question of law.
5. A question of law arises if the complaint amounts to one that the arbitrator has taken into account factors that should not have been taken into account, has failed to take into account factors that he should have been taken into account, has reached a decision based on an error of law or has reached a costs decision which was one which no reasonable tribunal could have reached.
6. A question of law can arise where the costs award has been based on findings or inferences of fact which it is clear from the award and from any documents incorporated into the award were neither supported by any admissible evidence nor were ones that a reasonable arbitrator could have made. This is because the arbitrator has, in such circumstances, taken into account factors, namely the erroneous findings of fact, which he should not have taken into account.
7. In any consideration of an arbitrator's findings of fact grounding an award as to costs, full respect must be given to the arbitrator's findings and to the principle that the arbitrator is given primacy by both the Act and the parties so far as fact-finding is concerned.
8. Reviewable questions of law will not necessarily give rise to a successful appeal. A costs award will only be set aside if it can be shown that, as a result of the errors made by the arbitrator that have been disclosed by the court's answers to the questions of law, it is reasonable and proportionate to interfere with the costs award.
9. Ordinarily, the result of a successful appeal from a costs awards will be an order setting aside the award and a direction to the arbitrator to reconsider the costs award in the light of the judgment setting aside the first award
10. Where leave to appeal from an arbitrator's costs award is required, the potential appeal must, in addition to these requirements, pass the tests imposed by section 69 of the Act as preconditions to leave to appeal being granted by a judge. However, where as in this case, leave to appeal is not required, the court must consider the appeal on its merits in accordance with the principles set out above.

8.2 Conclusion as to the Questions of Law Raised by the Appeal

86. The result of the appeal is that the arbitrator made the following errors:

1. He erroneously concluded that the magnitude of the counterclaim had a deterrent effect on an early settlement and he wrongly took that factor into account in reaching his discretionary decision as to costs. That factor had a decisive influence in the costs decision he arrived at.
2. He erroneously failed to have regard to the offers of settlement.
3. He erroneously took into account FGL's conduct during the contract even though he had not found any grounds that rendered such conduct material or relevant to his costs determination.
4. He erroneously fettered his wide discretion and failed to consider a proportionate or other intermediate award of costs in favour of FGL.

8.3 Conclusion as to the Appeal

87. It follows that the award that the arbitrator made as to the incidence of costs on the counterclaim cannot stand in its present form since it was fundamentally flawed by these errors of law. The arbitrator both misdirected himself and erred in principle. The costs award was, in consequence, based on reviewable errors and cannot stand in its present form without reconsideration by either the arbitrator or the court. The extent of these errors and the significant potential effect on FGL's costs recovery are such that it is inevitable that the costs award should be set aside and reviewed again from scratch.

Arbitration Law Monthly identifies a number of concerns about this judgment, not least that it appears to widen the scope for judicial intervention in arbitral costs awards; on my reading of the judgment, while I see where ALM's concerns arise, I do not believe that they are significant as that Journal asserts. We shall see when the Court of Appeal considers the matter.

Arbitration News Update 5 – 2nd July 2002 @ 1641

Dear Colleague,

Further to my newsletters, the last on 29th April, I set out below issue 5 of my informal newsletter. The e-mailing list for these newsletters consists of professional colleagues such as yourself with common or overlapping interests, particularly those who may not have ready access to research facilities, technical support departments etc or who may not have the time to scour legal websites, read journals etc. As before, if you do not wish to receive these newsletters, please advise and I will immediately remove you from the distribution list.

I would be happy to take in contributions on the understanding that since these newsletters (a) are wholly gratis and (b) go out in my name I may exercise appropriate editorial rights.

Since it ties in with my deadlines for "ARBITRATION", I will seek to issue at least quarterly unless major developments suggest interim issues.

The following matters have crossed my path in recent weeks; items marked ¶ denote cases upon which I have submitted an article to ARBITRATION or other professional journal but you are welcome to have an advance copy on the customary basis.

1. The scope of s.67 was significantly clarified by Colman J in Kalmneft v Glencore (¶), in particular that s.67 cannot be used to challenge the Arbitrator's exercise of his discretion under s.31(4). The Court of Appeal has now issued an additional clarification of s.67 in Athletic Union of Constantinople ("AEK") v National Basketball Association and Ors ([2002] EWCA Civ 830) concerning an international agreement (containing an arbitration agreement) regarding the registration of basketball players' contracts. The point concerns s.67(4) which provides that "leave of the Court is required for any appeal from a decision of the Court under this section" [i.e. 67]. There is identical language in s.68(4) but s.69(6) adds the language "to grant or refuse leave to appeal".

   In a dispute over the registration of a basketball player, AEK had applied to set aside the Award under s.67 and sought permission to appeal under s.69(2). The Deputy Judge dismissed the first application and refused permission to appeal to the Court of Appeal against his decision. He also refused permission to appeal to the Commercial Court on a point of law under section 69.

   The CoA held that references in ss.67(4), 68(4) and 69(6) were to the Commercial Court (s.105(1)) and that ss 67, 68 and 69 demonstrated a consistent legislative policy that no appeal shall be made against the decision of a court without the permission of *that* court. In this respect, there was no logical reason for distinguishing between the effects of sections 67(4) and 68(4) on the one hand, and the effect of section 69(8) on the other hand. The CoA had recently unanimously held that, on the true construction of section 69(8), a party who wishes to appeal from the decision of the High Court on appeal from an arbitration award requires the permission of the High Court, and *that the Court of Appeal has no jurisdiction either to grant permission itself or to review a refusal of the High Court to grant permission*: (see Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [2001] 1 QB 308). Much of the reasoning of Waller LJ, who gave the leading judgment in that case, can be applied to section 67(4).

2. In a complex shipping law case, Strive Shipping Corporation v Hellenic Mutual War Risks Association (a masterly judgement delivered by Colman J on 25th March 2002), the key issue was whether the shipowner or its employees had been complicit in the malicious cutting of the vessel's moorings leading to its total loss. Although massive (70,000 words), the judgement includes a key passage setting out the criteria and tests related to standard of proof, particularly when a commercial dispute includes allegations of fraud or other criminal acts which, if tried in a Criminal Court, would require application of the "beyond reasonable doubt" test". It is clear from the authorities that there must be a higher (i.e. higher than "balance of probabilities") standard of proof in such circumstances in a commercial case but express judicial guidance has hitherto been lacking as to what standard that actually necessitates.

   Colman J provides an answer. I have extracted that section of his judgement (at 2,050 words too long for this newsletter) but will send it on request.

3. In another of the series of recent major judgements in which the Lord Chief Justice has sat in a lower court, an important point of principle regarding expert evidence was laid down; the case, MP v Mid Kent Healthcare Trust, was a medical negligence case involving one of twins born with very severe disabilities. MKHT offered to pay 95% of the full liability quantum of damages (to be assessed) - this was accepted. The Court had ordered by consent that there should be seven single joint experts (including an educational psychologist, an occupational therapist, a speech therapist etc).

Lord Woolf observed that "the scale of litigation over medical mishaps … [such as this case] is a matter of considerable concern … this area of litigation tends to be peculiarly adversarial … the costs of litigation may be extremely high … claims can be very large indeed. However, it has to be realised by those who are involved in litigation in this area that almost invariably the costs fall upon those who are responsible for providing for the health of the nation through the National Health Service. In these circumstances it is the duty of the lawyers on both sides to use their best endeavour to keep those costs under control. It is not only the lawyers who are under a duty, the courts too are under a duty to restrain those costs. A way of doing so is by ensuring that the medical and non-medical expert evidence is restricted so far as possible."

The problem that arose in the present case is that, although the Master had ordered single experts to prepare reports, there came a stage where the claimant's parents wished to have a conference with the experts. They wanted that conference to take place without there being any representative of the defendant present because they wished the experts' evidence to be discussed. The proposal was not one which was acceptable to the defendant. The Master ordered, inter alia, that: (1) the application for the defendant's solicitor to be present at the claimant's conference be refused; (2) no conference be conducted by the claimant with the presence of joint experts and those separately instructed by the claimant or save with written consent by any party with any joint single expert.

The Academy of Experts Protocol states at paragraph 19.9

> "A single joint expert should not attend any meeting or conference that is not a joint one, unless all the parties have first agreed in writing:
> (1) that such a meeting may be held, and
> (2) who will pay the expert's fees for the meeting."

and this was approved by the Court.

Simon Brown LJ, in a supporting judgement, stated unequivocally: "When, if at all, should one party, without the consent of the other party, be permitted to have sole access to a single joint expert, i.e. an expert instructed and retained by both parties ? In common with my Lord, I believe that the answer to this question must be an unequivocal "Never". Not merely is there nothing in CPR Part 35, the Practice Direction supplementing Part 35, and the relevant Queen's Bench guide suggesting that such access should be permitted, but the implications of the rules are all the other way: see particularly rules 35.6 and 35.8."

4. The Law of Tort will undergo significant change following the recent House of Lords ruling in the asbestos cases grouped under the name of the first of the cases, Fairchild v Glenhaven Funeral Services. On 16th May it reversed 5-0 a 3-0 CA decision with likely significant increased liabilities to insurers. The full judgement was made available on 20th June 2002 (it is extensive at 46,500 words) and marks a significant change in the law; previously damages were recoverable only where causation was proved to apply and this case breaches that principle in that it could not be proved which of the employers had caused the asbestosis. I will report further at a later date.

Lord Bingham set out at para 9 the general principle to be addressed:

> "The overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another. Are these such cases ? A and B owed C a duty to protect C against a risk of a particular and very serious kind. They failed to perform that duty. As a result the risk eventuated and C suffered the very harm against which it was the duty of A and B to protect him. Had there been only one tortfeasor, C would have been entitled to recover, but because the duty owed to him was broken by two tortfeasors and not only one, he is held to be entitled to recover against neither, because of his inability to prove what is scientifically unprovable. If the mechanical application of generally accepted rules leads to such a result, there must be room to question the appropriateness of such an approach in such a case."

and also stated (para 23) that

> "The problem of attributing legal responsibility where a victim has suffered a legal wrong but cannot show which of several possible candidates (all in breach of duty) is the culprit who has caused him harm is one that has vexed jurists in many parts of the world for many years. As my noble and learned friend Lord Rodger of Earlsferry shows (see paras 157-160 below) it engaged the attention of classical Roman jurists. It is indeed a universal problem calling for some consideration by the House, however superficially, of the response to it in other jurisdictions."

The judgement notable both for its wide survey of the issue across several jurisdictions and for its ground-breaking approach to (i.e. rejection of !) legal precedent. The adaptation of the so-called 'but for' test (see also note below re Iraq) is necessary since strict application in these cases would have created injustice. Their Lordships appear to have concluded that that the purpose of legal rules, principles and precedent is justice and such rules will be disapplied where they obstruct justice; this is perhaps as novel an approach as was that first seen in *Donoghue v Stevenson* in 1932 and it would be reasonable to suppose that development of the law following *Fairchild* will be no less cautious than following *Donoghue*. This present

decision must be viewed in the context of its particular facts but it expressly opens up possible new developments in the law of negligence.

It should be observed that this decision, while a reversal of a key plank of the law, is very practical and in keeping with modern attitudes to damages and in part of mediation thinking: if the claimant had been employed by (say) five companies and had been exposed to asbestos in all of them, then it seems self-evident that the clamant receive the appropriate sum in damages without much ado, then for the insurers of the five companies to sort it out among themselves without bothering the claimant. This approach is common in P/I mediation and the oil industry deals with similar industrial accident claims in a different way (the employer accepts liability for his employees irrespective of how/why/by whom the accident was caused).

5. Some interesting cases passed me by before I hooked up to a web-based court reporting service:

(i) in *Profilati Italia srl v Paine Webber Inc* [2001] Lloyds Rep 715 the question was whether s.68(2)(g) applied where one of the parties had (allegedly) withheld material evidence; PI was an Italian manufacturer of aluminium products, PW was a London-based metals broker/trader; an affiliate, A, of PI entered into options/futures contracts on the LME acting through PW as broker – the total quantity involved was 1,000,000 tonnes over a 2½-year period and the contracts were sold via back-to-back agreements by A to PW and by PW to PI; various roll-over and other transactions followed under PW's terms of business and LME Rules and PW made margin calls on PI which were not met and PW closed out the PI account; various PI/PW disputes arose, in particular that PI's position would have improved significantly had PW not closed its account in October 1993; arbitration under LME Rules commenced and the tribunal awarded in favour of PW on 21st September 1999; PI made an out-of-time s.68 application alleging that PW had wrongly failed to disclose two material documents which would have supported PI's case and that the award had been improperly procured because the tribunal was misled.

In Deutsche Schachtbau und Tiefbohr-Gesellschaft m.b.H. v Shell International Petroleum Co. Ltd [1990] 1 A.C. 295, Sir John Donaldson M.R. commenting on public policy as a ground for refusing enforcement of an award under s.5(3) of the Arbitration Act 1975 said at page 316:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. . . . . It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

In Profilati, Moore-Bick J stated that "where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour." And recalled Para. 280 of the DAC Report concerning the rationale for S.68: "Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has occurred simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

Moore-Bick J considered the extent of the duty of disclosure, this not being "a case in which the parties were obliged to give, or can have expected to receive, disclosure on the very wide basis set out in the Peruvian Guano case. On the contrary, the approach which had been accepted on both sides was one under which the onus lay on the party seeking disclosure to identify at least in a general way the documents it was seeking" and in this PI's Solicitors had failed to ask the right questions.

So far as substantial injustice was concerned, even if there had been deliberate non-disclosure it would still be necessary for PI to show that it had suffered substantial injustice as a result. Both parties recognised that this required some consideration of the likely impact of the documents on the minds of the tribunal. PI alleged 'substantial injustice' because the non-disclosed documents would probably have had a decisive effect on the outcome of the arbitration but this argument depended, not only on the assumption that PW's representative would have told the truth in cross-examination (assumed so) but, more importantly, on the assumption that there was in fact an agreement between him and PI's representative in the terms alleged by PI. However, there was little or no evidence that that was the case.

Following a full review of the evidence, Moore-Bick J concluded that "I do not think that there is any substantial likelihood that disclosure of the these two documents would have resulted in the tribunal's reaching a different conclusion on this issue. Accordingly, even if I am wrong in holding that there was no failure to give proper disclosure in this case, I do not think that PI suffered substantial injustice as a result."

(ii) The last in a suite of cases *Amoco v British American Offshore* (¶) throws interesting light on when a court will award costs on an indemnity basis. In September 1997, Amoco contracted BAO to provide the Rowan Gorilla V drilling rig (then under construction) for a North Sea drilling programme for a minimum of one year commencing 2Q98 at $175,000/day. The rig was delivered late and, per BAO, came on hire in December 1998; per Amoco, it never came on hire and the condition of the rig together with the delay was such that it was entitled to terminate which it purported to do on 19/1/99. The key question in the litigation was whether Amoco was entitled to terminate the contract either under its express provisions or at common law. Amoco claimed damages for wasted costs but not for any breach of contract other than i.r.o. termination; BAO counterclaimed inter alia for hire from 25/12/98 to 22/10/99 (the date when BAO accepted what it said was Amoco's repudiation of the contract) and for damages at the same rate thereafter until 25/12/99 i.e. for a principal sum of approx. $65m. Throughout the case there was an overwhelming implication (and considerable evidence) that Amoco had manufactured the dispute in order to get out of an expensive drilling contract at a time of sharply falling oil prices. The trial began on 22/1/01 and ended on 4/10/01 after 85 days in court. Amoco's Closing Submission totalled 560 pages, BAO's was not much shorter and Langley J's judgement runs to 221 pages.

The documentary evidence overwhelmingly supported BAO's case and Amoco withdrew many allegations having, typically, argued facts at trial which it had happily accepted during 1998. Amoco's witnesses were generally roasted in cross-examination and Langley J was acerbically critical of seven of them for submitting evidence wholly inconsistent with the documents; in addition, he robustly trashed (paragraphs 205ff are a Great Read !!) Amoco's principal claim that the contract was terminated because the rig was unsafe since the documents incontrovertibly showed otherwise and, at paragraph 512, he states "Amoco's case fails on the facts at every point", continuing by trashing Amoco's contractual case.

6. At the risk of revisiting history, in carrying out some research for a Russian company, I found an interesting 1997 Court of Appeal case on public policy considerations, Soinco v Novokuznetsk.

N, a Russian aluminium producer, entered into a contract with S for the supply of aluminium; as part of the arrangements, N was to take minority equity interests in two S subsidiaries, E (Hungarian) and A (Argentinian). Subsequently, N had a "management reshuffle" and repudiated the contract; S took the dispute to Arbitration in Zurich. N asserted that under Russian Law it was illegal for it to have contracted to purchase foreign equity interests without the appropriate exchange control licence (ECL). An award was given in favour of Soinco, the Tribunal holding that (a) it would only be that part of the contract relating to the equity purchase which could be unlawful and (b) since it was N which had failed to apply for the ECL, any such illegality under Russian law should not prevent Soinco recovering damages for repudiation. The award became a Court Judgement; N failed to appeal within time and leave to appeal out of time was refused. Meanwhile the public prosecutor had commenced proceedings against N and E in N's local State Court; E did not appear. That Court found that the entire contract was illegal and also refused to recognise the decision of the arbitrators. N applied to the Swiss Courts to have the arbitration award revised on the basis of the Russian State Court decision of its but the Swiss Court refused inter alia because the arbitral Tribunal had expressly addressed the whole matter (at great length !) concluding that Russian EC laws could not be invoked to contest the acquisition of equity interests in E and A which were validly carried out pursuant to Hungarian and Argentine laws; even should such acquisitions be null, this circumstance in no way negated N's obligation to make supply aluminium to S, this being the essential purpose of the contract between the parties. Further, the Tribunal had no jurisdiction to hear questions relating to the acquisitions of equity interests in E and A which acquisitions had given rise to no claim. Expert Opinion was given by a distinguished Western academic who stated, inter alia, that the S/N contract having been declared invalid in Russia, it would be unlawful for N to pay the award, exposing N to prosecution and/or civil action from its shareholders."

The CoA was therefore looking at (a) an award of a competent tribunal to which the New York Convention applies, which had ruled on the illegality arguments; (b) an award payment of which appeared to be unlawful under Russian law; but (c) a Swiss award which if it were enforced in England would not offend English law or public policy (EPP) unless forcing N to pay, unlawfully under its own law, fell foul of PP considerations.

Waller LJ held that enforcement of this award would be contrary to EPP

(i) the English Court is concerned with the Award, not the underlying contract. The question of illegality having been raised and dealt with by the Arbitrators, and there being no requirement as a result to

perform some act which English law would regard as illegal under English law or contrary to the recognised morals of this country, the public policy is if anything in favour of abiding by the terms of the convention and enforcing the award;

(ii) in any event if an offence would be committed by N in Russia in paying the award, that would be the result of its own failure to obtain the requisite consents, and EPP would in my view be offended if that failure relieved that party from its obligation to meet the award.

and dismissed N's appeal.

The case predates but is wholly consistent with the CoA decision in Westacre where it enforced a Swiss award primarily on the grounds that EPP (i.e. supporting the New York Convention) required it to enforce such an award where the Award had been properly made in Switzerland and had been fully considered by the Swiss Courts although the contract underlying the dispute was one which appeared to be unlawful in both the country of performance and in England but not in Switzerland.

7. In Phoenix Finance Ltd v FIA & Ors, Phoenix was the buyer of certain assets from the liquidator of the insolvent Formula One team, Prost Grand Prix ("PGP"); it expected to be able to enter the 2002 F1 season with the Prost chassis but did not compete at the Australian GP on 10th March 2002 and was denied access to the Malaysian GP on 24th March, the FIA arguing that, under the Concorde Agreement ("CA") governing F1, PGP's rights to compete had been lost due to its insolvency; the CA is under English law and contains an arbitration agreement ("AA") in Clause 17.3 requiring arbitration of disputes in Lausanne under ICC Rules the PGP. Phoenix commenced proceedings in the English High Court and sought injunctive relief under s.44; the FIA sought a stay of those proceedings under s.9. Phoenix submitted that the FIA was both denying that Phoenix was party to the CA and seeking to include it in an arbitration agreement deriving therefrom. Phoenix's submissions were comprehensively rejected, its injunction denied and the FIA's stay upheld since under s.82(2), the AA applies to any party claiming under or through a party to the AA i.e. including assignees i.e. to Phoenix. The Vice-Chancellor stated (para 82ff)

> "In Detlev Von Appen Gmbh v Wiener Allianz Versicherungs AG [1997] 2 Ll.R.279 the Court of Appeal considered whether the insurers for voyage charterers were entitled themselves to bring proceedings against time charterers notwithstanding an arbitration clause binding on its insured. The Court of Appeal answered that question in the negative. At pp. 285 and 286 Hobhouse LJ, with whom I agreed, pointed out that had the proceedings against the time charterer been taken by the voyage charterer they would have been a breach of the arbitration clause but that there was no contract between the insurer and the time charterer, the former being only the assignee of the voyage charterer. He referred to the provisions of s.136 Law of Property Act 1925 whereunder the assignee obtains the benefit of all remedies for enforcing the chose in action assigned to him but takes subject to equities, including in both cases the right and obligation to arbitrate. At p. 291 Sir Richard Scott V-C agreed. He pointed out that
>
> > "[the insurer] is bound by the arbitration agreement not because there is any privity of contract between [the insurers] and [the time charterers] but because [the voyage charterer's] contractual rights under the sub-charterparty to the benefit of which [the insurer] has become entitled by subrogation are, subject to the arbitration agreement which, too, is part of the sub-charterparty. [The insurer] cannot enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject...."
>
> In my view that principle is directly applicable to this case. The rights, if any, of Phoenix are derived from those of PGP under Concorde and their sale by PGP and its liquidator to Phoenix. Phoenix is the assignee of PGP. It must take those rights subject to the obligation imposed by clause 17.3 to refer to arbitration any dispute in connection with their existence or extent.
>
> The principle of Detlev Von Appen Gmbh v Wiener Allianz Versicherungs AG [1997] 2 Ll.R.279 also appears to me to be recognised by the provisions of Arbitration Act 1996 to which I have referred. Thus s.82(2) treats as a party to the arbitration agreement a person claiming under or through such a party. Accordingly were the roles to be reversed Phoenix, as a party to an arbitration agreement, would be entitled to apply for a stay of proceedings under s.9(1). S.9 does not stipulate that the proceedings to be stayed must be brought by another party to the arbitration agreement. But if such a requirement is to be implied s.82(2) provides that for the purposes of the Act Phoenix is a party.
>
> In the light of this analysis it cannot be said that clause 17.3 is arguably either null and void, inoperative or incapable of being performed. Phoenix is as bound by its terms for the purposes of the Arbitration Act 1996 as is FIA or FOM. In those circumstances I am bound to make an order staying these proceedings and the alternative claim of FIA for a stay under the court's inherent jurisdiction does not arise."

8. A recent TCC construction case throws some interesting light on interest and financing costs; in *Amec Process and Energy Limited v Stork Engineers & Contractors (No2)* (TCC 15th March 2002), it became

apparent the judgement omitted to address the financing charges incurred by Stork for the costs of certain variations, the latter being provided for in detail in the contract but where AMEC consistently denied any variations and had therefore ignored these provisions. Stork had to finance the variations by way of a loan from its holding company where the terms of the I/C/L included interest compounded at monthly rests. The contract provided for valuation on, inter alia, a "reimbursable costs" basis, which included "a percentage mark-up to cover the cost and overheads". ***Held*** that since AMEC had failed to adhere to the variation provisions in the contract and had accordingly failed to specify the basis of payment during the work, Stork had become immediately entitled to payment on a reimbursable costs basis, since no other basis was appropriate. In addition, ***held*** that the contractual definition of reimbursable costs was sufficiently wide to include interest paid as financing costs. In those circumstances there was no reason why compound interest should not be awarded. However, it would not be fair or reasonable to allow Stork a more generous compounding basis of payment than if it had finance the variation on overdraft. Additionally, since AMEC had had access to Stork's accounts it would have realised that late payment would have to be funded by borrowing and the claim could thus have been brought as a breach of contract.

9. In *RC Residuals Ltd v Linton Fuel Oils Limited* (CA 2nd May 2002) the perennial problem of late submission of documents was addressed: both parties had ignored a Court order permitting the parties to call expert evidence and consequently the original trial was cancelled. The Judge consequently made an "unless order" (to ensure that the trial took place on 7th May 2002) which required that expert reports had to be served by 4pm on 12th April. RCR served its reports by fax, at 4.10pm and 4.20pm respectively but the contents of one of the reports had been available at 2.30pm and if it had been e-mailed to Linton would have been served in time. However, Linton's solicitor had refused service by e-mail. Notwithstanding the failure, the parties agreed that the experts should meet and thereby comply with the rest of the order. The Judge however subsequently debarred the evidence contained in the late reports, holding that to allow relief would undermine the seriousness of the "unless order". The CA upheld RCR's appeal since the judge had not correctly carried out the balancing act required under CPR 3.9(1), finding that the lower court had correctly emphasised the importance of an "unless order" but that this had to be balanced against the fact that the objective of the order had nevertheless still been achieved with the trial due to take place on 7th May 2002. The Court of Appeal went on to find that whilst Linton was entitled to refuse e-mail service of the reports it was to be noted that in an emergency such a rigid refusal may have made it more likely that relief would have been granted by the court.

10. In a landmark decision, the Inland Revenue has been blown out of the water by the House of Lords which decided unanimously (reversing a CA decision) that the IR has no power to require a taxpayer to exhibit privileged documents. The case derived from s.20 Taxes Management Act 1970 and the IR's argument was that collection of revenue was a ground on which a person's fundamental human right to consult his lawyer in confidence could be overridden. In the lead judgment, Lord Hoffmann said that Art.8 ECHR (right to privacy) was paramount although it was open to Parliament to seek to override that bearing in mind that any new legislation would have to be compatible with Art.8 and that legislation detracting from fundamental human rights could be justified only where there was a legitimate objective which was ***genuinely necessary*** in a democratic society.

11. The 2nd Edition of "The Law of Arbitration in Scotland" by Robert LC Hunter has been published recently @ £60; Butterworths; ISBN 0-406-94887-9. This is THE BOOK for anyone interested in arbitration in Scotland !

12. For anyone interested in International Arbitration, an essential purchase is the Kluwer Arbitration CD-ROM which has approx. 60,000 pages of materials including, in fully-searchable form, (a) the full texts of all relevant Conventions, etc etc (b) the full texts of the Fouchard/Gaillard/Goldman and Gary Born books (c) the complete text of Arbitration International from inception (d) a large number of ICC/ICSID/other awards (e) a selection of Court judgements (f) etc etc etc …….. There was a recent special offer to LCIA members. Contact sales@kli.wkap.nl.

13. The LCIA holds a number of interesting Symposia, including ones specific to construction, oil & gas and other relevant areas; these are open to non-members (members get a small discount) and are normally very good value compared with commercial conferences; check out www.lcia-arbitration.com. The next one scheduled is on 15th November on BIT/ICSID Arbitrations on which I have written a paper, available on request

14. In what is probably the final leg of the multifarious litigation arising out of the 1990 removal by Iraq of 10 Kuwait Airways planes from Kuwait, the House of Lords had to address, inter alia, Iraqi law. Per Lord Nicholls,

> "Given that the alleged wrongs were committed in Iraq, and given also the absence of any particular connection with any other country, it is to be expected that when adjudicating upon KAC's claims an English court would apply the law of Iraq. As English law now stands, that would be so. The general

rule is that the law to be used for determining issues relating to tort is the law of the country in which the events constituting the tort occurred: see sections 9(1) and 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995."

However, he later rejected Iraqi Airways argument that:

"In considering whether the impugned acts would have been civilly actionable in Iraq, one must examine how an Iraqi court would have been required to rule on KAC's claim in autumn 1990. An Iraqi court would have had regard to the entirety of Iraqi law, including RCC resolution 369 [a decree of the Iraqi government which effectively transferred title to the 10 aircraft to Iraq]. KAC's claim for misappropriation ('usurpation') of the ten aircraft would have failed. When applying the second limb of the rule the foreign law must be taken as it is. An English court should not treat as civilly actionable under Iraqi law a state of affairs which, in fact, would not have been so actionable. An English court should not, by excision of part of the foreign law, treat as existing under foreign law a cause of action which the foreign law did not actually recognise at the time"

and stated that:

"I must elaborate a little more. Stated more fully, IAC's argument invokes two different aspects of the law of Iraq: (1) as the lex situs, governing the effectiveness of the transfer of ownership by RCC resolution 369, and also (2) as the lex loci delicti, governing the impugned conduct of IAC in Iraq. IAC seeks to apply Iraqi law as the lex situs under (1) as a ground for excluding any liability which would otherwise exist in accordance with Iraqi law as the lex loci delicti under (2). I am not attracted by this reasoning. Given that the lex situs under (1) is not acceptable to an English court in these proceedings, the just result is to apply the lex loci delicti under (2) on the footing that Iraqi law as the lex situs under (1) is to be disregarded."

etc etc – the judgement is on the HL website and is a good read, if long !

Arbitration News Update 6 – 27th August 2002 @ 1106

Dear Colleague,

Further to my recent newsletters, the last on 2nd July, I set out below issue 6; refer at end for General/Administrative Notes.

Contents

With best wishes

Hew R. Dundas

Introduction

The following matters have crossed my path in recent weeks; items marked ¶ denote cases upon which I have submitted or will submit an article to one or other professional journal but you are welcome to have an advance copy on the customary basis.

My Scottish readership has requested more information on Scottish cases so I will start with reports of five cases, three of which are not only of particular Scottish interest but of wider application.

1. (¶) On 27th June 2002, Lady Paton, sitting in the Outer House of the Court of Session in the case Gillies Ramsay Diamond v PJW Enterprises which arose out of an adjudication, delivered an Opinion with potentially far-reaching significance; the main issues addressed were as follows:
   (i) was a contract administration services ("CAS") contract a construction contract within ss.104(1)(b), 104(2) and 108 of HGCRA96 ?
   (ii) could an adjudicator award damages under the statutory scheme ?
   (iii) can an adjudicator consider allegations of professional negligence ?
   (iv) had PJW in fact suffered loss in the circumstances ?
   (v) could GRD grant an EOT after certifying practical completion ?
   (vi) had the Adjudicator fully taken into account all GRD's submissions ?
   (vii) had his decision been wrong ?
   (viii) were his reasons sufficient ?

   PJW Enterprises Ltd contracted (on the SBCC Scottish Minor Works Contract (April 1998)) with R&R Construction (Scotland) Ltd for works on a building in Glasgow; clause 10A provided that any dispute or difference thereunder be referred to adjudication and Clause 10A.6.5.10 empowered the adjudicator to award damages and interest. PJW and R&R resorted to adjudication five times and PJW made certain payments accordingly. PJW had also instructed surveyors, Gillies Ramsay Diamond ("GRD") to provide contract administration services ("CASs") during the works, the T&Cs of such appointment not containing an adjudication clause. PJW and GRD fell into dispute and the latter's appointment was terminated. PJW argued that the CASs contract was a construction contract within ss.104 and 108 of the 1996 Act so that, despite the absence of an adjudication clause therein, it served notice of adjudication, alleging *inter alia* that it was an implied term that GRD would exercise the degree of skill and care to be expected of an ordinarily competent surveyor having allegedly failed in numerous ways to administer the R&R contract adequately, e.g. GRD had certified 10th September 1999 as the date of practical completion, eight weeks after the completion date (the PJW/R&R contract included a liquidated damages clause) although R&R had not then applied for any EOT. On or about 7th January 2000, R&R did apply and on 11th January 2000, GRD, without reference to PJW, purportedly granted a 41-day extension. In the course of an adjudication PJW/R&R, the adjudicator held that he was bound by that extension. In addition, PJW had engaged another Surveyor to complete GRD's contract thereby incurring additional fees.

   An adjudicator was duly appointed on 16th March 2001 but GRD submitted (i) that he should resign since any action was in delict (professional negligence), not through adjudication and (ii) the matters being referred to adjudication had already substantially been the subject of four previous adjudications; the Adjudicator rejected both submissions. At an oral hearing GRD repeated (i) and (ii) and added (iii) that PJW had not yet suffered loss (iv) that GRD's contract lay outwith HGCRA96 since CASs were not work under a "construction contract"; (v) that the adjudicator did not have the power to award damages; (vi) that GRD had not failed to issue written instructions; and (vii) that GRD had acted correctly in granting an EOT. The adjudicator's Decision of 4th May 2001 was substantially in PJW's favour for nearly £30,000, covering overpayments to R&R (consequent on GRD's failure to issue appropriate instructions), the consequences of the EOT and the incremental costs of hiring another Surveyor.

   Lady Paton's Opinion helpfully summarised respective Counsel's arguments (including extensive citation) which need not be repeated here (space limitations) save that GRD submitted in the alternative that the CASs element of the contract could be severed and was not a construction contract; she addressed the key issues as follows:

   (1) S.104(1) HGCRA96 provides, inter alia, that "In this Part a "construction contract" means an agreement with a person for any of the following … b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise …" and s.104(2) provides *inter alia*: "References in this Part to a construction contract includes an agreement … to do architectural, design or surveying work ... in relation to construction operations ..." The contract administration services amounted to "arranging for the carrying out of construction operations by others, whether under sub-contract ... or otherwise", in terms of section 104(1)(b). "To arrange" is defined in the OED as meaning "2. To put ... into proper or requisite order ...5. To settle (relations between parties, conflicting claims, matters in dispute, differences) ... 6. To come to an agreement or understanding as to mutual relations, claims, matters in dispute; 7. To settle the order, manner, and circumstantial

relations of (a thing to be done); to plan beforehand". It was of the essence of the CASs function that it "arranged" for the carrying out of construction operations. Severance was irrelevant. Further, GRD, by undertaking to carry out CASs, were "to do ... surveying work ... in relation to construction operations" (per s.104(2)). Lady Paton's view was fortified by statements of HHJ Gilliland, QC, in *Fence Gate Ltd.* v *James Knowles Ltd*., 31 May 2001, at paragraphs 2,3,6,7,11, and 12.

(2) Award of Damages: it is well-settled in Scotland that an arbiter, unless expressly empowered by the parties, does not have the power to award damages whereas an English arbitrator does. Adjudication is a UK-wide statutory scheme, hence the statutory provisions should be taken as they are, unless there was good reason to conclude otherwise and the Court should be slow to import into such scheme Scottish common law rules relating to arbitration, particularly if such rule has both been the subject of some criticism and would result in different English/Scottish approaches to adjudication. S.108(1) provides inter alia: "A party to a construction contract has the right to refer a dispute arising under the contract for adjudication ..." and the Scottish Scheme (SI 1988/687) is equally, if not more, widely drafted. Such language entitles an adjudicator to award damages, if a claim therefor was part of the dispute referred to him. Lady Paton found support for this conclusion in several sources: (i) in England, adjudicators can and do award damages: (ii) the Scottish construction industry appears to envisage and accept as appropriate the possibility that an adjudicator might award damages (refer SBCC Scottish Minor Works Contract (April 1998 revision), in particular clause 10A.6.5.10; (iii) this conclusion avoided the unacceptable situation which might arise where the Contractor had a claim for contract monies and the Employer was unable to plead the defences of breach of contract, damages, retention or set-off.

(3) No Loss: following GRD's failure to issue written instructions, an adjudicator acting in one of the five previous adjudications between PJW and R&R had been obliged to hold the former liable to pay the full contract price despite the work actually executed by R&R being of lesser value than the contract sum; per paragraph 23(2) of the Scottish Scheme, PJW was then obliged to pay R&R. In addition, following GRD's grant of an EOT, PJW was unable (until the extension was ruled wrong by Mr Wilson) to recover liquidate damages from R&R in consequence of which PJW incurred bank overdraft costs and additional legal fees. PJW had evidently suffered losses; whether or not PJW might ultimately recover some or all of those losses in subsequent Court or arbitral proceedings or in an arbitration could not be predicted or guaranteed. Consequently, PJW had suffered losses as soon as the over-payments had been made, and as soon as its additional interest and legal fees had been incurred.

(4) EOT/Written Instructions: Parliament had created the adjudication scheme in order to provide "a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ..." (Dyson J. in *Macob* v *Morrison)*. In England, it was not open to parties to seek judicial review of adjudication proceedings but, in Scotland, however, applications for judicial review of adjudications had been entertained (see *Homer Burgess Ltd* v *Chirex (Annan) Ltd)* but rarely, as emphasised by Lord Reed in *Ballast plc* v *The Burrell Company (Construction Management) Ltd*. There was much to be said for a policy that decisions of adjudicators acting under the 1996 Act should not be challengeable by way of judicial review; if adjudicators' decisions were open to challenge in Court by way of judicial review, the whole purpose of the adjudication scheme could be undermined. Assuming that, in Scotland, judicial review of adjudicators' decisions was to be permitted, and applying the guidance provided by Lord McFadyen in *Homer Burgess* and *SL Timber Systems v Carillion*, and by Lord Reed in *Ballast*, Lady Paton concluded that the present case did not fall into a reviewable category.

(5) Allegations of Professional Negligence: Lady Paton considered that there was nothing in the Act or the Scheme, nor in precedent nor principle, to preclude an adjudicator from reaching conclusions about the manner in which a professional person has performed during the construction contract, including any conclusions as to professional negligence. In a construction contract providing for professional services, it was usually an implied term that the professional should perform with reasonable care and skill; failure to do so might amount to professional negligence, always providing that the test in *Hunter* v *Hanley*, (1955 S.C. 200) was satisfied. Such professional negligence might in turn constitute breach of contract. The question referred to the present Adjudicator had *prima facie* invited him to consider *inter alia* whether GRD had acted with the appropriate care and skill; refer HHJ Gilliland in *Fencegate v James Knowles* (above). While it might appear startling that an adjudicator should be invited to rule within 28 days on whether a fellow professional had been professionally negligent, a proper construction of the statutory language setting up the "exceptional and summary" adjudication procedure permitted this very result, although importantly, a "provisional interim" result. If Parliament wished to exempt professional persons from the adjudication scheme, further legislation might be necessary.

(6) Failure to Consider Submissions: Lady Paton did not accept that the adjudicator could only have reached the conclusions he did through failing to take certain submissions and the authorities into

account; the adjudicator appeared to have taken into account all the material considerations placed before him, including submissions relating to the test for professional negligence.

(7) Wrong Decision by Adjudicator: if the adjudicator had acted *ultra vires* such would result in a decision which was a nullity in the sense outlined in ***Ballast*** *and* in ***Sherwood & Casson Ltd.*** v ***Mackenzie***. The question put to the adjudicator here had been whether PJW had suffered losses by virtue of GRD's breaches of contract; he had duly answered that question and had made rulings on interest and expenses. His decision might have been right, partly right, or wrong, but if his decision was indeed *intra vires* (even if wrong), it was not open to the Court to review it.

(8) Adjudicator's Reasons: In respect of the allegation of professional negligence, the test was notoriously difficult to satisfy; Lady Paton concluded that the adjudicator's reasons connected with grant of the EOT had been inadequate to justify his apparent finding in this regard. She reached the same conclusion i.r.o. the other negligence allegation, GRD's failure to issue written instructions. Consequently it could be the case that some parts of the adjudicator's decision were incorrect but any error which the adjudicator might have made had been an *intra vires* error, not an error rendering his decision (or part of it) *ultra vires*, or one which he had no jurisdiction to make. The effect of the "exceptional and summary procedure provided by the 1996 Act" (***Bouygues***) is that it was for GRD to seek to have an *intra vires* error corrected in any subsequent legal or arbitral proceedings.

Lady Paton concluded by dismissing GRD's petition.

2. (¶) My attention has been drawn to another interesting Scottish case, ***City Inn Ltd v Shepherd Construction Ltd*** (Opinion delivered by Lord McFadyen in the Outer House of the Court of Session on 27th May 2001).

City contracted with Shepherd (on the Standard Form of Building Contract Private Edition With Quantities (1980 Edition) with amendments) for the construction of an hotel in Bristol with a contractual completion date of 25th January 1999. A dispute arose regarding completion date which was referred to adjudication: Shepherd considered itself entitled to an EOT of four weeks (as certified by the architect) plus an additional five weeks awarded by the adjudicator. City claimed (a) for liquidate and ascertained damages ("LADs") in respect of the 4-week period, (b) for repayment of a payment made by it consequent on the additional 5-week period, and (c) for repayment of a sum of direct loss and expense certified by the architect consequent on the 4-week extension. These matters had come to Court because the contract had provided for provisional adjudication and final determination by the Court. The keys to the case were (i) interpretation of Clause 13.8 and (ii) whether the adjudicator's award affected the *onus* of proof in relation to justifying the additional 5-week EOT; Clause 13.8 was an insertion into the SBC contract form, providing that Shepherd should not execute any Architect instruction which, in its opinion, might affect the contract sum and/or the completion date unless it had submitted time and cost estimates and other related information and, further, providing a process for dealing with these; in particular, 13.8.5 provided that if Shepherd failed to submit the appropriate estimates &c, it would not be entitled to any EOT.

Shepherd argued:

(i) that 13.8.5 was effectively a penalty clause and, as such, unenforceable since, given any breach by it of 13.8.1, the effect of 13.8.5 would be both to deprive it of EOT(s) to which it would otherwise have been entitled and to expose it to LADs the contractual rate of which had been a pre-estimate of the loss and damage which City might sustain as a result of late completion, not of the loss and damage flowing from breach of 13.8.1;

(ii) 13.8.1 applied only if (a) Shepherd actually formed the necessary opinion of the instruction and (b) the opinion so formed included that the instruction would require an adjustment to the Contract Sum and (c) the opinion so formed was sufficiently defined for the detailed matters referred to in 13.8.1.1-5 to be addressed within the period allowed for the written submission to the Architect;

(iii) 13.8.1 did not apply (a) to instructions for the expenditure of provisional sums included in the Contract Bills or (b) where delay was due to non-timeous issue of instructions or (c) where delay was due to the lateness of City-supplied materials;

(iv) in any event, it was an implied term of the contract, both as a matter of law and of fact, that City and the Architect would not only ***not*** hinder or prevent Shepherd from carrying out its obligations under clause 13.8.1 but also that they would do all that was reasonably necessary to enable Shepherd to carry out those obligations; consequently, in the event of breach of these implied terms (as was in fact the case), then either City was estopped by such breach from relying on Shepherd's non-compliance with 13.8.1 or Shepherd was entitled to an EOT and City was not entitled to LADs;

(v) in the event that Shepherd had failed to comply with 13.8.1 (denied) then, in any event, City/the Architect had by their conduct either acquiesced therein or had waived compliance therewith or they had waived such compliance as a condition precedent to an EOT under 13.8.5 or they had become estopped from subsequently asserting compliance failure in order to defeat Shepherd's entitlement to an EOT.

In response, City submitted four general propositions derived from authority:
(a) the documents forming a contract must be construed as a whole;
(b) wherever possible, all provisions of the contract should be given effect, and no part should be treated as inoperative or surplus;
(c) where a contract was based on a standard form, but the parties had added special conditions, if any conflict arose between the standard terms and the special conditions, the special conditions would tend to prevail;
(d) where the wording of a contract was capable of bearing two meanings of which one would make the contract unlawful or unenforceable and the other would make it lawful and enforceable, the latter construction was to be preferred; for example, if it was possible to regard a provision either as imposing a penalty or as not doing so, the latter construction was to be preferred.

and submitted further that clause 13.8 did not stand in isolation but had to be read in conjunction with other clauses including Shepherd's completion obligation (23.1.2), its liability to £30,000/week LADs for late completion (24.2.1), and the EOT provisions (25); further, the contract envisaged that the risk of loss might be borne by City (e.g. by grant of EOT) or by Shepherd via LADs. 13.8.1 was designed to inform City if and when Shepherd considered that the issue of instructions would prevent timeous completion; if so informed, City might in some circumstances avoid delay by cancelling the instruction or might make advance arrangements i.r.o. any financial consequences of the delay. If Shepherd deprived City of that information through non-compliance with 13.8.1, then 13.8.5 ensured that the former retained the risk of loss (no EOT) but did not remove its entitlement to payment for the work, merely allocating the risk of loss by blocking any EOT. In summary, clause 13.8 as a whole was concerned with allocation of the burden of risk of the cost of delay.

As regards whether 13.8.5 was a penalty clause:
(a) City submitted (with extensive citation of authority, including Australian and Canadian) that in order for a provision to be classed as a penalty, it required to involve the concurrence of two events (i) a breach of contract and (ii) a result or consequence which was regarded by the Court as unconscionable in that it amounted to oppression or the imposition of a punishment; further, it was to be borne in mind that the rule against penalties was an exception to freedom of contract, and ought on that account to be kept within strict parameters. In this case the parties had, in adding 13.8 to the SBC form, chosen to make additional provision for the allocation of the risk of delay in completion. It was perfectly legitimate for City to seek to be warned of anticipated instruction-caused delay and for it to be agreed that, in the event of Shepherd's failure to provide that warning via 13.8.1, the risk of loss through delay should transfer from City to Shepherd; such a provision was no penalty. Further, the £30,000/week LADs had genuinely been pre-estimated and such provision could not be described as extravagant, penal or oppressive.
(b) Shepherd submitted that 13.8 dealt not with the allocation of risk of loss through late completion but with the consequences of Shepherd's failure to comply with 13.8.1, such adverse consequences, in the form of disentitlement to an EOT and consequent liability to LADs, flowing from non-compliance with 13.8.1; such flowed irrespective of whether the breach in question was technical or substantial and the LADs were not a genuine pre-estimate of the consequences of breach of 13.8, i.e. were indeed penal.

Lord McFadyen saw no disagreement in the submissions as to the law, merely application thereof to 13.8; the starting point for his analysis was, first, 23.1.1, which provided *inter alia* that: "... the Contractor ... shall ... regularly and diligently proceed with the [Works] and shall complete the same on or before the Completion Date" and, second, that the consequence of failure to complete on time was in 24.2.1 as follows: "... the Contractor shall ... pay or allow to the Employer liquidated and ascertained damages at the rate stated in the Appendix ... for the period between the Completion Date and the Date of Practical Completion". Further, he noted that, failing agreement on the effect of an instruction, 13.8.3 gave the Architect a choice:
(a) he could require compliance with the instruction, in which event contractual provisions for valuation of variations, the grant of EOTs, and claims for direct loss and expense would apply; or
(b) he could cancel the instruction, in which case City would merely reimburse the costs associated with the abortive instruction.

The LAD provision was accepted as constituting a genuine pre-estimate of loss consequent on delay but, in Lord McFadyen's view it was clear that the £30,000/week could not be regarded as such i.r.o. non-compliance with 13.8.1. In order to determine whether 13.8.5 was penal, it was necessary to answer two questions: (i) whether the event (i.e. non-compliance with 13.8.1) triggering 13.8.5 constituted a breach of contract, so as to come within the proper scope of the rule against penalty clauses and (ii) whether 13.8.5's effect, in depriving Shepherd of an EOT and imposing liability to LADs was to render them a penalty for breach.

What Triggered Clause 13.8.1 ?

Shepherd argued, largely from the actual contract language, that the obligation only arose if it actually formed an opinion while City argued that that removed the efficacy of the clause. Lord McFadyen

considered that it was first necessary to analyse the consequences which flowed from implement of the 13.8.1 obligations. Balancing the 13.8.5 consequences against 13.8.1's evident purpose of giving the Architect an opportunity to review his instruction in light of the contractor's opinion of its cost/time implications, he dismissed Shepherd's contention as not commercially sensible since what was contemplated was that on receipt of an instruction, Shepherd would apply its mind thereto and form a view as to those implications; such interpretation did not impose an excessive burden on Shepherd who would do it anyway. If Shepherd was not obliged to consider the effects of the instruction, 13.8.2 and 13.8.3 might/might not operate, according to whether the contractor bothered (or chose) to think about the consequences of the instruction. It could not reasonably be supposed that such uncertain operation was intended.

In what circumstances did 13.8.1 not apply ?

Shepherd had argued that it did not where (i) the instruction was for the expenditure of provisional sums (ii) delay from non-timeous receipt of the instruction (iii) delay was due to late- or non-supply of employer-provided services/goods; City accepted (iii). As regards (i), Lord McFadyen held that the language of clause 13.8 was applicable to all instructions, there being no qualification thereof to suggest that any sub-category should be excluded. As regards (ii), he held that a distinction fell to be drawn between (a) a late instruction which, simply because of its lateness, gives rise to a need to adjust the contract sum and/or grant an extension of time and (b) an instruction which, although late, is of such a nature that it would, whenever issued, have given rise to a need to make such an adjustment or grant such an extension; (b) fell within 13.8, whereas (a) did not. Any failure to comply with 13.8 would not exclude an EOT claim insofar as it was necessitated by the lateness of the instruction as distinct from its content.

Was the burden of proof reversed following the Adjudicator's Decision (i.e. the award of an additional 5 weeks EOT) ?

City had submitted that the EOT Decision had no such reversing effect since it remained for Shepherd to justify the EOT it sought, referring to the marginal note against clause 41A.8.1 in the SBC standard form contract: "arbitration or court proceedings are not an appeal against the decision of the Adjudicator but are a consideration of the dispute or difference as if no decision had been made by the Adjudicator". Lord McFadyen accepted that as a correct statement of the law since it was no part of the function of an adjudicator's decision to reverse the *onus* of proof in any arbitration or litigation to which the parties require to resort to obtain a final determination of the dispute between them and s.108(3) could not be interpreted as providing otherwise; the burden of proof in any such action lay where the law placed it, and was unaffected by the terms of the adjudicator's decision.

3. The Stated Case Procedure ("SCP") is where, on the request of one of the parties (but not on his own initiative) the Arbitrator, prior to the issue of the Final Award, states a case (i.e. a recital of the relevant facts and issues) for the opinion of the Court on a matter arising in the arbitration; while such matter is, in practice, almost always one of law, this is not a prerequisite. While England abolished this much-criticised procedure in 1979, it had been statutorily introduced in Scotland only in 1972 (s.3 Administration of Justice (Scotland) Act) despite dating back (as a principle) at least to 1207 (before Magna Carta !); s.3 remains on the statute book even if evidently anachronistic in the modern arbitral environment where arbitrators are expected to deal with all necessary issues (e.g. Kompetenz-Kompetenz, *Mitsubishi v Soler Chrysler-Plymouth*, *ECO Swiss v Benetton*, *Westacre*). It should be stressed that s.3 is *not* an avenue for appeal of an Award (despite a contrary assertion by the then Government) as confirmed by the Court in *Fairlie Yacht Slip Ltd v Lumsden* 1977 SLT (Notes) 41. Further, the SCP can be excluded either by the parties' agreement (e.g. Rules) or by statute (certain forms of statutory arbitration).

Stated Cases are rare and believed to number no more than a handful each year so it is a timely reminder to see the Opinion of the Inner House of the Court of Session, delivered on 28th May 2002, in *John Mowlem & Co PLC v Akeler Scotland Limited*, respectively contractor and employer i.r.o. the design and construction of two detached industrial units (the Phase A works) and the internal fit-out thereof and other works (Phase B); Akeler had a contractual right, but no obligation, to instruct Mowlem to carry out Phase B. The dispute arose in relation to the contractual provisions for the aggregate gross internal area ("GIA") of the two units. In the contract, Mowlem had warranted that the GIA would not be less than the areas shown in a schedule to the contract; the GIA was to be measured in accordance with the applicable RICS/ISVA code. The contract provided for damages if the units were built undersize (the specification called for Unit A to be >34,100ft^2, Unit C >27,900ft^2); in fact, as built they were 30,772ft^2 and 25,243ft^2. The contract drawings showed mezzanine floors to both units of [as-built] 3,862ft^2 and 3,410ft^2. It was agreed (i) that the units did not provide the contracted GIA of 62,000ft^2 at ground floor level but did if the mezzanines were taken into account; (ii) construction of the mezzanines did not form part of Phase A; (ii) the Phase B drawings made no provision for stairs from ground to mezzanine floor in each unit; (iv) Akeler had not instructed Mowlem to proceed with Phase B.

Did the contract provide for the mezzanines to be included in the GIA ?

No, said the Court following meticulous analysis of the contract language. Mowlem had warranted that the combined GIA would be >64,000ft^2 in Phase A; this was consistent with the liquidated damages clause and was further supported by (i) the contractual provision that the GIA was to be measured when Phase A (i.e. excluding the mezzanines) was sufficiently complete to permit measurement (ii) the facts that Phase B might never be built at all or, if it was, not necessarily by Mowlem (iii) no GIA warranty applied to Phase B.

To the English-trained arbitrator it seems strange that the Courts should be called upon to decide such a straightforward technical matter notwithstanding s.45 of the Arbitration Act 1996; in England s.45 (if ever used) would be expected to apply to issues of "pure law" e.g. the complexities of tort law (cf *Fairchild v. Glenhaven*), not to a technical matter assumed to be within the arbitrator's professional competence. *Mowlem* is no advertisement for the SCP.

4. (¶) *Interserve Project Services Ltd v K Systems Ltd* (Opinion delivered by Lord Eassie in the Outer House on 26th June 2002) was a construction case concerning remedy of defects, extra works and limitation periods with a neat dichotomy between the parties' positions.

In May 1995 Interserve (then Tilbury Douglas), itself principal sub-contactor to AMEC as Main Contractor, contracted with K Systems (flooring contractors) for the supply and fixing of vinyl floor covering in a building then being constructed by Interserve for a pharmaceutical company. Interserve sought damages for losses allegedly arising by reason of K Systems' [alleged] breach of contract (i.e. defective work) and the latter counterclaimed for payment of monies allegedly due under the contract and for the costs of certain extra works subsequent to the practical completion. Each party pleaded that the other's claim(s) was/were outwith statutory time limits. It was not clear in evidence precisely when K Systems' works reached practical completion but it was generally recognised as being in or around December 1995 but that was of no significance in proceedings since the proceedings had not been raised until 20th April 2001 i.e. after expiry of the 5-year period.

Interserve invoked s.10(1)(a) of the Prescription and Limitation (Scotland) Act 1973:

> "(1) The subsistence of an obligation shall be regarded for the purposes of section 6.... of this Act as having been relevantly acknowledged if, and only if, either of the following conditions is satisfied, namely -
>
> (a) that there has been such performance … of the obligation as clearly indicates that the obligation still subsists;"

and relied on K Systems' having carried out certain remedial works in May 1996 (i.e. less than 5 years before raising proceedings). The central issue therefore related to the basis upon which those works had been executed.

In January 1996, Interserve had instructed K Systems to undertake a complete survey of the flooring " in order to assess the extent of … remedial works required … you will immediately commence laying to achieve completion of all outstanding works on or by 26 January 1996." K Systems took the view that it should not remedy anything unless it was evident that the problem had been caused by faults in its workmanship or in the materials supplied by it. Interserve responded (inter alia) "You must now take immediate steps to identify the root of this major and increasing defect and to carry out repairs to and replacement of your materials as necessary". K Systems responded alleging water ingress caused by AMEC (agreed in part) and requesting an Official Order before commencing any work to which Interserve replied "… we confirm our instruction to … proceed immediately with outstanding remedial/repair works … . Furthermore we would confirm that you should arrange to have the reason for the breakdown of the vinyl bond to the underlying layers investigated by an independent party. Should this investigation indicate that the cause of the problem was not that of poor workmanship or faulty materials then we can confirm that you can expect payment for these works." K Systems appeared to have carried out remedial works in May 1996 but these did not prove satisfactory and the flooring works were finally finished around late 1997 by another sub-contractor. In 1998, AMEC and Interserve fell into dispute over the head contract and an independent floorings expert report was commissioned which wholly absolved K Systems; Interserve accepted that it had first argued K Systems' position with AMEC and had then argued the diametric opposite in these proceedings.

In Court, Interserve accepted that the works carried out in May 1996 had proceeded on the basis of the January 1996 correspondence and that it had not intimated any departure therefrom. Lord Eassie therefore considered that s.10(1)(a) of the 1973 Act had not been satisfied; consequently K Systems' assertion that Interserve was out of time was upheld.

So far as K Systems' counterclaim was concerned, there was no dispute that more than five years had elapsed but the company argued that Interserve's obligation to pay had become enforceable only on K Systems' production of an independent report absolving it from blame. The Court noted that the 1998 expert's report had not been commissioned by K Systems but by Interserve in order to persuade AMEC to release monies. Lord Eassie held that the terms of the January 1996 letter did NOT make Interserve's payment liability properly conditional on the provision of an expert's report since there had been evident defects in the floor coverings for which K Systems both disputed responsibility and refused to carry out rectification on a basis which would have conceded liability and wholly excluded any claim for remuneration. Interserve had agreed to pay for those works in the event that K Systems was not at fault. The latter had not been precluded from suing for its remuneration demonstrating therein that the defects were not attributable to it. Interserve had done no more than indicate a basis upon which the it might accept liability but the expert's report was not a condition precedent to liability. Since K Systems had failed to take no steps to enforce Interserve's payment obligation prior to this action, it followed that the counterclaim was also out of time.

5. (¶) In SIM Group Ltd v (1) Neil Jack and (2) Douglas Dickson (Property Management) Ltd (Opinion of Lord Clarke in the Outer House on 5th June 2002), SIM sought interdict ("an injunction" in English !) against the distinguished and highly respected Arbiter, Mr Jack (who did not appear in the action), from proceeding with an arbitration between SIM and DD.

In 1990 DD contracted (SBC/JCT80/PE+Q, as amended by the Scottish Supplement thereto) SIM to effect renovation works at a shopping centre in Glasgow. Disputes arose, and became proceedings in the Sheriff Court which were then sisted ("stayed") for arbitration. Pursuant to a 1994 Deed of Appointment, Mr Jack was appointed [sole] Arbiter and, in August 1999 he issued his decree arbitral ("final award") in favour of SIM in the sum of £24,700. So far, all was agreed in the present proceedings.

In March 2001 DD intimated a claim against SIM for £70,000 and requested Mr Jack to arbitrate the claim under the 1994 Deed; at a meeting in June 2001, SIM submitted that Mr Jack had become *functus officio* in August 1999 on issue of his final award and therefore had no jurisdiction to hear DD's claim; he then wrote to the parties and advised them that he considered that he did have jurisdiction under the 1994 Deed, noting that DD's claim, which related to payment for repair to defective render, had in substance formed part of a counterclaim by it in the previous arbitration proceedings, but which had been dismissed. Notwithstanding the issue of his final award, he concluded that he was not *functus officio* and had jurisdiction to arbitrate DD's claim, apparently since it was now formulated on a different legal basis from the original. In September 2001, the Court granted interim interdict.

Lord Clarke summarised respective Counsel's arguments:

(i) DD submitted that the present action was incompetent because it sought review of the actings of an arbiter, and any such review required to be taken by way of judicial review proceedings under Rule of Court 58 and not by way of ordinary action for interdict. The leading modern authority on the supervisory jurisdiction of the Court of Session was West v The Secretary of State for Scotland 1992 S.C. 380 where Lord President Hope had said (p.412): "The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument." Rule 58.3(1) provides: "....an application to the supervisory jurisdiction of the court shall be made by petition for judicial review." In *Kyle & Carrick District Council v A.R. Kerr & Sons 1992 SLT 629* Lord Penrose, having reviewed the authorities relating to the review of arbiter's actings, said at p.633:

> "The effect of these decisions is to assert a jurisdiction in the Court of Session to review the procedures adopted by arbiters and to decide whether decrees have proceeded within the scope of the reference, within the powers conferred upon the arbiter, and in accordance with the interests of substantial justice as reflected, for example, in the traditional rules of natural justice. The formulations adopted mirror to a substantial extent the expressions used in defining and describing the court's jurisdiction over other forms of tribunal and over public and other authorities generally. In my opinion, that jurisdiction is of the superintending or supervisory character covered by Rule 260B, as a matter of language."

(ii) SIM submitted that (a) Lord Hope had repeatedly referred (in *West* at pp.412-3) to the supervisory function of the Court of Session being in respect of a jurisdiction, power or authority "delegated or entrusted" to someone, (b) that supervisory jurisdiction was designed to control the actings of a person or body in carrying out the functions dedicated to him, BUT that (c) there was no supervisory jurisdiction when the person or body, whose actings were being challenged, had not been entrusted at all with any function. In the present case Mr Jack's jurisdiction had come from the 1994 Deed but had become exhausted in 1999 when he issued his final decree arbitral (i.e. Final Award). It was a basic

principle of arbitration law that the arbiter's duties include rendering an exhaustive award. In the *Stair Memorial Encyclopaedia of the Laws of Scotland* Vol.2 at paragraph 459 it is stated: "Since the function of the award is to decide the matters which have been referred to the arbiter and to bring the submission to an end, it should leave none of the disputed matters undecided, unless power has been given to pronounce part awards. The failure of the arbiter to exhaust the submission is fatal to the award." and at paragraph 438 of the said article which begins with the following words "the submission ends, if not terminated earlier by any of the events referred to above, when the arbiter issues his final award. When his award is issued his powers are at an end, his office is *functus* and the submission is closed" (Lord Clarke's emphasis). Later on in the same passage it was stated that "...once the award has been signed and duly delivered, the arbiter has concluded his labours and it is no longer possible for him, for example, to state a case for the opinion of the court." Consequently SIM argued in conclusion that a new arbitration was required with a fresh deed of appointment to deal with DD's re-formulated claim.

Lord Clarke noted (a) that the 1994 Deed had given the arbiter power to award interim, part and final awards as well as proposed awards; (b) that it was agreed that the August 1999 Final Award was so; (c) that DD had not submitted that the arbiter had failed to deal with any matter put before him or had overlooked anything. He concluded that SIM had been correct in submitting that, as soon as the Final Award had been issued, the arbiter's jurisdiction had ceased and that a fresh deed of appointment had been necessary for him to have any further power in that regard. He was *functus officio*. Accordingly his actions in June 2001 had been those of someone who had no jurisdiction and was therefore not subject to the supervisory jurisdiction of the Court, but could be prevented from acting, unlawfully, by means of ordinary legal procedures (i.e. interdict etc). DD had submitted that in a general arbitration there was no limit in time, or in the number of disputes that might come before the arbiter; such was true in the sense that, as is expressly provided for in the Deed of Appointment in the present case, the arbiter might have power to make interim or partial awards, but it ignored the significance and status of the Final Award, in that it was the Final Award which terminated the arbiter's function when, and as soon as, it was issued and delivered.

6. The recent (3rd July 2002) QBD case JT Mackley & Co Ltd v Gosport Marina Ltd raises some interesting issues.

Mackley had done construction work for Gosport (under ICE 6th Edition (1991) as amended); the Engineer had been Posford Haskoning Ltd (PHL); a Notice to Refer [matters to arbitration] had been served by Gosport; Mackley sought under CPR Rule 8 that this be declared invalid; the ICE appointed an arbitrator; Mackley's action had the agreement of neither him nor Gosport (s.32(2)(a) and (b) refer); Gosport sought [CPR.11] that Mackley's action be stayed, arguing that ss 1(c) and 32 AA96 gave the Court no jurisdiction in the matter; in the alternative. Gosport argued that s.1(c) showed that Parliament's intent was that jurisdictional matters should be dealt with by the Arbitrator, not the Court. In addition, there was no adjudication clause so the Statutory Scheme applied; two adjudications ensued, both going in Mackley's favour. Pursuant to ICE Clause 66 Mackley referred its disputed Final Account to PHL who made a decision; Gosport responded by serving a Notice to Refer [to arbitration] on both Mackley and PHL.

Mackley rejected this on three grounds (i) ICE Cl.66 permitted arbitration only if the decision of the Engineer was disputed - the Notice failed to identify which, if any, decisions were disputed (ii) Gosport was out of time, the Notice post-dating PHL's decision by more than 3 months (iii) the Notice was invalid in endeavouring to start a 3-way arbitration Mackley/PHL/Gosport which had not been not provided for the contract.

Gosport (represented by Geoffrey Hawker) submitted that s.32 excluded the jurisdiction of the Court in this matter, the s.32(2)(a) and (b) tests failing, and that, in any event, s.1(c) prevented the Court from intervening except in exceptional circumstances. Mackley accepted the s.32 submission but argued (i) that the Court's jurisdiction did not flow from s.32 and (ii) that s.1(c) did not amount to a mandatory prohibition on the Court's involvement. The real issue re jurisdiction was whether s.1(c) excluded, or fettered, the general jurisdiction of the Court to grant declaratory relief. Both Counsel cited the Vale do Rio Doce case ([2000] 2 All ER (Comm) 70) in support where Thomas J had stated, following consideration of authority and the DAC Report, that s.32 was an exception, applicable only in strictly limited circumstances, to the basic (s.30) rule that a tribunal can rule on its own jurisdiction; refer §146 DAC.

HHJ Seymour's carefully-drafted judgement opines that s.1 is a "curious provision" with no direct bearing on whether a Court could grant declaratory relief since s.1 applied only in construing the rest of Part 1 of the Act; the Judge concluded that s.1(c) should be seen as an expression of Parliamentary intention. In addition, he suggested that s.30 should be seen as limited only to those matters spelt out in s.30(1)(a), (b)

and (c), in particular that it was not beyond argument that s.32(c) excluded the power to decide that *nothing* had been submitted, i.e. there might be a lacuna in the Act.

Mackley submitted that (i) it was a condition precedent to refer a matter to arbitration under ICE 66(6) that a decision of the Engineer on the matter in question should first have been obtained and (ii) that Engineer decisions were final and binding unless pursuant to 66(6). After detailed review of authority cited by Counsel, HHJ Seymour concluded: "… notwithstanding the views of text-book writers, the Court should not customarily be troubled with disputes as to the validity of a reference to arbitration. Any question between parties as to the validity of a reference should in the first instance, at least, be determined by the arbitral tribunal." He then agreed with Mackley's submissions, noting that the ICE form of contract predated the 1996 Construction Act and made no allowance for adjudication. Further, dismissing most of Gosport's submissions (i) s.108(2)(a) of that Act had no relevance to any arbitration which might follow adjudication, (ii) s.108(3) did not provide that arbitration was the sole option, rather that arbitration, as final determination of matters referred to an adjudicator, is available only when provided for in the contract or by an ad hoc submission agreement, (iii) the argument that the effect of giving a Notice to Refer under Clause 66 without an Engineer's decision was that the reference was in suspense until such time as the Engineer has made a decision was "palpable nonsense"; (iv) the Notice had sought to commence a tripartite arbitration despite Gosport's claim that it really sought to establish two separate arbitrations.

Mackey was granted its declaration

7. Someone at the Royal Courts of Justice has been using the summer holiday period to clear out their in-trays – a number of hitherto unpublished judgements have belatedly appeared in the Court website:

In Cuflet Chartering v Carousel Shipping Co and Keen Maritime (2000 Folio 431; Moore-Bick J), Cuflet applied under s.68 to set aside an award made by the distinguished LMAA Arbitrator Mr. Alec Kazantzis ("AK").

In 1995 Carousel chartered a vessel to Cuflet on the Baltime form, the charter expiring (after extension) on 3rd October 2000. By 1998 a dispute had arisen i.r.o. hire and AK was appointed sole arbitrator; on 12th January 1999 he published an interim award in favour of Carousel in the sum of US$1.9m; no challenge was made to that award. The charter was terminated by repudiation some time in 1999 and Carousel instructed Solicitors, seeking unpaid hire and damages, and a claim was lodged with the Arbitrator in December; he gave Cuflet until 31st January 2000 to submit its defence. Following various extraneous events (including Carousel's arrest of a vessel), representatives of the parties agreed to meet in early February. However, on 31st January Carousel's Solicitors wrote to the Arbitrator stating that Cuflet had not lodged its defence and, on their request, the Arbitrator issued a peremptory order requiring submission of the defence by 9th February; in response to Cuflet's statement that the parties were in settlement discussions, the Arbitrator extended time to 14th February but made it clear both that he would proceed to an award on such documents as were before him (i.e. the claim) and that any further extension of time should be only with the agreement of both parties; Cuflet asked Carouse to agree to suspend proceedings but it declined to do so. No defence having been lodged, the Arbitrator, pressed by Carousel's Solicitors, published his Final Award on 18th February.

Cuflet applied under s.68(2)(g) to set the Award aside: it did not submit that the Award had been procured by fraud as such, rather that this was a case in which the award had been procured in a way which was contrary to public policy. It also submitted that even if Carousel had not expressly agreed to suspend the arbitration, they had nonetheless induced Cuflet to believe that no award would be made during settlement negotiations and had then gone behind its back so as to obtain an award i.e. that Carousel had acted unconscionably and contrary to public policy. In response, Carousel submitted that the Court should only intervene under s.68 in extreme cases and that the coupling of public policy with fraud in s.68(2)(g) was a clear indication that where, as in this case, the applicant relied on the conduct of the respondent in connection with the proceedings as constituting the serious irregularity the Court had to be satisfied that it was of a genuinely reprehensible character.

Per Moore-Bick J, "public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable … to attempt to define the circumstances in which subsection (2)(g) [was] capable of being invoked. However, where … one party to arbitral proceedings bases his complaint on the manner in which the other conducted himself in relation to the proceedings, I doubt whether anything short of unconscionable conduct would justify the Court in setting aside the award … it would not be enough to show that [Carousel] had inadvertently misled Cuflet, however carelessly they might have expressed themselves. However, once it is recognised that the allegation is one of serious impropriety it must also be recognised that cogent evidence will be required to satisfy the Court that Carousel did behave in such a manner."

Much of Moore-Bick's judgement consists of analysis of the exchanges between the parties in this context but he noted that (i) the dispute had been going on for two years; (ii) Cuflet had shown no sign of contesting Carousel's claim until the point at which its vessel was arrested; (iii) Carousel was clearly not going to concede the tactical advantage such arrest conferred; and (iv) that its participation in settlement negotiations had to be understood in that context. While Carousel had (i) never stated in terms that it owners would not concur in extending time, (ii) repeatedly assured Cuflet of its good will and its intention to try to settle amicably and (iii) assured Cuflet that the arbitral proceedings would not prejudice its willingness to seek an amicable solution, it had never suggested that it was willing to suspend proceedings while talks continued, a fact indirectly acknowledged by Cuflet in correspondence. Had Carousel misled Cuflet prior to the settlement negotiations, such would have been dishonest and the Court required clear evidence to such effect; no such evidence had been exhibited. Although both parties' representatives were communicating in a 2nd language (English !), there had been no misunderstanding in this regard. Cuflet had been aware that the Arbitrator would proceed to an award if it did not serve its defence and if Carousel did not agree to an extension. Cuflet continued negotiations not because it believed that proceedings would be suspended, but because it hoped to settle, rendering proceedings irrelevant.

Cuflet also submitted that Carousel's Solicitor's fax of 15th February to the Arbitrator had misleadingly stated that there had been no response from Cuflet during the previous two weeks (the Solicitors had been unaware of the negotiations). Moore-Bick J refused to accept that this had given rise to a serious irregularity of a kind causing substantial injustice to Cuflet. The Arbitrator had made it clear that, absent Carousel's agreement, he would grant Cuflet only a short extension and that in default of any defence he intended to proceed to his award; consequently, he had little choice but to pursue that course - had he granted an extension absent any application from Cuflet and agreement of Carousel, Carousel would justifiably have been aggrieved. The Judge concluded that this was not a case in which Carousel had acted in an unconscionable way in order to obtain an award behind Cuflet's back. Cuflet had also submitted that it had been deprived of the opportunity of putting forward its case and that this constituted a substantial injustice but the Judge declined to accept that in the present case where Cuflet had failed to reach the necessary threshold. Finally, Cuflet had issued the present application out of time and therefore required an extension s.79 but, since the application failed anyway there was nothing to be gained by granting an extension of time.

8. (¶) In many practical circumstances, the juridical distinction between England and Scotland has little consequence but a recent Court of Appeal case *Ennstone Building Products Limited v Stanger Ltd* ([2002] EWCA 916; judgement delivered 28th June 2002) raised interesting and significant questions. In addition, the appeal was from a decision of HHJ Frances Kirkham, known to many of us.

Ennstone supplied stone from a quarry in County Durham for use as facings of a new building in Edinburgh; the stone suffered from staining and Ennstone contracted Stanger to investigate, test and report on the problem, subsequently alleging that the latter had been negligent and/or in breach of contract; the latter denied both the contractual and the tortious claims. A trial of certain preliminary issues was ordered of which three are relevant here: (1) what were the essential terms of the contract between Ennstone and Stanger and what was its characteristic performance ? (2) what, if any, was the basis of any duty of care that Stanger might have owed Ennstone ? (3) what was the proper law of the contract and of any duty of care found in issue 1 and/or 2 ? This appeal was i.r.o. HHJ Kirkham's determination of (3) in which she had determined that Scottish law was the proper law both of the contract and of any tort ("delict" in Scotland); while the distinctions between English and Scottish contract and tort laws are generally of little import, the shorter Scotland limitation period meant that Ennstone's claim would be time-barred in Scotland but not in England.

Stanger was part of the Tarmac group, registered in England but carrying out its business through a Scottish Division based in Glasgow. Following a meeting with Ennstone in Glasgow, Stanger issued a quotation and programme therefrom, covering investigation at the quarry in County Durham, a desk study and visits to sites including the problem building itself and to another building in Scotland where similar stone had been used. Following laboratory testing and reporting, there were then to be site trials, including supervision by Stanger of cleaning trials at the stained building. Stanger advised that the building stone should be treated with oxalic acid but fresh staining followed and a second consultant advised that that treatment had exacerbated the staining. Consequently Ennstone commenced proceedings.

No formal contract document had ever been issued and HHJ Kirkham held that the terms of the contract were contained in the quotation and related correspondence, none of which determined the proper law. As to jurisdiction and forum, she held that the English courts had jurisdiction both in contract and in tort but reached no conclusion as to the proper law. The parties agreed that (i) the characteristic of the contract was the supply of advice and that (ii) the proper law of the contract was to be determined in accordance

with the Contracts (Applicable Law) Act 1990 ("CLA90") which incorporates the Rome Convention into law and which provides inter alia (Art. 4) that "… the contract shall be governed by the law of the country with which it is most closely connected. …" HHJ Kirkham held that (i) the services had been performed substantially in Scotland hence that Scottish law applied and that (ii) even if she was wrong as to performance, then Scotland 'prevailed' under Article 4(5).

As regards tort or delict, the acts and omissions complained of took place before the coming into force of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act") with the consequence that the rules determining the law governing this claim were those to be found at common law. Citing inter alia the Privy Council case of *Red Sea Insurance Company Limited –v- Bouygues SA* [1995] 1 AC 190, HHJ Kirkham concluded that "the overall picture is that the necessary skill and care were to be exercised by the defendant substantially in Scotland … [the quarry investigation and delivery of reports] … [were] a minor element …. following … Lord Slynn in *Red Sea*, … Scotland [was] the country which [had] the most significant relationship with [the alleged tort/delict]. It follows that the proper law relating to the duty of care which the defendant owed to the claimant is Scottish."

In the CoA, after careful consideration of CLA90 and the Rome Convention, Keene LJ concluded that the presumption under Article 4(2) was indeed that, where the contract is entered into in the course of the relevant party's trade or profession, the country of that party's principal place of business is to be seen as the most closely connected country, unless the contract terms specify that performance is to be effected through some other place of business. There was insufficient linkage with Scotland for the presumption under Article 4(2) to be disregarded by virtue of Article 4(5) (effectively an "all other things being equal" backstop) hence the judge had been wrong as regards the law of the contract.

After expressing some reluctance to separate the law of the tort from that of the contract, Keene LJ concluded that, as a matter of English law, where a tort consists in essence of the giving of negligent advice, that tort is committed where the advice is received (*Diamond v Bank of London and Montreal* [1979] QB 333) so that the alleged tort in this case was in England, in which case English law would apply. If he was wrong and this was a foreign tort committed in Scotland, English law would still normally apply so long as the double actionability test was met (see *Boys v Chaplin* [1971] AC 356) although there is of course a well-established exception to the general rule which allows the court to apply the law of the country which has "the most significant relationship with the occurrence and with the parties" although "The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred." (Lord Wilberforce in *Boys*)

Consequently, reversing HHJ Kirkham on both contract and tort, judgement was given in (effectively) Ennstone's favour in that it would benefit from the more generous English law limitations.

This case illustrates not only the considerable difficulty in applying Art.4 in practice but also the partial, even substantial, presumption in favour of the residence of the defendant as determining the proper law of a contract since the threshold for displacing that is seen as relatively high requiring, inter alia, express contract language as to the place of performance. However, there can be no point in specifying such matters with a view to securing a correct passage through Article 4 when it is so much easier to state the applicable law in the first place. As Bart Simpson would say, "Doh …….!!)

9. Cases can be like buses – you can wait for ages then two come along together; so is it with choice of law cases and Article 4 of the Rome Convention.

In Caledonian Subsea Ltd v. Micoperi srl (First Division, Inner House, Court of Session; Opinion delivered 12th July 2002), Micoperi asserted that the proper law of the contract was Egyptian, Caledonian asserting Scottish. Micoperi's argument was, broadly, that the sub-contract (diving work related to the laying of an offshore gas pipeline in Egyptian territorial waters) was for work in Egypt, that the head contract was with an Egyptian entity and expressly subject to Egyptian law; Caledonian relied on Articles 4(2) and 4(5) of the Rome Convention (see *Ennstone* above).

The decision was for Scottish law and is therefore on all fours with Ennstone; however the Scottish judges adopted a slightly different line of reasoning (and did not entirely agree with each other) so there is plenty of meat in the fine distinctions of judicial logic.

10. You might have thought that Locabail was history, notwithstanding the important fine-tuning of the "R v Gough" test by the House of Lords in Porter v MaGill, a decision following a thorough review of Euro-jurisprudence and the HRA; had you so thought, you were wrong – "Son of Locabail" was decided in December 2001 and by the "Locabail judge" but the full text judgement has only recently been released.

The principles of Locabail are well-known but the facts are less so: the Court of Appeal decision in the case we know as "Locabail" was in fact in respect of the conjoined appeals in five cases, two of which

involved affiliates of Locabail. In the two Locabail cases, decisions of Lawrence Collins J, sitting as a temporary judge while then Senior Partner of the leading firm of solicitors, Herbert Smith, were appealed on the basis that he could not be impartial since Herbert Smith, outwith his knowledge, had advised a party with whom one of the parties in the Locabail case was in a wholly unrelated dispute; the argument was that Herbert Smith, and hence Lawrence Collins J himself personally, stood to benefit from the Locabail case since the unrelated party itself potentially stood to benefit from the outcome of the Locabail case in that, depending on its outcome, more monies might be available to creditors. The appeal was dismissed, both because the connection was tenuous in the extreme and because the complainant in the Locabail case did not raise the issue until after Lawrence Collins had given a judgment against that complainant, by then six months after the Herbert Smith connection had been discovered. The CoA held that the fact that Herbert Smith had acted in unrelated proceedings against the husband of the litigant did not disqualify Lawrence Collins J on the broader ground of apparent danger of bias but that the question was whether, in the light of his actual knowledge at the time of hearing and of any other relevant facts established by the evidence, there was a real danger of bias to which the answer was a clear "no".

In "Son of Locabail" (BCCI v Ali; judgement given 3rd December 2001), Lawrence Collins, by then no longer a partner in Herbert Smith but instead a full-time judge, had been appointed sitting Judge to deal with all matters connected with the very extensive litigation arising from the liquidation of BCCI. An ex-employee of BCCI sought to have him removed from sitting in a case between a group of ex-employees and the liquidator of the Bank on the grounds that, notwithstanding that he was no longer a partner in Herbert Smith, he could not be impartial since Herbert Smith continued to advise Price Waterhouse which had been auditors to the Bank prior to its going into liquidation.

Lawrence Collins J dismissed the application to have himself removed both because the grounds for removal were wholly without substance and because of the important public policy that judges, once appointed to a case, (particularly one of the complexity of the BCCI litigation) should resign only if wholly necessary. In his judgment, he emphasised that certain firms of solicitors advising ex-employees had withdrawn their objections to his sitting and the liquidators had no objection; applying objective analysis, the observer of the BCCI v Ali proceedings would be deemed to know that (inter alia) (i) the present proceedings were between ex-employees and the liquidator and that PW was not party, either directly or indirectly, thereto; (ii) HS had acted for PW in certain proceedings; (iii) he had ceased to be a partner in HS in September 2000 (iv) although he was aware of the litigation per (ii), he had had no personal involvement in BCCI matters while at HS, and had not even been aware that there were proceedings by ex-employees against PW until the matter had been raised in these proceedings; (iv) the liquidators and the amicus curiae had confirmed that in their view the facts did not give rise to any reasonable apprehension of bias.

11. Some recent international developments:
    (a) Thailand has passed a new Arbitration Law (BE2545 [2002]) effective 30th April 2002, replacing the old (1987) BE 2530; the new law is substantially in Model Law form and removes the hitherto troublesome distinction between domestic and international arbitration.
    (b) Japan, whose Arbitration Law is contained in Part VIII of the Code of Civil Procedure derived from the German 1890 Code, is considering draft legislation to introduce a Model Law regime; it is expected to be passed by the Diet in 2003.
    (c) In what appears to be the first ever case of enforcement in Việt Nam of a foreign award against a VN company, Kurihara Kogyo's $895,000 HKIAC award against Hanoi Hotel JVC was enforced by the Court in Hà Nội.

12. While not directly relevant to arbitration, the 2001 decision in the Court of Appeal in *Merrett v Babb* not only significantly affects valuers (of whom several are recipients of this newsletter) but extends a critical area of tort law. Mr Babb had been an employee of a substantial sole practitioner firm of surveyors and valuers whose principal had been made bankrupt and where the trustee of the bankruptcy had (wrongly) terminated the firm's indemnity cover; Mr Babb had negligently valued a property for mortgage purposes for Ms Merrett who sued him directly for her losses. Extending the jurisprudence in *Smith v Eric S Bush* and *Harris v Wyre Forest DC*, the Court held that he was personally liable to meet her claim.

    Consequently, employees who provide professional or other specialist advice are at risk in the event of any shortfall in the employer's insurances and other resources. It follows therefore that any such employees, professional or otherwise, should seriously consider taking out their own insurance to cover such risk, either where the employer's insurance did not cover them personally, or where it might not respond in full. It should be noted that such employee insurance may be difficult to obtain and the premium relatively expensive; the RICS is reported to be addressing this issue.

13. Caparo Revisited and With A New Twist: in Royal Bank of Scotland v Bannerman Johnstone Maclay (Outer House, Court of Session; Opinion by Lord McFadyen 23rd July 2002), BJM was a firm of Chartered

Accountants which had audited the accounts of APC Ltd, a plant hirer, to which the Bank had lent £33,095,000 and in which the Bank had injected equity prior to APC and its subsidiary APC Civils Ltd (of which BJM was NOT the Auditor) being put into receivership. The Bank alleged (a) that BJM, as auditors of APC, owed it a duty of care (DoC) and that it had suffered loss as a result of breach of that duty (b) that its loss had been caused by fraud on the part of a Mr McMahon who had been, at the time of the acts in question, a BJM employee seconded to act as APC's financial controller, and that BJM was therefore vicariously liable. BJM had signed off as "clean" APC's accounts for the periods to 30th November 1995 and 31st March 1997 and had been in the course of finalising the accounts for the year to 31st March 1998 when the receivers were appointed. Certain preliminary issues, principally involving liability, came to trial.

Central to the Bank's case was its assertion that "It was [BJM's] duty to the [Bank] to take reasonable care in acting as the Auditors of APC … [and] to exercise the reasonable skill and care which would be exercised by any Auditor of ordinary competence. [BJM] knew from the outset that the [Bank] had an option to subscribe for a significant shareholding … [and] that the pursuers were shareholders in APC from October 1996 … [and] that the [Bank was a] substantial creditor … of APC … [and] that the [Bank] was APC's principal bankers … [and] that the business of APC was heavily reliant on its … overdrafts … [and] that shareholders of APC including the [Bank] relied upon the audited accounts in order to obtain assurances that the company's financial statements were free of material mis-statements caused by fraud or other irregularity or error. … . Statement of Auditing Standards 130 entitled 'The Going Concern Basis in Financial Statements' required Auditors, when forming an opinion as to whether financial statements give a true and fair view, to satisfy themselves that the company being audited will be able to continue as a going concern for twelve months after the date a given audit report is signed. An Auditor requiring to satisfy himself of APC's ability to continue trading, especially given its heavy dependence on borrowing from the [Bank], would need to see the bank facility letters each time he carried out an audit. … Those facility letters contained the requirement not merely that audited accounts be provided annually to the [Bank] but that management accounts be provided to it monthly, shortly after the end of each month. ... [BJM] accordingly knew that the provision of audited and management accounts to the [Bank] was a condition of [its] funding APC to enable it to continue to trade … [and] knew that the [Bank] would rely on the audited accounts as a check on the reliability of the monthly management accounts … . [BJM] knew that the statements and accounts audited by them constituted the main independent check on APC's own monthly management accounts and the main means of assessing the profitability of APC. …….. It was also [BJM's'] duty in auditing the accounts of APC to have regard to any liabilities of [Civils] which might have a material impact on the accounts of APC itself and to satisfy themselves, either from audited accounts of [Civils] or from other adequate evidence, as to the existence and extent of any such material liabilities. In all these circumstances it was reasonable for the [Bank] to rely upon BJM to exercise reasonable skill and care in auditing APC's accounts. *Separatim*, in all the circumstances [BJM had] assumed responsibility towards the Bank for exercising reasonable skill and care in auditing APC's accounts."

BJM responded that the Bank had not demonstrated the existence of a DoC, submitting that the existence of such would depend (a) on the foreseeability of damage suffered by the Bank as a consequence of reliance on BJM's negligent mis-statement, (b) on the existence of a relationship of proximity or neighbourhood between BJM and the Bank, and (c) on its being fair, just and reasonable in the circumstances of the case that such a duty should be imposed. Within the particular context of alleged liability for negligent mis-statement, proximity was to be measured, BJM submitted, by reference to whether (i) the person providing the information was actually or imputedly aware that the information in question would be communicated to the claimant, the claimant being an individual or a member of an identifiable class; (ii) the information was so communicated by him for a particular purpose; and (iii) the person providing the information knew that the claimant would rely on it for that purpose. It would be wrong to fall into the error of concentrating on the reasonable foreseeability of loss through reliance on the information to the exclusion of consideration of the purpose of the provision of the information. Counsel for BJM gave an extended review of authority including *Candler* v *Crane, Christmas & Co* [1951] 2 KB 164, *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465, *Al Saudi Banque* v *Clark Pixley* [1990] 1 Ch 313, *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 in particular the celebrated passage by Lord Bridge at p.620 and again at 623

> "These considerations amply justify the conclusion that auditors of a public company's accounts owe no duty of care to members of the public at large who rely upon the accounts in deciding to buy shares in the company. If a duty of care were owed so widely, it is difficult to see any reason why it should not equally extend to all who rely on the accounts in relation to other dealings with a company as lenders or merchants extending credit to the company. A claim that such a duty was owed by auditors to a bank lending to a company was emphatically and convincingly rejected by Millett J in *Al Saudi Bank* v *Clarke Pixley*".

and at 624H his Lordship added:

> "It would be ... wrong, in my opinion, to hold an auditor under a duty of care to anyone who might lend money to a company by reason only that it was foreseeable as highly probable that the company would

borrow money at some time in the year following publication of its audited accounts and that lenders might rely on those accounts in deciding to lend"

Counsel for the Bank analysed the differences between this case and Caparo's: in the latter case (i) the auditee had been a PLC while APC was a private company; (ii) the plaintiffs had relied on the audited accounts to purchase shares in the company on the stock market; here the Bank's share purchases were made in pursuance of an option; (iii) the accounts were put into general circulation; here they were specifically provided to the Bank; (iv) the auditors knew nothing of the identity of the share purchasers, whereas here the Bank's identity was well known to BJM, as was the purpose to which the Bank intended to put the accounts; (v) recognition of a duty to the plaintiffs would have opened up the possibility of liability to an indeterminate class; that did not arise in the present case. Following review of the authorities, Counsel summarised the Bank's case:

(1) A DoC arose where the defender knew or ought to have known that an identified person would rely on the information or advice which he had provided for a particular purpose.
(2) Throughout the fifty years since *Candler*, the emphasis had been on the need for knowledge, not intention, on the defender's part, and such knowledge was sufficient to overcome the problem of potential indeterminate liability which would otherwise arise if it were enough merely to show that reliance was reasonably foreseeable.
(3) When a person knew who was likely to rely on information or advice provided by him, and the purpose for which it would be relied on, and, in that knowledge, went ahead and provided the information or advice, he thereby assumed responsibility to the person placing reliance on it just as much as if he had intended that the information or advice be relied on for that purpose.
(4) The requirement of knowledge of the particular person or class of persons likely to rely on the information or advice, and the purpose for which such reliance is likely to be placed on it, enabled the defender, if he so chose, to disclaim responsibility to that person or class.
(5) This approach avoided the risk of indeterminate liability, and explained in which cases a DoC arises and why it was fair, just and reasonable that a DoC should be imposed in those cases.

Having summarised respective Counsel's extensive submissions at some length, Lord McFadyen commenced by observing that it was common ground between the parties that the existence of a DoC fell to be determined by the application of a tri-partite test, involving (i) foreseeability of loss, (ii) a relationship of proximity between the pursuer and the defender, and (iii) consideration of whether it was fair, just and reasonable that the law should impose a duty of the particular scope in question (see Lord Bridge in *Caparo* at 617H-618A). He continued that it was reasonably clear that the effect of the *dicta* in *Caparo* was that for a relationship of proximity to be held to exist the adviser must, at the time when the advice was given, know:

(1) the identity of the person to whom the advice or information was to be communicated,
(2) the purpose for which that person was to be provided with the advice or information, and
(3) that the person to whom the advice or information is communicated was likely to rely on it for the known purpose.

Lord McFadyen did not accept BJM's submission that more than mere knowledge was required and that there must have been "intention" that the Bank should rely on the audited accounts for the known purpose, the authorities cited falling short of an unequivocal statement to that effect. Further, he drew support in his rejection from BJM's failure to disclaim responsibility to the Bank for the consequence of any reliance that the latter placed on the audited accounts for that purpose. If such a disclaimer had been made, it would in Lord McFadyen's view, have been impossible to infer from the fact that the audited accounts were provided in knowledge of the purpose for which the Bank was likely to rely on them that BJM had assumed such responsibility. The absence of such a disclaimer, despite the fact that one might have been made, was a circumstance which enabled the inference of assumption of responsibility to be made; to allow such a role to the absence of disclaimer was in accordance with the approach of Lord Reid in *Hedley Byrne* at 486 and Lord Bridge in *Caparo* at 621A-B.

There was, of course, a second stage at which a disclaimer may be relevant, namely to negate liability for breach of a DoC that had been held to exist. *Smith v Eric S Bush* was an example of circumstances in which (1) the making of a disclaimer was held not to exclude the inference that a relationship of proximity existed, but (2) the disclaimer required to be considered to see whether it effectively excluded liability for the breach of the duty which arose out of the relationship of proximity. However, *Smith v Eric S Bush* was distinguishable from the present case in that it fell into the special category of the duty owed by a valuer of domestic premises for mortgage purposes. There a relationship of proximity was held (despite the disclaimer) to arise between the valuer and the purchaser from the combination of circumstances (1) that the valuer knew that, disclaimer or no disclaimer, the purchaser was highly likely to rely on the valuation, and (2) that the valuation report, although instructed by the mortgagee, was paid for by the purchaser. *Smith* v *Bush* did not justify the conclusion either that in a case such as the present the absence of a disclaimer cannot constitute a circumstance which goes to support the inference of assumption of risk, or

that in general the question of whether there is a disclaimer can only be relevant once it has been accepted that a duty of care exists.

The Bank had made a number of assertions about BJM's involvement in APC's financial affairs outwith the auditor role as, and its awareness of the Bank's' role as APC's principal bankers, and as the source of its working capital. These assertions were relevant to the question of proximity, but the critical assertions were those relating to BJM's knowledge of the use to which the Bank could be expected to put the accounts. BJM had required to satisfy itself of APC's ability to continue as a going concern and that in turn had required it to be satisfied as to the basis of the company's borrowing from the Bank, i.e. it was aware of the terms of the facility letters and, in particular, of the Bank's entitlement to see management accounts and annual audited accounts; that in turn supported the inference that BJM had been aware that the purpose for which the audited accounts would be communicated to the Bank was directly or indirectly as a check on the reliability of the management accounts, so that the latter might be relied on in making decisions as to whether, and if so at what level, the Bank would continue to lend to APC. ***There therefore existed a relationship of proximity between BJM and the Bank, giving rise to a duty owed by the former to the latter to take reasonable care to save the latter from suffering loss through relying on the accounts when making lending decisions***.

It was necessary to consider separately the question whether BJM owed the Bank a DoC i.r.o. relying on the accounts when making investment decisions in relation to the option to take shares in APC because it was clear from the authorities that there was a need for knowledge on the defender's part of the particular purpose for which the information was provided ("the very transaction in question" - per Denning LJ in *Candler* at 183; "fully aware of the nature of the transaction which the plaintiff had in contemplation" - per Lord Bridge in *Caparo* at 620H). There was, however, no directly equivalent basis to that above for the inference that BJM was aware that the audited accounts would be used by the Bank to make investment decisions i.r.o. share options. It could be argued that the Bank's lending and injecting equity capital were simply two ways of supporting APC and that it would be unrealistic to distinguish the Bank's use of the accounts for one of these purposes from their use of them for the other. This point was left to trial.

In conclusion [on this part of the case], Lord McFadyen held that the Bank had shown sufficient case on proximity to go to trial.

On the other principal issues [addressed here only briefly]:

(a) **APC Civils**: Lord McFadyen deferred to trial the question of whether BJM owed any DoC i.r.o. APC Civils which, although it had not audited the subsidiary's accounts, it was aware that APC had guaranteed APC Civils' debts;

(b) Alleged Fraud by McMahon/Vicarious Liability: There were two separate issues (i) whether on a proper reading of the Bank's pleadings it could be said that McMahon was effectively an APC employee – if so, the assertion of vicarious liability collapsed (ii) if McMahon had remained a BJM employee, whether his wrongdoing could be said to have been committed in the course of that employment. Regarding (i) the critically important factor was usually where lay the right to direct and control the manner in which the employee discharges his duties. The Directors of APC could scarcely, consistent with their duties as such, delegate control of the financial affairs of the company to one who was not subject to their direction and control not only of what tasks he undertook on the company's behalf but also of how he went about the performance of those tasks. His responsibility for the preparation of the company's annual figures for audit by BJM was also inconsistent with his remaining subject to the latter's direction and control.

14. The effect of conditional and contingency fee arrangements upon judicial costs orders continues to create new complications, with a consequential knock-on effect on arbitrators albeit indirectly so. The Court of Appeal has added another brick to the edifice in the recent case Factortame & Ors v Secretary of State for Transport (EWCA Civ 932; judgement delivered 3rd July 2002). As you may recall, the long string of Factortame cases arose from the Brussels-sanctioned quasi-theft of a substantial part of the UK's fishing quotas by European interests (one country in particular) with the consequence that the UK taxpayer has been paying out massive sums for the privilege of having its valuable fish quotas removed.

The latest case was an appeal from a 2001 decision by a Costs Judge concerning recovery as costs fees paid to Grant Thornton, a firm of accountants, as 8% 'of the final settlement received'. The SoS argued that that agreement was champertous (champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit' – Chitty 28th Ed. 17-054) and therefore unenforceable with the consequence that Factortame was not entitled to recover as costs any sums paid thereby; the Costs Judge had held that the agreement was not champertous. Because the question of whether maintenance and champerty can be justified is one of public policy, the law of champerty must be kept under review as public policy changes and application of precedent can be risky. Grant Thornton had provided accountancy services to Factortame and were owed approx. £200,000 plus interest, the only realistic hope

of recovery of which lay in Factortame's success in recovering substantial damages, ultimately from the UK Taxpayer.

In the course of a long and very detailed judgement, the Master of the Rolls (Phillips LJ) stated

> "A contingency fee agreement which entitles those providing litigation services to a percentage of anything recovered may give rise to particular objection on the ground that it poses a temptation to act in an unethical manner in order to achieve the maximum recovery. … it is pertinent to consider the role played by Grant Thornton in order to see whether the nature of their interest in the outcome of the litigation carried with it any tendency to sully the purity of justice on the facts of this case."

and

> "The prospect of receiving 8% … would have provided a motive for Grant Thornton to inflame the damages … . As to the likelihood of [this occurring], … Grant Thornton are reputable members of a respectable [Phillips MR appears not to have heard of Arthur Andersen !] profession whose members are subject to regulation. We do not believe than any reasonable onlooker, or indeed the SoS, would seriously have suspected that the fact that they were to receive 8% of the recoveries would tempt Grant Thornton to deviate from performing their duties in an honest manner. Had this not been the case, we do not consider that there would have been much scope for Grant Thornton to influence the outcome of the assessment of damages."

The agreement with GT was held non-champertous and the appeal against the Costs Judge's order was dismissed.

Comment: it should be noted that while the outcome substantially turns on the particular facts of the case, Phillips MR's thorough exposition of the law does support the general proposition that contingency fee arrangements are not necessarily champertous.

15. The question of what interest rates to award in arbitrations has received further guidance (see also ARBITRATION 68/2 (Kuwait Airways case) and the recent case Ahmed v. Jaura). From 7th August 2002, the UK legislation which provides for interest on overdue debts will apply to all (previously only small) businesses so that any creditor business can levy a statutory interest rate of base+8% unless the contract provides an alternative remedy which is "substantial", a word which will in due course be clarified in the Courts although DTI guidance suggests that the rate should compensate the supplier, i.e. must be at least equivalent to the latter's overdraft rate and must be more than the customer's deposit rate. In addition, creditors can now claim "reasonable" debt recovery costs - these are fixed by law and range from £40 to £100. Further, calculation of the interest rate has been simplified - instead of having to find out the base rate applicable on the day the debt fell due, the rate applicable to debts falling due in the first half of the year is now 8 percent over the base rate on the previous 31st December and for debts falling due in the second half of the year the rate is 8 percent over the base rate on 30th June. These reference rates can be found on the website www.payontime.co.uk.

The aim of the legislation was to encourage a culture of prompt payment, especially for small and medium enterprises, but suppliers are not required to apply the statutory rate and it remains to be seen whether small suppliers will feel able to impose such a rate on large customers.

16. The Lord Chancellor has announced acceptance in principle of Law Commission recommendations to streamline time limits for bringing civil claims - the Limitation Act 1980 provides for a range of limitation periods depending on the nature of the claim – refer Law Commission report "Limitation of Actions".

The recommendations suggest a basic 3-year period within which to bring a claim, to run from the date on which the claimant knew (or ought reasonably to have known) the facts giving rise to the cause of action, the identity of the defendant and that any injury, loss or damage is significant. The court would have a discretion to permit a personal injury claim to be brought outside the 3-year period. It is also recommended that there be a 10 year (30 years for P/I claims, 10 years for land-related claims) longstop period.

There is no present timetable for introducing legislation; given the present government's track record on meeting deadlines and target dates …… "mañana" sounds urgent.

17. Miscellaneous Information

(i) the Cologne-based Transnational Law DataBase (website www.tldb.de) carries a lot of [free] useful information on Lex Mercatoria and related topics so may be worth a visit;

(ii) if you are interested in the implementation of the Model Law in the 47 jurisdictions which have so implemented then "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" by Dr Peter Binder will be of interest; Sweet & Maxwell; ISBN 0-421-73940-1;

(iii) an international test of legal English has been developed – try www.toles.co.uk ; the site has a free sample examination paper ! Are you willing to embarrass yourself ?

18. Conferences/Seminars etc

(i) On 6th September 2002 the LCIA, in conjunction with Holman Fenwick Willan, is holding a Symposium on "Judicial Intervention in International Commercial Arbitration"; contact Irene Bates of the LCIA on 020-7405-8008, fax 020-7405-8009; e-mail ib@lcia-arbitration.com;

(ii) On 4th October 2002 the LCIA, in conjunction with Simmons & Simmons, is holding a ½-day Symposium on "A Few Good Men (and Women – Choosing and Challenging Arbitrators"; contact Simon Morgan at S&S – 020-7825-4209 or e-mail simon.morgan@simmons-simmons.com;

(iii) On 15th November 2002 the LCIA, in conjunction with Freshfields, is holding a Symposium on "Bilateral Investment Treaties"; contact Irene Bates (as above)

(iv) If you photocopy, for commercial purposes, any published material for yourself or clients, the changes in Copyright Law coming into effect at the end of 2002 will affect you, possibly significantly. An Institute of Petroleum Seminar will address these issues with leading experts in the field speaking; venue IP at 61 New Cavendish Street, London; on 3rd October 2002 commencing at 2pm after a buffet lunch at 1pm.

General/Administrative Notes

1. The e-mailing list for these newsletters consists of professional colleagues such as yourself with common or overlapping interests, particularly those who may not have ready access to research facilities, technical support departments etc or who may not have the time to scour legal websites, read journals etc.
2. If you do not wish to receive these newsletters, please advise and I will immediately remove you from the distribution list.
3. Conversely, if you have colleagues who might be interested, I will be glad to add them to the list.
4. I would be happy to take in contributions on the understanding that since these newsletters (a) are wholly gratis and (b) go out in my name I may exercise the appropriate editorial rights.
5. I will seek to issue at least quarterly unless major developments or the volume of items suggest interim issues.
6. In the interests of reducing length, some of the text is in terse note-form (eg use of acronyms etc) and it does not seek to be "best practice" elegant prose.
7. There are no attachments to this e-mail; if you receive an attachment WINMAIL.DAT, there is no need to try to open this since, although no-one quite knows what it's for or why it is created, it is believed to be no more than a default/back-up copy of this e-mail created by your or your ISP's software - older versions of Windows did this all the time with a .txt file attached being a copy of the message.

Issue #7 - 0820 7th November 2002

Dear Colleague,

Further to my recent newsletters, the most recent on 27th August, I set out below issue #7; refer at end for General/Administrative Notes. Note that references to sections or "s.00(1)(a)" are to sections of the Arbitration Act 1996 unless otherwise specified.

Contents

Spirit (employment/race discrimination) in which vital clarification of the "far-minded informed observer" (FMIO) test is given.

17. *Koch Shipping Inc v Richards Butler,* although arising out of an arbitration, concerns confidentiality issues arising when a partner in a Solicitor firm effectively joins the opposition. The threshold set for the standards of professional behaviour may appear extraordinarily high but RB met the test.

Section C – International Arbitration

18. Art. V of the New York Convention provides, exhaustively, seven grounds upon which a Court may refuse enforcement; it is permissive, not prescriptive and the general worldwide trend is pro-enforcement, anti-refusal. In Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co, the US Ninth Circuit of Appeals upheld a District Court decision which, at first sight, looks to be an 8th ground in that the Court held that it lacked jurisdiction over Shivnath.
19. Miscellaneous Cases: note that, while I normally do all my own research and analysis, where I cannot access the full text judgement necessary to do so, I will report briefly based on published items. In this context, the Editor and Publisher of "International Arbitration Law Review" have been most generous.
20. LCIA Bi-Annual Symposium Schedule of Questions.
21. Professor William Tetley's website, which I have commended to your attention before, is undergoing revision.

General Administrative Notes

1. In *Green Flower & Avin v Santierul Naval,* a dry-docking/ship-repair contract, entered into on behalf of GF by Avin (its manager) and the latter by Dovanko "as exclusive agents for [SN – a shipyard]", contained an arbitration agreement specifying English proper law and English law arbitration in London. 60% of the repair costs were to be payable upon completion and payment of the balance would (a) be covered by a first class bank guarantee and (b) be paid by two equal instalments, the first 30 days after completion of the repairs and the second 60 days after completion. Work, estimated by the Yard to take 25 days, commenced on 27th April 2001 but on 5th June 2001 a fire broke out inside a cargo tank and 10 Yard workers died. Understandably, perhaps, the Yard ceased work. The relevant Romanian authorities instructed the Yard to clean the vessel's cargo tanks and to take other safety measures before continuing repair works. The Yard took no action until 19th July 2001, when limited cleaning work was commenced by subcontractors. A year later, the repair works had still not been completed.

   GF claimed loss and damage by reason of the Yard's breach of contract in not effecting repairs within a reasonable time and/or damages for misrepresentation and began arbitration proceedings in London, appointing Sir Anthony Evans as their arbitrator. The Yard appointed a well-known LMAA arbitrator but made no reservation as to the jurisdiction of the arbitrators, although GF accepted that s.31(1) did not preclude the Yard from subsequently challenging the jurisdiction of the arbitrators while expressing surprise that the Yard should appoint its arbitrator without so challenging if indeed it were the case that the Yard believed itself not to be party to the contract. On 25th October 2001, GF submitted its claim for $12m in damages and an indemnity i.r.o. the 10 deceased.

   On 7th December 2001, almost 3 months after the Yard's appointment of its arbitrator, its Solicitors challenged the jurisdiction of the arbitrators, (i) denying that any contract existed between GF and the Yard and (ii) asserting that the correct forum was the Romanian Court. Subsequently the Yard asserted (iii) that Dovanko had acted as principal and that (iv) although the contract had been dated 23rd April 2001, the Yard had first sighted it in August 2001 so that any direct contractual relationship GF/the Yard was governed by the Yard's General Conditions as signed by the vessel's Master on admittance to the yard. It was subsequently agreed in Court that these issues fell to be determined by the Tribunal applying s.30 as applicable.

   However, the Yard had, in November 2001, commenced proceedings (analogous to summary judgement) in Romania to recover its drydock/repair costs making no mention in those proceedings of the pending arbitration and claiming, wholly inaccurately (i.e. by outright lies), both that the sum due was undisputed and that GF had not responded. On 10th December 2001, GF secured a High Court injunction preventing the Yard from pursuing such proceedings whereupon it withdrew them having submitted evidence in the High Court hearing. However in May 2002, following extended but unsuccessful WP negotiations, the Yard recommenced the Romanian proceedings in substantially identical form, again omitting any reference to the arbitration and again claiming that GF had failed to respond; the last assertion was truly extraordinary. On 14th May 2002 the High Court granted a fresh injunction precluding pursuit of the summary judgement proceedings but expressly not precluding arrest of the vessel.

   On 15th May the Yard applied to the Romanian Court for arrest, yet again making no mention either of the arbitration or of any of GF's arguments therein, the assertion being repeated that the latter had expressly admitted the debt as due and had failed to pay without any valid reason. Per the English Judge in the present proceedings: " Whatever may be the technicalities relating to the availability, or otherwise, of the defence of set-off (if any) under Romanian law, it is perhaps surprising in the arrest application, given the procedural history of the matter, that no reference whatsoever was made to the disputes between the parties nor to the claims being asserted in the arbitration proceedings by Owners." In any event the Romanian Court dismissed the arrest application, possibly on the ground that the vessel had already been detained by the Criminal Authorities i.r.o. the 10 deaths.

   The present proceedings before Miss Elizabeth Gloster QC arose because there was to be yet another application to the Romanian Court for summary process, i.r.o. which GF's lawyer had stated that such proceedings had to be "based on five criteria (a) urgency; (b) that it was a claim for an admitted debt which was certain, liquid and exigible, (c) that summary proceedings were appropriate (d) the summary proceedings were not contentious and (e) there existed a debt, asserted by "a written contract, statute, rules or other written instruments assumed by the parties" recognised under signature. The process did not involve a trial and there were limited rights for either of the parties to become involved; in particular, the Romanian Court might determine the case at any time. Counsel for the Yard disputed several aspects of GF's interpretations of Romanian law. However, it was well settled that the English courts would grant injunctive relief to restrain proceedings brought in breach of an arbitration clause (see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87) but, conversely, that, as an exception to this, that where parties had agreed to arbitrate, proceedings are brought and maintained solely for the purpose of obtaining security would not

generally be restrained (see *The Lisboa* [1980] 2 Lloyd's Rep. 546 and *Petromin v Secnav* [1995] 1 Lloyd's Rep. 546).

Miss Gloster held that:

(a) The Romanian proceedings were not confined to the obtaining of security but also invited the Romanian Court to determine, on a summary basis, the very issues that arose in the arbitration, this being the very reason for the order of 11th December 2001 requiring the Yard to discontinue proceedings. On the evidence and on the basis of the previous procedural history of this matter, there was a risk that, whatever the stated intentions of the Yard in the present application, the summary proceedings in Romania would indeed be used as a vehicle for the determination of the merits of the Yard's claim.

(b) The Yard had not satisfactorily explained why it had not brought, or could not have brought, ordinary (as opposed to summary) proceedings in Romania, referring to the existence of the disputed contract, to GF's contentions in the arbitration and to the fact that the Tribunal was going to decide the contract issue, on the back of which a Romanian arrest application could be made.

(c) In the event that the Romanian Court indicated that it would not adjourn the summary payment proceedings but would proceed to give a ruling in relation to them, there was no apparent immediate prejudice to the Yard in being required to discontinue those proceedings.

(d) If the Yard's evidence was correct that, as a matter of Romanian law, ship arrest proceedings could only be started in Romania by reference to a London arbitration to the extent that a counterclaim had been filed by the Yard and that such filing might be deemed under Romanian law as irrevocable submission to the London arbitration (surely unlikely in circumstances where the filing of the counterclaim was expressly stated to be without prejudice to the Yard's contentions on jurisdiction), there had been no submission that such filing would be regarded in the arbitration as a waiver of the contract issue.

(e) There was a real risk that, if summary proceedings remained indefinitely before the Romanian Court, then it might proceed to make a final order inconsistent with the arbitration proceedings or alternately its continued existence could be deployed by the Yard in some jurisdictional battle. This action was not one brought solely for the purpose of obtaining security as that phrase is used in the English authorities. Finally, in any event, on the Yard's own evidence, the summary payment procedure is a wholly inappropriate vehicle to be used in the current circumstances, where the debt is clearly disputed and an arbitration was in process where, as the Yard accepted, the issue as to whether it was a party to the Agreement would be determined by the Tribunal.

The injunction as sought by GF was therefore granted but subject to the proviso that, going forward, the Yard must have a vehicle for bringing Court proceedings in Romania solely for the purposes of obtaining security and in particular, if the Romanian Court were to consider it appropriate (about which Ms Gloster said nothing), the arrest of the vessel. In general terms, such proceedings would be of a type that: (i) were brought for the purposes of obtaining security only; (ii) were not for summary payment or judgement; (iii) referred to the alleged existence of the Agreement and the Yard's disputed contention that it was never a party to it; and (iv) referred to the arbitration proceedings and the facts: (a) that Owners disputed their obligation to pay the entirety of the Yard's invoices and had asserted a claim for damages that exceeded the amount of such invoices; (b) that the Yard disputed the jurisdiction of the arbitrators, on the grounds that it contended that it had never been a party to the Agreement and therefore to the arbitration clause; (c) that, by agreement between the parties, the arbitrators were going to determine the issue relating to their jurisdiction, i.e. whether the was any agreement in existence between GF and the Yard.

If the parties could not agree the terms of the proviso or the appropriate vehicle for the bringing of security proceedings in Romania, then the Court would decide those issues. In the meantime, and subject to any application by the Yard for a stay and for permission to appeal, Miss Gloster QC made the order in the terms sought.

2. The term 'pathological arbitration clause' (PAC) was coined to describe those clauses which, whatever the intentions of the parties might have been, fail to reflect them or alternatively were fundamentally defective in one way or another; most examples flow from referring to appointing institutions which never existed at all or which have ceased to exist by the time a dispute arises. In the modern era, where Courts are arbitration-friendly, it is generally, but not completely, settled internationally that Courts will try to give constructive effect to PACs where possible. Typically, the textbooks cite "Arbitration London" as sufficient.

In the Scottish case Bruce v Kordula & Ors (Outer House; Lord Hamilton; 15th May 2001), when faced with a not-very-PAC the learned Judge gave no indication of being aware of the international trend, in particular of the extensive efforts (particularly in France) to give effect to an agreement, albeit imperfect, to arbitrate and, in consequence, delivered a head-in-sand judgement 20-30 years behind the times. This case does no service to the efforts to promote Scotland as an arbitral centre.

PACs are dealt with in detail by Fouchard/Gaillard/Goldman for International Arbitration, particularly in the context where the institution cannot be determined with precision - see §483ff; they conclude that "if the institution can be identified with a significant degree of certainty, such clauses will remain effective" (§485). There is conflicting jurisprudence on this; in particular, the German Bundesgerichtshof has at times been unhelpful in dealing with contracts pre-dating the fall of the Iron Curtain and the cessation of activity of East German and other East European institutions but the French Courts have bent over backwards to identify an appropriate institution e.g. deciding that the non-existent "Yugoslavian Chamber of Commerce in Belgrade" actually meant the "Foreign Trade Arbitration Court of the Economic Chamber of Yugoslavia"; FGG give many other examples. It is regrettable that the Scottish Judge felt unable to accept that "Dean of the Faculty of Arbitrators" was a simple and self-evident misprint for "Dean of the Faculty of Advocates" (i.e. the equivalent of the Chairman of the Bar Council): the former phrase could only have had one meaning.

A separate question arose in a different case involving adjudication: the agreement to adjudicate was express as to which the appointing institution was but Party A applied to a wholly different institution which, without verifying its jurisdiction to act, promptly appointed an adjudicator. The latter decided very soon afterwards that he had no jurisdiction because of the improper appointment and resigned.

Suppose the preceding circumstances had occurred in an arbitration ? In English law, I submit that the matter is particularly clear: Party A's breach-of-agreement purported appointment fails the requirement of s.18(1) since the agreed procedure has failed since one party has referred the matter to the wrong institution which, absent the agreement of the other party, can have no jurisdiction whatsoever. In such case, party B should apply to the Court under s.18(2) and there can be no question other than that the Court will put the matter to the correct institution per s.18(3). There is ample jurisprudence that the Courts will make the parties stick to their arbitration agreement except where such is impossible.

To return to Bruce v Kordula, there was a 2nd reason why the PAC failed in that it stated i.r.o. any dispute that "the same shall be referred to an Arbitrator to be chosen by both the partners" (default – as above); however, the firm in question was a 5-partner firm (perhaps the firm had started as a 2-partner one) and the dispute arose i.r.o. the financial consequences of one partner's retiring. The learned Judge agreed that "both partners" could not work in a 5-partner firm.

With respect, M'Lud – WRONG: (i) the parties had agreed to arbitrate (ii) the dispute was 1 vs 4 so there were two disputants (iii) if the two sides could not agree on the arbitrator, the appointment was to be referred to the Dean of the Faculty of ***Advocates***; (iv) if the Dean could not or would not appoint, the Court had the residual power to do so.

A disappointing case.

Postscript: the 5-partner firm which caused all this trouble by writing a PAC was a firm of ……. Solicitors !!!

See also paragraph 19(11) below.

3. With apologies for catching up on past history, another 2001 Scottish case, Petition of Orkney Islands Council (Outer House; Lord Johnston; 21st September 2001) raised interesting points concerning limitation periods, the jurisdiction of the arbitrator and the Court's interference, or refusal to interfere, with the arbitrator's jurisdiction.

In or before 1992, the Council had contracted with a contractor, X, for certain works, the contract containing an arbitration agreement. A dispute arose i.r.o. the retention by the Council of liquidated damages by reason of alleged delays and, on 24th January 1996, X purported to issue a preliminary notice of arbitration but no such proceedings were ever instituted and a further notice was issued, in identical terms, on 16th January 2001 (i.e. just before the expiry of the 5-year limitation expired). The Council sought an injunction preventing X from proceeding with any arbitration since, so it submitted, (i) any dispute capable of being heard by any arbitrator was out of time; (ii) for there to be a relevant and competent submission to an arbitrator there required to be a dispute within the meaning of the arbitration agreement (iii) time having expired, there was no current dispute between the parties capable of being litigated; (iv) there had been no interruption of the limitation period and (v) as a matter of general law the Court had the jurisdiction to interfere in the context of arbitration if the issue presented to the Court was relevant and competent for its consideration The case before the Judge essentially turned on the question of whether or not there had been a relevant interruption effected by the service of notices of arbitration in 1996 and in 2001.

s.9(3) of the Prescription and Limitation Act (Scotland) 1973 states

"Where a claim ... is made in arbitration and the nature of the claim has been stated in a preliminary notice relating to that arbitration, the date when the notice was served shall be taken for those purposes to be the date of the making of the claim."

The Council submitted that there could be no question of interruption because no proper arbitration process with an arbitrator appointed and a claim made in it had ever commenced so that there was in fact no dispute between the parties. Counsel for X submitted that so long as there was a dispute as to whether or not the claim had expired, that was a dispute which fell to be determined by the arbitrator within the terms of the arbitration agreement.

Lord Johnston considered it important to place the position of the Court in relation to contracts containing arbitration clauses in its proper context. There was no doubt that the law did not oust the jurisdiction of the Court in general terms from consideration of contracts containing arbitration clauses but equally, where the claim or dispute in question fell firmly within the terms of the arbitration clause, it would only be in the most exceptional cases that the Court would interfere to prevent the matter being resolved by arbitration. The corollary to this was that, while it was recognised that before there could be an arbitration there must be a dispute, the Court, in being asked to determine whether such existed, should give a very broad interpretation to the word "dispute" including whether or not there existed a dispute in relation to a claim which otherwise fell within the arbitration agreement. The jurisdiction of the arbitrator should only be ousted by the Court if there was no basis upon which a two-sided dispute could be identified. It followed that it was irrelevant whether or not the Court considered that one side's position might be much stronger than the other.

What the Court was being asked to determine was whether there was in fact any dispute which was competently capable of resolution by the arbitrator, the applicable test being that the Court was required to be satisfied that there was only one conceivable resolution of the "dispute" before rejecting the role of the arbitrator. Consequently, the Court did not have to decide the issue as to the effect of a preliminary notice in relation to an arbitration where no substantive arbitration ensued so long as it was satisfied that there were two sides to the argument; the authorities cited by Counsel were consistent with the Court's maintenance of the integrity of an arbitration process if such had been agreed to by the parties in advance. In general terms a limitation issue was capable of determination by an arbitrator and there was no special position where a dispute as to whether or not any particular claim had time-expired however strong or otherwise the position of the Council might be on that point; such dispute was for resolution by the arbitrator.

Lord Johnston concluded by refusing the injunction sought, notwithstanding that if, ultimately, the Council's position on time-expiry was proved correct, some unnecessary expense might have been incurred; such was the consequence of the arbitration agreement and, in any event, in that result the Council might seek its costs; further, the limitation issue could be dealt with as a preliminary matter in the arbitration.

4. In Sopetra SA v Popco Naval and Energy Co Ltd [2002] EWCA Civ 1279 (11th July 2002), Popco applied for permission to appeal against Colman J's order for £8,000 security (by way of a bank guarantee) for the costs of its counterclaim, failing which the counterclaim would be stayed. Sopetra was suing Popco for some $50,000 demurrage and interest but the latter (a) pled in defence that Sopetra had undertaken the demurrage risk, and (b) counterclaimed for various matters, either (approx.) US$30,000 or £9,000; the amount (unclear) is not important here. At the case management conference, Colman J had been satisfied on the evidence before him that there was a real risk that if Popco failed in its counterclaim, Sopetra would not be able to recover its costs. Popco had submitted that it could say the same about Sopetra but Colman J's response was that it was open to Popco to apply for security for costs in reverse.

Sopetra's grounds for security were that if the counterclaim failed there was a real risk either that Popco would not be good for the costs or that it would try to evade payment; Colman J had accepted this. Popco's grounds of appeal were that Colman J's order was unfair because (i) it prejudged the counterclaim which, Popco contended, was both unanswerable on the documents and partly admitted; (ii) Colman J had dealt with the application with undue haste and had not appreciated the strength of Popco's position; (iii) Colman J had either given too much weight to the suggestion that Popco was impecunious or had given it too little (a brilliant line of contradictory argument !) since the order for security would stifle the counterclaim.

Sedley LJ saw no legal basis on which Popco could realistically hope to challenge the order on a full hearing before the CoA, (i) Colman J having had sight of material on which he could legitimately order security, (ii) the sum ordered (£8,000) not being excessive and (iii) there being evidence before him that Popco was an alter ego of its sole director against whom County Court judgements were outstanding. These had been sufficient grounds for Colman J's order.

Popco had submitted that Colman J had rushed the application without an adequate appreciation of the facts and documents; Sedley LJ was sympathetic in that a litigant in person, unaccustomed to the ways of the courts, might feel that a very experienced judge who has pre-read the papers was not going through the case in open court with the attention that the litigant expected but stated that that was precisely because it was an experienced judge who had read the papers. There nothing in the material (including the transcript) before Sedley LJ to support the suggestion that the hearing before Colman J had been so rushed or truncated that it had failed to do justice.

Consequently Sedley LJ refused Popco permission to appeal since, if he did so, he would be sending it into a hearing which it was almost certain to lose, at considerable cost. If Popco did make an application for security against Sopetra, or when the case was next considered in a County Court case management conference, it might be that ADR should be considered.

5. In Downing v (1) Al Tameer Establishment and (2) Sheikh Khalid al-Ibrahim ([2002] EWCA Civ 721; 22nd May 2002), the CoA heard an appeal by D against HHJ Kershaw QC's refusal, having set aside a writ against the Sheikh on the basis that he was not a party to the contract, to set aside the writ against ATE but where he had granted ATE a stay pursuant to s.9 on the grounds that the contract contained a valid arbitration agreement operative between D and ATE in respect of D's claim for repudiation of the contract. In the event that D's appeal against the stay was allowed by the CoA, ATE applied to pursue a cross-appeal for an order that the writ against it be set aside pursuant to CPR Part 11.

D, an individual, was the inventor of a process (referred to as "Black D") for separating crude oil from water; ATE was a Saudi company; the Sheikh had been the 100% or majority shareholder (disputed) in ATE and had signed the D-ATE agreement. D had patented his invention but had insufficient funds to develop it; by a contract (including an arbitration clause) dated 22nd February 1991 ("the Agreement") he agreed with ATE jointly (50/50) to exploit "Black D" for commercial gain.

D claimed that he had submitted positive evaluation tests to two testing institutes but that, following an unsuccessful test by a company in Saudi Arabia instructed by ATE, the latter thereafter wrongly both ceased to communicate with D and took no further steps to implement the Agreement, inter alia failing to provide any further funding. In addition, ATE denied the existence of the Agreement so, by letter in 1997, D accepted ATE's repudiation of the Agreement and commenced proceedings against ATE and the Sheikh.

Before such commencement, there had been sporadic exchanges of correspondence; inter alia, in 1994 the Sheikh had written "It is almost four years since the date of the [Agreement] and you are now asserting rights to arbitrate [this Agreement] in circumstances where you have not complied with your obligation and where there has been all but complete silence from you ..." and, in response to pressure from D's US lawyers, the Sheikh's lawyers wrote (in mid-1995)"... We have made it perfectly clear in the past that our clients do not accept that they have or have had at any time *any* contractual relationship with you. ***They have no intention of dealing with you further and you should consider this matter closed***." (emphasis added). On 12th February 1997 D's solicitors replied noting the denial that ATE had had any contractual relationship with D, stating "Our client has now instructed us to inform you that he accepts your client's repudiatory breach of the Agreement … in that your client has failed to provide financing ... Our client now considers in view of your client's repudiatory breach that the Agreement between your client and him of 22nd February 1991 is now terminated." The following day, ATE's Solicitors replied "Our clients deny *any* contractual relationship between them and your client. If there had been such a contractual relationship it would appear that ***your client would have committed a fundamental and repudiatory breach some years ago***." (emphasis added).

A further 3½ years elapsed before the Foreign Office Process Department was able to confirm service of a writ in Saudi Arabia. ATE and the Sheikh acknowledged service but took no further steps in proceedings save to issue applications under CPR Part 11 to set aside the writ and service thereof and, under s.9, for a stay of proceedings.

S.9(4) states that "On an application under s.9] the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed." The burden of proving that any of the grounds in s.9(4) has been made out lies upon the claimant and, if the defendant can raise an arguable case in favour of validity, a stay should be granted: *Hume –v- A.A. Mutual International Insurance* [1996] LRLR 19. D accepted (a) the principle and implications of separability (s.7) and (b) that the obligation of the parties to perform the arbitration agreement would remain in force, despite its repudiation by ATE, unless and until D communicated to ATE that he accepted such repudiation as bringing to an end the obligation of both parties to perform the arbitration agreement, it being necessary for such "acceptance" to be unequivocal. D submitted that (1) ATE's denial of *any* contractual relationship constituted a repudiatory breach not only of the Agreement but also of the arbitration agreement and (2) that, by service of the writ and statement of claim, rather than by seeking to appoint an arbitrator, he had unequivocally accepted such repudiation.

HHJ Kershaw had accepted (1) but not (2), the latter for two reasons:

(i) a writ could not possibly be said to be an unequivocal "acceptance" of a repudiatory breach of an arbitration agreement: a party to an arbitration agreement has the right to issue a writ (or claim form) and, if he does so, he does it in the knowledge that the other party may apply for a stay but may prefer litigation and so may not apply for a stay; the position is no different if the issuer of the writ is the victim of a repudiatory breach by the other party to the arbitration agreement."

(ii) in any event the correspondence had been such that the issue and service of the writ on ATE had been 'at best' equivocal as to whether or not D was accepting ATE's repudiation of the arbitration agreement; inter alia, in their letter of 12th February 1997, D's solicitors had stated only that they had accepted ATE's repudiation of the main agreement without stating that they also accepted any separate repudiation of the arbitration agreement. Further, the issue of the writ was itself equivocal in that it too contained no statement or indication that such repudiation had been accepted.

ATE had submitted to the CoA that it had not in fact repudiated the Agreement [NOTE: it took a brave, even heroic, QC to make such a submission given the language of the correspondence – see above !] but the Court affirmed the Judge's conclusion that it had and further affirmed the Judge's view that, prior to the issue and service of proceedings, ATE had plainly demonstrated an intention not to be bound by the arbitration agreement. However, the CoA rejected the Judge's interpretation of what had been a straightforward case of a claimant who, having been rebuffed in his efforts to implement the arbitration agreement by a defendant who denied its existence or any obligation to co-operate under its terms, resorted to proceedings, only to have the defendant perform a volte face and assert reliance upon the agreement which it had hitherto denied.

The existence of an arbitration agreement did not *prevent* either party from instituting court proceedings in respect of the underlying dispute, a principle based on the rule that the parties may not agree to oust the jurisdiction of the court (see *Scott –v- Avery* (1856) 5HL Cas 811). However, it was inaccurate to refer to a right to commence proceedings in any more general sense: whether or not such commencement was a breach of the arbitration agreement by the party instituting the proceedings would depend upon the circumstances. If satisfied that a breach was involved, as it usually would be, then the Court would grant a stay; if not so satisfied, but the position was arguable, the Court would grant a stay on the basis that the issue raised was not clear and that the arbitrator had the power under s.30 to rule upon his own jurisdiction. However, the fact that a party was in broad terms free to commence proceedings despite the existence of a valid arbitration clause, at the risk of stay being granted, *did not mean* that such commencement *could not* constitute an acceptance of the defendant's previous refusal to arbitrate, so that the Court was satisfied that a stay should not be granted.

There was an inherent tension between the power of the Court to determine whether an arbitration agreement is null and void, inoperative or incapable of being performed, and the ability of arbitrators to determine their own jurisdiction under s.30. However, it is clear that the Court has the power to determine whether a stay of judicial proceedings should be granted. CPR 1998, Practice Direction 49G, para. 6(2) expressly confers such a power on the Court "where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement .." Thus, in appropriate circumstances, the Court may hold that it is clear that the arbitration agreement sought to be relied on for the purposes of a stay has in fact come to an end prior to the application for a stay being made or heard, and hence is 'inoperative' for the purposes of s.9(4) (refer *Birse Construction Limited –v- Saint David Limited* [1999] BLR 194, HHJ Humphrey Lloyd's analysis and observations therein subsequently being approved by the Court of Appeal in *Al-Naimi –v- Islamic Press Agency* [2000] 1 Lloyd's Rep 522 at 524-5.

Potter LJ rejected HHJ Kershaw's view, holding that the position of a party issuing a writ following a repudiatory breach of the arbitration agreement was different from that of a person issuing proceedings simply to test the water. The question of whether or not the issue and service of proceedings was an unequivocal acceptance of the repudiation would depend upon the previous communications of the parties and whether or not the fact of the issue and service of the writ amounted to an unequivocal communication to the defendant that his earlier repudiatory conduct had been accepted, in the sense that it was clear that the issue of such proceedings (i) was a response to the defendant's refusal to recognise the existence of the arbitration agreement or any obligation thereunder and (ii) reflected a consequent decision on the claimant's part himself to abandon the remedy of arbitration in favour of court proceedings.

Rejecting ATE's argument that the Judge's decision on repudiation should not be disturbed, Potter LJ stated that the judge's decision should be rejected if the CoA concluded that he had made a wrong inference or had come to a wrong conclusion on the basis of the undisputed facts. D, having tried to get ATE to pursue the arbitration route, resorted to proceedings only because of ATE's refusal to co-operate or acknowledge the existence of the arbitration agreement; ATE had made its position clear in that regard in its letter of 22nd June 1995 in response to D's request to arbitrate, denying any contractual relationship and stating an intention not to deal with the claimant any further. Given D's view that the arbitration agreement was binding upon both parties and should be observed, there had been no reason for ATE to have supposed other than that the taking of proceedings represented D's abandonment of his right to arbitrate.

In consequence, the arbitration agreement had been inoperative for the purposes of s.9(4) at the time ATE made its stay application.

Consequently, the CoA set aside the stay.

……..

ATE had also argued that England was not the appropriate forum for proceedings, but that Saudi Arabia was; Potter LJ stated that the principles governing the question of the appropriate forum were well known (see *Spiliada Maritime Court –v- Consulex Limited* ("The Spiliada") [1987] AC 460). In essence the appropriate forum was where the case might most suitably be tried in the interests of all the parties and the ends of justice. The first consideration was the forum with which the action has the most real and substantial connection. This latter concept includes considerations of convenience, expense, the law governing the contract, the residence of the parties and where they carry on business. Potter LJ observed that HHJ Kershaw QC had plainly had the relevant considerations in mind and had come to a clear conclusion on a matter in which the weight to be attached to the various factors involved is for judicial discretion with which this CoA was reluctant to interfere. There had been no error in the Judge's exercise of his discretion and indeed, Potter LJ considered that he had plainly come to the right conclusion. Leave to appeal refused.

6. The underlying basic principles of s.68 applications were considered by Toulson J in *Ascot Commodities NV v Olam International Ltd* (QBD; Case 2001/914; 8th November 2001); he stated that such applications depended on four questions: (i) what was the meaning of the tribunal's critical finding ? (ii) had that finding been properly open to the tribunal given the way in which the case had been presented ? (iii) had the award dealt with the essential issues ? (iv) if there had been 'serious irregularity', had it been such as to have caused serious injustice ?

A GAFTA first tier tribunal had awarded O damages of $365,000 for breach by A of a contract dated 24th July 1998, by which A agreed to sell to O 3,000T of Vietnamese white rice C&F Gabon; the GAFTA Board of Appeal (the "Board")) had dismissed A's appeal as to quantum, liability not being in dispute; the damages award was i.r.o. only 1,155T tonnes of rice. A had caused the cargo to be discharged in Cuba rather than in Gabon; the key issues concerned O's interest in the 1,155T and quantification of its loss related thereto.

A had chartered a vessel (V1) to carry three parcels of rice to West Africa, two of which were for O, i.e. the 3,000T for Gabon plus a 5,500T parcel for Ghana; the cargo was loaded at Saigon on 28th August 1998 but in September the vessel was arrested by her crew in Singapore for non-payment of wages - the vessel's management company was insolvent. In July 1998, O had sold the 3,000T to a 3rd party (AEA) at $399/T, and AEA had paid for it by an L/C; B/Ls had been endorsed by O to AEA.

On 22nd October 1998 O sold a further 1,000T to AEA at $399/T, shipment to be by a 2nd vessel (V2), for which an irrevocable letter of credit was to be provided by 30 November 1998 or before the arrival of V2 in Gabon. O bought this additional 1,000T from A in the Far East for $365,000, the O-AEA contract including, inter alia, that [AEA] had, as collateral, provided O with B/Ls for 880T+275T on V1 under the condition that AEA would pay for the 1,000T before the earlier of (a) 30th November 1998 or (b) the arrival of V1 in Gabon. These B/Ls totalling 1,155T of V1's cargo were re-endorsed to O and it was those documents (or the goods to which they related) which lay at the heart of this dispute.

Disputes arose between A, O and AEA which might have been simplified by a 3-way arbitration but that was not possible and, in March 1999, O began GAFTA arbitration proceedings against A; however, in May A agreed to buy the 3,000T Gabonese parcel from AEA and, around that time, an associate company of A bought the vessel V1 and caused her to be sailed to Cuba, where the cargo was discharged, this constituting the breach of the A-O contract with which the Board was concerned. O argued that it owned the 1,155T covered by the B/Ls, having re-acquired it from AEA in exchange for the 1,000T parcel and that its loss was the sum of $365,000, which it had paid A to acquire the latter parcel. A argued that O did not own the 1,155T. The first tier tribunal concluded:

> "The crux of this matter is whether or not [O] had, at the relevant time, title to the goods. We do not accept A's submission that [O's] taking back the [B/Ls] and holding them as security for [the 1,155T] has somehow diminished [O's] entitlement to … delivery… . [O possessed B/Ls] for [1,155T] of rice and [was] thereby entitled to expect to take delivery of that rice in [Gabon], and [A], by interfering with the contract of carriage, prevented said delivery from occurring and are therefore liable to reimburse [O] for the loss that [it] suffered in replacing the rice, namely US $365,000."

The key to A's appeal to the Board was that the tribunal had made no specific finding on the factual issue as to whether O had re-purchased the 1,155T or whether it had been provided by AEA with B/Ls simply as

security for payment i.r.o. cargo on V2 but, instead, had found that it was sufficient that O had possession of those B/Ls which, the tribunal had said, 'thereby entitled O to expect to take delivery'; the tribunal had then concluded that the consequence of the frustration of that delivery was a loss to Olam of US $365,000. A argued that the tribunal had been wrong in that approach since:

(i) mere possession of the B/Ls did not by itself make O owner of the cargo. The nature of O's interest in the cargo covered by those B/Ls depended on the intention of AEA/O at the time of transfer. .... If Ascot was right that the B/Ls were intended only to provide O with security for the 1,155T, then endorsement/delivery of those B/Ls to O could not and did not make it owner of the cargo to which they related.

(ii) If O was not the owner of the cargo but simply had a security interest in it, its loss was necessarily limited to the effect on it of being unable to enforce that security interest. Olam had produced no evidence whatever that it had or would suffer any such loss. Nor was there any reason to suppose that it had or would suffer loss. It could simply pursue AEA for the price of the 1,155T.

A's and O's submissions were detailed and contradictory as regards the transactions and who had paid whom when; the Board in its award, concluded as follows:

6.7 "We find that [O was] given title to 1,155T when [B/Ls] were endorsed by [A] to [O's] order and were paid for under the [L/C]. From [O's] submission it was acknowledged that these goods were invoiced to and paid for by AEA. O endorsed the bills of lading to AEA to obtain this payment *and subsequently AEA did re-endorse them to O in consideration for receiving alternative goods from another shipment. We therefore find that O do have title to 1,155T tonnes carried vessel V1* [emphasis added]."

6.15 "A is bound to remedy its breach and to satisfy the claim for damages entered by [O] in the sum of US $365,000 in respect of their replacement of 1,155 tonnes of undelivered goods."

What was the meaning of the tribunal's critical finding ? (i.e. as (emphasised) in paragraph 6.7) ?

(a) Counsel for A submitted that the finding meant that O had acquired full beneficial ownership of 1,155T by the re-endorsement to it of B/Ls;

(b) Counsel for O submitted that the finding meant that the B/Ls had been re-endorsed to O, expressed as collateral but intended to convey beneficial ownership, but postponed because it was uncertain which vessel would arrive first and AEA was to have an option. It was a defeasible transfer of the beneficial ownership -- defeasible at the option of AEA. If V1 arrived first, AEA would take that rice, and the sale of the 1,000T on V2 would be rescinded; if V2 arrived first, AEA would take the 1,000T and relinquish all interest in the V1 rice. In the alternative, the finding of the Board meant that by one means or another O acquired either beneficial or possessory title, sufficient to establish the loss claimed.

Toulson J "read and re-read the Board's words", finding that they did not convey either of O's submitted meanings, rather that their natural meaning was that which A had submitted; if he was wrong about that he would have to conclude that they were sufficiently ambiguous to amount to a failure to record a clear finding on a central matter. Subject to the question of serious injustice, that would be a serious irregularity within s.68(2)(f).

Was the Board's finding properly open to the tribunal given the way the case was presented ?

While arbitrators are not necessarily bound by the way in which parties present their cases, it is likely to be an irregularity -- and potentially a serious irregularity – if, on an important point, arbitrators decide an issue on a basis not raised before them without at least giving opportunity to the parties to address it (cf Fox v Wellfair and other cases). Having studied the way in which O's case had developed and had finally come to be presented to the Board, Toulson J considered that, while it had originally appeared to be one of a simple cargo swap, subsequently the case had become one of B/Ls being delivered as security and seized after AEA's non-payment for the 1,000T on V2. While O claimed that that that had always been envisaged, such did not alter the fact that under the O-AEA contract the B/Ls had been expressly provided as security. He concluded that the plain and natural meaning of the award had been that the Board had analysed the case in the way which O had initially put forward, but was no longer its case. Given O's subsequent repackaging of its case, based on forfeiture of the V1 1,155T for non-payment of the V2 1,000T, it was not properly open to the Board to accept what had been O's original case without prior notice to the parties.

Had the Award dealt with the essential issues ?

Toulson J observed that GAFTA findings were habitually brief and that many would regard that as a virtue; it was certainly not an irregularity, nor was it incumbent on arbitrators to deal with every argument on every point raised. But an award should deal, however concisely, with all essential issues. One of the heads of serious irregularity recognised in s.68(2)(d) is "Failure by the tribunal to deal with all the issues that were put to it". The central point raised by A on its appeal was that if the B/Ls had been pledged as security, as appeared on the

face of the October 1998 contract, O's loss was not to be approached in the same way as if it was beneficial owners of the cargo. The point had not been addressed by the Board.

Since the whole process of arbitration was intended as a way of determining points at issue, it was more likely to be a matter of serious irregularity if on a central matter a finding was made on a basis which did not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters. However, this was not a case in which the tribunal had directed itself to, and rejected, the central issue argued by A but, rather, the tribunal had simply missed it. Toulson J noted that he might have missed what the Board intended, but the brief words in paragraph 6.7 was all there was to go on. A had submitted that where there was a finding which addressed a central issue, but left its reasoning unclear, the appropriate course was to ask for further reasons. But if an award, as delivered, failed to contain a finding on a central issue, it would be anomalous to ask for reasons for something which was absent.

If there had been irregularity, had it been such as to cause serious injustice?

It was inherently likely to be a source of serious injustice if irregularities occurred of the kind referred to above. Since the purpose of arbitration was to determine central issues between the parties, if there had been a flaw in that this had not been done, that was likely to be a matter of serious injustice. O had submitted (a) that no serious injustice had been caused since, even if O was merely a pledgee of the B/Ls, it was bound as a matter of law to succeed for the full amount of its claim and (b that the value of any rights which O might have had against AEA were legally irrelevant and factually nil. However, observed Toulson J, the present case was a claim for breach of a contract of sale where the injured party was to be put in the same position, so far as money can, as if there had been no breach. If there had been damage to O's security interest, the question arose as to what was the true amount of its loss suffered ?

It was argued by A that in considering the extent to which O had suffered loss through inability to enforce the particular security, it was relevant to take into account any remedy it might have against AEA. In assessing the compensation due to O through interfering with the contract of carriage and thus preventing it from realising the security provided by the B/Ls in the way it would have been able to do if the cargo had been landed in Gabon, was it necessary to take into account that, per A's case, O was well able to recover the monies due from AEA by other means ? This was a point raised in A's appeal, but not addressed by the Board; it would not have been right for Toulson J to have determined summarily that A's case was self-evidently so bad, such that he could say that it had suffered no serious injustice. It was a point capable of giving rise to an issue which might have to be decided in Court, but he was not persuaded that he could reach a summary conclusion that A's case was self-evidently bad without full and proper argument on the point. As to whether any rights against AEA were hopeless on the facts, that again was a matter on which it would be wrong to have concluded summarily that A's case was hopeless: it was entitled to have those matters considered by a GAFTA tribunal.

Accordingly, Toulson J concluded that this award could not stand. The question therefore arose whether it should be set aside or remitted for further consideration.

Whether to Remit or Set Aside ?

Toulson J emphasised that this was not a case where there had been any personal impropriety on the part of the Board in any possible sense but stated that the Court might take the view that an essential matter had not been addressed and therefore there was in law a serious irregularity without imputing anything in any way personally censorious of the arbitrators concerned. He saw no reason at all why the people who had heard this appeal should not continue to deal with the matter.

But the question was whether, in the state of affairs the case had reached, it was appropriate that there should be a fresh start or a reconsideration, the latter causing potentially serious problems since reconsideration implied working upon the earlier material plus such supplementary submissions as might be allowed. The problem here was that, twelve months on from the GAFTA appeal, Toulson J doubted whether anybody had a clear or reliable recollection of exactly how matters had been argued. The fact that there were now differences of recollection between those who had represented the parties demonstrated that only too clearly.

This was not a case where there had been an award only part of which was under challenge. The challenge successfully has been to the whole of the award because of a failure to address the central point in the way that was required.

Toulson J thought that, in such circumstances, justice required that there should now be a clean start. For that reason, and not because of any suggestion of any personal impropriety on the part of the arbitrators, the appropriate course was to set the award aside.

7. In James Moore Earthmoving v Miller Construction Ltd, ([2001] EWCA Civ 654 6th April 2001), a pre-1996 Act case, Moore had appealed from an order by HHJ Seymour QC on 1st November 2000 in the TCC, in

which he had both (a) set aside an arbitrator's interim award dated 31st March 2000 and (b) removed him for misconduct. The award was for £739,693.65 against Miller.

Moore had been subcontractor to Miller in connection with the construction of a bypass; disputes had arisen. During argument before the CoA, the parties had compromised the appeal and, in such circumstances, the CoA would not ordinarily have thought it necessary to have given any form of judgement; however, two aspects of the case had persuaded the Court that it was appropriate to say something: first, the reputation of the arbitrator was affected and, second, HHJ Seymour's judgement had been reported and had been relied upon in other proceedings in support of applications based upon alleged misconduct of arbitrators.

The judge had identified four principal grounds on which misconduct had been alleged against the arbitrator but had rejected the first three grounds and had not based his judgement on the fourth. In the light of the compromise, it was not necessary for the CoA to say anything about the grounds, except that the first ground had alleged that the arbitrator had decided to deal with the question of quantum in relation to the second of the issues before him without affording Moore an opportunity to make submissions on that question. It was to be noted that, perhaps not surprisingly, the application was not based upon any alleged prejudice to Moore. However, during the course of argument in the TCC it appeared to have been suggested that Moore was or might have been disadvantaged by the arbitrator deciding the question of quantum in issue 2 without Miller having had an opportunity of making submissions.

HHJ Seymour QC had ultimately held that the way in which the arbitrator had dealt with issue 2 had amounted to misconduct and that the matter had been so serious that removal was appropriate. He had reached those conclusions by holding (1) that the question had been whether, in the light of what had occurred, a reasonable person would no longer have had confidence in the arbitrator's ability to come to a fair and balanced conclusion if the matter were remitted, and (2) that Miller could rely upon misconduct which had not caused prejudice to it but which have or might have caused prejudice to Moore, even though Moore had not complained about the way in which the arbitrator had dealt with issue 2.

It was not appropriate for the CoA to express a final conclusion on these questions without hearing full argument but, both in fairness to the arbitrator and because of the reporting of the Judge's decision, it was appropriate to state these conclusions on the basis of the material and submissions which were put before the Court before it had been agreed that the appeal should be allowed.

(1) It was not appropriate to have made a finding of misconduct without at least having given the arbitrator notice of the ground upon which such a finding would or might be based; refer Mustill & Boyd on Commercial Arbitrations, 2nd Edn (1989), at 553:

> "Whenever an application is made to the court to set aside or remit an award on grounds of misconduct, 'technical' or otherwise, the notice of motion should be served on the arbitrator or umpire concerned. He may then either (a) take an active part in the proceedings or (b) file an affidavit for the assistance of the court or (c) take no action."

The CoA entirely agreed. It followed that the arbitrator should have been given notice of the new ground on which it had been suggested that he might have been guilty of misconduct.

[*NOTE: this principle does NOT appear in s.68 but does in s.24(5)]*

(1) The evidence did not support a finding of misconduct, either on the basis found by the judge or on the fourth ground originally advanced by Miller. In these circumstances, the CoA considered that nothing which had occurred in this case reflected adversely on the arbitrator at all.

[NOTE: under s.68(2) serious irregularity is a 2-leg test requiring BOTH one of the tests (a) to (i) to be met and there to be substantial injustice; this is a significant change over the pre-96 position; refer DAC report §280.]

(2) The CoA had every confidence that "this experienced arbitrator" would be able to resolve the remaining matters fairly when they were remitted to him in accordance with the agreed order of the Court.

[*NOTE: under s.68(3) – last sentence - the presumption is for remission unless there are clear reasons why not; note also that under s.68(3) that part of the award not remitted/set aside/nullified continues effective – this was NOT the case pre-1996; refer Huyton SA v Jakil SpA [1999] 2 Lloyds Rep 83.]*

(4) The question as to whether an arbitrator should be removed or the matter remitted to him in the case of misconduct may well depend upon the answer to the objective question formulated by Mance LJ in *Lovell Partnerships Northern Limited v AW Construction PLC (1996*) 81 BLR 83, 99, namely: "... whether a reasonable person would no longer have confidence in the present arbitrator's ability to come to a fair and balanced conclusion on the issues if remitted."

[NOTE: this is no longer directly applicable under the 1996 Act but, I submit, is consistent with recent jurisprudence.]

Clarke LJ concluded that it might be possible to imagine a case in which prejudice to the respondent to the application was a relevant consideration in answering question (4), but it was difficult to do so, especially

where, as here, the respondent (Moore) had made no complaint about the arbitrator and had accepted his decision in relation to the particular matters complained of by Miller. In any event, the Court was firmly of the view, based on the material before it, that this was not such a case.

8. Another 'old' case crossed my bows recently, covering an important point: in *Seabridge Shipping AB v AC Orssleff's EFTF's A/S* ([1999] 2 Lloyds Rep 685; Thomas J.; QBD Folio 1999/418; 9th August 1999), O chartered a vessel to S and disputes subsequently arose; Thomas J had to decide three issues: (i) did the charterparty incorporate the Hague Rules with their one year time bar or the Hague-Visby Rules with their longer period for bringing such a claim ? (ii) if the Hague Rules applied, did S's notice (on day 365/365) satisfy s.14 ? (iii) if not, could an arbitration be commenced in a manner other than that expressly permitted by s.14 ?

Thomas J held that the Hague Rules had been incorporated (this is profoundly interesting analysis but outwith the scope of this note).

Further, on 17th June 1997 (day 365) S's P&I Club sent a fax as follows: "TO Alan Oakley (London) CC Owners (Holte, Denmark): [S] wishes to claim an indemnity against [O] under the charterparty, alternatively, claim any loss and damages incurred in respect of any liability and/or expenditure incurred towards cargo claimants as a result of this cargo claim. Pursuant to the arbitration agreement [S is] to appoint their arbitrator and we would be grateful if you could indicate your acceptance of your appointment as charterers' arbitrator in this reference. Would owners who read in copy please indicate if they are prepared to accept you sole arbitrator, alternatively, attend to the appointment of their arbitrator within 7 days of this fax, failing which charterers will seek to have you appointed as sole arbitrator. …". [NB: Alan Oakley is a distinguished LMAA Arbitrator]

O argued inter alia, citing pre-1996 authority, that this could not be a notice since it was not addressed to O but merely copied thereto. Thomas J both dismissed the pre-1996 authorities as irrelevant except where they addressed a point not covered in the Act and dismissed O's argument since, taking into account the broad purpose of the Act to be a self-contained user-friendly document (particularly relevant given that both parties were Scandinavian), the language of s.14(4) had to be construed positively and not restrictively and the fax of 17th June evidently met all the requirements of s.14(4).

Having reached that conclusion he was not obliged to decide issue (iii) which concerned s.81(1); however, obiter, he observed that "… where a party has given a notice to the other party, making it clear objectively that it is a reference of the matter to arbitration, that it is likely that [this will satisfy] s.14 which is broad enough to include an implied request to appoint an arbitrator. If there are circumstances which cannot properly be met in this way, then the question must remain open as to whether an arbitration could be commenced in a way not expressly set out in Section 14. It is not necessary for me to decide that question. … it is difficult to envisage an apparent justification for providing for other means outside the Act which will only make for complexity and uncertainty and diminish the easy ascertainability of the law of arbitration where the Act, as in this case, expressly deals with this subject matter. …". The question remains unanswered but the prevailing view is that s.14 is intended as exhaustive but that s.81(1) may catch a situation which no-one has yet been able to envisage.

SECTION B – ADJUDICATION AND RELATED MATTERS

9. [NB: the following does not follow Scots legal terminology since that will likely be unfamiliar to the majority of readers]

In Construction Centre Group Ltd v Highland Council (Outer House, Court of Session; Lord McFadyen; 23rd August 2002), CCG had undertaken work for the Council and had referred certain matters to adjudication. On 28th June 2002 the adjudicator issued his decision, in terms of which he found the Council liable to pay £245,469.24 to CCG within seven days. The Council failed to pay and CCG therefore sought summary judgement plus interest; the Council lodged defences resisting summary judgement and CCG repeated its application on the ground that no defence to its action had been disclosed in the Council's defences.

Under [Scottish] Rule of Court 21.2(4)(a), the Court may grant summary judgement "if satisfied that there is no defence to the action disclosed". In *Mackays Stores Ltd* v *City Wall (Holdings) Ltd* 1989 SLT 835 Lord

McCluskey had considered the circumstances in which it would be appropriate for the Court to decide, on an application for summary judgement, a substantial issue of law raised in the defences, and expressed (at 836E) the opinion that: "The test I have to apply at this stage must be to ask myself if the question of law which is raised (the only question being one of law) admits of a clear and obvious answer in the claimant's favour." The Council accepted that the Judge could determine the matter now if he was satisfied (which he was) that the issues had been adequately discussed in the parties' submissions. CCG accepted that it could only succeed if it could persuade the Court that it should hold at this stage that none of the Council's ten points had any merit. For convenience these were addressed in four groups

(A) (pleas 1, 2 and 3) concerned with the provisional nature of an adjudicator's determination;

(B) (pleas 5 and 6) involving contentions that the adjudicator's decision was *ultra vires;*

(C) (pleas 7, 8 and 9) related to the question of retention or set-off; and

(D) the remaining pleas 4 (relevancy) and 10 (*quantum*);

the Council withdrew group D at the outset and group B during trial (already 4-0 to CCG !)

Provisional nature of Adjudicator's Decision

CCG submitted that a Decision was, on the one hand, provisional, in the sense that its effect might be reversed or altered when the dispute in question was finally resolved by agreement between the parties or by arbitration or by litigation but was, on the other hand, temporarily binding and enforceable, and therefore required to be implemented by the parties and should, if necessary, be enforced by the Court – s.108(3) referred. However, the subsequent arbitration or litigation so contemplated was not a process of review of or appeal from the Decision, but rather a final determination of the dispute in respect of which the Decision had provided a provisional determination; the ultimate arbitration or litigation would supersede the Decision but, until it did so, that Decision was binding, was required to be implemented and could if necessary be enforced (*City Inn Ltd* v *Shepherd Construction Ltd* 2002 SLT 781 at 794K, paragraph [59]). Adjudication was concerned not merely with providing an answer to a matter of dispute, but with securing payment of money on the basis of a provisional decision; in *Farebrother Building Services Ltd* v *Frogmore Investments Ltd* (TCC 20th April 2001, unreported) HHJ Gilliland QC had said: "The general rule in relation to adjudication decisions is that they are binding until set aside, and the approach which this court has adopted is that they should be enforced summarily because the whole purpose of adjudication is to provide a quick and effective remedy for the payment of money on a provisional basis." Consequently the Decision was binding on the parties, and required to be implemented; neither the Act nor the contract contemplated that the ultimate determination of the matter in arbitration would stand in the way of enforcement of the award in the meantime. *A & D Maintenance and Construction Ltd* v *Pagehurst Construction Services Ltd* [2000] 16 Const LJ 199, and *Absolute Rentals Ltd* v *Gencor Enterprises Ltd* [2001] Const LJ 322 refer.

This being the intention of the contract, reflecting the intention of Parliament, the Council's first plea-in-law, i.e. that summary judgement should be refused because the effect thereof would be to substitute a final judgement in place of an interim decision, was unsound: the summary judgement sought was merely a means of enforcing the Decision, as contemplated by the Act and the contract, and such was not a decision on the merits and would not stand in the way of a final determination of the dispute by arbitration different from the provisional determination made by the adjudicator.

The Council's second plea, relating to the Court's power to open up, review or revise certificates etc, was likewise unsound, for the same reason: in granting summary judgement, the Court would not be exercising those powers and would not be determining the merits but would merely be lending its authority to the enforcement of the Decision, and doing so simply on the ground that the parties had agreed that an adjudicator's award should be binding and enforceable.

The Council's third plea had sought to stay the present action pending arbitration but this ignored the existence of the contractual obligation to pay the sum awarded in the Decision pending a subsequent final determination of the dispute by litigation, arbitration or agreement (*Absolute Rentals Ltd* v *Gencor Enterprises Ltd*, *per* His Honour Judge Wilcox at 324). It followed that a party which held a Decision entitling it to payment of a sum of money was ordinarily entitled to enforce it, including by raising an action for payment of the sum awarded; denial of enforcement of a Decision in that way would obstruct the purpose of s.108: per HHJ Gilliland in *Farebrother*, the whole point of adjudication under a contract complying with s.108 was to obtain payment of money on a provisional basis.

It was important to appreciate the nature of the present action: CCG were not asking the Court to endorse the soundness of the Decision on the merits, but were merely asking the Court to recognise the parties' contractual obligation to implement the Decision. CCG sought summary judgement, not because it was in the right in the dispute, but because it was contractually entitled to require the Council to implement the Decision, whether it be right or wrong. Consequently, no judgement in this action was a finding by the Court that the adjudicator was right, but merely a recognition that he had made a Decision and that the Council was bound, for the time being, to implement it; such judgement had no effect on the final determination of the dispute by the arbitrator save that any payment made would be taken into account; however, such account would be taken of all sums paid, whether paid under judgement or voluntarily.

Clauses 66(4) and 66(6)(iv) of the contract appeared to say that the arbitral decision would "revise" the Decision; use of the word "revised" meant that the arbitrator's task was not to determine the dispute *de novo* but to review the Decision. What the Court might do by way of enforcing the Decision had no bearing on the arbitrator's final determination of the dispute. All that needed to be taken into account by the arbitrator in making his award is the extent to which payment to account had been made. There was, therefore, no incompatibility between any judgement in this action in CCG's favour and the provisional character of the Decision.

The Council had suggested that if such judgement were granted the arbitrator would be precluded from making a final award finding CCG entitled to less than had been paid under judgement but this was wrong: this action would provide no judicial determination on the merits, merely enforcement of the Council's contractual obligation to pay on the Decision. To stay this action pending arbitration would be to ignore the express contractual obligation that the Decision was to be implemented pending final determination by arbitration.

Lord McFadyen concluded that the Council had no defence in any of the Group A pleas.

Retention or set-off

The Council had submitted in various forms that, since it had a liquidate damages claim (LDC) against CCG of £420,000, it was entitled on that account to refuse to pay the Decision's £245,000 to CCG and to resist enforcement of the Decision in this action. In plea 7, the point had been advanced on the basis of service (albeit after the date of the Decision) of a s.111 Notice; in plea 8, it had been advanced on the basis that the Council had been entitled to exercise a right of compensation or set-off; in plea 9, it had been advanced on the basis of a right of retention. CCG submitted that the Council was not entitled, on any of these bases, to resist summary judgement.

CCG further submitted that the LDC could have been advanced before the adjudicator as ground for his not ordering the Council to pay the £245,000 but the latter had chosen not to advance that argument at that stage, and could not rely on it now to resist enforcement of the Decision. In *KNS Industrial Services (Birmingham) Ltd* v *Sindall Ltd* [2001] 17 Const LJ 170 HHJ Humphrey Lloyd QC said (at 182):

> "As Judge Thornton said in [*Fastrack Contractors Ltd* v *Morrison Construction Ltd* [2000] BLR 168] 'the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference'. A party to a dispute who identifies the dispute in simple or general terms has to accept that any ground that exists which might justify the action complained of is comprehended within the dispute for which adjudication is sought. ... The adjudicator is appointed to decide the dispute which is the subject of the notice and that notice determines his jurisdiction."

Para. 3 of the Referral Notice had stated that the adjudicator was to be asked *inter alia*: (1) to open up, examine and review IA21 to find an amount payable to [CCG] of £5.5m or such other amount as the Adjudicator may determine; (2) to order payment by the [Council] within seven days of the date of the [Decision] in the sum of £5.5m or such other amount as the Adjudicator may determine."

The scope of the adjudication had not simply been "How much ought to have been certified as payable in respect of Interim Application #21 ?" but had also incorporated a request for a payment order. It followed that it was incumbent on the Council to put before the adjudicator not only its evidence and submissions in support of the nil certification in respect of IA21, but also any other grounds on which it sought to rely in resisting any payment order. The arguments (a) that it had been entitled to set off its LDC against the sum which ought to have been certified, or (b) that it was at least entitled to retain any such sum pending determination of its LDC, were arguments that could and should have been advanced in adjudication. The fact that the Council had not advanced them had not extinguished its rights, rather that it had remained entitled to exercise any rights of retention or set-off which it truly possessed against any future payment under the contract. It was not, however, open to the Council, having declined or failed to advance the argument in the adjudication, now to deploy it as a ground for not implementing the Decision, which it was contractually bound to do. Further, the Council's purported reliance on a s.111 notice served within the seven day period following the date of the Decision was ineffective to resist enforcement thereof. S.111(1) provided as follows: "A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment." The role of a s.111 notice was to bring about a dispute over payment, which might then be referred to adjudication, not to serve as response to an adjudicator's decision. In the present case there had, at the adjudication stage, been no need for a s.111 notice because there was no certification of any sum due, which meant that there could be no final date for payment. It did not follow, however, that the contention that any sum which the adjudicator found should have been certified could be withheld against the Council's LDC could not be advanced in the absence of a s.111 notice. On the contrary, that contention remained available before the adjudicator, and should have been advanced at that stage if it was to be advanced at all.

CCG cited two TCC cases i.r.o. s.111, claiming *Solland* in support and distinguishing *Maclean*:

(i) *Solland International Ltd* v *Daraydan Holdings Ltd* (15 February 2002, unreported), in which in the adjudication the responding party had relied on what it claimed was a valid s.111 notice but the adjudicator had held that the notice was not valid. HHJ Seymour QC identified the issue as being whether, after the adjudicator had given his decision, the potentially paying party could raise matters relevant to what sum should in fact be paid (paragraph 24) and held that they could not; para 30 was also on point;

(ii) in *David McLean Housing Contractors Ltd* v *Swansea Housing Association Ltd* [2002] BLR 125, the defendants had, after the adjudicator's decision had been made, given notice under the contractual equivalent of s.111 asserting an LDC, and on that ground sought to resist enforcement of the adjudicator's decision by summary judgement. HHJ Humphrey Lloyd QC held that they were entitled to do so. To a material extent, however, his decision turned on the fact that the adjudicator had made a decision on the extent to which the contractor was entitled to an EOT, from which decision the quantification of the employer's LDC followed. There was thus no stateable defence to the LDC, and on that account summary judgement enforcing the adjudicator's award in favour of the contractor was refused.

The Council's submission could be summarised as four points:

1. There was nothing in the Act or the contract to suggest that the responding party was to be deprived of its entitlement to exercise a right of retention in respect of a claim for liquidate damages against the sum awarded by the adjudicator.
2. Although s.111 might have been drafted with the normal situation of a certified sum "due under the contract" in mind, and thus might have contemplated primarily the giving of a notice of withholding before adjudication, the language of the section was wide enough to cover the giving of a withholding notice against a sum which came to be "due under the contract" by virtue of an adjudicator's decision.
3. Except by invoking the procedure provided for in s.111, a responding party had no entitlement to have his defence of retention entertained by the adjudicator. An adjudicator would be entitled to take the view that a claim of retention in respect of liquidate damages, raising as it often would a potentially complex issue of extension of time (which might fall outwith the particular adjudicator's technical competence), did not fall within the scope of the dispute referred for adjudication.
4. It would be manifestly unjust to deprive the Council of its right of retention in respect of its LDC.

Lord McFadyen agreed with HHJ Humphrey Lloyd QC (cf *KNS Industrial Services (Birmingham) Ltd* v *Sindall Ltd* at 182) that the scope of an adjudication was defined by the notice of adjudication, but he also agreed that any ground that might be founded on by the responding party to justify its position also fell within the scope of the adjudication. Leaving aside at this stage the potentially restrictive effect of s.111, if the notice raised the issue as to whether a particular sum was due by the Employer to the Contractor, it was axiomatic that the adjudicator had to consider any relevant defence on which the responding party wished to rely in arguing that that sum was not due. In particular, (still leaving s.111 aside) it was clear that an employer who claimed to be entitled to LDs and sought to retain a sum that would otherwise be due to the Contractor against that claim, was in principle entitled to put that contention forward before the adjudicator. Any adjudicator who held otherwise and declined to permit the responding party to raise the issue of retention would be misdirecting himself. If an adjudicator had declined to consider an EOT dispute, as being distinct from that referred to him, that would not entitle him to refuse to allow the employer to argue for retention on the basis of the LDC. The fact that that claim was extant and *prima facie* justified would be sufficient to entitle the adjudicator to give effect to the plea of retention, without entertaining the substantive dispute as to whether an extension of time should be granted and the *prima facie* claim for LDCs defeated. This was not a case in which the Council had been deprived of the opportunity of pleading retention by the narrow scope of the adjudication. On the contrary, it chose not to raise the issue in the course of the adjudication but, had it done so, however, (again reserving the question of the impact of s.111) it would have been entitled to insist that the adjudicator consider it. The fact that the Council had chosen not to advance its retention argument before the adjudicator did not entitle it to rely on it now for the purpose of depriving the Decision of the enforceability which the Act and the contract conferred upon it. Moreover, although the Council could not exercise its right of retention against the Decision, the consequence was not that it had lost the right of retention rather that such right remained exercisable against any future sum falling due to CCG under the contract.

In any event, in the circumstances of this case s.111 did not affect the matter: (a) it was correct that the Council had had neither opportunity nor obligation to give a s.111 notice in advance of the adjudication because, in the absence of an Engineer's certificate, there was at that stage no "sum due under the contract" in respect of which a "due date for payment" might pass: the context in which the section provided for the giving of a notice did not arise; however (b) it followed that the absence of a notice under s.111 did not prevent the Council from putting forward in the adjudication the retention argument i.r.o. its LDC. S.111 prohibited withholding of payment without a notice only where the sum withheld is a "sum due under the contract", and as already noted, the absence of a certificate in respect of IA.21 meant that there was, prior to the adjudication, no contractual obligation on the Council to pay any sum under IA.21. Summarising, s.111, when applied in the somewhat unusual circumstances of this case, gave the Council

no opportunity to lodge a withholding notice in support of its retention argument, but at the same time it did not need such a notice to entitle it to argue retention before the adjudicator.

Lord Mc Fadyen observed that neither *Solland n*or *McLean* was directly in point:

(a) In *Solland* the Court had held that a party whose s.111 notice had been given in advance of the adjudication and had been held invalid by the adjudicator could not resuscitate the same point as a defence to enforcement of the adjudicator's decision. It did not follow from that decision that the Council, who had not given a s.111 notice before the adjudication, was excluded from giving one after the Decision had been issued.

(b) In *McLean*, the outcome had been heavily influenced by the fact that the adjudicator had, in dealing with the question of EOT, decided all that needed to be decided to support the claim for LDs, and that that was sufficient to make it inappropriate to grant summary judgement in terms of the adjudicator's decision without taking into account set-off of the LDs. HHJ Lloyds's decision did not afford a secure basis for holding as a matter of generality that it was open to a defender to give a s.111 notice to withhold payment of a sum awarded by an adjudicator.

Lord McFadyen concluded that s.111 did not permit the giving of a withholding notice in respect of an adjudicator's award; this did not give rise to any injustice since the Council had not been deprived of its right of retention. On the contrary, it had lost it (so far as IA 21 was concerned) through not advancing it at the proper time in the course of the adjudication, when it could have done so without a s.111 notice. If it had advanced it then, the point would have fallen within the scope of the dispute referred to adjudication, and the adjudicator would have been obliged to address it. It would, however, be inconsistent with the enforceable quality conferred by the Act (and the terms of any contract compliant with the Act) on an adjudicator's decision to allow the right of retention or set-off to be put forward as a defence to an action seeking enforcement of the adjudicator's decision. In the events which have happened, the Council's defences in its seventh, eighth and ninth pleas were unsound and did not afford a defence to this action.

Conclusion

Lord McFadyen concluded that there was nothing in the Council's defences which constitutes any defence to CCG's action and he therefore granted summary judgement (reserving expenses).

10-0 to CCG !!! (Normally only Celtic or Rangers do that well)

10. In John Moodie & Co & Ors v Coastal Marine (Boatbuilders) Ltd (Outer House, Court of Session; Lord McFadyen; 19th September 2002), a new fishing vessel had suffered from certain defects and Moodie had sued accordingly, the case substantially turning on the effect of an exclusion clause in the shipbuilding contract which was tried as a preliminary issue.

Moodie's case was (1) contamination of the vessel's fresh water tanks, (2) failure of the main engine/gearbox coupling, allegedly because bolts of incorrect length had been fitted during installation and (3) fracture/failure of various parts attached to the engine because of excessive vibration. Coastal relied on cl.12.7 of the contract, which appeared to provide for exclusion of liability for certain consequential losses including loss of fishing, arguing that parts of Moodie's claims were in respect of consequential losses excluded by cl.12.7. Moodie maintained that cl.12.7 was inapplicable to its claims. The language of cl.12 was fundamental:

"12.1 During the period of 12 months after the Delivery Date, [Coastal] shall be responsible for the rectification, at [its] cost, of any defect, failure or breakdown of the Vessel and/or its equipment caused by faulty materials or workmanship supplied by [it] or any Sub-Contractor.

12.2 [Coastal] shall not be responsible for: (a) damage caused by fair wear and tear, lack of maintenance, alteration or addition to the Vessel by [Moodie] or negligent operation of the Vessel; or (b) faults arising from the construction design with the exception of items designed by [Coastal] or any Sub-Contractor.

12.3 The Purchaser will notify the Contractor in writing within 10 days after any defect, failure or breakdown has occurred.

12.4 In the event of any dispute about whether a defect, failure or breakdown has occurred for which the Contractor is responsible under clause 12.1, the Vessel will be inspected by the SFIA [Sea Fish Industry Authority] whose decision on the dispute shall be binding on the parties. The parties shall have the right to be present at such inspection. All costs of such inspection shall be borne by the Contractor in the event that the SFIA decides that the defect, failure or breakdown is the Contractor's responsibility under clause 12.1. In all other cases, the said costs shall be borne by the Purchaser.

12.5 The Contractor shall have the right to carry out any rectification work required under clause 12.1 at the Yard [i.e. the defenders' Yard in Eyemouth] or another Yard nominated by the Contractor. The Contractor shall meet the cost of sailing or towing the Vessel to the Yard or such other Yard including the cost of fuel, oil, crew and flights, where appropriate. If it is inconvenient for the

Purchaser for the said work to be carried out at the Yard or at the other Yard nominated by the Contractor and the cost of the said work is estimated not to exceed £20,000, the said work may, subject to prior notification of the cost being given to the Contractor, be carried out at a Yard selected by the Purchaser. In that event, the Contractor shall pay for said work or, on demand, reimburse the Purchaser for the cost of said work.

12.6 In the case of machinery not manufactured by the Contractor, the Contractor's guarantee under clause 12.1 will be extended or limited (as the case may be) to the equivalent of any guarantee which may be given by the manufacturer of that machinery except that the Contractor's guarantee as regards work in adapting or installing the machinery shall not be restricted in any way. The Contractor shall notify the Purchaser of the guarantee period relating to such machinery not manufactured by it at least 3 months prior to the Delivery Date, failing which the Contractor's guarantee under clause 12.1 shall apply.

12.7 In no circumstances shall the Contractor be liable for any losses consequential on any breakdown or machinery failure including but not limited to loss of fishing."

So what did cl.12.7 actually mean ? In argument before the Court, the parties cited well-known authorities including that the proper approach to clauses which did not wholly exclude, but merely limited, liability for breach of contract had been explained in *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* 1982 SC (HL) 14 where Lord Wilberforce had said (at 57):

> "Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this [i.e. a standard form contract], must be construed *contra proferentem*. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think the appellants have striven to do. The relevant words must be given, if possible, their natural plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure."

Counsel for Coastal submitted, inter alia, that cl.12.7 contained no cross-reference to any preceding sub-clause of cl.12, and thus that there was no express declaration that the scope of the exclusion was limited to claims made under the express contractual guarantee contained in those earlier parts of the clause. He contrasted that absence of cross-reference with numerous other provisions in the contract, where cross-references were made when it was intended to tie one provision to another, e.g. cl.12.4, 12.5 and 12.6. It could therefore be inferred that no limitation on the scope of cl.12.7 to claims based on the express guarantees provided for in cl.12.1-12.6 was intended

He also submitted that the ordinary natural meaning of the language used in cl.12.7 was that it contained a generally applicable exclusion of liability for consequential losses arising from the limited class of events to which it referred, namely breakdown or machinery failure. The opening words "In no circumstances ..." were emphatically general, and were reinforced by the repeated use of the word "any". There was no such identity of language, when cl.12.7 was compared with the earlier parts of cl.12, as would compel the inference that the scope of cl.12.7 was intended to be limited to claims arising under the earlier parts of the clause. The cl.12.1 guarantee applied to "any defect, failure or breakdown of the Vessel and/or its equipment" caused by faulty materials or workmanship supplied by Coastal or any subcontractor. The same phrase appeared in the related procedural provisions in cl.12.3/12.4. Cl.12.7 was expressly of different scope, since it limited liability in respect of losses consequential on "any breakdown or machinery failure". It did not apply where there was a defect, but no failure or breakdown; and it applied only to machinery failure, not to any failure of the vessel or its equipment. Further, so far as the position of cl.12.7 in the structure of the contract was concerned, the mere fact that it appeared as part of cl.12 did not justify applying a restriction of its scope which was not present by virtue of the language used (*refer Loudonhill Contracts Ltd v John Mowlem Construction Ltd* 2002 SLT 253). There was no other place in the structure of the contract to which cl.12.7 obviously belonged. As in *Loudonhill*, it might appropriately have been expressed as a free-standing clause, separate from cl.12, but the fact that that had not been done was insufficient to result in restriction of its scope

It was necessary to consider what cl.12 provided: the essence of cl.12.1 was a performance obligation, not a payment obligation there being no obligation therein to compensate Moodie for any loss that might arise from defect, failure or breakdown. Consequently cl.12.7 could not have been intended as an exclusion of consequential loss from claims under cl.12.1, when the latter did not impose any liability for consequential loss. However, although cl.12.6 could involve Coastal's assuming liability for consequential losses if the

manufacturer's guarantee provided for such liability, it was impossible to reconcile the width and generality of cl.12.7 with the contention that its sole purpose was to exclude liability for consequential loss under cl.12.6. If Moodie was right about the scope of cl.12.7, the commercially implausible result would be that liability for consequential loss would have been excluded if a particular claim was presented as a claim under cl.12.6 based on the terms of a manufacturer's guarantee, but liability for the same consequential loss would not be excluded if the same claim could be presented on the basis of the implied term incorporated into the contract by virtue of section 11D(2) of the Supply of Goods and Services Act 1982.

Unsurprisingly, Counsel for Moodie argued the narrow application of cl.12.7 otherwise his client's claims would be defeated.

Lord McFadyen, in typical no-nonsense style, observed that cl.12.7 provided that: "*In no circumstances* … Contractor … liable for *any* losses consequential on any breakdown or machinery failure …", (his emphasis added), said that that the plain meaning of the language was that it excluded Coastal's liability for losses of the type to which it referred, irrespective of the circumstances in which, or the ground on which, a claim might be advanced against it for recovery of such losses. The words "*In no circumstances*" and "*any losses*" emphasised the generality of the provision. There was nothing in the language of the clause which compelled the reader to look elsewhere for assistance in understanding its meaning. It was not a provision that could be given an understandable meaning only by reference to its context.

Furthermore, Moodie's argument that cl.12.7 had to be regarded as limiting liability for consequential losses only in claims made under cl.12 was that that clause was not primarily concerned with the imposition of liability to pay compensation but rather an obligation to rectify defects. Cl.12 therefore did not provide any context in which a limitation clause excluding liability for consequential losses could have any application. Since Moodie was unable to get around that difficulty, it relied on the alleged interrelationship with cl.12.6 but the language of cl.12.7 was so much more general than was required merely to deal with cl.12.6. In any event, the language "In no circumstances ... any losses ..." were inconsistent with the proposition that cl.12.7 had the restricted effect of operating only as a proviso to cl.12.6.

While the construction of cl.12.7 could have been put beyond doubt by additional language, it did not follow that the absence of such language was a neutral consideration; very little help could be obtained by pointing to other occasions within the contract where, when one provision relates to another, an express cross-reference to the other provision by clause number is made. As Counsel for Coastal pointed out, examples could also be found where clauses were related in that way, but no cross-reference by clause number is expressed. Moodie's construction could have been made clear beyond doubt, either by incorporating the text of cl.12.7 in cl.12.6 as a proviso to it, or by modifying cl.12.7 to read: "In no circumstances shall the Contractor be liable by virtue of Clause 12.6 for ...". The absence of such a cross-reference had been regarded as a material consideration in *Loudonhill.*

Lord McFadyen concluded that cl.12.7 operated as a limitation of liability in respect of any claim for consequential losses of the type mentioned in the clause, irrespective of the ground on which the claim was made. In particular, cl.12.7 could relevantly be pled in defence to claims advanced under the implied term that the goods would be of satisfactory quality (e.g. s.11D(2) 1982 Act).

……..

Postscript: Clause 12.4 of the contract stated as follows

> "In the event of any dispute about whether a defect, failure or breakdown has occurred for which the Contractor is responsible under clause 12.1, the Vessel will be inspected by the SFIA [Sea Fish Industry Authority] *whose decision on the dispute shall be binding on the parties*. The parties shall have the right to be present at such inspection. All costs of such inspection shall be borne by the Contractor in the event that the SFIA decides that the defect, failure or breakdown is the Contractor's responsibility under clause 12.1. In all other cases, the said costs shall be borne by the Purchaser."

The present action did not address the status of this clause i.e. whether it acted as an Expert Determination clause or some other.

11. *Borkan General Trading v Monsoon Shipping* (Admiralty Court; David Steel J; 16th August 2002) arose because Borkan's tug Borvigilant had been a total loss with loss of life following a collision with Monsoon's tanker Romina G off the Kharg Island Terminal (KIT) (owned by the National Iranian Oil Company (NIOC)) on 22nd July 1998. The Romina G (it was a regular at KIT and had used Borkan's tugs (including Borvigilant) before) had arrived at KIT to load a cargo of crude; while NIOC owned its own tug fleet it also chartered in berthing tugs where required, these tugs being chartered by its subsidiary, National Iranian Tanker Company (NITC). As standard practice, the Master of Romina G had been required by the pilot to sign two forms prior to berthing operations, a Tug Requisition Form (TRF) and a document entitled "Conditions of Use of the Terminal at Kharg" (Conditions).

Borkan claimed in contract and both it and Monsoon claimed in tort for their respective losses consequent on the collision. Borkan relied, i.r.o. both its claim and its defence, on the conditions contained in the TRF and the Conditions. Borkand and Monsoon had agreed that the claims and counterclaims should be determined under English law and practice. Pursuant to an order dated 30th January 2002, the Court was presently concerned with (i) whether Borkan was entitled to rely on the Conditions and (ii) whether the latter afforded a cause of action for its losses and/or a defence to Monsoon's claim if it were ultimately held that the collision was due to the negligence of Borkan's tug. The judgement set out the preliminary issues in no little detail.

(1) Since the Contract (Rights of Third Parties) Act 1999 came into force only on the 11th May 2000, could Borkan take the benefit of the TRF/Conditions under traditional agency principles ? Clause 7 of the TRF stated:

> "[NIOC] shall have the right to perform their obligations under this contract by using a tug or tugs not owned by themselves but made available to the company under charter parties or other arrangement. In such circumstances, without prejudice to NIOC's rights, [Monsoon] agrees to the Owners or Charterers of such tug or tugs have the benefit of and being bound by these conditions to the same extent as [NIOC]."

Borkan argued (a) by virtue of the course of dealing between Borkan and NIOC, the latter were authorised to contract with Monsoon as agents for Borkan; and/or (b) Borkan had ratified the terms of the agreement that NIOC purported to have entered into on its behalf with Monsoon.

In *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 Lord Reid had considered the circumstances in which stevedores, being strangers to the contract in question, might be able to take advantage of provisions in the contract which were intended to benefit them. He had said (p.474)

> "I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome."

Further judicial guidance had been given in *New Zealand Shipping Co. Ltd v AM. Satterthwaite and Co. Ltd* [1975] AC 154 (The "Eurymedon") (particularly by Lord Wilberforce at p.166) and in a recent decision of the Privy Council in *The Mahkutai* [1996] A.C. 650, where a similar clause had been under consideration and where Lord Goff of Chieveley had said, after reviewing the authorities:

> "… the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protections of those terms as against the cargo owners. This is because (1) the problem of consideration in these cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the shipowners; (2) the problem of authority from the stevedores to the shipowners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle ratification; and (3) consignees of the cargo may be held to be bound on the principle in *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. Ltd* [1924] 1 KB 575. Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development, and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law."

The Romina G had been berthed by four tugs: citing the above authorities, Borkan argued that the technicalities of privity of contract should not be allowed to impede the obvious commercial expectations of the parties whereby non-NIOC tug owners should take the benefit of the very same terms on which NIOC could rely in respect of its own tugs.

David Steel J accepted Borkan's submission that the course of dealing between it and NIOC gave rise to implied authority on NIOC's part to contract with shipowners on the same terms as obtained for their own tugs.

(2) He also addressed at length whether Borkan had, in addition, ratified the implied contractual arrangements (i.e. TRF/Conditions) and concluded that it had been clear on the facts that it had. However, Article 19 of Bowstead on Agency (16th Ed.) stated "ratification is not effective where to permit [it] would unfairly prejudice a third party". However (i) Borvigilant was one of four tugs assisting the Romina G; (ii) all four tugs had been engaged on the TRF/Conditions; (iii) accordingly Borvigilant

had engaged on the [TRF's] basis that Monsoon would have no cause of action if its vessel was damaged in the mooring process; (iv) consequently no prejudice could conceivably arise from Borkan's ratification of the very terms that excluded that cause of action since it could not be (and was not) suggested that Monsoon had taken any step in the mistaken belief that Borkan would not ratify the agreement.

12. In Halloran v Delaney ([2002] EWCA Civ 1258 (6th September 2002), an appeal direct to the CoA from Liverpool County Court concerned the inclusion in a costs bill relating to "costs only" proceedings of a success fee of 20% (i.e. £172.80) of the legal fees. The reason for remitting the matter direct to the CoA was the apparently inconsistent practice of district judges in dealing with such success fees.

H had been injured in a road accident and entered into agreement regarding his claim with a firm of Solicitors I&Co including a Conditional Fee Agreement (CFA) on the Law Society's standard form; the CFA provided for a 40% uplift of which 10% related to the delay in settling I&Co's account. He also took out "after the event" (ATE) insurance. In December 2000 the claim settled at £1,500, and in January 2001 agreement had been reached on a sum of £910 (plus VAT) for the base costs, leaving outstanding the issues of recoverability of the success fee and the ATE premium. Costs-only proceedings commenced in July and the CoA gave judgement in *Callery v Gray (No 1)* on 17th July and in *Callery v Gray (No 2)* on 31st July 2001. In December 2001 H and D reached agreement on the amount of the success fee and the ATE premium recoverable on the main claim in the total sum of £585; all that remained in dispute now was the costs of the costs only proceedings. At a hearing in February 2002, the district judge ruled that H had acted reasonably in issuing the costs only proceedings and that he was entitled to recover the costs of those proceedings. H's claim had been settled without the need to issue proceedings, the settlement including D's agreement to pay H's reasonable costs, but before the introduction of CPR 44.12A on 3rd July 2000 there had been no straightforward way of obtaining an assessment of those costs in default of agreement as to their amount, since no proceedings had ever been started.

CPR contains numerous references to the need for any costs recoverable (including success fees) to be reasonable and proportionate (see CPR 1.1(c), 44.4(1) and (2) and 44.5; refer also Costs PD ("CPD") see CPD 11.1 and 45.4). CPR 44.3A and CPD 11.7–11.9 provide the basic ground rules for success fees. Further, CPD 17 addresses costs only proceedings brought pursuant to CPR 44.12A. CPD 17.8(2) provides:

> "… the costs judge or district judge should have regard to the time when and the extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings."

In *Bensusan v Freedman* (unreported, 20th September 2001), SCJ Hurst commented, in relation to CPD 11.7 and 17.8(2):

> "The combined effect of these two paragraphs is to prevent the costs officer from using hindsight in arriving at the appropriate success fee, and to prevent excessive claims for success fees in cases which settle without the need for proceedings when it was clear, or ought to have been clear from the outset, that the risk of having to commence proceedings was minimal."

The CoA agreed.

Counsel for D submitted that (a) as a matter of principle the district judge should not have allowed any success fee by way of percentage uplift on the costs of the costs only proceedings; alternatively (b) the figure of 20% was excessive given the minimal amount of risk involved, a figure of 5% being more appropriate; in any event (c) the Law Society CFA did not cover costs only proceedings.

Concerning the last point, the CoA approved and followed a previous (unrelated) decision of the SCJ, that by commencing costs-only proceedings, [H] would obtain a detailed assessment of [his] costs which would result in a final certificate and that certificate would be enforceable in the same way as any other judgement for a civil debt so that, taken together, the insurance policy and the CFA made it clear that the insurance cover extended to all necessary steps in relation to resolving [H's] claim, including [his] claim to be paid [his] reasonable costs. He had therefore found that the ATE insurance policy was still in force, the case not yet having been concluded. The case would be concluded when the costs were finally assessed. It followed from the language of the CFA that a claim will normally be "won" by achieving a result whereby the client is to recover his damages, basic charges, success fee and disbursements from his opponent in a quantified amount. Indeed, Condition 4 of the CFA refers to some of the consequences which are to be provided for "if the court carries out an assessment of our charges" on what is clearly, from the context, an assessment between the parties. The CFA therefore covered costs only proceedings. It followed that the district judge had been wrong when she considered that costs only proceedings constituted proceedings taken to "enforce" an agreement (because liability under the agreement was still to be quantified before it could be enforced) but correct in her conclusion regarding the CFA.

Counsel for D had submitted that no such uplift should be recoverable from the paying party as a matter of principle; alternatively, it should only be allowed in an exceptional case and not in a run-of-the-mill small personal injury claim like this. A success fee was charged to compensate the lawyer for the risk he runs in pursuing the claim without the right to recover his costs from his client. In this respect it differed from ATE insurance, which covers the client (as opposed to his lawyer) against risks as to costs. The risk for which the success fee was to compensate was the risk that the lawyer would not recover his reasonable costs. There was no such risk to the lawyer in costs only proceedings. Such proceedings could not be initiated in the absence of an agreement to pay costs which were expressly or impliedly reasonable, and the procedure represented a simple and cost-effective way of resolving any dispute as to their amount. The only risks for the client's lawyer in costs-only proceedings were that: (1) he does not recover the full costs of the action which he claims; (2) he does not recover the costs of the Part 8 proceedings; (3) he is ordered to pay some or all of the costs of the Part 8 proceedings, whether by reason of a failure to beat an offer made pursuant to CPR Part 47.19 or because there was no written agreement on which to base the proceedings, or otherwise.

In all the circumstances, to allow solicitors a success fee on the costs of costs-only proceedings would only encourage them to pursue those proceedings rather than seek to negotiate and compromise them; alternatively, even if a success fee on the costs of costs only proceedings was allowable in principle, an uplift of 20% was excessive in all the circumstances. In its judgement in *Callery v Gray (No 1)*, the CoA had allowed for the possibility of unforeseeable circumstances resulting in the ultimate failure or abandonment of what appeared to be a straightforward motor accident claim. He said that in costs only proceedings like these there were no such unforeseeable circumstances, and those elements which might give rise to risk were foreseeable and could be guarded against. He therefore argued that if any success fee was to be allowed at all, it should be minimal. He suggested a figure in the region of 5%.

While there was no great degree of risk is involved, Brooke LJ rejected the submission that even at the present time there was no risk in costs-only proceedings for which a lawyer acting under a CFA was entitled to seek protection; he cited the principles discussed by the CoA and approved by the House of Lords in *Callery v Gray (No 1)*. Further, in that case the CoA had held (at para 104) that in a simple claim for a traffic accident injury 20% was the maximum uplift that could reasonably be agreed where there was no special feature that raised apprehension that the claim might not prove to be sound. This was the success fee which the district judge had considered to be reasonable in the present case. Since at the time this particular CFA was made the regulations had only just come into force and therefore there was significant uncertainty about how they would operate, Brooke LJ could not say that she had been wrong to hold that an uplift of 20% was reasonable. She had a wide discretion to exercise, and there was no basis on which the CoA could reasonably interfere with the decision she had made.

As to future such cases, after taking advice from the assessor, and after considering the arguments in the present case, Brooke LJ considered that judges concerned with questions relating to the recoverability of a success fee in claims as simple as this, i.e. which were settled without the need to commence proceedings, should now ordinarily decide to allow an uplift of 5% on the claimant's lawyers' costs (including the costs of any costs-only proceedings which are awarded to them) pursuant to their powers contained in CPD 11.8(2) unless persuaded that a higher uplift was appropriate in the particular circumstances of the case. ***This policy should be adopted in relation to all CFAs, however they are structured, which are entered into on and after 1st August 2001, when both Callery judgements had been published and the main uncertainties about costs recovery had been removed.***

13. In *Ministry of Defence v County & Metropolitan (Rissington) Ltd* ([2002] EWHC 1833 Ch; 28th May 2002; Neuberger J), the MoD sold certain land to CMR which was obliged to make an extra payment if certain events occurred. The MoD claimed that these events had occurred; CMR denied this. The present case was concerned with liability although the Court's determining such could impact quantum; the latter had been provisionally established on the assumption that the MoD was correct. To enable CMR to sell off land pending such determination, MoD/CMR agreed to open a bank account in MoD's name into which CMR had paid certain appropriate sums. If the MoD succeeded at trial it would retain those monies, but if it lost the monies would be paid to CMR.

CMR had made an offer to the MoD, the precise terms of which were not disclosed to the Judge save that some or all of the monies would be retained by the MoD (CMR taking any balance), to settle the dispute and to dispose of the action. This not a Part 36 offer (which requires payment into Court) hence CMR sought an order that its offer be treated as if it were one. The MoD accepted that if it was open to the Judge to grant that order, then he should do so (otherwise the MoD "would be having its cake and eating it" - it (a) would have the benefit of the offer and (b) was protected in the event of CMR's insolvency and (c) would likely get a better rate of interest than if the money was in court. It also wanted to prevent CMR from making a further Part 36 offer without putting cash on the table since, if the latter wanted to protect itself on costs, it would have to pay into Court monies over and above that already paid into the account. Accordingly, if the Judge could grant the order sought by CMR, he should since it had made an offer to pay

money to settle a monetary claim. The MoD advanced no reason why the order should not be granted provided that the Judge had jurisdiction to do so. Did he have such jurisdiction ?

Neuberger J held that the wide words of Rule 36.1.2 of the CPR plainly gave him that jurisdiction. Rule 36.1.2 states:

> "Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part *it will only have the consequence specified in this Part if the Court so orders*."

As a matter of ordinary language, those words indicated, at least in the absence of good reason to the contrary, that the Court could at any time, at any rate before judgement or trial, order that a non-compliant offer should nonetheless be treated as a Part 36 offer. The wide meaning of the language was confirmed by considering the CPR generally and the purpose of Part 36 in particular. The CPR generally are intended to give the Court a wide and flexible jurisdiction to achieve justice: giving the emphasised words the effect indicated was consistent with that purpose. Secondly, the purpose of Part 36 was to widen and render more flexible the previous rules (part RSC and partly case law such as *Calderbank v Calderbank*), to enable sensible proposals to be made and then to be relied on by the party who made them, and sometimes, by the party who refuses them.

The present case showed clearly why it would be unjust, inconvenient and commercially unrealistic not to give the emphasised words of Rule 36.1.2 the wide and natural meaning. CMR would be handicapped if its offer was treated as non-Part 36 and, in addition, it would be a windfall for the MoD if, having fared less well at trial than if it had accepted the offer, it was still able to avoid the adverse consequences of having turned down a Part 36 offer. The trial judge would be able to deal with whether the quantum would be sufficient: if it was not then the MoD will benefit from the deficient offer; if it was enough, then CMR would benefit.

Neuberger J accordingly granted CMR the order it sought; it appeared that there had in fact been two offers so, if they were made sequentially, then they would be treated as sequential Part 36 offers whereas if they were made simultaneously, then the MoD would be free to accept either, unless and until CMR withdrew one of them.

14. Cases such as *Popely v Popely* (Chancery; Brooke LJ; 3rd October 2002) sometimes make me feel sympathetic towards Judges – they await the arrival in Court of the Great Case full of complex facts and involving weighty issues of law upon which they can then deliver a Masterly Judgement destined to be approved in the House of Lords and then cited for a generation or more; however, a "Popely" comes into Court instead. However, levity apart, there were interesting issues in this case including (i) what the CoA is *for* under CPR; (ii) second appeals; and (iii) considerations underlying grant of security for costs.

The Popelys were warring brothers, JH and RA; on 14 January 2002, Chief Master Winegarten had declined to order JH to pay security for costs, but Peter Leaver QC, sitting as a Deputy High Court Judge, had reversed that decision and made an order in a very substantial sum. The present case was a second appeal against the latter decision: the Access to Justice Act 1999 had made it clear that the CoA should be used sparingly in relation to second appeals. CPR policy was to deal with matters at first instance and then in an Appeal Court, and that the CoA should only become involved if there was an important point of principle or practice, or if there was some other compelling reason why the CoA should entertain a second appeal; further, the CoA was precluded from entertaining further evidence which was not before the lower Court, except in the exceptional circumstances set out in the authorities.

JH commenced proceedings against RA in August 2001, the latter applying that the action should be struck out or stayed on the grounds that he had not been properly served and/or that England was not the proper forum. JH asserted that (a) it was it is not true that RA had made himself a tax exile and (b) he (JH) wanted to continue with the proceedings in England. The immediate application for security by RA from JH was for not less than £100,000. The C/M had found that the condition set out in CPR 25.13(2)(g) was satisfied, in that JH had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. In those circumstances the matter that the C/M had to decide was whether it was just in all the circumstances to exercise his discretion to make an order for security for costs under rule 25.13(1)(a). The C/M made five points which were then considered on appeal in the same order:

(1) in late 1999 JH knew that RA had removed all the funds from the accounts of a company about which the complaint in this case was based; JH had sold his house and reinvested the money in a new house owned by trustees. When he took these steps, it was reasonable to suppose that might be contemplating proceedings; the C/M weighed this against JH and the D/J confirmed this, adding that if the sale had been intentional then it would carry even more (negative) weight;

(2) [a neutral point on which the D/J did not comment];

(3) it was common ground that JH had no assets against which an order for costs could be enforced, that he had funded this litigation on a conditional fee basis, except for counsel, and that he was paying counsel by loans from his sons. The C/Mr said that he was applying through his solicitors for legal aid and that he had complied with a County Court order to pay £50,000 security, this having been paid in part by him and in part by loans from others; the C/M said that this weighed against giving security, since JH would be prevented from obtaining justice if he was required to pay over £100,000 within ten days.

The D/J disagreed: the onus lay on JH to show that he could not fund the litigation but he had no provided no explanation of his sources of income, or how he could finance proceedings in the High Court, in the Bromley County Court (providing £40,000 security) and in a court in France, and could instruct counsel. Further, the C/M had failed to take the full circumstances of JH's properties into account.

JH sought (a) to adduce further evidence in the CoA which could quite easily have been provided before the C/M and D/J and (b) to give reasons for why things happened in the way they did and of his sons' present unwillingness to provide any more funding.

Brooke LJ held that there had been nothing incorrect in the way that the D/J had dealt with the matter, being faced with a common situation in that there was an element of mystery about JH's funding of litigation in three different jurisdictions, on his explanations thereof and why it was likely that it would not continue.

(4) The C/M had also taken into account RA's seeking to stymie JH by way of the present application for security, this weighing with him since the occasion for the present application was the counter-attack by RA. The D/J took a different view, saying that the application had been properly made in the light of an issue which clearly had to be determined, and could not be predetermined, as to whether the Court did have jurisdiction to entertain this litigation. Brooke LJ held that the D/J had been entitled in the exercise of his discretion to adopt the approach that he did adopt.

(5) Finally the C/M had said that this was a fight between two brothers, neither of whom had assets in England, and that JH had divested himself of his far fewer assets into a trust shortly before commencing litigation. Their motives might be different, but it would not be easy for the victor either way to enforce an order for costs, and the C/M considered that it was inherently unfair to order security when JH could not easily enforce an order if he won.

The D/J differed, distinguishing the general situations of claimant and defendant: C takes a positive decision to start litigation and, if D is going to have to defend the action while being unable to recover costs, that was a matter which the Court was entitled to take into account in deciding whether to order security, particularly if C had divested his assets so as to inhibit enforcement of a costs order. Brooke LJ held that that was a matter which the D/J had been entitled to take into account.

Concluding, Brooke LJ was quite satisfied that:

(1) it would be inappropriate on an appeal to admit any further evidence than was before the D/J and C/M;

(2) this was not a case which raised any important point of principle or practice;

(3) while JH might want to continue arguing or to adduce yet more evidence, CPR has expressly precluded this in appeals;

(4) if JH's allegations against RA had merit, one might feel sympathetic but sympathy was insufficient ground to grant permission for a second appeal in a case which clearly did not satisfy the appropriate criteria.

Application refused.

15. In Malkinson & Trim ([2002] EWCA Civ 1273 13th September 2002), M had (in 1993) commenced proceedings against a firm of Solicitors TT&Co and one if its partners, C1 (by then insolvent), who had been co-Executor (with SM) of the wills of M's parents. M's claim was for reinstatement of monies allegedly wrongfully paid out of the two estates in the 1980s in respect of solicitors' charges and accountancy services. CT had left TT&Co on 31st December 1987 to take up a partnership in another firm C2&Co. In 1993 C2 accepted service on CT's behalf and went on record as his Solicitors. In 2000 M served notice of discontinuance of the proceedings, the effect of which was, under CPR 38.6(1), that, unless the Court otherwise ordered, M was liable for CT's costs which amounted to £15,250 incl. VAT. C2&Co's Partnership Agreement stated inter alia (cl.13):

> "If [the firm acts] as solicitor .. for any partner … then no charge shall be made by the partnership practice for the provision of such services except in respect of out of pocket expenses and of costs recovered from other parties in any proceedings … and any costs so recovered shall belong to the practice."

M argued that this amounted to a contingency fee arrangement but this was rejected by the Costs Officer. On appeal, Costs Judge Rogers dismissed it but gave permission to appeal and, per CPR 52.14(1), directed that it go direct to the CoA. He identified three issues for decision:

(1) whether cl.13 of C2&Co's Partnership Agreement constituted a contingency fee agreement;

(2) whether, if so, that agreement was unenforceable, either by virtue of the Solicitors' Practice Rules or under the common law; and

(3) whether CT was entitled to recover costs in any event under the principle in *London Scottish Benefit Society v Chorley Crawford and Chester* (1884) 12 QBD 452, (1885) 13 QBD 872 (CA) (the LSBS case).

He held that (1) the effect of cl.13 was that CT incurred no liability to the firm, save in respect of disbursements, unless and until a costs order was made in his favour; (2) the agreement was not unenforceable under the SPR as at 1992 but was unenforceable at common law, the latter following the CoA in *Awwad v Geraghty & Co* [2000] 1 All ER 608; (3) the "LSBS principle" had survived the introduction of CPR and was applicable, hence CT should be allowed his firm's costs, subject to assessment.

The only issue before the CoA was whether the Costs Judge was correct in applying the LSBS principle but that issue turned on two distinct questions: (i) whether, in a case where the solicitor litigant carries on practice in partnership, the principle extended to work done on his behalf by the partnership and (ii) whether the LSBS principle had survived the introduction of CPR.

What was the LSBS principle ? "Where an action is brought against a solicitor who defends it in person and obtains judgement, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary." Although originating in 1884, the principle had been repeatedly endorsed, most recently as 1970. M sought to distinguish the present case since (a) CT, although a solicitor, had not expended his own time and skill in defending and (b) the present claim was not one which was against C2&Co or in respect of matters which had arisen while CT was a partner therein.

Chadwick LJ identified six principles arising from the LSBS case:

(1) a person wrongfully sued ought to be indemnified against the expense to which he is unjustly put;

(2) the need is for indemnity, not punishment or reward;

(3) a person can recover the cost of employing a solicitor to assist him in the litigation;

(4) a non-Solicitor litigant cannot recover, as costs, compensation for the expenditure of his own time and trouble;

(5) the preceding considerations are of no weight where the litigant is himself a solicitor;

(6) a rule of practice which enables a solicitor-litigant to recover, as costs, compensation for his own time and trouble is beneficial, because it is likely to lead to a reduction in the amount payable under a costs order (e.g. the Solicitor-litigant cannot recover for instructing himself !)

Chadwick LJ said that it would be absurd to permit a solicitor to charge for work in the litigation when done (a) by another solicitor (or a solicitor in another firm), or (b) by his clerk (or an employed solicitor in his own sole practice) or (c) by himself; but not to permit him to charge for the same work when done (d) by employees of the firm of which he is a partner or (e) by one or more of his partners. The successful litigant is entitled to an indemnity; there is no difficulty in measuring the costs and there is likely to be some saving of costs if the work is done within his own firm rather than if he is encouraged, in practice, to instruct another firm.

The second question in this appeal was whether the LSBS principle had survived the introduction of CPR; it should be noted that the harshness of the common law rule that a non-Solicitor litigant in person could not recover for his own time and trouble (stated in LSBS and affirmed in *Buckland v Watts* [1970] 1 QB 27, 35H, 38B) had been alleviated by RSC 62.18 made under the Litigants in Person (Costs and Expenses) Act 1975 but which expressly excluded solicitor-litigants (18(6)). The 1999 White Book recognised (at Note 62/b/139) that the 1975 Act had left the solicitor-litigant's position as in LSBS. CPR 48.6 had substantially reproduced RSC 62 Rule 18(1-4) but in 48.6(6) stated "For the purposes of this rule a litigant in person includes … (b) a barrister, solicitor, solicitor's employee or other authorised litigator (as defined in …) who is acting for himself." However, it was accepted that CPR 48.6(6)(b) must be read subject to section 52.5 of 48PD.3 which states: "Attention is drawn to rule 48.6(6)(b). A [practising] solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not, for the purposes of CPR, a litigant in person." But M had submitted that, once it was accepted that CT was not a litigant in person i.r.o. CPR, the LSBS principle became irrelevant.

Chadwick LJ said that that submission was founded on a misunderstanding of the reasoning in the LSBS case. The basis of the principle that a solicitor-litigant is entitled to the costs of his time was a recognition that he (in common with any other litigant) ought to be indemnified against the expense to which (assuming success) he has been unjustly put. There was no difficulty in measuring the costs and there was a potential saving in costs. One effect of CPR 48.6(6)(b), read in conjunction with section 52.5 of the PD, is that there was now more clearly recognised a distinction between the solicitor-litigant who was represented by himself in his firm name and the solicitor-litigant acted "in his own time" outside his practice. The latter is treated as a litigant in person for the purposes of CPR 48.6; and so is subject to the restrictions imposed by that rule, including the two-thirds restriction imposed by 48.6(2), but the former is not. Nor was there any

reason, consistent with the need to provide an indemnity, why he should be. Further, there is no reason, consistent with the need to provide an indemnity, why he should not recover the cost of providing professional skill and knowledge through employees of his practice. The position where professional skill and knowledge in connection with litigation to which one partner alone is party is provided by other partners or employees in the firm is, on analysis, indistinguishable in principle from the position where a sole practitioner represents himself in his firm name.

M's appeal was dismissed.

Chadwick LJ added important obiter remarks concerning the first two issues identified by the Costs Judge:

(1) he doubted whether cl.13 of the Partnership Agreement could properly be regarded as a contingent fee agreement since it did not commit the partnership or partners to provide any legal services to anyone, merely providing for the consequences, as between the partners, in the event that such services were provided;

(2) nothing in the present judgement was to be taken as a decision on what the position would be if litigation services were provided by the partnership to the wife, child or parents of a partner, or to his, her or their personal representatives or trustees, without a formal retainer;

(3) nor, of course, did this judgement address the position where litigation services are provided to a solicitor by a firm of which he is an employee and not a partner.

16. Questions of bias, perceptions of bias, reasonable apprehensions of bias etc continue to come before the Courts; the definitive conclusion on the matter was laid down by the House of Lords in Porter v Magill (refer section 10 of my News Update #6) and the lower courts are now busily applying that to defeat a plethora of HRA-based challenges all of which have failed. Two recent cases have raised new facets of the issue.

(1) In Sengupta v Holmes & Ors, a disciplinary committee (PPC) of the GMC had ruled that a complaint against S should not proceed to the full GMC; the complainants sought judicial review of this ruling and, curiously, were supported by the GMC itself; S, an "interested party" naturally supported the PPC's decision. The High Court reversed the PPC's decision and S applied for permission to appeal. In May 2002, sitting alone in Chambers and considering only the papers (as is customary), Laws LJ refused permission; as he was entitled to, S applied to the CoA and a hearing before Simon Brown and Tuckey LJJ took place in July 2001 following which permission was granted. The substantive hearing before the CoA took place in March 2002 before Jonathan Parker, Keene and Laws LJJ. Counsel for S submitted that Laws LJ should recuse himself on 'apparent bias' grounds. The CA adjourned until July when submissions were made by Counsel for each of S, the GMC, the Lord Chancellor and the Advocate-General, the latter two because of the fundamental importance of the issue.

Laws LJ himself gave the leading judgement: CPR 52.3 dealt with permission to appeal but there was nothing in any rule or practice direction to stipulate whether or not a judge who had at any stage considered an application for permission might sit as a member of the Court hearing the substantive appeal in a case where permission has later been granted. It was necessary to consider the law regarding bias: in *In Re Medicaments*, Lord Phillips MR had said:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased".

and this test had been endorsed by the HoL in *Porter v Magill* after full consideration of the authorities, particularly in Strasbourg jurisprudence.

It was especially important to consider closely the nature of the test imported by the notional "fair-minded and informed observer" (FMIO). Counsel for S had accepted that a lawyer accustomed to practise in the higher courts would entertain no apprehension at all of bias in a LJ in the present circumstances. However she submitted that the FMIO could not be equated with a practising lawyer familiar with court procedures and that the FMIO should not be a regular court user, although it might be someone who had "some knowledge of legal culture"; he or she should not be taken to be a person educated to any particular standard. A test for apparent bias which rests on the presumed or actual views of practising lawyers would not deliver public confidence in the judicial system: to a greater or lesser extent they, or some of them, would know the judges personally i.e. belong to the same 'club'. In the Supreme Court of South Australia in *Southern Equities Corp Ltd v Bond* [2000] SASC 450, Olsson J had cited authority showing that in Australia the notional bystander for the purposes of the apparent bias rule is described as a "fair-minded lay observer" (thus distinctly *not* a lawyer); Kirby J had said in the same case at 671:

> "The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and

uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish that they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated example of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."

Later in *Southern Equities* Bleby J had said (at paragraph 126):

"Judges are accustomed to defining standards of behaviour by reference to what would be done by a reasonable person. Most judges would claim to be reasonable people, and to be able to make such judgements on behalf of the community of which they are representatives. However, when one is required to assess the perceptions of a fair-minded lay observer, the judge is cast in a much more difficult role. Admittedly, the observer is observing a professional judge. But the judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of fair-minded lay observer, the judge must be clothed with the mantle of someone the judge is not. One must avoid the natural temptation to view the judicial conduct, state of knowledge, association or interest in question through the eyes of a professional judge. An apprehension of bias by pre-judgement is based on a perception of human weakness. Given the double use of 'might' in the current formulation of the test for apprehended bias, one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other."

Laws LJ described these statements as both useful and important.

Following review of the principal UK cases (Khreino, Mahomed and Rezvi), of Strasbourg jurisprudence (De Cubber v Belgium, Hauschildt v Denmark, de Haan v Netherlands) and additional Australian cases, Laws LJ accepted the distinction (drawn by Counsel for the Lord Chancellor) between two circumstances:

(1) where the judge has a financial interest in the case's outcome or a personal connection with one of the parties; as a general rule there was no need to show that the judge was actually influenced by such considerations; the suspicions of the parties and the public that he may be so influenced, even unconsciously, are reasonable, cannot be allayed, and the judge must stand down;

(2) where, absent any extraneous influence, there was an apprehension that the judge would approach the case with a closed mind; here there was no brightline rule which will tell the judge whether or not he must stand down and such an apprehension of a closed mind will only arise where it appears that he has *pre-judged* the issue, and in consequence it is reasonably feared that he cannot or will not revisit the issue with an open mind.

Counsel for S had accepted that the FMIO could be taken to possess "some knowledge of legal culture" and would know of the central place accorded to oral argument in the common law adversarial system; this was important, because oral argument is perhaps the most powerful force there is, in the English legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should be attributed to the FMIO; otherwise the test for apparent bias is too far distant from reality. It was common for a hearing to start with a clear expression of view by the judge or judges, which might strongly favour one side; it would not cross the mind of Counsel on the other side then to suggest that the judge should recuse himself; rather, he knows where he is, and the position he has to meet. He often meets it.

Laws LJ concluded by dismissing S' appeal; Jonathan Parker LJ agreed and Keene LJ, after adding some comments of his own, did so also.

Comment: I may be described as cynical but I detect an element of self-justification in the paragraph "Counsel for S … He often meets it" comparable to that which underlay the internationally-criticised decision in Laker v FLS Aerospace. However, while I share the international view that *Laker* was wrongly decided, I do consider that the present case was correctly decided although I see a flaw in the part of the argument.

(2) The issue in *Lawal v Northern Spirit Ltd* ([2002] EWCA Civ 1218 (9th August 2002)) on was whether a real possibility of bias existed when a part-time judge of the Employment Appeal Tribunal appears as an advocate before a tribunal chaired by another judge sitting with two lay members, one or both of whom had previously sat with the part-time judge. Although there was a growing body of jurisprudence on actual and apprehended judicial bias, there were no decisions of the English Courts or of the Strasbourg Court covering this point.

The appeal, brought with the permission of the CoA, was from the ruling by EAT on 15th January 2002 on the objection ("the Recorder objection") made by L; the FMIO test (see above), the Appeal Tribunal, comprising the President (Lindsay J) and two lay members, who had never sat with the part time judge, concluded that there was no possibility of bias.

L had been employed by NS from 1977 before resigning in 1997; he subsequently alleged that NS had caused him detriment and had victimised him on racial grounds by deliberately failing to supply references requested by him in 1998 and again in 1999.

In 2000 the Lord Chancellor appointed five leading employment law Counsel (all Recorders), to be part-time judges of the EAT, sitting for at least 20 days a year; they are not restricted from appearing as counsel before EAT; two lay members sit with the part-time judges both at preliminary hearings and on full appeals. L objected when Nicholas Underhill QC, a part-time judge, was instructed to appear for NS at the hearing of his appeal in 2001 before HHJ Wakefield and two lay members, one of whom had previously sat with Mr Underhill. After argument the matter was adjourned to be re-heard by the President and two other lay members, neither of whom had sat with Mr Underhill. The ground of L's objection was that the presence on EAT of a lay member who had sat with Mr Underhill in his capacity as part-time judge, constituted a violation both of the "impartial tribunal" requirement of Art. 6 (1) ECHR and of his common law right to an unbiased judge. The essence of the argument was that lay members of the Appeal Tribunal are colleagues of the part-time judges with whom they have sat from time to time; that such lay members might be subconsciously influenced by that previous professional relationship formed in the tribunal and by a sense of collegiate loyalty to him; and that, as the part time judge is the only legally qualified member of the tribunal, the lay members would tend to look to him for guidance on the law, thereby creating an opportunity for the development of a degree of authoritative personal influence by the part-time judge over the lay members. So, it was contended, this objection was "more specific and worrying" than a generalised allegation of the lay member's predisposition to favour one side rather than the other. It was submitted that, in the absence of proper safeguards, such as a "cooling off period" between sittings, there was a real possibility of bias.

The test (per *Porter v Magill*)is: "The question is whether the fair-minded and informed observer (FMIO), having considered the facts, would conclude that there was a real possibility that the tribunal was biased" per Lord Hope. It should be assumed that the FMIO would take reasonable steps to become sufficiently well informed to reach a balanced view on the possibility of bias. If what he had heard and seen gave rise to doubts about the impartiality of the tribunal, the FMIO would react responsibly before reaching a final view on such a serious question as bias on the part of a tribunal. He would look for an explanation of the circumstances giving rise to his doubts. To that end he would make reasonable inquiries. Such enquiries (spelled out in detail by the CoA) would show that there was no reasonable possibility of bias. The Recorder objection amounted to no more than an assertion that a lay member might possibly be more disposed to accept the submissions of one party's legal representative than those of the other side, as a result of the professional experience of having sat on the tribunal with him in his capacity as a part-time judge. That was merely a speculative and remote possibility based on an unfounded and, some might think, condescending assumption that a lay member sitting with another judge on the hearing of an appeal could not tell the difference between the impartial decision-making role played by a tribunal panel of a judge and two lay members and the adversarial role of the partisan advocates appearing for the parties. There was nothing in Strasbourg jurisprudence to suggest any different conclusion.

17. In *Koch Shipping Inc v Richards Butler* ([2002] EWCA Civ 1280; 22nd July 2002), K had secured an injunction against Richards Butler, a leading shipping law firm in London, restraining it from continuing to act for A in a London arbitration against K, on the ground that there was a real risk of disclosure of confidential information relevant to the arbitration by K's former solicitor, P. K's solicitors in the arbitration were JP&Co where P had been a partner and had acted as K's solicitor in the arbitration from April 2000 until leaving JP on 5th April 2001. Since 2nd July 2001 P had worked for RB as a 3-day/week consultant because of having small children. Following existing case law, the judge would have refused an injunction if RB and P had undertaken that she would work from home or somewhere other than RB's London office. Although the A v K arbitration (details of which are not relevant to the present case) had settled, RB pursued the appeal on principle.

A had instructed GA, a partner in RB, on the dispute with K arising; GA had accepted many instructions from A's Managing Agent over the years. K had instructed GM, a partner in JP&Co, and on his retirement, P had assumed responsibility until she left JP&Co.

The CoA judgement, with Clarke LJ leading, recites substantial detail of the working arrangements at RB i.e. who sat on which floor, how the work teams were created, how work was assigned, where the various secretaries were placed, where the photocopiers were, who ate in the canteen, how often partner or other group meetings were held etc etc. Further, although Clarke LJ ultimately distinguished the present case from recent similar cases (e.g. *Prince Jefri of Brunei v KPMG* [1999] 2 AC 222), he summarised the existing law as follows, first quoting Lord Hope in *Prince Jefri*:

> "As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied, it should bear in mind that the choice as to whether to accept instructions from the new client rests with the solicitor and that disclosure may result in substantial damage to the former client for which he may find it impossible to obtain adequate redress from the solicitor. It may be very difficult, after the event, to prove how and when the information got out, by whom and to whom it was communicated and with what consequences. In that situation everything is likely to depend on the measures which are in place to ensure that there is no risk that the information will be disclosed. If the court is not satisfied that the measures will protect the former client against the risk, the proper course will be for it to grant an injunction."

then stating the legal principles as follows (per Lord Millett in *Prince Jefri* p.234-239)

(1) The court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information.

(2) The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

(3) The duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so.

(4) The former client cannot be protected completely from accidental or inadvertent disclosure, but he is entitled to prevent his former solicitor from exposing him to any avoidable risk. This includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant.

(5) The former client must establish that the defendant solicitors possess confidential information which is or might be relevant to the matter and to the disclosure of which he has not consented.

(6) The burden then passes to the defendant solicitors to show that there is no risk of disclosure. The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it need not be substantial.

(7) It is wrong in principle to conduct a balancing exercise. If the former client establishes the facts in (5) above, the former client is entitled to an injunction unless the defendant solicitors show that there is no risk of disclosure.

(8) In considering whether the solicitors have shown that there is no risk of disclosure, the starting point must be that, unless special measures are taken, information moves within a firm (per Lord Millett at p.237). However, that is only the starting point. The *Prince Jefri* case does not establish a rule of law that special measures have to be taken to prevent the information passing within a firm. On the other hand, the courts should restrain the solicitors from acting unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur. "This is a heavy burden" (Lord Millett at p.239).

Lord Millet had also said (at p.239) "In my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."

Clarke LJ stressed that each case turned on its own facts and, in the present case, the key was the state of knowledge of, and the confidentiality observed by, one individual, P, whereas in other cases large numbers of personnel had been involved. In the present case K had been able to show a strong case with regard to the confidential information which P had. It had identified with particularity information which on its face was likely to be highly material to the A v K arbitration, both information relevant to any negotiations to settle the dispute and information about how any hearing might be conducted by K. However, RB and P had offered separate undertakings, including that P would not communicate with GA (the RB partner on the case), that P possessed no relevant documents and that RB would not raise the A v. K arbitration at Partners' meetings, that P would not enter the offices of those working for A and vice versa, etc. K, while accepting these precautions, continued of the view that the real risk was one of inadvertent disclosure i.r.o. which the High Court judge had said of P "… from the time that she joined RB, she has been alert to the danger of accidentally contravening her duty; that she has been `acutely aware of the need to avoid a situation where there was any chance that confidential information about former clients might slip through'. She is able to say that `there certainly has not been a single occasion when it is possible that [information relating to the arbitration] has been passed to anyone at RB'. In addition, since joining the firm, P had not even spoken to GA, the only exchange being an occasion when, at an informal shipping partners' lunch, he attempted to greet P and she had signalled that she could not speak to him.

Further, the Senior Partner of RB had said:

> "We do not give solicitors joining the firm express guidance or warning that they must not divulge (whether deliberately or inadvertently) information relating to their former clients. No such procedures are in place because it is fair to assume that qualified solicitors joining this firm will be aware of their professional duties and will avoid making such disclosure, or allowing such disclosure to happen in a casual way. *We would not recruit someone if we considered that they required this type of warning.* For similar reasons, we do not have procedures in place to stop solicitors joining from another firm talking to other members of [RB]. This sort of arrangement would plainly be unworkable. In my experience in running a large shipping firm, use of professional common sense is a much safer way of maintaining professional standards than imposing formal organisational procedures."

Counsel for RB extracted the following from the High Court judgement:

(1) No one doubted P's integrity or her high professional standing.

(2) No one questioned the integrity or high professional standing of the relevant case handlers at Richards Butler.

(3) Through P's colleague (who had left JP&CO at the same time) RB had continued to act for K on six [other] live cases, so they could have had no concern that general information about Koch might be disclosed.

(4) P fully understood the duties of confidence and confidentiality owed to former clients and had them well in mind.

(5) The only suggestion was that of indirect disclosure.

(6) It was inconceivable that P would place confidential information on the RB central server.

(7) She retained no documents.

(8) There was physical separation between P and A's case handlers since they were on different floors, albeit in the same building.

(9) There was no risk of inadvertent direct disclosure to A's case handlers because of the undertakings given by P not to communicate with them at all and by them not to communicate with her.

(10) P had given the further undertaking not to talk to anyone about the A v K matter.

and consequently submitted that. in all the circumstances, it was fanciful to suppose that P, despite those undertakings and in particular #10, might inadvertently let slip to someone at RB something about the A-K dispute which might be passed on to A's advisers.

Clarke LJ concluded that, although the High Court judge had reached the contrary view on the same facts, he had relied on a case very different (mainly that there were numerous personnel involved) from this one which was concerned only with the risk posed by some inadvertence on the part of one individual solicitor, P. In consequence, on the basis of the undertakings which both P and A's case handlers had given, K was fully protected because any risk of disclosure in the light of them was fanciful. Tuckey and Ward LJJ delivered short concurring judgements

Comment: the case illustrates the extreme lengths to which firms of advisers must go to avoid tripping up – note in particular that P refused to speak to GA at a Partners' lunch and that the location of secretaries and photocopiers, and who used the canteen, played a role

SECTION C – INTERNATIONAL ARBITRATION

18. In Glencore Grain Rotterdam BV v Shivnath Rai Harnarain Co, Glencore had purchased some 300,000T of rice from Shivnath, an Indian company, pursuant to 11 English-law contracts which included LRBA/London arbitration clauses. Disputes arose and were referred to the LRBA which subsequently issued an Award in Glencore's favour for $6.5m; Shivnath neither paid on the award nor challenged it in England so Glencore commenced enforcement proceedings in Delhi which are still pending. Subsequently, Glencore commenced additional enforcement proceedings in California on the basis that Shivnath had had business connections with California sufficient to establish the Court's specific and general jurisdiction over it; the District Court dismissed Glencore's action, holding that Shivnath did not conduct any business in the USA (except through a Sales Agent) and that Glencore had not asserted that the cause of action arose from Shivnath's activities in the USA.

The Appeal Court, while noting the pro-enforcement bias of the 1958 Convention (implemented in the Federal Arbitration Act §§201-208 especially §207 – a federal court "shall confirm the award unless … [the 7 grounds]), held that it did not abrogate the due process requirement that jurisdiction must exist over the defendant's person or property. Glencore had submitted that neither the Convention nor the FAA required personal jurisdiction but the Appeal Court cited 'bedrock' authority that "a statute cannot grant personal jurisdiction where the Constitution forbids it" and that the constitutional notions of due process were paramount. It found support in (i) the Restatement (Third) of Foreign Relations Law (1987) at §487, (ii) in district court jurisprudence and (iii) in the jurisprudential necessity to avoid constitutionally questionable

constructions such as interpreting the FAA to override Due Process; of course, neither (i) nor (ii) are binding. The Appeal Court applied the standard 3-part test to evaluate the propriety of exercising specific jurisdiction: whether (1) the defendant had conducted activities within forum (2) the claim arose out of in-forum activities and (3) the exercise of jurisdiction was reasonable and held that Glencore had failed (2) and (3), and had failed to show that it would not have suffered loss "but for" Shivnath's activities in California. A distinction had to be drawn between doing business "with" California and doing business "in" it. Further, the Court was not prepared to contemplate enforcement against in-forum assets which had not been shown to exist but which Glencore believed might exist or might do so at some subsequent time.

Comment: this appears to be a startling decision (described by the Court as "unremarkable") apparently driving the proverbial coach and horses through the Convention. I will return to this in due course.

I submit that the only basis on which an English Court would refuse enforcement in similar circumstances would be under s.103(3) of the 1996 Act – the 'public policy' exception, in this instance the policy being that of the losing party being at risk of having to make payment in some jurisdiction other than England (see *Deutsche Schachtbau und Tieftbohrgesellschaft mbH v Shell Petroleum Ltd* [1990] 1 AC 295 – the DST case). However, in *Soinco SACI v Novokuznetsk Aluminium Plant (No.2) ([1998] 2 Lloyds Rep 346*), enforcement was granted; however, in the latter case Chadwick LJ said at para 6

> *"It is common ground that the power of the Court to make a garnishee order, in circumstances in which it has jurisdiction to do so, remains discretionary. It is also common ground that the principles upon which that discretion should be exercised - at least for the purposes of the present proceedings - were considered exhaustively by the House of Lords in [the DST case]; and that it is unnecessary for this Court to look beyond that case in order to identify those principles. In short, the Court, in the exercise of its discretion, should not make a garnishee order in circumstances in which it would be inequitable to expose the garnishee to the risk of being compelled to pay the attached debt twice over - the risk of "double jeopardy".*

and at para 40

> *"The English judgement and the garnishee order are judicial acts which, applying what Lord Goff described as the generally accepted principles of international law, can be regarded as deserving of recognition in a foreign court. The enforcement of the Zurich award by entry of a judgement under the Arbitration Act 1975 conforms with the 1958 Convention. The Russian Federation is party to that Convention and - whether or not it would enforce the award in its own courts - might be expected to recognise the jurisdiction of the English court when acting under the Convention. The English court made the garnishee order of 23 July 1997 on the agreed basis that BMTG had submitted to its jurisdiction and that situs of BMTG's debt to NKAP was England. The criteria necessary to found the assumption that the judgement and the garnishee order will be recognised in a foreign court are present."*

although the CoA granted enforcement on the facts – para 45

> *"For the reasons set out in this judgement - which closely reflect the Judge's own reasons - I am left in no doubt that he was correct to reach the conclusion that BMTG had not shown that there was a real or substantial risk that it will be compelled to pay the garnished debt a second time. It follows that he was entitled to make the garnishee order absolute which he did. I would dismiss this appeal."*

Postscript: one of the criteria applied by the Court was that the Californian interest in the Glencore/Shivnath contracts (English law contracts for the sale of rice in India) was "slight"; this is very 'rich' coming from a state which practices a long-arm policy to assert jurisdiction (e.g. over the North Sea Brent crude market) where none objectively exists.

19. Miscellaneous cases reported elsewhere:

International Arbitration Law Review (which I commend to your attention) contains, in addition to the customary erudite articles, a "News Section" containing short reports of interesting cases from around the world; with the kind co-operation of the Editor, David Holloway (Barrister – Tanfield Chambers), and with the generous permission (for which I am greatly indebted) of the publishers, Sweet & Maxwell, I am able to bring you the following

(1) Ireland's Arbitration (International Commercial) Act 1998, which implemented the Model Law in Ireland, was threatening to follow Scotland's Model Law-implementing "International Arbitration Act" (which has the catchy title "Law Reform (Miscellaneous) Provisions (Scotland) Act 1990 (section 66 and Schedule 7)") into moribundity but …….. the first case under the AICA has now taken place. In Euro Petroleum Trading Ltd v Transpetroleum International Ltd (2001 #560/SP), an eccentrically-drafted dispute resolution clause provided, first for negotiations, then arbitration in the defendant's home Court. A dispute arose and Euro first requested TI to negotiate (no response) then appointed its own arbitrator and requested TI to appoint its one; TI failed to respond so Euro applied to the Court under ML Art.11(3)(a) to appoint TI's arbitrator; it duly did so. The whole process from issue of Euro's writ to issue of the Court Order took 45 calendar days covering Xmas/New Year i.e. approximating to 28 working days.

Comment: the system works !

(2) In a German case (III ZR 33/00 9th April 2000), parties entered into a contract and a separate arbitration agreement; a dispute arose over provision for security of performance. Party A commenced arbitration but, a year later, terminated the arbitration agreement for cause on the basis that B was unable to afford the arbitration and sued B for damages for breach of contract. Both First Instance and Appeals Courts dismissed the action and referred it to arbitration under §1032(1) ZpF (i.e. ML Art.8(1)). The Bundesgerichtshof (Supreme Court) reversed the decision since §1032(1) provides that the Court must decline jurisdiction in favour of arbitration except "where the arbitration agreement is null & void, inoperative, or incapable of being performed". The BGH found that the subject arbitration agreement was so incapable because of B's inability to pay the costs whereas B could obtain legal aid to defend the action in Court. Furthermore, B's right of access to the Courts would be excluded only if it had acted in bad faith.

Comment: this must be wrong in principle since one party's inability to pay its costs cannot, in my submission, amount to the arbitration agreement being incapable of being performed; as a practical solution, given the legal aid twist, this decision may have some merit but that is insufficient to overcome the wrongness of the principle

(3) In another German case (Brandenburgisches Oberlandesgericht (Higher Regional Court - HRC) 8SCHH 1/00), C and R entered into a construction contract whereby C (German co) would supply heating and plumbing works for R (Italian co) which was building in Germany; the contract was to a German domestic standard form, in German and provided for payment in DM. There was a separate arbitration agreement in a German standard form providing for arbitration under the rules of the German Construction Association (GCA) which, inter alia, provided for each party to appoint one arbitrator and the two to appoint the chairman failing which the Regional Court at the Employer's place of business would do so. Disputes arose and each party appointed its own arbitrator, both German, but they could not agree on the chairman and, on C's request, the local Regional Court appointed one. R appealed on the basis that the Regional Court in Bari, Italy had sole jurisdiction to appoint the Chairman (a circumstance evidently never intended). The HRC dismissed the appeal: the arbitration was essentially German, all significant features of the contract being German and there was nothing to suggest that the parties had ever intended non-German arbitrators; consequently ZpF §1035(4) (ML Art 11(4)) clearly referred to the Regional Court via ZpF §1030. Common sense prevailed over strict form.

Comment: I have frequently criticised German Courts for obsession with form over substance so it is reassuring to see a "common sense prevails" decision

(4) It is well-established in Swiss law that assignment of rights in a contract carries with it assignment of the rights in any associated arbitration agreement unless such latter assignment is excluded by law, by contract or by the nature of the contract; three recent cases have clarified this:

(i) In Nextrom v Watkins International, a 3rd party X had sold certain shares to N; on X being liquidated, its assets and liabilities were transferred to A and thereafter to W which claimed the outstanding balance of the share purchase price from N which, in an ICC arbitration, protested jurisdiction on the basis of W having no locus standi. The Arbitral Tribunal rejected N's argument in a Preliminary Award which N then appealed to the Tribunal Fédéral under §190(2)(b) PIL. Inter alia, N argued (a) that A could not have acquired X's assets because the latter's liquidation was illegal and (b) that the assignment X-A was invalid through failure to comply with contract requirements. The TF upheld the Award since the AT had examined all the evidence and had concluded that the assignments X-A and A-W had been valid; the assets so transferred included rights to the purchase price by N. Further, the TF held that N could not, in good faith, argue as it did since it had been aware of the facts of the two assignments and had raised no objections at that time (shades of s.73 AA96 !!).

(ii) C assigned a distribution agreement (DA) (including an arbitration agreement (AA)) to R; a subsequent dispute gave rise to an Award which R appealed on the basis that it had not in fact signed the DA. The TF, unsurprisingly, drew a clear distinction between the law of the DA and that of the AA, i.e. PIL §178; it was settled law that the AA did not need to be signed in the process of assignment.

(iii) A French company P had contracted with a Yugoslav company X for the supply of automotive parts; when the UN embargo commenced against Yugoslavia, P decide that it could not continue to perform the contract; X commenced an ICC arbitration against P which protested jurisdiction because the UN embargo prohibited any court from enforcing contracts with Yugoslavian companies. During the arbitral proceedings, O asserted that it had taken assignment of X's rights and that it should take X's place as claimant. P both denied O's right to take X's place and asserted that the assignment had been ineffective. By Interim Award, the Tribunal ordered that the arbitration should proceed with O as claimant; P successfully challenged the award at the TF. The Swiss Supreme Court ruled that, if an arbitral tribunal was to decide on jurisdiction in a preliminary award, it must examine all the facts including the validity of the assignment; this it had evidently

not done since the contract expressly both prohibited any assignment and made the contract personal to X. [NOTE: it seems quite remarkable that this had been ignored or overlooked]

Comment: all three decisions seem 'obvious' but it is indeed reassuring that the 'obvious' was upheld

(5) An English award was refused enforcement in Germany because the existence of the arbitration agreement was not proven to the German Court: C (Guernsey) and R (German) were both metal traders which, in 1997, entered into an oral contract for the sale of titanium rods; C sent a confirmatory fax to R which included an LME/London arbitration agreement but R claimed both that it had never received this and that it had never made a binding contract, refusing to accept the rods or pay for them. The arbitral tribunal concluded, on the balance of probabilities, that the fax had indeed been sent; in the alternative, even if it had not been received, the parties' reference to it in subsequent communications confirmed its existence. C obtained judgement under s.66 but was refused enforcement in Germany; on appeal to the Higher Regional Court in Rostock it was refused again, the Court holding that (i) the requirements of Art. IV(1)(b) NYC58 had not been met; (ii) those overrode the more generous domestic law (§1064(1) ZPO) which was applicable to international awards "unless otherwise provided in treaties", notwithstanding Art. VII which the Court held not to apply to 'form' requirements; (iii) R could rely on Art.V(1)(a) because there was no valid arbitration agreement in the context of Art II; (iv) even if R had received the fax, the circumstances failed Art II(2); (v) R was entitled to raise these issues in resisting enforcement despite not having made any challenge in England.

Comment: to the outsider, it might be possible to concur with (i) to (iv) above but, it is submitted, the contrary view should have been preferred particularly given the parties' conduct and the nature of the metals trade; however, (v) must be wrong. It is difficult to resist the conclusion that this was a "home team" decision and not the first such I have come across in Germany.

(6) Spain, with its somewhat antiquated arbitration law, does not figure prominently in international arbitration jurisprudence but gave rise to an interesting case Kern Electronics v Lucky Goldstar; KE was the exclusive distributor in Spain for LG's electronic products, the New York-law distribution agreement including a AAA/New York arbitration agreement. KE alleged that LG had sold products in Spain other than through itself and commenced proceedings before the Spanish Court whereas LG obtained a stay in favour of arbitration which was confirmed on appeal. In the Supreme Court, KE argued that the arbitration agreement was invalid under Spanish law since (i) the applicable substantive law had no connection with the subject matter of the contract (i.e. in breach of Art. 61 Arbitration Act 1988) and (ii) the arbitration agreement did not include, as required by Art. 5.1, an express agreement to comply with the terms of the Award. Both arguments were dismissed since (i) Spain's international treaty obligations overrode Art. 61 and (ii) Art. 5.1 was inapplicable to the present circumstances both because of the clear contrary intentions of the parties and because Titles I-VIII of the 1988 Act should be taken as applicable only to domestic arbitration.

Comment: this is a commendably positive interpretation by the Supreme Court, seeking to distance international arbitration from the constrictive clutches of the 1988 Act and, in addition, seeking to disapply Titles I-VIII. It should be noted that Art 5.1 of the 1988 Act is inconsistent with Art. II NYC58. However, if the arbitration agreement had provided for its seat in Spain, the procedural rigours of the1988 Act, typically severely encroaching on party autonomy, would have applied in full. Spain remains wholly unacceptable as the seat of any international arbitration.

(7) In a Swiss case arising out of an ICC arbitration, one of a 3-man panel had had to resign on being appointed a Minister in his home country; his replacement refused to participate in proceedings unless the existing draft Award was withdrawn; the other 2 arbitrators proceeded to render an award which was confirmed by the ICC. The losing party appealed to the Swiss Court on the grounds of the defective tribunal but the appeal was dismissed, the Court distinguishing between a truncated tribunal (i.e. where one member resigns and is not replaced) and a tribunal including a refusenik. The loser also appealed on the grounds that the Award had failed to apply mandatory provisions of EU a/o Greek competition law but the Court followed existing Swiss jurisprudence that such matters lay outwith [Swiss] public policy.

Comment: perhaps because I was taught by, or am acquainted with, several distinguished Swiss arbitrators but the Swiss Courts seem to hit the bull and 'get it right', at least most of the time (see next item)

(8) In another Swiss case arising out of an ICC arbitration, the issue was bias: R was a state-owned Cuban company and its PAA was a Cuban national who had advised the Cuban Government on various (unrelated) matters. C challenged the award on grounds of bias but this was dismissed since (i) it was too late, the issue being raised only after the award had been published and (ii) the arbitrator's work for the Government were past activities which could only be relevant if there was a continuing relationship; (iii) the arbitrator's failure to disclose the relevant facts was not itself a ground for challenge, only the facts themselves.

Comment: (ii) and (iii) appear remarkable to the point of perversity and, I submit, would not be followed in England since there are very clear grounds on the facts for the "Fair-Minded Independent Observer"

to reach a bias conclusion. Supposed the Arbitrator had ceased acting as the Government's principal external legal adviser the day before he was appointed having earned $250,000 p.a., up to that time ? "Real danger of bias" – the man withheld material information about his relationship – how can that be dismissed as irrelevant ?

(9) In yet another Swiss case a novel issue arose: a GCC tribunal rendered an award on liability against R and then convened hearings on quantum. At the final hearing, R exhibited evidence that C, purportedly a Texan company, had been incorporated only some time after the arbitration had commenced. C argued that it was not the company to which R referred but was, rather, "C, a division of Z Inc." registered under the Texas Business Names Act. The tribunal held that C was not a legal entity so could not have brought the claim. C challenged this arguing that (i) the tribunal was bound by its award on liability (ii) the question of its locus standi was res judicata and (iii) R's challenge was out of time.. The Swiss Court upheld the award: (i) agreed, but (ii) the question of C's legal existence had not been addressed by the tribunal, only its entitlement to claim and (iii) while defects in procedure must normally be addressed forthwith, a particularly serious defect such as the 'non-existence' of the claimant were not capable of remedy so could be challenged at any time.

Comment: under English law, "C, a division of Z Inc." can only mean Z Inc. since C has no legal persona so R's challenge could not arise. If, after proceedings had commenced, Z had incorporated C Inc as a subsidiary and had assigned to it the rights and obligations formerly held by Z Inc. in its C division, then (subject to any peculiarities of the C-R contract regarding assignment) C Inc. would have valid title to the rights in the claim – see the Swiss cases in this area covered at sub-section (4) above

Postscript: the precise nature of a corporate 'division' has caused difficulty for years; in 1983, the 4,500T deck of a North Sea oil production platform was lifted on to the supporting jacket 180° out of orientation; the fault was that either of (a) the design contractor which had written the load-out and lifting procedures (b) the fabrication contractor which had loaded out the deck section or (c) the marine installation contractor which had fouled up offshore. Each of the three contractors blamed the other two but, given that they were no more than divisions of the same legal entity, the legal liability fell squarely on that entity irrespective of the multiplicity of divisions and/or trading names.

(10) Nigeria's Arbitration and Conciliation Act 1990 was given a thorough run through all three tiers of Court in a recent construction case. R terminated C's contract to construct a building and the latter, absent any arbitration agreement, commenced Court proceedings, inter alia seeking to recover payment for work done. Before submission of pleadings, C and R agreed to arbitration, the award to be binding. The arbitrator duly rendered an award which R sought to resist in Court which (a) held that the parties were bound by it (b) adopted the award as a judgement of the Court (c) awarded interest @ 20%. The Appeal Court sets aside the HC judgement, instead recognising the award as binding. Four issues were submitted to the Supreme Court (i) whether the HC could adopt the award as its own judgement (ii) whether C was obliged to file the same award in Court for it to attain the same effect/status as a judgement (iii) whether the HC had power to award 20% interest (iv) whether the AC had been correct. It held that (i) a valid award in a voluntary submission to arbitration was final and conclusive; (ii) a settlement agreement arising out of litigation was not final and conclusive until (and if) made a judgement of the Court but arbitration proceedings (even if, as here, such was a way out of litigation) were not the same as settlement negotiations and an award would be enforced by the Court on application; (iii) no Court had jurisdiction to award interest on an award or otherwise to interfere with it (iv) no Court had jurisdiction to adopt an award as its own judgement; its only jurisdiction was to give leave to enforce the award as a judgement.

Comment: at first sight the maters in issue appear curious but the Supreme Court's judgement represents robust upholding both of 'common sense' and modern arbitral practice, perhaps not unsurprising given Nigeria's close legal ties to European (principally English) legal doctrine and practice.

(11) The German Courts once again failed to resolve a pathological arbitration clause in a case where The arbitration agreement provided for the arbitral tribunal ("Schiedsgericht") to be appointed "through a Chamber of Handicrafts". The dispute involved a construction contract and outstanding payments thereunder; C tried to initiate arbitral proceedings but none of the relevant Chambers of Handicrafts were prepared to appoint a tribunal and, in any event, R did not appoint its arbitrator. C then applied to the Bavarian Highest Regional Court either to appoint the tribunal or to declare that arbitral proceedings were inadmissible thereby permitting litigation to ensue. The Court rejected the application for appointment but did declare arbitral proceedings inadmissible. It held that the arbitration agreement was ambiguous and therefore void for uncertainty since the clause failed to specify which of the two potentially competent Chambers of Handicraft was intended and it was therefore impossible to appoint a competent tribunal irrespective of the fact that neither of the two Chambers was engaged in arbitration or was even willing to appoint an arbitrator. Whereas in other jurisdictions, Courts have found a way through such ambiguities (often with the subtlety of a bulldozer) in this case the Court, in my submission wrongly, declined to do so: since the parties had agreed to arbitrate it cannot be held material who should appoint the arbitrator otherwise they would have specified so with greater

accuracy. Although Art. IV(5) of the 1961 European Convention would have provided a solution for an international arbitration it was inapplicable to this case being a purely domestic one.

Comment: as stated in my previous newsletter (in respect of a poor Scottish decision on a badly drafted arbitration agreement), it is my submission that the Court should find a solution to defects in arbitration agreements wherever possible and only in the cases (very few) of total impossibility should the Court give up; the present case is not one of the latter category. Suppose UK-based parties want an arbitrator – ignoring choice of Rules (a different circumstance) does it materially matter whether the CIArb or LCIA or ICC UK (or the Court) makes the appointment ? I submit not.

(12) No doubt inspired by the case referred to above, Ireland has been abuzz with activity: in a High Court case, a local authority (LA) sought an injunction preventing the tribunal continuing an arbitration between the LA and a property developer (PD) i.r.o. certain land which the LA wished to compulsorily purchase from the PD. Information was laid before the tribunal to the effect that the PD had, through bribery of Dublin CC officials, secured re-zoning the land with consequent significant increase in value hence the injunction sought. The PD argued that the Court's jurisdiction to intervene in the conduct of an arbitration was limited to challenges to appointments. The High Court granted the injunction, holding that there was an arguable cause of action and that the balance of convenience lay with the making of the order (the classic common-law test). The judge said, inter alia,

> "I emphasise that in reaching my conclusion … I have been influenced by the public interest considerations which apply to this case. Parliament has identified the general issue of bribery [of DCC officials] as a matter of urgent public importance. It appointed a tribunal (of inquiry) which itself has indicated that it intends to investigate the specific allegations against the [PD]. There is clearly grave public concern that these matters be inquired into and determined as soon as reasonably possible. It is also in my opinion, of importance to the public that a reasonable opportunity be afforded to the [LA] to procure evidence, if such there be, in support of its allegations made in these proceedings against the PD."

Comment: this is a novel manifestation of "public interest" or "public policy" considerations and it is not immediately apparent where is to be found the Court's jurisdiction in this regard.

20. The LCIA hold a bi-annual symposium in a rural retreat in Hampshire; the Great and the Good (plus a few such as me) attend and this event alone is worth joining the LCIA for; the questions submitted in advance by participants represent an extraordinary snapshot of current issues in International Arbitration and can be found on the LCIA's website www.lcia-arbitration.com - look for Symposia/Conferences, then Schedule then Tylney Hall. If you have any difficulty I can provide my own copy.

21. Professor William Tetley's website "Tetley's Law and Other Nonsense" at http://tetley.law.mcgill.ca includes a glossary on maritime law terms at: http://tetley.law.mcgill.ca/maritime/glossarymaritime.htm and a glossary of national maritime laws and international conventions at http://tetley.law.mcgill.ca/maritime/marlawgloss.htm and a glossary of conflict of law terms at: http://tetley.law.mcgill.ca/conflicts/conflicts.htm as well as history, politics and other esoteric matters . Twenty chapters of Marine Cargo Claims 4th Edn, 2005 appear on the site and others will appear as they are written. The Professor would appreciate any comments, corrections and suggestions, you may have, because he is now reconfiguring the site; E Mail William.Tetley@McGill.ca

ARBITRATION NEWS UPDATE

by

Hew R. Dundas

Issue #8

February 2003

Contents

Section A – UK Domestic Arbitration

22. Permit me a small nationalistic gesture in opening with Scotland !

    Scottish Arbitration law has been, as I have indicated before, in much, even desperate, need of modernisation being based on centuries of case law and limited-scope Acts of 1695, 1894, 1972 and 1990 with no codifying statute; however, rescue is finally at hand ! I had the privilege not only of serving on the Committee, chaired by Lord Dervaird, which has drafted the Arbitration (Scotland) Bill 2003 but also of serving on the drafting sub-committee. I report below on some of the main provisions of the new Bill although it is not yet clear when the Scottish Executive will be able to allocate parliamentary time to it.

23. *Wiltshier Construction (Scotland) Ltd v Drumchapel Housing Co-operative Ltd*, in the Inner House of the Court of Session, was an interesting example of the much-criticised Stated Case procedure which will be repealed when the new Arbitration Bill becomes law; however, the principal issue was contractual and is of interest in that regard as well. Interestingly, the Arbiter's preliminary conclusions as to the law were confirmed by the Court.

24. ¶*Checkpoint v Strathclyde* revisits territory familiar to CIArb students i.e. the *Fox v Wellfair* case of the Arbitrator giving himself 'secret evidence' from his own expertise; in *Checkpoint*, Park J takes a more pragmatic view – the [rent review] arbitrator had been very carefully selected for his specific expertise and he was entitled to apply that expertise. In addition Park J reviewed the rationale of s.69 in detail (see also *Lobb v Aintree* at section 4 below).

    STOP PRESS: the Court of Appeal has just (6th February) delivered judgement, substantially confirming Park J; I will hold over a full report on the case until Issue #9 but I include a brief report below.

25. ¶An arbitration *Lobb v Aintree*, relating to the design of a new grandstand at Aintree Racecourse, has thrown up two separate cases already, each of interest; the first, in 1999, was a (preliminary) s.67 appeal arising out of an oddly-worded arbitration agreement, the second a highly-complex s.69 appeal where I attended Court for the hearing. I report first on the jurisdictional appeal, the outcome of which was, in broad terms and unsurprisingly, that if you choose to arbitrate then arbitrate you shall.

26. ¶The second *Lobb v Aintree* case was decided in November 2002, involving a conjoined Leave to Appeal application and the appeal hearing itself. The point of law in issue was an exceptionally complex and difficult one having involved the HoL in two contrasting decisions (*SAAMCO*, *Aneco*) in recent years which were addressed in my article in ARBITRATION Vol. 68/2. The proceedings were also of particular interest because of the intense scrutiny of the four tests in s.69(3).

27. The case *Hussman (Europe) v Al Ameen* has been widely reported and commented upon; however, in revisiting it recently it appears to me that it was, in part at least, wrongly decided; in anticipation of the successful exercise of my right of appeal under the new s.69A (see below), I report accordingly.

28. *CMA CGM S.A. Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co & Others* ([2002] EWCA Civ 1878; 18th December 2002) was reportedly the first ever s.69 appeal to be heard in the Court of Appeal; the judgement gives substantial, arguably definitive, clarification and guidance as to the whole appeal process of s.69, the considerations (*Nema*, *Antaios*) which preceded it, the circumstances of the drafting of, and the actual language of the Act itself. I consider this to be a very important, almost certainly definitive, case.

29. Arbitration is EASY: get the parties together, hear the evidence, make a decision, write an Award – but who are the parties ? Er ……. ?? An interesting LMAA Case, *Internaut & Sphinx v Fercometal*, is a case in point with an all-star cast of the Magnificent Four [distinguished LMAA Arbitrators]; the "phone a friend" option invariably works when the "friend" is David Steel J.

Section B – UK Adjudication, Contract and Other Matters

30. ¶Colman J's judgement in *Cable & Wireless v IBM* has been attracting a lot of press coverage so I will report only briefly and that largely in the context of follow-up to the (Australian) *Aiton v Transfield* case to which, perhaps surprisingly, Colman J does not refer; my article in "Asian Dispute Review" (September 2002) refers.

31. An important point affecting building (and other) contracts was raised in *Northern & Shell PLC v John Laing Construction Limited*. A Warranty Deed in respect of a new office building had been entered into in January 1990 but was expressed to be effective from a date in August 1989: was such retrospectivity valid ? If yes, N+S' substantial claims under the Deed were statute-barred.

32. All you ever wanted to know about groundwater levels can be found in *Co-Op v Henry Boot*, this and interesting questions of contract interpretation arose. Inter alia, HHJ Seymour QC held that where a Main Contractor takes over a preliminary foundations design from an engineer, it is obliged to use reasonable skill and care in checking that preliminary design before finalising it. Further, preliminary site investigation reports may be of little or no contractual significance.

33. The world of adjudication would be a duller place if (a) all parties wrote wholly comprehensible adjudication clauses and (b) all losers in adjudication accepted their fate with equanimity and a willing chequebook; however, in the case *Edinburgh Royal Joint Venture v Broderick Structures* in the Court of Session, neither was the case and an artificial attempt to circumvent the enforcement of an Adjudicator's Decision was trenchantly dismissed.

34. Is a dispute referable to adjudication if there exists a settlement agreement ? Who best should decide whether or not such agreement exists ? In *Quality Street Properties v Elmwood*, these and related issues were discussed in a Scottish case whose outcome, rarely given that the 'Construction Act' applies both sides of the border, may be distinguishable from that in England.

35. In *Glencore v Metro*, the Court of Appeal considered whether ordering security for costs against an insolvent claimant was just and concluded on the facts that it was.

36. In *Jetoil v Okta*, the justness of ordering security was addressed in a wholly different context and, on the facts, no such order was made.

37. Experts have been getting a hard time recently in the English Courts and in three well-known instances Judges have been strongly critical of them; what if the Judge's criticism was in fact unjustified ? In a partly-parallel case involving removal of an arbitrator, the latter was zapped with an order for the costs of two applications to the Court arising out of an arbitration he had mishandled but his s.29 immunity appears not to have been considered by the Judge

Section C – International Arbitration, Conflict of Laws and Related Matters

38. I have a fascination for cases in the English Courts where none of the parties have any connection with England, not least because, in the first such case I ever studied (20+ years ago) none of the parties spoke any English. In a recent case three Iranian companies appealed from a first instance decision that a contract between one of them and a US company was governed by the law of Texas; the contract was held to be governed by English law. The judgement gives a useful review of conflict of laws principles.

39. Not be to be outdone, and comparable to the above Iranian case, a recent Court of Session case involved an Italian company suing a Norwegian company, owners of a vessel flying the Panamanian flag, i.r.o. bunker fuel obtained by the Cypriot charterers of the vessel at locations in Turkey and in Sicily.

40. A number of high-profile commercial cases in recent years have featured the redoubtable Jonathan Sumption QC but, in a recent (and very interesting) case, he sat as Deputy Judge; the principal issue was whether litigation in England should be stayed in favour of litigation in the Czech Republic; both countries were sufficiently connected with the dispute for the respective Court to hear the case but which was more appropriate ? If the Czech Republic, would the parties obtain substantial justice there ? The case is also interesting because it is known as the "Mystery of the Disappearing Brewery" …. read on below.

41. Arbitrators know and, no doubt, love their separability clauses e.g. Art.16(1) of Model Law and s.7 of the 1996 Act; but what is the equivalent position with respect to a jurisdiction clause in a contract ? In an interesting judgement, only recently available, Colman J addressed this question relying, in part, on the analogy with arbitration.

42. I am not aware if the law of Lesotho has hitherto figured prominently in international arbitration but there is a first time for everything; in Lesotho v Highlands Water Venture, interesting issues arose as to whether the substantive (Lesotho) or procedural (English) law should govern the (a) award of interest and (b) the currencies of the award. In respect of interest, Morison J identified a need for a decision by a higher court.

43. In my Newsletter #7, I, perhaps rather provocatively, criticised a German Bundesgerichtshof decision refusing a stay for arbitration on the basis that the arbitration agreement was incapable of being performed (OK so far) BUT where the "incapability" was solely the inability of one of the parties to finance the arbitral proceedings, which reason I considered fundamentally wrong in principle even if it led to a practical outcome. I have subsequently located a 1981 English Court of Appeal case which confirms my opinion.

44. Dr Peter Binder of Wolf Theiss & Partners (Vienna), author of the impressive and very useful tome "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" (see section 26), has kindly contributed some valuable information on the reform of Austrian arbitration law.

45. I report on miscellaneous cases reported in "International Arbitration Law Review" by kind permission of the Editor and Publisher, featuring Germany, Hungary, Poland, Wisconsin, Texas, Spain, Singapore and Hong Kong.

46. Singapore represents a lacuna in my world in not having an on-line Court reporting system so I am reliant on others for information about the several interesting cases which have recently arisen there. The Singapore office of Baker & McKenzie, Wong and Leow publishes an interesting and valuable newsletter containing, inter alia, short reports of interesting cases; with the generous permission of that firm (via David Howell) for which I am most grateful, I am able to report on leading cases.

47. While I do not propose to engage in detailed book reviews, several interesting new publications have crossed my desk recently which I will mention briefly.

SECTION A
UK Domestic Arbitration

19. The Arbitration (Scotland) Bill 2003 has some similarity to the [English] Arbitration Act 1996, not least that both ultimately owe much to the Model Law; further, in my submissions to the Committee I stressed that a high proportion of arbitration users in the UK (e.g. the construction sector) operate in both England and Scotland and therefore that there were advantages to tracking the language of the 1996 Act where possible. However, we have endeavoured to limit further the opportunity for appeal to the Court – e.g. see (k) below.

Importantly, a Schedule to the Bill contains the text of the Scottish Arbitration Code (1999) which contains detailed rules which supplement the main provisions in the Bill and which *will apply to the conduct of every [domestic] arbitration unless parties choose not to apply them*; this augments the "unless the parties otherwise agree" approach.

Existing statutory arbitration schemes are generally unaffected; consumer protection continues under existing regulations as in England. For international commercial arbitrations the UNCITRAL Model Law, enacted in 1990 but very little (if ever) used, continues in force (it remains an option for domestic arbitration; s.62(4) refers)) and is contained in a Schedule to the Act. The opportunity has been taken to re-enact the provisions of the New York Convention of 1958 providing for foreign arbitration awards and agreements, replacing the former (1975) UK legislation.

Since the Bill is not yet in final form a detailed review and/or comparison with the Model Law and the 1996 Act would be misplaced but key points include:

(a) those sections of the 1996 Act regarded as fundamental to the arbitral process (e.g. ss. 1, 33, 40 and others) reappear in substantially identical form as do dear friends such as s.68;

(b) in a number of instances, the opportunity has been taken to clarify matters not addressed in the 1996 Act; e.g. a.29(3) expands the English s.37 to prevent the difficulty which arose in *Hussman (Europe) v Al Ameen* where the Chairman of the Tribunal met the Tribunal's Expert in private;

(c) some provisions in the Bill reflect the SAC's increasing acceptance e.g. in standard form construction contracts and it was felt inappropriate to disturb that process;

(d) s.11 imposes disclosure obligations on the arbitrator of any circumstances likely to give rise to justifiable doubts as to ~~his~~his impartiality or independence; s.11(2) makes this a continuing obligation;

(e) s.13 provides a detailed procedure for challenging an arbitrator;

(f) s.16 provides a detailed resignation procedure; it is one of the oddities of the 1996 Act that the consequences of resignation are provided for but not the mechanics of resignation itself;

(g) s.19 provides that "No arbitrator, clerk or nominating body shall be liable to any party for any act or omission in connection with any arbitration except for the consequences of conscious and deliberate wrongdoing." This is (consciously) a narrower test than that in s.29 of the 1996 Act;

(h) s.21 reinstates the word "only" dropped from s.38(3) of the 1996 Act; the DAC Supplementary Report at §28 explains the omission but recently the Court of Appeal in *Nasser v United Bank of Kuwait* effectively overruled the DAC;

(i) s.22 recognises the role of the Clerk to the arbitration; at present Scottish arbiters sit, in all but the most simple of cases, with a Solicitor as Clerk to advise on the procedural law whereas in England this would be seen as exceptional. It is intended that, with the law now contained in one place (as was an objective of the 1996 Act), arbiters will begin to sit without a Clerk with saving of expense; (however, this intended sea change in culture may not be unanimously welcomed);

(j) s.40 repeals the stated case procedure contained in s.3 Administration of Justice (Scotland) Act 1972; you may recall that Scotland introduced such a procedure not long before England rejected it in 1979 !

(k) However, s.43 (tracking s.69 of the 1996 Act reasonably closely) permits an application to the Court for determination of a question of law arising out of an award (including an interim or partial award) with the key difference that the leave of the Court is required (i.e. there is no equivalent of the English s.69(2)(a));

(l) s.71(3) applies the SAC as the default procedure.

20. *Wiltshier Construction (Scotland) Ltd v Drumchapel Housing Co-operative Ltd*, in the Court of Session, was an interesting example of the much-criticised Stated Case procedure under s.3 Administration of Justice (Scotland) Act 1972 which will shortly be repealed. Wiltshier was contractor to DHC for the modernisation of a number of blocks of houses in Glasgow. Disputes arose between them as to whether, in the light of the extent to which the work had been disrupted by vandalism, the provisions of the contract relating to (a) completion date and (b) contract sum had been superseded by entitlement to a reasonable time for completion and

remuneration on a *quantum meruit* basis. The dispute was referred to arbitration and, following a hearing, the Arbiter indicated that he was minded to dismiss Wiltshier's claim and substantially rule inadmissible its answers to DHC's counterclaim. At Wiltshier's request, he then stated a case for the opinion of the Court; this was heard by the Inner House (i.e. appeal court) and Lord McFadyen, a regular 'contributor' to these pages, gave the only judgement.

The contract was subject to the conditions of the Standard Form of Building Contract With Quantities (1980 Edition) (with amendments). The key provision of the contract for this appeal was cl.9.17 of the preliminaries set out in the BoQ, headed "Site Security"; 9.17(b) required the contractor to obtain from the police a crime profile "in order that he is fully cogniscant (*sic*) of the crime level in the area" and 9.17(c) provided that: "*The Contractor shall be responsible for the security of the site and of all work done by him from the Date of Possession of the Site until the date of handover of the site or any such sections*." (emphasis added since this was the central issue). 9.17(d) set out certain minimum (but not limiting) measures to be taken by the contractor including the possibility that security 24 hours a day might be appropriate, stating: "The Contractor should make allowance for this level of security if this proves necessary", in addition referring to CCTV; a later passage set out DHC's specific requirement that security services be provided "at all times". Cl.9.17 concluded: "The Contractor is recommended to visit the site: examine and ascertain for himself the specific nature and level of security requirements which may influence or affect his tender. Any monetary or other claims made by the Contractor on the grounds of want of knowledge of any or all of the matters noted under Site Security will not be entertained by the Employer."

Wiltshier claimed that "... the time taken to carry out the Works and the manner and cost of their being carried out [had been] radically altered as a result of vandalism, theft, damage and fire-raising greatly in excess of what could reasonably have been foreseen by an experienced contractor … and greatly in excess of what was foreseen by [it] as a reasonable and experienced contractor" and that "Despite [Wiltshier's] best efforts, due to the nature and extent of the vandalism, theft, damage and fire-raising experienced on site, it is both impractical and impossible for [it] to identify the nexus between the said incidents of lawlessness and corresponding heads of loss suffered by it."

Wiltshier then argued that (i) as a result of the vandalism, the works actually done were not covered by the contract, but were such as to be outside its scope; (ii) DHC had made it clear that it wished Wiltshier to remain on site and carry out the works, notwithstanding the radical change in the time, manner and cost of carrying them out; (iii) the provisions of the contract relating to the original scope of the works were rendered inapplicable; (iv) that it/DHC did not address the terms on which Wiltshier would be paid in respect of these radically different works, nor the time for completion of those works; (v) consequently, in substitution for the original contract provisions for time and payment, there arose an implied requirement to complete these radically different works within a reasonable time, and that it would be paid reasonable remuneration in respect thereof. In the alternative, DHC had been unjustly enriched by Wiltshier's execution of the "radically different" works, and it was therefore equitable that that enrichment should be reversed.

The Stated Case

The Arbiter set out at considerable length the submissions which had been made to him in the course of proceedings; his Decision included that Site Security was a risk to be borne fully by the contractor; cl.9.17(c) made this expressly clear, the absolute nature of the responsibility for this risk not being restricted by, inter alia, cl.9.17(d). Consequently, irrespective of the allegedly higher than normal incidence of vandalism and lawlessness, even if extreme, delays, loss and expense arising therefrom and not otherwise reimbursable under the contract, were and remained the responsibility of the contractor.

Further, the Arbiter had noted that Wiltshier had not argued that the contract had come to an end, either as a result of DHC's breach of contract, or on the ground of frustration. He stated: "… I do not accept that in the absence of a breach or termination of the contract a change in the time, manner and cost of carrying out the contract work is a change, which entitles [Wiltshier] to any payment … beyond what is expressly provided under the contract. I do not accept that there is any basis for an implied right to reasonable time and reasonable remuneration in favour of the contractor in these circumstances. I am persuaded of this in particular by [certain authorities] and by the express contractual allocation of security risk to the contractor" and that "[Wiltshier] says that DHC effectively requested it to remain on site and carry out the contract works. In the circumstances that was no more than its existing contractual duty." The Arbiter concluded by rejecting (i) the 'outside scope of contract' argument, (ii) that there had been any renegotiation of the contract, and (iii) that any new terms as to time and payment had been implied into the contract.

In respect of the 'unjust enrichment' issue, he stated "The contract works remained the contract works and, [following] my decision on responsibility for the risk associated with site security, it follows that the 'changed circumstances' [claimed by Wiltshier] were matters which fell to be dealt with within the framework of the contract. ... There is no room for the application of the principle of unjust enrichment."

Questions of Law for the Opinion of the Court

(i) On the true construction of the contract, and in the circumstances, did the responsibility for security imposed on Wiltshier by cl.9.17 preclude it from claiming (a) for payment for the works *quantum meruit*, and (b) that it was entitled to "a reasonable time" as the period for completion of the contract works and (c) on the basis of unjust enrichment ?

(ii) Did the fact that the contract was not terminated preclude, in the circumstances, the claims made by Wiltshier (a) for a reasonable time to complete the work (b) of an entitlement to be paid for the works on a *quantum meruit* basis or (c) for payment on the basis of unjust enrichment ? If it precluded any of those claims, which did it preclude ?

Decision of the Court – Introduction

Following a thorough summary of Wiltshier's and DHC's arguments (respective Counsel were two of the Big Names of the Scottish Bar with particular expertise in construction law), Lord McFadyen opened by reminding the Court and the parties of the nature of these proceedings, i.e. for the opinion of the Court on questions of law arising in the arbitration. There was no 'appeal', there being no review of any decision already taken, rather that the guidance of the Court was being sought on such questions of law. The Court's role was solely to answer these specific questions.

Given the breadth of the arbiter's procedural discretion, it might be an abuse of s.3 of the 1972 Act to bring questions of mere procedure before the Court on the pretext that they were questions of law. In the present case, the Court was not precluded from considering the relevancy and specification of the pleadings about the additional agreement on the ground that these are procedural matters within the arbiter's discretion; however, the Court can properly consider those matters *only to the extent that it was necessary* to do so in order to answer the specific questions. Further, since the Arbiter used the phrase "in the circumstances …", it was legitimate and necessary for the Court to take into account the entirety of Wiltshier's pleadings when considering how to answer the questions. Moreover, although it was clear that the Arbiter was minded to take a certain view of Wiltshier's pleadings, the Court was not constrained thereby and should form its own view.

Decision of the Court – Question 1

The critical cl.9.17 contained a mixture of (a) procedural and substantive requirements and advice and (b) guidance to the contractor, 9.17(c) (see above) containing the main substantive requirement i.e. that Wiltshier should be responsible for security. This constituted an unequivocal and unlimited allocation of responsibility to Wiltshier even though other parts of 9.17 constituted suggestions or guidance and, when account was taken of 9.17 as a whole, it contained nothing limiting that responsibility. The clause did not require Wiltshier to perform the impossible by seeking to prevent all breaches of security, however unforeseeable but, on the contrary, the clause functioned as a provision allocating the risk, including the risk of loss and expense caused by security breaches which risk was on Wiltshier whether the loss or expense resulted from foreseeable or unforeseeable events.

The apparent severity of this conclusion was mitigated by other provisions of the contract, e.g. provisions (i) obliging DHC to take out an all risks insurance policy from which Wiltshier could benefit; (ii) entitling Wiltshier to be paid both for any work damaged by the breach of security or for "restoration, replacement or repair" etc.

Fundamental to Wiltshier's claim was the argument that a new agreement had been entered into because the original contract did not contemplate vandalism of the level actually encountered, and did not make appropriate provision for time or remuneration in those altered circumstances; that proposition was seriously undermined by 9.17. Further, the original contract made provision for appropriate remuneration in the circumstances which happened even though it might not have ensured that Wiltshier was remunerated for every aspect of the consequences of the high level of vandalism; however, it did provide for payment both for the original work and for the repair work, and made available claims for loss and expense caused by the disruption resulting from the remedial works. Consequently, nothing turned on Wiltshier's having sought, in the arbitration, to make a global claim; it was inappropriate for the Court to say anything in this case about the circumstances in which a global claim might be available, but it seemed to the Court that a global claim would be available to the same extent in a loss and expense claim under cl.26 as in a claim of the sort which Wiltshier had sought to make in the arbitration.

The Arbiter had been right in expressing the view that there was insufficient evidence of a new agreement on a *quantum meruit* basis, Wiltshier's argument proceeding on the basis that the level of vandalism had taken the work outwith the scope of the contract; this was clearly contradicted by cl.9.17, and ignored the provisions in the contract addressing remuneration in the circumstances.

As regards unjust enrichment, the construction of clause 9.17 precludes that arguments either that the high level of vandalism put the works done outwith the scope of the contract, or that the contract ceased to provide for remuneration for them. Consequently, any claim Wiltshier might have had was regulated by contract, and there could be no resort to a claim based on unjust enrichment

The answer to Question 1 was "YES".

Decision of the Court - Question 2

The fact that the original contract was not terminated

(i) would not preclude Wiltshier's claims based on contract, if they were otherwise available; however, given the answer to the contractual aspect of Question 1, however, the point is irrelevant;

(ii) does preclude Wiltshier's unjust enrichment claim since the original contract provided for the events which happened and, consequently, so long as that contract remains in force, there could be no unjust enrichment claim.

It was therefore unnecessary to answer Question 2, so far as it related to the contractual claim; as it relates to the unjust enrichment claim the answer was 'YES'.

Comment

Although the Stated Case procedure has been the subject of much criticism in recent years, particularly in respect of the potential it offers for delaying tactics, this instance of use of the procedure appears entirely rational (and remarkably close to the little-used English s.45) in that the Court's decision on the questions of law disposed of key issues in the arbitration in a decisive manner.

It is interesting to consider how such an arbitration might have proceeded in England: if we assume that the arbitrator had made his award in substantially in the form of the Stated Case then a s.69 appeal would have required either DHC's agreement or leave of the court. In respect of leave, it seems clear that s.69(3)(a) and (b) would be satisfied but, given the conclusions of the court in this case, s 69(3)(c)(i) would not apply and it is difficult to see how s.69(3)(c)(ii) could apply either; given such failure to overcome the s.69(3)(c) hurdler it would not be necessary to consider s.69(3((d). My preliminary conclusion is that [English] leave to appeal would not have been given in this case, one distinction with ***Lobb v Aintree*** (see section 5 below), being that the matter of law in issue there was an exceptionally complex one which had been the subject of two recent contrasting House of Lords decisions; in the present instance, the issues of law appear straightforward matters of contract.

In addition, it is noteworthy that the Court substantially confirmed the Arbiter's preliminary conclusions as to the law whereas in Scotland there is a traditional view that Arbiters should be technical arbiters and should leave the law to the lawyers (typically, as expressed in a recent statement by one of Scotland's most distinguished Arbiters). There is a clear contrast in attitude between (a) Scottish arbiters who are used to the services of a Solicitor as Clerk to the arbitration, primarily to advise on the procedural law but also available to advise on legal issues arising on the substantive law and, on the other hand, (b) the position of the arbitrator in ***Lobb v Aintree*** where he, an architect by profession, was obliged to hear and deal with intensely complicated submissions on a very difficult area of law.

As stated above, s.3 of the 1972 Act is to be repealed in the new Arbitration Bill and it is the general intention, albeit not unanimously endorsed, that Scottish arbiters will, in due course after a transitional period, be expected to "stand on their own two feet" and deal with all issues arising in the arbitration, not merely the technical ones.

Although not directly pertinent to the theme of this report, the references to "global claims" calls for further reflection particularly for those engaged in the construction sector; as I read Lord McFadyen's judgement, there remains a major question to be decided in the Court of Session in respect of such claims.

21. In ***Checkpoint Europe Ltd v Strathclyde Pension Fund*** ([2002] EWHC 439 Ch; 21st March 2002; [2003] EWCA Civ 84; 6th February 2003) familiar territory arising from the much-cited case ***Fox v Wellfair*** (traditionally the first arbitration case given to CIArb students) was revisited; the issue in ***Checkpoint***, as in ***Fox***, was the dichotomy between an arbitrator with particular expertise applying that expertise in pursuance of the arbitration and that arbitrator giving himself "secret evidence" upon which the parties are denied the opportunity of comment. Taking ***Fox*** to the extreme, a substantial advantage of arbitration would be eliminated in that the special-expertise arbitrator would not be allowed to apply that expertise; this would clearly be wholly antithetical. On the other hand, when, as in this case, a Rent Review arbitrator (surveyor) conducts an arbitration essentially between two other Rent Review surveyors it cannot be logical that every last iota of the arbitrator's experience has to be laid out on the table for the examination of the parties; such professionals must have and do have a common level of professional expertise and mutual understanding.

The dichotomy remains but, at least, the law and the judicial approach to it has become clear, not least because Park J gave permission to appeal to the Court of Appeal and that appeal was duly heard, leading to an authoritative and presumably final decision on the principle.

Checkpoint was tenant of a storage and distribution depot in Bracknell, Berkshire, comprising mixed office/warehouse space; importantly, the office content was apparently much higher than that for similar buildings in the area. The lease incorporated an arbitration agreement specifying that the arbitrator must be a chartered surveyor with particular experience in the letting and/or valuation of property similar to the depot and situate in the same area and used for similar purposes.

In his award, the arbitrator stated, inter alia, "... the parties know that I was instructed and closely involved with the area for some years including the period within which these two lettings were achieved. My experience as letting agent confirms..." and, in rejecting some of Checkpoint's submissions as to the rental, he stated "as already stated, my experience in the market in the area does not support that contention".

In the first instance proceedings, Checkpoint applied under s.68, under two heads (i) whether the arbitrator had taken into account his own personal experience without giving the parties an opportunity to comment thereon, and; and (ii) whether the arbitrator's apparent failure to have addressed a key element of evidence was in itself a serious irregularity. In addition, Park J had refused (s.69(2)(b)) Checkpoint leave to appeal under s.69, there being no appeal to the Court of Appeal against that refusal (s.69(8)).

Park J noted that the arbitrator was expected to some extent to draw on his personal knowledge because the arbitration agreement required him to have it; he rejected Checkpoint's attempt to distinguish between the general knowledge acquired by a surveyor (which it was accepted he could apply) and the personal knowledge of specific matters which, it was asserted, should be disclosed to the parties to give them an option to comment. Park J sagely observed that that distinction was "easy to state in a broad way but tends to break down when analysed with care". In part, he drew support from a judgement of Tuckey J (as he then was) in *Egmatra v Marco Trading*; this was also cited with approval in the [Checkpoint] Court of Appeal which, in a unanimous decision, substantially upheld Park J on all issues and took the opportunity to clarify and restate the principles applicable to an arbitrator using his particular expertise. A full report of this important issue will follow in the next issue of this Newsletter.

However, a number of subsidiary issues arose in the case which are worth mentioning in this report:

(i) there is a distinction between an arbitrator asking himself questions of his own expertise and his asking persons other than the parties or their advisers; while the latter would normally represent application of inquisitorial powers, the former does not;
(ii) a distinction needs to be drawn between general expert knowledge and knowledge of special facts relevant to the particular case (Dunn LJ in *Fox v Wellfair*) – this is still the case;
(iii) the test in s.68(2) involves causation, not potential causation;
(iv) in respect of what constitutes an irregularity, §280 of the DAC Report remains authoritative; as Tuckey J had said in *Egmatra*, "so this is no soft option clause as an alternative to a failed application for leave to appeal. Substantial injustice has to be shown before the Court will interfere.";
(v) after publication of the award and after filing of Checkpoint's s.68 application, Strathclyde's solicitors wrote to the arbitrator asking him to clarify some aspects of his award; following several exchanges of correspondence, Checkpoint launched a s.69 application alleging an error of law in the award, such error having been revealed in the subsequent correspondence. Park J expresses some considerable disquiet at this post-award exchange of correspondence and, in proceedings, he substantially dismissed that correspondence from consideration. Such exchanges of correspondence appear **not** to be normal in rent review arbitrations; other than pursuant to a s.57 application, it seems to me *prima facie* fundamentally wrong that either party or the arbitrator should engage in any such correspondence post-award particularly when as here, litigation was already under way.

22. An arbitration Lobb v Aintree has thrown up two separate cases, each of interest; the first was a (preliminary) s.67 appeal in 1999 arising out of an oddly-worded arbitration agreement, the second is dealt with at section 4 below.

Lobb, a firm of architects, had been engaged by Aintree to design and supervise the building of a new grandstand at Aintree Racecourse between late 1996 and April 1998, the intention being that it be ready for the Grand National in the latter year; both timescale (demolition of an existing stand and construction of the new one had to be fitted in between the 1997 and 1988 Meetings) and budget (Lobb had had to design to a fixed construction budget of £5.5m) were very tight. Further, in March 1997 the 'Green Guide' setting out regulations governing sports stadia (including horse race facilities) was revised and reissued in a 4th Edition (GG4) with significant impact on the project. The new stand was ready on time but (a) overran the construction budget by nearly 40% and (b) had a capacity some 25-30% less than Aintree had wanted. The reasons for the latter were primarily (i) a wider gangway than originally designed; (ii) GG4's stricter requirements on crush barriers and rake; and (iii) escape requirements.

On 31st March 1999 Aintree gave notice of arbitration, suggesting two names, and on 22nd April made a unilateral application to the CIArb for an appointment, stating "An Agreement between the parties dated 25.3.98 includes the provision that in the event of a dispute, either party may apply to the Chartered Institute of Arbitrators to appoint an Arbitrator in the matter"; the President of the CIArb appointed John Sims. Lobb considered that, under the contract, both parties had to agree specifically that a particular dispute be referred to arbitration before an arbitrator could have any jurisdiction over that dispute and that it had not so agreed. On 13th July, by agreement, a hearing on jurisdiction as a preliminary issue took place before Mr Sims. On 5th August he published an award (the Jurisdiction Award) in which he declared that (a) the contract contained a valid and enforceable arbitration agreement (b) Aintree's notice had been a proper one and (c) he had been validly appointed as arbitrator. Lobb applied under s.67 for:

(i) a declaration that there was no valid arbitration agreement;
(ii) a declaration that Mr Sims did not have jurisdiction in relation to the disputes which had arisen;
(iii) an order that the Jurisdiction Award was of no effect and be set aside;
(iv) costs of this application and the arbitration.

The contract provided that "Disputes *may be dealt with* as provided in paragraph 1.8 of the RIBA Conditions but shall otherwise be referred to the English Courts. The construction, validity and performance of this Agreement shall be governed by English law". Paragraph 1.8.1 of the RIBA Conditions provide as follows: "… any difference or dispute arising … *shall* be referred by *either* of the parties to arbitration by a person to be agreed … or, failing agreement, [by] a person to be nominated at the request of *either* party by the President of the CIArb." (emphasis added)

Lobb submitted that the arbitration clause was ambiguous and void for uncertainty because of the first words of the clause "Disputes may be dealt with …", arguing (a) that it was impossible to derive from the wording whether, in order for a dispute effectively to be referred to arbitration, both parties must agree to join in the reference or whether it was sufficient if one party alone initiated the reference and (b) that the words used were equally capable of bearing either meaning and that the contract as a whole contained nothing to indicate which meaning was to be preferred. Since the permissive part of the arbitration clause was ambiguous, the only effective part of the clause was the mandatory requirement that "Disputes ..... shall otherwise be referred to the English courts".

Colman J observed (a) that this was a somewhat unusually-worded clause, probably drafted specially for this contract; (b) there could be no doubt that, if the clause was wholly or partly ambiguous, to that extent the Court would decline to enforce it; (c) the question whether an arbitration clause was unenforceable for ambiguity involved precisely the same constructional considerations as in relation to any other contractual provision, i.e. the Court was concerned to identify that meaning of the words used which, in all the relevant circumstances, the parties were to be taken mutually to have intended.

If a dispute was to be dealt with as provided in paragraph 1.8, either party was obliged and entitled to refer it to arbitration i.e. a party seeking relief by way of damages or otherwise was obliged to refer his claim to arbitration. In the absence of indications to the contrary, the first part of clause 13.1 would strongly indicate that it was to be open to either party to refer a dispute to arbitration if it chose to do so and that, if it did so, the other party would be bound to accept that reference. On the other hand, if one party ignored the availability of arbitration and commenced an action in court, the other would be entitled to insist that the dispute be referred to arbitration and to apply for a stay of the action. If a dispute was to be "dealt with" in accordance with paragraph 1.8, it was clearly to be treated as if there was a mandatory arbitration clause which would enable either party to insist on arbitration and would entitle that party to apply for a stay under s.9.

The argument that the first part of clause 13.1 was equally capable of meaning that, unless both parties agreed on arbitration, the Court had jurisdiction was misconceived since reference to disputes being dealt with in accordance with a mandatory arbitration clause available to either party (paragraph 1.8) strongly suggested that the mutually intended meaning of "may be dealt with" was that either party could insist on arbitration if he chose to do so, rather than that disputes might be arbitrated only if both parties agreed upon that course.

Further, the Courts had consistently taken the view that, provided that the contract gives a reasonably clear indication that arbitration is envisaged by both parties as a means of dispute resolution, they would treat both parties as bound to refer disputes to arbitration even though the clause was not expressed in mandatory terms; e.g. in *Mangistaumunaigaz Oil Production Association v. United World Trade Inc*. [1995] 1 LR 617 the argument that the language "Arbitration, if any, by ICC rules in London" was ambiguous and left in doubt whether the parties did intend to create a mandatory reference to arbitration was rejected. The argument that, by providing for arbitration "if any", the parties were merely binding themselves in advance to the arbitral rules and venue which would govern any ad hoc agreement for arbitration which they might subsequently make if a dispute arose, strained common sense.

Lobb had submitted that Aintree's damages claim could be pursued in arbitration while it could pursue its own claim for outstanding fees in litigation even though the claim and cross-claim might involve common issues of fact and law. On the construction of clause 13.1 at which Colman J had arrived, this problem was avoided, for the primary means of resolving all disputes was to be by arbitration unless both parties agreed on litigation.

Colman J concluded that clause 13.1 contained no ambiguity; consequently, the declarations sought by Lobb were refused. There was a valid arbitration agreement, Mr Sims had had jurisdiction to make the Jurisdiction Award and it was binding on the parties.

Comment

At the risk of sounding partial, typical robust common sense from Colman J. What is of value is the confirmation that the Court will seek to enforce arbitration agreements in such circumstances together with the purposive style of analysis of an apparently mixed permissive/mandatory clause. Refer also section 25(2) below where this decision was cited with approval in the High Court in Singapore.

Postscript

In advance of GG4, it had been widely expected that horse race facilities would be subject to less stringent controls than football stadia but it was this proving not to be the case which appears to have wrong-footed Lobb. There were several arguments in favour of less stringent treatment, a principal one of which was that the typical horse-race-goer (by implication Morning Coat/champagne/canapés etc) was very different from the typical football fan (26 pints of lager, curry & chips); the proposer of such a distinction had evidently never been at a race meeting where the champagne ran out part-way through the afternoon !

23. The second Lobb v Aintree case was decided in November 2002, involving a conjoined Leave to Appeal application and the appeal hearing itself. The point of law in issue was an exceptionally complex and

difficult one having involved the HoL in two contrasting decisions (SAAMCO/Aneco) in recent years which were addressed in my article in ARBITRATION Vol. 68/2. The proceedings were of particular interest because of the intense scrutiny of the four tests in s.69(3).

The main facts of the Lobb/Aintree dispute are as set out in section 4 above.

Aintree commenced arbitration proceedings against Lobb concerning, inter alia, the loss of capacity. The Arbitrator separated the disputes into five heads and a hearing was held over 21 days in April/May 2001 limited only to the first three heads. He published a First Award on 8th March 2002 addressing only liability on Issue 1, and on the basis of the findings of fact therein, a question of law arose and Lobb sought the permission of the Court, pursuant to s.69(2)(b), to appeal that question of law and, if so granted, the Court's determination of that question of law pursuant to s.69(1). Aintree contested both application and appeal.

The Arbitrator had found, inter alia, in his First Award, that:

(i) Lobb had not been in breach of any contractual or other obligations as regards the number of standing places; but that

(ii) it had been in breach of an obligation to warn Aintree of various matters which would have influenced the latter in its decision to proceed with construction immediately after the 1997 Grand National;

(iii) if Lobb had fulfilled its obligations, Aintree would have decided to have postponed construction until after the 1998 Grand National and, therefore, that it had been deprived of the opportunity to remedy the loss of capacity and also of the opportunity to gain other collateral benefits;

(iv) Aintree was entitled to recover from Lobb the financial consequences of both the loss of capacity and of the collateral benefits less the cost which Aintree would have incurred in regaining those lost places and benefits and less other benefits gained by having the grandstand available during the 1998 Grand National meeting.

The principal issue of law in the present case was in respect of the proper measure of damages arising out of Lobb's obligation to have warned Aintree of the consequences of certain events; this area of law had given rise to two recent House of Lords decisions (*SAAMCO* and *Aneco*; refer ARBITRATION 68/2). The essence of the HL decision in *Aneco* had been to identify that the line of authority (*Superhulls*, *Nykredit*, *Petersen*) in this highly-complex area of the law had reached a fork in the road and that *SAAMCO* was to be considered the exception whereas *Superhulls* was to be considered a correct statement of the law. As will be seen, the essence of Lobb's s.69 appeal was to seek to bring itself into the *SAAMCO* exception rather than suffer the more painful consequences of following *Aneco* (where the negligent insurance brokers earned <$250,000 commission but the case cost them approx $80m).

The s.69(3) Tests

Let us remind ourselves that, pursuant to s.69(2), an appeal can be brought only with the agreement of both parties or with leave of the Court; in practice it can generally be presumed that the parties will not agree hence, in practice, leave of the Court is the main avenue to appeal. S.69(3) requires the Court to be satisfied in respect of each one of the four tests set out, not merely one or more of them; in addition, the test at s.69(3)(c) is an either/or and s.69(3)(c)(ii) is a two-part 'both' test. So how did Judge Thornton approach the s.69(3) tests in *Lobb v. Aintree* ?

(a) Both parties accepted that the question as to the appropriate basis for quantification of damages was a question of law and it was also, clearly, one which arises out of the relevant question that is posed and answered by the award. Further, it was accepted by both parties that the determination of the question will substantially affect the rights of one or both of the parties; in addition, in a letter to the parties dated 4th April 2002 the Arbitrator had stated that: ".... if leave to appeal is granted, the outcome of the appeal will have a substantial effect on the quantum of damages arising from my other findings of my award."

(b) Aintree had submitted that the question in the form posed by Lobb was not one the Arbitrator had been asked to decide but that submission now had to be considered in relation to the question as re-posed by the Judge, which question was that which the arbitrator had actually posed, albeit that he chose different language. The question was one which was found in, and arose out of, the award. Aintree's contention that Lobb had departed from the argument it had put to the Arbitrator was both inadmissible and inconclusive. The Judge therefore rejected Aintree's submission that the Arbitrator was not asked to determine the question in the form it was now in.

(c) Was the Arbitrator's decision obviously wrong or open to serious doubt ? He had not defined what approach he had adopted in arriving at his conclusion as to how the recoverable loss was to be quantified; both parties had accepted that that approach should include consideration of foreseeability while, in addition, Lobb had contended that he should have considered what loss fell within the scope of Lobb's relevant duty and, in so doing, should have excluded loss which was only recoverable if Lobb had been in breach of an express warranty or had been giving advice as to whether or not to proceed with the project (the SAAMCO principle). The Judge reduced this to the following questions: (i) had the Arbitrator applied a "but for" test ? (ii) was it relevant to ascertain the scope of Lobb's duty that had been breached ? (iii) Should Aintree's recoverable loss be confined to loss which fell within that scope of duty ? (iv) Was it necessary to exclude loss which would only be recoverable if Lobb had been held

to have been in breach of warranty or to have had a duty to give general advice ? (v) Should the Arbitrator have applied the SAAMCO principles?

The Arbitrator posed the question he had to answer in these terms: "what was the financial loss suffered by Aintree as a consequence of Lobb's breach or breaches ?" His answer was that Aintree was entitled to the loss of additional revenue from direct and collateral benefits that would have been earned less the additional costs of procuring the larger building in question. He provided no further reasoning for the adoption of this test and made no reference to any need for the relevant loss to have been foreseeable or within the scope of Lobb's duty to warn Aintree. The difficulty with the Arbitrator's finding was that it was made in a vacuum without any findings as to the quantum of loss in question, but that difficulty was inherent in the splitting of the issues and awards and was one accepted by the parties. In this constrained context, it was is clear to the Judge that the Arbitrator's stated approach had been a "but for" approach whereas the correct approach would have been to have started by considering what loss would be reasonably foreseeable as a direct consequence of the relevant breach of duty. In failing fully to consider foreseeability and in apparently imposing a "but for" test, the arbitrator had obviously been wrong.

Judge Thornton observed that the law relating to recoverable damage in professional negligence actions, and the extent to which the reasoning of those decisions was generally applicable to claims for breach of duty, as opposed to being confined to the more limited field of professional valuations, was both uncertain and controversial. The Arbitrator had not considered this line of authority (*comment: it would appear that it had not been cited to him*) in determining the basis upon which Aintree's financial loss would be recoverable; as a result, there was no reference in his answer to the need to consider the scope of Lobb's duty nor whether the obligation to avoid the nature and extent of the loss being claimed by Aintree fell within this scope. It was at least arguable that these authorities and the principles that they defined were applicable. The arbitrator's determination of the basis upon which he was to award damages was, given the absence of any reference to the scope of Lobb's relevant duty, open to serious doubt; he should have given brief reasons why the ***SAAMCO*** line of authority was not applicable. The question of whether and to what extent ***SAAMCO*** is applicable to professional negligence claims against architects et al. is one of general public importance.

(d) Was it just and proper in all the circumstances for the Court to determine the question ….. ? Such a test was new and the Act gave no guidance on the matter. While the Court should take account of, and give weight to, the party autonomy policy that matters should be decided by the Arbitrator, where he was obviously wrong and his decision could substantially affect one of the parties, the Act 1996 provides that that party be allowed leave to appeal; it followed that the other party must show that 'substantial injustice' would be a consequence of leave to appeal being granted.

Aintree main argument of 'injustice' related to Lobb's alleged delay. However, the latter's jurisdictional challenge which, as it was fully entitled to do, it first mounted before the arbitrator and then mounted separately by way of an application heard by Colman J, while unsuccessful, was of proper weight (see above at section 3). This challenge held up the arbitration for seven months since when, the parties had jointly got the dispute to a hearing and had agreed to the split procedure. As a result, the present appeal will neither substantially delay the overall progress of the arbitration nor add substantially to the costs.

Judge Thornton concluded that Lobb should be granted leave to appeal the question of law.

Comment

A forthcoming article will comment in detail on this important case with its many facets so I will be brief here. First, HHJ Thornton QC's masterly judgement constitutes a valuable addition to and refinement of the growing jurisprudence on s.69 (see ***Checkpoint*** above and CMA-CGM below). Second, the further refinement in the law around ***SAAMCO/Aneco*** is particularly valuable and it is interesting that a "mere" TCC judge can contribute even following two 'massive' HoL decisions. Third, it should be noted that a non-lawyer arbitrator, even the redoubtable John Sims, was thrown in at the deep end of the legal swimming pool in an area of law where two contrasting HoL judgements have confused many (and where one of the cases was decided after the Arbitrator had heard closing submissions), but acquitted himself with distinction (the law he was "wrong" in not considering was not cited to him" even to the point of being described as "enlightened and informed" by Counsel in open Court; for less experienced and pupil arbitrators this is both reassuring ("you CAN do it") and challenging ("how would I measure up in a cutting-edge legal scenario such as this case ?"). Fourth, John Sims' First Award serves as a model worthy of reproduction in its meticulous assimilation, assessment and analysis of a huge mass of detail.

Postscripts

(i) the cynic might suppose that Counsel's describing the Arbitrator as 'enlightened and informed' was a preamble to showing him to be neither; while such might be the case in other proceedings, the context here (you will recall that I was present in Court) was by way of genuine compliment, endorsed by the Judge, not least because, other than the difference in interpretation of ***SAAMCO***, the First Award proved 100% bullet-proof and impervious to attack;

(ii) on my being introduced to the Judge at the start of the day, he enquired why anyone (i.e. me) should "waste paper" on writing about his judgements (a mild dig at previous articles I had written) and his

opening comments to Counsel included "I don't want another of my judgements splattered across the legal journals". Any Judge wishing to avoid coverage in professional journals can seek to do so by delivering tedious, uninteresting and valueless judgements dealing solely with the narrow issues and making no contribution to the development of the law. In *Lobb v Aintree*, HHJ Thornton QC failed, yet again, to meet any of these publication-avoidance criteria.

24. *Hussmann (Europe) Ltd v Al Ameen Trade and Development Company & Ors* (AAC) (QBD; folio 1999/1199; Thomas J; 19th April 2000) has been widely reported and commented upon (but has only recently appeared on the Court website) so I will restrict the following to brief comment only on the issues. Note that "Ors" were the three individual members of the Tribunal. Note also that the recently-enacted s.69A is a new provision in the Act where legal commentators such as me apply, most humbly and respectfully, to the Court for permission to suggest that a judicial decision might in fact be open to question.

The Background

In 1990 HCN, H's predecessor in title, both ultimately US-controlled, entered into a Sales and Services Agreement (SSA) with AATD Establishment (AAE) appointing it distributors in Saudi Arabia for HCN's refrigeration products. Under Saudi law, an 'Establishment' has no legal personality distinct or separate from its owner i.e. is similar to a UK sole proprietor business. AAE was owned by a Mr AP. By May 1991 AAE owed HCN $217,000 for goods ordered and H agreed to accept 75% thereof payable by instalments; HCN maintained that its agreement to take a 25% loss had been conditional on punctual payment. From November 1991, payments were late and, in February 1992, HCN sent a chaser to AAE which responded alleging that H products had been sold to a supermarket chain (SMC) without its knowledge. HCN and its US parent HUSA each manufactured different mo9dels of similar products. HCN asserted (i) that the sales to SMC were by HUSA and it was not involved; (ii) although the SSA was for HCN products, it had agreed a distributorship fee with HUSA to be paid by HUSA to HCN who held that sum against AAE's debt to HCN. Several disputes HCN/AAE arose, one relating to AAE's contention that it had appointed a sub-distributor, AN, which was responsible (i.e. not AAE) for payment of goods supplied. HCN contended that sums were owing and AAE maintained that commission was due. In May 1994 AAE and HCN agreed that the former would pay $57,428 in settlement of the outstanding balance, it being again HCN's contention that it was a precondition that this would be promptly paid.

However, in December 1992 AP had incorporated AAE as a limited company AAC in which he/his family owned 100%; he notified HCN as follows: "We hereby inform that the name [AAE] is changed to read as [AAC]. A copy of the Gazette paper is enclosed herewith." The copy Gazette notice was in Arabic without a translation; a translation was subsequently put before the Tribunal, making it clear that AAE's business had been transferred to AAC. HCN did not know whether it had received the notification, but asserted that it did not know of the transfer.

The payments promised to HCN were not made and it terminated the SSA by notice in April 1996, both because it wished to appoint a new distributor and recover the sum due. For both reasons, in February 1997 HCN commenced arbitration under the arbitration agreement in the SSA which provided:

> "This agreement shall be governed under the commercial agencies regulation of Saudi Arabia, amendment and implementing procedures in accordance with the Royal Decree No. II dated 20.02.1382 Hijra. Any dispute arising out of or in connection with this agreement shall be finally settled in accordance with the arbitration provisions in the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chamber of Commerce, by one or more arbitrator(s) appointed in accordance with the said rules."

HCN's notice of arbitration cited "Al Ameen" meaning "[AAE aka AAC] a limited liability company incorporated under the laws of the Kingdom of Saudi Arabia (Commercial Registration No. 7415) and having a place of business at PO Box 166, Riyadh 11411, Saudi Arabia." Although the definition referred to it being a limited company, the number given was AAE's registration number.

HCN nominated a London Solicitor and AP/AAC nominated a London-based Arab lawyer as their respective arbitrators; thereafter the EACC appointed an English Circuit Court Judge, expert in Arab Law, as Chairman. Interestingly, permission for the latter appointment was given by the Lord Chancellor on condition that the Judge conducted the arbitration in his own time and that any remuneration or fee charged was paid to HM Treasury; he agreed to this (*no comment !)* in order to try to assist the EACC and its new arbitral system. This was apparently the first arbitration it had had which proceeded to a full hearing.

Following various interlocutory proceedings and a full hearing and the Tribunal's taking expert advice on Arab Law, on 11th July 1999 it issued an Award substantially in AAC's favour – H's claim for unpaid debts succeeded to the tune of $57,000 but AAC's counterclaim for commission succeeded t.t.t.o. $660,000; costs of £140,000 were awarded against HCN.

H applied to the Court raising three main issues:

(i) had the tribunal had jurisdiction to have made an award in favour of AAC ?
(ii) had the tribunal's conduct of the proceedings amounted to a serious irregularity

(a) in relation to the expert evidence, or
(b) by failing to deal with certain issues put to it?

(iii) did the Court have jurisdiction to review the fees and expenses of the tribunal and, if so, should the Court direct an adjustment?

AAC sought to uphold the award on the first two issues and was neutral on the third but would have no objection if the Court reduced the fees. The arbitrators took no part in the first two issues but contended on the third that the Court had no jurisdiction and that in any event the Court should not reduce their fees. HCN's also applied for leave to appeal under s.69 but determination of that was to take place (as customary) on paper without a hearing, after the determination of the three issues.

Jurisdiction

This turned on whether AAC had become party to the SSA, a matter of Saudi law which provides that: (i) contractual rights can be assigned; the agreement AAE/AAC was effective to assign the rights and obligations under the AAE/HCN contract; (ii) an assignment does not become binding on the counterparty unless it consents; there was no clear evidence as to what constituted consent under Saudi law, but it was agreed that, to establish consent under the law of Saudi Arabia, it would be necessary to show that HCN knew of the AAE/AAC transfer and expressly or impliedly consented thereto.

The Judge held, on the incomplete facts and records before him, that the English notification had done nothing more than state that there had been a change of name and that the sending to HCN of a document in Arabic was, in the circumstances, insufficient to give it notice that there had been a change from a sole proprietorship into a limited liability company, particularly when the letter referred to this as a change of name only. Further, the Judge found nothing in the correspondence at this time to suggest that HCN had knowledge of, let alone consented by their continued dealing to, the assignment.

Comment: I regret to have to disagree, strongly: having been responsible for subsidiary offices in non-English language foreign countries, I can state that it is axiomatic and self-evident not only that one has translated into English anything one receives by way of a circular or official document in the foreign language, but also one translates the original of everything received in both languages to verify the accuracy of the English language version. It is wholly beyond credibility that HCN should receive a Gazette Notice in Arabic and do nothing with it; it may have come as a surprise to HCN, but Saudi Arabia is an Arabic-speaking country with its own Arabic-style law and legal system, it is NOT the 52nd State of the USA. In any event, HCN was put on notice that something had happened to AAE and was entirely responsible for following it up to confirm the precise facts.

Further, the Judge later stated "It is clear … that [in April 1996] they thought that an Establishment had separate legal personality from its owner." This statement tells us, astonishingly, that HCN had been in contract with AAE for 6 years and had never ascertained what its precise legal status was. With respect, in the Real World ***you never execute a contract with an entity whose legal status you have not verified****. The Judge appears to accept this in paragraph 17(6) where he details Saudi law advice taken by HCN* ***in August 1998*** *regarding AAE's legal status.*

In its Award the Tribunal made no formal decision on jurisdiction, the issue arising from HCN's amendment of its claim to reflect the AAE/AAC issue, holding (i) that the AAE/AAC 'conversion' made AAC the correct party to the arbitration and (ii) that the fact of conversion was known to HCN. The Judge held that whether he approached the question as a review of the decision made by the tribunal or as a fresh hearing of the issue on jurisdiction the decision of the tribunal had plainly been wrong: it therefore had had no jurisdiction to make an award in favour of AAC since it had never been a party to the SSA nor, therefore, to the arbitration agreement.

Comment: I respectfully submit, for the reasons stated above, that this is wrong.

Serious Irregularity regarding Expert Evidence

HCN applied to set aside the Award on the counterclaim in its entirety; its principal grounds were (i) the way in which the Tribunal had dealt with expert evidence and (ii) its failure to have dealt with the issues put to it (see below for (ii)).

Although the AAE/HCN contract was clearly under Saudi law, none of the pleadings in the case suggested any material difference from English law. Following a directions meeting, the Tribunal issued written directions that the "law to be applied" (other than the Saudi Commercial Agency law referred to in clause 17 of the distributorship agreement) was to be submitted before 10th July 1998. They also ordered that experts on Saudi law were to be asked to report on each issue on Saudi law as agreed by the parties and to be determined by the tribunal; the reports were to be submitted by 14th September. HCN wrote to the Tribunal stating that its position was that (i) although the law to be applied under clause 17 of the SSA was Saudi law, except insofar as evidence was led and accepted by the tribunal on Saudi law, the law to be applied was English law; and (ii) its understanding was that both parties had agreed that the Tribunal should take expert advice on Saudi law and that there would not be separate expert reports. In September 1998 the Tribunal suggested (and the parties agreed) it appoint Dr Anis Al-Qasem, a Saudi law expert of great distinction, as its expert. However, no written instructions were provided to Dr Al-Qasem; instead the chairman of the tribunal had a meeting with him where draft terms of reference were discussed but which were never signed as it was decided at the earlier directions hearing that they were not essential in the light of the detailed pleadings. The ToR summarised each of the points in dispute and the issues in the case in

terms such as “was Al Ameen in breach of the agreement in failing to promote sales ?” but, significantly, did not identify any specific points of Saudi law.

Dr Al-Qasem’s main Report set out, with great clarity, the principles of Saudi law relating to construction, the rules as to liability, evidence and commercial agency regulation; in particular, he identified one significant difference between English and Saudi law: under the latter evidence of the subsequent conduct of the parties is admissible to assist in construction of contracts. He then addressed the issues in dispute as set out in the draft ToR, rendering his opinion on all the points in issue before the Tribunal, applying the principles of Saudi law to the facts as he saw them and reaching various conclusions on the matters that had been submitted to the Tribunal for decision.

Shortly afterwards, HCN wrote to the Tribunal suggesting that the report should be ruled inadmissible and excluded since (a) the parties had proceeded on the basis that there was no material Saudi law issue between them; (b) they had agreed to the retention of the expert on Saudi law [only] on the basis that someone should be available to answer Saudi law queries and (c) the report in any event went considerably beyond what should have been within an expert report. HCN made three principal allegations: the Tribunal should not (i) of its own motion and without consulting the parties have instructed Dr Al-Qasem in the terms they did; (ii) have instructed him to cover the issues raised in the terms of reference but only deal with Saudi law; (iii) met him and discussed the report in the absence of the parties without obtaining their consent.

After quoting Mustill & Boyd (2nd Edition) at page 72 to the effect that if the parties do not plead foreign law then it is not necessary for the Tribunal to do so, Thomas J commented that a general request to a foreign lawyer to review the entire case and opine on the principles of foreign law where the parties have not raised specific issues is a course that no prudent tribunal should embark on without considerable hesitation, Further, he rejected the suggestion that, since s.46(1)(a) required the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties, a mandatory requirement was imposed on a tribunal sitting in London where the proper law was a law other than the law of England and Wales to obtain general evidence and guidance in relation to that foreign law. Absent any suggestion by the parties that the applicable system of law differs from English law, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as English law. The Judge suggested that the correct course to have been followed by the tribunal would have been to have asked the parties whether there were any points where Saudi law differed from that of England and Wales or to have itself raised with the parties specific points on which they might need assistance; it would have been better if the tribunal had (i) sought the views of the parties on the issues raised before instructing Dr Al-Qasem and had (ii) discussed the ToR with the parties. However, what happened could not have amounted to an irregularity since the tribunal had been left to instruct the Expert.

Regarding the Tribunal’s meeting with Dr Al-Qasem, s.37(1)(b) provided that the parties should be given a reasonable opportunity to comment on any information, opinion or advice offered by the Expert. Per Professor Merkin “Arbitration” §13.46(e) “.... consultation with the [Expert] should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment”. The Judge rejected the Tribunal’s submission that, in its meeting with Dr Al-Qasem, it was not taking evidence and so the provisions of s.37(1)(b) did not apply, concluding that the holding of this private meeting with the Expert fell below the standards ordinarily to be expected of arbitrators and that their failure to inform the parties of the fact of the meeting immediately afterwards had also been an irregularity. The Judge referred with approval to Mr [now Professor] Mark Cato’s statement, in his *“Arbitration Practice and Procedure: Interlocutory and Hearing Problems”* at §14.5.2: an arbitrator who finds himself in this position should tell the parties about what he has done and give them a full opportunity to test the evidence by way of cross-examination or by calling evidence in rebuttal.

HCN argued that the irregularities upon it had relied should be looked at cumulatively; Thomas J agreed but was entirely satisfied that the cumulative irregularities were not ‘serious’ within s.68(2).

Serious Irregularity regarding Issues put to the Tribunal

In its s.68 application, HCN had put forward seven issues which, it argued, the tribunal had not dealt with, the first being the assignment issue. It could not give rise to any question of any irregularity, as the Tribunal had dealt with the matter in the way put to it. The other six matters could be summarised as.

(i) Was AAE entitled to a prompt payment discount (i.e. in relation to the 75% settlement agreement), it being HCN’s contention that its agreement to take 75% was conditional on punctual payment. The Judge held that the Tribunal had properly considered these issues.
(ii) On what products was commission payable ? The Judge held that while the Tribunal’s reasoning might be <100% clear its decision had been clear in the result; s.68(2)(d) did not require a tribunal to set out each step by which it reaches any conclusion. Any failure by the Tribunal in that respect was not a failure to deal with an issue that was put to it - it might amount to a criticism of the reasoning, no more.
(iii) Was commission payable on HUSA products sold separately by the latter ? Held: as (ii)

Tribunal’s Fees & Expenses

On 1 April 1999 the secretary to the EACC advised the parties that the award had been approved and that the Centre’s administrative charges and the arbitrators’ fees had been in accordance with the rules as £15,520 and £70,000 respectively; HCN contended that this was excessive.

The £70,000 represented £30,000 (Chairman) and £20,000 (each winger); the Chairman spent 185 hours, the wingers 160/150 hours i.e. averaging approx. £140 per hour. The numerous hours were spent over four periods:

(i) pre-hearing between November 1997 and November 1998 in correspondence, the preliminary objection, settling the terms of reference, framing issues, directions, discovery of documents, witness statements and the appointment of the expert.
(ii) five days for the hearing.
(iii) several meetings post-hearing including necessary deliberations; drafts were discussed and a final meeting held; the final award took time and careful reasoning.
(iv) The cost problems between March and May 1999.

HCN confined its challenge (after considering all the evidence) to two matters (i) payment to the chairman re typing/word processing; and (ii) the overall amount of the fee paid to the arbitrators. The tribunal argued that (a) the Court had no jurisdiction under the Act since the fees had been fixed by the EACC under its Rules; (b) the Court should not adjust the fees in any event; (c) in any event it would be unjust to order repayment of the fees since two of the arbitrators had been paid and had spent the monies.

Per Professor Merkin "The starting point is s.28(5), which recognises that the arbitrators are entitled to be paid, by way of fees and expenses, the amount (or on the basis) agreed by them with the parties, thereby … preventing that agreement from being challenged by the parties. The [Act] … does not refer expressly to fees as determined by an arbitral body, but it must be assumed that acceptance of the terms of such a body amounts to an agreement to pay fees and expenses in accordance with those terms." However, Thomas J held that the EACC Rules did not amount to express agreement: the arbitrators had taken the mistaken position that the fees charged had been determined by the Board and they were therefore not responsible for their reasonableness but, in his judgement, they were, the provisions of s.28 being applicable but s.28(5) not so.

However, HCN took issue with the 185/160/150 hours (described by the Judge as "quite extraordinarily high") spent by the respective arbitrators, estimating 27 hours each for the hearing, 12 hours (interlocutory matters - Chairman only), 24 hours each for consideration of documents (relatively few), 4 hours post-hearing discussion and 10 hours (Chairman only) to draft the Award i.e. totalling (respectively) 77/55/55 hours i.e. a suggested reduction of 62%. While the Judge was sympathetic he accepted that the hours had actually been spent and declined to order an adjustment. Further, while accepting that the Chairman, as a sitting Judge arbitrating in his own time, had no direct secretarial support, he rejected the additional charge for typing/word processing – such was deemed included in hourly rates for professional persons.

Thomas J emphatically rejected the argument that, since the two wingers had spent their fees they could not repay it. Ouch !

Comment

See above regarding the jurisdiction issue. The s.68 issues are helpful in clarifying the grey area between "irregularity" and "serious irregularity" (of course s.68 is a 2-part test: having established serious irregularity the applicant then has to demonstrate 'substantial injustice'. The expert issue is unsurprising, the tribunal being rescued, in my submission, from a serious irregularity only by the discovery, during the hearing, of the secret meeting; however, I have to express surprise that a distinguished tribunal should get it so wrong regarding the meeting with the Expert where Professor Cato hits another bull's-eye. On fees, HCN's 'estimate' was exceeded by a massive 165% and I consider it hard done by in the judgement in that it should have been given more information than it was in order to seek a reduction.

25. In *CMA CGM S.A. v. Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co & Others* (the Northern Pioneer) ([2002] EWCA Civ 1878; 18th December 2002), apparently the first ever s.69 appeal to be heard in the Court of Appeal, the origins and purpose of s.69 were definitively explored in the sole judgement, given by the Master of the Rolls. Given the nature of the judgement, I see no basis upon which permission to appeal to the House of Lords could be granted and, I submit, the longstanding question as to "why does s.69 exist ?" has now been answered (see comment below)

The Facts

A highly-distinguished tribunal, Sir Christopher Staughton, Mr Adrian Hamilton QC and Mr Kenneth Rokison QC, held in an award that the charterers of four vessels under a NYPE form charter had not validly cancelled those charters pursuant to the War Cancellation Clause (WCC). The charterers sought permission under s.69(2)(b) to appeal on the grounds that the Tribunal had erred in relation to seven issues of law; Tomlinson J. refused permission but did grant permission under s.69(8) to appeal to the CoA against his decision in relation to four of the issues. The appeal raised three principal questions: (i) had Tomlinson J. applied the correct principles when granting permission to appeal to the CoA ? (ii) had he applied the correct principles when refusing permission to appeal the award ? (iii) had he correctly applied the latter principles ?

The Owners, claimants in the arbitration, were four single-vessel German limited-liability partnerships which had each chartered their vessel to a company of which the Charterers was successor in title. Cl.31

was a WCC which provided, so far as material, as follows: "In the event of ……. of [Germany as flag state] … becoming involved in war (whether there be a declaration of war or not), either the Owners or the Charterers may cancel this charter…."

Following a fall in line rates, the charters became uneconomic. In March 1999 a military operation began in Kosovo in which Germany participated as a member of NATO. The Tribunal had found that: "The particular operation with which we are concerned started on 24th March 1999. Germany participated as a member of NATO. Under the German constitution, the German Bundestag approved German participation in the operation. From 24th March, this participation involved the deployment of 10 Tornado ECR aircraft and 4 Tornado Recce aircraft of the German Air Force, initially mainly suppressing Yugoslav air defences, and reconnaissance, and later switching to other targets. During the second half of April the intensity of the operation, including Germany's participation, increased considerably. We conclude, however, that the operation was one operation, starting on 24th March, and the increase in Germany's participation was one of scale or tempo, rather than in the nature of Germany's involvement."

By notice dated 29th April 1999 the Charterers purported to terminate each of the charterparties on the ground that Germany, the flag state, had become involved in war in Kosovo and Yugoslavia. The Tribunal found that the cancellation of the charterparties had been invalid for reasons which included the following: (i) [by a 2:1 majority] that the events in Kosovo had not constituted 'war' within the meaning of that word in cl.31; (ii) [2:1] that if events in Kosovo had constituted war, Germany had not been 'involved' in that war within the meaning of that word in cl.31; (iii) [3-0] that under cl.31, the right to cancel a charter had had to be exercised within a reasonable time of the event in question; (iv) [3-0] the Charterers had not given notice of cancellation within a reasonable time of Germany's alleged involvement.

The Charterers sought permission to appeal on the following issues:

(i) Whether on a proper construction of cl.31, the expression "[a] nation … becoming involved in war" included participation in a military operation as a member of NATO;
(ii) Whether the cl.31 cancellation option arose only in the event that the war in question, or the flag state's involvement in that war, had an impact on the trading or operations of the vessel or vessels concerned;
(iii) Whether (a) there was implied into cl.31 any term to the effect that the right to cancel had to be exercised by the giving of a notice within a particular time frame or (b) there was no such implied term and the right to cancel could be lost only as the result of an election by the party concerned (the "construction issue").
(iv) If there was an implied term, whether the term in question was that the right to cancel had to be exercised (a) by notice given within a reasonable time of its accrual (and in particular within a few days thereof) or (b) before such time had elapsed as to make the other party believe that no such right would be exercised (the "time issue").

Background to s.69 – The Nema and Antaios Guidelines

The Arbitration Act 1979, recognising that England was seen as having a highly interventionist arbitration regime, drastically limited the availability of appeals to the Court; s.1(1) of that Act provided: "In the Arbitration Act 1950 … section 21 (statement of case …) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award … on the ground of errors of fact or law on the face of the award." S.1(2)ff created the predecessor of s.69 albeit in different terms.

In an epic case in 1982 (*Pioneer Shipping v B.T.P. Tioxide ('the Nema')* [1982] AC 724) the House of Lords set out guidelines for the grant of permission to appeal to the High Court from the decision of an arbitrator; in particular, permission should not normally be given i.r.o. a 'one-off' clause unless, in the opinion of the court, the arbitrator was obviously wrong. However, their Lordships held that rather less strict criteria were appropriate i.r.o. standard-form contracts since it was in the public interest that these should carry as high a degree of legal certainty as was practicable to obtain. However, leave should not be given even in such a case unless the judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong; further, when the particular events were themselves "one-off" events, stricter criteria should be applied along the same lines as those appropriate to "one-off" clauses.

In 1985 in the Antaios (*Antaios Compania SA v Salen AB (the 'Antaios')* [1985] AC 191), the Nema Guidelines were generally affirmed, e.g. per Lord Diplock: "… your Lordships should … [affirm] that the Nema Guidelines that even in a case that turns on the construction of a standard term, "leave should not be given … unless the judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in his construction", applies even though there may be [conflicting] dicta … at first instance …. I am confining myself to conflicting dicta not decisions. If there are conflicting decisions, the judge should give leave to appeal to the High Court, and … give leave to appeal … to the Court of Appeal .. general public importance … only thus can be attained that desirable degree of certainty in English commercial law… ."

The s.69 criteria are clearly strongly influenced by, but do not precisely follow, the Nema Guidelines, Lord Phillips MR concluding that they were a little more generous (see below).

in the *Antaios* Lord Diplock had said (with successor section references inserted with the caveat that the 1996 language differs from the 1950/1979 but not materially):

(i) "….leave to appeal to the Court of Appeal should be granted by the judge under [the predecessor of s.69(6)] only in cases where a decision whether to grant or to refuse leave to appeal to the High Court under [s.69.2(b)] … called for some amplification, elucidation or adaptation to changing practices of existing guidelines laid down by appellate courts; and that leave to appeal under [s.69(6)] should not be granted in any other type of case. Judges should have the courage of their own convictions and decide for themselves whether, applying existing guidelines, leave to appeal under s.69(2)(b) ought to be granted or not."; and

(ii) [if granting leave under s.69(2)(b)] "…the judge ought to give reasons for his decision to grant such appeal so that the Court of Appeal may be informed of the lacuna, uncertainty or unsuitability in the light of changing practices that the judge has perceived in the existing guidelines; moreover since the grant of leave entails also the necessity for the application of *Edwards v Bairstow* [1956] AC 14 principles by the Court of Appeal in order to examine whether the judge had acted within the limits of his discretion, the judge should also give the reasons for the way in which he had exercised his discretion."

Lord Phillips MR said that there was nothing in s.69 which offered any grounds for departure from these principles; on the contrary, the fact that s.69 slightly eased the granting of permission to appeal from an award *was all the more reason why the Judge's decision on the application for such permission should be final*.

Had Tomlinson J. applied the correct principles when granting permission to appeal to the CoA ?

He had refused permission to appeal to the Commercial Court because he considered that s.69(3) precluded the grant of permission, notwithstanding that he had identified issues in relation to the proper construction of a standard WCC that were 'obviously of general public importance'. In granting permission to appeal to the CoA in relation to this decision he said: "However, on the issues relating to the [WCC], I grant leave to appeal … pursuant to S.69(6) of the Act, in order that the [CoA] may consider whether I have misapplied the statutory criteria or have approached them inappropriately inflexibly given the general public importance of the underlying question of the proper approach to the construction of a standard WCC, and, if it thinks it appropriate, give guidance."

Lord Phillips MR said that the *Antaios* criteria fell to be applied, subject to the qualification that the guidelines are no longer judicial but statutory and that, in consequence, there was no scope for amplifying or adapting them in the light of changing practices although, to the extent that there was scope for elucidation as to their application, it might be appropriate to grant permission to appeal. Subject to this, if the Judge decided that the statutory criteria had not been satisfied, he should not grant permission to appeal against that decision. *His decision on the merits of the application for permission to appeal should be final.* The Judge had not identified any uncertainty regarding application of the criteria and it had been his clear view that they precluded the grant of permission to appeal; further, he had neither pointed to any uncertainty in the criteria nor had suggested any possible misapplication thereof by him. Perhaps he had hoped that the CoA might ease the rigorous restriction imposed on review by the Commercial Court of important issues of law arising in arbitrations. The CoA did approve the grant of permission to appeal for such a motive. However, it would be necessary to consider the extent to which some aspects of the *Antaios* could be reconciled with the statutory criteria.

Lord Phillips' Comments on Procedure

Before considering the principles applied by Tomlinson J. Lord Phillips MR interjected some comments on the procedure adopted in this case. The Charterers had applied in writing for permission to appeal, the Claim Form being 10 pages long; however, it was accompanied by a witness statement from the Charterers' solicitor, part of which was unnecessary and inappropriate, including 137 pages of exhibits, including not merely the award but also 45 pages of skeleton argument at the arbitration. Owners responded with 28 pages to which Charterers responded with a further 13.

In North Range Shipping Ltd v Seatrans Shipping Corporation [2002] EWCA Civ 405; [2002] 1 WLR 2397 the CoA had held that a Judge, when refusing permission to appeal under s.69, was required by virtue of Art.6 ECHR to give sufficient reasons to enable the losing party to understand why he had reached his decision, although such reasons could be very short; to this extent the Antaios guidelines are no longer followed. Tomlinson J, in refusing permission to appeal, gave very adequate reasons for his decision in two and a half closely typed pages, receipt of which by the parties sparked off further responses from them both. The Judge considered it appropriate to consider this correspondence, commenting "I cannot think that the [CoA] envisaged that the giving of reasons should lead to a potentially never-ending process in which it is suggested that, for one reason, or another, the judge's decision is wrong."

Lord Phillips MR agreed, viewing this mini paper war with dismay; applications for permission to appeal should normally be on paper in order to simplify the procedure and to save the Court's time. If this case reflected current practice, then the procedure has got out of hand and is at odds with both the spirit of the legislation and the ethos of the Commercial Court. Written submissions in support of an application for permission to appeal from findings in an arbitral award should normally be capable of being read and digested by the Judge within the half-hour that, under the old regime, used to be allotted for such applications.

Had Tomlinson J. applied the correct principles when refusing permission to appeal against the award ?

For the Charterers' appeal to succeed, they would have to reverse three separate findings of the Tribunal in relation to cl.31: (i) that operations in Kosovo were not 'war'; (ii) that Germany was not 'involved' and (iii) that they had been required to give notice of cancellation within a reasonable time and had failed to do so. The Judge had observed that the first two issues involved mixed fact and law and that the proper approach to the construction of clauses such as cl.31 was a question of general public importance. He did not, expressly, consider whether the majority decision of the Tribunal on these two issues had been open to serious doubt, perhaps because successful challenge on (i) and (ii) would not affect the result unless the (unanimous) decision of the Tribunal on the third issue could be attacked. The Charterers' challenge thereon was to the finding that, as a matter of law, they had had to exercise any right to cancel within a reasonable time.

The Judge had held (a) that this challenge was not open because the question had not been not 'one which the Tribunal was asked to determine' (s.69(3)(b) refers) and (b) that there had been alternative bases upon which the Charterers' delay in giving notice of cancellation might have been argued but these alternatives had not been addressed before the Tribunal. Given the Judge's conclusion that the Tribunal had not been asked to determine the critical question, his refusal of permission to appeal had been inevitable; he had applied the correct principles although the manner of application remained to be considered.

Had Tomlinson J. correctly applied the principles governing permission to appeal from an award ?

Following *Edwards v Bairstow* the CoA role was essentially one of judicial review, i.e. of the Judge's decisions of law whereas, where he had made findings of fact, or exercised a discretion, the familiar *Wednesbury* test fell to be applied [1948] 1 KB 223.

Was the question one which the Tribunal had been asked to determine ? S.69(3)(b) was an addition to the Nema Guidelines, resolving a difference of view between the Commercial Court and the Court of Appeal in *Petraco (Bermuda) Ltd v Petromed* [1988] 2 Lloyd's Rep 357. In giving s.69(8) permission, the Judge had commented that "the critical question was not even raised faintly"; Charterers challenged this finding.

What had he considered to be 'the critical question' ? The CoA found that this had been issue (iii) above since the Judge had said: "I do not believe that it would be a proper exercise of my statutory discretion to give leave to appeal in circumstances where the [Tribunal had] unanimously concluded that any right to cancel which the charterers may have enjoyed was not exercised within a reasonable time and was thus lost. … the arbitrators were not asked to analyse the matter in terms of waiver/election and evidence was not deployed before them concerning [Charterers'] awareness or lack of awareness as to the existence of a right to cancel. The resolution of the question in fact left to the [Tribunal] was an objective determination of fact peculiarly within the province of the [Tribunal]. I conclude that it is inappropriate to give leave to appeal on the issues arising out of the WCC. The questions raised are either questions the determination of which will not substantially affect the rights of one or more of the parties or are questions which the tribunal was not asked to determine."

Charterers submitted that. (i) the Tribunal had held that cl.31 was subject to an implied condition that the right to cancel had to be exercised within a reasonable time of its accrual; (ii) Charterers had challenged before the Tribunal the existence of this implied condition; (iii) it followed that the question of whether there was an implied term was one which 'the tribunal was asked to determine'; (iv) Charterers argued that mere inaction would not constitute an election, estoppel or waiver, however long it continued; (v) it was for Owners, not Charterers, to raise any averments of estoppel, waiver or election but they had not done so.

In its award the Tribunal had made the following finding: "An option to cancel a charterparty in the event of war must be exercised within a reasonable time of the event in question (*KKKK v Belships Co* (1939) 63 L1.l.Rep 175):

Lord Phillips concluded that, insofar as refusal of permission to appeal was founded on s.69(3)(b), it was not well founded; however, Charterers should have made it plain that this was a real issue and one that would, if necessary, form the basis of a challenge before the Commercial Court where the alternative allegations of election, waiver and estoppel could have been explored. As it was, if Charterers were to be given permission to appeal to the Commercial Court and there succeeded on the ground that the Tribunal had been wrong to have found an implied term and that issues of election, waiver and estoppel had remained to be resolved, the matter would have to be remitted to the Tribunal for further consideration. This would have justified the Judge in refusing permission to appeal, applying s.69(3)(d).

There were, however, other considerations that justified the Judge in refusing permission to appeal: before he could grant permission to appeal, s69(3)(c) had had to be satisfied.

(i) Was the decision of the Tribunal that there was an implied term obviously wrong ?

While there was scope for argument as to whether the Tribunal were correct in finding an implied term, it could not be said that the Tribunal was obviously wrong to follow the decision in *KKKK v Belships;* Charterers had accepted this.

(ii) Was the decision of the Tribunal that there was an implied term open to serious doubt ?

In *KKKK v Belships*, Branson J had rejected the submission that a clause in a charterparty giving owners and charterers a war cancellation option remained open so long as a state of war continued, holding instead that a term was to be implied that the option would have to be exercised within a reasonable time; in so finding he applied the test of whether, as a matter of business efficacy, it was necessary to imply such a term. However, cases dealing with the operation of WCCs were rare and more common were cases dealing with the right to withdraw a vessel for non-payment of hire. Those cases all agreed that such a right had to be exercised within a reasonable time of the non-payment, but they did not agree on the juridical basis for such a requirement. Since there existed different theories in this regard, it was at least arguable that there was a serious doubt as to whether an implied term formed the basis of the requirement to exercise a right to withdraw within a reasonable time was. However, it was not necessary for the CoA to express a final view on this matter.

Does it matter ? Antaios Reconsidered

Was the question of whether the Tribunal had been correct in following *KKKK v Belships* 'a question of general public importance' ? If it had been wrong, would this 'substantially affect the rights' of the parties ? The present circumstances mirrored those in the *Antaios* where the Tribunal had apparently held that there was an implied term that the right to withdraw would be exercised within a reasonable time. In that case Staughton J had examined the authorities and concluded that they demonstrated quite clearly 'that lapse of a reasonable time does deprive the Owner of the right to withdraw'; he went on to hold that what mattered was the Tribunal's conclusion that the right to withdraw was lost, not the manner in which they described that right. Once they had found as a fact that a reasonable time had expired, their conclusion was inevitable. He then gave permission to appeal against his decision for the sole purpose of permitting the CoA to consider whether his approach had been correct in principle.

The CoA was unanimous in holding that Staughton J had acted correctly in principle in giving permission to appeal to the Court of Appeal against his own decision. However, only by a majority did they hold that his decision to refuse permission to appeal to the Commercial Court against the award was also correct, on the basis that the Tribunal had correctly held that Owners had to exercise their right (if right they had) to withdraw the vessel within a reasonable time and that, whatever the juridical basis for this requirement, the Tribunal's findings that a reasonable time had elapsed was inviolable. Inter alia, in the leading judgement, Sir John Donaldson MR said "I know of no authority for the proposition, and I do not think that I have ever heard it suggested before, that a shipowner can extend the time for reaching a decision whether or not to withdraw beyond what is reasonable in all the circumstances by the simple device of announcing that his failure to decide is without prejudice to his rights…. . … waiver or an implied term are not alternatives. The implied term may well set a limit on the owners' rights and waiver may cut down those rights, but the concept of waiver is only appropriate where the person "waiving" is giving up some right. In the instant appeal the owners are contending that by "waiver" they acquire something which they would not otherwise have had, namely a right to withdraw the vessel after the expiry of a reasonable time."

In the House of Lords Lord Diplock had endorsed the decision of Staughton J. and the majority of the Court of Appeal, thereby appearing to determine that principles of waiver were capable of resulting in the loss of a right to withdraw from a charter solely through passage of time. However, the question for the CoA in the present case, applying *Antaios*, was whether, on the facts of this case, the decision of the Tribunal that the charterers were out of time for exercising a right to cancel the charter was 'open to serious doubt'; the answer was clearly "no". A delay, more than one month from the time of the events alleged to have given rise to the right to cancel, in purporting to cancel was only consistent with a determination to continue with the charterparty despite those events. Had the Tribunal applied the principles of election, waiver and estoppel they would have concluded that these precluded the right to cancel the charterparty after so long a period of delay. Thus the juridical basis upon which the Tribunal had found that the right to cancel had to be exercised within a reasonable time had not impacted upon its decision.

Consequently, determination of the question of whether the Tribunal had been right to imply the term which they had would not substantially have affected the rights of the parties; further, the question was not one which is of general public importance. It followed that this appeal should be dismissed.

Thus, in order to resolve this appeal, it had not proved necessary to have decided whether it would have been open to Tomlinson J. to have granted permission to appeal to the Commercial Court against the majority finding. This question necessitates consideration of the extent to which the criteria in s.69 had departed from the Nema Guidelines and this was a matter upon which the CoA should give guidance.

The Departure from the Nema Guidelines

In the *Antaios,* Sir John Donaldson MR had considered the question raised by Staughton J of whether, where the latter had considered the Tribunal probably right, the fact that the CoA might take a different view was any ground for granting permission to appeal to the High Court. He considered that the issue had no basis since such differences were inherent in appellate courts and that one or other view would be affirmed by the House of Lords if necessary. In such a case leave to appeal to the High Court should be given, provided that the resolution of the issue would ***both*** substantially affect the rights of the parties (s.69(3)(a)) ***and*** the case qualified for leave to appeal to the CoA under s.69(8).

Lord Diplock is said, in the *Antaios*, to have placed a 'gloss' on the Nema Guidelines. Inter alia, he had said: "Decisions are one thing; dicta are quite another. In the first place [the latter] are persuasive only …

In the second place, the fact that there … [are] dicta but no conflicting decisions on the meaning of particular words or phrases … in a standard-form commercial contracts … suggests either that [there is no need to choose between them] … sufficient … to justify the cost of litigating the matter; or that [the industry] … shares a common understanding as to … [the meaning]. … it is in the very nature of judicial discretion that within the bounds of "reasonableness" in the wide *Wednesbury* sense of that term, one judge may exercise the discretion [under s.69(2)(b)] one way whereas another judge might have exercised it in another … . It follows that I do not agree with Sir John Donaldson MR. … where in the instant case he says that leave should be given under … [s.69(2)(b)] to appeal to the High Court on a question of construction of a standard term … [where] … there are two schools of [judicial] thought … where the conflict of judicial opinion appears in dicta only. This would not normally provide a reason for departing from the Nema Guidelines …."

This reasoning would have precluded Tomlinson J. from giving permission to appeal unless he had considered that the Tribunal's decision on that issue was probably wrong. Lord Phillips MR did not consider that this part of the Nema Guidelines had survived enactment of s.69. The criterion for granting permission to appeal in section 69(3)(c)(ii) was that the question should be one of general public importance and that the decision of the Tribunal should be *at least open to serious doubt*. This language imposed a test which was broader than Lord Diplock's requirement that permission to appeal should not be given 'unless the judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in his construction'. Section 69(3)(c)(ii) is consonant with the approach of Sir John Donaldson in the *Antaios.*

Lord Diplock's Nema Guideline which has been superseded by section 69(3)(c)(ii) was calculated to place a particularly severe restraint on the role of the courts in resolving issues of commercial law of general public importance. This was because the likelihood of conflicting judicial decisions in relation to such issues, where they related to standard clauses in widely-used charterparties containing arbitration clauses, was greatly reduced by the guideline itself. The facts of this case demonstrate that changing circumstances can raise issues of general public importance in relation to such clauses that are not covered by judicial decision.

Further, the nature of international conflict has changed over the years and such changes underlay the construction issue: the reasoning of the majority on the Tribunal on this issue had been as follows: (i) there is no technical meaning of the word 'war' and it must be construed in a common sense way – see *KKKK v Bantham Shipping* [1939] 2 KB 554 at 558-9; (ii) 'war' had to be distinguished from 'warlike activities and hostilities short of war' [dealt with in cl.23(a) of the charter] being war between nation states; (iii) a businessman applying common-sense in the context of cl.31 would not regard the NATO operation in Kosovo as a war; (iv) Members of NATO participating in a NATO operation are not 'involved' in the operation as a nation.

The minority arbitrator, Sir Christopher Staughton, had thought that the majority arbitrators had asked the wrong question. They should have asked whether a businessman would have said that there was a war in Kosovo in March and April 1999, to which the answer would have been 'yes'. Germany, in his view, was 'involved' in the Kosovo conflict. The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority was, 'at least open to serious doubt'. Lord Phillips MR concluded that, had it not been for the fact that the Tribunal's' conclusion on the 'time' issue rendered the question academic, it would have been open to Tomlinson J, in accordance with section 69(2)(b), to have followed his inclination and given permission to appeal.

Comment

Is there clear and valid reason for the continued existence of s.69 ? The ability of a disgruntled party to appeal on a point of law is often cited as a reason why some arbitrations go elsewhere and are lost to the London 'market'; for example, there have recently been anecdotal suggestions that some commodities arbitration business may have been diverted to Hamburg for reasons which include disapproval of s.69. However, I am unaware of any hard evidence to support (or, to be fair, dismiss) such suggestions. It does appear clear that there is a continuing general trend to minimising the involvement of the courts in the arbitral process and that limiting the scope for appeal may well be consistent with international norms in this regard.

[2003] 69 ARBITRATION 1 carries an important article "Appeals from Arbitral Awards – Should s.69 be Repealed ?" by Professors Michael O'Reilly and Roger Holmes; however, *CMA* was decided after that article had gone to press. Their conclusions suggest repeal since, inter alia, they observe that "there is no evidence that s.69 has... added significantly to the development of commercial law." In a forthcoming article I propose to address the questions raised by the distinguished professors and, at least for the present, my initial response is that the present case at least partially answers them.

That said, it might be thought to be an unnecessary risk to rule out all possibility of such an appeal because of the possibility that a genuinely serious issue could arise which was denied access to appellate courts; one has only to think of the vast number of decisions made in the High Court and subsequently overturned. It is my preliminary view, therefore, that the correct approach is to retain s.69 but to make it difficult for parties even to get into the High Court and certainly more so to get into the Court of Appeal on points of law arising out of arbitrations. For the present, I conclude that what I look for in s.69 is given by the

judgement in the present case and the fine-tuning of the understanding of s.69 and, in particular, placing it in the clear context of the Nema and Antaios Guidelines has rendered both arbitration lawyers and the maritime sector a valuable service. To repeal s.69 will close off this avenue for deciding critical matters and would, I submit, be both in appropriate and unhelpful.

Postscript

There is one nuance to this case which caused me some wry amusement when I first read it: the Award which gave rise to it was made by a tribunal including Sir Christopher Staughton and it is an amusing twist of history that it was the review of one of his judgements in the High Court which is central to the Court of Appeal's decision in the present case.

26. The case *Internaut Shipping Limited GmbH & Sphinx Navigation Ltd of Liberia v Fercometal SARL* ([2002] EWHC 1230 (Comm) QBD; 21st June 2002) is another example of "Guess the Party [to the contract]" where the "phone a friend" option, viz. David Steel J, worked as usual.

In 1994 Sphinx time-chartered its vessel ELIKON to a 3rd party, Primary, which arranged for the carriage of 12,000T of steel rods from Klaipeda to Algeria. Primary and Internaut then entered into a JVA whereby Internaut would fix the remaining space on the vessel (its summer dwt was >28,000T) and that they would share costs and revenues relating to any additional cargo. Internaut contended that it had then fixed, as principal, the remainder of the space to Fercorizetal SA under a voyage charter, this part cargo consisting of three parcels of steel profiles totalling about 14,000T for discharge at Oran, Algiers and Skikda.

The primary issue for the Court was to determine the identity of the counterparty to Fercorizetal under the V/Ch.

The telexes fixing the V/Ch were exchanged between Internaut and Fersped (acting on behalf of Fercorizetal) and, throughout, the vessel was referred to as *"Internaut TBN built 1974 or younger".* Subject to agreement on the primary terms, it was otherwise common ground from the outset that the fixture would be *"basically as per [the T/Ch]".* By 27th December 1994 the parties were duly agreed on the main terms including a nomination procedure. On the 29th December, Internaut (i) nominated ELIKON referring to Sphinx as Owner (ii) notified Fersped *"for B/L carrier please use Sphinx Navigation Ltd Liberia c/o Internaut Shipping GmbH".*

Loading at Gdansk was completed on the 11th January and, on 2nd February, a signed V/Ch (Gencon form) dated 27th December was returned to Fersped by Internaut. Box 3 identified "Sphinx c/o Internaut. Notably, the V/Ch was signed by Internaut in the owner's box without qualification. On 14th February Internaut telexed Fersped to advise that it was Owner.

The vessel completed discharge on 4th March and on 7th Internaut faxed Fersped a laytime calculation showing a balance due to the former of US$149,000 . The fax also lodged an alternative claim by Owners for breach of the "always accessible" provision in the V/Ch in relation to the delay in discharge. An arbitration commenced on 11th April by the appointment, on LMAA Terms, of John Schofield as Owner's arbitrator; the Defendants subsequently appointed Bruce Harris and the 3rd arbitrator was Robert Gaisford. Soon after the arbitration commenced Internaut commenced proceedings in Algeria against the recipients of the cargo and attempted to join Fercometal, to which the latter, understandably, objected as being contrary to the arbitration agreement. On 26th September it obtained an injunction from the Commercial Court against Internaut and Sphinx so as to restrain them from taking any further steps to join Fercometal to the Algerian proceedings. On 9th October Internaut advised Fercometal that the application to join Fercometal to the Algerian proceedings was being withdrawn.

The original arbitration proceeded but the points of claim in the arbitration were served in the name of Sphinx. It was this identification, that Internaut contended was a misnomer, which was later to form the basis of the arguments in the present case. In the meanwhile, various preliminary issues were dealt with in an interim award, largely in Owners' favour, dated 23rd March 1999. Fercometal's application for permission to appeal to the Commercial Court was struck out on 12th November 1999 as being out of time.

Owners successfully applied to amend its claim to advance a claim for damages for breach of the "always accessible" provision. Prior to that hearing, Fercometal had resurrected the matter of security for costs (first raised in December 1996). On the 7th June 2000 they had referred to "the Plaintiffs [having] an office in Liberia ..." i.e. presumably meaning Sphinx, not Internaut. On 17th August the Tribunal wrote to the parties querying, inter alia, the precise ownership, whether Internaut was manager of Sphinx and what the Internaut/Primary relationship was. After some acrimonious exchanges between the parties, Internaut accepted on 19th December that although the arbitration had been commenced by Internaut, Sphinx had been named as Claimants in the claim submissions, asserting (i) that this had been a misnomer and (ii) that Fercometal had at all times been aware of this. Internaut wrote the same day to Mr Schofield appointing him on behalf of Internaut in relation to the dispute *"without prejudice to our application for leave to amend the points of claim and joinder application in the existing arbitration".* On being given notice of that new appointment, Messrs Penningtons awkwardly chose not to appoint Mr Harris as their arbitrator, but, on 26th December, appointed Mark Hamsher.

At this point David Steel J observed that "it is an equally depressing feature of this litigation that, despite

the very modest sums that are at stake, the parties already have expended as much again on the arguments as to the disponent owner's identity."

On the 26th January 2001 Internaut applied to the Tribunal for permission for leave to amend the points of claim to add Sphinx; the application was opposed and the paper war continued. On 9th April 2001, the Tribunal wrote as follows:

> "… we do not, in the circumstances, have power to make such an order, which would have the effect of including two different companies in the capacity of principal parties to the charterparty (and the arbitration agreement) when only one of them can have been such a party.
>
> In the absence of any agreement giving us power to decide the issue as to which of those parties was the owner (or disponent owner) under the Charterparty and therefore party to the arbitration agreement, we cannot but think that the parties' interest would be best served in seeking a decision from the Court as to this and sooner rather than later.
>
> … we do not consider the matter for decision to be properly the subject of [an award] (reasoned or otherwise) and none will therefore be issued."

Following the by now customary exchanges where no-one could agree anything, a hearing took place on 30th November following which Cresswell J made an order for the following issues to be determined (1) whether Internaut or Sphinx or both was party to the V/Ch of 27th December 1994; (2) which of Internaut and Sphinx was party to the original arbitration; (3) whether the Tribunal had had power to grant permission to amend the Points of Claim in the original arbitration to substitute Internaut for Sphinx.

Fercometal submitted that it was clear by reference to Box 3 that, despite the unqualified signature, Internaut had signed in a representative capacity; furthermore, by virtue of cl.1, Sphinx was the specified Owner, confirmed by cl.20 which described the beneficiaries of the freight payment once again as "Owners c/o Internaut Shipping GmbH". Internaut relied on three matters to establish that it was the contracting party: (i) It was well established that a party who signed a contract in his own name was deemed to have contracted personally unless it was clear that he had executed it as agent only; (ii) the factual matrix confirmed that Internaut had been the contracting party; and (iii) in the event of any ambiguity, extrinsic evidence was admissible which clearly demonstrated that Internaut was the disponent Owner.

The general principle regarding unqualified signatures is set out in Scrutton on Charterparties 20th Edition Article 19: "Where a person signs the charter in his own name without qualification, he is prima facie deemed to contract personally and, in order to prevent this liability from attaching, it must be clear from the other portions of the Charterparty that he did not intend to contract personally." Cases existed to show that, even in circumstances where, within the body of the Charterparty, the signatory is described as "agent for" or "on behalf of" a third party, he could remain personally liable: e.g. in *The Frost Express* [1996] 2 Lloyds Rep 373 where the relevant box for identifying the name and address of the owners had been completed with the words "SG as agents for owners or disponent owners". The charterparty had been signed by SG's managing director without qualification. SG were not in fact owners or disponent owners but pool managers. It was held that they had contracted personally.

Box 3, in referring to Sphinx as being "c/o" Internaut, fell a long way short of indicating "clearly" or "plainly" that Internaut was not personally liable, not even suggesting that Internaut was merely an agent for Sphinx. To the contrary, the inference was that Sphinx was purporting to conduct its business on Internaut's behalf.

Internaut contended that it had previously chartered vessels to Fercometal in which it was named in Box 3; furthermore, its assertion of ownership was consistent with: (1) telexes from Fersped/Fercometal being responded to directly by Internaut; (2) the main terms were agreed in respect of a vessel "Internaut TBN"; (3) the nomination of ELIKON was in the form "accept the vessel" i.e. not touching on the identity of the contracting parties.

If nonetheless the contents of Box 3 resulted in an ambiguity, extrinsic evidence was admissible to prove the true nature of the agreement: see *Chitty on Contracts* para. 12-113, 12-120. In particular extrinsic evidence was admissible to demonstrate that a person who expressly signed as an agent was in fact a principal: see *Harpers & Co. v. Vigers Bros.* (1909) 2 KB 549. The unchallenged evidence showed that: (1) Internaut had signed as principal not as agent; (2) it had had no instructions to sign on behalf of Sphinx and had not even been in contract with Sphinx; (3) in any event, Sphinx had already T/C-ed the entire vessel to Primary; (4) Internaut was not authorised to contract on behalf of Primary's behalf nor did it purport to do so; (5) Internaut had nominated its own bank account to receive the freight.

Given all this, David Steel J accepted Internaut's submission that it was the C/P to Fercometal on the V/Ch. The answers to Cresswell J's three questions were (1) Internaut was C/P to the V/Ch; (2) Internaut must be the C/P to the original arbitration since the only fair construction of the exchanges in April 1995 leading to the appointment of the Tribunal was that the Tribunal had been appointed to determine the disputes that had arisen between the parties to the V/Ch: see *Unisys v. Eastern Counties* [1991] 1 Lloyd's Rep. 538; (3) the Tribunal had the necessary power.

Comment

The question as to who was/is the counterparty also arose in *Hussmann v Al Ameen* (see above) where Hussman inexcusably never bothered to find out who or what its counterparty was in the circumstances of a long-term distributorship/agency agreement. My argument there is almost certainly unworkable in the

maritime context where a large number of contracts are entered into by ship managers/brokers and the like, a significant proportion of the fleet is owned by single-vessel companies incorporated in jurisdictions with generous regulatory and taxation environments; further, a high proportion of contracts are 1-off fixings. I do not believe it to be practicable or cost-effective in the maritime sector to verify the counterparty's bona fides in the way Hussman should have; however, where differences in style or nomenclature do arise it does seem to me that there is an inherent onus to enquire further having been put on notice.

As to the legal analysis – this sees to me to be splendid judicial common sense !

Section B
UK Domestic Adjudication/Contract/Other Cases

27. "Agreements to agree" are not enforceable in English law by reason of want of certainty. Further in *Walford v Miles ([1992] AC 128 at 138)* Lord Ackner had stated that: "… the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations". In an article in "Asian Dispute Review" (September 2002), I addressed the latter dictum in the context of the important Australian case, *Aiton v Transfield*, in which the aptly-named Einstein J surveyed common law jurisprudence around the world and concluded that that dictum was unsustainable. I concluded:

> *"Walford v Miles* is demonstrably inconsistent with other common law authority and part of the rationale thereof is contradicted by continental experience and statutory provisions. 'Negotiation in good faith' is not repugnant to the adversarial tradition and does not impair the rights of the parties to represent their own interests. The growth in England of mediation as an ADR process, including the consequent wider application of the concept of interest-based rather than rights-based negotiation, support the submission that *Walford v Miles* is no longer applicable in this context."

However, *Aiton* was not, ultimately, about "negotiating in good faith" although that principle underlies much of the argument, but was chiefly about the enforceability (or otherwise) of an agreement to mediate as the 2nd stage in a 4-tier dispute resolution process (I commend the case to you if you are interested in multi-tier DR clauses); having concluded that agreements to negotiate in good faith, and therefore an agreement to mediate in good faith, were not, in principle, unenforceable, Einstein J declined to enforce the mediation agreement for want of certainty in its formulation.

There the matter rested for three years until *Cable & Wireless v IBM* ([2002] EWHC 2059 Comm; 11th October 2002) when Colman J addressed substantially the same issue: inter alia IBM sought a stay of C&W's claim pending reference to ADR. he posed the key issue at the outset: "[IBM's application] raises an issue of great importance, in particular as to the effect, if any, which should be given by the Courts to agreements to refer disputes to ADR."

C&W and IBM were party to a Global Framework Agreement (GFA) covering supplies by IBM companies around the world to their C&W counterparts under Local Service Agreements (LSAs) including one between the respective UK subsidiaries; the GFA included provisions designed to maximise and monitor the quality and price competitiveness of IBM's services through a 3rd party-verified benchmarking process. Complex further provisions applied if IBM failed to meet the benchmark, leading, inter alia, to possible compensatory payments by IBM to C&W. A 3rd Party Benchmark Report, rejected by IBM. concluded that IBM had not met the requisite benchmarks and C&W claimed £31.5 - £45.0m in compensation from inception; IBM argued, inter alia, that compensation (if any) was due only from the date of the Benchmark Report.

Clause 41 of the GFA stated (refer above re *Walford/Aiton*; in fact Clause 41 is conceptually identical to the equivalent clause in Aiton's contract)

"41.1 The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to [the GFA] or any [LSA] promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.

41.2 If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by [CEDR]. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings"

[*Does "ADR" include arbitration here ? Clearly not since (i) a binding decision by a 3rd party arbitrator acting in a judicial capacity is inconsistent with the principle underlying Cl.41; (ii) CEDR is an inappropriate body for appointment of arbitrators; (iii) the last sentence cannot apply to arbitration since ss.9-11 are mandatory. Further, does "ADR" include any other non-mediation process ? It would appear that it could but (i) there is no mention anywhere of the parties contemplating anything other than mediation, (ii) Colman J never refers to anything else; (iii) CEDR might not necessarily be the appropriate appointing body i.r.o. non-mediation ADR.*]

Clause 40 provides for an escalation of negotiations within the respective corporate hierarchies and includes the language "Neither [party] may initiate any legal action until the [Cl.40] process has been completed, unless such [party] has reasonable cause to do so to avoid damage to its business or to protect or preserve any right of action it may have."

It was common ground that Cl.40 had not resolved the dispute. IBM submitted that the Court should give effect to cl.41.2 by ordering a stay for ADR; C&W had declined to refer the dispute to ADR.

IBM's principal submission was by way of analogy to s.9, since the stay therein was originally introduced by the Common Law Procedure Act 1854. The purpose of that legislation had been to supply a means of

enforcement of a contractual obligation where none had previously existed: see the explanation given by Lord Moulton in *Bristol Corporation v. John Aird & Co* [1913] AC 241 at page 256.

C&W's principal submission was, unsurprisingly, that cl.41.2 was unenforceable for want of certainty; it cited authority to the effect that an agreement to negotiate is not enforceable in English law. It also submitted that, since the last sentence of clause 41.2 expressly contemplated the issue of proceedings where an ADR procedure was being followed, it could not have been the mutual intention that the reference to ADR should have binding effect since the facility to commence proceedings was inconsistent with the enforceability of the duty to submit the dispute to ADR. Third, since IBM had commenced separate proceedings challenging the Benchmarking Report it had therefore failed to comply with the agreed reference to ADR, so that it would be inequitable for the Court to enforce such reference upon IBM's application. Finally, even if clause 41.2 was enforceable, IBM was guilty of delay in making its application and the Court's discretion should therefore he exercised against the relief claimed since it was analogous to specific performance.

Colman J held that:

(i) the DR structure left no doubt that litigation was to be a last resort in the event that (a) Cl.40 negotiations and (b) ADR were unproductive;

(ii) the last sentence of clause 41.2 did not qualify this conclusion although it did introduce an unqualified opportunity to commence litigation. That did not detract from the weight which the parties attached to the agreement to refer their dispute to ADR;

(iii) the mere issue of proceedings was not inconsistent with the simultaneous conduct of an ADR procedure, such as mediation, or with a mutual intention to have the issue finally decided by the courts only if the ADR procedure fails;

(iv) there was, therefore, no basis for the submission that the parties had not mutually intended that clause 41.2 should be a binding agreement to refer disputes to ADR.

However, the question still arose as to whether that reference was, in substance, nothing more than an agreement to negotiate and, as such, incapable of enforcement in English Law (per CoA in *Courtney & Fairbairn Ltd v. Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297) where Lord Denning had said.

> "If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, it is not a contract known to the law."

Colman J noted that at the time when the GFA had been entered into, CEDR had recently published the 6th Edition of its "Model Mediation Procedure and Agreement" with detailed provisions including termination in turn including a walkaway right. Cl.41.2 therefore required not merely an attempt in good faith to achieve resolution of a dispute but also the participation of the parties in a CEDR procedure, participation in such being of sufficient certainty for a Court readily to ascertain compliance.

He continued that this might "seem a somewhat slender basis for distinguishing this type of reference from a mere promise to negotiate. However, the English courts should nowadays not be astute to accentuate uncertainty (and therefore unenforceability) in the field of dispute resolution references. There is now available a clearly recognised and well-developed process of dispute resolution involving sophisticated mediation techniques provided by trained mediators in accordance with procedures designed to achieve settlement by the means most suitable for the dispute in question. That this is a firmly established, significant and growing facet of English procedure is exemplified by the judgement of Brooke LJ. in *Dunnett v. Railtrack Plc* [2002] 1 WLR 2434 at page 2436-7" Further CPR 1.4(1) provided that "The court must further the overriding objective by actively managing cases. Active case management includes ... (e) encouraging the parties to use an ADR procedure if … appropriate and facilitating the use of such procedure." To decline to enforce contractual references to ADR on the grounds of uncertainty would be contrary to public policy as expressed in the CPR and in *Dunnett*.

Importantly (and here we diverge from Einstein J in *Aiton*) Colman J added that ***contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty***. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms or whether the duty to mediate was expressed in qualified terms. The wording of each reference would have to be examined with these considerations in mind. In principle, however, where there was an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find.

What should the Court do ? The reference to ADR was analogous (as IBM had submitted) to an agreement to arbitrate. As such, it represented a freestanding agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings. The jurisdiction to stay, although introduced by statute for arbitration agreements, was in origin an equitable remedy and is, further, a procedural tool provided for by CPR 26.4 to encourage and enable the parties to use ADR. While the Commercial Court had rarely stayed proceedings for ADR, more normally adjourning or spacing out the case management timetable, the availability of the remedy whether of a stay

or other order must be a matter for the discretion of the court.

What factors should the Court consider in exercising discretion ?

(i) Analogous to s.9, strong cause [Note: s.9 goes a good deal further than 'strong cause' !] would have to be shown before declining a stay, e.g. if on the facts ADR would be a completely hopeless exercise (NB *Hurst v Leeming*).

(ii) Because this dispute raised an issue of construction of a long term contract, did it need to be resolved by the courts ? This must carry very much less weight in the face of an agreement to refer to ADR because parties contracting into ADR must be taken to have appreciated that mediation outcomes did not reflect the parties' precise legal rights and obligations, but rather offer mutually commercially acceptable solutions.

(iii) In this case there was another very relevant consideration: IBM had disputed the fundamental validity of the Benchmarking Report; if it was correct in this, the construction dispute would not arise and the present proceedings would be rendered futile and, likely, of no assistance now or later

(iv) Should IBM's delay in applying for a stay deprive it of the remedy of enforcement of the ADR agreement ? There may be cases where enforcing ADR after such delay would be unfair to the other party but not here: there would be no material prejudice to C&W if the ADR process went ahead.

Colman J concluded that the hearing of C&W's claim for declaratory relief on the construction issue should be adjourned until after *all* disputes had been referred to ADR; in the event that this proved unsuccessful the parties could re-instate this claim, provided that the issue of the validity of the Benchmarking Report is by that time the subject of further proceedings which this court can consider in the course of its overall responsibility to manage the existing proceedings. Hopefully this will prove unnecessary in view of a successful mediation

Comment

Post-Aiton, my first response to seeing this was "I told me so"; this must be the correct way forward, whether 'post-CPR' or otherwise. While I can envisage the post-Walford Acknerites spluttering over their G&Ts (similar to some of the post-Dunnett reaction), the dispute resolution world has changed and continues to change and, I submit, it is for imaginative High Court judges to push the envelope with the dual safety net of CoA and HoL behind/over/under them.

Further, my second reaction on hearing of the case before seeing the judgement was "how did he do it ?" since there were some powerful authorities to be overcome (although *Walford* was not cited). Although Colman J's (and IBM's) analogy with s.9 is, ultimately, unsustainable (there is a wide gulf between "null and void, inoperative or incapable of being performed" and "futile" or "hopeless"), the analogy is good in the sense that the Court should stand back and let non-litigious processes run their course. I see a stronger analogy between the broad reasoning here ("You chose ADR ? Go ADR") and that in the jurisdictional case in *Lobb v Aintree* (above) ("You chose arbitration ? Go arbitrate"); if you skipped over *Lobb*, you will not be surprised to hear that the judge there was ……. Colman J.

As stated above, this decision extends the principle in *Aiton* i.r.o. what degree of certainty is necessary before a stay for ADR will be granted, recalling that the mediation agreement in the latter was held unenforceable; whether we categorise this quantum leap forward as reflecting CPR or as reflecting the change in judicial attitudes between 1999 (Australia) and 2002 (England) matters not – the leap has been made.

Finally, and meaning no criticism of Colman J's landmark contribution to English jurisprudence, there seems to me to be an interesting contrast between the respective judgements in *Aiton* and *C&W/IBM*: the former is widely researched, citing authorities from around the world and giving the impression of seeking to cover every conceivable academic ground of attack; the latter is much simpler, less academic, common sense-based and as much a statement of policy as a legal judgement; in my view, there is a very strong and purposive trend in the English courts, at its most visible in *Cowl* and *Dunnett* but increasingly evident everywhere in the system, whereby the policy considerations underlying 'Access to Justice' are real and getting ever more so.

28. An important point affecting building (and other) contracts was raised in *Northern & Shell PLC v John Laing Construction Limited* (TCC case HT02-08; HHJ Anthony Thornton QC; 4th October 2002). A Warranty Deed in respect of a new office building had been entered into in January 1990 but had been expressed to be effective from a date in August 1989: was such retrospectivity valid ? If yes, N+S' substantial claims under the Deed were statute-barred.

JLC had applied for summary judgement regarding when the start date arose for the limitation period applicable to a claim for breach of warranty by N&S, assignee of the benefit of the Deed provided by JLC which had covenanted and undertaken that, as the building contractor, it had duly complied with its contractual obligations under the underlying building contract with the developer company.

Under a main contract dated 10th February 1988, JLC had contracted to construct an office block in London Docklands; the work was carried out in stages and Practical Completion (PC) of the 3rd and final stage was

achieved on 15th June 1989. N&S alleged that cladding (supplied by a sub-contractor) for the blocks was neither weatherproof, nor airtight nor thermally secure because of defective construction; these defects were alleged to have arisen as a result of breaches by JLC of several terms of the building contract and therefore to have given rise to breaches of the Deed.

The Deed appeared to have been provided on 16th January 1990 by JLC to a company (the Lessee) which appeared to have acquired a long (>15 years) leasehold interest in the blocks from the Developer. JLC had agreed, as a term of the underlying building contract, to enter into a Deed under seal in a form reasonably required by such Lessee and therefore did so a few months after the Lessee's purchase. In the DEED, references to the Lessee were deemed to include its successors in title and assigns. The benefit of the Deed was assigned three times, the last to N&S by Deed of Assignment dated 14th January, 2002. JLC had not had any opportunity to accept or challenge the validity of these assignments and Judge Thornton therefore proceeded on the assumption that N&S had the same entitlement to sue on the Deed as its predecessors in title including the Lessee; if this action was to proceed further, JLC was entitled to challenge this assumption.

Clause 5 of the Deed provided that it should come into effect on the day following the date of issue of the Certificate of Practical Completion (CPC) under the Building Contract (JCT Private With Quantities form which, inter alia, obliged the JLC to enter into warranties under seal in respect of any successor in title of the original purchaser which took on a lease of 15 years or more i.e. including N&S; this entitlement arose consequent on s.56 of the Law of Property Act 1925; refer Chitty on Contracts 28th Edition paragraphs 19-106/107) which was on 25th August 1989. The Claim Form had been issued on 14th January, 2002 so that if time had started running on 26th August 1989 the claim was statute-barred having been commenced more than 12 years after the cause of action had accrued; however, if the critical date was the date of the Deed itself then the present action had been started one day within time.

The key was clause 5 of the Deed which stated "this Deed shall come into effect on the day following the date of issue of the [CPC]". JLC had argued that the effect of this language had been to have brought the Deed into effect on a date earlier than that upon which it had been entered into and therefore that the Deed had had a retrospective effect; it relied on the recent but already lengthy line of authority on the matter (see below). In contrast, N&S argued that the earliest date upon which any cause of action could accrue based on a promise or warranty was when that warranty was made i.e. when the relevant contract or Deed had been entered into so that clause 5 could not have made such a date earlier than that of the Deed - the clause was doing no more than identifying the dates by reference to which the promise of due performance was to be taken to have been given.

Judge Thornton started by analysing the nature of the obligations JLC had undertaken when entering into the DEED: it had provided a promise about its contractual performance whereby it undertook that it had complied with, and would in the future comply with, the terms of the building contract, that it had exercised and would continue to exercise reasonable skill and care etc. In consequence, the promises undertaken related in part to past performance and in part to future performance, the watershed between which was defined as being the day immediately following the date of CPC.

The Deed had been drafted as if that watershed date had not yet occurred, i.e. the parties had intended the Deed to be executed in advance of the date of CPC but, since the Deed could not have been signed before the Lessee had purchased its leasehold interest, the Deed would therefore have had to have been entered into between 23rd May and 25th August 1989, the obvious intention of the parties to the building contract having been that the Deed would be entered into at the time or soon after the Lessee's purchase i.e. the parties must have envisaged that the Deed would be entered into before CPC but soon after the entry into 15-year lease with JLC's promises to take effect immediately soon after the Deed was signed and immediately following the date of CPC. As stated above, these promises related in part to past and in part to future performance.

For whatever reason, the parties had not in fact entered into the Deed for several months and its critical date had passed but the language of Clause 5 was not amended. The watershed date had obviously been chosen with considerable care since the date of CPC had also been the date upon which JLC's obligations to carry out and complete the works had become replaced by certain other obligations to remedy defects occurring during the coming defects liability period; the developer had also repossessed the building on that day. It was normal, in a building contract of this kind, for the date of CPC to be the key, watershed date. In essence, as set forth in the Deed, JLC was promising the 3rd party Lessee that, at the date of CPC, construction works had been duly performed in accordance with the terms of the contract and that it would in the future satisfactorily perform all its forthcoming defects liability obligations.

Counsel for JLC (recently elevated to QC) had cited five authorities to support her submission that the parties to a contract or Deed could indeed agree both that it would have retrospective effect and that any cause of action thereby created would accrue when the parties agreed that the Deed would take effect and not on any later date when the Deed was in fact entered into:

(1) in *Trollope & Colls v Atomic Power Contractors* [1963] 1 WLR 333., Megaw J had stated that "so far as he was aware, there was no principle of English law which provided that a contract cannot in any circumstances have retrospective effect... often the contract expressly so provides. I can see no reason why, if the parties so intend and agreed, such a stipulation should be denied legal effect."

(2) In *Vincent & Or v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 CA. the Court of Appeal held that the Deed had been delivered in escrow and hence the necessary condition precedent to its taking effect had occurred when, at trial, the judge had found that date for possession of the property had been 1st May 1967; this case could be distinguished from *Trollope & Colls* since the parties had had no prior legal relationship (i.e. the same circumstance as between Claimant and Defendant in the present case);

(3) in *Bradshaw v Fawley* [1980] 1 WLR 10. the Vice-Chancellor had held that the parties were able, in a Deed, to backdate contractual obligations to a date predating the date thereof;

(4) in *City of Westminster v Clifford Culpin and Partner* [1987] 12 Con LR 117 CA. Megaw LJ had stated that "I see no reason... why … [the contract] should be deemed not to have applied so as to have given rise to the cause of action for that breach of contract on that date";

(5) in *Tameside Metropolitan Borough Council v Barlow Securities Group Services Limited* [2001] 75 Con LR 113 CA the Court of Appeal had held that "… any breaches of contract should be regarded as occurring as at the date of breach rather than time starting to run only on execution of the Deed".

Counsel for N&S submitted that all these cases had been ones where the parties had had a pre-existing relationship which had been superseded by the contract or Deed in question albeit that the relationship had, in two cases, been a commercial and not a contractual one (*Trollope*, *Vincent*). He submitted that parties could not agree that a cause of action created by a contract could have retrospective effect where the parties had had no pre-existing relationship of any kind since the necessary facts to support it could only first have occurred at the time when the contract was entered into. Judge Thornton dismissed these submissions, stating that there was no basis upon which to limit the operation of the retrospectivity principle to situations where the parties had had a preceding contractual or commercial relationship; he noted that in none of the five cases had any part of the judgement relied on the pre-existing relationship as an essential feature of the decision, rather that each of the five authorities had stressed the imposition of retrospectivity arising as a direct result of the express or implied wishes of the parties. In any event, in the present circumstances the parties had in fact had a pre-existing relationship of a contractual nature and hence Counsel's attempts to limit application of retrospectivity would not have been sustainable.

Judge Thornton drew the following conclusions from the five authorities cited:

(1) a contract or Deed could take retrospective effect whether as the result of the operation of escrow or because of language in the Deed;

(2) retrospective effect occurred when intended by the parties, whether by the express language of the contract or by way of implication from the surrounding circumstances and the requirement for business efficacy;

(3) to give the contract or Deed retrospective effect, any breach of contract created thereby which had occurred prior to the date of entry should ordinarily be regarded as having first become actionable and to have given rise to a cause of action from the original date upon which breach had occurred, subject to any contrary provision in the contract or Deed:

(4) the parties could agree that any obligation should crystallise or cause of the action accrue from an earlier date than that of the contract or Deed;

(5) the parties' intention that a contract or Deed was to have retrospective effect was more readily to be seen where the parties had had a prior contractual relationship preceding the contract or deed in question but it was still possible for such retrospective effect where there had been no such prior contractual relationship or such was provided for by the clear language of the contract or deed;

(6) the retrospectivity principle was excluded where, exceptionally, the law or any relevant statutory provision precluded a contract or deed from having retrospective effect.

Having analysed the authorities, Judge Thornton returned to Clause 5 of the present Deed which, he stated, was unambiguous: it was to come into effect on the day following the date of issue of the CPC. Dismissing a submission by N&S relying on an 1883 Court of Appeal decision, Judge Thornton stated that the parties to the Deed had clearly intended that the warranties it provided were to take effect in their entirety at the same time as the relevant underlying event occurred and any consequent breach of the building contract took effect in the underlying building contract since the parties envisaged that the Deed would be entered into before PC. While, in principle, the parties to the Deed could indeed have created an obligation thereunder which crystallised later and ran for longer than the underlying obligation it supported, they had neither intended nor created such dissonance in the present case but, rather, had intended to create, and had succeeded in creating obligations and causes of action under the building contract and collateral obligations and causes of action under the Deed which crystallised simultaneously and took effect for the same period of time.

This intention was demonstrated by the language both of the building contract and the DEED; in particular, Clause 5 included the language "shall come into effect". Although the parties had failed to enter into the Deed at the intended time, JLC would have had no option but to enter into it whenever the Lessee called upon it to do so. There was, therefore, from the earlier date, a relationship between JLC and Lessee equivalent to a contractual one in existence by virtue of the terms of the building contract and the enforceable 3rd party rights it conferred on the Lessee.

In conclusion, all N&S's claims were held statute-barred since the relevant causes of action had accrued before the date of the Deed i.e. on the day following the date of CPC. JLC was entitled to summary judgement and the action was dismissed

Comment

This case has two personal aspects: first, in 1996 I had (to no avail) argued this exact point with a foreign Ministry of Law - although we had found a way around the issue, it was reassuring to have my arguments confirmed so authoritatively. Second, I was in attendance (as a guest of HHJ Thornton QC) at the TCC for the handing down hearing arising out of this case. Personal interest aside, it seemed to me as an oil and gas lawyer that the outcome was obvious since, mainly for PRT reasons, sales of UKCS oil and gas interests were almost invariably made effective 1st January or 1st July irrespective of the date of execution; I had not been aware of how complex the issue had in fact been or that it had had such a long history. Finally, much of the handing-down hearing was in fact a leave to appeal hearing and Counsel for JLC, interestingly, relied on the fact that, of the five authorities, three were Court of Appeal and the two High Court ones were by judges who went on to much greater things.

29. *Co-Operative Insurance Society Ltd v (1) Henry Boot Scotland Ltd (2) Henry Boot plc and (3) Crouch Hogg Waterman Ltd* ([2002] EWHC 1270 TCC; HHJ Seymour QC; 1st July 2002) features a lengthy judgement addressing a number of interesting issues regarding contract construction. CIS, the freehold owner of a building in Glasgow, contracted Boot to demolish (retaining the façade), design and reconstruct it (the "Works"). CHW was Consulting Engineer for the Works.

On 13th-14th March 1996, during the execution of the Works, water and soil flooded into the excavations. By agreement certain preliminary issues were tried relating to the contractual position CIS/Boot including the key question of whether a site investigation report (dated April 1994) prepared by Terra Tek Ltd. (*"the Report"*) had been incorporated into the Contract, and, if so, what were the consequences of such incorporation. Although the preliminary issues arose directly only between CIS and Boot, submissions were made by Counsel for CHW, broadly in support of CIS' position, unsurprising since CIS had claims against both Boot and CHW in respect of the flooding, and each of Boot/CHW has adopted the position that contractually the other was at least primarily responsible to CIS for the consequences.

The Contract document provided that it incorporated the JCT SBC (1980 P+Q), incorporating Amendments 1 to14 (as corrected and excluding #3) and TC/94, amended by the CDP Supplement (1981; rev. 1994) (all taken together the "JCT Form") and as further amended and supplemented by the provisions of the Schedule, and provided that, for the avoidance of doubt, the provisions of the Schedule should prevail in the event of conflict with the provisions of any of the other documents hereinbefore mentioned. HHJ Seymour recites from the Contract at some length.

The Report included the following:-

(i) "This report is based on information established by observation, boring, sampling and testing. … natural strata vary from point to point … groundwater conditions are dependent on seasonal and other factors … infill materials are subject to an even greater degree of diversity. Whilst an attempt is made in comprehensive reporting to assess the likelihood or extent of such variations at the site, it should be recognised that there may be conditions pertaining which are not disclosed by the investigation…"

(ii) "Groundwater was encountered in the … [certain boreholes]. A borehole however represents a very insensitive standpipe … close vicinity of the River Clyde … redrilling was required during boring, the groundwater conditions encountered therein may not be truly representative of the groundwater regime of the area."

The Standard Method of Measurement of Building Works, 7th Edition, published by the RICS/BEC ("SMM7") includes various "General Rules" and, inter alia, Section D20 of the Classification Tables covers measurement of works of "Excavating and Filling".

The preliminary issues to be tried were divided into five sections, the first "General" and the other four sections were: (A) Ground conditions/Groundwater; (B) Design; (C) Construction (D) SMM7 issues.

Issue A1: What were Boot's contractual obligations (if any) in respect of: (a) design of the basement walls; (b) construction of the basement walls; (c) prevailing ground conditions (including the groundwater level) and (if different) the ground conditions (including the groundwater level) discernible from the Report) ?

It had been agreed that expert evidence could be adduced but only Boot sought to rely upon any i.r.o. the preliminary issues; however, Boot's evidence (on the Report) was of little assistance since its main thrust was to seek to disregard certain qualifications in the Report thereby to draw inferences about ground water levels. HHJ Seymour held that none of this evidence was relevant to what the Report actually said.

Further, the written submissions by Boot and CIS had made assertions as to the underlying facts, and it was clear that these were hotly contested. It was inappropriate in this trial of preliminary issues to resolve such factual disputes, such to be deferred to the main trial of this action fixed to take place in November 2002. However, it was necessary to consider in turn each of the issues set out in sections A, B, C and D of

the preliminary issues which have been agreed and to indicate both the principal submissions of the parties in relation thereto and conclusions where such could be usefully reached; however, some issues could not be addressed in a factual vacuum.

Boot argued that it was, as a matter of contract, entitled to rely upon the information about the prevailing ground conditions contained in the Report and that the difference between that information (essentially stable ground and groundwater level at approximately 3.2m AOD) and the actual conditions encountered (unstable ground and groundwater level at approximately 6m AOD) was fundamental. The contiguous bored pile wall (CBPW) design by CHW, together with Boot's proposed dewatering would have provided an effective and adequate support and a watertight barrier if groundwater levels had been as described in the Report; further, if the ground conditions had been as described, the soil between the CBPWs would have "arched" and this, together with the planned dewatering, would have prevented any soil and/or groundwater loss. It was of the essence of the CBPWs that this arching would have occurred and therefore the use of this design by CHW presupposed dry and stable ground.

Boot submitted that the Report had been incorporated into the Contract because it was referred to in Note 5 on Drawing A301A which had been identified in the Preliminaries of the Bills of Quantities and accompanied them stating "For prevailing ground conditions refer to Site Investigation Report….". Accordingly on a proper and true construction of the Main Contract there was an express term of the Main Contract that the prevailing ground conditions would be as shown in the Report; alternatively, if it was not an express term it was certainly an implied term of the Main Contract. In addition (a) Drawing A303 expressly stated that the piling design and specification were based on it; (b) Drawing S1 was incorporated by the Third and Sixth Schedules and drawing S1 necessarily incorporated the Report since otherwise drawing S1 was meaningless; (c) Item 171 of the BoQs incorporated it; and (d) Item 130 of the BoQs expressly stated that they had been prepared from the Tender Drawings (which included Drawings A301A and A303).

Both CIS and CHW submitted to the contrary because (i) the Report was not specifically mentioned in the list of "Contract Documents" set out in the Contract or stamped or signed as a "Contract Document"; (i) the references on Drawings A301A and A303 were insufficient to incorporate it, being for information purposes only; (iii) Boot's argument was that, because the BoQs had been prepared from the tender drawings, including Drawings A301A and A303, and because those drawings refer to the Report, the Report was thereby incorporated into the Main Contract; such an argument was fanciful: the Contract Documents were clearly defined, and that definition excluded the Report; (d) under cl.2.2.2.4.1 Boot was deemed to have satisfied itself as to "the form and nature of the site including the ground and subsoil".

Boot responded that, even if the Report was not a Contract Document, the clear statement on Drawing A301A incorporated into the contract the statement of prevailing ground conditions contained in it which became a contractual given or benchmark as between CIS and Boot or a conventional basis upon which both parties to the contract were entitled to proceed. In addition, the "contractual given or benchmark" was to be derived from the Report without regard to any qualifications therein, since such qualifications, if given effect, meant that no worthwhile information was being conveyed (see comment at end).

HHJ Seymour QC held that it was plain that the Report had not been incorporated into the Contract, neither being listed as, nor stamped or signed, as a *"Contract Document"*. Further, he considered that the nature of such a report was such that it was unlikely that parties would wish to incorporate it into a contract since all it could show was the result of particular soil investigations. If parties did incorporate such a report into a contract, difficulties could arise as to what was the effect in law of so doing since it was impossible to say that any definite or positive statement of a nature such as could amount to any sort of contractual term had been made, rather, that the information given was hedged about with qualifications as to the accuracy and reliability of what was shown by the investigations undertaken. He accepted that the references to the Report on Drawings A301A and A303 were to identify for Boot a source of potentially relevant information about ground conditions. Further, the Judge rejected Boot's submission that there was an implied term to the effect that the Report was to be incorporated: if it was not expressly incorporated, there was no justification for incorporating it by implication since no statement sufficiently definite to be relied upon was contained in the Report.

Issue A2: Did the Report amount to a warranty or representation from CIS that the prevailing (actual) ground conditions/groundwater level would be those that were discernible from that Report?

No: since the Report had not been incorporated into the Contract, nothing in it could be a term thereof although, at least in principle, something in it could amount to a representation or, alternatively, it could form part of a contract collateral to the Contract under which Boot might derive rights separate from those created under the Contract. However, when the terms of the Report were considered in relation to groundwater, it not only did not say what Boot submitted it said, but also did not contain any statement sufficiently definite and unqualified to have amounted to a representation upon which Boot could reasonably have relied.

Issue A3: What were Boot's contractual rights and obligations in respect of the prevailing (actual) ground conditions/groundwater level on site ? Were those rights and obligations subject to the ground conditions/groundwater levels that were discernible from the 1994 Report ?

Boot submitted that its rights were that they were entitled to take the benchmark stated in the Report as given, alternatively it was entitled to recover pursuant to Cl.2.2.2. However, the first part of the submission assumed success in relation to issue A1 and/or issue A2 and was no more than the logical consequence of such assumption.

CHW submitted that the issue was impossible to understand because Boot did not have any contractual rights or obligations in respect of the prevailing ground conditions/groundwater table on site but did have contractual obligations (i) to satisfy itself as to the form and nature of the site including the ground and subsoil, (ii) to control groundwater, (iii) to obtain a watertight structure during all stages of construction and (iv) to provide earthwork support to sub-basement excavations, such being part of the CDP.

Inter alia, CIS submitted that Boot was obliged to warn of defects, whether or not they were responsible for the particular element of design in question, provided that such defects "would be apparent to an experienced and competent contractor". Further, there was nothing in the express words of the Contract to justify all of Boot's design and construction obligations having to be filtered through the Report or that those rights and obligations should be measurable by reference to the Report rather than the actual conditions on site.

HHJ Seymour QC held that, as issue A3 had been formulated, the answer was "none", as CHW had submitted, the concept of having contractual rights and obligations in respect of ground conditions or groundwater levels being meaningless - they are what they are. What mattered was what were the contractual rights and liabilities as a result of the flooding on 13th-14th March 1996. It seemed that, whatever the groundwater levels actually were, Boot sought some contractual right to assume that they were something different, or no contractual liability in the event that they proved to be something different from that which it had assumed.

Issue A4: if there was a difference between the prevailing ground conditions or groundwater level and the ground conditions/groundwater level (if any) discernible from the 1994 Report, did the Contract exclude Boot's liability for the consequences of that difference ?

It was (substantially) common ground that the answer was "no".

Issue B1: what were Boot's contractual rights and obligations in relation to the design of the piled walls ?

Boot submitted that its only contractual obligation in relation to the design of the piled walls forming part of the Works was to prepare working drawings in respect of the concept devised by CHW.

CIS submitted that (i) the "Contractor's Designed Portion" (CDP) included earthwork support to sub-basement excavations, bored bearing piles to foundations and CBPWs and temporary propping thereto, (ii) Boot was responsible for the design of those elements under the Contract and (iii) Boot was obliged to provide working drawings for those elements; (iv) where some aspects of the design had already been carried out and were included within the Contract Drawings, Boot had been obliged to complete that design by producing all necessary working drawings, and doing calculations and obtaining evidence that the design would work in practice. Cl,2.7 fixed the standard of the design work to be done and in addition (i) Cl.2.11 obliged Boot to integrate the design of the CBPWs with other elements of the Works and (ii) Cl.2.12 obliged Boot to co-ordinate elements of the design of the Works. The most important element of the sub-basement for present purposes was the earthwork support to the sides of the excavation, i.r.o. which Boot was obliged to design and construct a system to prevent soil and water from falling into the excavation because the sides of the excavation had collapsed; how it did so was a matter for it.

CHW concurred with CIS albeit on a different analysis.

HHJ Seymour held that, under Cl.2.1.2, Boot had been obliged to complete the design of the CBPWs, that is to say, to have developed CHW's conceptual design into a completed design capable of being constructed. That process of completing the design must have involved examining the design at the point at which responsibility is taken over, assessing the assumptions upon which it is based and forming an opinion whether those assumptions are appropriate. *Ultimately someone who undertook, on terms such as those of the Contract (that is to say, including Clause 2.7) an obligation to complete a design begun by someone else agrees that the result, however much of the design work was done before the process of completion commenced, will have been prepared with reasonable skill and care*. The concept of *"completion"* of a design necessarily involves a need to understand the principles underlying the work done thus far and to form a view as to its sufficiency.

Issue B2: did Boot have any responsibility or obligations in respect of any element of the design of the piled walls previously prepared by others ?

All parties appear to accept, as it seemed to HHJ Seymour QC correctly, that the answer to this issue had been determined by the answer to the previous issue.

Issue B3: was the obligation to warn pursuant to Clause 8.1.4 relevant to Boot's design responsibilities ?

HHJ Seymour QC accepted CIS' submission that on a proper construction of Clause 8.1.4 of the Appendix to the Contract the obligation to warn therein set out applied both in the case in which the relevant design work had not been undertaken by Boot and in the case in which it had.

Issue C1: what were Boot's responsibilities in respect of the carrying out and completion of the construction of the CBPWs ?

CHW submitted that Boot had been responsible for constructing and completing the CBPW works such that they would provide safe and effective support to the excavation when this was undertaken; this responsibility included for temporary propping and any other "special measures" to ensure that the retained material was contained behind the contiguous pile wall. Further, Boot had had a responsibility to take into account the effects of groundwater which was anticipated by it to be above the level of the excavation, and proceed with the excavation in a manner that would ensure the safety and integrity of the works during construction.

HHJ Seymour QC accepted these submissions (and equivalent ones by CIS) but observed that they did not, of course, deal with the important question of entitlement to payment in respect of performance of the obligations identified.

Issue D: was Boot entitled to be paid pursuant to Clause 13.2 of the Contract for work consequent upon a change in the prevailing ground conditions from those provided for, or which should have been provided for but were not provided for, in the Bills of Quantities ?

Having summarised the extensive submissions by Counsel, HHJ Seymour QC stated that the critical question in relation to Boot's submission that the *"Contract Bills"* did not state a pre-contract groundwater level was whether that was the case or not. There seemed to be no difference between CIS and Boot as to the consequences of there not being a statement of a pre-contract groundwater level, if that was indeed the case. The effect of SMM7 Section D20 P1(a) was that an actual level had to be stated, together with the date when it had been established and, therefore, that the requirements of that provision were not complied with. If CHW's submission that they did not have to be was correct, then Cl.2.2.2.1 would be qualified to the effect that those provisions did not apply in respect of any matter in respect of which Boot was deemed to have satisfied itself pursuant to Cl.2.2.2.4. There was no justification for any such qualification.

The Judge rejected several of CHW/CIS' submissions, in particular that if any item of earthwork support was not specifically described in the *"Contract Bills"* it should be treated as covered by one of the general items. It was plain from the terms of General Rule 2.9 of SMM7 that it was only where an applicable measurement rule was identified in SMM7 in respect of an item that that item, where it appeared in a BoQ, fell to be priced.

HHJ Seymour QC concluded by answering Issue D as "yes"; however, it remained to consider whether the *"Contract Bills"* in fact omitted the items in relation to earthwork support upon which Boot sought to rely.

Issue D1: was Section 3 of the Contract Bills (entitled Sub-Structure – D Groundworks) measured as "Provisional" ?

All parties agreed "yes"; in addition, Boot made the point, already considered by the Judge, that quantities described as *"provisional"* were not to be treated as equivalent to *"Approximate Quantities"*.

Issue D2: if so, was this section of the work subject to re-measurement ?

It followed that the answer was "yes" in relation to any item of work specifically identified in the BoQ; any omission therefrom fell to be dealt with under Cl.2.2.2.2 and Cl.13.2.

Issue D3: did Cl.2.2.2.1 provide that the Contract Bills had been prepared in accordance with SMM7 ?

All parties agreed "yes", although CHW correctly submitted that Cl.2.2.2.1 did contemplate departures from SMM7 if it was specifically stated in the *"Contract Bills"* that there was a departure.

Issue D4: did Cl.2.2.2.2 provide that, if there was any departure from the method of preparation referred to in Clause 2.2.2.1, namely SMM7, or any error in description of quantity or omission of items, then such departure or error or omission should be corrected, and any such correction should be treated as if it were a variation required by the instruction of the Architect under Clause 13.2 ?

All parties agreed "yes", although CIS identified three qualifications relating to other issues included within these preliminary issues.

Issue D5: (i) was Drawing A301A identified in the Preliminaries of the BoQs and (ii) did it accompany them ?

All parties agreed "yes" to (i); the Judge was not sure that the answer to (ii) mattered, but since only Boot addressed it, submitting that the answer was also "yes", he was prepared to assume that correct.

Issue D6: did the Drawing show "for the prevailing ground conditions refer to the Report" ? And did it accordingly show the pre-contract ground water of the order of 3.5 to 4m AOD ?

All parties agreed "yes" to the first question; although Boot submitted "yes" to the second, CIS' submission "no" was correct for reasons given above.

Issue D7(a): assuming that the Bills established the pre-contract groundwater level as set out and that the actual was about 6m AOD should the BoQs be corrected in accordance with Cl.2.2.2.2 so as to correct the error in the description of the groundwater conditions ? Should this correction be treated as a variation under Clause 13.2?

Issue D7(b): alternatively if the BoQs failed to establish a pre-contract groundwater level should they be corrected in accordance with Cl.2.2.2.2 so as to correct the error in the description of the groundwater conditions ? Should this correction be treated as a variation under Clause 13.2 ?

The parties disagreed on everything with CHW submitting that all of D7 missed the point, but they could only be answered in the negative. However, on the assumption, which the Judge had found above to be false, that the *"Contract Bills"* did comply with the requirements of SMM7 Section D20 P1(a) in respect of stating a pre-contract groundwater level, the consequence of the level stated being incorrect was that the excavation was required to be re-measured in accordance with measurement rule M5, not that a correction fell to be made under Cl.2.2.2.2 which would be treated as a variation under Clause 13.2. The answer to each of the questions raised by issue D7(a) was therefore negative.

Given the findings set out in relation to the General Issue D the answer to both questions arising under issue D7(b) is "yes".

Issue D8(a): should the measurement of the Works in the BoQs be revised to reflect the post-contract water level of about 6m AOD and corrected in accordance with Cl.2.2.2.2 ? Should this correction be treated as a Variation under Clause 13.2 ?

Issue D8(b): should the measurement of the Works in the BoQs be revised to reflect the post-contract water level of about 6m AOD by correcting the errors in quantity and accordingly corrected in accordance with Clause 2.2.2.2 ? Should this correction be treated as a Variation under Clause 13.2 ?

Following D7 no further answer to any question in D8 was required.

Issue D9: assuming that the BoQs were prepared on the basis of stable soil conditions and that unstable soil conditions were encountered, should the earthwork support element of the BoQs be likewise corrected and should this correction likewise be treated as a Variation under Clause 13.2 ?

The parties disagreed on this issue, Boot arguing "yes/yes" and CIS/CHW "no/no". The Judge held that the answers to the questions posed depended critically upon whether the assumptions contended for were correct with the consequence that the questions were too theoretical at this stage.

Issue D10: assuming that there had been an alteration or modification of the design and/or quantity of works in that the works which were carried out were different from the works in the BoQs and the said Variation was instructed by GMA, should the works be valued under Clause 13.1.1? Alternatively is this alteration or modification to be treated as a Variation under Clause 13.2?

After briefly summarising Counsels' contradictory and confusing submissions, HHJ Seymour QC stated that "the issue as formulated was very difficult to understand and, for the present it did not seem useful to express any view"; the parties accepted this.

Issue D11: should the sub-structure groundwork BoQ be corrected or revised in accordance with Cl.2.2.2.2 so as to correct the omission of the earthwork support to the faces of the excavation where contiguous piles had been installed ? Should this correction be treated as a Variation under Clause 13.2 ?

As with several of the preceding issues, per Boot "yes/yes" per CIS/CHW "no/no".

Having summarised opposing submissions by Boot/CIS, the Judge considered that it would be premature to answer finally these questions at this stage. He noted that Bill No. 3 page 305 item G, the implications of which were hotly contested, appeared ambiguous. He noted that resolution of the ambiguity was important because of his rejection of the alternative answers to the issue put forward by CIS, namely that the item, if not on proper construction covered by item G on page 305 of Bill No. 3, was covered by more general items within Bill No. 1, and that Cl.2.2.2.2 of the Contract could not apply to anything falling within the CDP because of the terms of Cl,2.2.2.3.

Issue D12: should the re-measurement under issue D2 above be treated as a Variation under Clause 13.2 ?

Per Boot "yes", per CHW "no"; CIS submitted that this had already been dealt with: no changes to the earthwork support item give rise to any adjustment to the Contract Sum because of Cl.2.2.2.3. If that was wrong such changes fall to be re-measured under Cl.13.4.1.1 and re-valued in accordance with Cl.13.8. The excavation, which was not part of the CDP, fell to be re-measured under Cl.13.4.1.1; Cl.2.2.2.2 and 13.2 were irrelevant.

HHJ Seymour QC concluded that, given his earlier rejection in principle of the first answer provided by CIS, and his conclusion as to the effect of the use of the word *"PROVISIONAL"*, the answer to this issue is "no" in relation to items specifically included within the relevant part of the BoQ, for the alternative reasons argued by CIS.

Comment

When I first read this judgement (19,800 words) I thought that I should probably find some alternative profession and leave construction law to people with real brains preferably with a direct cyborg link to a Cray Supercomputer. Having read it again in detail in order to prepare the foregoing reduction it became a great deal less daunting and, other than some basic familiarity with earthworks, foundations, piling etc, it requires no great feat of intellect to understand, merely a substantial dose of common sense and some considerable attention to detail.

Coming from a background originally in oil industry construction (including a $1.3bn offshore production platform), I found two aspects of this case wholly remarkable:

(i) that Boot should seek to limit its responsibility in taking over CHW's conceptual design; in my experience (and the contracts I drafted made this expressly clear) the main contractor assumed total responsibility for the entirety of any works it had to design irrespective of the involvement of any sub-contractor or 3rd party design contractor; based on my experience, there is no practicable alternative;

(ii) that anyone would pay any real attention to the Report since it was, from its language, quite evidently no more than an indication of ground condition and therefore largely worthless; the Judge appears to be of similar mind (see A2 above).

30. The massive project for the new Edinburgh Royal Infirmary will likely generate years of work for construction professionals in the litigation, arbitration and adjudication fields. One such case came before the Court of Session recently and was heard by Gordon Coutts QC, a leading member of the CIArb Scottish Branch, sitting as a temporary Judge (opinion 2nd August 2002). The case *Edinburgh Royal Joint Venture v Broderick Structures Ltd* arose where the latter instituted enforcement proceedings i.r.o. an adjudicator's Decision and the former then obtained (ex parte) a court order suspending those proceedings. BSL sought to lift that suspension.

Disputes had arisen and had been referred to adjudication leading to a Decision. The applicable contract provisions "were more than usually difficult to follow" but did exclude arbitration as the longstop. S.108(3) of the 'Construction Act' provided that a decision of the Adjudicator was binding until the dispute was finally determined by [legal proceedings]. The contract provided at cl.27.1 that: "any dispute or difference arising between the contractor and sub-contractor shall be resolved in accordance with the sub-contract disputes resolution procedure set out in Appendix 8." So far, so good … but said Appendix 8 contained a "virtually incomprehensible" attempt to adapt the ORSA Adjudication Rules 1998 to a Scottish contract; this adaptation appeared to have involved more amendments than retention of original text. However, ORSA para.14 provides: "decisions of the Adjudicator shall be binding until the dispute is finally determined by legal proceedings … or by agreement." The adaptation provided (inter alia):

"(f) notwithstanding Rules 14 and 33, no party shall, save in the case of bad faith on the part of the Adjudicator make any application whatsoever to a competent court in relation to the conduct of the Adjudication or the decision of the Adjudicator until the earlier of the Actual Completion Date of the last Phase or termination of this Sub-Contract unless and until the prior written consent of both the Sub-Contractor and the Contractor has been obtained.

It was also provided by para 28A:

"Every decision of the Adjudicator shall be implemented without delay. The parties shall be entitled to such reliefs and remedies as are set out in the decision, and shall be entitled to summary enforcement thereof, regardless of whether such decision is or to be the subject of any challenge or review. No party shall be entitled to raise any right of set-off counterclaim or abatement in connection with any enforcement proceedings. The parties agree and bind themselves to each other to docquet every decision with their consent and to registration of the Adjudicator's decision in the Books of Council and Session for execution."

The Adjudicator's Decision provided (inter alia) that (i) BSL was due a 46-week extension of time i.e. revising the completion date to 25th June 2000; (ii) BSL was entitled to £556,177.00 (including interest) + VAT i.r.o. Direct Loss and/or Expense; (iii) payment within 14 days; (iv) parties jointly and severally liable for Adjudicator's fees/expenses of £39,958.93 incl. VAT; these to be shared 50/50.

ERJV refused to consent to registration of the Decision per ORSA para 28A so BSL raised an enforcement action in the Court of Session to which ERJV's response was the suspensive court order. BSL argued that there was no bar to enforcement of the Decision while ERJV relied on (f) above; however, such reliance wholly failed to take into account para 28A which did not bar enforcement, as opposed to challenge, of the Decision. (f) was not a stand alone provision and could not prevent BSL's enforcement of the Decision, to which it was entitled, both in contract and in statute. The Judge observed that, if 'balance of convenience' was presently a consideration in the present circumstances, such could go to prevention of enforcement, the only purpose of which would be to permit ERJV to avoid compliance with its contractual and statutory obligations.

Further, ERJV had argued (i) that the terms of (f) meant that all disputes were postponed until the conclusion of the contract when they could all be raised at one time; (ii) BSL had failed in regard to consideration of the mutuality of obligations since the Decision did not give it the EOT it sought so that monies would be due by BSL to ERJV by way damages for delay; (iii) since BSL had failed to comply with the contract, it was not entitled to found upon the provisions thereof.

The Judge rejected ERJV's arguments as unsound and unsustainable since it was an inevitable consequence of statute that monies paid on a Decision might not ultimately be held due or might even prove to be irrecoverable. The absence of set-off in adjudication could lead to inequity in some cases, but statute and the present contract so compelled. Given the agreed paragraph 28A the attempted invocation of (f) to try to prevent enforcement was ineffective: BSL was not seeking to challenge the Decision, merely to enforce it. ERJV had attempted to obtain an illegitimate deferral of payment on the Decision: a sum

had been fixed, it was due, it should be paid; if there were other sums due by BSL to ERJV, such were unquantified and no Decision had been made thereon.

The Judge lifted the suspension order i.e. releasing BSL to pursue enforcement through the Court.

Comment

The case demonstrates yet again (see *Re Orkney Islands Council* in an earlier Newsletter) that Adjudicators' decisions will be enforced and that artificial devices, whether in contract or otherwise, to circumvent enforcement will inevitably fail.

31. In contrast to the previous case, not all attempts to avoid enforcement fail: in *Quality Street Properties (Trading) Limited v Elmwood (Glasgow) Limited*, Sheriff Principal Edward F Bowen QC, reversing a Sheriff's decision, granted interdict against an adjudication proceeding. The key lay in s.108(3) of the 'Construction Act': "The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined … by agreement".

Quality sought interim interdict against Elmwood's seeking to appoint an adjudicator and thereafter proceeding with an adjudication. Interim interdict was granted then recalled; that recall was the subject of the present appeal.

The contract works, alterations to properties in Glasgow, were completed by November 1999 and, thereafter, a dispute arose over the sum due to Elmwood, the contractors, leading to a protracted series of meetings and correspondence between the parties. While certain payments were made by Quality, Elmwood raised an action in Court seeking £126,290, its arguments in support of which being , at best 'sparse'. Quality lodged a detailed defence, particularly that there had been an agreed settlement and all but £7,000 retention had been paid. In the alternative (i.e. if there was no settlement agreement), Quality lodged a counterclaim for damages.

Thereafter Elmwood sought to refer two disputes to adjudication: (i) an ascertainment of the amount properly due to Elmwood in terms of its final account, including loss and expense; (ii) payment to Elmwood i.r.o. loss and expense due to the regular progress of works being affected. The issue of that reference prompted the present proceedings.

Quality argued that: (i) Elmwood was seeking to refer to adjudication the issues which are currently before the court in the aforesaid action; (ii) Elmwood had agreed the final account so no dispute could arise; (iii) since Elmwood had commenced proceedings in Court for final determination of the disputes, it was barred from referring them to adjudication; (iv) the matters which Elmwood sought to refer to adjudication covered more than one dispute, and Quality had not consented to more than one dispute being adjudicated upon.

The sheriff declined to grant interim interdict since (a) Parliament had "specifically imposed upon" parties the process of adjudication; (b) that it could be commenced at any time, and (c) it was not inconsistent with court proceedings. He appeared to accept that adjudication proceedings could be displaced (or at least superseded) if the parties had entered into a settlement agreement; however, he did not consider that Quality had shown *prima facie* that such existed. He went on to hold that the balance of convenience favoured continuation of the adjudication proceedings. In that respect he said:

> "Again, I emphasise that Parliament had provided this remedy for parties to a construction contract. The parties themselves have agreed to incorporate adjudication provisions within their contract and therefore questions of expense and delay seem to me to be nothing to the point. The question of expenses effects both equally and I cannot see that the cost of preparation for an adjudication is likely to be any different from continuation of the current proceedings".

Sheriff Principal Bowen QC held that while the sheriff's approach to Quality's entitlement to interim interdict had been correct, he had reached the wrong conclusions on the two key issues of (a) whether Quality had demonstrated its case and (b) whether, on a balance of convenience, it was appropriate to grant interim interdict.

While argument on the existence of a compromise agreement existed had been developed before him to much greater extent than before the sheriff, he had put that out of mind and had dealt with the case as presented to the sheriff. Quality's defence had set out in detail the nature of negotiations, asserting in particular (i) that on 26th November 1999 it had proposed a final account figure of £305,025 and (ii) that Elmwood accepted this in January 2000 with £280,000 being payable as the contract sum and a further £25,000 payable on condition that Quality would introduce further work to Elmwood. There were clear assertions of agreement on a specific sum and payment thereof and this was not a case, as the sheriff had appeared to suggest, of a party seeking to avoid adjudication "by the simple device of a bare proposition that an agreement was reached as to monies due pursuant to the contract". Further, it was not necessary, again as the sheriff appeared to suggest, for Quality to have sought "judicial determination as to the existence of that agreement" in any manner other than by stating it in the defences to the action raised against them. Elmwood had accepted that the jurisdiction of an adjudicator could be ousted by a settlement agreement; this was consistent with dicta in *Shepherd Construction Ltd v Mecright Ltd*, 2000 BLR 489 where it was held that until the settlement agreement was set aside there was no dispute capable of being referred to adjudication, supporting the view that a dispute which had been compromised was no

longer susceptible of a reference to adjudication notwithstanding the provision in Section 108(2)(a) of the 1996 Act that a reference may be made "at any time".

Consequent on this conclusion it was unnecessary for S/P Bowen QC to express any view on Quality's argument regarding bar; in any event no argument had been advanced thereon; however, he observed that he could see a basis for it in terms of s.108(3) which contemplated a decision in adjudication ***prior*** to final determination in Court, arbitration or otherwise.

It was equally unnecessary to deal with the argument as to "more than one dispute" save that s.108(1) conferred a statutory right "to refer a dispute" to adjudication and, in *Fastrack Contractors Ltd v Morrison Construction Ltd & Another*, (2000 BLR 168) the view had been expressed (at p.176 para 20) that a "dispute" which may be referred to adjudication "is all or part of whatever is in dispute at the moment that the referring party first intimates adjudication reference".

On 'balance of convenience' question the sheriff appeared to have reached the view that the issues in adjudication might well be the same as in the current court proceedings but such view, whether correct or not, did not justify the conclusion that the balance of convenience favoured allowing the adjudication to proceed. Quality's case was that there was no dispute to adjudicate and it was entitled to have that issue resolved; if resolved in its favour the costs of adjudication would be avoided. If the adjudication proceeded Quality would doubtless argue that the claim had been compromised so that the adjudicator's decision, whichever way, was unlikely to be accepted so that Court action would ensue. Consequently, the issue of whether the compromise agreement was reached should be resolved in Court action and it was appropriate to pronounce *interim* interdict against the adjudication proceeding.

Comment

S/P Bowen QC must be correct in his consideration of the effect of a settlement agreement on the right to refer a dispute to adjudication "at any time"; the latter phrase can only apply in the context of an existing dispute. If it were otherwise, then it could arguably apply after the final determination of the matter in Court or arbitration which would be absurd. S.108(3) clearly treats the three methods of final determination as of equal weight. It should be noted that S/P Bowen QC left open Quality's 3rd and 4th arguments so these may resurface elsewhere.

We have seen the last argument before, most notably in *Azov Shipping* (a s.67 appeal) where the decision appeared to usurp the jurisdiction of the adjudicator or arbitrator (as applicable). *Azov* was widely, but not unanimously, criticised in the journals but, in my view, the facts in the present case are distinguishable, not least since they represent circumstances a great deal simpler than the complex questions of Ukrainian law on which *Azov* revolved.

Although the 'Construction Act' applies to both England & Wales and to Scotland so that decisions in each should, in principle, be applicable in the other, this decision is clearly not one such since it relates to the Adjudicator/Court interface provided by CPR in England.

While it might be unfair to criticise the sheriff's initial decision since he did not hear full argument i.r.o. the settlement agreement, his logic, to the extent reproduced in S/P Bowen QC's Opinion, is disappointing. In the context of the forthcoming Arbitration (Scotland) Bill 2003 where appeals to a sheriff court are possible other than under ss.45/46 (i.e. equivalent to the English ss.67/68), this causes me some concern.

32. In *Glencore International AG v. Metro Trading International Inc & Ors*; [2002] EWCA Civ 1252; Tuckey LJ; 31st July 2002) the difficult question arose of whether it was just to order for security for costs against an insolvent claimant.

In one of the long-running series of MTI-related cases Glencore applied, unopposed, for security for costs of a MTI cross-appeal. Glencore's appeal and MTI's cross-appeal were from judgements of Moore-Bick J (all but full-time assigned to this wide-ranging group of cases) in this complex litigation which resulted from the misappropriation by MTI of large quantities of oil stored by it to the order of various parties, chiefly Glencore, in floating storage off Fujairah, UAE. In February 1998 it was discovered that there was a very substantial shortfall between the oil which should have been stored to Glencore's order and the oil that was still remaining, which was itself the subject of competing claims by others; MTI soon collapsed. Two lengthy trials had already taken place, the first designed to deal with conflict of law issues, issues of substantive Fujairah law (as the lex situs) and issues of substantive English law on the passage of title; the second dealt with all issues as to the terms, nature and effect of the contractual relationships and arrangements between Glencore and MTI. On Glencore's proprietary claims against MTI, the Judge had held that Fujairah law applied and that, under that law, title did not pass to MTI in oil which was simply commingled with other oil but did pass where it was blended (as a matter of English law, title would not have passed in either case).

Glencore appealed the findings (i) that Fujairah law applied and (ii) that title in blended oil passed to MTI; the latter was given permission to cross-appeal the decision about commingled oil and related issues, but MTI was hopelessly insolvent; Glencore's application for security was made on the basis that the cross-appeal and the appeal raised discrete issues and that it estimated, with full substantiation, its costs of resisting the cross-appeal at more than £100,000: the issue would take several days to prepare, the

Fujairah law issue was complex and involved consideration of substantial expert reports and many days of transcript evidence taken during the first trial. The security application was put on the basis of CPR 25.13(2)(c) i.e. that there was reason to believe that MTI would be unable to pay Glencore's costs of the cross-appeal if ordered to do so. Per Tuckey LJ, there was no doubt that this condition had been met and the only question was whether in all the circumstances it would be just to make the order.

In a letter of 17th July 2002, MTI's (Greek) lawyer asked the Court to consider two points: first, MTI had no counsel and due to the high cost of proceedings in London and the unavailability of legal aid for companies, it was unable to defend itself and consequently it felt strongly that it would not get a fair trial in London; Tuckey LJ observed sharply that MTI had had a fair trial, that this was an appeal, that legal aid was not generally available to companies in other jurisdictions but that this did not mean that Glencore should have to take the risk of not being able to recover costs if MTI's appeal was unsuccessful. Secondly, MTI's lawyer stated that although more than $US60 million were held in London by its receivers, it was unable to use any of those fund to obtain a fair trial for the exclusive benefit of their other creditors. Tuckey LJ, no less sharply, observed that no application for funding had been made by MTI to the receivers nor would such be justified; even assuming that some of those funds could be said to belong to MTI, there were already claims thereto vastly in excess of their value. If Glencore had to enforce a costs order against those monies, all that Glencore would be able to do would be to add the costs of such an order to its outstanding, very substantial, unsatisfied claims, so that in fact it would recover little if any of its costs in the event that the cross-appeal failed.

In these circumstances, Tuckey LJ was satisfied that it would be just to order security in this case although he was concerned about the amount to be ordered because, although the commingling and blending issues were discrete, there would be a degree of overlap between them. Taking that into account, he considered it appropriate to limit the order to one of £80,000, payable within one month. Should MTI fail to put up security, its cross-appeal should stand dismissed with costs without further order.

33. A series of inter-related disputes concerning crude oil handling and refining contracts in Macedonia (formally the Former Yugoslav Republic Of Macedonia - FYROM) has given rise to a string of cases of which the most recent, dealing with interest, costs and permission to appeal, concerns us here. The first. on a preliminary issue, was an interesting contractual case involving an arbitration agreement but where the parties agreed to litigate in the High Court instead; refer *Mamidoil-Jetoil Greek Petroleum Company SA & Moil-Coal Trading Company Ltd v. Okta Crude Oil Refinery AD*; (QBD 1999 Folio 1513; Thomas J; 26th January 2000).

The 'principal' case deciding substantive issues is *Mamidoil-Jetoil Greek Petroleum Company SA & Moil-Coal Trading Company Ltd v. Okta Crude Oil Refinery AD* ([2002] EWHC 2210 (Comm); Aikens J; 4th November 2002); the present case ([2002] EWHC 2462 (Comm); Aikens J; 26th November 2002) involves the same parties, Aikens J providing further clarification of the applicability of indemnity costs. In the principal case, Aikens J had held that Jetoil and Moil-Coal (i) had succeeded on their claims for damages under the disputed contracts and (ii) were entitled to certain declarations they claimed but he declined to grant certain injunctions that they had sought. Following the principal judgement the parties had been able to agree on the principal sums due to the two claimants by way of damages totalling US$ 9,2 million. However, the parties were unable to agree (inter alia) the basis upon which costs should be awarded. Several issues arose in relation to costs including: (i) were the claimants entitled to all the costs of the two actions or should they only recover a percentage of their costs ? (ii) should the basis for the assessment of costs be the "standard" basis or the "indemnity" basis ? (iii) what, if any, was the effect of a so-called "Part 36 Offer" letter sent by the claimants' solicitors to Okta's then solicitors on 9th August 2000 ? (iv) if costs were to be assessed on the "indemnity" basis, then what were the consequences of that decision ?

The claimants submitted that costs should "follow the event" therefore that, since they had largely won they should get all the costs of the two actions. Okta disputed this as wrong in principle, referring to CPR Part 44.3(3)(b) which specifically states that a Court must have regard to the fact that a party has been successful in part of his case; it argued that the claimants had failed on several issues at trial. Aikens J held that the claimants were not entitled to 100% of the costs, principally because an issue over an injunction was added late in the proceedings and argument thereon took one out of 11 days of the trial; that issue involved additional evidence and preparation and the fact that Okta won on that claim was significant and should be taken into account in deciding the incidence of costs. The other issues where Okta 'won' were dismissed by the Judge as all being issues in the main body of the trial involving no special preparation or work that would not otherwise have been performed by the parties and their advisers. Consequently, he ordered that Okta should pay the claimants 90% of their costs but without prejudice to any pre-existing definitive costs orders.

The Claimants submitted that costs should all be assessed on the indemnity basis, arguing that the conduct of Okta in resisting the claims for damages, both before and during the actions, was "so shocking that the Court's view of the defendant's conduct should be reflected in an order that all the awarded costs be assessed on a more generous basis: i.e.. the indemnity basis". CPR Part 44.3(4)(a) and (5) refer. In the alternative, costs should be paid on the standard basis until 31st August 2000 and thereafter on the

indemnity basis, this submission was founded on a letter dated 9th August 2000 (the "Offer"), intended as a Part 36 offer, whereby the claimants offered to settle for US$7 million in total; that offer was rejected and, in the event, the claimants subsequently beat it. Okta submitted that all the costs should be assessed on the standard basis since the Offer had not been a proper Part 36 offer, given that (a) it had been made before part of the action for damages had started and that (b) it did not properly state the basis of calculation of the US$7 million.

Aikens J rejected the claimants' first argument on the facts. Had the Offer been a Part 36 offer ? As regards the $7 million, Okta had never asked for further and better particulars of how the US$ 7 million was calculated. As regards the date of the offer (i.e. before the second action was started), Okta argued that it did not comply with CPR Part 36.10 but the claimants submitted to the contrary, relying on the Court of Appeal decision in *Huck v Robson* ([2002] 3 All ER 273) to the effect that an offer made before the start of litigation could constitute a Part 36 offer for the purposes of CPR 36.21, provided that the such offer complied with the requirements of CPR 36.10. Aikens J held (a) that if the claimants had wished the Offer to be regarded as a Part 36 offer, then it had had to comply not only with CPR 36.10 but also CPR 36.5 which prescribed the form and content of a Part 36 offer and (b) that the Offer, as required by CPR 36.5, indicated that it related to both claims and that it was intended as an offer to settle both for $7 million inclusive of interest (c) that it therefore complied with CPR Part 36.5.

Aikens J then proceeded to consider CPR 36.21(1) which, if fulfilled, obliged Okta, in declining the Offer, to show why it would be "unjust" for the Court to award indemnity costs, interest on costs and a higher rate of interest on the sums recovered. Okta submitted: (a) there had never been any break down of the US$7 million offer as between the two claims; (b) the offer had been made at a very early stage of the claims and thereafter there had been very little information as to the basis on which the claimants had made their loss of profits claims; (c) Okta had made repeated efforts to obtain information that would have enabled it to evaluate the offer but the claimants had consistently failed to disclose documents relating to quantum until well into 2002 but the Offer was open for acceptance for only 21 days in August 2000; given the subsequent history of the litigation, the Court should conclude that even if Okta had sought more details of the basis on which the offer was made, it would neither have received them within the 21 day period, nor at all.

Aikens J. concluded on the facts that (a) the Claimants had refused to give proper discovery of quantum documents before May 2002; (b) it was likely that if Okta had demanded further and better particulars of the Offer, then such would not have been forthcoming within 21 days of 9th August 2000; (c) the Claimants would probably not have been willing to extend the time within which the Part 36 Offer could have been accepted; and (d) even if the further details had been given, Okta would not have accepted the Offer but would have fought the case to the end.

In deciding whether it was unjust to award the successful claimant indemnity costs and additional interest under CPR Part 36.21 he had to take into account all the circumstances of the case including: (a) at the time that the Part 36 Offer had been made, following the decision of Thomas J., the main contract had terminated as at 1st January 2000, reducing significantly the quantum of the claim; (b) that position changed only after the Court of Appeal's judgement in March 2001; (c) throughout the proceedings it was reasonable for Okta and its advisers to take the view that, on the main contract claim, its "force majeure" defence might succeed; (d) throughout the pre-trial period the claimants had failed to give proper disclosure of quantum documents; (e) although Okta's defences to the claim on the subsidiary contract had been much weaker, the quantum of that claim had been much less than the claims under the main Contract, (once the Court of Appeal had held that the it remained effective until March 2003).

In these circumstances Aikens J. concluded: (1) that it had been reasonable for Okta not to have accepted the CPR Part 36 Offer whilst Thomas J's view of the period of validity of the main contract prevailed. In any event the offer had only been open for acceptance for 21 days; (2) even after the Court of Appeal's judgement, there were serious issues to be tried on the effectiveness of the force-majeure letters and hence whether the main contract claims could succeed; (3) throughout the relevant period it had been difficult, if not impossible, for Okta accurately to have gauged the proper quantum of the claimants' claims on both contracts.

Accordingly in all the circumstances it would be unjust to make any orders against Okta under CPR Part 36.21.

34. Part 35 of the CPR sets out 'new' rules governing the use of expert witnesses in the English courts, both incorporating and extending Cresswell J's celebrated dicta in *Ikarian Reefer*. In three cases (there may be others !) Experts have fallen seriously foul of the Judge and the ensuing judgements have not made comfortable reading. In *Anglo Group v Winther Brown & BML* (pre-CPR) the Expert appeared to be arguing that *Ikarian Reefer* did not apply to him; understandably the Judge was not impressed. In *Stevens v Gullis/Gullis v Pile* the Expert was, in effect, thrown out of court, his 'expert report' ruled inadmissible and his client denied the opportunity to obtain a replacement Expert; the Gillis Expert, on reading the language of the judgement, probably regretted that he had not taken up a different profession:

In a controversial case, *Pearce v. Ove Arup & Ors*, involving an allegation of breach of copyright in architectural designs, Jacob J, in his judgement, launched a powerful attack on Mr Pearce's Expert, a distinguished architect, for allegedly falling so seriously short of the requirements of Part 35 that he should be reported to his professional body (RIBA) for purposes of disciplinary proceedings. Some indication of the nature of Jacob J's judgement is given by the fact that he put his conclusion at the front of his judgement not at the end, stating: "… the case has no foundation whatsoever. It is one of pure fantasy - preposterous fantasy at that." It is not obvious from the face of the judgement upon what architectural expertise and knowledge the learned Judge based his criticism.

The Expert in question was duly reported to RIBA and the appropriate disciplinary proceedings ensued. The conclusion of those proceedings was the dismissal of all charges against him and, in effect, at least in the eyes of RIBA, his complete exoneration. One possible interpretation of the conclusion of the RIBA disciplinary proceedings is that the Judge's criticisms were totally unfounded.

However, Jacob J's judgement stands as a matter of public record, presumably in perpetuity, freely accessible on the internet and widely reported. What then is the position of the Expert ? Other than some form of public apology from the Judge, how can he remove the stain on his reputation ? In addition, if he incurred costs, e.g. of legal or other representation, in defending himself before the RIBA disciplinary body, other than could conceivably be available from some form of insurance, what recourse does he have (and against whom) in respect of the expense necessary to clear his name ?

This case has clear parallels with another recent case where an arbitrator was not only removed from his appointment but his fees were wiped out completely by an order for the costs of two separate applications to the Court, the first for an injunction preventing him proceeding with the arbitration, the second to have him removed. The arbitrator attended, but was not represented at, the second hearing at which the costs order against him was made, having been led by the first Judge to believe that his attendance was to assist the Court rather than that he would, in effect, be put on trial. In any event, the arbitrator raised the question of his s.29 immunity but this was brushed aside by the judge without any apparent consideration thereof. Although the arbitrator's conduct of proceedings had, so far as spelled out in the judgement against him, been at best ineffective, at worst incompetent, there was no suggestion at any point in the court proceedings that he had been guilty of bad faith - the phrase was never mentioned. In the circumstances, it seems *prima facie* clear that the award of costs against the arbitrator was in clear breach of his statutory immunity under s.29. This causes grave concern.

These two cases, taken together, raise serious issues which require to be addressed in the appropriate forum/fora.

SECTION C
International Arbitration, Conflict of Laws and Related Matters

35. In Iran Continental Shelf Oil Company & Ors v IRI International Corporation ([2002] EWCA Civ 1024; 28th June 2002), ICSOC and two other Iranian companies, IOOC and NIOC, appealed from a decision of McCombe J on 5th December 2001 in which he had held that a contract between IOOC and IRI was governed by the law of Texas; they asserted that the contract was governed by English law.

The claimants were State-owned Iranian corporations, NIOC, parent of the other two, being the principal Iranian State oil & gas company; IRI was a Delaware corporation with its principal place of business in Houston, Texas and which, at all relevant times, had an office in the UK. In 1994 IRI contracted (i) to supply and ship various equipment and materials required on an IOOC oil production platform, R4, offshore Iran and (ii) to provide installation engineers. IOOC paid IRI US$1.1 million for its services including $140,000 for the installation services. After IRI had shipped the materials but before it had provided the installation services the USA imposed an embargo (there had been a reverse embargo in effect but one apparently more honoured in the breach than the observance) on US corporations trading with Iran so IOOC had to engage others to do the work. IOOC sought the return of the US$140,000 plus damages for breach of contract in respect of (i) the extra cost of having the work done and (ii) loss of production in the meantime. The cost of having the work done by others was claimed to have been about US$1.3 million and the total claim amounted to some US$75 (repeat, seventy-five !) million.

It was common ground that the English courts had jurisdiction over the present action, the resolution of which might depend upon the law governing the contract; the question as to what law was tried as a preliminary issue, IOOC arguing that the effect of Article 3 of the Rome Convention was that the applicable law was Iranian, IRI, unsurprisingly, arguing Texan (the cynic might suggest that IRI was contemplating the notorious District Court of Harris County, Tx !). McCombe J, however, held that the parties had not chosen any law to govern the contract and rejected both cases. It was common ground that if Article 3 did not give the applicable law then Article 4 applied. IOOC submitted that under Article 4 the contract was governed by English law or, alternatively, by the law of Iran, whereas IRI submitted Texas. The judge held, on the facts, 'Texas' under Article 4.2 there being no closer connection with any other country (Article 4.5). Neither party challenged the Judge's Article 3 conclusion, but IOOC argued that he should have held 'England' applying Article 4.2 whereas IRI argued that he was right to conclude 'Texas'. In the respective alternatives, IOOC argued that if the he was right under Article 4.2, he should have held that the effect of Article 4.5 was 'Iran' and IRI argued that if he was wrong under Article 4.2, he should nevertheless have held that Article 4.5 led to Texas.

The authorities agreed in respect of the Rome Convention that "… the question of interpretation should be looked at from a broad Convention-based approach, not constrained by national rules of construction" (Tuckey LJ in *Samcrete*) and "It is indeed appropriate to adopt a purposive approach and not to construe the Convention in a narrow literal way." (Clarke J in *Olderdorff*, approved by Tuckey LJ in *Samcrete*).

Article 4.2 Considerations

In order to identify the relevant country under Article 4.2 it was necessary to identify first "the party who is to effect the performance which is characteristic of the contract"; there could be no doubt that this was IRI, IOOC's only obligation being to pay for the services and, as Professors Giuliano and Lagarde observe in para A4-34 of their report, payment of money "is not, of course, the characteristic performance of the contract". Further, Article 4.2 then presumed that the contract was most closely connected with Texas unless "under the terms of the contract the performance is to be effected *through a place of business other than the principal place of business*". IOOC argued that this was in England, since IRI's UK office was in Sevenoaks. Further, it was common ground that the several references to "performance" in Article 4.2 and 4.5 had the same meaning; consequently, if under the terms of the contract the performance was to be effected through IRI's Sevenoaks office, the effect of Article 4.2 was to presume that the contract was most clearly connected with England; in further consequence, English law would apply unless Article 4.2 was to be disregarded pursuant to Article 4.5. The key question was therefore whether IRI had been obliged to effect performance through its Sevenoaks office; the Judge held 'no' and IOOC argued that he was wrong.

Clarke LJ considered that, to resolve this issue, it was important to identify the terms of the contract, not merely the documents but also the 'factual matrix'. The R4 platform had been badly damaged during the Iran/Iraq war and needed extensive repairs. The first relevant contact between IOOC/IRI had been in 1990 in the course of another wholly separate contract which, so the Judge had held, had been concluded through IRI's then London office. In 1990 IRI's representative in the UK had inspected R4 and had submitted a quotation for its repairs. He used "IRI International" letterhead showing the

Sevenoaks address but making no reference to IRI's US activities; he signed "IRI International - UK, Simon C White, Technical Services Manager". The subsequent (1994) contract, i.e. that presently under dispute, referred to IRI International but it was evident that some of the materials were being shipped from Houston, Tx. In 1995 a bill of lading was issued naming IRI International c/o Sevenoaks as shipper and evidencing loading of the contract materials at Houston for carriage to Iran and a certificate of origin was signed naming the shipper/exporter as IRI International, again c/o Sevenoaks. However, the Judge had expressly held that (i) IOOC had been aware that it was IRI's US personnel who called the shots and that (ii) from time to time there had been direct contact between IOOC and IRI personnel in Texas.

Nevertheless, the contractual documentation used IRI Sevenoaks letterhead with no reference to IRI in the US; the Judge had found that (i) this was what IOOC had chosen in order to avoid being seen to be dealing directly with a US Corporation and (ii) IOOC had known that IRI-UK was not a separate legal entity. In order to answer the critical question as to the location of the characteristic performance, it was necessary first to identify the nature of the characteristic performance and then to consider whether it was to have been effected through the UK office.

Clarke LJ stated that the contract was in part a CFR contract for the sale of goods, in part a contract for services and, noting that the Judge had held, following the authorities, that the real supply of goods had been in Houston, suggested that there was an argument that the characteristic of the contract had been to repair the R4 platform in Iran. However, the question was whether that performance had to have been effected through Sevenoaks. He rejected IRI's submission that there had been nothing in the contract which had required the Sevenoaks office to perform the contract i.e. to load the ship or at least to take physical steps to do so since the contract document required IRI's place of business in the UK (i.e. IRI-UK for short) to effect the characteristic performance identified above. This could be seen by considering the terms of the contract here, both generally and in the context of the relevant characteristics of a C&F contract identified in the authorities: (i) the quotation had been sent under cover of a letter signed by Mr White expressed to be on behalf of IRI-UK; (ii) the obligation to ship the goods into Houston was to be effected through the Sevenoaks office – the contract expressly provided that shipment was to be arranged by IRI International UK at its Sevenoaks office and it was for that reason that the bill of lading had named IRI at the Sevenoaks address as the shipper; (iii) it was IRI-UK's obligation to arrange the shipment and thus to arrange the contract of carriage which it had by procuring the issue of the bill of lading through the forwarding agents with IRI-UK named as shipper; (iv) under the terms of the contract it had been for IRI-UK to have tendered the documents to the bank and IRI-UK had been named as the beneficiary under the L/C.

Clarke LJ concluded that, although this was a most unusual case, under the terms of the contract (which were freely agreed by both parties, no doubt for good commercial reasons) the characteristic performance was to be effected through IRI's place of business in England. In arriving at an opposing conclusion to McCombe J, he said that "I do not think that it is fair to say that the Sevenoaks office was no more than a conduit of communication … the contractual documents were carefully prepared and agreed in order to show the English place of business as the supplier and shipper without any express reference to IRI in America. That was … by agreement. … the claimants' … reasons … were regarded by both parties as sufficient reason to be reflected in the contract." Further, he concluded, "… I would hold that the parties agreed that the characteristic performance of the contract, notably (as the judge held) by delivery of the goods to the ship in Houston, was to be effected by IRI's place of business in England. It follows that I would allow the appeal on this aspect of the case and hold that the effect of Article 4.2 as applied to the facts of this case is that it is to be presumed that the contract is more closely connected with England and that by the combined effect of Articles 4.1 and 4.2 the contract is governed by English law unless that presumption is to be disregarded under Article 4.5."

Article 4.5 Considerations

This provides: Article 4.2 "shall not apply if the characteristic performance cannot be determined, and the presumptions in [4.2] ... shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country." There is continuing debate as to the interpretation of Article 4.5 (see my article on *Ennstone v Stanger* in [2002] ARBITRATION 4) and much of that debate has focused upon the weight to be given to the presumption in Article 4.2. For example, in *Credit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1 at 5, Hobhouse LJ observed that Article 4.5: "... formally makes the presumption very weak, but it does not detract from the guidance that paragraph 2 gives as to what is meant by `the country with which it is most clearly connected' and does not detract from the need to look for a geographical connection. This reading of Article 4 is also supported by the commentators." In *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 2 All ER (Comm) 1, Morison J had expressed the competing approaches in this way, in para 7:

"The real issue between the parties centres on the relationship between [4.2/4.5]. Whilst

[4.2] looks to the location of the principal performer, [4.5] looks more widely to a connection between the contract and a country. If there is a divergence between the location of the principal performer and the place of substantial or characteristic performance, what then ? On the one hand, were the presumption to be displaced whenever such divergence existed, the presumption would be of little weight or value. [4.2] must have been inserted to provide a `normal' rule which is simple to apply. Giving wide effect to [4.5] will render the presumption of no value and represent a return to the English common law test of ascertaining the proper law, which places much less weight on the location of the performer and much more on the place of performance, and the presumed intention of the parties."

This issue was decisively resolved in ***Samcrete* (which was a case concerning a guarantee) where Potter LJ cited a French case, ***Societé Nouvelle des Papétieries de l'Aa*****, in which the court had stated:**

`... it follows both from the wording and the structure of Art.4, as well as from the uniformity in the application of the law which has been intended with the Convention, that this exception to the main rule has to be applied restrictively, to the effect that the main rule should be disregarded only if, in the special circumstances of the case, the place of business of the party who is to effect the characteristic performance has no real significance as a connecting factor.'"

IRI submitted that the presumption that the contract was most closely connected with England under Article 4.2 was displaced by Article 4.5 in favour of Texas since, when the circumstances were considered as a whole, they clearly demonstrated that the contract was more closely connected with Texas than England. McCombe J had not had to consider this particular question because he had reached a different conclusion under Article 4.2 in favour of Texas. The effect of the decision Clarke LJ had reached was that IRI's characteristic performance was ***by agreement* to be effected through England; this was a powerful factor against the argument that the circumstances as a whole showed that the contract was more closely connected with Texas even if the materials were physically shipped in Houston and that they were obtained from various parts of the United States, including IRI's own premises in Texas and even if by far the greater part of the total contract price had been the value of the goods. Mr White, of IRI-UK c/o Sevenoaks, had played an important part in the technical aspects of the contract, visiting the R4 platform in 1990 which visit led to the quotation, and being responsible for identifying the materials and work required. Given that the whole purpose of the contract was to refurbish a platform in Iranian waters and that the technical requirements were identified by Mr White from the UK office, and given the role to be played by that office under the contract (at least formally), it could not fairly be concluded that it clearly appeared from the circumstances as a whole that the contract was more closely associated with Texas than with England. Other cases cited in which Article 4.5 had been applied had turned on their own facts.**

On the facts of this most unusual case, the contract had connections with Iran, Texas and England. Different factors connected it with each. For the reasons given and in all the circumstances of the case, Clarke LJ held that that the presumption in favour of England under Article 4.2 was not displaced in favour of Texas by Article 4.5.

The appeal would be allowed and the contract declared governed by English law.

Comment

This is yet another 4.2/4.5 case but with the English judiciary moving away from Hobhouse LJ's 1997 decision in *Credit Lyonnais* towards a stronger presumption in favour of the former; interestingly Clarke LJ, polylingual as all judges now have to be, had considered all seven original languages of the Rome Convention and had found different emphases regarding the presumption

Postscript: IRI's Counsel in the case was M Tugendhat QC who is presently splashed across the tabloids in representing Catherine Zeta Jones and Michael Douglas in their privacy action against HELLO

36. In *Marodi Service Di D. Mialich & C.S.A.S. v. Mikkal Myklebusthaug Rederi A/S* (Court of Session; 18th April 2002; TG Coutts QC sitting as Temporary Judge), an action for payment, Marodi (Italian) sued MMR (Norwegian), owner of a Panama-flagged flag vessel, i.r.o. bunker fuel obtained by the Cypriot charterers of the vessel in Turkey and in Sicily. Marodi arrested the vessel at Aberdeen. MMR lodged defences and the jurisdiction of the Court of Session was admitted but Marodi then applied for a stay pending determination of the dispute in the Italian Courts.

Marodi alleged and MMR denied that there had been any supply contract between them; however, MMR admitted that the vessel had received bunkers in Turkey and Sicily but claimed that the delivery note expressly stated "only for charter account" so that it was the Charterers who had contracted Marodi.

Counsel for Marodi conceded that he was making an unusual request in unusual circumstances, there being no precedent directly in point. Under Art.8 of the Rome Convention, the existence of a contract, and therefore, the application of its terms and conditions, fell to be determined according to Italian law, as the law of the putative contract, so that it was more appropriate that the resolution of the dispute between the parties be determined in the courts of Italy.

Counsel for MMR submitted: (i) Marodi, having commenced action in Scotland, was barred from commencing another action elsewhere; (ii) so long as the present action was 'live', no other court had jurisdiction (cf. Brussels and Lugano Conventions); (iii) in any event if there was available another competent court, it was not clear that the law of Italy would apply and there was no weight of circumstances which made Italy more appropriate than Scotland.

T/J Coutts QC reviewed the international and domestic legislation, noting that while Scotland and Italy were party to both Conventions, Norway was party to Lugano only. In particular he referred to Art.8: "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

Marodi submitted that the Court's consideration of whether the claim should proceed in Scotland, given that MMR disputed the existence of the contract, required application of Art.8 and it would be proper to stay to permit the Italian courts to determine the matter. *Renvoi* was inapplicable, although Italian law said that the dispute would be governed by the law of the flag, to a decision on the existence of the contract. The Court had the power to stay the case and since there was no inconsistency with any of the Conventions, it was an option open to Marodi to have the case stayed. The principles of *forum non conveniens* (FNC) require compelling reasons for ordering that a case be heard elsewhere but the present case had no connection with Scotland other than that it was the locus of arrest (for the appropriate principles refer *Credit Chemiquie v James Scott Engineering Group Ltd* 1979 SC 406 and *Spiliada Maritime Corp.* v *Ansulex Ltd* 1987 1 AC 460). As regards waiver, there were no pleadings of the quality envisaged by Lord Fraser in *Armia Ltd.* v *Daejan Developments Ltd* 1979 SC. (HL) 56 so Marodi could not have abandoned any right they might have to stay proceedings.

MMR submitted that no dispute arose about the jurisdiction of the Scottish court, invoked by Marodi and accepted by it. None of the FNC cases cited were cases in which the claimant had sought to change forum. Under the Convention, any court before whom this dispute was raised, be it Italian or Norwegian, would be obliged to stay its proceedings in order that the matter be determined by the court first seized of the jurisdiction i.e. Scotland which could not be supplanted, save by agreement. MMR had not contested jurisdiction, as envisaged by Article 18. Marodi could have commenced action in Italy and thereafter could have arrested in security in any of the other Convention States (Art.24). They had not done so and the effect of the present action was to invite the Court to assume that they had. In the ECJ case *The Tatry* 1999 QB 515, the Advocate-General stated "Once the plaintiff chooses a court by instituting proceedings for the arrest of a vessel, the court before which the same action is again brought later must do no more than simply dismiss it on the ground that the same proceedings have already been commenced elsewhere." The ECJ then held that Art.57 of the Brussels Convention specifically subordinated that Convention to existing rules. Marodi's action for a stay conflicted with the provisions of the Convention and there is no other tribunal having competent jurisdiction which could more suitably be invoked for the interests of all the parties and for the ends of justice. Finally, by invoking the jurisdiction of the Scottish court in the way that has occurred, the Marodi had waived any right to claim FNC.

T/J Coutts QC dismissed Marodi's motion principally because it had invoked the jurisdiction of the Scottish court and had litigated therein to close of pleadings; that jurisdiction was not challenged by MMR and it did not assert FNC. In such circumstances it would be extraordinary for the Court, against MMR's wishes, to allow Marodi to forum-shop having secured its jurisdiction and arrest in Scotland. Any convenience to Marodi in litigating in Italy was something it should have considered when raising this action. If it wanted to litigate there it could have abandoned the present proceedings and commenced anew in Italy; if it wanted to retain the benefit of the Scottish arrest and jurisdiction, it must proceed with the case as it stands.

Further, so long as the present action remained before the Scottish court, no other action could be raised elsewhere since, in terms of the Convention, such an action would require to be dismissed as made absolutely plain by the ECJ in *Tatry*.

Comment

No comment; a straightforward case but a helpful review of principle.

37. In *Ceskoslovenska Obchodni Banka AS v Nomura International PLC & Ors* (QBD case [2002] Folio 201 12th December 2002) an entire brewery in effect disappeared …. surely one of the most interesting cases in the English courts in recent years !

COB was successor in title to a state-owned bank (IPB) which had been partially privatised in the early 1990s; as at early 1998 IPB had owned a controlling interest in a well-known Czech brewery group. COB alleged that the Deputy General Director of IPB had, in conjunction with Nomura, engaged in an unlawful scheme which had resulted in the transfer of IPB's stake in the brewery to affiliates of Nomura for nil consideration. The financial machinations and manipulations which had led to this apparent outcome were extraordinarily complicated and have given rise to a mass of litigation, both in the Czech Republic and in England. The present proceedings, before Jonathan Sumption QC sitting as a Deputy Judge, was in respect of an application by Nomura to dismiss or stay COB's action on the ground that England was not the appropriate forum for the litigation which should be heard by the City Court of Prague. The detailed financial manipulations on which the case was founded is summarised in the Deputy Judge's detailed judgement but, (fortunately ?) is not relevant to the present report and can reasonably be ignored.

COB's claim in the present action was founded mainly on Czech law and its case was pleaded at length with reference to the Czech Civil and Commercial Codes; the principal question before the Deputy Judge was as to which of the two actions should proceed. There was no dispute as to the fundamentals of the law: jurisdiction against the defendants in England had been founded as of right and without resort to any exorbitant jurisdiction of English Court.

However, the first question was whether the Czech Republic was clearly and distinctly a more appropriate forum, having regard to all the circumstances, including the connections of the two jurisdictions with the parties, the dispute, the relevant legal systems and the evidence. If it was, then the English action would necessarily be stayed, unless there were special circumstances making it unjust to do so. It would not usually be unjust to stay an action so that it could be tried in the appropriate forum simply because there were procedural or substantive advantages for COB in proceeding in England, particularly if the advantages to COB were simply the counterpart of corresponding disadvantages to Nomura. What had to be shown, if a stay was to be refused, was that substantial justice would not be done in the appropriate forum.

The Deputy Judge held that the Czech Republic was a distinctly more appropriate forum: inter alia:

(i) the key question was whether the various transactions involving IPB and the Brewery had been lawful;
(ii) that question depended on whether the relevant transactions had been improper acts for IPB to have entered into and/or for its management to have approved i.e. fundamentally a dispute about the internal management of a Czech company in respect of a Czech brewery; further, three intermediaries who participated in the relevant transactions were Czech companies.
(iii) Although Nomura was/is an English company it conducted an international business, inter alia through a Czech representative office, staffed by Czech residents, at least three of whom are alleged to have participated in the transactions; these facts made Nomura's English connection less significant for present purposes than the Czech connections of all the other key players.
(iv) Little significance attached to the location of meetings.
(v) The key legal issues all arose under Czech law; while these could be dealt with in the English Court, such would be as a matter of expert opinion, whereas they are much more appropriately decided by Czech courts as questions of law. There were two reasons why this was particularly important:
    (a) Nomura's challenge to COB's title to sue, although twice rejected by different Czech courts, could not be dismissed as not being a real issue and, although there was no doctrine of precedent in Czech law, it was wholly inappropriate for an English, rather than a Czech, court to pronounce on the validity of the acts of the Czech National Bank.
    (b) The legal concepts relied on by COB involved questions of legal policy which could only be satisfactorily answered by a Czech court; given such issues, a court would have to decide what the appropriate commercial standards ought to be and the setting of such standards is for the Czech courts.
(vi) None of this was affected by COB's reliance on an alternative cause of action in equity under English law. The arguable availability of a cause of action in equity does not reflect any natural connection of the dispute with England but was simply the result of the Claimant's decision to sue there.
(vii) On balance, more of the witnesses and more of the documentation were likely to be in Prague than in London.

Given that the appropriate forum for the case was indeed the courts of the Czech Republic, the question arose as to whether substantial justice would be done there. COB said not since (it argued) Czech judges had limited experience of commercial litigation, that civil actions in the Czech Republic took too long to reach a decision, that they were too slow and that Czech procedure made only limited provision for cross-examination

or disclosure of documents, both of which were argued to be essential if the issues in this action were to be properly tried.

The courts of the Czech Republic had only recently become exposed to commercial disputes on any scale, because, until about 1990, most such disputes had been between state trading organisations, and they had been dealt with outside the court system in 'economic arbitrations'. It was clear that the Czech court system had developed rapidly since the end of the communist era, particularly in the last two years when the main driver of change had been the standards required for accession to the EU; the courts now heard many commercial cases with complex facts and legal issues, and had proved capable of dealing with them. There were specialist judges assigned in priority to the trial of commercial cases, and this case would be heard by one of them. However, it was accepted by both parties' experts that a Czech judge would lack the same knowledge and experience of such litigation as a Judge of the Commercial Court.

The timescale required to resolve civil disputes was more relevant; in a report prepared by Mr Justice Colman in November 2000, he had said that the Czech system had defects which 'taken together render it well below the standard reasonably to be expected in a modern European state'. A particular problem was delay; the respective experts were broadly agreed that the present case could be expected to take between three and four years to reach a first instance decision, 5-6 to reach appeal. Such delay could amount to a denial of substantial justice and was capable of being a breach of ECHR Article 6 (see comment below). On any view, such delays, albeit unsatisfactory, are not unusual in Europe, and do not mean that substantial justice could not be obtained in the Czech Republic.

COB also raised objections in respect of the alleged absence of proper procedures for cross-examination and disclosure but these were not justified, the evidence disclosing a state of affairs which was fairly typical of civil law jurisdictions. Criticisms such as COB made needed to be kept in perspective: cross-examination and disclosure of documents were both features of the common law tradition of England and other countries whereas in civil law jurisdictions the obtaining and deployment of evidence is controlled by the Judge. English procedure was exceptionally thorough, but it was also exceptionally expensive and demanding of court time. No judicial system was perfect, not least because each represented a compromise between competing objectives. It was certainly not possible to say that the absence of extensive facilities for disclosure of documents and discovery made substantial justice unobtainable, even in cases which were evidentially complex or arose out of commercial fraud.

Deputy Judge Sumption QC concluded that, although these proceedings would be somewhat more expeditiously disposed of in London than in Prague and although High Court procedure might offer some advantage over Czech procedure, the advantages which a Czech court would have in applying Czech law and giving effect to Czech standards of business conduct prevailed. Substantial justice would be obtained in either jurisdiction so the case should therefore be heard in the one which was appropriate to its subject-matter.

The English action should be stayed.

Comment

I found this a fascinating analysis of the rival merits or otherwise of two judicial systems with widely differing philosophical origins. The masterly clarity of the present judgement, in an area of law often of considerable complexity, gives rise to no surprise given Jonathan Sumption QC's outstanding success at the Bar. What is particularly interesting is his apparent dissociation from some of the comments made in the Report on the Czech judicial system; in particular he states "Some [criticisms] seem to me to be over-influenced by the way that we do things in England and to make insufficient allowance for the major procedural differences between civil and common law systems"

Further, the major issue arising from that Report, accepted by the Deputy Judge, related to delay and, noting that the Report (no doubt, masterly and thorough) was quoted in this judgement only very briefly, one's immediate response to the brief extracts was that the author had never considered litigation in Italy or Greece where getting a case to appeal within six years would be regarded as something approaching miraculous. As the Deputy Judge in effect said, we must beware of assessing everything by reference to English standards.

I await developments with interest as to the "Case of the Disappearing Brewery" and I look forward to applying my professional skills and expertise in assessing the quality of the appropriate product in due course.

Postscript: in my last employment (as General Manager Legal of a substantial oil company) I sold an Italian subsidiary whose only asset was an outstanding court action again the Italian VAT authorities for recovery of overpaid VAT; the payments had been made 7-8t years before; the case was expected to go to court within 4-6 years of the sale and, if appealed, a further 6-8 years would be required, i.e. a total of a maximum of 22 years from overpayment to the expected determination of an appeal. Czech Republic 2, Italy 0 ?

38. In IFR Ltd v Federal Trade SpA (QBD; 2000 Folio 1393; 13th September 101) Colman J considered three interesting questions (i) formation of contract under economic duress (ii) application of the Commercial Agents (Council Directive) (Amendment) Regulations 1998 (1998 SI No. 2868) and (iii) separability of the jurisdiction clause. While that part of the judgement addressing duress is important in its own right I will address only the separability issue here.

s.7 of the Arbitration Act, following Art.16(1) of the Model Law, provides that "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and *it shall for that purpose be treated as a distinct agreement*." (emphasis added). Aside from the academic debate (e.g. see Stewart Shackleton's various writings on the matter) as to whether the separability principle is strongly enforced or otherwise in England, the principle is, in arbitration, at least clear in statute. But what applies in general ?

Pursuant to a distributor agreement (the 1998 Agreement), IFR (formerly a Marconi company but sold to a US in 1998) granted to Federal the exclusive right to purchase certain specified electronic equipment for resale in Italy. This agreement replaced a previous one Marconi/Federal. Clause 9(a) of the Agreement provided that ""To the extent permitted by local law, the Agreement … shall be construed and interpreted in accordance with the laws of England and subject to the jurisdiction of the English courts, without giving effect to the choice of law principles thereof … If any provision of the Agreement contravenes any law, including the law of the place of performance, such provision shall be deemed not to be a part of this Agreement herein, and the remainder of this Agreement shall be valid and binding as though such provision were not herein included."

Federal commenced proceedings in Italy, claiming, *inter alia,* that the 1998 Agreement had never become binding, and, in the alternative, claiming that, if it had become binding, it was an agency agreement and, under Italian law, Federal was entitled to compensation for termination. Separately, IFR had commenced proceedings in England for recovery of outstanding debts owed by Federal. On its receipt of the Italian Court papers, IFR commenced further proceedings In England claiming (i) a declaration that, pursuant to clause 9 of the 1998 Agreement and to Article 17 of the Brussels Convention and to the Civil Jurisdiction and Judgements Act 1982 (CJJA) the English courts had exclusive jurisdiction and also (ii) an injunction restraining Federal from taking any further steps in the Italian proceedings. Federal's only ground for contesting jurisdiction was its argument that the 1998 Agreement was voidable for economic duress with the consequence that it was not bound by clause 9.

Two days before the hearing in London, Federal lodged a massive submission in part relying on the Agency Regulations; after much messing around by Federal including failure to comply with various Court directions (Colman J's patience was evidently sorely tested !), this and related evidence was dismissed. However, evidence apart, Federal's main argument was that it had been forced under duress to enter into the 1998 Agreement in place of the Marconi Agreement, relying on the twin facts that (i) IFR had threatened to break the Marconi Agreement if Federal would not enter into the new agreement and (ii) the impracticality of Federal litigating to preserve that agreement; the threatened breaches of contract amounted to IFR's repudiation of the Marconi Agreement.

Federal's challenge to clause 9 proceeded on the assumptions (i) that, if Federal had entered into the 1998 Agreement under economic duress, that agreement was rendered voidable; and (ii) if it were effectively avoided, the law and jurisdiction clause could not be relied upon. Inherent in these assumptions were two fundamental issues: (i) if the 1998 Agreement was voidable and had been avoided, had clause 9 also been avoided ? (ii) if the answer to that question was 'no', did duress render a contract void or merely voidable ? In seeking to analyse these questions, Colman J started by reviewing the jurisprudence i.r.o. the separability of arbitration agreements from *Heyman v Darwins* to *Harbour v Kansa.*

The separability principle protects arbitration agreements from the consequences of the voidability of the principal contract, *but not from the consequences of the non-existence thereof* . this may appear illogical: if a party has been induced to enter into the principal contract by a fraudulent misrepresentation, he has equally been induced by that misrepresentation to enter into the arbitration agreement: had there been no inducement, he would never have entered into either agreement but it is not open to him to avoid the arbitration agreement. Why should this be ? In Colman J's view, the doctrine of separability was an emanation of a unique principle, i.e. that as a matter of a policy of the law it is so desirable that the agreement as to *how a dispute should be resolved* should be preserved that it should remain enforceable and effective even if the principal contract was voidable.

If that analysis was correct, should the separability principle apply to jurisdiction clauses ? Was there any relevant difference between an agreement to refer one's future disputes to arbitration and an agreement to refer such disputes to a particular court ? The question is whether the policy of the law reflects some intrinsic characteristic of arbitration as distinct from other forms of dispute resolution and there would seem to be no reason in principle why as a matter of policy it should be more desirable to preserve an arbitration agreement than to preserve a jurisdiction agreement.

However, in *Mackender v. Feldia AG.* [1967] 2QB 590 (CA), an insurance policy had been expressed to be governed by Belgian law and including a term that any disputes arising under it would be subject to the exclusive jurisdiction of the Belgian courts. The English underwriters claimed, in the English court, declarations that the policy (made in London) was void as contrary to public policy or that it was voidable because the assured had failed to disclose that the jewellery insured was to be smuggled into Italy. The issue before the [English] court was whether leave should be granted to the underwriters to serve English proceedings outside the jurisdiction (in Belgium), in the face of the Belgian jurisdiction clause. Lord Denning MR held that the contract was not avoided from the beginning but only from the moment of avoidance and, in particular, the foreign jurisdiction clause was not abrogated. Diplock LJ essentially agreed.

Colman J concluded that, with regard to this authority and as a matter of principle, there was no conceptual basis for distinguishing the policy applicable to jurisdiction agreements from that applicable to arbitration agreements, and that in English law the same principle of separability therefore applied to a jurisdiction clause as to an arbitration clause.

Comment

It seems to me that this analysis is not only persuasive but also correct; it is curious to see an arbitration-derived principle being applied to litigation since, perhaps too often, (refer a forthcoming article in "ARBITRATION") the boot has been on the other foot with some damage to the reputation of arbitration, at least until HHJ Anthony Thornton QC stopped the rot in *Fencegate*.

Further, with the admirable Colman J at the helm in this case, it may be unsurprising to see his decision in *Cable & Wireless v IBM* reported above but it is interesting now to speculate whether an ADR clause would be considered separable; I submit that that mist be the case, taking IFR and C&W together.

39. In *Lesotho Highlands Development Authority v Impregilo spA & Ors in joint venture as Highlands Water Venture* [2002] EWHC 435 Comm (Morison J; 15th November 2002), the Authority applied to the court to set-aside or remit a partial award (made by a highly distinguished tribunal) on the basis that it did not apply the contractual provisions as regards currencies and did not apply the law of Lesotho in respect of interest. The Authority therefore argued that the award had been in excess of the Tribunal's jurisdiction (s.67) and and/or was the result of serious irregularity in the conduct of proceedings (s.68). Since the arbitration was under ICC rules, appeal under section 69 was precluded.

In 1991 Highlands had undertaken certain obligations in relation to the construction of a dam in Lesotho; the project had been successfully completed on time. Highlands claimed reimbursement in respect of incremental wages paid to its workers; the matter was referred to arbitration in a sum exceeding $12 million. Terms of Reference were signed in 1999 including a new arbitration agreement which designated the law of Lesotho as the substantive law; the arbitration was held in London and the ToR provided that the Arbitration Act 1996 would apply in place of the Arbitration Act No. 12 of Lesotho.

The contract contained detailed provisions in respect of currencies and exchange rates, in particular the rates between the Lesotho Maloti (Rand-tied) and the various European currencies had been frozen. Further, different rates of interest were agreed for each of several currencies.

In the Award, the Tribunal had stated:

"13.15 [interest] … the fundamental question [is] whether the right to interest is … governed by the procedural [or the substantive] law … . … in [certain] jurisdictions the right … may be … governed by the substantive law ... [but] … the right to interest is regarded as a matter of procedure under English law. The tribunal received no evidence as to the applicable rules of conflict of law in Lesotho and therefore must presume this to be the same as English law. This would lead the tribunal to conclude that interest is governed by English law. The issue is, in any event, placed beyond doubt by the agreed Terms of Reference … ."

and

"13.17 [currency] … this issue is also a matter of procedural law ... For the reasons … [at] 13.15 above, … the powers under s.48 … are, *prima facie,* applicable … "unless otherwise agreed by the parties". … Whilst [the contract] may provide for the currencies in which payment under the contract is to be made, [it] is silent to the currency in which any arbitral award is to be given. … the parties have not "otherwise agreed" on the powers available to the tribunal, and the tribunal accordingly concludes that it has the power to order payment of any sum of money found to be due in any currency. … ."

The Authority argued that the tribunal had erred in deciding that it had power under ss.48 and 49 of the Act when it did not, thereby exceeding its jurisdiction [s.67(1)(b)] or its powers [s. 68].

(i) It had been wrong to have characterised the question of the currency of the award as procedural; it was necessary to look at the parties' agreement - refer *Jugoslavenska Oceanska Plovidba v Castle Investment Co. Inc* [1974] QB page 292, at pages 298, 303 and 305; and *Miliangos v George Frank (Textiles) Ltd*

[1976] 1 Lloyd's Rep. page 201, at page 208. Furthermore, Rule 209 of Dicey & Morris states "where there is doubt as to the currency ... it must be ascertained by construing the contract in accordance with the applicable law" and "The currency in which damages for breach of contract are to be calculated must be ascertained in accordance with the law applicable to the contract."

(ii) The provisions of the Act could not override the applicable law of the contract i.e. the law of Lesotho; further, the ToR provided that the Tribunal should "… distinguish between amounts in respect of the source of goods and services ... and award in the respective currencies."

(iii) In this case, no claim had been made to the tribunal that it should make an award in currencies other than as provided for in the contract which effectively required claims 12 and 37 to be in Maloti and the others in the currency proportions agreed in the contract. The tribunal should have put their proposed approach to approach to the parties since it differed to that which either party had contended for.

(iv) Interest was a substantive, not a procedural, law matter, although the rate of interest might be a matter of procedural law. Dicey & Morris Rule 196 provided: "(1) The liability to pay contractual interest and the rate … are, in general, determined by the law applicable to the contract… . (2) The liability to pay interest as damages for non-payment of a debt is determined by the law applicable to the contract under which the debt is incurred, but *(semble)* the rate of such interest is determined by English law. (3) The rate of interest awarded by virtue of clause (2) of the Rule is a matter for the discretion of the court pursuant to section 35A of the Supreme Court Act 1981, and in the exercise of that discretion the court will, prima facie, award the rate applicable to the currency in which the debt is expressed." The tribunal had been obliged to apply the law of Lesotho to ascertain the entitlement to interest and they had been wrong not to do so.

(v) The Authority would suffer substantial injustice if the matter was not remitted back to the arbitrators since the Maloti had fallen substantially between hearing and award and the Authority would pay very substantially more than if the Tribunal had followed the correct regime.

Highlands submitted as follows:

(i) The Authority's application did not fall within either s.67 or 68 of the Act and was an attempt to bypass the s.69 exclusion. The tribunal had had power under the Arbitration Act to make an award in any currency and to award interest as they saw fit.

(ii) The only conceivable basis for arguing jurisdiction was that there was an issue as to "what matters have been submitted to arbitration in accordance with the arbitration agreement." If the tribunal had erred in exercising its powers under ss.48 and 49, that was not an issue of jurisdiction. The "matters" submitted to arbitration were clearly spelt out in the ToR and incorporated both the arbitration agreement and the residual powers of the tribunal. If the tribunal had erred, that did not make the error one which gave rise to a jurisdictional challenge.

(iii) The only possible s.68 argument related to an alleged excess of power but there was no doubt that the tribunal had the powers conferred by the Act; if they exercised those powers wrongly then that was an error of law rather than a matter falling with s.68(2)(c). The ToR provided that *"subject to these terms of reference"* the arbitration would be governed by the arbitration agreement; part of the 'subject to' was cl.7.1 of the ToR which expressly empowered, if not required, the tribunal to settle the dispute in accordance with the provisions of the Act.

(iv) The mere fact that the Maloti was the stipulated currency said nothing about the currency/(ies) of award.

(v) It was unclear that interest was a matter of substantive law. In *Kuwait Oil Tanker v Al Bader (*unreported, 16th November 1998) the Court of Appeal had declined to express a view as to whether the award of interest was a substantive or procedural matter.

(vi) The contract had dealt with interest payable by the Authority in the event of late payments to Highlands but had not dealt with the power of the arbitrators to award interest.

Decision

The court should be wary of s.69 challenges pretending to be under ss.67 or 68: see, for example, *Petroships Pte Ltd of Singapore v Petec Trading & Investment Corporation* [2001] 2 Lloyd's Rep 348, 351. Morison J held that the present application was not concerned with "substantive jurisdiction" but with the way the tribunal had dealt with matters which had been referred to it rather than whether those matters had been so referred; consequently, this had to be a s.68 case or would fail. The arbitration agreement empowered the Tribunal to carry out the function previously held by the Engineer including ascertaining what sums were due and owing under the contract, i.e. more a case of ascertaining the value of a contractual debt than of assessing damages.

The way the Tribunal had approached the currency and interest issues had been different from the way that either party had presented its case. While this was not irregular, it might have been preferable if the Tribunal had put it to the parties for their comments; however, Highlands had expressly invited the Tribunal to exercise its ss.48/49 powers. The tribunal had chosen, as it was quite entitled to do, to limit oral representations. It regarded both the currency and interest issues as matters of procedural law.

Morison J considered that the Tribunal had not had the power to have made an award in currencies differing from those provided for in the contract; those were the currencies which the Engineer had been required to apply and the Tribunal had been in no different position in relation to non-procedural matters. The law to be applied was the law of Lesotho, which for this purpose must be assumed to be the same as English law. As a matter of English law, the currency of the award was a matter to be determined by the applicable law of the contract, as the Authority had submitted. The ToR required *"award in the respective currencies",* that is, in the currencies stipulated for in the contract, save to the extent that the parties otherwise agreed. The words *"subject to these terms of reference"* did not permit the tribunal to treat what was a matter of substance [or rather, a matter governed by the substantive or applicable law] as a matter of procedure. The words contemplate that on [properly called] procedural matters the Act would apply but they do not mean that the provisions of the Act took precedence over the arbitration agreement on matters of substance. In other words, the phrase *"subject to these terms of reference"* meant, and could only mean, "subject to *matters of procedure being governed by clause 7.1"*. The partial award had therefore been made in error.

Could that error fall within s.68 or had it been it an error of law ? Morison J held that the error had constituted the Tribunal's exceeding its powers since in purporting to have exercised a discretion which it wrongly believed had been conferred on it by the Act, it had asserted a power which it had not possessed. The award should be remitted so that the Tribunal could produce an award consistent with the applicable contractual provisions.

The question of interest was less clear, in the sense that there was a continuing debate as to whether matters of interest as part of damages were matters of substance or procedure or, more precisely, whether such interest was a matter determined by the applicable law or by the *lex fori.* If it was a matter of procedure, then the Tribunal had been entitled to award interest as it had but if not, then not; the views of the higher courts would be required to determine the issue conclusively.

However, the Tribunal was dealing with a Dicey & Morris Rule 196(1) case, namely the Authority's liability to pay [contractual] interest. The amount due to Highlands had been in the nature of a contractual debt rather than an entitlement to damages so that both the liability to pay and the rate of interest followed the law of Lesotho which appeared to provide that interest was only payable when the Authority could be said to have been in culpable default; and in any event the amount of the interest could not exceed the amount of the principal. The rates of interest were those set out in the contract.

There was no good reason why, if the issue of interest under a contract was a matter for the applicable law, it should cease to be so where the claim was for interest damages; where a claim was for interest by way of damages then the rate would, in such a case, be a matter for the applicable procedural law, and, in general, the rate would be that which is appropriate to the currency of the award. Again, for the same reasons as applied to the currency of the award, the Tribunal had exceeded its powers and will have to reconsider the award of interest.

40. In my newsletter #7 at section 19(2) I reported on a German case where the Bundesgerichtshof (Supreme Court) had reversed a First Instance/Appeal Court decision staying proceedings for arbitration since ZPO §1032(1) (i.e. Model Law Art 8(1)) provided that the Court must decline jurisdiction in favour of arbitration except "where the arbitration agreement is … *incapable of being performed*". The BGH found that the arbitration agreement in question was incapable because of party B's inability to finance its costs of proceeding; however, B could obtain legal aid to defend the action in Court. I commented that "this must be wrong in principle since one party's inability to pay its costs cannot, in my submission, amount to the arbitration agreement being incapable of being performed; as a practical solution, given the legal aid twist, this decision may have some merit but that is insufficient to overcome the wrongness of the principle."

Having been taken to task recently for criticising Court decisions, I am fortified in this instance to find that the law of England supports my submission. In *Janos Paczy v Händler & Naterman GmbH* ([1981] 1 Lloyds Rep 302) the Court of Appeal had reached precisely my conclusion. The CoA concluded that only if BOTH parties were incapable of financing proceedings was the AA incapable of performance.

This is set out at p.72 of the newly-published 2nd Edition of "Maritime Arbitration" – see below for some comment on this important publication.

41. Dr Peter Binder of Wolf Theiss & Partners (Vienna) may be known to you either as a former UNCITRAL man or as attendee at LCIA Seminars or as author of the impressive tome "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" a meticulous analysis of the implementation of the Model Law in the 47 jurisdictions which have done so. He has kindly contributed the following note on reform of Austrian Arbitration law (see section 9 above regarding reform of Scots arbitration law).

Reform of Austrian Arbitration Law

The current provisions of the Austrian Code of Civil Procedure (ZPO) which regulate arbitration (secs. 577 - 599 ZPO) boast a long history, and their rudiments date back as far as 1898, the last revision having taken

place in 1983. With all due respect for history, the rapid developments in the international arbitration field in recent years have now increased the pressure on Austria to modernise its arbitration law, lest it will rapidly lose importance as a venue for international arbitration. This fact motivated the Ludwig-Boltzmann-Institute in the year 2000 to set up a high-calibre working group on the reform of Austrian arbitration law. The product of the working group's two year elaboration is a draft text for the new Austrian provisions on arbitration procedure, which was recently published together with a commentary in "Entwurf eines neuen Schiedsverfahrenrechts", Paul Oberhammer (Manz Verlag, 2002).

Apart from almost doubling the number of provisions from 23 to 42, the detail contained in the draft legislative text is a drastic improvement on the current provisions of the ZPO, which through their conciseness leave almost too many issues to be decided by case law. The models for the new draft provisions are obvious: primarily the UNCITRAL Model Law on International Commercial Arbitration (UML), whose structure the draft follows. On closer examination, however, a certain similarity with the 1998 German Arbitration Law, which itself is heavily modelled on the successful UML, becomes apparent. Like the German law (and some of the other adoptions of the UML), the draft Austrian provisions attempt to make a number of useful additions and amendments to the UML, thereby counteracting UNCITRAL's goal of achieving the greatest possible harmonisation in international commercial legislation. The working group itself also admits to borrowing from the Swiss, French and English arbitration laws, and the commentary states that the group attempted to make the draft provisions compatible with most institutional arbitration rules.

Regarding the structure of the draft provisions, the working group resisted the temptation to retain the structure of the current provisions and created an entirely new, as well as now logically organised, text following the UML's structure:

Chapter I	General Provisions (secs. 577 - 580 ZPO)
Chapter II	Arbitration Agreement (secs. 581 - 585 ZPO)
Chapter III	Composition of Arbitral Tribunal (secs. 586 - 591 ZPO)
Chapter IV	Jurisdiction of the Arbitral Tribunal (secs. 592 - 593 ZPO)
Chapter V	Conduct of the Arbitration Proceedings (secs. 594 - 602 ZPO) Chapter VI - Making of Award and Termination of Proceedings (secs. 603 - 610 ZPO)
Chapter VII	Recourse against Award (secs. 611 - 614 ZPO)
Chapter VIII	Recognition and Enforcement (sec. 615 ZPO)
Chapter IX	Judicial Procedure (secs. 616 - 618 ZPO)

The commentary notes that the working group made a concerted effort to incorporate useful solutions for burning issues. One of these issues is the form requirement of the arbitration agreement, an issue currently under examination by UNCITRAL's own "Working Group on Arbitration" with a view to revising the UML's article 7 and making it more useful in coping with modern business practices. A further point of the draft I would like to point out here is the issue of a proxy's power to conclude an arbitration agreement, a point that is in desperate need of repair in the current law: under the present legal situation, a special certificate of authority, which must be concluded according to the same (strict) form requirements as the arbitration agreement, is necessary for the proxy to validly conclude an arbitration agreement for his master. To my knowledge, this most impractical requirement can not be found elsewhere in modern international arbitration legislation. The draft sec. 583 ZPO remedies this uncomfortable situation by detaching the form requirement for the conclusion of the certificate of authorisation from that of the arbitration agreement, thus making oral conclusions of proxies possible at last.

The above examples are just two of the whole array of exciting, novel features to be found in the new draft; a detailed, further examination of these features would, however, go beyond the scope of space offered to me in this newsletter.

In the meantime, the draft has been presented to the Ministry of Justice and it is to be expected that more or less the exact text of the current draft law will be passed by the government. However, judging by the rate at which Austrian government is currently moving - since the last election on the 24th of November, 2002, the major political parties have so far failed to form a coalition - it is uncertain exactly when the draft will be passed. In any case, the new law will help put Austria back on top of the arbitration map, which - keeping in mind the fact that within the next decade Austria is likely to "move" from the outskirts of the European Union to its centre - is all the more important.

Dr. Peter Binder, LL.M. (E-Mail: pbinder@wtp.at)

WOLF THEISS & PARTNERS (Vienna-Praha-Bratislava-Beograd)

42. <u>Miscellaneous cases reported elsewhere:</u>

International Arbitration Law Review (which I commend to your attention) contains, in addition to the customary articles, a "News Section" containing short reports of interesting cases from around the world; with the kind co-

operation of the Editor, David Holloway (Barrister – Tanfield Chambers), and with the generous permission (for which I am most grateful) of the publishers, Sweet & Maxwell, I am able to bring you the following

(1) A recent case in the German Bundesgerichtshof (BGH, the Supreme Court) is relevant to all countries: did the transferor of an interest in a limited partnership (LP) remain bound by the arbitration agreement (AA) binding the parties thereto ? P and D had been such partners and under the AA disputes "arising out of the legal relationship between the partners" were to be settled by arbitration. P subsequently transferred its interest in the LP to a 3rd party competitor and D initiated arbitration proceedings against P claiming violation of a prohibition of competition contained in the partnership agreement. P commenced court proceedings seeking a declaration under §1032(2) ZpO arguing that D could no longer seek arbitration since P was, post-transfer, no longer bound by the AA. P relied on a long line of BGH decisions confirming that the rights and duties under an AA are automatically transferred along with the rights under he principal contract to which the AA relates.

The BGH dismissed P's application:

(i) the authorities cited by P had been concerned solely with whether the transferee was bound by the AA and it was a wholly different question whether the transferor remained bound or was released;

(ii) whether such a release applied depended on the parties' intentions in entering into the arbitration agreement.

In the present case the parties had been free to limit the scope of the AA to the existing partners but had not done so; further, noted the Court, the continuing obligations of a transferor, particularly in respect of competition, could be envisaged as giving rise to post-transfer disputes which the parties had evidently intended to remain subject to the AA.

This BGH decision, in part confirming that the AA is an accessory right, therefore binding on transferees whether or not the latter expressly assented thereto, consistent with the generally prevailing international view, e.g. in France, Switzerland and the USA. However, the present case asks, apparently for the first time, whether the automatic transfer of rights under the AA amounted to an automatic complete release of the transferee; the answer is no.

Comment: this seems entirely logical; however, I will leave to others question of the status of the "non-compete" provision under EU law. In the oil industry, with frequent transfers of production licence interests, I am used to drafting very precise terms allocating risks, obligations and liabilities pre/post the effective date of transfer.

(2) Giving effect to my intention to widen the scope of this Newsletter as far as possible, I am pleased to report a first Hungarian case (5.P.22.301/2002/5). A claimant seller sold a factory to the respondent buyer but subsequently cancelled the contract alleging RB's breach of contract; the latter contested CS' right to cancel. In the Arbitration Court, CS claimed (i) a declaration as to the validity of its right to cancel and (ii) consequent damages; RB sought dismissal of the claim and counter-claimed HF629m plus interest.

The tribunal rendered a partial award rejecting CS' claim and holding that the cancellation of the contract had been unlawful, stating therein that "[it would] give the reasons for the partial award in the final award". RB commenced proceedings in the Budapest Municipal Court seeking the setting aside of the partial award on the grounds that it was unreasoned. The Court granted set-aside with reference to Art.55(1)(e) of the Hungarian Arbitration Act (HAA) which allows the setting aside of an award if "... [it] was not in accordance with this Act": HAA Art.41(2), in providing that the "the award shall state the reasons upon which it is based, unless it is a [consent] award", makes no distinction between interlocutory, partial or final awards in this regard; consequently, reasoning may be omitted only if the parties so agree or in the case of a consent award.

Comment: no surprise to English Arbitrators (ss.47(1) and 52(4) refer); it is, however, reassuring, that jurisprudence around the world is generally reaching the same conclusions in such matters.

(3) Diversifying further, an interesting case (CZP 8/02; 8th March 2002) arose in Poland whereby an individual, KK, entered into a lease, containing an arbitration agreement, with the Agricultural Agency of the Polish Government (it would appear, in a quasi-privatisation circumstance). The Agency sought to annul an arbitral award arguing that the arbitration agreement (AA) had been entered into on its behalf by an attorney acting only on the basis of a general power of attorney (GPoA); the Regional Court in Poznañ held that a GPA was insufficient to conclude an arbitration agreement; on appeal, the first instance judgement was broadly upheld and the case was referred from the Appeal Court to the Polish Supreme Court.

The Supreme Court clarified that an AA should be regarded as a contract of derogation from the jurisdiction of State Courts and should be regarded as a separate agreement from the principal contract (PC) so that, consequently, the validity of entry into the AA (i.e. the validity of the PoA) had to be considered separately from the validity of entry into the PC. Art. 98 Polish Civil Code provided three classes of PoA: (i) general, conferring authority for the acts of ordinary management; (ii) specific to a

specific act, necessary when that act was outwith 'ordinary management'; and (iii) where the law expressly required that a specific act could be performed only if the attorney had a specific PoA. There was nothing in Polish law putting AAs into (iii); was entry into an AA within the ordinary powers of management or not ? The entry into an AA had important/significant consequences, the main one being the substantial exclusion of State Court jurisdiction; entry into an AA therefore directly affected a party's right to legal protection and such entry was therefore a significant legal act, exceeding the scope of ordinary management and therefore requiring a specific PoA, a general one being insufficient.

Comment: as with the Hungarian case, this must be right as a matter of general principle.

(4) Living, as I do, in a country (i.e. Scotland, as opposed to England), where I often despair at the priorities of our Legislature (e.g. more recently concerned with fox-hunting, child-smacking and releasing convicted killers from jail than with major commercial issues such as the long-overdue reform of Scottish arbitration law) it is refreshing to read of a country where the Legislature is prompt and responsive to lacunae or other difficulties raised by its legislation. I have previously reported on cases in Singapore where the Courts have created serious difficulties in relation to the interface between arbitration rules on the one hand and Singaporean legislation on the other; following a change in the law in 2001 following the *John Holland v Toyo Engineering case* (see Newsletter #3), a further Singaporean case, *Dermajaya Properties v Premium Properties* ((2002) 2 SLR 164), on which I have previously reported (see Newsletter #4), raised a new difficulty regarding Singaporean legislation which was cured by an Amendment Act raised on 27th August 2002 and passed only five weeks later; in its press release of 24th August, 2002, the Ministry of Law stated that "the Bill will clarify that parties have full liberty to agree on their own arbitration rules and their choice of arbitration rules will be fully respected under Singapore law. This approach will, thus, reaffirm the principle of party autonomy in international arbitration."

The issue in *Dermajaya* arose from the arbitrator having power to grant security for costs under Part II of the IAA but not under UNCITRAL Rules and the "domestic" Arbitration Act 1953 (since repealed): the Court had held that the adoption of UNCITRAL Rules was insufficient to exclude application of the Model Law and IAA; in addition, those Rules were held completely excluded being incompatible with the Model Law and IAA (Note: possibly the most startling conclusion of any Court in recent years i.e. to declare that the UNCITRAL Rules were incompatible with the Model Law !)

Under the new IAA s.15A, Rules will be given effect to the extent they are not inconsistent with mandatory provisions of statute from which the parties cannot derogate. In particular, provisions of rules are not inconsistent with the Model Law or Part II of the IAA if (i) they merely provide for a matter on which the Model Law/Part II are silent; (ii) they are silent on a matter covered by the Model Law or Part II; or (iii) if they provide for a matter which is covered by a provision of the Model Law/Part II which permits the parties to agree arrangements for that matter but which provides a default provision absent such agreement: such arrangements may be made by agreeing Rules or otherwise.

Comment: three cheers for the Singaporean legislature !

(5) In *George Watts & Son Inc v. Tiffany & Co*, (248 F.3d 377 7th Circuit 2001) the US Seventh Circuit Court of Appeals gave guidance on when "manifest disregard for the law" by an arbitral tribunal justified setting aside of its award.

Pursuant to a dealership agreement, W sold T's products in Wisconsin; T sought to terminate the agreement and W filed suit; the parties then agreed to arbitrate and the subsequent award, largely in W's favour, did not award it its legal costs. W applied to the District Court for an order for payment of legal costs, claiming that the tribunal had manifestly disregarded Wisconsin law in failing to award them. The District Court upheld the award and the 7th Circuit Court of Appeals affirmed that decision, noting that, while an error of law was not a ground listed in the Federal Arbitration Act for vacation or modification of an award, the US Supreme Court had endorsed "manifest disregard" as a non-statutory basis for vacation but had not provided guidance as to the application of such principle. The Court held that "manifest disregard" prevented enforcement of only two limited kinds of order: (i) one requiring the parties to violate the law and (ii) an order which did not adhere to the legal principles specified by contract. While a tribunal could not order the parties to violate the law, any compromise decision it reached must lie within the limits set by the arbitration agreement; no rule of Wisconsin law prevented W and T from agreeing that each should bear its own costs and the tribunal was therefore permitted to order (effectively) the same outcome. The Court observed that those "who want their arbitrators to have fewer powers need only provide this in contract".

(6) In Bowen v. Amoco Pipeline Co (254 F.3d 925 10th Circuit 2001) the 10th Circuit Court of Appeals ruled, in contradiction of decisions by the 5th and 9th Circuits, that the parties could not interfere with the judicial process by imposing on the courts an enhanced standard of review of awards.

Mr and Mrs Bowen owned part of a stream crossed by an oil pipeline; on the discovery of pollution, they commenced proceedings in the District Court against Amoco and others which the Court ordered to arbitration. The parties agreed to modify the arbitration rules to expand the scope of judicial review to allow

either party to appeal the award to the District Court on the ground that the award was not supported by the evidence. The tribunal found in favour of the Bowens and issued a megabuck award including punitive damages which Amoco sought to have vacated on the basis that the award was not supported by the evidence. The District Court declined to apply this higher standard of review, holding that parties could not in contract or otherwise amend the standards laid down in the FAA. The 10th Circuit Court of Appeals upheld this decision: it was not open to the parties to interfere with the judicial process by seeking to impose higher standards of review upon the courts.

This decision expressly contradicts decisions made by the 5th and 9th Circuits, reflecting the tension between two aspects of public policy (i) that in favour of limiting the scope for judicial review of awards and (ii) that in favour of enforcement of arbitration agreements as drafted. A definitive ruling from the US Supreme Court is necessary,

(7) In an interesting multi-jurisdictional case, the Spanish Supreme Court granted exequatur of an award issued by the Czech Chamber of Commerce Arbitration Court which (inter alia) ordered a Spanish company A to pay a Czech company C interest on late payments in the sum of $112,000. The Supreme Court's decision applied both the New York Convention 1958 (NYC) and a Bilateral Convention (1987) (BC) between Spain and the former [Communist] Czechoslovakia, the BC having subsequently been ratified by the Czech Republic.

A argued against grant of exequatur on the basis that (i) the Supreme Court was not the competent court (ii) there had been inconsistencies in the grant of the award (iii) neither its submission to the arbitration agreement nor the arbitration agreement itself were valid and (iv) it had neither been notified of the arbitration proceedings nor of the award against it. Regarding (i), A's argument was based on apparent conflicts between the BC and the NYC; despite the inconsistencies of language the Supreme Court held that it did indeed have jurisdiction since the matter would have come before it in any event. Regarding (ii), the Supreme Court saw A's arguments as going to the merits of the tribunal's decision that was outwith the Court's jurisdiction and Art.5(1)(c) NYC did not apply. In regard to (iii), A had alleged that there was no "written agreement" as required by NYC since the arbitration agreement had not been signed by its legal representative, the pre-printed purchase confirmation order containing it on its reverse. The Court held that the arbitration agreement was clearly incorporated in the general terms and conditions and, although on the reverse, there was no evidence to support the argument that the parties had not intended to enter into it. In regard to (iv), C exhibited certified documentation evidencing the service of notice on A of the arbitration proceedings and the award, the former even having been stamped by A and signed by its representative (doh !!!) and it was found that the notification of the award had been correctly delivered to A notwithstanding being returned by A's representative.

(8) In *Cathay Pacific Airways Ltd v Hong Kong Air Cargo Terminals Ltd* (2002 UKHC 193; Deputy Judge Gill) the principal question was whether an arbitration agreement had come into existence in circumstances where the principal contract had been negotiated but not concluded.

The parties commenced negotiations of an airport cargo handling contract although no agreement was ever concluded; HKACT proposed a draft agreement containing an arbitration clause and Cathay made a counter-proposal incorporating a different form of arbitration clause. Subsequently, cargo claims arose and Cathay issued proceedings against HKACT which, in turn, applied for a stay in favour of arbitration, arguing that (i) its proposed draft had been an offer to Cathay to submit all disputes to arbitration, (ii) Cathay's counter-proposal had incorporated a different form of arbitration clause but had not rejected arbitration, (iii) both parties had therefore demonstrated the intention to arbitrate and (iv) the parties' conduct had brought into existence an arbitration agreement despite the fact that the principal contract was never concluded. The Court declined to grant a stay on the basis that no arbitration agreement had come into existence; HKACT had had to show the presence of the essentials of offer and acceptance in respect of the arbitration agreement. However, there had been an offer and counter-offer but no acceptance and therefore no contract, the differences between the proposed arbitration clauses indicating absence of reaching minds.

The position is similar in English law, not least following *Downing v Al Tameer* in which Potter LJ emphasised that basic principles of contract law applied to arbitration agreements.

43. Singapore represents a lacuna in my world in not having an on-line Court reporting system so I am reliant on others for information about the several interesting cases which have arisen there. The Singapore office of Baker & McKenzie, Wong and Leow publishes an interesting and valuable newsletter containing short reports of relevant cases; with the generous permission of that firm (via David Howell) for which I am most grateful, I am able to bring you the following:

(1) In *Mitsui Engineering and Shipbuilding Co Ltd v PSA Corporation Ltd and Keppel Engineering Pte Limited* (suit number 114 of 2002; unreported; Woo Bih Ji; 2nd August, 2002) the High Court considered factors relevant to determining whether an arbitration was to be considered 'international' under Singaporean law, there being separate legislation for international and domestic arbitration. The International Arbitration Act states (summarising) that an arbitration is international if any of the following are outwith Singapore: (i) the place of business of one of the parties (ii) the seat of the arbitration, (iii) a place where a substantial part of the contractual obligations is to be performed or (iv) the parties have agreed that the subject matter of the arbitration agreement relates to more than one country; where a party has more than one place of business, the relevant place of business shall be that with the closest relationship to the arbitration agreement.

Mitsui was incorporated in and had its his head office in Japan but also had an operational office in Singapore; it was accepted that that it had a place of business in both; which place had the closest relationship to the arbitration agreement ? The Court concluded that Japan was applicable since (i) the contract was substantially performed in Japan; (ii) Mitsui's principal negotiator was based in Japan, not in Singapore; (iii) formal communications to Mitsui were to be sent to Japan; (iv) Mitsui's Japanese address was used in the contract. The arbitration was therefore an international arbitration, the fact that the governing law of the contract was Singapore law and the fact that the seat of the arbitration was Singaporean were considered irrelevant; furthermore, even if Mitsui's place of business was deemed situate in Singapore, since the substantial performance of its contractual obligations took place in Japan the arbitration was still an international one.

(2) In *WSG Nimbus Pte Ltd v. Board of Control for Cricket in Sri Lanka* (OS No. 601627/2001; unreported; Lee Seiu Kin J; 13th May 2002) the High Court held that an arbitration agreement under which the parties have a right or option to elect to submit the dispute arbitration is a valid "arbitration agreement" for the purposes of the International Arbitration Act. In addition, the Court held that in objecting to the jurisdiction of the Sri Lankan Courts, WSG had not thereby submitted to the jurisdiction of those courts for purposes of deciding the issue of jurisdiction. Interestingly (refer above), the Court considered the English case *Lobb v. Aintree*. Most importantly, the Court held that an agreement by which either party has the option to elect for arbitration which option, if exercised, bound the other party to submit to arbitration is an arbitration agreement.

(3) In *Koh Brothers Building & Civil Engineering Contractors Pte Ltd v. Scotts Development (Saraca) Pte Ltd* (OM no. 600013/2002; unreported; Judith Prakash J; 21st September, 2002) the Court removed an arbitrator for misconduct in a domestic arbitration. In the course of the arbitration, the Contractor applied for an interim summary award for payment of certain sums but the Employer objected to the application on grounds of 'res judicata'. The arbitrator agreed to hear the Employer's preliminary objections to the application before deciding whether to hear the application itself. In the course of the hearing, submissions as to both the preliminary objections as well as to the merits were raised but, following the hearing, the Employer reminded the arbitrator that the hearing had been solely for the purpose of considering the preliminary objections, and there had been no full hearing of the merits of the application. However, the arbitrator proceeded to hold that it was inappropriate for him to hear the Contractor's application, in doing so referring to the merits of the application not merely to the preliminary objections.

The Court held that the arbitrator had misconducted the arbitration by (i) exceeding the scope of reference for the preliminary hearing; (ii) failing to indicate that he was considering making a decision on the merits of the application on the basis of the submissions made at the hearing and failing to permit the Contractor an opportunity to reply; and (iii) by failing to give the parties an opportunity to address him on the merits of the application so that he could determine whether the issues could be dealt with summarily. In deciding on removal, the court applied a test very similar to that applicable under English law that removal should follow only if it was determined that the conduct of the arbitrator was such as to make any reasonable person think that there was no real likelihood that he could not or would not fairly determine the relevant issues.

It should be noted that, under the new Arbitration Act 2001 'misconduct' as such is no longer a ground for removal and a 'substantial injustice' test, similar to that in s.24 of the English Act, applies.

44. While I do not propose to produce a full-length book reviews, I thought it might useful if I mentioned briefly those books which have crossed my desk or which I have bought recently.

(1) "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" by Dr Peter Binder (author of the note on arbitration law reform in Austria, above) (Sweet & Maxwell; 2000; ISBN 0421-739-401: £145.00), represents an invaluable reference book, concisely summarising the background to the Model Law drafting process (Dr Binder worked at UNCITRAL hence his comments in this context are especially valuable) but, most significantly, providing a clause by clause comparison of precisely how the Model Law

has been implemented in the 50-odd jurisdictions in which it has been. I was almost stunned by the extent to which small details differ from country to country and it shows how careful one has to be in this context.

(2) Although by a different publisher (Kluwer), a newly-published book "Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration (1985-2001) by Henri C. Alvarez, Neil Kaplan CBE QC and David W Rifkind (ISBN 90-411-1925-6; 2003; a remarkable £61) lists several hundred cases on a clause by clause basis thereby representing another invaluable source of additional data as to how the Model Law has been applied by the Courts; the book includes cases from Canada and Hong Kong (constituting the majority of the book) but also from Bermuda, India, USA, Australia, Singapore, Russia and New Zealand (none from Scotland – there have been none reported in the 12 years of the Model Law !). The case reports are generally a page or so and do not constitute or give detailed analysis. I have already found the book useful in pointing me in the right direction in respect of queries.

These two books are an essential pair in my practice.

(3) Also recently published by Kluwer is the second edition of "Dispute Resolution in Asia" edited by Professor Michael Pryles (ISBN 90-411-1894-2; 2002; £96). After a useful broad-brush opening chapter entitled "The Cultures of Dispute Resolution in Asia" the book continues with sections, each contributed by specialists, on Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, the Philippines, Singapore, Taiwan and Việt Nam. The latter Chapter, jointly written by a partner in Coudert Frères (Paris) and a Professor of Law at the Open University of Saì Gòn, indicates the rudimentary nature of the arbitral environment in Việt Nam where although there has been established a Việt Nam International Arbitration Centre (few of whose 11 arbitrators reportedly speak English) and although various rules and regulations have been enacted, there are many gaps and a great deal remains to be done. The book is generally strong in addressing mediation and/or conciliation in each (but not every) country covered.

(4) "London Maritime Arbitration" has recently been republished in a new second Edition (Informa; ISBN 1-84311-146-2; £164) with the inimitable Bruce Harris added as a Consulting Editor to the two distinguished barristers, Clare Ambrose and Karen Maxwell; in a witty foreword to the new edition, Bruce Harris explains that he was inveigled into co-editing following his reviewing the 1st edition in “ARBITRATION”. Be that as it may, the book seeks to strike, and generally succeeds in striking, a balance between the academic/theoretical and the practitioner’s experience. I found some of the discussion of the 1996 Act outstanding in its clarity and precision and the book could easily be read a for this alone. In general, each section of the book sets out the provisions of the Act and other law followed by an outline and analysis of the applicable LMAA Terms in conjunction with other practical comment derived, presumably, from Bruce Harris’ unrivalled practical experience. I found the book unquestionably of value but confess to some disappointments: first, there is a powerful emphasis on "London" and at the opportunity to place ‘London Maritime Arbitration’ in an international context, whether by reference to arbitration in New York or by reference to the Model Law or otherwise, has been lost (perhaps consciously, due to tight space limitations). Secondly, I take issue with some of the statements made in the book such as, for example, (a) [p.278] that s.63 (5) gives substantially the same approach to costs as in litigation; as I have argued in an article to be published in “ARBITRATION” Vol.69/2 (May 2003), following HHJ Thornton QC's outstanding judgement in ***Fencegate***, such a view is patently wrong; and (b) [p.172} it is stated that an agreement under s.69 to exclude appeals is necessarily an agreement to waive reasons; this is clearly not the case even if the converse is.

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #9
DECEMBER 2003

Contents

SECTION A – UK Domestic - Arbitration

1. Can an arbitrator award interest on costs under s.49(3)(a) ? Discussions and exchanges of e-mail correspondence have revealed divergent views on this question although it is noted that CPR Rule 44.3(6)(g) gives a judge express power in this regard in respect of court proceedings. I consider the arguments applicable to arbitration and comment on some recent jurisprudence as regards litigation.

2. S.69 has been "in the news" with major articles in ARBITRATION (Vol. 69/1 and 69/3), one arguing for repeal, the other for retention; the London Shipping Law Centre recently hosted a significant debate on the matter with a panel of four distinguished speakers chaired by a no less distinguished former High Court judge. Given the constitution of the audience and given that the maritime sector has always been strongly in favour of s.69, the show–of-hands vote gave a wholly unsurprising result. However, the debate itself was of interest and is reported below.

3. S.39 appears much discussed yet little used; however, it was considered in the case *BMBF No.12 Ltd v Harland and Wolff* in the context of BMBF seeking remission of a s.39 Interim Award under s.69(7) so that hindsight could be applied in recalculating the quantum of the Interim Award. Unsurprisingly, this saw short shrift from the Court of Appeal.

4. Continuing the s.69 theme, *Mowlem v Newton Street* saw interesting questions of the scope of a Main Contractor's responsibility arise in an arbitration with the near-inevitable outcome Arbitrator 1 Appellant 0

5. The interface between, on the one hand, an English arbitral award and its enforcement in England and, on the other, counter-action taken in a foreign court, is a fruitful source of interesting cases and *People's Insurance Company of China (Hebei Branch) & Or v Vysanthi Shipping Co Ltd*, a Cypriot company, is also another example of the world's maritime trade coming to London to resolve its problems. The case is also of mild interest in that it was one of last decisions of Thomas J prior to his promotion to the Court of Appeal.

6. Pursuing the s.69 theme, *NYKK v Golden Strait* saw yet another defeat of a s.69 application; what singles out this case is the Judge's comments on the Award itself.

7. In *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*, the latter not only tried to avoid its obligations under a Government Guarantee of a state-owned entity but also tried to defeat the Malaysian-owned Sabah's reliance on an English jurisdiction clause by taking pre-emptive action in the courts of Pakistan. Perhaps unsurprisingly, the Court of Appeal rejected both the attempted avoidance and the taking of such action in the local courts. This decision is, in my view, important since the Court of Appeal refused leave to appeal to the House of Lords and therefore, barring some exceptional circumstance, the decision is final in respect of the very common type of guarantee in use in this case

8. In *BLCT (13096) Ltd v J Sainsbury plc*, yet another unsuccessful s.69 appeal, this one arising out of a rent review arbitration, the Court of Appeal considered s.69(5) and (6) in detail with particular reference to the *North Range* case and the interface between Art.6 ECHR and arbitration. Applying both *North Range* and ECtHR jurisprudence, the Court of Appeal found s.69(5) and (6) compatible with the ECHR. It is understood that this case may be appealed to the House of Lords.

9. Just as English arbitration is criticised by continental Europeans for allowing excessive interference by the judiciary, Scottish arbitration is open to similar but greater criticism in the greater scope (given the antiquated common law basis of Scottish domestic arbitration law in the absence of a modern arbitration statute) for supervision of arbitrators by the judiciary. As I have argued elsewhere, the availability of rights of appeal in England is necessary but almost all such appeals are unsuccessful (see elsewhere in this newsletter), the judiciary taking a firm line. Despite the greater degree of supervision in Scotland, it is reassuring to note that modern thinking has arrived on the judicial bench. In *Haden Young v Dinsmore*, the claimant sought to injunct the Arbiter from proceeding with the arbitration until it had had a proper opportunity to consider late-submitted expert reports; the Arbiter's procedural decisions were upheld by the Court.

10. In *Brican v Merchant City Developments*, a Scottish case, there was a tripartite arrangement between the Employer, the Main Contractor and the Sub-contractor whereby the Employer was to pay the Sub-Contractor direct, there being valid concerns about the solvency of the Main Contractor. In simplified terms, the Sheriff reached the right conclusions via a wrong analysis in law, on appeal the Sheriff Principal reached the wrong conclusions and, on appeal to the Inner House of the Court of Session, the latter restored the Sheriff's conclusions while correcting the analysis.

11. I trust that non-Scottish readers will bear with me as I consider three interesting Scottish cases where the Arbiter stated a case for the opinion of the Court of Session under s.3 Administration of Justice (Scotland) Act 1972. I have argued before that continued retention of s.3 in Scotland is an anomaly and it is proposed to repeal it pursuant to the Arbitration (Scotland) Bill. However, the questions of law incorporated in the stated cases are not entirely dissimilar to the questions of law currently being brought before the English High Court under s.69 and, despite the anomaly of the Stated Case Procedure, give rise to points of some interest.

SECTION B – UK Domestic - Other

12. Her Honour Judge Frances Kirkham gave a very interesting address to the Scottish Branch of the Chartered Institute of Arbitrators at its 2003 Annual Dinner and she has very kindly consented to the reproduction of her speaking text in this Newsletter for which I am most grateful. Her topic might be entitled "A View from the Bench" but includes important comment on the "Future of Arbitration".

13. I have reported previously on cases of Judges trashing Expert Witnesses or Arbitrators, in part addressing a case where an expert witness architect was not only heavily criticised in the judgement but was reported to his professional body for an alleged significant failure to comply with his CPR Part 35 obligations. That architect was subsequently completely exonerated by his professional body's disciplinary committee. Since reporting on the case, I have seen the published decision of the disciplinary committee and I comment further on the case, particularly with a view to assisting expert witnesses in future such cases.

14. In *Bank of Scotland v HY Butcher and Co*, the principal facts and issues (relating to guarantees given in respect of a partnership agreement) are not germane to this report but the Court of Appeal, by way of postscript, made some powerful comments concerning the bundles lodged with the Court by Butcher's Solicitors. This criticism, in trenchant terms, extends that seen in several recent cases (e.g. in *Northern Pioneer*) where Solicitors have become engaged in paper wars to the initial dismay, and subsequent near-fury, of the Court of Appeal. Arbitrators dealing with ludicrously oversize submissions (as I was recently in a documents-only case) will be fortified by the Court's trenchant comments.

SECTION C – International Arbitration and Other Matters including Conflict of Laws

15. I am indebted to the Editor and Publisher of International Arbitration Law Review for permission to report briefly on interesting arbitration cases from around the world by way of extracts. This issue contains reports from the US Supreme Court (1), California (1), Germany (4), Switzerland (4), Indonesia (2), Nigeria (1) and India (1).

16. I am also indebted to the Editor and Publisher of the ABA's International Arbitration News for permission to report briefly on interesting US arbitration cases by way of extracts; 12 of the 14 cases addressed are from the Appeals Courts.

17. I am also indebted to Messrs Baker & McKenzie's Singapore office for permission to report briefly by way of extracts on interesting Singapore arbitration cases by way of extracts.

18. A student recently raised an interesting query concerning awards annulled in the jurisdiction of the seat of the arbitration but enforced in another. A new and important book on this topic, by Dr Hamid G Gharavi, has been published.

19. The distinguished maritime consultant and arbitrator, Simon Everton, recently won a prize in a major international Essay Writing Competition organised by the London Shipping Law Centre and sponsored by

Charles Taylor Consulting; his topic, "What Would be an Effective Deterrent to Sub-Standard Shipping ?" is of interest, not only in itself, but because of its introduction of elements of oil industry thinking into a maritime issue. With the kind permission of the London Shipping Law Centre and of Charles Taylor Consulting, to each of whom grateful thanks are here recorded, I am pleased to publish Simon Everton's distinguished and highly interesting essay.

Text

SECTION A – UK Domestic - Arbitration

1. In a recent case, an award was given substantially in the Claimant's favour and "costs followed the event", to be determined by the arbitrator if not agreed which they were not. Although the successful Claimant was slow in putting together its costs submission which comprised a collection of paid invoices with supporting explanations (CPR and court procedures did not apply to the case so the submission was not in court-style Bill of Costs form), apparently for reasons of the closure of the company's relevant office and the transhipment of all documents to another office, the Respondent did nothing with the costs submission, despite several express undertakings to deal with it within stated timescales, for more than seven months. Consequently, through the Respondent's delay the Claimant was kept out of its money for seven months longer than it should have been.

   When the Respondent finally replied to the Claimant's costs submission, it attempted to lay the delay at the Claimant's feet and, rather curiously in my view, claimed some form of compensation in this regard; however, the simple facts of the case were that the Claimant's five-month delay in submitting its schedule of costs was to the Respondent's advantage in delaying 'the dreadful moment' when it had to pay. Further, the additional seven-month delay caused by the Respondent was entirely its own fault and also delayed the Claimant being reimbursed; I was unable to understand what loss the Respondent thought it had suffered as a consequence of this latter delay.

   In the circumstances, and considering that the reference in s.49(3)(a) to the "justice of the case" and given that the Respondent had itself opened the door regarding compensation for the seven-month delay, I duly awarded interest for that seven-month period on the Claimant's costs which, in any event, had been paid out more than a year before. It should be noted that the award on the merits in the substantive case had fixed liability for costs on the Respondent and the 7-month period post dated that award.

   In discussing a similar case where the respondent was causing unreasonable delay in the determination of costs process, a highly-respected colleague responded that it was not possible to award interest on costs other than, perhaps, interest to run after the award was made. The apparent justification of this contradictory position was a 1988 case, *Hunt v RM Douglas Roofing* ([1988] I App Cases 398), discussed in the 2nd edition of Michael O'Reilly's book "Costs in Arbitration Proceedings" at 4.1.2, 4.8 and 5.7.3; the essence of the argument is that no liability for costs arises until the costs award is made and that therefore interest cannot be awarded in respect of any period prior to the date of the costs award. Of course, since 1988 the law has changed very significantly both in respect of litigation (i.e. the CPR) and in respect of arbitration (the Act) so the question arises as to whether *Hunt v Douglas* remains good law.

   Let me consider litigation first: CPR Rule 44.3(6)(g) clearly supersedes *Hunt v Douglas* which therefore has no continuing effect. In "ARBITRATION" volume 69/2 on "Costs in Litigation", I addressed the major case *Amoco v British American Offshore* (QBD 1999 Folio 1159; 22nd November 2001) where Langley J concluded that, in principle, he should award interest on BAO's very substantial costs although, in fact, he did not do so for reasons related to other legal proceedings in Texas between the parties. He noted in his judgement that there appeared to be no [post-1999] authority relating to the award of interest on costs.

   It seemed to me that the logic of Langley J's judgement applied equally in arbitration and in my specific case where the unreasonable actions of the losing respondent caused the successful claimant to be delayed recovering its costs for some length of time and, necessarily, the loser incurring financing or other costs of being kept out of its money. It should be noted that Michael O'Reilly addresses financing costs at section 5.7.3 of his book, citing *Hunt v Douglas* and other cases from 1881 and 1981. The question of whether those cases are still good law remains open

   In principle, therefore, there seemed to me to be no objection to the award of interest on costs in arbitration; in addition, the purpose of the award of costs is indemnity i.e. to restore the successful claimant to the position he would have been in had the proceedings never been brought. The indemnity principle underlies the award of interest on the principal sums due in arbitration or in litigation. I saw no difference in principle where the successful claimant had paid out monies, i.e. to his Solicitors or other advisers, and only recovered those monies as a later date; to me, the indemnity principle clearly justifies, at least in principle, the award of interest on costs in such circumstances.

   I referred my draft argument to Professor Robert Merkin, editor of the seminal "Arbitration Law" loose-leaf manual, and to Professor Michael O'Reilly. Neither of the distinguished professors entirely agreed with my argument but Professor Merkin, in broad terms, suggested that it would be unlikely to be disturbed by a court. He also pointed out, which I had overlooked, that pre-CPR the judge had no power to award interest on costs and therefore that the Act had been drafted in that context and, consequently, it could reasonably be argued that the drafters of the Act had not envisaged s.49(3)(a) being stretched to the point of covering interest on

costs. However, I would argue that the thought processes of the drafters in 1995-96 is not relevant (other than captured in the DAC Reports which nowhere address the interest on costs point) and the true question is "what does the Act actually say ?"

Summarising briefly, Professor O'Reilly's response to my argument was to suggest that the principle in *Hunt v Douglas* subsisted i.e. that the liability to costs arose only when the costs award was actually made and therefore that applied to preclude any order of interest prior to the date of the costs award. He suggested, therefore, that there was no authority upon which to make such award of interest on costs.

I return to my fundamental argument: the principles underlying the award of costs in litigation were set down in *London & Scottish Benefit Society v Chorley* ((1884) 13 QBD 873) and these principles (the LSBS principles) were not only cited with approval by the Court of Appeal in 2002 (in *Malkinson v Trim* [2002] EWCA Civ 1273) but were also stated to have survived the introduction of CPR. Consequently, it follows that the LSBS principles survive, at least as regards litigation. One of those principles is the indemnity principle. I therefore rely on this case and its recent citation in the Court of Appeal as authority for my fundamental argument on the indemnity principle underlying my main argument justifying the award of interest on costs.

In any event, the language of s.49(3)(a) is not only wide enough in terms to encompass an award of interest on costs, it includes reference to "as meets the justice of the case"; if delay on the part of the paying Respondent keeps the Claimant unreasonably and justifiably out of his money for any material length of time, then, I will argue, the justice of the case requires that the Claimant be compensated accordingly and that necessitates the award of interest on costs. As Professor Merkin observed, given express provision in this regard in CPR and given Langley J's establishing of the principle in *Amoco v BAO*, it would appear unlikely that a court would disturb such an award.

In order to sustain my argument, *Hunt v Douglas* and the other old cases have to be considered as no longer good law; they were decided under the regime incorporating both RSC and the 1950 (or earlier) Act, both of which have now been repealed. I do not therefore find it difficult to argue that it is no longer good law. In this context, by way of support, I note that none of Mustill & Boyd (2001 Companion), Professor Merkin's "Arbitration Law" or his "Arbitration Act 1996" (2nd Edition) cite *Hunt* at all which is inconsistent with its continuing to be good law; in consequence, I find indirect support for my argument in this non-citation.

Let me return to address some comment in respect of Langley J's judgement in *Amoco v BAO* which appears to be the first high-profile award of interest on costs in English litigation. There are two matters in the judgement which Langley J did not explain and does not justify and which I find unsustainable. First, he brackets the award of interest on costs with the factors that had, previously in his judgement, led to the award of indemnity costs in the sum of £16 million; I submit that, although the factors which, in the CPR, lead to the award of indemnity costs may also lead to the award of interest on costs, there can be and is no causal relationship between them; conversely, if the factors required for an order of indemnity costs are not present there is nothing in CPR or logic to conclude therefrom that no award of interest on costs can be made. Second, Langley J referred to a substantial part of BAO's costs having been incurred more than a year before judgement and he appeared to suggest that some such time threshold would be necessary before awarding interest on costs; with respect, there is no justification for any such minimum time limit either in the CPR or in the fundamental logic of the case which, at the risk of some repetition, relates to the indemnity principle. In contrast, applying the indemnity principle, any delay in the claimant's recovery of its costs should, at least in principle, merit consideration for the award of interest.

The foregoing opinions are mine and any responsibility for the expression on behalf of either of the two distinguished professors is also mine. Should any reader of this Newsletter have views on the matter I would be delighted to take them on board and give them airtime in a subsequent issue.

I return to look at my case where I awarded interest: the facts of the case supported the award of interest, the justice of the case supported the award of interest and the language of s.49(3)(a) is wide enough to include it. Whether or not a s.69 challenge to my Award might or might not be made is not a major consideration; neither is the question of whether or not, if such challenge were made, a judge would be sympathetic or otherwise. As I saw that case, and would see a future one, the award of interest was, in principle, correct and, if it was rejected for not following "old law" then that would be most unfortunate since I do not believe that it could have been the intention of the drafters that the express provisions of the Act could be defeated by previous cases; the Act was intended to codify the law as it stood in 1996 and should be permitted to do so, not permitted to be affected by "old law".

2. Alone among countries which have adopted the UNCITRAL Model Law or have enacted arbitration legislation substantially consistent therewith, England's s.69 gives the parties to an arbitration the ability to appeal to the Court on a 'question of law' arising out of the award; similarly, s.45 gives them an equivalent ability to appeal

to the Court on a question of law arising during the arbitration proceedings but prior to the publication of an award.

This Newsletter is not the place to recite the long history underlying ss.45/69; the DAC Report at §217-221 and §284-292 address the issue and the loose-leaf "Arbitration Law" (ed. Professor Robert Merkin) contains an extensive analysis; all leading textbooks on English arbitration law also address the matter in varying degrees of detail. In brief, without rehearsing history, s.69 was understood to have encapsulated the guidelines laid down in two major cases in the early 1980s, *The Antaios* and *The Nema*, where the conditions required to be met before an appeal to the Court of Appeal could be made were understood to have been captured in s.69(3).

In a comprehensive and erudite article in "ARBITRATION" Vol. 69/1, Professor Michael 'Reilly and Roger Holmes analysed all the cases in the period 1999-2002 contained in Lloyds Law Reports and concluded that s.69 should be repealed since not only did it serve no useful purpose, its retention was contrary to the broad international consensus of arbitration legislation, whether deriving from the Model Law or not.

Perhaps unfortunately for the two distinguished authors, within a very short time after their article had gone to press two major s.69 cases were decided, the first in the TCC, the second, critically, in the Court of Appeal. In the latter case, *Northern Pioneer*, the Court of Appeal concluded, inter alia, that s.69(3) had slightly widened the barely-open door to such appeals left by the Nema Guidelines. The two cases were discussed in full in my article in "ARBITRATION" vol.69/3 which I concluded by rejecting the arguments put in the earlier article and stating the firm opinion that the two cases both justified the continuing retention of s.69, always bearing in mind that it is non-mandatory and that that the parties can exclude it by agreement. Feedback from the commodities and, in particular, the maritime sector was overwhelmingly approving of the conclusions of my article.

On 15th October 2003, the London Shipping Law Centre's first meeting of its 2003/4 programme convened a debate with the topic "Should the Right of Appeal from an Arbitration Award be Retained, Widened or Abolished ?". A distinguished panel of five speakers (Simon Crookenden QC, Bruce Harris, Michael O'Reilly, John Morris and Tom Birch-Reynardson (DLA), chaired by HH Anthony Diamond QC put their views in short presentations followed by a debate and contributions from the floor. Inevitably some of the views and contributions retrod ground well-covered in the two articles in "ARBITRATION" and I do not propose to duplicate by repeating them here.

The first presentation, by Simon Crookenden QC, was a masterly summary of the history and rationale underlying s.69; seen in that historical context, its continuing existence seemed wholly logical.

Bruce Harris spoke from an Arbitrator's and a maritime perspective and, in particular, suggested both that maritime law was a moving target and hence that certain matters would have to be clarified by judicial decision, and that it was not unknown for arbitrators to make a mistake of law (see the case *Lobb v Aintree* addressed in my article in "ARBITRATION"). He did note that, however, there appeared to be some indications that leave to appeal was easier to obtain in the TCC than in the Commercial Court where it was undoubtedly difficult. He concluded by addressing the perennial question of the publication of awards but that is a different topic I will address in due course.

Michael O'Reilly put the case for the abolitionists, largely following the themes and conclusions of his earlier article in "ARBITRATION". In particular, he questioned whether English law had in fact developed as a consequence of s.69 appeals. His principal arguments in favour of abolition were that the right of appeal contradicted the fundamental concept of party autonomy, that the costs of arbitration were increased by the necessity to review awards from a s.69 perspective and that the existence of a right of appeal restricted the desired finality of an award. (Bruce Harris had responded to this last point commenting that ss.67 and 68 also restrict finality but for good reason which was not in dispute).

John Morris, of the London-based UK Defence Club, the largest such club in the world, was billed as a "user" of arbitration but he clarified that the real users were in fact London Solicitors and their maritime clients, whether in the UK or elsewhere; however, he spoke from the latter's perspective. He discussed the reasons why non-UK maritime entities chose to arbitrate in London, seeing the main reasons being habit, preference born of experience and previous practice because London maritime arbitration provided experienced arbitrators from the maritime sector, had a lengthy and distinguished track record and that the arbitrations were conducted on the basis of English maritime law which was internationally respected and with which the parties were familiar. He suggested that absolute finality was not a dominant consideration and he noted that, in his experience, parties rarely chose to exercise their right to exclude application of s.69. He noted (as did others) that often the most energetic users of s.69 were losers trying to find a way out of their predicament. He saw an important aspect of s.69 as being the interaction between the judicial and arbitral systems, ensuring both that the two systems remained in contact and that arbitral tribunals were fully aware of their exposure to potential judicial scrutiny under s.69; he suggested that the paucity of successful s.69 appeals might in fact indicate that arbitrators were generally "getting it right". (in this context, the case *Lobb v Aintree* covered in my article is very much in point: there the arbitrator was sandwiched between two House

of Lords decisions in a complex area of law which decisions are not at all easy to reconcile and where the second decision was rendered after the conclusion of the arbitration proceedings so the case was, therefore, not cited to him). Mr Morris also suggested, interestingly, that the reporting of appropriate cases and the subsequent debate was in itself of value, possibly as much as, if not more so than, the precise result of the appeal. He concluded by expressing support for the continuing retention of s.69 and stated that it should not be widened since this would risk returning to the "bad old days" which had existed prior to 1979.

Tom Birch-Reynardson (DLA) gave "A Solicitors Perspective", stating that Solicitors wanted a robust, speedy and reliable arbitration regime without unnecessary expense; countering one of Michael O'Reilly's points, he considered that the incremental cost of reviewing an Award for a potential s.69 appeal was minimal. He stressed that s.69 could be excluded by the parties if they so chose, as was the case in several sets of rules e.g. the LMAA's FALCA and SCP. He also itemised a number of s.69 cases which had clearly added to the corpus of the law and, in some cases, had removed uncertainties or anomalies hanging over from pre-1996 Act days. He expressed concern that abolition of s.69 would remove a vital element of quality control on English Arbitrators even if it was clear that those arbitrators had gained a reputation for excellence.

On the Chairman opening up the debate to the floor, Stewart Shackleton (whose Annual Review of English Arbitration Cases published in International Arbitration Law Review represents the most important such publication of the year) argued persuasively that the perceived merits of s.69 were illusory and, in an international perspective, it was wrong for England to retain the possibility of appeal when no other leading arbitration jurisdiction did so nor did the Model Law. Readers of the Annual Review (and, if you are not one, you should be !) will be familiar with Stewart's very thorough arguments in this area and with his criticisms of what he sees as the excessive involvement of the English judiciary in the arbitral process.

Nearing the conclusion of the debate, I raised what I saw as the next significant issue and that was the matter of what was a "question of law" ? HHJ Thornton QC, in two recent judgments (*Fencegate* and *Skanska*), had apparently significantly widened the scope of what could be a question of law although his views appeared to be inconsistent with an extra-judicial statement by Lord Savile. A senior Judge, sitting in the audience, expressed strong disapproval of any attempt to widen the scope of what constituted a question of law but this interesting debate was necessarily cut short since time had run out.

So where did this debate take the s.69 issue ? It was appreciated, (and expressly noted by several speakers), that s.69 existed not only for the benefit of the maritime sector but was applicable to all sectors of English commerce and that the overwhelmingly pro-s.69 vote in the meeting was not ultimately a determinative factor. Further, with only Michael O'Reilly (primarily from a construction viewpoint) and Stewart Shackleton (largely from a Parisian perspective) arguing for abolition in a roomful of retentionists, the debate was, perhaps, unbalanced or at least gave the impression of being so.

From my own viewpoint, the conclusions I reached in my article on *Northern Pioneer* remain my opinions and I heard nothing new in the debate sufficient to alter those views. In particular, two factors stand out for me: first, the parties can agree to exclude s.69 appeals (as is done in many sets of Rules) thereby both enhancing party autonomy and increasing the finality of any Award; second, given the dissent in the Northern Pioneer tribunal (and remember that the dissenter was a retired Court of Appeal judge), it seems to me self-evident that the matter of law which gave rise to that dissent must go before the Court and, if necessary, a superior court for decision.

Postscript

The Arbitration Club Oil & Gas Branch discussed s.69 at its November 2003 meeting with no clear consensus; OGEL5 will carry an article on this.

3. Can an Interim Award under s.39 of the Act be appealed under s,69 ? This was a subsidiary issue in *BMBF (No.12) Ltd v Harland & Wolff* ([2001] EWCA Civ 862).

A distinguished Tribunal (Sir Anthony Evans, Professor John Uff QC and the late Michael Ferryman) made a s.39 provisional award that BMBF should pay H&W US$27,000,000 and £3,300,000 within fourteen days. The award was made following the resolution by the Arbitrators in H&W's favour of a disputed point of construction, namely, whether or not, if BMBF had validly exercised its rights under Clause 15.2(ii) (taking of possession), it was obliged to pay H&W the outstanding instalment which was payable by BMBF on delivery of the vessel, less the costs of completing it.

Tomlinson J reversed the Arbitrators' interpretation of the Contract and H&W appealed.

As a subsidiary issue, BMBF contended that, in the light of H&W's parlous financial position, which it asserted rendered it unlikely that any money paid to it by BMBF would be recoverable thereafter, the Court should order, pursuant to s.69(7), remission of the Interim Award to permit the Arbitrators to re-assess the cost of

completion with the certainty of hindsight, in place of the uncertainty of future estimation which they had obliged to adopt at the time of that award.

The language of s.69(7) may appear wide but s.69 is concerned only with appeals to the court on a question of law; s.70(4) does not apply either. Neither section covers the position where, in relation to a s.39 Interim Award properly made on the basis of the evidence and/or arguments of the parties at the time, it is simply alleged that subsequent events or a change of circumstance have rendered that Interim Award unduly advantageous to one party or the other. In the instant case, the Interim Award was not (and was not intended to be) a final judgment upon, or disposition of, the claims of the parties. Insofar as it was other than an exercise of the Arbitrators' discretion, it was an exercise of the arbitrators' jurisdiction under s.39 to order on a provisional basis any relief they would have power to grant on a final award. That included making a provisional order for the payment of money or disposition of property as between the parties (see s.39(1) and (2)), such provisional order being subject to adjustment as necessary when the Arbitrators make their final award: see s.39(3). As stated by the Arbitrators (at paragraph 25 of their award) the central issue they were asked to consider was the legal consequences of BMBF's exercise or purported exercise of the right to take possession under Clause 15.2(ii), it being common ground that they could not hear evidence to decide whether the vessel was in a deliverable state on or before 31 July 2000 but that they should make an interim award in the light of their decision

In the event, the Arbitrators followed the pattern of the form of H&W's claim i.e. for the delivery instalment less a deduction 'for the estimated cost of completing the vessel in accordance with the Contract and Specification' which H&W put 'without prejudice' at US$ 2,000,000, but which BMBF claimed in its estimates at almost US$ 10,000,000. The latter figures were in turn attacked by H&W. The Arbitrators found the BMBF evidence to be, in a number of respects, 'self-serving and to grossly exaggerate the position'. In the Annex to their Interim Award, the Arbitrators had set out the details underlying their conclusion that, on the basis of the estimates and other evidence before them, US$ 3,400,000 should be awarded to BMBF by way of retention for the costs of completion.

It was not suggested that the Arbitrators erred on any point of law or did other than reach a reasonable conclusion as to the likely quantum of the completion costs *on the evidence before them*. Counsel for BMBF merely submitted that it would be appropriate to remit the award to the Arbitrators to permit a re-assessment of the costs of completion with the certainty of hindsight on the basis of evidence not available at the time. His application had been not made before the judge (Tomlinson J) nor had it found any place in H&W's notice on this appeal. Furthermore, the basis upon which Counsel had argued for remission (in circumstances in which it seemed to Potter LJ that he had accepted by implication it would not otherwise be ordered) were those relating to the fear that there would be no chance of recovering sums paid pursuant to the Interim Award if the Final Award was in favour of BMBF. In the face of a similar submission, the arbitrators expressly stated (at paragraph 59 of the Award): "We do not consider that the sum otherwise due from H&W should be reduced for this reason, in the circumstances of the present case."

In consequence, BMBF's s.69(7) appeal was blown out of the water.

4. *Mowlem PLC v Newton Street Limited* [2003] EWHC 737 TCC (TCC case HT-02-386 and HT-02-442; HHJ Wilcox QC; 4th April 2003) was an appeal against an Interim Award of Mr Michael Black QC, where the arbitration had arisen out of a contract for the design and construction of 104 flats and associated works at Newton Street, Manchester, involving repairs to a former Post Office sorting office and the creation of underground parking, commercial units at ground floor level and residential units above those. The building, completed in 1910 and used as a Post Office until 1993, was an early example of a large reinforced concrete structure. The contract was based on the JCT Standard Form of Building Contract with Contractor's Design 1998 edition, as amended by the parties, in particular, by adding Article 10 which gave rise to controversy. In Clause 39B.4 the parties expressly agreed that s.69 should be included. Mowlem contended that the Arbitrator had made a number of errors of law.

The dispute was with regard to the interpretation of Article A10, namely: (a) whether the Contract Administrators' Instruction No.6 issued on 2nd November 2000 instructing concrete repairs and parapet waterproofing works constituted an Employers Change within the meaning of Article 10.3; and (b) whether Mowlem was responsible for obtaining the necessary planning consents for the Works, including any necessary amendments to the Planning Permission and any resulting delays, costs, loss and expense.

Further disputes were referred to the Arbitrator and consolidated; these related to revisions to the dates of completion for sections of the Works in respect of concrete repairs and parapet waterproofing instructed by way of the Employers Agent's Instruction No.6 and consequential matters relating to valuation of certain changes and the ascertainment of direct loss and/or extent and/or damages. Mowlem also referred to the

Arbitrator the ascertainment of loss and/or damage caused by certain alleged misrepresentations, including that NSL had misrepresented the factual circumstances relating to the planning permission for the Works and that Mowlem had relied upon such misrepresentations when entering into the Contract.

The Concrete Repairs

Mowlem carried out repairs to the concrete perimeter ring-beam, an internal concrete frame, part of the superstructure of the existing building, which was to be built upon by way of adaptation and the addition of new build. The frame was expertly examined by consultant engineers to ascertain its loading capacity for both the adaptation and the addition of new build. It was not systematically inspected to ascertain the integrity of the beams. The Arbitrator found that neither party knew about the need for concrete repairs before the Contract was signed. Subsequently, Mowlem was advised that various structural items required further investigation, including tests to determine the location and integrity of the reinforcement and strength and condition of the concrete. That investigation was not carried out before contract execution and Mowlem did not provide for it. The Arbitrator concluded that the Contract neither expressly or, as a matter of construction, specifically referred to any concrete repair.

The issues which arose for decision (Mowlem's answers in brackets) were: (a) was Mowlem responsible for carrying out the Concrete Repairs at its own cost ? (No) (b) Did the Concrete Repairs form part of the Works as defined in the contract ? (No) (c) did CAI 6 constitute an Employer's Change within the meaning of Article 10.3 and/or a Change within the meaning of Clause 12 of the Conditions ? (yes) (d) was Mowlem entitled to any addition to the Contract Sum of £4.6m (GMP) in respect of the cost of the Concrete Repairs ? (yes) (e) was Mowlem precluded from making any claims against NSL in respect of the Concrete Repairs, including any claims for extensions of time and/or loss and expense ? (No).

The Arbitrator's Interim Award concluded that the Contract neither expressly or as a matter of construction specifically referred to concrete repairs and he observed that because parties have not specifically described works expressly or otherwise or a Contractor has not priced for a specific item, that is not determinative of the proper construction of the contract since it was not unusual for construction or engineering contracts to cast unknown or unforeseen risks on one party or another. He gave as an example Clause 12 of the ICE Conditions the essence of which is to place the particular and defined risk of adverse conditions on the Employer and not on the Contractor.

Counsel for Mowlem submitted that the absence of any explicit reference to an obligation to repair concrete supported its contention that such work could not therefore be considered part of the 'works' undertaken by the applicant under the contract because of the definition in Condition 1.3: "Works: the Works briefly described in the First Recital and referred to in the Employer's Requirements and the Contractor's Proposals and including any changes made to those works within this Contract".

He also submitted that the Article 10 obligations were limited to obligations in respect of 'the Works' as they were defined in the Contract Documents; the precision of the definition of 'the Works' was inconsistent with an intention of the parties to impose or accept the burden of carrying out unforeseen work, not within the definition of 'the Works'. Although Mowlem had accepted 'additional risks and responsibility' (Art. 10.2.1), it had not accepted the risk of rectifying at its cost any unforeseen defects in the existing building. He submitted that the key phrase which governed the identification of these additional risks was 'the carrying out of the Works'. This by reason of the definition clause could not include the risks relating to the concrete repairs.

HHJ Wilcox QC held that Article 10 expressly addressed the risks accepted by Mowlem, paragraph 2.1 referring to the acceptance of additional risk and responsibility which clearly pointed to obligations additional to those imposed by the unamended contract in which Mowlem had acknowledged that it had satisfied itself and made full provision for all risks, contingencies and other matters which might influence or affect its carrying out of the Works. Except in relation to an Employer's Change, Mowlem had accepted that it would not be entitled to make any claim against NSL or seek any relief or remedy under any Clause of the Conditions nor would it be relieved from the risks or obligations imposed on or undertaken by it in relation to the Works on the grounds set out in paragraph 10.2.3. The provisions of Article 10 very clearly allocated the burden of unforeseen or unknown risks to Mowlem.

Mowlem as tendering contractor had had to consider the information available about the building; its condition was there to be ascertained and a contractor took a commercial risk as to the extent of the information available. The Contract placed the risk of the inadequacy of that information upon Mowlem, even if it could not foresee a particular matter. In any contract with a significant design element at the interface of a building into the ground or onto an existing structure, there is a commercial imperative to allocate the risk of the unforeseen or to ascertain any degree of risk arising out of the ground conditions or existing structure. There was nothing in the GMP provisions to displace the ordinary and unambiguous meaning of Article 10 that the risk of unforeseen defects in the existing building was Mowlem's. HHJ Wilcox QC concluded that the Arbitrator's construction of Article 10 in relation to the concrete repairs had been appropriate and based upon the clear words of the contract within its general scheme.

The Planning Issue

Was Mowlem responsible for obtaining any necessary planning consent for the Works, including planning consent in respect of the revised elevations, at its own cost ?

The Arbitrator had found that: (i) it was no part of Mowlem's obligations to obtain planning permission for the Works; (ii) it was obliged to address all matters necessary to conform with the Planning Permission at its own expense; (iii) it was also obliged to deal with any decision of any relevant authority made for the purpose of Development Control Requirements at its own expense, but not i.r.o. decisions prompted by a matter that constituted an Employer's Change; (iv) it had accepted the risk of resolving divergences and discrepancies within the Contract Document and between the Contract Documents and the Statutory Requirements (in fact the Planning Permission was a Contract Document); (v) it had also accepted the risk of inadequacy in any drawings, specifications or other information to be used in relation to the Works, including the Contract Documents.

The Planning Permission had been granted i.r.o. 95 apartments, on the basis of drawing 214-09B that provided for holes to be cut into the parapet to admit adequate natural light. Subsequently, it was agreed that the parapet should not be cut into because it served a structural function and NSL made consequential changes to the design of the proposed building by increasing the number of flats from 95 to 104 and completely revising the light admission basis. Thereafter, Mowlem took over the design responsibility and, subsequently, the Council informally indicated that it would approve the revised design, stating that a formal application would be required which was duly lodged by the Owner. The Council then granted Planning Permission for the 104 apartments; the Contract was executed 7 days later. The Arbitrator found as a fact that, as at execution, the proposed elevation design would, when completed, have met the Council's formal approval. The Arbitrator also found that the Parties had contracted on the basis that Planning Permission had been obtained by NSL. However, there was a difficulty in that the earlier permission had been granted on the basis of elevation drawing 214-09 RevB whereas the relevant Contract Drawing was 521J which showed revised elevations.

By Article 10.2.1(ii) and (iii) Mowlem had accepted the risk and responsibility for the resolution of any divergences and discrepancies within the Contract Documents. Article 10.2.3 further provided that Mowlem could not escape such risk or responsibility by reason of any misunderstanding on Mowlem's part, any error in information provided by NSL or its consultants or any inadequacy in the drawings or specifications.

The Judge held that the resolution of the planning issue did not constitute an Employer's Change as defined by Article 10.3 because Mowlem had express responsibility under Article 10 to resolve any discrepancies at its own cost and the Contract Drawings and the specifications had remained unchanged.

Mowlem submitted that all Article 10.2.1(iii) provided was that it should have allowed for the relevant risks. Since obtaining planning permission was not within the meaning of 'the Works' and would involve a change to the Contract Documents – not least the planning statement itself – it would be entitled to recover under Article 10.2.3 and its allowance under 10.2.1(iii) should take that into account.

However, the Arbitrator had found that Mowlem had not undertaken a general obligation with regard to all planning matters, its obligations being clearly predicated on the existing Planning Permission and it was responsible for practical steps to put that into effect. In the 'Description of Work – April 2000, Planning', Mowlem's obligations were limited to satisfying any conditions attached to the approval, paying all fees and charges associated with obtaining approval for any minor changes in the Planning Permission as required by itself and meeting all costs associated with the design and construction of the works to meet and satisfy the requirements of the Planning Approval. The Judge fully upheld the reasoning of the arbitrator as to the extent of the obligation undertaken by Mowlem in relation to planning and the effect of Clause 10 in relation to the discrepancies between the two plans.

The ingenuity of Mowlem's Counsel was boundless: (a) he next argued that there had been a breach of warranty insofar as it was stated by NSL that there was planning permission for the Works. The Judge dismissed this since, given the clear terms of Article 10, which provided that the risks of resolving discrepancies lay with Mowlem, it could not be shown that it could have suffered any loss in relation to the asserted breach. (b) he next tried s.3 Misrepresentation Act 1967 and argued that Article 10 had no effect at all in relation to either the planning issue or the concrete repair issue, submitting that the Arbitrator had failed to distinguish between the position as it was before Contract execution and the position as it was after, contending that Mowlem had suffered loss because a pre-contractual representation was made to it, namely that 'Planning Permission had been obtained by the Employer". He contended that Article 10.2.3 was so widely drawn in excluding or restricting liability that it could not possibly satisfy the requirement of reasonableness in s.3, e.g. that it was wide enough to cover fraud.

The Judge held that the ambit of any clause must be looked at objectively in the light of the circumstances obtaining at the time the contract was entered into, including the scope of the contract and the commercial realities intended by the parties, including such elements as allocation of risk. NSL had submitted that even if

Article 10.3 was construed as excluding or restricting relief based on matters outside the contract, nonetheless it did not fall foul of the test of fairness and reasonableness under the Misrepresentation Act because its width of exclusion does not distinguish between innocent and fraudulent misrepresentation. A clause excluding or limiting liability was not to be taken as covering fraud (refer *Government of Zanzibar v British Aerospace Ltd* (2000) 1 WLR page 2333) which, inter alia, quoted Chitty, page 722 para 14-125: "No exemption clause can protect a person from liability for his own fraud or require the other party to assume what he knows to be false". The Judge in *Zanzibar* cited appropriate authority and concluded "This is a high and longstanding authority and even in contracts of today has the ring of common sense that clauses dealing with representations are not intended by the parties to apply where a representation has been fraudulently made." Judge Wilcox concluded that the reasoning in *Zanzibar* was compelling and persuasive. However, in the present case there was no allegation of fraud and Article 10.2.3 was applicable only to exclude those particular forms of relief mentioned in Article 10.3 and arising under the Contract.

The Arbitrator had considered the ambit of Article 10 and, Judge Wilcox held, had rightly concluded that Article 10 was primarily an allocation of risk clause. Insofar as it did exclude and restrict liability, it was reasonable. His finding that it was reasonable encompassed the facts before him and in his domain which is a mixed question of fact and law. He had directed himself properly as to the burden of proof and his conclusion that Article 10 was fair and reasonable should not be disturbed. Furthermore, he had found as a matter of fact that no such representation had in fact been relied upon. That was a finding wholly within the province of the Arbitrator.

Mowlem's appeal therefore failed: the Arbitrator's Award was correct.

Comment

With respect to the distinguished arbitrator and to the learned judge whose erudite analysis of law is most helpful, both in interpreting Article 10 of the Contract and in applying s.3 of the Misrepresentation Act, the conclusion appears to me one of innate common sense: Article 10 reads clearly as a risk allocation clause and it would be nonsensical if Mowlem's arguments had defeated the obvious intentions.

A contractor's world is, no doubt, a tough one but someone has to bear the risks of defects in an existing structure which is being converted, or the risk in the subsoil beneath a new building or otherwise and it is essential that standard forms of contract fully and precisely allocate risk and that bespoke amendments do the same but also do not distort the risk allocation mechanisms of the underlying form of contract.

5. There have been innumerable cases where proceedings in respect of the same, or parts of the same, dispute are commenced in different jurisdictions; equally, there have been a large number of arbitrations in which one party, typically the prospective loser, commences litigation in a jurisdiction other than that of the seat. One recent such case, with some interesting features, was ***Peoples' Insurance Company of China (Hebei Branch) and China National Feeding Stuff Import/Export Corporation v Vysanthi Shipping Co Limited*** ([2003] EWHC 1655 (Comm); Thomas J; 10th July 2003; cases No 2002 Folio 344 and 2002 Folio 661.

Vysanthi, a Cypriot company, (the "Owners") was the owner of a bulk carrier; on 28th June 1996, they issued two B/Ls for 29,900MT of soya bean pellets loaded at San Lorenzo, Argentina for carriage to and delivery at Chinese ports. The B/Ls (Norgrain Charterparty 1973 form) were consigned to Order and claused on their face:

> London Arbitration/English law to apply to all disputes arising out of this bill of lading in accordance with Clause 8 on the back of this bill.
>
> 8. All disputes arising out of the Bill of Lading shall be arbitrated at London and unless the parties agree forthwith on a single arbitrator, be referred to [the Baltic Exchange] … . No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the Award is made. Any dispute arising under the Bill of Lading should be governed by English Law.

The vessel grounded on leaving San Lorenzo and was re-floated by salvors on LOF 1995 terms, Owners declaring general average. Salvors requested security and the vessel was delayed until cargo interests provided such security. The B/L was negotiated and CNFS became the receivers (the "Receivers"). On 19th July 1996 PICC provided salvage guarantees. The vessel arrived in Ningbo, China in September 1996 and was immediately arrested but released after the provision of a guarantee for $1.3m issued by PICC against counter security provided by Owners' P& I Club.

Proceedings in the Chinese Courts

In October 1996 the Receivers commenced proceedings before the NMC, seeking to recover their salvage outgoings plus costs and expenses. Owners immediately objected to the jurisdiction of the Ningbo Maritime

Court (NMC) but, in January 1998 that Court held that it had jurisdiction. Owners appealed to the Zhejiang Provincial Higher People's Court (the "Higher Court") which, in May 1998, dismissed the appeal. Owners then appealed to the Supreme Court of China to review the decision of the two lower courts on the grounds that they were perverse; the Supreme Court declined to rule on the matter, but asked the Higher Court to reconsider – it did and ruled that its earlier decision was correct. Subsequently, PICC was substituted as Claimants as they had indemnified the Receivers and, in September 2001, the NMC held that Owners were at fault and ordered them to pay damages to PICC.

The English Arbitration

In August 1996, Owners commenced arbitration against the wrong Chinese company but, on 19th October 1999, commenced arbitration against the Receivers, appointing Mr Donald Davies, a distinguished LMAA arbitrator. He became the sole arbitrator pursuant to s.17(2).

In the arbitration, the Receivers objected immediately to the jurisdiction of the Arbitrator, but they appeared and defended the claim under that reservation. In February 2001, a 4-day hearing took place before Mr Davies. On 14th March 2001, he published his award, correcting it under s.57 on 4th April. In summary, he held that he had jurisdiction under the arbitration clause contained in the B/L and that there had been no submission of the claim advanced in the arbitration to the courts of China. He held that the Receivers were liable to pay general average in the sum of $367,000 and damages for detention in the sum of $28,500. On 20th June, he made a further award dealing with interest and costs and on 13th February 2002 (after a hearing), he made a 3rd Award in which he assessed the costs payable by the receivers.

Proceedings in the English Court

In March 2002, PICC and the Receivers initiated proceedings in the High Court, seeking (i) a declaration that the NMC judgment was enforceable and capable of recognition in England and Wales and (ii) an injunction against the enforcement of Mr Davies' Awards. Conversely, in July 2002, Owners commenced proceedings against the Receivers, seeking to enforce the Awards. An Order was made ordering the enforcement of those Awards, subject to the right of the Receivers to apply to set aside that Order.

Could the Awards be Challenged ?

Neither party sought an award on jurisdiction or made any application to this Court in respect of the Arbitrator's jurisdiction during proceedings. The Arbitrator, in such a case, would therefore be expected to deal with the question of jurisdiction in his substantive award on the merits which is precisely what Mr Davies did; per Thomas J "in a characteristically clear section in his award, Mr Davies set out the objection of the Receivers and then, at paragraphs 38-45 of his award, set out his conclusions. He referred to the fact that the Receivers had not led any evidence of their own regarding the proceedings in China, although they had had ample opportunity for doing so. They had relied on the evidence of Owners' Chinese lawyers that (i) Owners' action in China was to emphasise that the dispute relating to the grounding of the vessel was subject to London arbitration and the law of England and Wales; (ii) Owners were seeking to avoid a default judgment against them which would lead to the execution of the $1.3m guarantee; (iii) the effect of the decision of the NMC was that the dispute before it was not a dispute which arose ***under*** the bills of lading and the arbitration clause was therefore not applicable; (iv) the Higher Court had ruled that the NMC had assumed jurisdiction because the dispute was not a dispute relating to the contract of affreightment but at no time had the NMC ruled that the dispute which arose out of the B/L could be determined by the Courts of China; (v) neither Chinese Court had held that such disputes could not be determined by arbitration in London; (vi) it would have been commercially unthinkable not to have continued efforts in the Courts of China to protect the guarantee that had been provided on behalf of Owners.

On the basis of that evidence, Mr Davies concluded that Owners had not submitted to the jurisdiction of the Chinese Courts for the determination of any claims under the B/Ls, and that no claims by Owners which were subject to the arbitration had been put before the Courts of China.

Under the Act, if the tribunal deals with a question of jurisdiction in its awards on the merits, then that decision may be challenged under s.67 subject to the provisions of s.73. S.73(2) provides a 28-day time limit, subject to ss. 79/80(5). No such proceedings whatsoever were commenced in the High Court until 28th March 2002 and no extension application was made until 25th November 2002.

However, the Act does not entirely accord with the needs of the commercial community and of international understandings – inter alia, an arbitral tribunal cannot be the final decision-maker on the question of jurisdiction (e.g. refer §138 DAC Report). However, the tribunal's power to interim-rule on its own jurisdiction means that the parties cannot delay valid arbitration proceedings indefinitely by making spurious challenges in court; conversely, the party objecting to the tribunal's jurisdiction has the unfettered right to apply to the Court which is not in any way bound or limited to the findings made in the award or to the evidence adduced before the arbitrator and ***does not review the decision of the arbitrator but makes its own decision on the evidence before it*** (see Gross J in *Electrosteel Castings Ltd. v Scan-Trans Shipping & Chartering Sdn. Bhd.* [2002] EWHC (Comm) 1993 at §22-23). However, that right to challenge is time-limited and it cannot be held

until attempted enforcement.

In the present instance, prior to consideration of the application to extend time, there was no doubt that (1) the Receivers had lost the right to object to the Arbitrator's jurisdiction long before they issued proceedings (March 2002) and that (2) there was no other basis for challenge to the Award which had therefore taken effect as a binding determination of the issues decided on the merits as between the parties.

Extensions of time are dealt with in ss.79 and 80(5) and the principles for the exercise of the Court's powers had been succinctly summarised by Colman J in *Kalmneft JSC v. Glencore International AG* (see my two articles on this case on the website), highlighting the need for expedition in proceedings before the Court, as the object of arbitration was defined in the Act as obtaining a fair resolution of disputes *without unnecessary delay or expense*, and he had referred to the special requirement in s.79(3)(b) "that a substantial injustice should otherwise be done" which was not applicable under s.80(5). Colman J concluded that it was necessary to make some allowance for parties to London arbitration who had little experience of arbitration in London. He identified the key factors as: "(i) the length of the delay; (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have; (vi) the strength of the application; and (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

In an affidavit sworn on behalf of the Receivers, it was contended that a substantial injustice would, absent the extension of time, be done to them as they would be bound by an Award which had been founded upon inaccurate and unsupportable findings as to jurisdiction. The delay in making the application was said to be excusable upon the basis that: (i) they/PICC had not sought to appeal the Award because it had been based on findings which were not capable of sensible challenge on appeal. No attempt had been made to appeal and the Receivers only became in a position to do so when the judgment of the NMC was issued, effectively destroying the basis of the Award; (ii) until the NMC had issued its judgment on the merits and until Owners had threatened to seek to enforce the Award, there was no conflict between the Award and any judgment on the merits. Accordingly it was said that no application to challenge the award would have served any practical purpose.

The Judge had to consider Receivers' submission in the light of the "Kalmneft Principles":

(i) Their delay in applying had been very substantial, almost one year;

(ii) Had the Receivers acted reasonably in all the circumstances ? Owners had contended that Receivers' failure to challenge was because if they had sought to challenge the Award prior to the decision of the NMC, they would have had to clarify their case on jurisdiction which they did not want to do. The important fact was not the reason for not making a challenge, but the fact that a deliberate decision was made not to challenge the Award, an obvious error but one made by an experienced firm of solicitors and by a knowledgeable applicant;

(iii) Neither the Arbitrator nor Owners had contributed in any way to the delay;

(iv) Had here been there any prejudice apart from mere loss of time ? Since this question required examination of the Chinese judgments - see below;

(v) There had been no impact upon the arbitration (already concluded);

(vi) The strength of the application – see below.

(vii) Fairness – see also below.

Prejudice/Strength of the Application

Owners submitted that, if the Receivers had made an application to the Court within the 28-day time limit specified, they would then have had to set out their case as to why the Arbitrator had been wrong in his decision on jurisdiction i.e. they would have had to clarify the basis upon which the Chinese Courts had assumed jurisdiction but that would not have been easy, given the basis upon which the two Courts in China had decided that they had jurisdiction.

The NMC based its decision on the following grounds: the validity of the arbitration clause should be decided on the basis of the law governing the arbitration clause agreed upon by both parties. In the event that no governing law is chosen, the governing law should be the law of the place of arbitration or the place where the arbitration award is issued. In this case, the place of arbitration was London. According to English law, any dispute arising out of the B/L referred to a dispute under the B/L itself, but not a dispute *relating* to it. The dispute in this case involved the salvage cost incurred during the performance of the freight contract, which is evidenced by the B/L but it is not a dispute *under* the B/L. Therefore, this dispute is not included in the

disputes to be arbitrated as provided in the B/L.

The Higher Court dismissed the appeal, holding as follows: Receivers had filed claims before the NMC claiming for contribution to the salvage cost. Consequently, this case was a dispute over contribution to the salvage cost, instead of a dispute over the freight contract and therefore the arbitration clause in the B/L did not apply. The salvage agreement did not provide for London arbitration for disputes arising from contribution to the salvage cost. Therefore, it was correct for the NMC to have exercised jurisdiction over this case since the Vessel had been arrested by the NMC prior to litigation.

In its decision on the merits, the NMC had first set out the evidence including the Award which had been relied on by Owners as proving that they had exercised due diligence in ensuring that the vessel was seaworthy prior to setting sail and had not been at fault for running aground. The NMC held that the Award was not binding on it in determining the liability for the accident and should not be used as evidence. (NOTE: their arguments are of interest to the maritime sector but are outwith the scope of this report).

Thomas J considered it clear that the NMC's judgment on the merits was that the claim which succeeded against Owners was a claim under the B/Ls and that they evidenced the only contracts between the Owners and Receivers. However, in the earlier rulings upon jurisdiction, it had been clear that the Higher Court had decided that the claim was not a dispute over the contract of affreightment.

if the Receivers had applied to the English Court prior to the NMC judgment, they would have had to consider what position they would take on jurisdiction. There would have been four possibilities:

(ii) Before the Arbitrator, they had deliberately decided not to call evidence on Chinese law on the effect of the NMC and Higher Court decisions on jurisdiction. If they had followed that course before this Court and within the time limit, then it was difficult to see how the English Court could have reached a different conclusion to the Arbitrator's since the evidence before the Court would have been the same as that before him. The claims before him were, as a matter of English law, obviously claims under the B/Ls and, as on Owners' evidence such claims were not being adduced in China, the Court would have reached the same conclusion as him.

(iii) If, however, the Receivers had decided to adduce their own evidence, it is difficult to understand how they could have credibly put forward a case that did not involve adopting a course which would have meant making clear that the claim being made in China was either a claim under the B/L or a claim in tort or both.

(iv) If they had adduced evidence before the English Court to the effect that the claim before the Courts of China was a claim under the B/L, then again it is difficult to see how this Court could have reached a different conclusion on that evidence to that reached by the Arbitrator on the evidence before him in view of the terms of the decision of the Courts of China on jurisdiction, where each Court expressly stated that claims under the B/L were not claims which were before them. If they had contended that the claim in China had been one relating to the B/L, then that would have made no difference as the claim being made before the Arbitrator was a claim under the B/L and there would have been no reason why he did not have jurisdiction over such a claim.

(v) If the Receivers had adduced evidence that the claim was a claim in tort, then it was difficult to see how the Arbitrator's decision could have been successfully attacked; he would have had jurisdiction to determine the claim in contract, unless there was a principle analogous to the doctrine of *cumul,* though with the opposite effect (see *The Sindh* [1975] 1 Lloyd's Rep 372).

There was a further consideration: if the Receivers had asserted that the claim being advanced in the Courts of China was a claim under the B/L, that assertion and the evidence in support would have been embodied in the judgment of this Court which would inevitably have reached the same conclusion on jurisdiction as the Arbitrator.

Counsel for Receivers had studiously avoided explaining whether the claim had been based in contract or in tort. If it had been conceded in England that the claim made in the Chinese courts was a B/L claim in contract, it was difficult to see how the NMC could have reached a decision, prior to the issue of its decision on the merits, other than a decision that the decision on jurisdiction had been mistaken. In any event, Owners had been deprived of the opportunity of making that powerful submission. It therefore followed that Owners had been caused irredeemable prejudice by Receivers' failure to apply within the statutory time limit.

Thomas J then concluded that he should NOT exercise his discretion to extend time.

He continued by considering in detail what the consequences might have been of Receivers having made their bad decision not to appeal within time based upon wring advise from their Solicitors; although fascinating, this is outwith the scope of this report

<u>Enforcement of the Award or Recognition of the NMC Judgment</u>

Owners submitted that it inevitably followed that the Judge should give leave to enforce the award in England, for two reasons: (i) the Court was bound by the Act to enforce the Award as there were no grounds

on which it could be validly impugned; (ii) since the Award on the merits had preceded the NMC judgment, this Court should recognise the former as having been given earlier in point of time. The Judge considered both arguments well-founded.

Owners then contended that, in these circumstances, this Court should immediately strike out PICC's/Receivers' application for recognition of the NMC judgment since this was an abuse of the process of the English Court, on the grounds that the Chinese action represented a collateral attack on the Award and that it was clear that the NMC judgment could not be recognised in any event. Receivers/PICC contended, that in the circumstances the action should not be struck out, but referred for decision on a preliminary issue. However, the Judge was unimpressed, finding it clear that there were no grounds upon which the Award could be challenged and that the principles of issue estoppel and *res judicata* operated.

Conclusion

Thomas J therefore gave leave to enforce the Award and granted summary judgment against PICC and the Receivers in their action for recognition of the NMC judgment.

Comment

At the risk of sounding somewhat partial, this case yet again demonstrates the strength of London arbitration and the quality of what the process can produce even if not all awards stand up to scrutiny so well (another example of a strongly approved award follows as the next item).

That said, the case is interesting in balancing the conflict between a London arbitration and foreign court proceedings not least because, as it appears from the judgment, PICC, whether or not on express legal advice, appears to have made a very poor tactical decision in ignoring the time limits provided for in the Act in order to promote its chances in the Chinese Courts. It is, perhaps, unsurprising that the Judge should have taken such a negative view of such a decision.

6. In Nippon Yusen Kubishiki Kaisha v Golden Strait Corporation ([2003] EWHC 18 (Comm); Morison J; 17th January 2003), our dear friend s.69 made another appearance. While the decision is a straightforward appeal (briskly dismissed) on a point of law and creates no new jurisprudence, the point of law itself is of some general interest and, more relevantly in respect of this Newsletter, the distinguished Judge's comments on the Arbitrator's Award are of particular interest.

In 1998 NYKK chartered a vessel, the GOLDEN VICTORY, from Golden Strait and a dispute arose as to the date when NYKK could terminate the C/P. It provided for London arbitration and Mr Robert Gaisford was appointed by agreement of the parties as the sole arbitrator; the arbitration was conducted on LMAA Terms. The Arbitrator made an Interim Declaratory Award on 16th September 2002 in favour of Owners. NYKK appealed under s.69 as permitted by the C/P.

The tone of the judgment (and the death knell for the appeal) was set in its second paragraph which stated, inter alia: "[a]t the outset I would like to pay tribute to the care with which the Award has been prepared. If I might say so, the Award is a model of its kind, well-reasoned and, in my view, obviously right."

The Golden Ocean group included GOGL which was Owners' parent; the Group had ordered a number of VLCC newbuildings of VLCCs from a Japanese yard. A fixture memo GOGL/NYKK confirmed a 7-year time charter, GOGL being described as the Owner. NYKK was given an option to "charter back" the vessel to GOGL on expiry of the 3rd or 5th year "on a back-to-back basis". The fixture was stated to "be subject to amicable discussion and mutual agreement of details of C/P including form of C/P" and these were subsequently agreed with Owners stated as owners. The Arbitrator concluded that the Vessel was "delivered into the C/P" on 7th January 1999.

The C/P, on an amended Shelltime 4 form dated 10th July 1998 with two addenda dated 17th July 1998 and a Memorandum of Agreement [MOA] of the same date, for a 7-year period commencing from delivery, with a specific daily charter rate together with a profit sharing agreement whereby Owners and NYKK were to share "any operating profit over and above" the stipulated charter rate. NYKK was obliged to use their best efforts to fix the Vessel at market-related rates.

The Arbitrator found that it was common ground between Owners/NYKK that the former wanted to charter the Vessel to a reputable entity for seven years to facilitate the necessary financing but that, conversely, NYKK required the Vessel to fulfil commitments to a potential sub-charterer for 1-3 years but did not want a 7-year charter.

The C/P was terminated following sale of the Vessel to a German company in 1999 whereby Owners became sub-charterers to NYKK. In 2000 GOGL/Owners sought Chapter 11 protection in the USA following which a complex reconstruction plan was put in place whereby ownership passed into a new entity. However, NYKK considered that the MOA gave them a right to re-deliver the Vessel either at three or five years and thereby terminate the C/P. It was actually re-delivered on 14th December 2001 and Owners treated the re-delivery as

a repudiatory breach of contract which they accepted.

The question before the Arbitrator was whether the MOA entitled NYKK to redeliver, i.e. (in effect) whether the C/P was a 7-year one or a 3+2+2 one.

Counsel for NYKK submitted that the MOA gave it an option to terminate by redelivery after three or five years. Further, the factual matrix included the Fixture Memorandum and the Arbitrator had erred in rejecting it as a legitimate basis for construing the Contract. Counsel also made a number of detailed submissions (not relevant to this report) regarding his view of the true interpretation of the C/P

Counsel for Owners essentially relied upon and fully supported the Arbitrator's reasoning. Rather than summarise Counsel's submissions, Morison J considered it appropriate to summarise the Arbitrator's reasoning.

The correct approach to the construction issue was that "one should have regard to the factual matrix so as to consider the contract as expressed by the parties in the same context as the parties did at the time they made it. However, serious surgery on the words and syntax would only be justified if it was apparent from the factual matrix, or the particular construction to which those words and syntax would otherwise lead, that something must have gone wrong with the drafting." As the Arbitrator stated, the words which the parties choose to express their agreement cannot be said to be the irrebuttable final determinant, but that the starting point must be the words chosen by the parties to express their agreement in the first place. This was correct.

The Arbitrator had concluded that when the MOA was executed it had always been the intention of both parties that GOL, the ultimate parent of the group, should be bound, and that finding was entirely compatible with NYKK's subsequent approach. Some of NYKK's submissions with regard to GOL were absurd given its acceptance (by signature) of certain obligations. As to the language of the MOA, the Arbitrator had said that he had found it very difficult to find a plain meaning from the heading to the charterback options clause at all and it was unfair to criticise him for dealing with these detailed points one by one and to suggest that he thereby failed to look at the Contract overall or 'in the round'. If he had not dealt with the individual points he would have been criticised for not doing so. Observing that the MOA was loosely worded, but that a charter back was consistent with the commercial objective which would have been defeated had there been a right to re-deliver the Vessel at three or five years. The word "back" meant a charter on a back-to-back basis to a company within the group and was consistent with the commercial background. The words "elect to continue" were inconsistent with a 7-year charter and it was common ground that they were not apposite in any event. The Arbitrator had concluded that the words were really referring to the charterback option:

> "this option was, as previously mentioned, a means by which to bridge the different positions of the two parties at the time of contracting and was intended to have a similar commercial result to a redelivery. Up until the exercise of the option, [NYKK] would have the full rights and obligations under the [C/P] as therein expressed but after the exercise of the option, those rights and obligations would have been passed on to GOL on a back-to-back basis so that NYKK could look to GOL for the entire performance of the C/P."

Inter alia, the Arbitrator had rejected an argument attaching significance to certain language In the C/P, stating that this was boilerplate language and attaching no significance thereto.

The Judge considered that the Arbitrator had dealt convincingly with NYKK's problem of trying to explain why there needed to be options to charterback on a back-to-back basis if all that was intended was an option to re-deliver at three or five years, the proposition that the reference to GOL and its description as the Owners' parent company indicated a "guarantee" or provided "flexibility" being insupportable. The word 'guarantee' was absent and no kind of guarantee was given by GOL, merely a commitment to take the Vessel on as a subcharter from NYKK.

The Judge adopted (without repeating) the Arbitrator's analysis of the 'business sense' 'reasonable man' approach, although it added nothing to what he had already said, so succinctly. In the latter's view the words meant what they said; there was an option to charterback at three and five years, an option which satisfied NYKK's concern that it might have no use for the Vessel after three or five years. A charter back was not a re-delivery, which was an option not acceptable to the GO Group, for the reasons set out in the Award.

For these reasons the appeal must be dismissed.

Comment

For reasons of limitations of space, I have had to omit much of the legal argument, particularly NYKK's submissions which were rejected, and interested persons are invited to read this in detail in the judgment (which is quite short).

However, the key point to me is that the Arbitrator's Award has been used not only as the basis for Owner's submissions but also as a substantial part of the basis for the present judgment. Even stripping out the wholly-justified laudatory language adopted by Morison J, this dual usage makes its own powerful statement.

It seems to me that all arbitrators should aspire to this level in preparing their Awards.

Note

I wish to record my thanks to the parties with whose consent two points of detail omitted from the judgement were kindly clarified.

7. Arbitration, whether investment or other, between foreign companies and Host States (whether acting through the Government itself, an agency thereof or a wholly-owned subsidiary hereof), throws up its own suite of difficulties and issues, well-covered in the literature. Two particular issues recur (i) actions instigated by the State in its own courts in apparent defiance of an arbitration agreement and (ii) the scope and limitations of Government Guarantees. English judicial policy towards these issues is clear enough but a 2002 Court of Appeal case which I have revisited recently seems to capture the essentials very well. The case is *Sabah Shipyard (Pakistan) Ltd The Islamic Republic of Pakistan & anr* [2002] EWCA Civ 1643; Pill, Waller and Nourse LJJ.

The broad circumstances of the case are very familiar to me having entered into similar contracts and associated guarantees on many occasions. This case is VITAL knowledge for anyone whose company carries out business with States or State entitles.

David Steel J had (i) granted an injunction restraining the The Islamic Republic of Pakistan (the "Government") from continuing proceedings commenced by it on 31st October 2001 in the Court in Islamabad and (ii) ruled against the Government's application to stay the English proceedings. The Court of Appeal gave permission to appeal on all issues which were

(1) whether, under a Government guarantee given in Sabah's favour, the Government, in waiving sovereign immunity, had consented to the CoA having jurisdiction to grant the injunction;

(2) the proper construction of the jurisdiction clause of the same guarantee (cl. 1.9.1) under which each party had consented "to the jurisdiction of the Courts of England for any action filed by the other Party under this Agreement to resolve any dispute between the Parties and may be enforced in England except with respect to the Protected Assets, as defined in the Implementation Agreement of the Guarantor" and

(3) whether the circumstances were such that if the CoA had jurisdiction to grant an injunction it should do so, in particular in the context of the Government having obtained an injunction in Pakistan restraining Sabah from commencing proceedings in England.

The facts

Sabah was a Pakistan-incorporated limited company with a Malaysian parent; its sole purpose was to contract with the Government and KESC, a state-owned corporation, for the design, construction, operation and maintenance of a barge-mounted electric generation facility at Karachi. Various agreements were signed in 1996 including the Implementation Agreement (the IA) between Sabah and the Government, and the Power Purchase Agreement (the PPA) between Sabah and KESC. In accordance with the terms of the IA, Article 22, the Government also entered into a guarantee dated 5th May 1996, in favour of Sabah. Clause 1 of the guarantee provided as follows:-

"1.1 Guarantee

> In consideration of [Sabah] having entered into the PPA with KESC … the Guarantor hereby irrevocably and unconditionally guarantees and promises to pay the Company any and every sum of money KESC … [is] obligated to pay to [Sabah] under or pursuant to the PPA … that KESC … has failed to pay when due in accordance with the terms of those agreements, which obligation of the Government shall include monetary damages arising out of any failure by KESC … to perform its obligations under the PPA, respectively, to the extent that any failure to perform such obligations gives rise to monetary damages."

The project was delayed and disputes arose as to why. KESC drew down on certain Sabah L/Cs on the basis that the delay was due to Sabah being in breach of contract. Sabah asserted that the delay was due to force majeure, that KESC should have granted an EOT and thus that KESC had acted wrongfully and in breach of contract. On 7th December 1998 Sabah commenced arbitrations against the Government under the IA, and against KESC under the PPA. The PPA arbitration took place in Singapore, and the arbitrator, Sir David Tompkins QC, made an award in Sabah's favour in the sum of US$6.84m together with interest and costs.

KESC refused to pay and challenged the award in the High Court in Karachi, so on 7th September 2001, Sabah called on the Government guarantee. The latter responded asserting (1) that the Government was not bound by the findings in the KESC/Sabah arbitration; (2) that Sabah had in any event not established KESC's liability; (3) that because the IA had terminated, the PPA had ceased to exist, and 3(a) the demand was premature because the legality of the basis on which the PPA had been terminated was still subject to

arbitration, and 3(b) was not maintainable for failure of consideration; (4) no demand could be made until the award was made an order of court; (5) the demand had not been made in accordance with the guarantee.

On 31st October 2001 the Government issued proceedings in the Court in Islamabad, describing the proceedings as "Suit for a declaration & permanent injunction". The pleading asserted the points set out in the letter of 11th September but also asserted that the award had been obtained by fraud, and claimed a declaration to that effect in addition to declarations that the demand was based on an award not binding on the Government, that the guarantee was invalid due to failure of consideration, and that Sabah should be "permanently restrained by injunction from making any demand under the guarantee."

Also on 31st October 2001, the Government applied ex parte for an injunction pending trial of the action restraining Sabah from making any demand whatsoever under the guarantee. It was common ground that the form of words had the effect, and was intended to have the effect, of preventing Sabah commencing proceedings in England despite clause 1.9 1 of the guarantee (it appeared that Cl.1.9.1 was not drawn to the attention of the Islamabad court).

There followed extensive procedural history which is not in point here, except that there was an argument as to whether the ex parte injunction had continued in force, the Government asserting that as a matter of Pakistani law it did, Sabah contending the opposite.

In any event Sabah applied ex parte to David Steel J on 11th December 2001 who granted an injunction. The Islamabad Court had been due to hear the application inter partes on 13th December 2001, but postponed that hearing until after the date of the on-notice hearing in England. At the latter, David Steel J held that the Government had by the guarantee waived sovereign immunity including consenting to the granting of an injunction His view was that "whilst the burden would be on [Sabah] to establish that the proceedings commenced in Pakistan [were] vexatious or oppressive, ... it [was] a burden lightened by the fact that the parties [had] identified a neutral forum in which they are content that their dispute should be determined …" Consequently, he held that the proceedings in Pakistan were vexatious and oppressive. In reaching that conclusion he found that the reason given for invoking the jurisdiction of the Pakistan court, i.e. that it was a convenient forum, was not a legitimate reason having regard to the terms of the guarantee. He based his conclusion inter alia on the following: … (3) that the allegations of fraud had effectively been withdrawn and replaced by a complaint of procedural unfairness; (4) that the complaint was in any event difficult to argue, but even if there was merit in it, it would be for a Singapore court to adjudicate upon, Singapore having jurisdiction over the arbitration ….

Sovereign Immunity

Clause 2.6 of the guarantee provided as follows:

"2.6 Sovereign Immunity

The Guarantor hereby irrevocably and unconditionally agrees that the execution, delivery, and performance by it of this Guarantee constitute private and commercial acts.

The Guarantor hereby irrevocably and unconditionally agrees that: (i) should any proceedings be brought against the Guarantor or its assets, other than its military aircraft, naval vessels and other defence related assets or assets protected by the diplomatic and consular privileges under the 1978 Immunity Act of the United Kingdom or … any analogous legislation (the "Protected Assets") in any jurisdiction in connection with this Guarantee or any of the transactions contemplated by this Guarantee, no claim of immunity from such proceedings will be claimed by or on behalf of the Guarantor on behalf of itself or any of its assets (other than the Protected Assets); (ii) it waives any right of immunity which it or any of its assets (other than the Protected Assets) now has or may in the future have in any jurisdiction in connection with any such proceedings; and (iii) consents generally in respect of the enforcement of any judgment against it in any such proceedings in any jurisdiction to the giving of any relief or the issue of any process in connection with such proceedings (including without limitation, the making, enforcement or execution against or in respect of any of its assets whatsoever (other than the Protected Assets) regardless of its use or intended use). "

Counsel for Sabah argued that (1) clause 2.6 as a whole appeared to be intended to be a comprehensive waiver placing the Government in the same position as any private individual save in relation to "protected assets"; (2) support for that view was supplied by the fact that it would be odd for a State to waive immunity from suit in a particular jurisdiction, but preserve for itself the right in effect to resist enforcement of that very right; (3) clause 2.6 was constructed so as to deal first with commencement of proceedings by 2.6(i); second, with the proceedings themselves by 2.6(ii); and third, with the enforcement of any judgment by 2.6(iii). The language of 2.6(ii) was very wide and by waiving "any right of immunity" "in connection with any proceedings," the Government was consenting to the granting of any relief against it (save in relation to its protected assets) in connection with the proceedings e.g. an interim injunction for Mareva relief or for an anti-suit injunction. In the alternative (4) if (as the Government argued) because the word "consents" appeared in clause 2.6(iii), and not in 2.6(ii), it was only to 2.6(iii) to which the Court could look so far as "procedural privileges" were concerned, that clause should be construed so as to amount to a consent to relief including injunctive relief even prior to final judgment.

Counsel for the Government argued that the language of 2.6 followed the language of s.13 of the State Immunity Act so that word 'waive' was used when it was concerned with waiver of Sovereign Immunity, and "consent" when it was concerned with privileges retained by a State. It was only in cl.2.6(iii) that the word "consent" appeared. Thus it was, he suggested, from cl.2.6(iii) and that clause alone that any consent to the granting of an anti-suit injunction had to be spelt out. But he submitted that cl.2.6(iii) was governed by the words at the commencement of the clause "enforcement of any judgment". So until final judgment, he submitted, there was no room for spelling out any consent to relief by way of injunction. Thus his submission was that there was no consent to the granting of any injunction during the currency of any proceedings. He accepted that once judgment had been granted the word "relief" included injunction, i.e. a Mareva injunction to aid enforcement of a judgment.

Waller LJ noted that this submission had certain rather odd consequences: (i) it implied that the Court could grant a Mareva injunction to aid enforcement of a final judgment but it could not grant one during the currency of the proceedings; (ii) similarly it implied that a final injunction might be granted to aid enforcement of a final judgment but an interim injunction to hold the status quo pending decision could not. Further, it implied that although the Government had waived immunity in relation to suit brought in England, and however vexatiously it might behave elsewhere, it could not be compelled to comply with its obligation.

Waller LJ concluded by rejecting the Government's submissions in this regard and upholding the Judge on the State Immunity issue.

Exclusive or Non-exclusive

After lengthy analysis of the full cl.1.9. and review of the extensive authority cited by Counsel (valuable reference material for those interested);, Waller LJ concluded that cl. 1.9.1, when taken with clause 2.6, was not an exclusive clause in the sense of making it a breach of contract for either party to commence proceedings in a jurisdiction other than England.

However, in the present case the Government had (i) clearly agreed to submit to the jurisdiction of the English court (ii) appointed agents for service, and (iii) agreed to waive any objection that any action brought in England was being brought in an inconvenient forum. It could not have been the intention of the parties that if proceedings were commenced in England, parallel proceedings could be pursued elsewhere unless there was some exceptional reason for doing so. It certainly cannot have been contemplated that convenience could count as a reason for pursuing proceedings in a country other than England. In particular, where England has been chosen as a neutral jurisdiction by an entity, Sabah a Pakistan company with Malaysian shareholders, and the State of Pakistan, it cannot have been contemplated that parallel proceedings would be pursued in the courts of Pakistan simply on the basis that that forum was a convenient forum.

It was therefore a clear breach of contract to have sought to have prevented Sabah commencing proceedings in England, the agreed jurisdiction. Furthermore, if Sabah had already commenced proceedings in England before the Government had commenced proceedings in Pakistan, it would in the context of this particular clause clearly have been vexatious for those proceedings in Pakistan to have been commenced if the only basis for bringing the same was on the ground of forum conveniens. If such proceedings were commenced in Pakistan simply to attempt to frustrate the jurisdiction clause, such conduct would be contrary to the spirit of the jurisdiction clause and vexatious.

Should an English Injunction be granted ?

The principles here have been considered recently in two cases in the House of Lords, *Donohue v Armco Inc and others* [2002] 1 Lloyd's Rep 425, and *Turner v Grovit and others* [2002] 1 WLR 107, and, following those decisions, in the Court of Appeal in *Glencore International AG v Exeter Shipping and others* 18th April 2002. Per Lord Hobhouse in *Turner*:

> "The making of a restraining order does not deny or pre-empt the jurisdiction of the foreign court. Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including

Conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into then picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted."

Counsel for Sabah stressed:

(i) to take steps as part of the proceedings in Pakistan to try and prevent proceedings in England was the clearest breach of contract; if the Islamabad court had been made aware of the effect of the relevant clause no injunction would have been granted, but the moving for an injunction and the claim for relief in the proceedings demonstrated that the aim of the Government was to have one set of proceedings but in Pakistan;

(ii) the proceedings in Pakistan could be seen as vexatious - there was simply no need to seek a negative declaration; if the Government's point on not being liable under the guarantee is a good point it will be a good point in England as well as Pakistan and the only basis for suggesting that the proceedings should be allowed to be brought and continued in Pakistan was on 'forum conveniens' but, in the context of cl. 1.9.3, that could not provide a legitimate basis for Pakistan being the sole court in which proceedings could be brought, and could not indeed provide a basis on which parallel proceedings should be allowed to continue in Pakistan once English proceedings had been commenced;

(iii) an injunction against the making of a demand under the guarantee or claiming under it was completely unnecessary. A demand had already been made. Sabah did not have any security against which it could enforce its claim.

Waller LJ concluded that if proceedings had been commenced in England before the Government has commenced proceedings in Pakistan, then the commencement of such proceedings in Pakistan would have been vexatious and oppressive absent exceptional reason – it could show none, relying only on matters of convenience. To have sought an injunction to prevent English proceedings being the parallel proceedings in those circumstances would have demonstrated even more clearly that the Government's conduct was oppressive and vexatious. Did the fact that it had commenced proceedings first change the position ? No - these were evidently commenced as a pre-emptive strike, with the intention of preventing Sabah proceeding in the agreed forum, England. The parties could not have contemplated that if proceedings were commenced in England, parallel proceedings would still take place in Pakistan.

The judge was right to grant an injunction in this case and right to refuse the Government's application to stay the English proceedings. I would dismiss the appeal.

Sir Martin Nourse and Pill LJ concurred.

Comment

None: none necessary !

8. Section 69 has been a big winner in the judicial popularity stakes in recent months (inter alia see ARBITRATION 69/1 and 69/3) with Rent Review cases featuring prominently (Checkpoint, Warborough etc).

Lo ! and Behold ! – Another One ! In BLCT (13096) Limited v. J Sainsbury plc ([2003] EWCA Civ.884; Arden, Longmore LJJ; 30th June 2003) further significant jurisprudential developments arose.

Pumfrey J had refused to hear an application for an oral hearing of an application made by BLCT for leave to appeal (LTA) on a point of law against an award (dated 13th May 2002) in a rent review arbitration between BLCT and Sainsbury. The present CoA hearing was of a LTA application against that refusal; this had come for hearing in court before two Lord Justices pursuant to the directions of Waller LJ who had given reasons that he had doubts (i) as to whether the CoA had jurisdiction to grant leave and (ii) as to whether it would grant leave even if it had jurisdiction to do so; he had, however, added that the point on jurisdiction was one which should be clarified. Accordingly, the hearing in the CoA was with respect only to the questions of the LTA application and an EOT.

The relief sought in the re-amended notice of appeal had been that the order made by the judge set out above should be set aside and that there should be an oral hearing of BLCT's LTA application against the arbitrator's award. The principal ground of appeal was that s.69(6) was incompatible with Art.6(1) of the ECHR because of its effect in entirely preventing any CoA consideration of an application to appeal to it

[NOTE: I have already argued in print – ECHR considerations omitted - that this is correct as a matter of arbitration law].

Background/The Arbitration

BLCT (landlord) and Sainsbury (tenant) were parties to a 35-year lease of a superstore in Cambridge. A rent review went to arbitration: the critical definition was that of "Market Rent" as defined in the lease. The Arbitrator's function had been to determine "Market Rent" in accordance with the terms of the lease and the law: the term meant "the higher of the yearly rental aggregate yearly rents at which the demised premises might reasonably be expected to be let as a whole or in permitted parts by a willing lessor to a willing lessee with vacant possession without any premium in the open market at the relevant Review Date …" on certain specified assumptions.

The nearest comparable related to a proposed new ASDA store in Cambridge; this comparable was largely contemporaneous, was a superstore of the same size as Sainsbury's and was only about a mile away. As regards the new store, Safeway had offered £20.48/sq.ft and ASDA £18.00/sq.ft plus a £3m premium and the latter offer was accepted. The £3m was not paid for anything specific but BLCT said that it was paid as a premium i.e. a part of the consideration for the grant of the lease, a not unusual circumstance. It argued that companies taking leases of large superstores were often willing to offer and pay substantial premiums. ASDA was agreed as the nearest comparable but it was not agreed how to analyse it nor how it should be adjusted for the purposes of finding the market rent of the Sainsbury store; should the £3m premium be decapitalised (or rentalised) and treated as part of the rent ? BLCT's Expert Witness said that the ASDA comparable would equate to a no-premium £23/sq.ft and arrived at £1.8m/p.a.. Conversely, Sainsbury's EW said that the premium in the ASDA comparable should be ignored and that the £18.00/sq.ft should be reduced to £16.00 to take account of other factors. BLCT asserted that the rentalisation of capital sums was a common feature of adjustment of comparables in the course of rent reviews.

The Arbitrator had in effect preferred Sainsbury's view, accepting that the ASDA comparable had been of critical importance but then treating it as if no premium had been paid. He held that the premium was a "key money payment with no evidence that it could at any time be converted into a rental payment or could be treated as a payment in lieu of rent." He had also held that there was no single approach to the treatment of premiums as they could be amortised at different rates. His opinion had been that premiums should not be decapitalised as a matter of course and that market place rentals could be lower than that which operators could afford. It could not automatically be assumed that a premium paid for representation reflected the difference between rent actually paid and a higher market rent. He held that his function was to ascertain the Market Rent and that for this purpose the market itself had to be identified and the rents which were paid in the market applied to the subject premises. If there was no evidence in the market that higher rental levels would be paid and that the landlord received the full rent plus a premium there was no evidence as to why an even higher rent should be automatically identified as the market rent through the amortisation of the premium if there was no such evidence of Market Rents being at higher levels. Where the rental reflected the Market Rent and the premium paid was key money there was no reason to amortise or decapitalise the rent to secure a higher rent which in itself could not be supported by evidence in the market place. Accordingly, it was not appropriate to decapitalise the premium paid by ASDA. "If the market will not support a higher rental level than the rent paid, then the Market Rent must be adjudged to be the rent paid without the amortisation of a premium".

BLCT's case was that the Arbitrator had misunderstood the legal concept of willing lessee, who is a person, albeit entirely hypothetical, who was actively seeking premises which fulfilled the needs which the present premises could fulfil. Accordingly, the fact that other real tenants would not have paid a higher rent in place of the premium was irrelevant. Accordingly, the Arbitrator had made a fundamental error of law in rejecting the rentalisation of the £3m premium. The second error of law alleged by BLCT was that the Arbitrator had wrongly regarded the premium as "key money" and thereby as entirely unconnected with the lease which it submitted, was unrealistic. In essence, therefore, the Arbitrator's alleged error of law was to have held that it was necessary, when determining the rent that a willing lessee would pay, to find that there was evidence that such levels of rent were actually paid, where there was evidence that in comparable transactions sums had been paid as consideration for the grant of the lease which were not called rent.

The Award and the Appeal

The award was published on 13th May 2002 and on 7th June 2002 BLCT made a s.69 LTA application setting out detailed reasons and stating the questions of law. The grounds stated inter alia that (i) there was a substantial (£1,775,000 being £23.00 - £18.00 x 71,000 sq.ft x 5 years) effect on the amount of rent; (ii) the decision of the Arbitrator was obviously wrong; (iii) alternatively, the question was one of general public importance because it applied not only to the subject lease but to many other commercial property leases.

After much procedural waltzing, a Chancery Master made an order "that the application to appeal be referred to a judge of the High Court for consideration pursuant to [s.69(5)] on a date to be fixed by the listing office." it appeared that the Master thought that there could be an oral hearing after the initial disposition on paper. It also appeared clear that BLCT asked for an oral hearing. Furthermore, the order of the court was ambiguous

since it referred both to s.69(5) and to the fixing of a date by the listing office, the latter consistent with an oral hearing, the former suggesting that there would be no oral hearing unless the judge thought it was appropriate.

On 30th August 2002 Pumfrey J directed that LTA be refused, inter alia because: " … (2) It is not entirely clear what the suggested questions of law are. (3) the Arbitrator did not exclude the possibility that the £3m payment might be rentalised for the purposes of ascertaining the notional rent for the purposes of comparison. Whether to do so, and in what circumstances, is a question of the method of valuation. The basic question is whether the rent payable by ASDA should be reduced i.r.o. the £3 million. (4) The first complaint is that the Arbitrator found that other real tenants would not have paid a higher rent in place of the premium, but that this was irrelevant. This is not so. It is a matter which has been taken into account, since the notional willing lessor and lessee cannot be taken necessarily to agree a rent higher than any real rent in the market place … (6) I do not consider that the award is obviously wrong and I do not consider that it raises an issue of general public importance". BLCT's complaint was that the judge's reasons had made no reference to the questions of law as formulated by it in its application. On 9th September 2002, BLCT issued an application for an order that "upon reconsideration that an oral hearing pursuant to CPR 52.3(4) of the refusal of LTA made by Mr Justice Pumfrey on 27 August 2002, that the appellant be granted LTA" the award and "in the alternative pursuant to s.69(6) of the Arbitration Act 1996, that LTA to the Court of Appeal be granted to appeal the order of refusing LTA, with all necessary extensions of time in order to be able to do so."

On 26th October 2002, Sainsbury's solicitors wrote to Pumfrey J stating that they had been advised by leading counsel that CPR 52.3(4) had no relevance and enclosing a detailed skeleton argument. By letter dated 29th January 2003, Pumfrey J's Clerk replied, inter alia stating that: (a) "a decision under s.69(6) taken without a hearing is dealt with in that way because the court does not consider that a hearing is required – see s.69(5). The judge did not consider that a hearing was required. (b) CPR 52.3(4) is expressly subject to any rule, enactment or practice direction which sets out special provisions with regard to any particular category of appeal and is therefore subject to s.69. The ordinary rules relating to a renewal of an application for LTA refused on paper do not, in the judge's view, apply to a decision under s.69(6). (c) The judge has accordingly caused that the date fixed for the proposed oral application for leave to appeal be vacated."

After more waltzing, on 10th March 2003, the Clerk wrote to BLCT's solicitors as follows: "The Judge refuses LTA against his refusal to grant LTA under s.69(2). The reasons are the same as those given in refusing LTA to the High Court. The Judge considers that the provisions of s.69(8) (which apply to appeals which have been heard) suggests that important factors in deciding whether to grant LTA [against] a refusal of leave are whether the case is one of general importance or there is some special reason. The judge considers that there is no such factor here."

BLCT's Submissions

It accepted that it had no right either to appeal to the CoA (a) against a refusal of leave or (b) against an Arbitrator's decision or to ask the CoA for such leave. However, it argued that it was entitled to an oral hearing under Art. 6 in the absence of special circumstances (cited: *Scarf v United Kingdom* [1999] EHRLR 332). It also relied on *Allan Jacobson v Sweden (No.2)* (8/1997/792/993, unreported) and *Fischer v Austria* (1995) 20 EHRR 349. In the former case the ECtHR confirmed that in proceedings in a Court of First and only Instance the right to a "public hearing" under Art.6(1) entailed an entitlement to an oral hearing unless there were exceptional circumstances. As regards jurisdiction, BLCT submitted (and Sainsbury agreed) that in *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397, the Court of Appeal had held that there was a "residual jurisdiction in this court to set aside the judge's decision under s.69 in a case of unfairness" (p.2403 per Tuckey LJ).

BLCT therefore submitted that it should have the right to have the decision reconsidered at an oral hearing and that s.69(5) did not prevent this. Further, s.69(6) was incompatible with Art.6 because it conferred no right of appeal in the present case and because there was no right to an oral hearing below.

Sainsbury's submissions

The judge's authority to determine the application was exhausted once he had decided the issue on paper per s.69(5). Accordingly, he could not reconsider the matter. CPR 52.3(4) was subject to statutory provisions to the contrary and thus the judge was correct to have concluded that CPR 52.3(4) was subject to s.69(5). There was, in any event, no prospect of success because the judge had been correct to have concluded that an oral hearing was unnecessary - he had had full particulars of the grounds of the application. *North Range Shipping Ltd v Seatrans Shipping Corporation* showed that (i) parties to a consensual arbitration waive their Art.6 rights in the interests of privacy and finality; (ii) Art. 6 did not guarantee a right to appeal; (iii) the limitations imposed by the Act on the right to appeal to the courts do not themselves offend Art.6; (iv) Art.6, however, applied to the statutory appeal process; (v) the manner of application of Art.6 to court proceedings depended on the special features of the proceedings involved;

account must be taken of the entirety of the proceedings in the domestic legal order and the role of the appellate court therein.
Consequently, Sainsbury submitted, (i) BLCT had accepted arbitration with limits on the rights to appeal; (ii) if a would-be appellant could not convince a judge on paper, it would be a rare case where he could do so at an oral hearing; (iii) in any event, the ECtHR has held that LTA can be refused on paper even in a criminal case (*Monell & Morris v UK* (1987) 10 EHRR 205.

Conclusions

Both Counsel accepted that, notwithstanding s.69(6), the CoA possessed residual jurisdiction to grant relief in a case of unfairness (see *North Range*). The question at issue in that case had been whether the judge's reasons for refusing LTA under s.69(5) had been adequate for the purposes of Art.6 ECHR. The CoA had held that they had been and the case had been an active example of the Court considering that the process by which the judge had reached his decision had complied with Art.6(1). The Court had had, therefore, to consider the application of Art.6. At paragraph 28 the Court had said:

> "the judge is right to say that in reality the High Court is the court of last resort in arbitral proceedings. Resort to that court by way of appeal is severely limited by statutory provisions which do not offend Art.6. We reject [the] submission that there is no proper analogy because, unlike the cases considered by the Commission, there have been no court hearings in the lower courts to which Art.6 will have applied. The arbitral process has its commercial advantages of privacy and finality which does not involve such hearings but that is what the parties have chosen."

This was authority for two further propositions, one explicit, one implicit: first, statutory provisions limiting the right of appeal from an arbitral award did not offend Art.6, the parties having chosen that course; second (by implication) it was open to the parties to agree to waive the protection of a public hearing and a public pronouncement of the decision to which they would otherwise be entitled under Art.6. Moreover, where Art.6 was satisfied by proceedings at first instance, there was no ECHR obligation on the State to provide an appeal process.
The residual jurisdiction of the Court to intervene in the event of unfairness was, as Arden LJ saw it, a residual jurisdiction to intervene to ensure that the process of reaching a decision under s.69(5) complied with Art.6 and that the hearing of that application was a "fair … hearing" for the purposes of that article. A hearing which violated the appellant's right under Art.6(1) to a fair trial would constitute unfairness for the purpose of the *Seatrans* case.
There was no real prospect of success for the argument that an application determined on paper under s.69(5) could be reconsidered at an oral hearing. That proposition would require a provisional determination on paper before a final determination at a hearing which is not what s.69(5) says, rather that the Court should "determine" the application on paper unless it made the positive decision that a hearing is required. If an oral hearing is required by Convention jurisprudence, then it is surely "required" for the purpose of s.69(5) on its true interpretation but it was too late to ask for an oral hearing after the application has been determined on paper.
Arden LJ rejected the submission that it was a requirement of Art.6 that there should be an oral hearing unless there are exceptional circumstances in the case. The fact was that the parties had already had a full hearing before the Arbitrator and Counsel for BLCT had not suggested that that process had not complied with Art.6: the hearing had been before an independent tribunal, each side had had the opportunity to put its case and knew the evidence of the other party, the Arbitrator had given reasons for his decision, the proceedings had been in private. This was apparently contrary to Art.6, but the parties had waived their right to have asserted that this had been a violation by virtue of their agreement to arbitrate.
Arden LJ considered that the true principle was that, in order to determine whether an oral hearing was necessary for Art.6 purposes, the nature of the application must be examined to see whether one was required. In the present case, the question on which LTA was sought had been one of law. There had been no question, for example, as to a party's credibility; there had been no question of any decision on the facts at all, as in the case of *Fischer v Austria* (above). In those circumstances, Arden LJ considered, Art.6 did not require an oral hearing of an application for LTA against an arbitral award save in exceptional circumstances.
Consequently it was necessary to consider the particular circumstances in this case: the point of law was complex, but there had been no difficulty in explaining it. There had been a statutory obligation to have identified the point of law and there had been a full and sufficient description of it in the LTA application and there had been a substantial witness statement in support. The judge had also had skeleton arguments. It had never been suggested that the judge had lacked any material information for the purposes of his decision.
The only circumstances which might have qualified as exceptional in this case were those arising out of the hearing on the 7th August 2002 where BLCT's solicitor specifically asked for an oral hearing. It was indicated to him (inaccurately) by the Master that if a decision was made on paper which was adverse to him there

would be a right to renew the application before a judge. There was also the form of the order dated 7th August 2002 which gave rise to a reasonable expectation that there would be an oral hearing.

Did any of these indications matter? BLCT's solicitor had been in a position to form a view as to whether or not there could be any oral renewal of the LTA application and it had not suggested that he had been under the impression that the matter would necessarily be the subject of an oral hearing and that he had omitted to take some step on the basis of what the Master had told him. Arden LJ did not consider that the judge's decision not to hold an oral hearing could be faulted on what he knew. If he had known that there had been a request for an oral hearing the question would have arisen as to whether he would reasonably have reached the other view. In Arden LJ's view, he would have maintained the view that an oral hearing was not appropriate.

Accordingly, even if the judge had not had in his mind the particular circumstances mentioned above, there would be no real prospect of success on appeal because they would have made no difference to his decision. Counsel for BLCT had been unable to identify any other characteristic of the LTA application which would constitute an exceptional circumstance justifying an oral hearing in this case. He had made the general point that there was value in oral argument: that was undoubtedly so - good advocacy was an essential requirement for doing justice in an individual case, the qualities making advocacy helpful to the Court in achieving justice including both clarity and economy in presentation.

However, there were countervailing policy considerations in the 1996 Act. Section 1(a) of the 1996 Act provided, inter alia, that "the object of arbitration is to obtain the fair resolution of disputes … without unnecessary delay or expense". This applied to the determination of s.69(5) LTA applications just as to the arbitral proceedings themselves. As this case had shown, once the question of an oral hearing had been raised, there would inevitably be the loss of time in fixing dates, undermining the finality and efficiency of the arbitral process.

Was s.69(6) incompatible with Art.6 because it conferred no right of appeal in the present case and further because there had been no right to an oral hearing below ?

(i) s.69(6) required the leave of the High Court only for any appeal from a decision of the Court to grant or refuse LTA: did that decision include a decision that a hearing was not required ? Counsel for Sainsbury had submitted that such a decision was an integral part of the decision to grant or refuse LTA but, however, that same argument (if good) would apply to the refusal of a judge to recuse himself on the grounds of bias. It would certainly be very odd if the refusal of the judge to give leave against that decision meant that the appellant had no avenue of appeal to the Court of Appeal. Arden LJ considered that the answer lay not in any incompatibility with the ECHR but in the residual jurisdiction articulated in *North Range*. In the case of any violation of a party's right to a fair trial, Sainsbury's submission was sound but Arden LJ did not consider that appeal on the contrary argument had any real prospect of success.

(ii) was s.69(6) incompatible with Art.6 because there was no right to an oral hearing below ? Arden LJ rejected this argument because, although Art.6 conferred the right to "a fair and public hearing", this did not necessarily mean a hearing at which the litigant was entitled to attend. It all depended on the nature of the application: see *Monell and Morris v UK* (above).

Counsel for BLCT accepted that the judge had been correct in his having held that CPR 52.3(4) did not apply to a decision under s.69(5).

Arden LJ concluded that there was no real prospect of success on appeal and LTA should be refused. Longmore LJ agreed.

Comment

Again, this must be right for the reasons so clearly set out by the Distinguished Lady Justice (the first English such Court of Appeal case on which I have commented), continuing the line of cases leading up to *North Range*. The structure for s.69 appeals was most carefully drafted, fully reflects Art.5 of the Model Law and has been vigorously clarified in *Northern Pioneer.*

Further, political considerations apart (I am not only unable to detect any significant benefit in England or Scotland from having enacted the ECHR into domestic law but also see substantial downside from having done so) I see it as essential to arbitration that the ECHR be kept at a substantial distance

However, I do not find the argument relating to "finality and efficiency" above particularly helpful since it appears to me to verge on the subjective, detracting from the cogent logic of the rest of the judgement

9. In *Haden Young Ltd v Dinsmore* (Court of Session; Outer House; Lord Brodie; 6th May 2003), HY, respondents in an arbitration, sought judicial review of an Arbiter's (i.e. Mr Dinsmore's) decision and sought to injunct him from proceeding with arbitration until it had had a proper opportunity to consider expert reports admitted late and to deal with the late amendment of pleadings by the Claimant. HY argued that (1) the late amendments and admission were prejudicial to it; (2) the Arbiter had taken irrelevant considerations regarding delay into account since the delay was entirely down to the Claimant; (3) since the arbitration had

been conducted on the basis of formal litigation pleadings, HY had had a legitimate expectation that the conventions associated with such pleadings would be observed, including the allowance of time to respond.

In Court, HY and the Claimant were represented by Counsel but the Arbiter was not represented although his Clerk (i.e. a Solicitor) was present but only in the capacity of an observer.

On the first day of a six-week hearing, the Arbiter had refused a three-part motion put to him by HY and declined to suspend the hearing; the motion was that the Arbiter should (1) refuse to allow the Claimant to amend its pleading; (2)... and (3) refuse to allow the Claimant to introduce certain expert reports, until such time as HY had had a reasonable opportunity to consider the new material. The Arbiter had made his decision having heard Counsel for both HY and the Claimant over a 2½ hour period and having then retired for over an hour before resuming the Hearing and announcing a brief but reasoned decision.

In Court, the respective Counsel were agreed as to the relevant authorities addressing the competency of judicial review of an arbiter's conduct of proceedings, in particular in *West v Secretary of State for Scotland* [1992] SC385; [1992] SALT 636. The grounds for review were familiar ones, summarised by Counsel as (a) Wednesbury unreasonableness, (b) breach of natural justice, (c) procedural unfairness and (d) being obviously wrong.

HY had been a sub-contractor to the Claimant in respect of pipework carried out as part of a construction project around 1990; arbitration had commenced around 1992/93 and proceeded via formal pleadings supplemented by Scott Schedules. The original Arbiter had resigned in January 2000 and was replaced by Mr Dinsmore who had convened an Interlocutory Hearing and had thereafter issued Directions requiring, inter alia, the exchange of all expert reports by 16th April 2002; they were duly exchanged. A number of other interlocutory matters were dealt with in 2002/2003 including, at the request of the Claimant, that the Arbiter should State a Case for the Opinion of the Court under s.3 Administration of Justice (Scotland) Act 1972; however the issue the subject of the Stated Case did not affect the present 6-week hearing fixed for 29th April 2003.

Counsel for HY accepted that its application for judicial review could be successful only if it could satisfy the Court that the decision complained of was unreasonable in the Wednesbury sense or was obviously wrong or was based on flawed reasoning. The Court was entitled to ask whether the Arbiter had given sufficient weight to the prejudice caused to HY and whether there was any reason to give weight to the need to press on as opposed to allowing time for HY to consider the new materials.

Counsel for the Claimant stressed that the test HY had to meet was a very high one and that it had failed; the proposition that the arbitration had been conducted on the basis of traditional formal pleadings was not supportable. He also observed that the major work on the sub-contract had started some 15 years previously and that it was inarguable that HY had not itself contributed to some of that delay. He submitted that the Court should be reluctant to interfere with an arbiter's decision, particularly in respect of procedural matters. Only manifest unfairness or irregularity, in the Wednesbury sense, could justify the Court's interfering. The Arbiter had considered the relevant issues at length and had made a decision supported by rational reasons which did not result in manifest unfairness. HY's argument based on reliance on formal litigation pleadings failed since it was within the jurisdiction of the Arbiter to make relevant procedural decisions.

Lord Brodie commenced by noting that the parties were not in dispute as to the applicable principles of law: the decisions of an arbiter are subject to the supervisory jurisdiction of the Court, a matter quite distinct from the Stated Case Procedure. Although the Articles of Regulation (1695) restricted the grounds for set-aside of arbiters' awards to "corruption, bribery or falsehood", the courts (in *Shanks & McEwan (Contractors) Limited v Mifflin Construction Limited* [1993] SLT1124) had interpreted "corruption" to include a failure to observe the rules of natural justice. In addition, in *Forbes v Underwood* (1886 13R at p.467) the Lord President had stated:

> "The position of an Arbiter is very much like that of a Judge in many respects, and there is no doubt whatever that whenever an inferior Judge, no matter of what kind, fails to perform his duty, or transgresses his duty, either by going beyond his jurisdiction, or by failing to exercise his jurisdiction when called upon to do so by a party entitled to come before him, there is a remedy in this Court."

It followed that the supervisory jurisdiction of the court extended to review of the conduct of a private arbiter in procedural matters; however, the Court would not merely reopen the question before the Arbiter since there was a distinction between the jurisdiction entrusted to him on the merits, with which the Court could not interfere, and such control as may be exercised by the Court where the Arbiter refused to act at all or exceeded his jurisdiction.

However, recognition of the applicable principles was one thing, applying them another. Lord Brodie considered it appropriate that he should regard the Arbiter's decision with the degree of deference due to one who had been selected by the parties for his particular expertise, the parties having chosen arbitration. He considered that the Arbiter would have a much better understanding of the issues arising in the arbitration

and how they might fairly and efficiently be addressed than the Court might have a hope to acquire in the course of a hearing. In any event, it was clear from *Shanks & McEwen* that judicial interference in the arbitral process should be minimised and should be limited to extreme situations.

Lord Brodie was not persuaded that the Arbiter's decision in the present case had been unreasonable: he had identified the issues put before him, had considered them and had delivered a reasoned decision. He had recognised the potential prejudice to HY. Further, the Arbiter's taking to account previous delays was not an irrelevant factor in arriving at his decision; he had been entitled to have considered the desirability of avoiding further delay, irrespective of which party had been responsible for previous delays.

Lord Brodie separated HY's arguments regarding 'legitimate expectation' from its others; he noted that the Claimant's Counsel had disputed that the arbitration had in fact been conducted on a formal pleadings-related basis. It would therefore be difficult for the Court to identify the exact extent of the "legitimate" expectations of the parties. The question of what weight to give to the pleadings in any arbitration was a matter for the judgment of the Arbiter; he might have to have regard to any rules which had been agreed to govern the proceedings. While it had been possible that the notional "reasonable arbiter" would have suspended the hearing to allow HY to consider the new materials, Lord Brodie did not accept that such individual would necessarily have done so: this was a matter for the Arbiter's discretion and he was not persuaded that such legitimate expectation could arise, even in a very formally-conducted arbitration, in the absence of some specific promise or indication on the part of the Arbiter that he would respond in a particular way in the event of amendments being sought.

Having regard to the whole circumstances, Lord Brodie considered that HY had not made out a prima facie case for set-aside or injunction.

Comment

When I see argument founded on a statute of 1695, my confidence that the concepts of modern arbitration will win through is necessarily limited but Lord Brodie is, in my most respectful submission, to be commended, for "cuttings the ####" and reaffirming the concept of the discretion of the Arbiter. As stated above, the scope possessed by the Court of Session to supervise private arbitration is not only much wider but also much less well-defined than the precision and elegance of the English Arbitration Act but, perhaps thankfully, this case has arrived at the right conclusion. Had it been otherwise, then we might all have thrown our hands in the air and taken early retirement.

Despite the highly commendable conclusions of this case, the sooner that the Arbitration (Scotland) Bill 2002 becomes law and we can replace several hundred years of common law with a concise modern statue, so much the better.

10. *Brican Fabrications Ltd v Merchant City Developments Ltd* (Inner House, Court of Session; Lords Marnoch, Hamilton, Caplan; 7th July 2003; principal Opinion of Lord Marnoch) was a revisiting of the Eternal Triangle of Employer, Main Contractor, Sub-Contractor (i.e. Merchant, Circle Construction Ltd, Brican respectively). Merchant was engaged in a project to refurbish and develop a former commercial building in Glasgow for leisure use but ran into difficulties and contracted with Circle as the main contractor. Inter alia, Circle was responsible for the appointment of all sub-contractors, the key sub-contract being for the supply and erection of steelwork which, given Merchant's prior difficulties, was now highly time-critical. However, Circle was unable to find any sub-contractor willing to carry out the steelwork; Brican refused to become involved having become aware of Circle's parlous financial circumstances and therefore being reluctant to enter into any sub-contract with Circle. Circle led Merchant to believe that a sub-contract was on the point of being concluded when in fact Brican had refused; Merchant then contacted Brican and, at a meeting between them (in Circle's absence) it was agreed that Brican would enter into a sub-contract with Circle provided that Merchant would pay it directly for the steelwork. Of course, such an arrangement could be valid only if consented to by Circle. Subsequently, Circle and Brican entered into a sub-contract in standard form.

Brican commenced work and was paid by Merchant for approximately six months before Circle went into liquidation; in the present case Brican claimed approximately £43,600 from Merchant being the outstanding balance on account.

But first instance, the Sheriff had found that the arrangement between Brican, Merchant and Circle was a tripartite contract constituted by an oral offer by Merchant and the subsequent exchange of various letters and faxes. He also found that it was a term of the 'tripartite contract' that Circle would quantify and value the work executed by Brican and would inform Merchant of the sums to be paid, in respect of which Brican would render a VAT invoice directly to Merchant, the latter deducting appropriate sums from payments to be made to Circle. Unsurprisingly, given this analysis, the Sheriff found in favour of Brican in the full amount of its claim.

On appeal, the Sheriff Principal disagreed, accepting that what the Sheriff had found as fact had indeed been the intentions of the parties but he concluded that, as a matter of law, the relevant documents did not achieve this. For him, the principal documents were the Main Contract Merchant/Circle and the Sub-Contract Brican/Circle. He accepted that the parties might have arrived at a collateral agreement on the side but he would not accept that oral variation given that it was inconsistent with the rights created under the two principle contracts. The Sheriff Principal therefore recalled the Sheriff's decree for payment and granted absolvitor to Merchant.

Lord Marnoch's' opinion starts with the statement that "… proceedings in both lower courts had been bedevilled by a failure to analyse and identify clearly the nature and terms of the contract as founded on by [Brican]". He continued that the primary, but not sole, responsibility for this must presumably rest with those representing Brican. He rejected, sharply, the Sheriff's characterisation of the arrangement as a tripartite contract, instead, finding that a certain letter from Merchant to Brican had evidenced a completed bilateral or contract between the two companies, albeit one subject to the suspensive condition that Circle would waive its strict rights under the appropriate provisions of the Main Contract and Sub-Contract. He saw the subsequent exchanges between the parties of various communications as evidence of purification of that condition.

In the course of the Hearing the parties had conceded that there had indeed been a bilateral oral contract between Brican and Merchant and it followed that that contract could in no way have been varied by the terms of either the Main Contract or the Sub-Contract. Lord Marnoch continued "I am satisfied that... the Sheriff Principal did misdirect himself regarding the true legal nature of this transaction and that accordingly his judgement cannot stand. I am further satisfied that, despite its questionable terminology, the Sheriff's findings and reasoning did reach the correct result." Lords Hamilton and Caplan delivered short concurring Opinions.

Comment

Whether or not unique, what is certainly remarkable is that the original decision of the Sheriff should be upheld where his legal analysis had been so forcefully rejected. It is also remarkable that the Sheriff Principal appears to have completely misunderstood the significance of the oral contract made six or eight weeks before written contracts were entered into; whereas it might well in practice be difficult to reconcile apparently conflicting oral and written contracts addressing of the same subject-matter, such difficulty cannot excuse the Sheriff Principal's apparent decision to ignore the oral contract.

Further, respective Counsel produced ingenious argument relating to the tripartite payment provisions, little of which found favour with the court. In any event, it is clear that in any repetition of the circumstance where the Employer pays the Sub-Contractor direct then the Main Contract and Sub-Contractor must be amended expressly to cater for such payment mechanism, it being clear that leaving the principal contracts unamended is a recipe for trouble. [I have used a genuinely tripartite contract in analogous circumstances where the terms thereof were expressly stated to represent amendment (to the extent applicable) of both contracts

In any event, it would have been an extraordinary result if Brican, which had originally treated Circle on a "do not touch with bargepole" basis and which had been proved 100% correct in this regard and had established, so it believed, a bullet-proof payment mechanism by which it could carry out the steelwork which Merchant so desperately needed (it had pre-let part of the building hence was under immense time pressure) was to be defeated by artificial or legalistic construction of the contract.

11. The Arbitration Act 1979 repealed the heavily-criticised s,21 Arbitration Act 1950 known as the "stated case procedure" (SCP). However, the SCP had then only recently been introduced in Scotland as s.3 of the Administration of Justice (Scotland) Act 1972 which section continues in force despite continuing criticism that this represents an anomaly best removed which it will be once the Arbitration (Scotland) Bill 2002 becomes law.

There are typically, 3-4 cases a year under s.3 and I have reported previously on some of them; it seems that, on balance, arbiters are getting the law right rather more often than getting it wrong, comparable to the position in England in respect of s.69 appeals where, in the great majority of cases, the arbitrator has got the law right, the minority otherwise representing anomalous cases such as *Northern Pioneer* and *Lobb v Aintree* reported above. Three further SCP cases have been posted on the Scottish Court website, one apparently dating from 2001 but which has only recently shown up on my regular web search.

11.1 In *Bryant Homes (Scotland) Limited v Secretary of State for Scotland* (Extra Division, Inner House, Court of Session; Lords Prosser, Johnston* and Caplan; 30th May 2001), Bryant had, between January 1994 and August 1995, negotiated with the Secretary of State for the purchase of a former hospital for conversion into residential apartments. In due course, Bryant applied to the Secretary of State pursuant to the contract of

purchase for a reduction in the purchase price; the dispute arose over the claim for reduction which was referred to arbitration. Initially the arbitration had dealt with certain preliminary matters and, in that respect, the Arbiter issued a draft Part Award with a (separate) Note of Reasons on 19th August 1999. The Secretary of State requested the Arbiter to state a case for the Opinion of the Court of Session on nine separate questions; the Arbiter issued a Certificate of Refusal in respect of questions 1, 8 and 9, declined to deal with questions 4, 5 and 6 and dealt with questions 2, 3 and 7. The Secretary of State applied to the Court challenging the Arbiter's refusal and the Court issued an order requiring him to answer questions 1 and 8 which he did in an Award dated 10th July 2000. By the time that the case came to court question 1 had been agreed between the parties leaving 2, 3, 7 and 8 but it was agreed that the latter two were complementary.

The specific matter in dispute was the provision in the contract that, in certain circumstances, the Purchaser could apply to the Seller for a reduction in the purchase price i.r.o. "exceptional costs" provided that the Seller was satisfied (acting reasonably) that such exceptional costs were costs which were not and could not have been calculated or anticipated on the basis of information made available to the Purchaser by the Seller - at the outset of negotiations, certain information had been provided to the Purchaser and during the negotiations further information had become available; in broad outline, the provision regarding reduction in purchase price appeared intended to reflect unanticipated circumstances such as the discovery of disused mine workings underneath the former hospital.

The questions issue were, in summary form, as follows: (2) had the Arbiter been correct in construing the reference to "exceptional costs" as relating solely to particular circumstances on site or as meaning costs which were conceptually different ? (3) had the Arbiter been correct to find that the relevant documents were those made available to Bryant between January 1994 and August 1995, rejecting the Secretary of State's submission that the relevant documents only to the 4-month period following conclusion of missives ? (7/8) had the Arbiter been correct to find that the Secretary of State should bear the burden of proof that he had exercised his discretion reasonably ?

In respect of Question 2, the Secretary of State argued that "exceptional costs" must be interpreted as costs exceptional in relation to the total value of the development; since the exceptional costs in dispute were only 4.5% of the total estimated development costs, he argued that these could not be exceptional. He also argued that "exceptional costs" should be taken as a single whole, not on an item-by-item basis. Bryant argued that the common usage of the word 'exceptional' could not be restricted purely to the percentage of the total development costs - if such had been intended, the contract would have included such a percentage as the threshold; secondly, since the reference was to "exceptional costs" in the plural rather than in the singular, the matter must be assessed on an individual basis and not on an aggregate one. The Court rejected the Secretary of State's arguments as not having been what the parties had intended, being unworkable and substantially irrelevant and, in any event, inconsistent with the factual background of the purchase.

In respect of Question 3, the issue was the phrase "within four months from the date of the conclusion of the missives" (i.e. 18th April 1995): the Secretary of State argued that the relevant documents must have arisen on or after 18th April and on or before 18th August, i.e. that the phrase established both a start-date and an end-date for the relevant period. Bryant argued that the phrase established only the end-date and therefore that all relevant documents could have arisen at any time between the commencement of negotiations in January 1994 and the expiry of the 4-month period on 18th August 1995. There appeared to be limited authority regarding the word "within" and the two cases cited were dismissed by the Court as turning on their own facts. The Court concluded that the phrase had been intended to establish an end-date only, since what mattered was Bryant's state of knowledge commencing with the disclosure of information in January 1994 and the subsequent disclosure of new information at any time up to the 18th August 1995 end-date.

In respect of Questions 7&8 (taken together), Counsel for the Secretary of State ultimately accepted that it was indeed for his client to demonstrate that it had acted reasonably. Bryant had argued that the proviso permitted the Secretary of State to avoid a claim for a price reduction in respect of exceptional costs and, therefore, it was for the Secretary to justify reliance on the proviso. Silence showed that the Secretary did not choose to rely on it. Although the Arbiter had given no substantive reasons for his decision in this regard, the Court was satisfied that he had arrived at the correct conclusion, reaffirming that it was for that party asserting such a proviso to establish the grounds upon which it relied.

Comment

As in previous cases involving SCP upon which I have reported, the Arbiter "got it right"; not least because there was almost no authority on the points in issue (except, of course, substantial authority relating to reliance on exclusion clauses) and the questions largely fell to be answered by reference to professional common sense within the factual matrix of the purchase of a disused hospital and the state of knowledge of Bryant as Purchaser. Given that the Arbiter "got it right", what merit do we perceive from the existence of the SCP ? If we transpose the factual matrix to England and assume that the arbitrator had issued an award incorporating his interpretation of the contract and the law,

could the Secretary of State have launched a s.69 appeal ? In the absence of hearing argument by Counsel, it seems to me that the provisional answer to this question must be 'no' (even before considering the chances of success): while ss.69(3(a) and (b) are satisfied and ingenious Counsel might conceivably 'twist the Judge's arm' on 3(d), 3(c)(i) appears to fail and, given that this was a 1-off contract, 3(c)(ii) appears to fail also. Similarly, could s.45 have been called into play prior to the issue of an award ? The answer appears to be "no" given s.45(2)(b)(i).

By way of postscript, (and see in more detail below) it should be noted that the Arbiter issued a ***draft*** Part Award accompanied by a separate Note of Reasons, both these procedures being the norm in Scotland, the latter as had once been the case in England in that by not issuing reasons as part of the award there was less ground upon which the losing party could challenge the Award. Of course, such thinking was thrown out with the bath water in England and rightly so; there can be no objective justification for separating reasons from the award and, as in so many of these recent Scottish cases, these defects in the common law will be cured by the Arbitration (Scotland) Bill (s.35(4)).

11.2 *HomeBase Limited v Scottish Provident Institution* (SPI) (Extra Division, Inner house; Lords Marnoch,, MacFadyen and Abernethy; 13th June 2003) was a rent review case concerning a DIY store/garden centre in Dundee where the rent fell to be reviewed with effect from 8th October 2002 and, failing agreement, was referred to arbitration. The parties jointly invited the Arbiter to determine a preliminary question of law as follows: should the market rent of the premises be based upon unrestricted non-food retail use in terms of the planning legislation or upon the non-food retail use permitted being restricted to the sale of DIY/garden goods ? A clause in the lease precluded HomeBase from using the premises except as a non-food retail warehouse as defined in the planning legislation; however, a separate clause obliged it at all times to comply with the planning legislation.

Detailed planning permission had been granted in 1987 for the "erection of superstore, retail warehouse, speciality shopping, food court, office building, heritage centre and the associated car parking" and, in addition, was subject, inter alia, to the condition precedent that a s.50 planning agreement be entered into with the Local Authority and that the premises be used only for purposes within the appropriate class within the planning legislation. A s.50 agreement was duly entered into: inter alia, it restricted the range of goods to be sold by excluding food (other than for consumption within an in-store cafe). This restriction was confirmed by a specific Local Authority consent required by the s.50 agreement which referred to "that range of goods normally retailed in DIY outlets including garden centre".

In his draft Award, the Arbiter concluded that the rental should be based upon the unrestricted non-food retail use as defined in the planning legislation. His reasoning was that use of the premises for the sale of non-DIY goods was not in fact prohibited since the planning permission had been granted for the retail warehouse and, in his view, this implied that the sale of any type of retail goods could be consented to by the Local Authority. He considered that the only reason that the permitted use was limited to DIY/garden goods was that that was the only use which had been put to the Local Authority for its approval.

Four questions of law were put to the Court for its opinion: (1) in the absence of evidence and submissions, had the Arbiter been entitled to conclude that the only reason why the permitted use was limited to DIY/garden goods was that such use was the only use for which approval had been requested ? (2) in the absence of evidence and submissions, had he been entitled to conclude from the grant of planning permission for the retail warehouse that the sale of any type of non-food retail goods would be consented to by the local authority ? (3) in the absence of evidence and submissions, was had he been entitled to conclude that other uses would be permitted by the local authority ? (4) in any event, had he been correct in concluding that the valuation of the market rental should be based upon unrestricted non-food retail use ?

The Court considered Question 4 first: the lease included a key phrase "the purposes herein permitted" where "herein" could, if viewed in isolation, be capable of referring to any of (a) paragraph 2 of Part V of the Schedule or (b) to Part V of the Schedule or (c) to the entire Schedule or (d) to the entire lease. The Court considered that the last was the appropriate construction and, consequently, the rental required to be assessed on the basis that the permitted use was for non-food retail use restricted to DIY/garden goods.

In respect of Questions 1, 2 and 3, the Arbiter had discussed the concept of "hope value" (a known concept, broadly reflecting the difference between that value reached on the restricted basis and that reached on an unrestricted basis): the Court found that there had been no discussion of the "hope value" concept in the hearings before the Arbiter and, although it understood why he had had resort to that concept because it might well have a role to play in the valuation process ultimately to be carried out by him, since the matter had not been raised at the hearing the Arbiter had been wrong to have made the assumptions that he had and to have allowed those assumptions to affect his approach to the

preliminary question of construction with which he had been concerned. In Scotland, an Arbiter must base his conclusions of fact on the evidential material placed before him by the parties (*Mitchell-Gill v Buchan* 1921 SC390 per Lord President Clyde at 395). In any event, the Court having answered Question 4 in the negative, the parties accepted that questions 1, 2 and 3 also fell to be answered in the negative.

Comment

A rare instance of an Arbiter/Arbitrator "getting it wrong" ! Our profession's claim to perfection is dented and we must now concede that we are not all perfect, however hard that might be to admit; in this case, there is no excuse such as in *Lobb v Aintree* where the arbitrator was tripped up by a House of Lords decision made after the close of hearing and submissions. In the present case, it seems that the Arbitrator put the cart before the horse and had difficulty with reverse gear.

Consider transposing the facts to England (I should clarify that there may well be authority on such a question in English rent review arbitrations but, if so, I am not aware of this): the s.45 application would clearly have been considered by the Court since the parties were agreed that the questions of law be so considered. As regards s.69, 3(a) and 3(b) are clearly satisfied and the Court's analysis shows that 3(c)(i) would have been satisfied; in any event, such questions involving the interface of consents issued under a s.50 agreement and the appropriate use conditions in the planning legislation seem to me, prima facie, to be one of general public importance in a circumstance where the Arbiter's decision was certainly open to doubt. Consequently, I believe that a s.69 appeal on identical facts would be heard.

11.3 Escaping with no little relief from the arcane world of rent review arbitrations involving concept and analyses baffling to Nobel Prize-winning scientists, I turn to the third of the three cases which is in the familiar territory of the interpretation of a construction contract, in particular as to who was or was not a named or nominated sub-contractor.

In *Mowlem (Scotland) Limited v Inverclyde Council* (1st Division, Inner house; the Lord President*, Lords Marnoch and Wheatley; 1st October 2003), Mowlem was the main contractor to the Council for the construction of a leisure complex west of Glasgow. The questions of law submitted to the Court via the SCP are of particular interest having been divided into two parts, the first jurisdictional, the second substantive. Interestingly, and mirroring the English trend, the two parts of the hearings were held together since the facts and much of the argument affected both parts.

Following the conclusion of hearings on substantive matters, the Arbiter issued a draft Part Award on 7th February 2001 and invited the parties to make representations - both did. On 2nd March, the Council submitted a Minute requesting that the Arbiter state a case; instead, the Arbiter issued a revised draft award on 6th May to which the Council again responded by requesting he state a Case. After further exchanges including comment on the draft award, the Arbiter issued a further draft Award dated 2nd July and, on the same date, he wrote to the parties indicating the detail of the questions he was prepared to state for the opinion of the Court, requesting their comments. On 9th July, the Council indicated that it would propose a further Minute requesting the Arbiter to state a Case of certain specified questions, essentially those it had already posed. The Arbiter responded on 13th August to the effect that he would state the questions he had identified on 2nd July, not those requested by the Council on 9th July. On 3rd October, the Council submitted a further Minute requesting that the Arbiter state a Case for the Opinion of the Court. Mowlem responded by claiming that the Arbiter had on 13th August refused to state a Case and that the Council was therefore out of time (14 days) in applying under the Rules of Court for a Stated Case; Mowlem also requested the Arbiter to issue his Part Award in final form. On 9th October, the Council responded that the Arbiter's fax of 13th August had not been a refusal to state a Case but was instead concerned with the form of the questions.

The issue before the Court was, essentially, the status of the Council's fax of 9th July and of the Arbiter's response of 13th August. Under the Rules of Court, a 14-day time limit would run from the issue of any decision (or statement of reasons) by the Arbiter. The Arbiter had had to decide what had been meant by 'decision' in terms of the Rules of Court and he had held that the relevant usage of the word was a decision of the tribunal where it had come to a determination of some aspect of the case before it. Mowlem had contended that the draft Award of 2nd July had been such a decision and therefore, under Rule of Court 41.5(2), the Council's application for a Stated Case was out of time. The Arbiter had also concluded that an Award issued in draft and not signed did not constitute a 'decision' in terms of Rule 41. He had also had to consider, given that the Council could lodge an application for a Stated Case at any time at prior to a decision, whether it had done so in its fax of 9th July and, if so, whether the Arbiter's response of 13th August had constituted a refusal. If that had been the case, then the present Stated Case would be incompetent having been made out of time. The Arbiter had concluded that that the Council's fax of 9th June had not been such an application, merely a request to formulate certain questions; since that fax had not been an application, the Arbiter's response of 13th August could not have been refusal of an application therefore the

Minute presented by the Council on 3rd October was within time and the Stated Case could properly be presented to the Court for its Opinion.

The Court held that the Arbiter had been correct to have stated the case presently before it since his issue in draft of a Part Award could not have been regarded as a 'decision' in terms of Rule 41.5, instead merely an indication of a decision he proposed to make. Further, the Court held that the Arbiter had been correct in concluding that it was open to the Council to lodge an application for a Stated Case at any time (no award having been issued) and that its fax of 9th July had not been such an application. Consequently the Arbiter's response on 13th August could not be regarded as a refusal to state a Case. In conclusion, Mowlem's argument that the present Stated Case was invalid was rejected.

The Court next addressed the substantive issue in dispute: Mowlem had received tender documents from the Council and had been invited to tender for the Works; part of the Works (curtain walling) was to be carried out, to a specified system, by one of four listed domestic sub-contractors. In the terms of the contract a Domestic Sub-Contractor was a person to whom the Main Contractor sub-let any portion of the work other than to a Nominated Sub-Contractor: the distinction being drawn was between a sub-contractor being imposed on the main contractor or and the latter being given a shortlist from which to choose.

Mowlem had duly invited the four listed sub-contractors as to submit quotations but three, in one way or another, declined to or were unable to quote and the 4th (Structal, whose system of curtain-walling had been specified in the Bills) had submitted a quotation but had immediately withdrawn it. In consequence, the Council's Contract Administrator (CA) resuscitated previous negotiations with a sub-contractor (Nelson) and invited it to submit a price for the sub-contract works, which it did. Nelson was then asked to submit its price to Mowlem as agreed with the CA; it did. At this stage it had been made clear to Nelson that it was on a shortlist of one. Mowlem was then informed that an alternative sub-contractor was in discussion with the Council and that the former would contact Mowlem in due course – Nelson's identity was not disclosed at first but was shortly afterwards. Various negotiations Council/Mowlem and Mowlem/Nelson continued with a view to finalising the contract and the contract price; however, the specification for the sub-contract works (i.e. deleting the requirement to install a Structal system of curtain-walling) was not in fact altered until 14th February.

In early 1996, Nelson went into receivership having done little more than some design work and Mowlem appointed a replacement sub-contractor which also became insolvent upon which Mowlem decided to carry out all remaining curtain-walling work itself. At no stage did Mowlem ask the CA to take any steps under Clause 35 of the contract (i.e. that relating to Nominated Sub-Contractors).

The initial substantive question to the Arbiter had been whether, from the outset, the curtain wall sub-contract was to be performed by a "named domestic sub-contractor or by a nominated sub-contractor". He took the view that the CA had effectively named Nelson in the Contract Bills and he stated that it had been for the CA to have put into effect the appropriate contract nomination procedure but he had not done so. He concluded that Nelson had been named to Mowlem by the CA.

The questions stated for the Opinion of the Court were: (a) had the Arbiter been entitled ain law to hold that there was a valid agreement between the CA and Mowlem naming Nelson as a sub-contractor? (b) had Nelson had been named as a sub-contractor within the meaning of clause 35 of the contract ?

After lengthy consideration of submissions by respective counsel, the Court found that Nelson had not been named as a sub-contractor within the meaning of the relevant contract clause. The original sub-contractor (Structal) had been merely one of four sub-contractors listed and had not been treated as a Nominated Sub-Contractor even if it was the only one of the four which could in fact have responded fully to the tender since it was its curtain walling system which was to have been installed as provided in the Bills. The Court held that whatever the position might have been in regard to Structal had been superseded by its withdrawal and consideration of the status of Nelson had to be considered afresh. There was no justification for the proposition that the CA had been in a position to have required Mowlem to enter into any sub-contract with Nelson: Mowlem had been free to have proposed an alternative sub-contractor but chose not to do so but that did not affect the argument as to whether Nelson had been named. The Court disagreed with the Arbiter that there had been a change in the Contract Bills by which Nelson had been named with a view to its being considered nominated, there having been no appropriate agreement between Mowlem and the CA. Two English cases had been cited in support of argument by Mowlem but the Court held that each had turned on its own particular facts and was of no assistance here.

The case was remitted to the arbiter to proceed.

Comment

As in the HomeBase case, it seems to me that the Arbiter "got it right" on the difficult issues and "got it wrong" on the easy ones since, as a matter of construction, the Court's reading of the "nominated" issue seems plain common sense.

As regards "when is a decision not a decision ?" the answer "when it is a draft Award" is obvious enough but this merely adds one more to he list of questions arising from the anomalous practice of issuing awards in draft for comment.

To the non-Scottish arbiter, the practice of issuing Draft Awards for the parties to comment on seems baffling, inviting unnecessary debate, wasting time and watering down the arbiter's authority. While the practice is, in part, designed to limit scope for subsequent appeals (since Scots law lacks the tight restrictions on appeals in the English Act although the new Arbitration Bill will remedy this deficiency). Further, in the absence of relevant statute, there is no slip rule although (again) the new Bill provides one in s.37. As an aside, there are interesting differences of language between the Scots s.37(1) and the English s.57(3), particularly in respect of ambiguity:

Sco 37(1) … a party may, by application in writing, request the tribunal to amend the award to correct any clerical or typographical error or any error arising by accident or omission…. (4) The tribunal may … on its own initiative correct any error of a type referred to in subsection (1).

Eng 57(3): The tribunal may on its own initiative or on the application of a party (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

SECTION B – UK Domestic - Other

12. The text of HHJ Kirkham's address to the Annual Dinner of the Scottish Branch of the Chartered Institute of Arbitrators follows:

"As your Chairman has explained, in judicial terms I am now 2½ years old. It might be said by some that I am well into the terrible twos. I hope that, broadly, I behave myself and do not throw too many tantrums. It's certainly true that I am still learning a very great deal about the job. I believe it's the sort of job where one never stops learning. I recognise that judges find it difficult to stop the flow. In this respect, we are indulged by advocates. No one tells you it's time to stop. I hope I shall not abuse your indulgence of me this evening.

The TCC

The Official Referees were created in 1873. In 1998 the Official Referees became the Technology and Construction Court. The then Lord Chancellor handsomely described the work of the TCC as "…by any standards, exacting and economically very important work, calling for an elite corps of specialist judges." One thinks that's terrific. Then one reads in the TCC guide that the scope: of work includes not only construction, engineering and the other areas of work identified as being appropriate for the TCC; the court is "in reality, the specialist court of the High Court which deals with all those complicated and technical civil disputes which are not the province of some other specialist tribunal." So, you can see that we are a sort of glorified dustbin. I sometimes think that the most important qualification is the ability to carry boxes of lever arch files.

Work of court in Birmingham.

The TCC in Birmingham exercises the full jurisdiction of TCC work, undertaking the full scope of conventional TCC work. A characteristic is hands-on case management. That cliché means, in practice, that I poke my nose in and try to ensure that a case is being handled actively by all parties. In Birmingham, the trial judge manages cases from the beginning and throughout the procedural stages until trial. . It seems to me that it is most unsatisfactory for a client to settle at the court door. By then, huge sums of money have been spent. If you are going to settle, settle early.

We try to maintain control by, for example probing the strength of the case, exercising control over expenditure on expert evidence, encouraging trial of preliminary issues and encouraging the parties to mediate.

In Birmingham, we recognise that we are in the twenty first century and indeed that, in some respects, we are in competition with the private sector. We try to offer a modern service. This includes telephone and video hearings, especially where a hearing is needed at short notice and the parties are based outside Birmingham, or where it will obviously save costs. I have recently sat at a weekend to accommodate parties where an additional day's hearing was needed unexpectedly.

We also offer an early neutral evaluation service to assist parties to settle.

Adjudication

The work of the TCC, on which interest is currently focused, is enforcement of adjudication decisions. I am seeing increasingly imaginative challenges to jurisdiction. I have concerns about enforcement of adjudicator's decisions which are plainly wrong. The knowledge that the decision is only temporary is of little comfort to me, let alone to the losing party. However, anecdotal evidence suggests that most cases go no further than the adjudicator's decision. I see very few which proceed from adjudication to litigation, and I understand that few proceed to arbitration. This suggests that parties either live with the outcome or resolve matters in negotiations that follow the adjudicator's decision. I have been told that the thinking among some major contractors and subcontractors is that, while the adjudicator's answer may well be wrong, at least that is cheaper than an incorrect arbitrator's award. If that is the way that parties are thinking, it raises serious concerns about arbitration.

The Future of Arbitration

What, then is the future of arbitration ? Is there still a place for it in domestic disputes in the construction and engineering industries ? It seems to me that arbitration still has a role to play. It has a number of advantages over adjudication. For example: (i) there is less chance for one party to be ambushed, as can happen in adjudication; (ii) an arbitrator normally gives reasons and in order to give reasons, a tribunal must analyse the evidence and issues: this discipline may help the tribunal arrive at a correct decision; (iii) a longer timescale may give the tribunal a better opportunity to get to grips with the issues and evidence than is possible in the very short timetable permitted in adjudication; (iv) arbitration, unlike adjudication, offers finality.

I wonder whether there is a place for the introduction of a fast-track arbitration scheme for the construction and engineering sectors? I am aware that such an idea has been considered, e.g. by the TCC Bar Association. Perhaps the Scottish Branch of the Chartered Institute could lead the way?

Out reach.

I consider it important to maintain close links with the community. This includes, for example, lecturing to students at Birmingham University. Some of us have worked with the Birmingham Law Society in their campaign to raise awareness of the wealth of legal expertise and experience in Birmingham.

I retain close links with the Chartered Institute of Arbitrators. I continue to teach for the Chartered Institute. I welcome CIArb pupils who need a day's sitting in court to complete their training. The links between the TCC and Chartered Institute have traditionally been strong, not least because we deal with challenges to decisions of arbitrators in construction and engineering disputes including appeals. May the relationship continue and flourish.

Last year I attended a conference of the International Association of Women Judges. It was attended by about 250 women judges from most parts of the world. Much of the discussion focused on human rights and similar issues. It was humbling to learn how, in some countries, judges at domestic level are striving to implement the principles of the various international conventions but where this brought a real risk of conflict with their national governments. And they are doing this in circumstances where, in many cases, they do not have security of tenure. It makes one appreciate even more what we have (at least until recently) perhaps taken for granted here - the independence of the judiciary. This independence is of utmost importance to our society. It is a jewel to cherish and never to lose.

The Homily !

We have all benefited hugely from the experience and learning of others. I have been very greatly helped by others over the years. Many of you will have had a similar privilege. Now is the time to share your experiences with others. Don't pull up the ladder behind you. Help the younger or less experienced folk. Don't fall into error (as the Court of Appeal sometimes politely puts it) by thinking that those who come up behind you are not as good as you and could never be. Be generous with yourself, with your time and experience. If you share generously with others, it will not diminish you. Instead, you will grow in stature and as an individual.

Chairman, thank you very much."

13. In *Pearce v Ove Arup*, a case relating to allegations of breach of architectural copyright, the Claimant's Expert Witness, a distinguished architect, was very powerfully criticised by the Judge and was also reported to the Disciplinary Committee (DC); of his professional body in respect of his alleged failure to comply with his Part 35 obligations. As reported in Issue No. 8 of this newsletter, the architect in question had been completely exonerated by the DC; I have now seen that Committee's (published) decision and have become aware of other facts and information relevant to the case. Much of that material is specific to the facts in *Pearce* and do not bear repetition or examination; however, some of the issues raised by that material are of

general application and are worthy of consideration, not only by those proposing to serve as Expert Witnesses, but also by those who instruct them.

I am indebted to the exonerated Architect and his Counsel for making certain additional information available to me. The views expressed herein are, of course, entirely my own. Further, the DC had access to a substantial additional amount of information relating to this aspect of the case than was available to the Judge and any comments should be taken in that context.

The case raised a number of issues of general application:

(i) In front of the DC and in accordance with the Rules of its parent body, it was for the complainant to prove his case, not for the Expert to prove his innocence. Further, the standard of proof in such cases (not specified anywhere) should, given the seriousness of such a complaint, require compelling supporting evidence. It is insufficient for the complainant merely to present the opinions of the judge as evidence, such opinions being findings neither of fact nor of law.

(ii) Before the DC, the Expert presented his own expert witness (the complainant presented no expert evidence) whose opinions and conclusions very substantially supported those of the Expert himself. This support evidently weighed heavily with the DC.

(iii) It was implicit in the criticism of the Expert that he had not departed from his Instructions where those were incomplete; such criticism is entirely misguided – the Expert's "jurisdiction" is defined by his Instructions and he is not, and should not try to be, a detective.

(iv) The Expert's obligations under Part 35 include (a) rendering an unbiased opinion and (b) omitting to consider material facts or information; the actual complaint to the DC alleged that he had failed on both counts:

  (a) The DC accepted that the Expert's Report had not been unbiased but had been presented as such by Defending Counsel and accepted so by the Judge

  (b) The DC accepted that the dispute was about plan copying and agreed that a visit to the Town Hall and the Netherlands Architectural Institute (NAI) had not been necessary. Applying the hindsight which marks this case, the DC suggested that an additional paragraph to the Expert Report might have stated "As this case relates to the copying of plans and not to the construction of the building, and as the Defendants admit that the building was constructed substantially in accordance with the plans, I have not considered it necessary to go to the expense of visiting the Town Hall". The DC was clear in that omission of such a statement was, so far as it was concerned, in no way a breach of Part 35.

(v) Further, it appeared from the judgement that the Expert had accused the Defendant of lying and/or perjury; there was no such accusation in his Report but the words had been put into his mouth by the Judge ('perjury') and Defendant's Counsel ('lying'); the DC suggested, again with the benefit of hindsight, that the Expert who could, of course, not refuse to answer the questions, might have said, "that is not a matter for me as an expert witness - I do not think that I should answer the question" or similar. This is seriously difficult for an Expert in Court, particularly when both Judge and opposing Counsel are on the same line of attack. In any event, the DC concluded that the Expert's indiscretion in allowing himself to be manipulated in this regard did not amount to professional incompetence.

(vi) It appears that, at least in the field of Architecture, there is a distinct difference between the copying of plans or elements of plans (i.e. 2-D) on the one hand and the copying of buildings or elements of buildings (i.e. 3-D) on the other; Mr Pearce's case related to the copying of plans but much of the judgement concentrates on the 3-D models of Mr Pearce's building (which, in fact, was never built) and the Defendants building, the Town Hall in Rotterdam; I understand that the focus on the 3-D models was substantially irrelevant to the question of copying of plans. Without wishing to engage in architectural debate, I can easily envisage such misunderstandings and misconceptions in the mind of a judge (there was a famous case in Scotland in the 1960s where the committal proceedings of a rape trial was halted since the JP thought rape was a green plant with a yellow flower which produces an oil) and of Counsel in any such case and, it would appear, all efforts of Mr Pearce's Counsel to focus the judge's mind on the correct issues failed. I can see that it must be very frustrating for an Expert Witness when it is clear to him that the Judge and Counsel are missing the entire point. I do not believe it can be for the Expert Witness to lecture Judge or Counsel from the witness box but this then leaves a potential gap in the process the papering over of which is by no means obvious.

(vii) In law, there is a clear difference between "passing-off" and "breach of copyright"; the unanimous decision of the House of Lords in *Designers Guild Ltd v. Russell Thomas (Textiles) Ltd* ([2001] ECDR 10 (H.L) had clarified the difference and has given rise to a number of factors to be taken into account in deciding whether the case is one of passing off or one of copyright. It appears that the Judge in *Pearce* may not have given full weight to this case in which it was held, inter alia, that the key to an action for passing off was deceptive resemblance (i.r.o. which a visual comparison is often all that was

required to decide) whereas an action for the infringement of copyright was not concerned with appearances but with derivations.

(viii) The robust cross-examination of witnesses, expert or other, is an integral part of English law's adversarial litigation process; many cases turn entirely on the credibility of witnesses and it is not only an accepted tactic but often an entirely necessary one to attack or attempt to discredit a key witness. That said, there are, or should be limits, as to how far cross-examining Counsel can go. It is also essential that the Judge manage the process fairly and reasonably for both sides. It would appear from extracts from the transcript which I have seen that some of the questioning of Mr Pearce's Expert was, at best, close to the edge. In addition, it appears from such extracts that the Judge gave the impression of condoning an over-aggressive line of questioning. How can an Expert Witness deal with this ? He cannot of course refuse to answer questions, there being no equivalent in English law to "plead the Fifth" but, in perhaps two crucial instances, Mr Pearce's Expert might (applying a liberal dose of hindsight) have responded that the question related to matters outwith his professional expertise.

(ix) Although, following publication of the judgment, the criticised Expert was given the opportunity to make representations as to why he should not be reported to his professional body's Disciplinary Committee, he was given no such opportunity prior to publication and, arguably, not even any warning of the thunderstorm that was about to break upon him. As a matter of natural justice, this must be wrong: if, post-interview, a newspaper made such powerful criticisms of a public figure without checking its facts it would lay itself open, as a minimum, to a complaint to the PCC and, in addition, possible liability to defamation proceedings. It seems, then, highly unfortunate that judicial immunity should permit a judge to express views which have, subsequently, been totally rejected by the DC without any visible obligation to confirm his facts or justify his opinions.

(x) One of the strongest criticisms of the Expert Witness architect was that he did not visit the Town Hall in Rotterdam and did not examine the as-built drawings of the building lodged with the Netherlands Architectural Institute (NAI). As accepted by the DC, since the litigation concerned 2-D plan copying, any visit to the building would have served no objective purpose and the as-built drawings would have been substantially irrelevant. Further, since the claimant was legally-aided, the question arose of whether it was an appropriate use of legal aid funds to make a foreign site visit where (a) there was in fact no objective reason for any such visit and (b) the Defendant's Expert had been to the NAI and relevant drawings had been disclosed to the Claimant and inspected by his Expert. One lesson which can perhaps be read from this is that it is a very unsafe assumption that the reader of an Expert Report has the same level of expertise, or even any, as the Expert and therefore a number of self-evident matters should be stated to avoid the criticism referred to above. For example, the Expert could have stated why he did not visit the Town Hall or the NAI even if those reasons would have been self-evident to a fellow architect.

(xi) One other criticism of the Expert was that he did not state in his report that he had not reviewed a certain document; in fact he had listed the documents he had reviewed and the list excluded the document in question. It must therefore have been an entirely reasonable presumption that he had not in fact examined that document and it seems entirely unreasonable that he should now be criticised so strongly for not making an express statement of such non-examination. This seems to me to be wholly extraordinary but, looking forward, it may be that in similar circumstances it would be prudent for the Expert to make an express statement that he had not examined it, if only for the avoidance of doubt and the avoidance of unfair and unjustified criticism.

14. *Governor and Company of the Bank of Scotland v HY Butcher & Co* [2003] EWCA Civ 67 concerned a guarantee given by a partnership where not all the individual partners signed it; inter alia, was it binding on all of them (yes) or only on those who did ? The judgement of Michael Kallipetis QC (sitting as a Deputy High Court judge) was robustly upheld on all counts by the Court of Appeal but this is not why I report on the case. Instead, following strong criticism by HHJ Thornton QC in *Lobb v Aintree* and even stronger criticism by the Court of Appeal in *Northern Pioneer* (both s 69 appeals), the wider interest in the Butcher case is the Court of Appeal's comments on the bundles provided by Butcher's Solicitors (whom I shall not name although they are named on the face of it the judgement).

Giving the principal judgement, Mr Justice Munby stated:

"A number of matters cry out for comment and censure. The appellants' failure to comply with good practice and the specific requirements of relevant Practice Directions verged on the scandalous:

(i) The simple fact is that, properly organised as they should have been, the materials to which we were referred would all have fitted comfortably into two lever arch files … In the event we were supplied with seven lever arch files and three additional, smaller, files … .

(ii) Despite overloading the bundles which they did lodge with a vast mass of superfluous material the appellants omitted from their bundles a number of key documents and important authorities. These omissions had to be made good by the bank, which helpfully provided a most useful bundle of documents and a bundle of supplementary authorities.

(iii) There were significant failures by the appellants to comply with Practice Direction (Court of Appeal: Citation of Authority) [1995] 1 WLR 1096, a complete failure to comply with Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 and almost total disregard of the requirements of paragraphs 5.6(7), 5.8 and 15.11 of the Practice Direction supplementing CPR Part 52.

The appellants' sloppy and casual approach to the preparation of the bundles was exemplified by the fact, commented on by Lord Justice Chadwick during argument, that only three of the ten bundles we were supplied with were numbered, that they (for inexplicable reasons) were numbered 5, 7 and 8, and that there were no bundles numbered 1 – 4, 6, 9 or 10.

No purpose would be served by going through all the deficiencies in the bundles in laborious detail. But I should add some further observations:

(i) The appellant lodged four bundles of documents contained in lever arch files. It is striking that:

  (a) These bundles did not include copies of either the partnership deed, the consultancy agreement or the guarantee … .

  (b) The only documents contained in the appellants' four bundles to which we were referred during the hearing of the appeal were, in the first bundle, the notice of appeal and, in the second bundle, the judgment of the learned judge and a mere handful of pages from the transcripts of evidence. We were not taken to anything in the third and fourth bundles.

  (c) The documents to which we were referred would, as I have already said, all have fitted comfortably into one small lever arch file.

(ii) The appellants supplied us with a bundle containing no fewer than thirty-four authorities and a second bundle which, calling itself the core bundle of authorities, contained further copies of twelve of these authorities. I draw attention to the following features of these bundles:

  (a) In some cases inappropriate [versions of the] reports had been used…. .

  (b) Two of the most important authorities … had not been included in any of the appellants' bundles of authorities. Again, we were dependent on the bundle supplied by the respondent.

  (c) We were referred to only thirteen of all these authorities. Of those thirteen only five were in the core bundle, thus rendering that bundle in large measure redundant.

  (d) The authorities, statutes and extracts from textbooks to which we were referred would, as I have said, all have fitted comfortable into a single lever arch file. In the event they filled two lever arch files and three additional smaller files.

The regrettable fact is that the court has been hampered in its handling of this appeal by the unwieldy and disorganised state of the bundles lodged by the appellants. This case is a striking example of the kind of bad practice which shows why the various Practice Directions I have referred to are needed and why they require to be complied with."

Chadwick LJ echoed Munby J: "he has set out in some detail the respects in which the appellants' failure to comply with relevant practice directions has made the task of the court in hearing this appeal significantly more onerous than it need have been. I endorse the observations which he has made. The practice directions set out requirements calculated to assist the court to deal efficiently and expeditiously with the numerous appeals which come before it. The court is entitled to expect that solicitors – and, in particular, solicitors instructed by substantial clients in a commercial dispute – will make some effort to inform themselves of its requirements in relation to the preparation of the bundles to be used at the hearing of an appeal and to comply with those requirements. The bundles prepared by the appellants' solicitors in the present case give no reason to think that any attempt was made to do so."

SECTION C – International Arbitration and Other Matters including Conflict of Laws

Miscellaneous cases reported elsewhere:

15. International Arbitration Law Review (which I commend to your attention) contains, in addition to the customary articles, a "News Section" containing short reports of interesting cases from around the world; with the kind co-operation of the Editor, David Holloway (Barrister – Tanfield Chambers), and with the generous permission (for which I am most grateful) of the publishers, Sweet & Maxwell, I am able to bring you the following.

(i) I reported earlier on Glencore Grain v Shivnarath Rai where the Californian Court refused to enforce an award against SR, an Indian company, on the basis that it had no assets in the jurisdiction, a line of argument by several US Courts which is sometimes described at the 8th ground for non-enforcement under the NYC58. The same applied in CME x Zelezny (a New York case) where a multi-million dollar award was enforced to the tune of ……5¢, this being the only identifiable assets in jurisdiction.

The US position is, broadly, that due process considerations oblige all Courts to be able to exercise either (a) personal jurisdiction over the defendant or (b) "quasi in rem" jurisdiction over his assets.

In Italtrade International LLC v Sri Lanka Cement Corp, the latter had almost no connection with Louisiana and the Court held that the US Statute implementing NYC58 did not give the Court "power over all persons throughout the World who have entered into [an NYC] arbitration agreement".

This appears to miss the point in that the NYC should give the award-debtor the right to enforce except under the 7 grounds listed in Art.V. What Glencore wanted was, inter alia, to be able to arrest SR's next shipment into California the moment it arrived (the same applies to aircraft), not to have to wait until the Court condescended to give the appropriate order.

Comment

Watch this space !

(ii) In the Bayerisches Oberstes Landesgericht, a party pled set off in resisting enforcement of a foreign award: the claimant had sought to enforce an ICC award pursuant to §1060 ZpO (Art. 36 Model Law); the respondent had acknowledged that there were no grounds for set-aside under §1059(2) ZpO (Art.35) but sought set-off i.r.o. the claimant's allegedly defective performance of work under a wholly different contract in a different country. The ICC Tribunal had refused to deal with this counter-claim since it was not covered by the arbitration agreement,

Per the BOL, pursuant to §1062 ZpO such a matter fell to be determined by a Higher Regional Court, not by a first instance court, the old jurisprudence (which might have allowed set-off) no longer being applicable. The defence failed.

Comment

Undoubtedly correct; it is refreshing to see the "old baggage" being discarded (see the English case *Fencegate v NEL Construction* which propounds a startling rejection of pre-1996 baggage)

(iii) In a Bundesgerichtshof case, the partnership agreement for a firm of attorneys included an arbitration agreement and a dismissed partner sought compensation from an arbitral tribunal; the claim was rejected. The Award was sent by registered mail to Counsel for the claimant but the requested receipt was not returned. Counsel later acknowledged in writing that he had received the Award but still did not return the receipt. 3 months later the claimant applied to have the Award set aside.

The Frankfurt HRC declared the set-aside action admissible; this decision was confirmed by the BGH. The 3-month time bar per §1059(3) ZpO (i.e. Model Law Art 34(3)) had not expired. While the new law applied to the time limit, the action commencing after 1/1/98, the question of when the award was "received" was governed by the old law since the arbitration had commenced prior to 1/1/98. The latter left the definition of "received" to the parties, and the arbitration agreement required the Award to be *served*. Service required an acceptance of bring served which was absent.

Under §1054(4) ZpO (Model Law Art 29(4)), service by registered mail return receipt is OK

Comment

3 cheers for the new law ! The idea that enforcement could be blocked by the respondent merely ignoring the Award seems extraordinary

(iv) Moving to Switzerland, Art.180(3) PIL provides, i.r.o. challenge to an arbitrator, that the decision of the judge at the place of the arbitration is final; however this had left open the question of whether, on the arbitrator surviving challenge and subsequently issuing his Award, the respondent could re-challenge under Art. 190. On 3rd July 2002, the Federal Tribunal ruled that no such challenge was possible.

Comment

Good; common sense ?

(v) An interesting multi-party case was heard in the Cantonal Court of Zurich: A, B and C were partners in a Swiss Ordinary Partnership and the arbitration agreement provided for each to appoint an arbitrator. A notified B and C of his wish to wind up the partnership and appointed an arbitrator; B and C failed to

appoint theirs so A applied to the Court for the appointment for a joint arbitrator for B and C; C accepted this in principle but B objected, inter alia, since it saw C's interests as aligned with A's s should share an arbitrator with A.

The Court first held the arbitration agreement partially invalid since it did not provide for equality between the parties. The Court next tried to determine what the parties would have done had they realised this ad held that the joint defendants B/C should jointly nominate an arbitrator, there being insufficient evidence to support the contention that A's and C's interests were aligned,

The Federal Tribunal had previously held that the parties' real interests in the dispute overrode their position in the proceedings.

It should be noted that, although this was a domestic case, its principles would apply to an international arbitration in Switzerland.

(vi) In another Swiss case, there was a construction contract (containing an arbitration agreement) between C and E; subsequently, a 3rd party T undertook to pay C on behalf of E. In an ensuing arbitration, T objected to being subjected to the arbitration agreement.

The Federal Tribunal dismissed T's objection and upheld the Award since T was no mere guarantor pr surety but had taken on the payment obligation fully and jointly with E and was therefore subject to the AA.

(vii) What power (if any) does a Tribunal have to amend contracts to fit the facts of the case, e.g. by rectifying an omission ? This question has generated much debate but without firm conclusions; some courts have upheld Awards which include rectification, others not. The Swiss Federal Tribunal has upheld an Award incorporating rectification

In the same case, the Federal Tribunal held that the arbitral tribunal must apply the law as they see it and are not restricted to those legal arguments put by the parties (although the parties right to be heard is paramount). However, the arbitral tribunal could not rely on law (statute or other) which had not either been argued by the parties or which the parties could not reasonably have been aware (i.e. a "no surprise" rule).

In a different and unrelated case, the Federal Tribunal came to the same conclusion.

This has been addressed in England in *Sanghi Polyester*, with substantially the same outcome.

(viii) The Indonesian courts have been much in the news in recent years in relation to several power projects to be constructed by foreign contractors where the contracts were signed as a time of booming economy and, soon after commencement of construction, the Asian financial crisis occurred and, so it would appear, the Indonesian government sought to renege on its obligations. There have been several high-profile investment arbitration cases in this area and the Indonesian courts have sometimes taken a strongly interfering line including issuing injunctions to prevent the tribunal proceeding with the arbitration.

However, there is arbitral life in Indonesia separate from these difficult Investment arbitrations.

In a case concerning the sale and purchase of steel, the Buyer refused to accept delivery on grounds that the steel was of a different specification to that ordered, and unilaterally repudiated the contract. In the ensuing arbitration, the Buyer substantially based its case on allegations of fraud, forgery, bad faith etc. The tribunal rejected all Buyer's contentions and issued an award in favour of Seller. Buyer appealed to the South Jakarta District Court to annul the award on grounds of fraud, forgery etc. The District Court decided in Buyer's favour, interpreting the critical Art.70 of the Indonesian Arbitration Law as requiring the Court itself to make conclusions in relation to forgery. Seller has appealed to the Supreme Court.

It appears that the District Court has materially misunderstood the provisions of Art.70 and it must be hoped that the Supreme Court will reverse the decision.

(ix) In another Indonesian case, a state-owned entity which supplied special security paper to the Central Bank for the printing of bank notes contracted with a 3rd party for the supply of raw paper and paid in full in advance of shipment. The first shipment was found to be defective and unfit for purpose but Buyer accepted a second shipment in the hope of improvement in quality but this was not realised. The dispute went to arbitration and the Tribunal issued an award ordering Seller to refund the deposit and pay the costs of the arbitration. The Award was registered with the local District Court and Buyer applied for an enforcement order to which Seller responded by applying for annulment. The case

turned on Art.70 which is narrowly-drawn and it appears that Seller's application went to the merits i.e. exceeding the scope of Art.70. The District Court found against Buyer on various grounds which appear to stretch the scope of Art.70.

As in the preceding case, Buyer has appealed to the Supreme Court. Also as in that case, it appears that Seller has used Art.70 to go to the merits of the case, a purpose for which it could never have been intended. However, it appears that the statutory language may be insufficiently precise in part and it must be hoped that the forthcoming Supreme Court ruling will remove any ambiguity and severely limit the apparent ability of the Court to interfere in the arbitration.

(x) An interesting case relating to jurisdiction arose in the US Supreme Court: H had been a client of an investment brokerage firm, D, and pursued arbitration against D on the grounds of misrepresentation concerning certain investments. H pursued arbitration pursuant to an arbitration agreement in D's standard conditions, providing for arbitration under the National Association of Securities Dealers' (NASD) Rules which, inter alia, provided for a 6-year time bar. Before the arbitration started, D filed suit in the District Court in Colorado seeking a declaration that the matter was out-of-time. The District Court dismissed D's action, on the grounds that the arbitrator, not the Court, should interpret and apply the Rules.

The 10th Circuit of Appeals reversed this decision, holding that (i) application of the rule was a question of the underlying arbitrability of the dispute and that (ii) the presumption was that a Court, not an arbitrator, would decide such questions. Other Appeals Courts had reached different conclusions on this point and the Supreme Court accepted to hear the case.

The Supreme Court reversed the Court of Appeal, holding that the matter was one for the arbitrator; in so holding, it noted its earlier decision in *First Options of Chicago v Kaplan* where it had decided that the arbitrability question was for judicial determination unless the parties had clearly agreed otherwise. However, not every 'gateway question' was a question of arbitrability. Where there were questions e.g. about whether or not the party was bound by an arbitration agreement, these were (by presumption) for judicial decision; conversely, where the parties might expect that the arbitrator would decide the gateway question, the Court should normally defer to the arbitrator. Further, procedural questions (including waiver, delay, notice, estoppel and other conditions precedent to arbitration) were, by presumption, for the arbitrator, not the Court.

The Supreme Court concluded that the present question was one that, presumptively, was for the arbitrator, noting that NASD arbitrators were generally more expert in deciding such a matter than the Court might be.

Comment

In light of recent criticisms of courts, both in the USA and elsewhere, for interfering in and assuming control of jurisdictional issues (e.g. see *Azov Shipping* in England), the US Supreme Court's decision in the present case is to be warmly applauded and its distinguishing of this case from First Options is also welcome along with its ruling regarding 'procedural questions'. While accepting that the court must retain some residual jurisdiction, the overriding objective of modern arbitration must be to have the arbitrator decide issues wherever possible and practicable, subject always to the public policy override.

It is also helpful that such a case should be decided at the highest level, the restrictions on appeal, whether in the Model Law or otherwise, being such that few Supreme Courts get to see arbitration cases, the English House of Lords only doing so in its Privy Council guise (e.g. *Bay Hotel*, *AEGIS* etc)

(xi) A recent case in Germany showed the difficulties caused by short-cutting the execution of contracts. A Yugoslav Seller and a German Buyer agreed three contracts over the telephone and the details were inserted by Seller on a blank form which had been signed by both parties and was then photocopied for the three sales contracts. A completed form was faxed to Buyer who neither confirmed it in writing nor rejected it. Subsequently, Buyer refused payment for alleged deficiencies and Seller instituted arbitration at the Belgrade Chamber of Commerce in which Buyer refused to participate. The tribunal held that it had jurisdiction and rendered an award in favour of Seller. In enforcement proceedings in Germany, Buyer denied the existence of an arbitration agreement, either oral or in writing.

The Bayerisches Oberstes Landesgericht rejected the application for enforcement, finding that Art.II(1)(2) of NYC58 was not satisfied, the contractual documents being produced by photocopy but not being signed. In addition, faxing the final document to Buyer was not an "exchange of letters or telegrams" in the sense of Art.II(2), being unilateral. Mere acceptance of an offer including an arbitration agreement, whether orally or implicitly, was insufficient to constitute a valid arbitration agreement. The defects of this purported arbitration agreement would have been cured if Buyer had submitted to the jurisdiction of the tribunal but it had not.

These are important issues in relation to the NYC58 form requirements. In Int.ALR 6/3 at N-28, Dr Stefan Kröll suggests that the Court had focused on Art.II and had not differentiated sufficiently between the requirements of Art.IV and Art.V. His interesting comments on this case merit careful consideration.

(xii) Fraud or allegations of fraud cause potentially severe difficulty in arbitration and for arbitrators; see for example, the ***Hilmarton*** case where the English Court enforced a Swiss Award i.r.o. a contract in Algeria where the subject matter of the contract was apparently illegal in Algeria and would have been contrary to public policy in England but was not in Switzerland. The Court held that it was enforcing a Swiss Award, not examining the merits, and that the NYC58-driven public policy of enforcing Awards overrode any qualms it might have as to the subject matter.

In a Nigerian case, B and K contracted for the hire of containers for the export of petroleum products., the contract containing an arbitration agreement. A dispute arose and B, as Claimant, referred it to arbitration, initially claiming $85,000 but subsequently increasing the claim to $400,000. K filed proceedings in the High Court seeking to revoke the arbitration agreement and the arbitrator's authority on grounds of fraud. B responded by seeking a stay (e.g. as in s.9 in England) but this was refused by the court, the Judge granting K its motion, revoking both the arbitration agreement and the Arbitrator's authority.

B appealed to the State Court of Appeal, challenging the power of the first instance judge to revoke the arbitrator's authority on any ground other than as provided in the Arbitration and Conciliation Act (ACA). In particular, s.2 ACA provides that an arbitration agreement shall, unless the contrary intention is expressed in the arbitration agreement, be irrevocable except by agreement of the parties or by leave of the Court or a Judge. K argued that since no such contrary intention had been expressed, the Court had been competent to revoke the agreement and the authority of the arbitrator.

The Court of Appeal rejected K's application and reversed the trial judge: where a party has good cause to revoke the agreement, it must do so by the application to the Court or a Judge as had been done in this case. Under Nigerian law, a distinction must be drawn between prima facie evidence of fraud and proof thereof: under the Rules of Court, fraud should be specifically pled. Under the Evidence Act where fraud arises in a civil matter, it must be proved beyond reasonable doubt but, in the present case, the judge had not based his decision on actual fraud but only on K's allegations.

(xiii) The Higher Regional Court of Hamburg recently enforced an award in Germany despite the Polish Court's refusal to enforce it there.

Two Polish coffee trading companies made a telephone contract for the sale of consignments of coffee. The claimant buyer confirmed the sale by registered mail and requested the respondent seller to return one signed copy of the contract documents. These documents, as is common in the commodities trade, were terse referring to the "European Contract for Spot Coffee" (ECC) and stating "Arbitration Hamburg". The ECC provided that disputes should be settled by arbitration (a) at the place named by the parties and (b) under the rules and practices of the local coffee trading association and (c) that the law of the named place should apply to the contract. Disputes arose and the claimant secured an award in its favour in Hamburg. However, enforcement in Poland was rejected on the grounds of lack of a valid arbitration agreement (Art.II NYC58). The claimant then sought to enforce the award in Germany, respondent objecting invoking the earl Polish judgement and the lack of a valid arbitration agreement.

The Higher Regional Court held the award enforceable: the place of arbitration was Germany therefore the award was a domestic one and the refusal by the Polish Court to enforce it had no relevance in Germany. The Polish Court decision did not annul the Award and could not bind the German courts in any way and, dealing only with procedural matters, was not recognisable in Germany.

The Hamburg HRC held that, under German law, a party had to object to confirmation letters if it wanted to avoid being bound by the contract so that the arbitration agreement became part of the contract when the respondent did not object to its inclusion.

Furthermore, the terse reference to "Arbitration Hamburg" was sufficient since, necessarily read in conjunction with the ECC, the arbitration agreement required arbitration in Hamburg under the rules of the German Coffee Association under German law.

Comment

It is reassuring that the terse reference to "Arbitration Hamburg" was upheld, there being many such two-word arbitration agreements in modern commerce; further, as a general observation, the HRC's

validation of enforcement is also welcome. Cynics might speculate as to whether the outcome might have been different if it the award creditor had been German.

(xiv) Arbitration in India is often held up to ridicule, particularly because of interference by the courts and some eccentric behaviour by arbitrators; however, in a recent case the Supreme Court has addressed two important issues arising under the Arbitration and Conciliation Act 1996, (i) whether it would have jurisdiction under the Act to set aside an award which was patently illegal or in contravention of the Act or of any other substantive law or was contrary to the provisions of the contract and (ii) the meaning of the phrase "public policy" appearing in s.34(2)(b)(ii) of the Act.

The Supreme Court held (1) that any award is subject to review in accordance with the basic concepts of justice and (2) that if the arbitral tribunal has not followed the mandatory procedures of the Act, it would have acted outwith its jurisdiction, and therefore the award would be patently illegal and could be set aside under s 34 provided, however, that such a procedural failure should be patent and should affect the rights of the parties and (iii) that (effectively adding a 4th ground to s.34) an award could be set aside on 'public policy' grounds.

In an earlier judgment (*Renusagar Power v General Electric*) the Supreme Court had held that an award would be contrary to public policy if it was contrary to any one of (a) a fundamental policy of Indian law (b) the interests of India (c) justice or morality. However, in the present case, the Court sought to distinguish the term "public policy" from its application in *Renusagar* where the award had been a foreign award. The Court held that, since a foreign award was subject to challenge at the seat, only after it was made final there could it be enforced in India. On the other hand, for any award challenged under s.34, there was no remedy other than as provided by that section and therefore the term "public policy" should be given a wider interpretation. What then was "public policy" ?

PP related to something concerning the public good and the public interest; an award which, on its face, was patently in violation of statutory provisions could not be said to be in the public interest, such award being likely adversely to affect the administration of justice. In consequence, in addition to the narrower meaning given to the term PP in *Renusagar*, an award had to be set aside if it was patently illegal. The Court clarified that the illegality of the Award had to go to the root of the matter and a trivial illegality could not trigger the "public policy" trap. In addition, an award could also be set aside if it was so unfair and unreasonable that it "shocked the conscience of the court", such an award being considered opposed to "public policy" and therefore required to be voided.

Comment

Perhaps from not having read the entire judgment, which might reveal logic and analysis sufficient to justify these apparently dramatic conclusions, my response on reading a short report of this case was one of gloom and depression: a perception of India's 1940 Arbitration Act was that almost any award seemed to be able to get into the courts and its finality was delayed by extended litigation often lasting a decade or more. In the rest of the world, we perceived the 1996 Act as a potential cure for these failings. This preliminary indication is that we might have been wrong

16. The ABA's International Arbitration News (which I commend to your attention) contains, in addition to the customary articles, short reports of interesting US cases; with the kind co-operation of the Editor-in-Chief, Ben Sheppard Jr, and with the generous permission (for which I am most grateful) of the ABA, I am able to bring you the following.

(i) In *General Electric v Deutz*, the 3rd Circuit Court of Appeals (i) confirmed that D was not entitled to rely on an arbitration agreement entered into by a subsidiary but (ii) held that no injunction was warranted on res judicata grounds. Deutz had been parent company guarantor of GE's counterparty and GE sued it in the district court in Pennsylvania for breach of contract. Deutz tried to start an arbitration in London but, in Pennsylvania, a jury found it not entitled to arbitration. Deutz then tried to get the English High Court to injunct GE from proceeding, but this was rejected whereas GE successfully secured the converse injunction from the Pennsylvanian court. The tribunal concluded that there was no arbitration agreement Deutz/GE. Deutz appealed everything emanating from the district court

The 3rd Circuit found on the facts that there was personal jurisdiction over Deutz in Pennsylvania. Further, although Deutz had signed the contract as guarantor, neither had it initialled the pages containing the arbitration agreement nor was it mentioned therein. Consequently it could not be held party thereto

(ii) In *Du Pont v Rhone Poulenc & Ors*, the 3rd Circuit Court of Appeals held that D, a non-signatory to a JV agreement, could not be compelled to arbitrate (i) as 3rd party beneficiary (ii) as agent or (iii) by equitable estoppel. D's and R's subsidiaries had each been party to the JV agreement and the JV had failed and D sued the R subsidiary (RF) and R itself for breach of contract and fraudulent misrepresentation. RF and R sought dismissal of the suit in favour of arbitration but the District Court refused. The 3rd Circuit upheld the District Court's decision.

(iii) In *Louis Dreyfus v Blystad Shipping*, the parties entered into a tanker voyage charter for the transport of a cargo of soybean oil from the US to China; the VC provided for arbitration in New York. During the voyage D requested B to change the discharge port and issued indemnities for incremental liabilities. The vessel was detained at the new discharge port for 3 months and B sued D in London under the indemnities but immediately thereafter demanded arbitration under the VC. D refused to arbitrate and asked the NY District Court to stay the arbitration on the basis that B had waived its right to arbitrate by instigating proceedings in London. The NYDC refused on the basis that D had not been prejudiced.

The 2nd Circuit Court of Appeals reviewed the decision de novo and confirmed it. Applying pro-arbitration federal policy, the Court held that (i) the scope of the VC's AA was wide (ii) that the indemnities did not supersede the VC (iii) B had not waived its right to arbitrate by commencing proceedings in London. In respect of waiver, the Court considered three factors (i) the short time between commencing litigation and commencing the arbitration (ii) the minimal progress in the litigation (iii) the absence of evidence of prejudice to D.

(iv) In apparent contradiction to the *GE/Deutz* and *Du Pont* cases above, in a complex case arising out of a Licence Agreement between Thixomat (Tx) and Takata Corporation (TC), Tx licensed TC to use certain machinery but, in breach of the LA, TC transferred certain machinery to TP which was not at that time a wholly-owned subsidiary of TC. Tx sought to prevent such transfer and TC/TP started an ICC arbitration seeking a declaratory award that they had not breached the LA. Tx applied to the NY State Court to stay the arbitration arguing that TP was neither signatory to the AA nor (at the relevant time) a wholly-owned subsidiary of TC so that Tx should not have to arbitrate with TP.

The District Court refused Tx' application, principally on policy grounds: (i) all aspects of the dispute fell under the LA and were based on common facts (ii) the ICC arbitration was the most effective way of resolving such a dispute, avoiding difficulties of res judicata or collateral estoppel (iii) since TC had commenced arbitration, granting Tx' application would deprive TC of its contractual right to arbitrate (iii) since TP was now a wholly-owned subsidiary of TC it would inevitably be affected by the ICC arbitration and should therefore be allowed to participate therein.

Comment

This seems remarkably proactive and practical on the part of the District Court.

(v) The interface between the Federal Arbitration Act and State statute is an interesting area and a recent 5th Circuit case involving Louisiana is one example where it was held that the FAA precluded the State from applying restrictions to the enforcement of arbitration agreements.

In OPE International v CMC, OPE, a Texas LLP, entered into a construction subcontract with CMC, a Louisiana corporation; the s/con contained an arbitration agreement providing for Texas law to govern all disputes, with arbitration in Houston. In addition, the s/con envisaged works taking place outside Louisiana and therefore included waivers of CMC's rights to certain remedies under Louisiana statute

On certain disputes arising, CMC filed suit in Louisiana seeking (i) damages and (ii) a declaration that the AA violated public policy and was therefore void. OPE filed a motion seeking to compel arbitration in Texas and this was granted by the district court; CMC appealed.

The 5th Circuit considered the Louisiana statute (which declared as unenforceable, as being contrary to public policy, any provision in any construction contract requiring any arbitration to be brought outside Louisiana or conducted other than under Louisiana law) and noted that s.2 FAA precluded state laws which prevented parties from enforcing arbitration agreements. The Louisiana state was therefore inapplicable. The Court reasoned that Congress had, in the FAA, declared a National Pro-Arbitration Policy and had withdrawn the States' powers to specify the forum for resolution of disputes. The District Court had therefore properly compelled arbitration in Houston.

(vi) In Seatrust Motors v Daimler Chrysler, the 1st Circuit Court of Appeals held that neither federal law nor policy excluded antitrust claims from the pro-arbitration presumption of the FAA.

DC authorised a new dealership near SM's premises in Massachusetts and the latter claimed that this represented both (i) an arbitrary and unfair trade practice under Massachusetts law and (ii) a violation of antitrust law. The SM/DC Dealership Agreement included an AA and the District Court ordered arbitration. SM appealed to the 1st Circuit arguing, following *American Safety v JP Maguire*, that the dispute was not arbitrable on the premise that the public interest in antitrust plus its complexity made it inappropriate for the matter to be dealt with in arbitration.

Separate from the question of arbitrability, the 1st Circuit was not persuaded by Seatrust's antitrust argument but, in any event, decided to bury *American Safety*. It held that antitrust claims were arbitrable since, although some such claims were huge ones in which there might be a public interest argument, many (such as this one) were not and were merely business disputes. The Court stated that the appropriate Government agencies had the necessary powers to deal with major cases irrespective of what actions were pursued in courts or in arbitration.

Comment

Maybe I'm missing something (knowing very little about US anti-trust law), but I had understood that an older case, *Mitsubishi v Soler Chrysler Plymouth*, had decided this some years ago. Did *American Safety* reverse *Mitsubishi* ?

(vii) In 1996 a US life insurance company, Gulf Guarantee, sued its reinsurer, Connecticut & General; proceedings were stayed for arbitration. In 2000, Gulf sued CG again, claiming breach of the arbitration agreement in CG's vetoing the selection of the tribunal chairman. CG responded by seeking to strike out the chairman as not possessing the necessary qualifications. The District Court dismissed all of Gulf's claims and confirmed the strikeout.

On appeal, the 5th Circuit Court of Appeals upheld the dismissal of all of Gulf's claims but reversed the strikeout of the arbitrator. Both Gulf's and CG's applications were outwith the scope of power granted to District Courts under the FAA. In respect of Gulf's claim of breach of the arbitration agreement, the Appeals Court held that courts were limited to determinations of (i) whether a valid agreement to arbitrate existed and (ii) the scope and enforcement of the agreement; the FAA did not provide for any other court intervention prior to issue of an arbitral award. In addition, while district courts can intervene to select an arbitrator, e.g. by way of default, the FAA gave the court no authority to remove a sitting arbitrator.

Gulf had also argued that CG had waived its right to arbitrate in refusing to progress the arbitration; the District Court found that there had been no waiver and this was confirmed by the Appeals Court which stated "… there is a strong presumption against a finding that a party waived its contractual right to arbitrate". The waiver had to be some overt act in court that showed the desire to litigate rather then arbitrate but CG's engagement in a lengthy dispute about the composition of the tribunal had not constituted such an overt act.

(viii) In an direct contradiction to a 3rd Circuit Court of Appeals decision, the 5th Circuit held, in *Westmoreland v Sadoux*, that, except in rare circumstances, non-signatory agents of signatories to an arbitration agreement may not themselves rely on it.

Westmoreland claimed that two individuals, the operating managers of a company in which it was one of three shareholders, had fraudulently induced it to sell its stake to them for a small sum when, only two months later, they sold the company for substantially more (60x !). The two individuals obtained a stay for arbitration, arguing that since they had acted as agents of the other two companies signatory to the arbitration agreement, they could rely on it.

The Court noted the well-entrenched federal policy to read arbitration clauses broadly but questions of policy were different from the question of who may rely on an arbitration agreement. The Appeals Court identified only two exceptional circumstances (1) when a signatory relies on the terms of the arbitration agreement in a suit against a non-signatory and (2) when a signatory claims that the non-signatory has committed misconduct in concert with another signatory. Other than in these two instances, non-signatories could not seek to rely on the arbitration agreement.

(ix) The wide availability of freely-downloadable software and other materials on the internet gives rise to difficulties in a number of areas of law and, in a 2nd Circuit Court of Appeals case, *Specht v Netscape & AOL*, the issue was whether internet users downloading free software from a website were bound by an arbitration agreement contained in a licence agreement on a submerged screen. In a class action, Netscape and AOL sought to rely on an arbitration agreement contained in the online licence agreement, downloaders having assented to it.

The Appeals Court disagreed and held that reasonably prudent internet users would not have learned of the arbitration agreement before downloading any software. In part, the decision was based on the fact that the arbitration agreement came at the end of a lengthy legal document available on a scroll-down screen and that it had been presented in such a manner that it concealed its true nature.

(x) In another 2nd Circuit case, a Taiwanese company T commenced an ICC arbitration against SW and its affiliates and successors. SW sought to stay the arbitration since it was in bankruptcy and the other named defendants were not signatories to the arbitration agreement. The stay was denied in respect of SW but granted in respect of its affiliates. T then amended its claim in the arbitration, seeking damages equal to its costs of opposing the stay applications. SW sought to injunct T from pursuing its amended claim in the arbitration.

The District Court held that the question of the arbitrability of T's claim for its costs was one for a Court and ruled that it was not arbitrable since it arose out of litigation separate from the contract. The Appeals Court reversed this, holding that the broad form of the arbitration agreement was evidence of the parties' unmistakable intention to submit questions of arbitrability to the Tribunal. In addition, the parties were bound by ICC Art.6 which specifically provides for the ICC Court to consider questions of arbitrability. Finally, the Appeals Court rejected SW's argument that the choice of law clause in the contract showed the parties' intention to limit the power of the arbitrators in addressing issues of arbitrability.

(xi) Is there life after Cable and Wireless v IBM ? The 1st Circuit Court of Appeals held, in *HIM Portland v De Vito Builders*, that a party could be obliged to undertake mediation as condition precedent under the contract before seeking to rely on the arbitration agreement. The contract provided that the parties should endeavour to resolve disputes by mediation and although a request for such could be made concurrently with the filing of an arbitration claim, mediation was expressly established as a condition precedent to commencement of arbitration proceedings.

This ruling regarding conditions precedent reflects those on other circuits e.g. in *Kemiron v Aguachem* the 11th Circuit had held that all conditions precedent must be satisfied before relying on an arbitration agreement.

(xii) A Michigan corporation M, and a German company B were in contract whereby M was to be the exclusive US sales agent of certain of B's products. Subsequently, B elected to terminate the relationship and M sued for millions of dollars in unpaid commission. The District Court stayed for arbitration pursuant to an arbitration agreement. M secured an award in its favour and was granted confirmation under the New York Convention; however, B continued to contest the amount owed. The District Court remitted part of the award to the arbitrator for reconsideration and clarification.

The 6th Circuit Appeals Court held that (1) the remittance was not a final order and was therefore not appealable under the FAA (2) the District Court had been correct to remand the award to the arbitrator for clarification. In addition, could arbitrations under ICC rules be remitted ? There was no direct authority in the Rules providing for remittance but that in isolation did not preclude remittance by a domestic court (Art.35 refers); however, the District Court's remand order was insufficiently specific as to how the arbitrator should proceed.

(xiii) An English Award came under fierce pressure in a court in the Northern District of Ohio: seamen employed by a US Steamship Company, S, claimed that they had been exposed to asbestos while serving aboard S's vessels. S was by then insolvent and the plaintiffs obtained a default judgment against it and, in 1990, sought a declaration that they were entitled to proceed directly against the company's P&I Club, the West of England (West). West sought to stay the US litigation in favour of an arbitration agreement specifying English law and London as venue. The 6th Circuit Court of Appeals determined that the plaintiffs were bound by the arbitration agreement between S and West and dismissed the case pending outcome of the English arbitration. The tribunal ruled in favour of West on all claims and awarded it $500,000 by way of costs. West applied to the Northern District of Ohio to enforce the award.

The arbitration agreement specifically provided that disputes relating to the arbitration should be heard by the Commercial Court in London so the District Court refused to hear procedural issues. However, the Court considered the plaintiffs' reliance on Art.V ss 1(c) and 2(b) of the 1958 Convention. They argued that the award of costs, including legal costs, exceeded the scope of the arbitration agreement which had made no mention of such costs; the court rejected this argument since the arbitration

agreement specified that the Arbitration Act 1996 was to apply and it expressly empowered an arbitrator to award costs.

Perhaps more interestingly, plaintiffs also argued that the Court should refuse to enforce the award on the public policy exception but the Court refused to do so since that exception should be construed narrowly, applicable only where "enforcement would violate the State's most basic notions of morality and justice" - the subject Award did neither although the award of legal costs was contrary to American practice, the Court considering that this had been freely agreed between the parties in reaching their arbitration agreement.

Finally, the Court rejected the argument that the award of costs and interest was punitive and that costs should not be awarded except in connection with bad faith in the litigation.

(xiv) The District Court for the Southern District of New York held over its decision regarding enforcement of a Russian Award pending the outcome of litigation in Russia concerning enforceability. A Russian commercial bank, K, and a Dutch company, N, entered into a joint venture agreement from which the Russian bank sought to withdraw; N filed an arbitration claim against K in Moscow and the tribunal found that the latter had unilaterally breached the contract without justification and that its breach had forced N into insolvency in the Netherlands. ICCA issued an award in N's favour and it applied to the Moscow City Court for execution while K applied to have it set aside.

The two sets of proceedings were consolidated and transferred to the Moscow Commercial Court which found no grounds for set-aside and issued an enforcement order. K appealed to the Russian Federal Arbitration Court (Moscow District) which reversed the lower court's decision.

At the same time, N sought execution in New York and K applied to dismiss that action, arguing that that Court lacked subject matter jurisdiction over that dispute because the award was not yet enforceable under the law of the seat (i.e. Russia); Art.V(1)(e) refers. N argued, quoting both Russian and US authorities, that the award was in fact binding and enforceable but, despite the pro-enforcement bias of the Convention, the District Court was unable to overcome the Arbitration Court reversal of the lower court's enforcement order. In consequence, the District Court found that staying the New York proceedings under Article VI of the Convention was appropriate

17. Singapore is a hotbed of developments in arbitration law, particularly given that it is a Model Law jurisdiction. Baker & McKenzie's Singapore office publishes a very interesting "Disputes Newsletter" (which I commend to your attention) containing, in addition to other interesting materials from SE Asia, short reports of interesting Singaporean cases; with the kind permission of B&M's David Howell (for which I am most grateful), I am able to bring you the following.

(i) ABC Co v XYZ Co [2003] SGHC 107 arose from an international arbitration governed by the Model Law pursuant to Singapore's International Arbitration Act. ABC sought to set aside an interim award pursuant to Art. 34 and filed its application within time. Subsequently, and out of time, ABC sought to amend its application by adding six new grounds for set aside. Prima facie, Article 34 excluded any such amendment out of time and XYZ argued that the three months was a strict limit; conversely, ABC argued that it was merely introducing new grounds, not new causes of action. It was accepted that this was a procedural issue on which the Model Law was silent. The Court held that an application to amend a notice of appeal differed from an application to amend an originating motion for set-aside: in an appeal, the applicant does not have to prove new facts but must show that existing evidence has not been fully considered whereas a set-aside application could establish new facts which had not been considered by the Tribunal. The court concluded that to have allowed the amendments requested by ABC would be to add new causes of action because each ground for set-aside constituted a separate such cause. Only one of the six new grounds arose from the existing facts.

(ii) I have reported above on the debate in England concerning whether s.69 of the Arbitration Act 1996 should be retained, amended or repealed; central to that debate is the English Court of Appeal decision in *Northern Pioneer* which reconsidered the Nema Guidelines. The latter were relied upon in a case arising from a domestic arbitration in Singapore, In *Re An Arbitration Between Digital Dispatch (ITL) Pte Ltd and Citycab Pte Ltd* [2003] SGHC 6 where the Court held that the arbitrator had obviously been wrong in his construction of a contract and that leave should therefore be given for an appeal. It should be noted that, following the Model Law, there is no such appeal in a international arbitration in Singapore, the only option being to apply for set-aside under Article 34.

(iii) In England, applications to remove an arbitrator are rarely successful; in a recent Singaporean domestic case under the former Arbitration Act, *Anwar Siraj & Ors v Ting Kang Chung* [2003] SGHC 64, the Court declined to remove an arbitrator on the grounds of misconduct. The case arose from a domestic house-building contract where the Owners submitted that the arbitrator was neither diligent nor competent and had displayed a complete lack of knowledge of arbitration law and practice and possessed neither qualifications nor experience as an arbitrator; they also contended that he had shown bias in favour of the Builder. The Court held that "misconduct" was to mishandle the arbitration such as would likely result in a 'substantial miscarriage of justice' but the making of erroneous findings of fact or law or procedural errors did not, in isolation, amount misconduct. The arbitrator had wide discretion regarding the conduct of proceedings provided that these did not offend natural justice: one party's lack of confidence in the arbitrator was insufficient ground for removal - there had to be a real likelihood that the arbitrator could not or would not fairly decide the issues before him. The fact that an arbitrator appeared to be constantly ruling in favour of one party was consistent with all the merits being on that party's side. As regards competence, the arbitrator's taking legal advice on procedural matters was not evidence of incompetence (note: if it was, Scots arbiters would be in real trouble !). The Court concluded that the Owners had failed to make a case for removal. (Note: "misconduct" is no longer a ground for removal but the present Arbitration Act would be unlikely to produce a different result.)

18. The New York Convention permits, but does not oblige, the court from which enforcement is sought to refuse enforcement if the award has been set aside in the country of the seat of the arbitration. There are significant conceptual difficulties if the Court of the seat, i.e. closest to the arbitration, decides to annul the award but a court elsewhere does enforce it. There are recent example cases such as *Baker Marine*, *Chromalloy*, *Westacre* and *Hilmarton*. It is evident that opinion within the international arbitral community and judiciary varies quite widely as to what is or is not correct in principle in this regard. Further, it would appear that the various enforcement courts involved in these cases have not applied a single consistent set of principles.

In addition, and taking *Westacre* as an example, the performance of the underlying contract appeared to be illegal under the laws of Kuwait and would also have been unenforceable in England as contrary to public policy. However, the performance of the contract, i.e. essentially influence-peddling, was not contrary to public policy in Switzerland and therefore not unlawful there (although actual bribery would have been), the seat of the arbitration. I have argued before that there is a significant breakdown in logic in that the Westacre award should become enforceable in England merely because of the interpolation of Switzerland in the chain of jurisdictions.

A recently-published book, "The International Effectiveness of the Annulment of an Arbitral Award" by Dr Hamid G Gharavi (Kluwer; 2002; ISBN 90-411-1717-2) examines this area of international arbitration in great detail. In particular, the book is notable by the powerful opinions of the author who has no qualms in attacking the views of world-reputed, highly-distinguished international arbitrators and commentators - aside from its other merits, the book is a very good read ! Although it has been developed from Dr Gharavi's doctoral thesis, it reads as a "proper book" which, in my experience, is too rarely the case when such theses are converted into four-blown books.

In my view, this is a highly important book and well worthy of consideration by all those working in international arbitration in whichever capacity.

19. The Charles Taylor Consulting Essay Prize, established under the auspices of the London Shipping Law Centre, has been generously sponsored by the Charles Taylor Consulting Group, one of the largest maritime management and consultancy organisations in the world, (refer its website at www.ctcplc.com). In 2003, a Charles Taylor Prize was awarded to Simon Everton, not only a leading figure in the shipbroking and related worlds but also a maritime arbitrator of considerable reputation.

With the kind co-operation of Simon himself, and with the kind permission of both the Charles Taylor Consulting Group and the London Shipping Law Centre for which I and Simon are most grateful, I am pleased to bring you, appended to this Newsletter, Simon's prize-winning essay "What would be an effective deterrent to sub-standard shipping ?"

Although this lies slightly outwith my own direct interests and responsibilities, I was taken by the cross-fertilisation of ideas between the oil & gas and the maritime sectors

Charles Taylor Consulting is a publicly-listed company based in London which has been evolving since the mid-nineteenth century. It provides solutions to a wide variety of problems and management services to a diverse client base from around the world and it has offices at 49 locations in 21 countries and

employs in excess of 660 people. The CTC hallmarks are the provision of high-quality services and a common-sense approach, whether in managing companies or providing solutions to clients' problems. CTC's clients are as diverse geographically as they are by activity and range from small private businesses to multinational companies. In the early 1990s CTC set up its own captive management business, which was later expanded by the acquisition of a Bermuda-based captive manager. At the same time a separate investment management company was established to manage client funds. By 1996 CTC had a significant presence in what has become known as the alternative risk market. Although 'alternative risk transfer' and 'risk retention' have recently become fashionable concepts, they have been the basis of CTC's business for over a century. In addition CTC's management activities, the group began to develop a separate emphasis on consultancy services to shipowners and others involved in the transportation industry. More recently it have expanded our operations into the energy and aviation industries.

CHARLES TAYLOR CONSULTING
PRIZE ESSAY

What would be an effective deterrent to sub-standard shipping?

Simon Everton
M.A. (Oxon), M.C.I.Arb.

Introduction

For most outside the shipping industry, the issue of sub-standard tonnage is raised only when there is a major disaster in the oil industry. Disasters such as the “Torrey Canyon”, the “Exxon Valdez”, the “Braer” and the “Erika” from time to time occupy our television screens and the front pages of our newspapers, bringing the spotlight of publicity on the issue of sub-standard tonnage.

My own career in shipping has been predominantly in the dry cargo industry, and the purpose of this essay is to address the problems of sub-standard dry cargo tonnage, and how an effective deterrent might be provided in this side of the shipping industry. The problem of sub-standard tonnage has had to be addressed by the wet side of the business much more publicly, and the oil industry has taken considerable steps down this road, many of them successful. The problems of sub-standard tonnage are both common to the wet and dry sides of the industry, but also different. Not least in the manner of publicity – oil disasters bring front-page pictures of tar covered seagulls and polluted holiday beaches, whilst the impact of dry cargo incidents are not so photogenic. But the problem does exist in the dry cargo industry and there are lessons that the dry trades can learn from the wet industry, and more specifically in the way that the oil companies and tanker owners have responded to these special problems.

Definition of sub-standard tonnage

It would be helpful at the outset to try to define what is meant by sub-standard tonnage. The simple answer is that a sub-standard ship is one that simply does not do and/or is not capable of doing the job for which she is chartered.

In the office where I started my career as a shipbroker was proudly displayed the oldest charterparty in existence, dating from the 1760s, for a carriage of tallow from Archangel to London. The language used in this document is very similar to charterparty forms still in use today. It was as relevant then as it is now that vessels much be “tight, staunch and in every way fitted for the voyage…”. A simple and more recent definition is found in the judgement of the “Arianna”[1], where it was held that there was a presumption of unseaworthiness if "*there is something …. which endangers the safety of the vessel or its cargo or which might cause significant damage to its cargo*".

What are the practical effects of a sub-standard vessel? Typically, a ship might be substandard in one of three ways. She might be structurally sub-standard, a ‘rust-bucket’ as such ships are colloquially known. I have in the past visited ships in port and been grateful to get back on dry land in one piece. Many older and poorly maintained ships (although poorly maintained vessels do not have to be old) will show one or more of the obvious problems; for example leaking hatch covers, unclean or rusty holds, gear which is broken or incapable of maintaining its SWL, engines which would seem to struggle to move the ship without the assistance of a fleet of tugs. The list is endless.

Alternately the vessel may be sub-standard in terms of manning. As an example, the crew may be inefficient and not capable of carrying out their basic duties[2]. The Master and/or Officers may not be English speaking (as is required in most charterparties), and be incapable of dealing with the documentation necessary for the cargo, and of keeping proper records. Clearly the ship’s officers and crew are as important to the successful prosecution of a voyage as the ship itself, and their inefficiency will make a vessel sub-standard as much as any structural defect.

Finally, the vessel’s management may be sub-standard. The vessel’s certificates may be out of date or not available. Every vessel requires a sheaf of certificates to pass muster – classification, gear tests, IMO, and the absence of a relevant certificate for all or part of the ship will delay or prevent a voyage just as easily as a damaged engine or inefficient Master.

Without the headline stories which accompany the oil disasters, it is tempting to ask of sub-standard dry cargo vessels; is there a problem? A glance at reports in the shipping press, Lloyds List or Tradewinds, will turn up every day in the casualty reports examples of ships detained or held up for reasons which clearly put the vessel into the category of

[1] Athenian Tankers Management SA v Pyrena Shipping Inc. (The Arianna) [1987] 2 Ll L R 376

[2] A very good example is in the case of the “Hong Kong Fir”, quoted below.

sub-standard tonnage. There has recently been an increase in port state controls on sub-standard tonnage. Countries (usually the more advanced economies such as the EC and the USA) are now far more rigorous in checking ships which call at their ports. The nature of international trade is that voyages frequently start or finish in one of these countries, so 'rogue' vessels are far more likely to be picked up than was the case even 10 years ago. Clearly if a ship is delayed in port, there will be delay to the cargo with all the obvious problems down the line and, if the cargo is perishable, all the attendant risks of physical damage.

Does the law help?

The purpose of any voyage is the carriage of cargo in the pursuit of international trade, and it is the maritime charterer who provides the impetus for most voyages. They drive international trade, and without them shipping would be a very small world. It is important to remember that the charterparty for these voyages represent merely the 'F' element in a C & F sale.

In the absence of proper controls, the maritime charterer may be faced with the inevitability that sometimes he will charter a sub-standard vessel. What then are the remedies open to this hapless victim? It is probable that in the first instance he will call upon his lawyer for a solution. However, in this situation, it is my suggestion that he will not find a very satisfactory answer to his problems, and certainly not the redress which he hopes for.

In such a situation the maritime charterer will want one of two things, or most probably both. He will want to be able to cancel his ship and to terminate the contract, and he will want damages. A closer look at ways in which the law might help him achieve these twin objectives provides, in my opinion, a view rather of obstacles that might be placed in his path, obstacles that to a commercial man might come as a rather unpleasant surprise.

There are various international conventions which govern the carriage of goods by sea. English law has adopted the Hague-Visby Rules (1968) which replaced the earlier Hague rules (1924), and are incorporated into our law via the carriage of Goods by Sea Act (1971). As a result, the Shipowners' duty to provide a seaworthy ship, while absolute at common law, is replaced by one from the Hague-Visby Rules, Article III Rule 1, which reads:

> "*The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: -*
>
> *(a) Make the ship seaworthy;*
>
> *(b) Properly man, equip and supply the ship;*
>
> ***(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation*.**"

The use of the phrase "*due diligence*" is an interesting one. Effectively this means that where unseaworthiness has been found the shipowner can escape liability if he can show that he did exercise due diligence in providing a seaworthy vessel at the start of the voyage. Only if he cannot do that he will lose the benefit of the many exclusions of liability found in the Rules. However, if he can show that he exercised due diligence then his excluded liability is far ranging. Consider Article IV Rule 2. (a), which states;

"*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship*".

This seems to me to be a fairly wide-ranging exemption which works in favour of the owners, rather than the maritime charterer.

A further question of what might exercise the maritime charterers' mind when faced with a substandard ship is how can he get out of his contract. He is saddled with a ship which is not performing the task for which he has chartered it, and he wants out; or in other more legal words he wants to repudiate his contract. Here again the law does not help him in the way that he might wish for.

A charterer can only repudiate a contract for beach of a condition of a contract, but not for breach of a warranty, where the remedy lies only in the way of damages. Although this may be a potentially attractive remedy, at the same time it will tie the charterers' hands in the way he continues the commercial purpose of his activities. Even more unhelpfully, it may not be clear at the critical moment whether the shipowner is in breach of a condition or a warranty. A leading case

on this is "Hong Kong Fir - v - Kawasaki Kisen Kaisha"[3]. The "Hong Kong Fir" was built in 1931, and in 1956 (when she was 25 years old) she was chartered for a period of 24 months. Her engines were old and only efficient when given constant attention. A further problem was that the Chief Engineer was a drunk, as were (apparently) most of the others on board. The manning in the engine room was insufficient and she kept breaking down. She sailed from Liverpool to Newport News in ballast to pick up a cargo of coal for Osaka. On that voyage she was at sea for 8½ weeks, off hire for 5 weeks and underwent repairs which cost £21,400. At Osaka further repairs were required which took 15 weeks and cost £37,500.

When the case came to court, it was found that these delays were "*not sufficient to frustrate the commercial purpose of the contract*". I would suggest that this might have come as a nasty surprise to a maritime charterer, who is more likely to have a commercial (as opposed to legal) background. The vessel was in fact off hire for 4 months in the first 7 months of a 2-year charter. Whatever the charterer reckoned he was getting when he entered into the charter, one thing he would have thought that he was sure of was that he was getting the use of a ship. In this case what he clearly did not get was the use of the ship, and he therefore felt – reasonably one might feel on a purely commercial analysis – that he was entitled to treat the contract as at an end, and move on with his commercial activity and charter a replacement vessel.

However, the courts decided that the Owners' breach did not "*deprive the other party of substantially the whole of the benefit of the contract*". Furthermore the Owners' obligation to provide a properly maintained and seaworthy ship was (on the facts of this contract) not "*a sufficiently binding obligation the breach of which would allow the Charterers to treat the contract as at an end*", but merely a breach for which they could pursue a remedy in damages. Lord Diplock called it an "*innominate term*", which although may be legally helpful to explain the ratio of the decision really does nothing to address the problems of what was clearly by any lay definition a sub-standard vessel.

I once read a book which tried to explain the Rules of the game of Golf, which can to many seem far more Byzantine than any pronouncement of the House of Lords! The writer cleverly distilled these down to the very simple underlying principle that, wherever possible in any way at all, the ball should be played as it lies. I don't think it is stretching the analogy too far to liken this to the courts' approach to commercial contracts; after all, I suspect many of our learned judges are also golfers! But put in similar words, the contract, wherever possible, should be performed as it was originally intended by the parties, and that any party injured by a breach should seek recompense in damages.

For a trader or merchant, this brings serious problems of practicality. A charterer faced with a vessel that needs repairs, such as in the Hong Kong Fir case, is simply not getting what he bargained for. He has to make contingency plans to continue his business, to keep his customers satisfied. He doesn't know how long the repairs may take, and at what point they might in fact be of so serious a nature and take so long to repair that they might even lead a modern day Lord Diplock to begin to think that the charterer had been "*deprived of substantially the whole of the benefit of his contract*".

This case illustrates very clearly a situation where the law as applied by the courts is quite probably at odds with the commercial expectations of a maritime charterer who has chartered a substandard ship, and I would suggest that it is not a unique example. The maritime charterer might believe that there are regulatory bodies who are responsible for ensuring that vessels are fit to sail, and to carry cargo – i.e. seaworthy and cargoworthy. If a properly certified vessel proves subsequently to be unseaworthy, or sub-standard, he might perhaps expect that he could obtain some remedy from these bodies. However, this apparently promising avenue also turns out to be a fruitless cul-de-sac.

In the case of the "Nicholas H"[4], the ship loaded cargoes in Peru and Chile for Italy. On voyage, cracks developed in the vessel's hull and she went to Puerto Rico and was surveyed at anchor by her Classification Society, NKK. They recommended some permanent repairs. Owners objected to making permanent repairs and carried out some temporary repairs and called on NKK to make a further survey. The NKK surveyor made a further survey, changed his mind and allowed the "Nicholas H" to sail without the permanent repairs being carried out. Had all gone well, there would have been no story, however the ship sailed, the temporary repairs failed, and the ship sank. The cargo owners sued NKK.

The case went to the House of Lords, who held by a majority that there was "*no duty of care by Class towards Cargo Owners"*.

[3] "Hong Kong Fir - v - Kawasaki Kisen Kaisha" [1962] 2 QB 26

[4] The "Nicholas H". (1995) 2 Lloyd's Rep 299 (HL)

On commercial analysis and in the context of sub-standard tonnage the decision seems unsatisfactory and unhelpful. Charterparties stipulate that performing vessels should be classed "Lloyds 100A1 or equivalent". If the decision of a class surveyor cannot be relied upon, what is the purpose of requiring vessels to be in class? The facts of the case did not involve the issue of a vessel's rolling survey position (the maritime MOT) but a specific survey to determine whether the ship could undertake a specific voyage. She had been passed fit by the class surveyor when she turned out to be quite palpably unfit. It might seem there could not be a clearer case for implying a duty of care. But according to the House of Lords, no such duty exists.

I suspect that the decision was made more for policy reasons than commercial considerations; it could clearly lead to all kinds of problems if Classification Societies were to be held liable in cases where vessels they have passed fit proved not to be so. The facts of the "Nicholas H" facts seems fairly clear-cut, but it might be difficult to limit how far down the line a duty of care might be implied on another set of facts.

But whatever the reasons behind this decision, again charterers and cargo owners appear to have no remedy in this area. Once again the charterer of a vessel that proves to be sub-standard seems to be on his own in the minefield that is the law, and unlikely to get a satisfactory remedy from the courts.

This analysis may perhaps be rather bleak, perhaps to make the point, and obviously in some cases a legal approach can of course provide some satisfaction, most obviously in the payment of damages. But it can, I suggest, be unhelpful in areas where the maritime charterer of substandard tonnage might most need help; most specifically in putting his contract at an end.

Above all legal solutions are by their nature reactive, rather than proactive. A good commercial operator will try and avoid problems, rather than solve them when they arise. The modern jargon for this is risk assessment, and risk avoidance.

Risk assessment; drafting of contracts

One solution open to Charterers is to ensure charterparties are more rigorously drafted in their favour. Every charterparty contains a cancelling clauses which gives the Charterers the clear option to cancel a ship if she arrives after an agreed date. In these clauses, time is explicitly agreed to be of the essence of the contract, and the Charterers' right to cancel the contract is clearly spelt out.

It should be possible to construct similar clauses which would address other eventualities deemed by the charterer to be of equal significance to the commercial purpose of the voyage. Although there is authority that is will probably not be sufficient merely to label a clause as a condition to give a clear right to repudiate in case of a breach[5], it should not be too difficult to draft clauses which give Charterers the right, explicit, agreed and unambiguous, to cancel a charter in cases where, for example, a vessel is off hire for a specified period of time, or perhaps does not have the necessary certification to load an agreed intended cargo.

Risk assessment; Pre-screening of tonnage

However, in the context of risk assessment there is, I suggest, a way in which maritime charterers and cargo interests can provide themselves with an effective deterrent to sub-standard shipping, and it is a way that is already successfully in operation in the oil industry. This is a self-imposed exercise by the charterer to pre-screen tonnage before fixing, and to ensure that they fix only tonnage that passes their own self-imposed standards.

The oil industry has been forced to react to widely publicised incidents such as the "Erika" or the "Exxon Valdez" by introducing internal screening of tonnage to filter out the kind of ships that are most likely to prove to be substandard. This has been largely successful, and has overcome initial reluctance from the owning fraternity. John Hughes, who after 30 years with Exxon following a career at sea, is now the very well qualified Director of OCIMF, the Oil Companies International Maritime Forum said in a recent conference speech "*one effect of the "Erika" has been to raise awareness of the charterer's role in deciding what quality of tonnage is acceptable for employment. The European Commission has stated that one of the criteria for considering whether a civil liability and compensation system is fully satisfactory is that it should discourage ship operators and cargo interests from transporting oil in anything other than tankers of impeccable quality*."

[5] Schuler v Wickman Machine Tools [1974] AC 235

This of course touches on the question of who pays for the consequences of oil spills, as much as the commercial problems of sub-standard tonnage, and in this respect and others the circumstances of the oil trade are different from dry cargo. However, with some effort, the dry cargo industry could and, in my opinion, should address this process far more rigorously, and would reap considerable benefit from doing so. Some of the larger trading houses have put such a system into place, and I have been lucky enough to observe the very impressive results of one such system. It is instructive to see how the company went about tackling the need for such a procedure, and to review the results.

The first step is to identify the problem, and having done so, so see how it adversely impacts on the company's commercial activities. There is adverse publicity for the Charterer attached to the chartering of substandard tonnage;

I suspect that almost everyone can recall the name of the oil company involved in the "Erika" disaster. Dry cargo problems are not front-page news, but equally industry gossip about unreliable deliveries can be commercially harmful. Delays caused by substandard tonnage held up on the voyage will cause interruptions to customers' supply chain, and in these days when there is increasingly frequent reliance on 'just-in-time' delivery such delays are not acceptable. A reputation for unreliability may well tell against a tenderer for repeat business; a company who is known to have an effective screening programme in place will be looked on more favourably. Moreover, charterers will be seen to be taking a responsible position commercially, environmentally and gain industry respect.

There are clear cost implications. An obvious benefit of improvement in the quality of chartered tonnage will be a fall in the cost of insurance premiums. As with all types of cover, the cost of premiums is directly affected by the claims record.

There are also clear benefits for staff. In the case of substandard tonnage staff become involved in claims and disputes when they could be freed up for more profitable tasks. Handling disputes is not only time consuming but also frustrating, and cutting out the problems that substandard tonnage causes can bring direct benefits to staff both in terms of costs and productivity.

The benefits may seem very obvious, but how does a charterer go about addressing the problem? It is critical that there is a corporate decision to screen chartered tonnage pre-fixture, and a corporate will to make it work. It is fundamental that the policy is seen to be consistent throughout the company and must be respected down the line with no exceptions. There must be no easy excuses for a trader to charter an unapproved vessel simply because of the superficial attraction of a cheap freight rate. The commitment has to be absolute, and a corporate culture of screening must become ingrained. It is vital that long-term benefits must be recognised and short-term problems sidelined in favour of the bigger picture.

Having made the decision to pre-screen all tonnage before chartering, what practical steps should the maritime charterer take? Many steps are obvious. They should build up a database of information by monitoring the casualty reports (for example those published in Lloyds List). They will get internal feedback from brokers which is important even in today's market which is increasingly conducted across screens, rather than face to face. In the past when a majority of charters were concluded in London, the Baltic Exchange used to exist as a fairly effective self-regulatory body, and acted as an informal register of substandard tonnage and owners. Today the market is so internationally diverse that a far more comprehensive system of contacts is needed. An effective system will include strict monitoring of perceived 'rogue' tonnage and/or owners.

There must also be a strict insistence on detailed pre-fixture questionnaires. Amongst dry cargo owners' brokers this has always seemed to cause problems. I suspect this is largely simply due to laziness, but also the fact that the habit has not become ingrained. In the oil industry, majors like BP and Shell will simply not consider a tanker for charter without their detailed questionnaire being completed to the satisfaction of their operations department. A well constructed questionnaire will cover not only the physical aspects of the vessel and confirmation of where she is insured, but also look at its trading history, detailing records of recent surveys and dry-docks, accidents or breakdowns, and even such information as the Owners' regular bunker suppliers, with whom checks might be made for payment records. Whether the vessel is classed with a classification society in the IACS group, or whether her P&I cover is with a club within the International Group can often give a clue to the type of Owners and ship that the charterers are considering. The answers must of course then be incorporated in the charterparty as part of the warranties given by the Owners.

Pre-screening should also incorporate rigid age control of chartered tonnage.

Insurance companies will tell you that it is statistically proven that the age of a vessel is in direct proportion to its performance. A good scheme will set thresholds – 15, 20, 25 years old – beyond which a vessel will simply not be

considered, or alternately will be subject to more rigorous tests. In some cases, charterers will even go as far as a physical pre-fixture survey of marginal tonnage. This may sound drastic and expensive, but can be used as a last resort to back up the seriousness of the pre-screening exercise.

It is vital that the system is subject to continuous upgrade. Screening is a continuous process and must be treated as such. Just because a ship passed the tests a year ago doesn't mean that it hasn't changed in that time.

Clearly there are cost implications in a screening programme. At first sight the cost of screening appears high, particularly if a physical survey is required. Staff will be required to implement the scheme, and to ensure that it is a continual process. There may be costs in freight, where traders are obliged to ignore a vessel at a cheaper freight which does not meet the standards set. However, in my opinion the benefits accruing will underwrite this. There is also the possibility that owners might participate in the costs of screening. A responsible owner will want to be an 'approved' vessel, and can gain market benefit from this status.

As outlined earlier there are cost benefits to be gained from a strict screening policy. Charterers can expect a reduction in insurance premiums, as insurance companies will deal favourably with companies who have effective screening policy. Staff are freed up from dealing with long running claims and disputes, and there is a definite business advantage flowing from increased efficiency to customers.

I have learnt that the total costs of a strict screening policy adopted by a major dry cargo trading house represents less than 0.1% of total freight bill; in simple terms just one thousand dollars for every million dollars of freight. At the same time, they calculate that 88% of dry cargo vessels involved in casualties at sea and detentions in port would not have passed their pre-fixture test. I consider this to be a quite staggering statistic, and shows that the costs of screening are well rewarded commercially.

Conclusions

In conclusion, I think that the dry cargo industry has lessons to learn from the oil industry, which has been forced to lead the way in providing a deterrent to sub-standard tonnage. The high profile coverage of disasters has given them an irresistible impetus to put this into practice. It is also a more compact industry, where a few major companies share a major slice of the market, both as charterers and also at the same time as shipowners. The debate has been held in the public domain – I think it fair to say that the single casualty of the "Erika" had a profound and policy changing effect in this area.

Owners have been forced to think the unthinkable, and now look upon questionnaires and even physical surveys as routine; having passed them, they will then describe their tanker to other charterers as being 'Shell or BP approved', and oil majors' approval is now worn as a badge of pride. Most importantly the industry's efforts in this area are ongoing, with continual attempts to raise the bar in terms of the standards asked of ships and Owners.

Perhaps most important, the move to an effective deterrent has come from within the industry, with the market users reacting to a situation, rather than having regulations forced upon them from outside. It is my opinion that the industry has been swifter to react and self regulate in order to avoid solutions imposed from outside. That this solution to the problem has been arrived at by the market itself has made it, in my opinion, infinitely more palatable to most shipowners.

The dry cargo market is different to the oil market. It is far more diverse and fragmented, not only in terms of owners and charterers but also by the nature of the variety of cargo carried alone. It also lacks the front-page imperative that has to a large extent driven the oil industry in this area. Perhaps for a collective impetus to find a self-regulated deterrent to sub-standard tonnage the dry cargo industry needs its own "Erika". But I believe that there are strong commercial reasons to introduce screening, and dry cargo owners are gradually but increasingly prepared to accept this as routine. Problems still exist; there is still the Friday night trader who will bully his freight department to take a risk on an unknown and unchecked ship which is offering freight $2.00 less than the market. It needs a strong corporate culture to resist this, but once in place results should flow. If this is followed through, the industry will have provided its own strong and effective deterrent to the problem of sub-standard tonnage, and will have avoided the need for unwelcome regulations imposed from outside.

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #10 DECEMBER 2004

17th March 2004

1. I have reported previously (see [2002] 68 ARBITRATION 4 at 408) on *Gillies Ramsay Diamond v PJW Enterprises*; this has recently come to appeal and the appeal rejected on all four counts: inter alia, (i) the Court confirmed that adjudicators have the power to award damages; (ii) although the adjudicator had not mentioned certain reference materials that had been submitted to him, it had been his duty to have considered these (Scheme, para. 17) and it should be assumed that he had done so unless his decision and his reasons suggest otherwise which they did not; (iii) as regards the alleged unintelligibility of the adjudicator's reasons, he had understood what questions he had had to answer, he had answered those questions and, however erroneous, his answers were at least comprehensible. The Court held that the reasons had been sufficient to show that the adjudicator had dealt with the issues remitted to him and to show what his conclusions had been on each; (iv) it was not competent for the Court to review alleged intra vires errors of law, such being for determination in arbitration, litigation or by agreement. Finally, Lord McFadyen observed "I agree that I was wrong, in *Homer Burgess*, to treat an adjudicator as being in substantially the same position as a statutory decision-maker. The circumstances of the present case make it clear that it is important to distinguish the position of an adjudicator from that of a statutory decision-maker." In addition, and arguably obiter, the Inner House rejected the Lord Ordinary's view, in *Deko Scotland v ERJV* (also reported on previously), that adjudication was a form of arbitration. In particular, a Scottish adjudicator is not subject to the common law limitations on the powers of an arbiter. [287 words]

2. It is widely agreed that the adjudication process has its limitations, three of which are (i) that it may well be inappropriate to deal with large, long-running or significantly complex disputes, not least because of the accelerated timetable; (ii) it may well be unsuited to dealing with issues such as professional negligence involving significantly different and more complex issues than the amounts due for payment under sub-contracts; (iii) the adjudication process is prone to ambush by a claimant who has a significant time advantage in preparing a complex case where the respondent will have only a very few days to reply. The case *London and Amsterdam Properties v Waterman Partnership [2003] EWHC 3059 (TCC)* demonstrates all three of these limitations with great force and, looked at from a non-adjudicator's perspective, the dispute between LAP and Waterman is totally unsuited to adjudication.

   LAP was developing a shopping centre in Milton Keynes against great pressure of time. Waterman was consulting structural engineer to LAP. LAP claimed that late delivery by Waterman of design information to project sub-contractors had caused substantial delays which had to be recovered by acceleration payments totalling £6.4m of which, LAP asserted, Waterman was liable for £2.5m. LAP's claim on Waterman was wholly unparticularised and, over an extended period, LAP's Solicitors consistently refused to provide the necessary information (which Waterman's Solicitors equally consistently demanded) concerning LAP's claim. Waterman's main point during this period was that it must be given the opportunity to accept, reject or modify LAP's claims with full regard to the evidence upon which those claims rested.

   The matter was referred to adjudication by LAP although Waterman disputed the referral; on LAP's request, the RICS appointed the same adjudicator as had adjudicated an earlier claim between LAP and a works sub-contractor. Waterman rejected the Adjudicator's jurisdiction on six grounds (1) confidentiality and the adjudicator's prior knowledge; (2) that the adjudicator was a Chartered Surveyor whereas the dispute concerned a professional negligence claim against a Structural Engineer (3) there had in fact been no referral at all of any 'dispute' to the Adjudicator (4) LAP's submissions to the Adjudicator were of excessive length (over 1,000 pages whereas the Scheme limited submissions to 20 pages) (5) given the volume of LAP's claim and the way in which it was served, Waterman was unable to deal with it in the timescale, this being a breach of natural justice (BNJ) and (6) the Adjudicator's proposed remuneration was inconsistent with paragraph 25 of the Scheme.

   The judges dismissed all Waterman's objections save (5). LAP had consistently refused over an extended period to reveal sufficient information on its claim to permit Waterman to deal with it (e.g. LAP had agreed to release quantum information but only provided Waterman had admitted liability, a proposal which I find utterly bizarre). Further, the information as to LAP's claim in its Referral Notice was so general and unparticularised and unsupported, Waterman's Expert tore it apart. Extraordinarily, the Adjudicator then allowed LAP to reintroduce the full data of the claim (over 1,000 pages) into the adjudication as "evidence" and he allowed Waterman only six days to deal with such a vast quantity of information which, you will recall, Waterman had been requesting from LAP for nearly a year without success. The Adjudicator appeared to see no problem in this but the judge disagreed - vigorously.

   Perhaps adjudicators will read this case differently but I find it bizarre: (1) for the reason that LAP consistently refused to detail its case against Waterman until it introduced it in the middle of the adjudication as "evidence" and it is hardly surprising that the judge pounced on this with some force and was highly critical of LAP's Solicitors, (2) the adjudicator's apparent total failure of comprehension as to what the issue actually was regarding particularisation of the claim and its deliberate withholding by LAP until they could dump 1,000 pages of complex material purporting to be "evidence" on Waterman allowing the latter six days to reply. [666 words]

3. A recent case in the English High Court, *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd*, brought out some interesting and useful clarifications regarding application of the Arbitration Act 1996. The case arose out of a complex international contract between the two pairs of companies for the supply of raw materials and electricity to, and the manufacture of ferroalloys by, a plant in Georgia, FSU. Each pair of companies contracted jointly and severally although, in parts of the contract, it was necessary to construe the contract in reference to the four individual companies. The arbitration agreement provided for each party (i.e. each pair) to appoint an arbitrator and the two arbitrators to appoint a third. The contract also provided at Clause 18 that variations to it required the consent of all four parties. Disputes arose about non-supply and non-payment and R appointed, by fax addressed to Z, as its arbitrator a leading English QC Arbitrator. Z's response was ambiguous as to whether it accepted R's nomination of the QC as one of three or whether it accepted him as the sole arbitrator. R's solicitors sought clarification of 'sole arbitrator' (which had not been its original intent) in express terms which was given by Z. Aside from some interesting commercial issues with interesting arbitral consequences, the following questions arose (1) was the ad hoc arbitration agreement invalid as being (allegedly) under the law of Georgia ? (2) given the arbitration agreement for a three-person tribunal, was it open to R and Z to have agreed for a sole arbitrator ? (3) given Clause 18 was the ad hoc arbitration agreement for a sole arbitrator invalid ? (4) did the sole arbitrator, if validly appointed, have jurisdiction to determine his own jurisdiction ? (5) Where R and F jointly and severally owned rights, could R sue in its own name ?

   Colman J held as follows (1) the ad hoc arbitration agreement had been made where its acceptance was received, i.e. England, and the arbitration was in all respects English so Georgian law was inapplicable; (2) in a four-party contract it was open to R and Z to have agreed an ad hoc arbitration agreement between them solely in respect of disputes between them; prima facie the other two parties were not bound to this; (3) while an arbitration agreement is separable from the contract in which it is contained, a clause such as Clause 18 which governed variations both to the main agreement to the arbitration agreement, was not itself separable and, to have bound all four parties to the ad hoc arbitration agreement, full compliance with Clause 18 would have been required; (4) the Act gave an arbitrator power to determine his own jurisdiction and the circumstances of this case provided no exception; (5) since R's rights and obligations were held jointly and severally with F, it followed that it did have title to sue in its own name for monies due to it. [496 words]

19th June 2004

See *Chancebutton & Deletenumber v. Compass Services* [2004] EWHC 1293 Ch.

A 25 year lease had been granted in 1982 with 5-year rent reviews, the final one being due in 2002. Current Market Rent was defined as "… the gross full market rent without any deduction whatsoever at which the demised premises might reasonably be expected to be let at the relevant Review Date in the open market without a fine or premium and with vacant possession by a willing landlord *for a term equal to the term originally granted under this lease* and under a lease on the same terms and conditions in all other respects as this present lease …".

The issue was whether the rent review should be on the basis of the 5 years unexpired or on 25 years being the term originally granted.

Lawrence Collins J had little difficulty in arriving at the 5-year conclusion but his summary of the background, the case law and the respective submissions is of interest.

5th July 2004

1. The convention in common law litigation is for the claimant to have the last word, e.g. in the making of closing submissions although this would normally mean it having it two bites at the cherry to the respondent's one. This convention does not normally apply in international arbitration and it is open to the parties or the arbitrator to agree/impose an alternative procedure. In a recent case, *Margulead v Exide*, a London-seated arbitration was heard in Chicago, the contract being under the laws of Georgia (USA). At the close of the penultimate day of the hearing the Arbitrator ordered that the final day would consist of oral closing submissions by C and R with no response by the former. Colman J held that there was nothing wrong with this form of procedure since it met s.33(1)(a) requirements.

   The case also had a subsidiary issue in that the Award did not expressly deal with an argument put forward by C: Colman J held that there was a distinction between failure to deal with an issue (s.68(2)(d)) and a deficiency of reasoning (s.70(4)). The arbitrator had expressly accepted R's arguments on the relevant issue and had also stated that he had considered all submissions put to him. The fact that he had not given his reasons for rejecting C's submissions did not fall within s.68(2)(d).

2. A common criticism of arbitration and arbitrators is the sometimes lengthy time which the latter take to publish awards (some jurisdictions and Rules impose 90 or 180-day limits). In a very interesting case concerning the implication of terms into contract, *Ultraframe UK v. Tailored Roofing Systems*, the Court of Appeal described the eight months that the first instance judge had taken to produce a draft judgment as

"totally unacceptable". The CoA quoted an earlier CoA judgment in which Peter Gibson LJ had said "a Judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again."

The same principles should be applied to Arbitrators.

3. In a recent case in the English High Court, *Atlantic Plovidba & Or v. Consignaciones Asturianas,* an important point of judicial policy arose as a side issue. A contract existed for the carriage of a crane from one Spanish port to another; was the contract contained in the Bill of Lading or the (separate) Booking Note - the latter contained an appropriate London arbitration agreement whereas the former did not. AP purported to serve a notice of arbitration but referred therein to the B/L; consequently, the CA argued that the notice was defective. English judicial policy is to take a broad and flexible approach to notices of arbitration and, in any event, it was conceded by Counsel for CA that if the notice had been in general terms without referencing the B/L it would have been valid; the judge held that a court "should be slow to dismiss as ineffective a notice of arbitration solely because it referred to the wrong document".

   A second issue arose as to whether the Court had an unfettered discretion under s.18 to appoint or to refuse to appoint an arbitrator. That section laid down no general principles by way of guidance (but see s.19) and in an AA50 case it had been decided that the discretion was indeed unfettered. Given the importance of the nature of the arbitral process and the enhanced recognition of party autonomy in AA96, the Judge held that the Court should hold the parties to their agreement and should exercise discretion in favour of constituting the tribunal except in where it was evident that the arbitral process could not result in a fair resolution of the dispute without unnecessary delay or expense. The discretion under s.18 was not limited by reference to the circumstances of s.9 and, held the Judge, this must have been deliberate drafting i.e. that there might be other circumstances in which a Court would be justified in declining to act.

4. *Minermet v Luckyfield Shipping* in the English High Court raised an important issue concerning the appointment of arbitrators: the arbitration agreement (contained in a GenCon charterparty) provided for a 3-main panel and, if R failed to nominate his arbitrator within 14 days, C's appointee became sole arbitrator (as in s.16(4) AA96). L nominated its arbitrator on 3rd July 2003 and various exchanges followed between L's Solicitors (English) and M's (Italian). On 28th July, L asserted that its appointee, Mr O, had been appointed Sole Arbitrator; M objected, stating (i) that it was awaiting a response to its fax of 8th July (ii) that it was appointing Mr S as its arbitrator. M applied under s.68(2)(a) but Cooke J dismissed that, holding that L's Solicitors were under no duty to respond to L's fax of 8th July and that the 14-day contractual limit was unaffected by the exchanges between Solicitors. Further, s.17 did not apply since there was an agreement between the parties. Mr O was entirely correct in deciding that he had been validly appointed and had jurisdiction. M had also applied under s.79(1) to extend to 28th July to validate its appointment of Mr S but s.79(3)(b) created an insuperable bar to extension since no substantial injustice could be shown. While it was apparent that some enforcement jurisdictions might take a negative view of the default appointment of a sole arbitrator overriding the arbitration agreement, that was not itself substantial injustice.

17th July 2004

In *Davidson v Scottish Ministers* ([2004] UKHL 34; 15th July 2004) the House of Lords decided "an important question of substance" i.e. whether the Second Division of the Scottish Court of Session had been right to have set aside decisions made by an Extra Division of the Court of Session on the ground that those decisions had been vitiated by apparent bias and want of objective impartiality on the part of one member of the court.

The issue was that Lord Hardie, who had sat in the Extra Division, had previously (before he promoted himself to the Bench) been Lord Advocate and, in that capacity had both been engaged in piloting and promoting the Scotland Bill (including the ECHR) in the House of Lords, and had, inter alia, advised the House on the effect of s.21 Crown Proceedings Act 1947 on the remedies which might be available to the courts in Scotland against the Scottish Ministers.

Davidson, a prisoner in Barlinnie jail, appealed under Art.3 ECHR and his appeal turned in part on s.21 of the 1947 Act. Would a Fair Minded Informed Observer (FMIO) consider that Lord Hardie would be fully objective and impartial ?

The Second Division decided not and this decision was upheld by the House of Lords.

20th July 2004

Jurisdictions around the world have different rules about the citing of authority in court; I do not propose to engage upon a comparative analysis (there is, no doubt, one out there !) but my attention was kindly drawn (by Colin

McClory) to a very helpful and succinct summary of the Scots law position in the case Petition of Mutas Elabas (opinion of Lord Reed; Court of Session; 2nd July 2004) as follows:

"[29] Finally, in the light of the submissions of counsel for the petitioner in this case (and the submissions of other counsel in other cases), it may be appropriate to add some observations about the citation of authorities. First, the citation of cases is not an end in itself: it is a means to the establishing of legal principle. Insofar as a submission consists of propositions of legal principle, those propositions (unless trite law) require to be supported by a citation of the authority from which each principle is derived. A submission which states the principle involved, then mentions the case from which the principle is derived, is more intelligible than one which merely blurts out one case after another. A case ought not to be mentioned unless counsel is able to explain exactly how it supports the proposition in question. That involves more than reading a *dictum* without explanation of the context (let alone reading a *dictum* without explaining that it comes from a minority or dissenting opinion, if that be the case). Unless the case is so well-known that explanation is unnecessary, the court should be told what the case was about, what the issues were, and what the various members of the court (if it is an appellate decision) had to say that is relevant to the point under discussion. A proper analysis of authority cannot usually be done by "looking very briefly" at cases, as counsel in the present case repeatedly assured the court was his intention: it calls for a careful explanation of each case, informed by an understanding of the distinction between the *ratio decidendi* and what was *obiter dictum*. Such an analysis should be undertaken as part of the submission: the judge should not be expected to read the case for himself without having counsel's submissions on it, in the hope that he may discover why it is relevant, or whether it should be interpreted as assisting the argument of the counsel who mentioned it. In an area of the law, such as asylum law, in which there is a large quantity of case-law available in reports and on the internet, counsel's researches may turn up numerous authorities which appear to be relevant. In order that proper use be made of court time, it is necessary to sift the grain from the chaff, and to place before the court only that part of the researched material which is required for the resolution of the particular case."

These seem to me to be excellent general principles, consistent with recent [English] Court of Appeal dicta.

The case was an immigration appeal by a failed asylum-seeker; his Counsel bombarded the Judge with a barrage of cases, some in full, some in head note form, some merely by way of citation. The Judge was singularly unimpressed and, in the body of his judgment, makes some acid comments.

5th August 2004

The following cases have been decided recently in the English High Court:

1. The issue in *Tame Shipping Ltd v Easy Navigation Ltd (the "Easy Rider*") ([2004] EWHC 1862 Comm), a s.68 application, was whether, and if so in what circumstances, a party seeking to challenge an award could rely on the arbitrator's reasons published separately from the award and expressly on terms that no use could be made of them in any proceedings relating to it. Perhaps surprisingly, the answer was "yes".

   The dispute was over repairs to a vessel being sold and the arbitration was under LMAA SCP and is the first case of which I am aware where an SCP arbitration has come to Court. Under SCP, the parties expressly agree to waive all rights of appeal, thereby making reasons redundant as far as questions of law were concerned. Tame applied under s.68 on two grounds: (i) the arbitrator had based his conclusion on an argument of which they had no notice and to which they were given no proper chance to respond; and (ii) in assessing damages the arbitrator had wrongly disregarded an important item of evidence. However, the only evidence to support these grounds was in the Arbitrator's reasons. Could the Court consider them ? There was pre-1996 Act authority on the point but this was of limited relevance given the significant change in the 1979 Act regarding the role of the Court in reviewing awards.

   Tame submitted that it was not possible as a matter of public policy for the parties and the arbitrator to prevent the Court from considering any material that may have a bearing on the outcome of an application before it, including any reasons published by the arbitrator on a confidential basis. Easy Navigation accepted that the Court could not be prevented from looking at the arbitrator's reasons, but submitted (i) that there was still a strong public interest in enabling arbitrators to publish confidential reasons which could not be deployed by a dissatisfied party in an attempt to challenge the award, save in exceptional cases and (ii) that unless there were grounds for thinking that the reasons would disclose fraud or some other very grave misconduct on the part of the arbitrator, the Court should refuse to allow them to be put in evidence

   The authorities established that if the parties had agreed that the reasons be separate on terms, express or implied, that the parties were not to refer to them in connection with any proceedings relating to the award, the parties were bound by contract to each other (and to the arbitrator) not to make use of them in that way. They also establish, however, that an agreement of that kind cannot preclude the Court from accepting the reasons in evidence if it considers it right to do so. Where the evidence of the alleged irregularity is entirely contained in confidential reasons, however, the Court is faced with the difficulty that it

cannot discover whether the allegation is well-founded without examining the reasons. A 1985 case suggested that the Court could look privately at the reasons to see whether they disclosed anything of that nature, but should disregard them entirely if they did not; that was an unsatisfactory approach. First, it was inappropriate for the Court to consider the reasons privately without hearing submissions from the parties – in practice that would amount to admitting them in evidence. Secondly, it was not possible in the light of the decision of the Court of Appeal in *The Montan* to limit the scope of the enquiry to evidence of fraud or criminality, suggesting that the Court can and should look at the arbitrator's reasons in any case in which they are alleged to disclose an irregularity of a kind that would cause serious injustice. Whenever an application is made under s.68 the Court is being asked to find that there has been an irregularity of a really serious nature that will cause substantial injustice if it does not intervene, in which circumstances the Court has no alternative but to examine the relevant evidence and, if that lies in the arbitrator's reasons it must look at them, whether or not they are confidential, unless there is evidence from other sources that makes it unnecessary to do so or it can see that the allegation is groundless or there is some other exceptional reason for refusing to do so. Failure to do so would risk allowing a substantial injustice to go unremedied which could not be justified by any general public interest in allowing arbitrators to publish their reasons in that form.

The Court was not bound by any agreement of the parties and since the only evidence of the manner in which the arbitrator had reached his decision was contained in his reasons then, if they cannot be adduced in evidence, the s.68 application failed. Moore-Bick J held that Tame should be permitted to rely on the reasons, notwithstanding its agreement to the contrary, thereby enabling the Court to look at them and the parties to make submissions in relation to them.

However, having considered the arbitrator's reasons, Moore-Bick J dismissed Tame's application since no serious irregularity was disclosed, principally because the parties had agreed that there was to be no right of appeal under s.69.

2. *Vrinera Marine Co Ltd v Eastern Rich Operations Inc (the "VAKIS T")* ([2004] EWHC 1752 Comm) was a s.69 appeal on two related questions of law arising from an Award as to (i) whether the costs of an arbitration brought by ERO against sub-charterers, Bao Steel, were caused by breach of the obligation of seaworthiness in the head charter and/or (ii) were too remote in law to be recoverable.

Vrinera, the Owner, commenced arbitral proceedings against ERO, Charterers, i.r.o. bottom damage to the vessel allegedly caused by breach of the safe port/berth obligation in the charterparty. ERO denied liability and asserted that the claim was frivolous, vexatious and an abuse of the arbitral process. It put Vrinera to proof of the seaworthiness of the vessel. ERO commenced an arbitration against sub-charterer Bao Steel alleging breach of the safe port/berth obligation in the sub-charterparty. Bao Steel defended that claim including making positive allegations of unseaworthiness and ERO adopted much of Bao Steel's defence by way of a counterclaim against Vrinera in the main arbitration. ERO claimed damages and an indemnity in respect of its own costs and Bao Steel's costs of the sub-arbitration. There was, however, no claim in the sub-arbitration by either ERO or Bao Steel for damages for breach of the obligation of seaworthiness, nor did ERO expressly allege such a breach in its counterclaim in the main arbitration

The two arbitrations were not consolidated but were the subject of concurrent hearings on liability issues. It became apparent on Vrinera's own evidence that its case was indeed spurious. The vessel had not docked at the allegedly unsafe berth but at a berth which, on the evidence, plainly was safe. It was also, as the Tribunal held, shown that the cause of the undoubted damage to the vessel was its own unseaworthy condition at the commencement of the charterparty. Vrinera then discontinued its claim against ERO, and, in consequence, ERO discontinued the claim against Bao Steel. ERO sought an order for payment against Vrinera of its own costs and the costs payable to Bao Steel in the sub-arbitration as damages for breach of contract by reason of unseaworthiness. The Tribunal gave permission to ERO to amend its counterclaim to plead a positive case of unseaworthiness and to allege that those costs were incurred in consequence. Vrinera contended that the costs were incurred as a consequence of ERO's own decision to make a claim against Bao Steel on a basis which ERO in fact believed (rightly) to be wholly without foundation.

ERO accepted that the Tribunal's decision had been bad in law because it had not applied the right legal test for either causation or remoteness. The issue before Langley J was whether or not the matter should be remitted to the Tribunal to address those questions on the correct legal basis, or, as Vrinera submitted, the answer was so obvious and so obviously in its favour that the Court should proceed to give it and so save the parties from incurring yet further costs in a futile remission.

The Award could not stand because the Tribunal appeared to have addressed the issue of causation only by reference to whether or ERO's pursuit of the claim against Bao Steel did "break the chain of causation" without addressing the question whether or not as a matter of common sense the breach of contract by Vrinera complained of (unseaworthiness) was the "effective or dominant" cause of the loss by way of the costs incurred and payable in the sub-arbitration. Further, the Tribunal had addressed the issue of remoteness solely by reference to foreseeability. It was agreed that this was inadequate but not agreed what the correct test should have been; however, the law does not require that the mechanism ***by which the damage arose*** should be contemplated by the parties, only that the damage itself should have been: Chitty on Contracts, 29th Edition, para 26-050.

To remit or not to remit – that was the question. S.69(7) was, properly, biased toward remission subject to exercise of judicial discretion. Vrinera argued that if the correct tests were applied the outcome was inevitable; if so, remission would be futile. Langley J agreed

3. In *Westland Helicopters v Sheikh Salah Al-Hejailan* ([2004] EWHC 1625 Comm) Colman J welcomed back two very public names, Westland having nearly brought down the Thatcher government in the late 1980s and Sheikh Al-Hejailan having defended the two UK nurses accused of murdering a colleague in Saudi Arabia. The case involved two unusual applications (i) a s.67 one to set aside in part or to vary §1 of an Award by the redoubtable John Tackaberry QC for want of jurisdiction (ii) in the alternative, a s.68 application to set aside or declare of no effect parts of that same Award.

The unusual character of these applications arises from their content and their background.

The Sheikh had acted for Westland in relation to a dispute arising out of a contract between it and an international treaty organisation called the Arab Organisation for Industrialisation (AOI) set up in 1975 between Saudi Arabia, United Arab Emirates, Qatar and Egypt to create an Arab arms manufacturing industry. Around 1979 AOI was put it into liquidation giving rise to considerable disputes between Egypt, which endeavoured to continue with AOI 100%, and the others. Westland had a substantial claim against AOI and sought compensation from it and its individual members, including Saudi Arabia and the AOI Liquidation Committee. In May 1980 Westland commenced an ICC arbitration against AOI and each of the four member states. There followed immensely complex proceedings in the Swiss courts relating largely to the jurisdiction of the arbitral tribunal; after nearly nine years and vast expenditure on legal costs Westland won on the jurisdiction issues and an interim award concluded that AOI was liable to Westland and that its member states, including Saudi Arabia, were jointly and severally liable. Finally, in 1993 the tribunal issued a final award in Westland's favour of damages of £365m + costs (£20m) + retention of £35m paid to it in advance. Westland recovered about £140 million by means of enforcement of that award against bank accounts in New York, Paris, Frankfurt and London. The Egyptians unsuccessfully challenged garnishee proceedings in England (Westland Helicopters Ltd v. Arab Organisation for Industrialisation [1994] 2 Lloyd's Rep 608) following which, in 1994 Westland reached a settlement with Egypt and the successor organisation which it controlled giving Westland £190 million including the £140 million which it had already recovered.

The Sheikh's March 1985 Engagement Letter with Westland had provided, inter alia, for a success fee of 10% up to £55m recovery and 15% on any excess thereover. In addition, if at the date of termination thereof no money or other compensation had been received by Westland from Saudi Arabia, the Sheikh undertook to reimburse certain fees and expenses. Westland served notice of termination on 8th June 1987.

Following the 1994 settlement agreement, the Sheikh claimed a success fee arising out of it; he subsequently claimed time & expenses for post-1987 work. Westland rejected the success fee but was prepared to pay reasonable T&E. This was unacceptable to the Sheikh.

The late Sir Michael Kerr was appointed sole arbitrator and issued an interim award ("the Kerr Award") in 1999; in the arbitration the Sheikh argued that although his contract had been formally terminated, this had been for cosmetic purposes and that there had been an implicit continuation of the success fee agreement up to the time of the settlement in 1994. However, he also advanced an alternative case based on quantum meruit but quantified at a reasonable sum calculated by reference to the size of the settlement, thereby reflecting the restitutionary basis of quantum meruit. Sir Michael dismissed the Sheikh's claims for a success fee; subsequently a new arbitrator, John Tackaberry QC, was appointed. The question of interest, and whether the Sheikh was claiming it, subsequently arose.

The arbitrator subsequently wrote to the parties indicating that he was minded to make an award on a retainer basis but he made no mention of interest in his methodology. Westland objected that he had no jurisdiction to investigate such a method of valuation his jurisdiction being confined to determining the only outstanding issue following the Kerr Award, namely the Sheikh's claim for legal fees based on normal hourly rates supported by a properly particularised invoice and appropriate contemporaneous evidence.

In his Second Award, the Arbitrator held that he did have jurisdiction to apply the general retainer method of valuation because the Kerr Award had not imposed any limit or rules on the way that the Sheikh might formulate his claim, save that a success fee or a quantum meruit based on outcome had been ruled out. He valued the quantum meruit claim as nine years at $50,000 plus interest of $455,760. Westland was willing to pay US $450,000 all-in.

Wetland was, however, out of time in seeking to challenge on jurisdiction. However, had the Kerr Award conclusively determined that the only correct method of valuation was the application of an appropriate rate to a proved number of chargeable hours? No.

Westland had also argued that the Sheikh's initial exclusion of any claim for interest and his subsequent failure to raise any such claim before Mr Tackaberry precluded him from claiming it at all. However, an arbitrator's jurisdiction is confined by the scope of the reference and he cannot make an award in relation to a claim which is not within that scope unless all parties agreed that the scope should be widened sufficiently to include it. On the opening day of the Kerr hearing, Counsel for the Sheikh had stated that he

made no claim for interest; the effect of this was to exclude from the reference any claim for interest unless the scope of the reference was subsequently widened. If any claimant having once abandoned one part of his claim subsequently sought to reinstate it, he could do so only by consent of the opposing party or, without such consent, by permission from the arbitrator. In the latter case, considerations of justice and fairness to the opposite party might well arise. The relevant question was therefore whether the Sheikh had, at any time before the Tackaberry Award, effectively reinstated his claim for interest on the capital sum awarded: he had written to the Arbitrator in 2001 stating that, in view of the fact that the fees attributable to the quantum meruit basis of claim had been outstanding since 1995 when he first demanded payment, the applicable hourly rate should either be increased by a factor to reflect that delay in payment or "an explicit award of interest" for 6 years should be made. This clearly referred to an alternative claim for a free-standing award of interest on the capital sum calculated from 1995 when the first demand for payment was said to have been made. Westland had not objected to (and had not replied to) that letter in terms suggesting that there was no longer any reference to a claim for interest. However, in its skeleton argument before Mr Tackaberry it stated that there was "no other separate claim for interest under English substantive or procedural law". There was therefore no doubt that at least in his 2001 letter the Sheikh had quite explicitly put forward a claim for a separate award of interest but there was nothing in his skeleton argument about that, nor had there been in his earlier statement of case.

Colman J held that the effect of all this was that the Sheikh had effectively advanced an independent claim for interest and no objection had been raised as to the arbitrator's jurisdiction to entertain it. However, since the claim as formulated in the 2001 letter and orally was limited to interest for the period from January 1995, the Arbitrator was certainly not empowered to award interest which related to any period before that.

Since the independent interest claim had been explicitly raised at the hearing and the necessary facts i.r.o. want of jurisdiction in respect thereof that issue were available to Westland at that hearing, its failure to object in the spot clearly precluded it from taking by the present application any point on jurisdiction which could have been raised then. Furthermore, the arbitrator had specifically invited procedural complaints and none had been made. Westland was therefore precluded by s.73(1) from raising this ground of objection to jurisdiction; however, they could still object to the Tackaberry Award to the extent that it calculated interest i.r.o. any period prior to January 1995.

Westland had also made ss.68(2)(a)(b) and (c) applications, arguing that there had been serious irregularity in that (a) before making his Award the Arbitrator had failed to allow submissions as to that claim even though it had at the outset been expressly abandoned and (b) he had awarded interest calculated by reference to the period from 1985 to 1994 in spite of the fact that interest had only been claimed from January 1995. Colman J held that Westland (a) had had sufficient opportunity to address the issue of interest; (b) could have, but had not, submitted that the arbitrator should not exercise his discretion under s.49 or should do so in some particular way, they could clearly have done so then or during the delay of over two years between hearing and Award. To describe what had happened here as a serious irregularity would be to return to the pre-1996 Act era of King v. Thomas McKenna Ltd [1991] 2 QB 480, an approach which s.68 was expressly designed to replace. However, inasmuch as the arbitrator had awarded interest for the pre-1995 period, if he had jurisdiction, there was serious irregularity, for none was claimed. Otherwise, if he had jurisdiction, his award of interest was clearly open to him. Since Colman J had already held that the award of interest for the pre-1995 period was made without jurisdiction and had been effectively challenged under s.67, the s.68 application gave rise to no additional relief.

Postscript regarding Costs of the High Court application

Westland's applications were only partially successful and, except as set out below, Colman J would have awarded Westland 30% of its costs of both applications, reflecting the fact that, although it had had to apply to court for orders the effect of which was to reduce the amount of the award by a considerable amount, they had failed on major issues which they had raised and to which the bulk of the time at the hearing had been devoted. Conversely, The Sheikh would be entitled to recovery of a part of his costs to reflect the fact that his challenge to the main grounds of the applications had been successful.

However, the hearing of these applications had been in unusual circumstances. The Sheikh's solicitor was a US national, US-qualified attorney who worked in the Sheikh's law firm in Saudi Arabia. He had been perfectly entitled to have acted as the Sheikh's solicitor through the two arbitrations including instructing Counsel who, in turn, had been perfectly entitled to have accepted those instructions and to have appeared in the arbitrations.

When it came to the applications before this court, neither the US lawyer nor the Sheikh's law firm were entitled to act as solicitor (s.20 Solicitors Act 1974) nor therefore was Counsel entitled to accept instructions to appear for the Sheikh (Code of Conduct of the Bar Part IV §401). Further, by s.25(1) of the 1974 Act no costs could be recoverable by the Sheikh in respect of work done by his lawyer or his firm because they were unqualified persons acting as if they were solicitors. Consequently, the Court had no jurisdiction to make any costs order in the Sheikh's favour nor could he recover Counsel's fees since such would ordinarily be included in a solicitor's disbursements but the effect of s.25(1) is to preclude recovery of all costs which would normally be included in a solicitor's bill of costs, including Counsel's fees.

This unfortunate state of affairs led inevitably to the consequence that there was nothing to set off against a costs order in Westland's favour. If the Sheikh's lawyers could not be entitled to a costs order, he could not be entitled to any reduction in Westland's costs which represented the setting-off of such costs as he would otherwise recover. In the event, therefore, Westland should recover 70% of its costs of both applications.

18th August 2004

On 10th August I circulated a query as to whether s.93 had ever been applied and whether Judges did in fact sit as Arbitrators. I had a splendid response and thanks are due to all those who made contributions. I summarise below the combined state of public domain knowledge.

General

1. See (inter alia) Merkin "Arbitration Law" (loose-leaf) §8.10ff, Merkin "Arbitration Act 1996" (annotated) commentary on s.93, DAC Report §341ff; Bernstein @ 2-232; Mustill & Boyd [1989] p.265ff and [2001] p.177, Russell 4-025ff.

1950 Act

2. See s.4 Administration of Justice Act 1970; s.11 Arbitration Act 1950.

3. Sir Christopher Staughton, while a sitting Judge, sat as Sole Arbitrator in "The Bamburi" and his Award dated 11th January 1982 was published at [1982] 1 Lloyds Reports 311. The case concerned a vessel which became trapped in the Shatt-al-Arab during the 1979 Iraq/Iran war: was it a constructive total loss for purposes of the applicable insurance policy ? Yes.

   Sir Christopher's masterly award is an elegant and comprehensive restatement of the law in this area dating back to at least 1756. Many other vessels were trapped in the same area at the same time so it is clear that such an authoritative award by a Judge sitting as arbitrator was entirely appropriate.

   There is an echo in Sir Christopher having been one of the arbitrators in "The Northern Pioneer" which concerned interpretation of a War Risks cancellation clause in a charterparty; the s69 appeal went to the CoA who redefined s.69(3) in relation to the Nema/Antaios Guidelines . Even that case was circular in Sir Christopher having been first instance Judge in "The Nema"

4. PCW Syndicates v PCW Reinsurers ([1996] 1 All ER 774 [1996] 1 Lloyds Rep 240) was an appeal under the 1950 Act against an award by the then Waller J, as sole arbitrator. Analogous to "The Bamburi", the key issue related to interpretation of s.19 Marine Insurance Act 1906 in a case where a Lloyds Managing Agent had been defrauding its syndicates; by agreement of the Parties, the preliminary issue of whether reinsurers could repudiate their contracts by reason of non-disclosure of the fraud (which was not a fraud on reinsurers) was referred to a Judge-Arbitrator on the basis of an assumed set of facts. The Award (unreported in its own right but quoted in the CoA judgment) was appealed and the appeal dismissed.

   The case is strongly analogous with "The Bamburi" in that a key point of law with widespread precedential effect outside the present dispute was referred to a Judge-Arbitrator.

   Curiously Sir Christopher Staughton presided over the Court of Appeal which heard the appeal ! Even more remarkably coincidental is that Gordon Pollock QC appeared for the respondents in each of "The Bamburi" and PCW. Further, our respected friend Saville LJ sat in PCW.

5. Russell on Arbitration cites (fn.59 on p.104) an unreported 1991 case Wilson v Keen in which an application that the Judge-Arbitrator sit in the dual capacity of both Judge and Arbitrator was rejected since the two functions could not be exercised simultaneously.

1996 Act

6. TCC judges actively seek appointments as arbitrator – see the TCC website which gives detailed procedures set out for such appointments and a scale of charges. It has been suggested that much greater use should be made of Judge-Arbitrators - they come at £1400 a day all in including the Court room.

7. Enquiry of the TCC produced little concrete information, in particular no information on the number of cases post 31/1/97.

8. However, HHJ Humphrey Lloyd QC has sat as Arbitrator in a number of references (as have other TCC Judges), in particular in a current major construction case where an award on a preliminary issue has been published but i.r.o. which an application for leave to appeal to the Court of Appeal has been lodged. Note that Sch. 2(1) effectively ups by one level the appeal processes in Part I of the Act.

9. In *Hussman v Al Ameen & Ors* ([2000] 2 Lloyds Rep 82) a dispute had arisen over a distributorship agreement in Saudi Arabia. This was referred to arbitration under the Rules of Conciliation, Arbitration and Expertise of the Euro-Arab Chamber of Commerce ("EACC"). The latter appointed HHJ Eugene Cottran as Chairman of the tribunal; he was a Circuit Court Judge who had had considerable expertise in Arab law. Permission was given by the Lord Chancellor to the appointment on terms that he conducted the arbitration in his own time and that any remuneration or fee charged was paid to HM Treasury (seems most unfair !). This was the first EACC arbitration which had proceeded to a full hearing which was the principal reason for the L/C granting permission. However, this was not a s.93 case, rather a 1-off ad hoc one.

10. Informal contact with the LMAA has indicated no recollection of any case in which it has appointed a sitting Judge inter alia since, by definition, such cannot be a LMAA Full Member.

Comment

11. I have had a recent arbitration where, as a component of a main issue, I was required to address a point of law upon which there was not only no authority but was one which Lord Hoffman in the House of Lords had expressly chosen not to address in deciding another matter. In contrast to the Bamburi and PCW cases, since the Hoffman-avoided point was not fundamental to my case, there was clearly nothing beyond the abilities of a "mere" arbitrator.

    In *Lobb v Aintree* the distinguished arbitrator was unfortunately sandwiched between two apparently irreconcilable House of Lords decisions, one postdating the arbitration proceedings and not being cited to him. In the ensuing s.69 appeal, there was no suggestion that either (a) the arbitrator had failed in any way (quite the opposite – warm compliments were paid in open court) or (b) that "mere" arbitrators should not be burdened in this way.

    So there it stands; if anyone wishes to add any further input or comment on Judge-Arbitrators I will happily circulate it

30th September 2004

Does an Expert Witness Enjoy Immunity from Suit ?

This was the primary issue in Karling v Purdue (Opinion of JG Reid QC dated 29th September, sitting as a Temporary Judge; available on the Scottish Court website).

K was convicted of murder in 1995 but the conviction was eventually quashed on appeal. P was engaged by K to provide an expert opinion for use in K's defence. In the present case, K was suing P for damages for breach of contract and fault and negligence. Was P immune from such suit being an expert engaged in such circumstances ?

In a lengthy Opinion, Mr Reid QC surveyed the authorities, both English and Scottish and extracted the following principles (§65) – NB I have omitted the numerous citations he very helpfully gives:

1. When a witness comes to court to give evidence he has the benefit of an absolute immunity in respect of the evidence which he gives in the witness box in a court of justice. He is immune from any civil action that may be brought against him on the ground that the things said or done by them in the ordinary course of the proceedings were said or done (i) falsely and maliciously without reasonable and probable cause, or (ii) negligently (the privilege does not extend to statements made by a person who, in relation to criminal proceedings is an informer or instigator of the inquiry process if that person acts with malice and without probable cause - malicious prosecution.
2. The underlying rationale of the immunity is that witnesses should speak freely, and the desirability of avoiding repeated litigation on the same issue*;* without the rule witnesses would be reluctant to assist the court; originally it was to protect a witness who had given evidence in good faith from being harassed and vexed by an action of defamation based on what he said in court.
3. The immunity would be worthless if confined to the actual giving of evidence in court. Accordingly, the immunity covers a statement of the evidence which the witness might give if called to give evidence. The immunity thus applies to a potential or prospective witness who may not, in the event, be called to give evidence; and where proceedings are merely in contemplation but have not yet commenced.
4. Moreover, immunity applies to the early stages of litigation where evidence is being collected with a view to court proceedings. In particular, the immunity applies to the compilation of expert and technical reports in the course of an investigation with a view to giving evidence. Whether evidence is provided with a view to court proceedings is a question of fact;
5. Negligent conduct, such as examination or removal of organs in a post mortem examination, for the purposes of making a report with a view to giving evidence will be protected on the ground that the conduct forms part of the preparation by a potential witness. This is because the conduct relates directly to what requires to be done to enable the witness to give evidence; and is part of the normal function of an expert witness or potential expert witness.

6. Absolute immunity exists where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated;
7. Where investigations have an immediate link with possible proceedings immunity applies.
8. When an expert is engaged in the context of an existing litigation or a prospective litigation, he may perform a dual role. The first is advisory and the second is in his capacity as expert witness with all the responsibilities to the court as which that entails. In one sense, all communications by an expert to his client constitute advice in one shape or form. He may advise him of his factual findings following on investigation; he may advise him of his conclusions based on those findings and/or other established or assumed facts. He may suggest a particular strategy or tactic. Part or all of this may be included in a report to be lodged as a production to which he may in due course speak. All of the foregoing may be intimately or closely connected with proceedings, actual, contemplated or possible. The difficulty of identifying whether the work of an expert or part of it falls within or outwith the protective circle of immunity is greater in the context of civil proceedings than criminal proceedings. The period between engagement and the giving of evidence or the settlement of the case may be several years. Initial engagement may occur where litigation is not in contemplation. In criminal proceedings a defence expert is unlikely (although it is possible) to be engaged before criminal proceedings are "on-going".
9. As with advocates prior to *Hall*, the acts of an expert which are "intimately connected" with the conduct of the litigation and those which are not is a distinction which is very difficult to apply with any degree of consistency and may not truly represent the touchstone of immunity.

While Karling's was a criminal case, the authorities cited include civil ones (including *Ikarian Reefer*) and Mr Reid QC's Principles clearly apply (at least in part) in civil litigation and may apply in arbitration.

Counsel for P invited the Judge to sustain P's second plea-in-law "The defender being immune from suit, the action should be dismissed" and he duly did so.

My grateful thanks are due to Colin McClory for drawing my attention to this most interesting case.

5th October 2004

Disclosure of Expert Reports in English Litigation

CPR 35.13 provides that "A party who fails to disclose an expert's report may not use the report at the trial or call the expert to give evidence orally unless the court gives permission"; however, if an expert makes an early report to his client before he makes the report which is later disclosed in the litigation as being the evidence he intends to give at trial, does the law require that earlier report to be disclosed or is it privileged ?

In *Jackson v Marley Davenport Ltd* ([2004] EWCA Civ 1225), the Court of Appeal held that it was privileged.

J had sustained serious injuries as a result of an industrial accident; MD was his employer. An order was made that each party be permitted to appoint, inter alia, one pathology expert to give written evidence with a provision for exchange of expert reports. J's Solicitors then instructed an expert and asked him to answer certain questions and to prepare a report for the purpose of a conference with lawyers. Thereafter he provided a further report which was served on MD and in which he referred to (i) two letters of instruction and (ii) other specified documents which had been forwarded to him for the purposes of writing his report.

On application, the District Judge ordered disclosure of the first report pursuant to CPR 35.13. On appeal, a High Court Judge held (i) that the court had no power under CPR to order the disclosure of an earlier draft report of an expert (ii) that CPR 35.13 did not mean that every report produced by an expert had to be disclosed and therefore did not override the law of privilege which would otherwise subsist in an earlier report.

The Court of Appeal agreed.

14th October 2004

Unilateral Arbitration Agreements + s.9 AA96

NB Three Shipping Ltd v Harebell Shipping Ltd
[2004] EWHC 2001 Comm (Morison J; 13th October 2004)

It is well established in English law that arbitration agreements can be unilateral (but certain other jurisdictions take an opposite position, requiring symmetry). A common example is in the commercial property sector where in some leases only the lessee may refer a rent review dispute to arbitration; the reason here is that in such leases the lessor proposes the new rental at each rent review date so has no need to refer any dispute to arbitration.
An interesting and novel set of circumstances arose in the NB3 case, relating to a charterparty on a BareCon89 Form in which, inter alia, included:

47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty ***but the Owner shall have the option*** of bringing any dispute hereunder to arbitration. …."

47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement ***which the Owner determines to resolve by arbitration*** shall be referred to arbitration in London

Part of the argument was over the semantics of "bringing", "determines" etc but that is not the key issue.

As regards unilateral arbitration agreements, Russell on Arbitration (p.46-47) was cited and is particularly helpful.

The principal issue was whether proceedings brought by Charterers (i.e. not in breach of an obligation to arbitrate prior to exercise of Owners' option) should be stayed pursuant to s.9 AA6; it was submitted, inter alia, that there had been no reported case where s.9 had been applied against the "wrong" half of a unilateral arbitration agreement such as this one.

Morison J noted that Clause 47 was designed to give 'better' rights to Owners than to Charterers: e.g. (i) although Charterers were limited to action in the English Court, Owners had the right to bring proceedings in any court having jurisdiction pursuant to the Brussels Convention with Charterers waiving any objection on grounds of forum non conveniens; (ii) Charterers were required to provide a place for service within England whereas Owners were not; (iii) Charterers were constrained not to challenge enforcement of any judgment "which is given or would be enforced by an English Court" whereas Owners were not etc.

Morison J further noted that Owners' option in 47.02 was not open-ended, e.g. it would cease to be available if Owners took a step in the action or they otherwise led Charterers to believe on reasonable grounds that the option to stay would not be exercised.

Morison J accepted Owners' submission that Clause 47 had two streams running through it: the litigation stream and the arbitration stream. The arbitration stream [Clause 47.10] satisfied the requirements of an arbitration agreement since a one-sided choice of arbitration is sufficient. Were the present disputes to be referred to arbitration ? Yes, once Owners' option to arbitrate had been exercised. Neither the fact that the proceedings had been properly (i.e. not in breach of an obligation to arbitrate) brought by Charterers nor that s.9(1) only applied after Owners' option had been exercised affected this conclusion. Once Owners had exercised their option the arbitration agreement provided that disputes should be arbitrated; refusal of a stay would be to deny party autonomy.

A secondary issue arose concerning an application by Charterers for certain disclosures by Owners – Morison J held that that was properly for the Tribunal to deal with.

28th October 2004

Bias In Adjudication

An interesting adjudication case, where the judgment has been published today, has been decided by the Court of Appeal in AMEC v Whitefriars concerning alleged bias. Interestingly the TCC decision (HHJ Toulmin QC) has been reversed unanimously.

There were three main features:

(i) the same issues had previously been adjudicated by the same adjudicator but that first decision declared a nullity by the Court (HHJ Humphrey Lloyd QC) for reason of the appointment being defective; the fact that the same adjudicator saw the case a second time did not in isolation lead to bias;

(ii) the Adjudicator had had a unilateral telecon with the Solicitor to one of the Parties; on the facts, this did not lead to bias; [NOTE: this remains very dangerous territory];

(iii) the Adjudicator had taken legal advice on an issue and had duly communicated the outcome to the Parties but he had not advised them in advance of his intention to do so; this was acceptable.

The case is at [2004] EWCA Civ 1418

31st October 2004

When is A Dispute a "Dispute" ?

This is an old question, extensively covered in the [English] authorities, most notably in *Halki Shipping v Sopex Oils*; there are separate and overlapping lines of authority, one for arbitration and one for adjudication.

The question resurfaced in *AMEC Civil Engineering Ltd v the Secretary of State for Transport (represented by the Highways Agency*) ([2004] EWHC 2339 TCC), an arbitration case (despite extensive reference in the judgment to adjudication), and Jackson J reviews the authorities at §42-68 of his judgment. At §68 he draws seven propositions therefrom:

"1. The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

There are a number of other matters of great interest in this case.

3rd November 2004

An Adjudication Case

As we are all too well aware, the 28-day adjudication process can be put under great pressure by vast volumes of paper; in a recent (judgment given on 29th October 2004) TCC case arising out of two successive adjudications on broadly similar facts (*Emcor Drake & Scull Ltd v. Costain Construction Limited & Skanska Central Europe AB t/a Costain Skanska Joint Venture* ([2004] EWHC 2439 TCC) HHJ Havery QC had this to say:

20. "Finally, [CSJV] submitted that EDS had included within its notice of referral in the second adjudication facts, matters and documentation (comprising in excess of 4,000 pages of a total of approximately 5,000 pages) relating to, and considered by Mr. M in, the first adjudication. It was unfair and an abuse of the adjudication process to require CSJV to respond to those facts and matters in the second adjudication. Mr. H's decision [i.e. in the 2nd adjudication], if otherwise enforceable, ought not to be enforced for that reason.

21. The necessity to respond quickly to vast quantities of paperwork is one of the well-known hazards of the adjudication process. That cannot of itself be a ground for contending that there has been an abuse of process. In my judgment, the fact that the same documentation appears in two successive adjudications is a wholly insufficient ground for describing what happened as an abuse of process."

So there you have it !

The case is of additional interest i.r.o. the interface between the two adjudications, both being EoT claims made at separate dates.

Finally and intriguingly, it appears from their names that the two adjudicators were, by complete coincidence, in fact partners in the same firm of Solicitors although that connection had no relevance to the present case at all.

CSJV's challenge to the jurisdiction of the 2nd adjudicator was blown out by an unusually terse HHJ Havery QC e.g. at §9 "The basis of Miss X's submission [for CSJV] on this point was that [it] was empowered under clause 11.7 to grant only one extension of time. It followed that there could be only one adjudication on the point. She put her argument more attractively, but that is the essence of it. In my judgment, the argument involves a non sequitur and I reject it." Ouch !

18th November 2004

Esso in the Court of Appeal

Per Tuckey LJ

"This is an appeal from a judgment of Moore-Bick J. [2003] EWHC 1730 (Comm.) given in group litigation between Esso, the well-known oil major, and about 100 of its retail licensees who had carried on business from Esso owned service stations in Great Britain during the 1990s. The judgment dealt with issues of construction of Esso's standard forms of agreement which gave Esso the right to adjust the amounts payable/receivable (margins, fees

and allowances) by its licensees. The judge held that Esso was entitled to adjust these amounts at its discretion *except for adjustments made arbitrarily, capriciously, dishonestly or irrationally*, and that the adjustments in issue in the litigation had not been made in breach of the agreements in these respects. He also held that Esso was not entitled to make adjustments which would make it commercially impossible for the licensee to operate the service station; whether Esso was in breach of this term could only be decided on a case by case basis."

The appeal was dismissed.

I submit that the principles established are of wide general application

20th November 2004

1. The DTI has circulated a consultation document concerning UNCITRAL's proposed amendment to Art.17 (interim measures) of the Model Law which, although never used, remains in force in Scotland. However, the amendment, even if ratified by UNCITRAL, does not oblige Scotland to change its law and has no direct effect in Scotland. s.44 of the English Act (and s.33 of our new Bill) already provides wide powers of the Court in support of arbitration. The primary purpose of the amendment is to bring other countries, lacking such statutory support, up-to-speed. There is one difference in that the amendment proposes that Arbitrators have Ex Parte powers; this is being vigorously resisted by the UK delegation to UNCITRAL and by almost all leading UL arbitrators – inter alia, for an arbitrator to hear an Ex Parte application runs directly contrary to the fundamental principle of arbitration (Model Law Art.18, English s.33 and the Bill's s.15(1)) that each party be treated equally and have a full/reasonable opportunity to put its case. [167 words]

2. Not an arbitration issue but …….

   MT Højgaard A/S v Forth Estuary Transport Authority (Court of Session; Lord Eassie; 3rd November 2004) arose out of construction works on the Forth Road Bridge; disputes arose and were referred to arbitration but the parties settled. The Solicitors for FETA refused to release the agreed settlement monies except under deduction of tax, Hs tax certificate having expired. Payment of £1.5 m + VAT was duly made 6 months later, immediately upon H's securing renewal of its tax certificate. H sued for interest at the judicial rate. FETA contended, citing §7F(1) of the 1993 Regulations, following s.559 ICTA 1970, that it had not been liable to pay the £1.5m until it had had sight of H's tax certificate. Lord Eassie agreed. An easy one !

27th November 2004

To the Limits of Adjudication …….. and Beyond ?

As we all well aware, adjudication in England and Scotland (under UK-wide legislation but slightly different Adjudication Schemes) was envisaged as a quick, 28-day fix primarily to keep the cash flowing in the construction industry e.g. per Lord Ackner in HoL debate "Adjudication is a highly satisfactory process. It comes under the rubric of 'pay now argue later' which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up completion of important contracts."

Given that an adjudicator's Decision is binding unless and until superseded by arbitration, litigation or by agreement, one might have expected a reasonably high rate of disputes being taken on. There is no doubt that it has been successful and anecdotal evidence quotes figures of 85% or higher (compare the number of TCC cases to the number of appointments and you are in the 95%+ range) for the number of adjudicated disputes which stop at the Decision. 'Quick fix' or 'rough & ready' maybe, but effective in resolving disputes.

There are areas where the adjudication process comes under enormous pressure, in particular Final Account disputes referred to adjudication (accompanied by the proverbial van-load of lever arch files of documents) after the completion of a contract and (ii) professional negligence.

There have been two important judicial pronouncements on whether or not professional negligence can be adjudicated, (i) *Gillies Ramsay Diamond* (Inner House, Court of Session) and (ii) *London Amsterdam Properties v Waterman Partnership (TCC)* [both addressed above]. In both cases the answer was "yes" albeit with some judicial reluctance e.g. in *Gillies* where the Court was uncomfortable with having one QS decide on another's negligence (and possibly also his reputation and career) in only 28 days.

The purpose of this short note is to draw your attention to a recent case in the TCC, *CIB Properties v Birse Construction* ([2004] EWHC2365 (TCC); 23rd November 2004) which examined the outer reaches of the adjudicator's galaxy and looked out into deep space. I will leave interested parties to read the whole of a lengthy (202 paragraph) judgment but let me pick out a few of the many highlights:

(1) this was a huge dispute over two adjudications involving £millions, substantial claims management manpower, hundreds of lever arch files etc etc; CIB's combined costs were stated to be £974,000 and Birse's £1,161,000 and the Adjudicator's costs in the second adjudication alone exceeded £150,000;

(2) Birse sought to prevent enforcement inter alia on the grounds that the dispute was too complex for adjudication; HHJ Toulmin QC stated that this point had not previously expressly been decided before; for his conclusion see §199 below

(3) both sides played a tactical game throughout, including accusations of ambush, described in great detail by HHJ Toulmin QC – this makes interesting reading !

(4) the Adjudicator allegedly made a slip but there is no equivalent in adjudication of the Arbitrator's s.57; see §200 below

(5) the Judge considered the conduct of the Adjudicator, and by implication the extent to which one single individual could cope with the massive size and complexity of the case in a limited timeframe, in detail – see §193 below;

(6) The Judge concluded by ordering enforcement of the Adjudicator's decision that Birse should pay CIB some £2 million.

I would not be surprised to see this go to appeal but I see little prospect of success.

Extracts from the Judgment of HHJ Toulmin CMG QC (emphasis added)

193. I have considered the conduct of the Adjudicator, John Uff CBE QC. *At all stages he was careful to consider how he could conduct the adjudication fairly and he succeeded in doing so*. He was mindful of his duty to ensure that both parties had a fair opportunity to put their case. I accept without reservation his assurances in his decision that if he had not felt able to reach a decision fair to the parties he would not have done so. It is acknowledged that adjudication is not a final proceeding and that within the limits of an adjudication proceeding *the Adjudicator fully discharged the duty not only to act fairly but to reach a fair determination on the evidence*. In relation to the experts' issues, the Adjudicator gave the parties a fair opportunity to deploy their cases before him. *The Adjudicator felt he was able to deal with the experts' issues on the basis of the evidence he received. I see no reason to doubt his judgment.*

199. *I have already considered the question of whether there are some disputes, including this one, which are so complex that they are not suitable for adjudication. I conclude that this issue is governed by the Act. There is a general right under section 108(1) for a party to a construction contract to refer a dispute or difference to adjudication*. There is a duty on the Adjudicator to reach a decision provided that the conditions in section 108(2) are met. This means that the Adjudicator must be able to discharge his duty to reach a decision impartially and fairly within the time limit stipulated in section 108(2)(c) and (d). A defendant is not bound to agree to extend time beyond the time limits laid down in the Act even if such a refusal renders the task of the Adjudicator to be impossible.

200. I am doubtful how far I should investigate the alleged slip. In *Bloor* I reached the very limited conclusion that in certain circumstances an Adjudicator may, on his own initiative or at the request of a party, correct an accidental error or omission. In this case Birse asks me to extend the principle to circumstances where the Adjudicator declines to take any such step. I do not understand the Adjudicator's letter dated 19th March 2004, properly read, to constitute an invitation to the court to reach a conclusion in relation to the alleged slip and to indicate whether or not the Adjudicator should correct it. Even if he has gone this far I should have to consider the Adjudicator's invitation in the context of the decision of Dyson J in *Bouygues v Dahl-Jensen* upheld by the Court of Appeal. The conclusion in that case was that if the Adjudicator was answering the right question, the decision ought not to be reviewed. *It seems to me that Parliament intended the procedure to be an interim procedure which, if carried out fairly and in a manner which is procedurally correct, is not subject to review by the court. I conclude that even if the Adjudicator had invited the court to carry out a review the court should decline to do so*. However, I do not understand the Adjudicator's letter to be making such a request but rather to be saying politely that if the court concludes that he has made a slip and orders him to correct it, of course, he will do so.

6th January 2005

1. Court challenges to arbitrators' fees under s. 28 AA96 are rare so it is all the more surprising that a recent case reached the Court of Appeal; the issue before the Court was one of whether or not the challenge had been out of time; HELD: the first instance Judge had been within his discretion in allowing the challenge to proceed. What makes the case interesting is the implied criticism of the Arbitrator, a partner in a firm of accountants (i) he accounted for time in 15 rather than 6-minute units; (ii) in addition to his own time, he charged substantial sums for secretarial assistance (this head of expense has already been rejected twice in the English courts); (iii) he took 20 hours (+4 hours secretarial) to prepare a 2-page costs award; (iv) he spent apparently excessive time e.g. 10 hours to read a skeleton argument; also he charged time for reading the trial bundles in their entirety. While I have little sympathy with the arbitrator regarding (ii), (iii) and, particularly, (iv), not least since I account in 15-minute units (as a sole practitioner, I do not possess the sophisticated time-tracking systems in use in large firms), the criticism in (i) appears unreasonable. [204 words]

6th January 2005

The Award of Costs

Grosvenor v High-Point Rendel ([2004] EWHC 3057 (TCC)) is a helpful case on costs under CPR which may give arbitrators some useful guidance on a number of issues.

G's claims for commission i.r.o. a number of clients were substantially defeated and he was awarded £1,644.38 (inclusive of VAT and interest), approx. 2% of the sums claimed but he argued that that meant he had still "won"; understandably HPR argued that 2% was not 'winning'. Wholly unsurprisingly, the Judge took the latter view.

Further, on 14th January 2004 HPR had made an offer of £25,000 inclusive of G's costs and VAT in circumstances where HPR had been told that those costs were £15,000 (not stated in the judgment, but implied as inclusive of VAT). G contended that this offer was inadmissible not being in the form £X + costs. The Judge rejected this contention.

The Judge followed Lord Woolf MR in *Phonographic Performance Ltd v AIE Rediffusion Music Ltd* [1999] 1 WLR 1507 at page 1522H:

> "The most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice, which has already started. It is now clear that a too-robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

Since G would have netted substantially more from accepting that offer than he ultimately did; the Judge awarded costs as follows

Prior to 14 January 2004

(a) G to recover 25% of his costs from HPR to reflect costs incurred in relation to those parts of his claim on which he was ultimately successful (i.e. the 2%) and the bringing of the claim generally;

(b) HPR to recover 75% of its costs from G to reflect success on the vast bulk of the issues;

After 14 January 2004

(a) G to bear his own costs;

(b) HPR to recover 75% of its costs from G, to reflect the reasonableness of the sum offered on 14 January 2004 and its success on the great majority of the individual issues; the discount of 25% reflected the absence of a Part 36 payment or offer and HPR's failure to admit timeously the small sums due in respect of the work done by G i.r.o. which he won commission.

The only aspect of all this which I find surprising is G's winning 25% of his costs when he 'won' 2% of his claim, i.e. notionally attributing 23% to the fact that he won anything at all; suppose he had won 1% or 0.1% … or £1 ?

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #11
30th JUNE 2005

INTRODUCTION

The following is a compilation of my occasional series of briefing notes based in (mainly) English and Scottish cases and covering arbitration, adjudication, mediation and other ADR. For purposes of this Hewsletter, I have made a few minor corrections but otherwise left the text as was.

It should be borne in mind that these notes are digests of the cases with light commentary, often produced on the same day as the text of the judgment becomes available; other publications should be read for profound scholarly analysis and comment - my focus is to get the news onto computer screens ASAP. Inter alia, since the notes are e-mailed in plain form, I do not use footnotes.

6th January 2005

The AWARD of COSTS

Grosvenor v High-Point Rendel ([2004] EWHC 3057 (TCC)) is a helpful case on costs under CPR which may give arbitrators some useful guidance on a number of issues.

G's claims for commission i.r.o. a number of clients were substantially defeated and he was awarded £1,644.38 (inclusive of VAT and interest), approx. 2% of the sums claimed but he argued that that meant he had still "won"; understandably HPR argued that 2% was not 'winning'. Wholly unsurprisingly, the Judge took the latter view.

Further, on 14th January 2004 HPR had made an offer of £25,000 inclusive of G's costs and VAT in circumstances where HPR had been told that those costs were £15,000 (not stated in the judgment, but implied as inclusive of VAT). G contended that this offer was inadmissible not being in the form £X + costs. The Judge rejected this contention.

The Judge followed Lord Woolf MR in *Phonographic Performance Ltd v AIE Rediffusion Music Ltd* [1999] 1 WLR 1507 at page 1522H:

> "The most significant change of emphasis of [CPR] is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this [CPR is] reflecting a change of practice, which has already started. It is now clear that a too-robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

Since G would have netted substantially more from accepting that offer than he ultimately did; the Judge awarded costs as follows

Prior to 14 January 2004

(a) G to recover 25% of his costs from HPR to reflect costs incurred in relation to those parts of his claim on which he was ultimately successful (i.e. the 2%) and the bringing of the claim generally;

(b) HPR to recover 75% of its costs from G to reflect success on the vast bulk of the issues;

After 14 January 2004

(a) G to bear his own costs;

(b) HPR to recover 75% of its costs from G, to reflect the reasonableness of the sum offered on 14 January 2004 and its success on the great majority of the individual issues; the discount of 25% reflected the absence of a Part 36 payment or offer and HPR's failure to admit timeously the small sums due in respect of the work done by G i.r.o. which he won commission.

The only aspect of all this which I find surprising is G's winning 25% of his costs when he 'won' 2% of his claim, i.e. notionally attributing 23% to the fact that he won anything at all; suppose he had won 1% or 0.1% … or £1 ?

14th January 2005

ARBITRATOR FEES & TIMESHEETS

Several have requested sight of my short note on a CoA case involving, inter alia, Arbitrator Timesheets - *United Tyre v Born* [2004] EWCA Civ 1236

Court challenges to arbitrators' fees under s.28 AA96 are rare so it is all the more surprising that a recent case reached the Court of Appeal; the issue before the Court was one of whether or not the challenge had been out of time; HELD: the first instance Judge had been within his discretion in allowing the challenge to proceed. What makes the case interesting is the implied criticism of the Arbitrator (who was unrepresented and did not appear), a partner in a firm of accountants (i) he accounted for time in 15 rather than 6-minute units; (ii) in addition to his own time, he charged

substantial sums for secretarial assistance (this head of expense has already been rejected twice in the English courts); (iii) he took 20 hours (+4 hours secretarial) to prepare a 2-page costs award; (iv) he spent apparently excessive time e.g. 10 hours to read a skeleton argument; also he charged time for reading the trial bundles in their entirety. While I have little sympathy with the arbitrator regarding (ii), (iii) and, particularly, (iv), not least since I account in 15-minute units (as a sole practitioner, I do not possess the sophisticated time-tracking systems in use in large firms), the criticism in (i) appears unreasonable.

7th February 2005

CAPACITY to ENTER into an ARBITRATION AGREEMENT

This was the key issue in *Continental Enterprises Limited v Shandong Zhucheng Foreign Trade Group Co* ([2005] EWHC 92 (Comm); 2nd February 2005); was the contract and the arbitration agreement void for GroupCo's lack of capacity ?

CEL, a Bermudan trading company with an office in Hong Kong, s.67-challenged a GAFTA Appeal Award on jurisdiction which had concluded that (i) GroupCo, an agri-business from Shandong Province, PRC, was not bound by a contract for the purchase of soybean meal from CEL and (ii) the Board had no jurisdiction to consider CEL's claim against GroupCo.

CEL had agreed to sell 300,000T soybean meal to a buyer identified in the contract as GroupCo; the latter contended that the contract was void because (i) by reason of the limited scope of business permitted by its articles of association and/or by reason of the absence of the necessary Ministry import licence, GroupCo did not have the legal capacity to enter into the contract and/or (ii) that, by reason of GroupCo's not having the necessary Ministry Licence, the contract was void for illegality. GroupCo had an affiliate Shandong Zhucheng Foreign Trade Co (FTC) which did possess the relevant licence.

Under the contract the buyer had to open an L/C but on GroupCo's applying therefor, the Bank refused absent the Licence. GroupCo then tried to get the contract amended to make FTC the buyer (the detailed argument over the effectiveness of any such purported amendment is outwith the scope of this note). Subsequently the price of soybean meal fell and the buyer defaulted; in a separate arbitration, CEL secured an Award against FTC in the sum of $9.5m and sought to enforce it in the Shandong People's Court and proceedings there continue (!)

GroupCo unquestionably did not possess a Licence so contended that it had not had the 'legal capacity' to enter into the contract which was therefore void; CEL responded that the absence of a Licence did not create any want of legal capacity, albeit it might raise issues of legal validity.

At common law, the capacity of a corporation to enter into a legal transaction such as a contract is governed primarily by the constitution of the corporation which in turn is governed by the law of the place of incorporation: (Dicey & Morris, Conflict of Laws, 13th Edition, Rule 154). Art.11 of the PRC Company Law states "Companies shall engage in business activities within their registered scope of business…". In contrast to FTC's Articles which made express reference to import/export activities, GroupCo's Articles made no such reference. Further, FTC's Articles made express reference to Ministry approval while GroupCo's did not. GroupCo would need to change its Articles if it wanted to apply for a Licence and, pending such and absent Ministry approval, it would not have been entitled to engage in foreign trade. Consequently, the Judge held that a Chinese court would hold that GroupCo had had no capacity to enter into the contract and accordingly that contract was void.

Does this want of capacity vitiate the arbitration clause as well ? Yes; although Art. 19 PRC Arbitration Law provides for severability and that the arbitration agreement is not affected by the invalidity of the contract in which it is contained, Art.17 provides that "An arbitration agreement shall be null and void under one of the following circumstances … (2) one party that concluded the arbitration agreement has no capacity for suitable conduct or has limited capacity for civil conduct …." . The Judge concluded that a Chinese court would thus conclude that a Chinese party without a Licence would not be entitled to enter into a GAFTA arbitration agreement.

CEL's challenge to the Appeal Award was consequently dismissed.

Although it was not necessary to decide the illegality issue, the Judge referred to Art.16 Rome Convention which states "The application of the rule of law of any country specified by this convention may be refused only if such application is manifestly incompatible with the [English] public policy ….". He considered that an import agreement by GroupCo was not 'manifestly' contrary to English public policy, its default arising in regard to non-compliance with the PRC's import licence system, not in its breach of some form of absolute prohibition.

Comment

The key issue for the present (there are others in the judgment) is the examination of GroupCo's capacity to enter into a GAFTA arbitration agreement; this is a matter for PRC law notwithstanding the law of the GAFTA contract or the law of the arbitration agreement contained within it.

11th February 2005

The ROLE of a JURY

Criminal law is not my field but I retain an interest in the process, inter alia because of the predilection of newspapers to build up criminal trials as circulation boosters.

R v Wang ([2005] UKHL 9) concerns the trial Judge's giving directions to the Jury and the HL judgment includes an important statement of general principle which I found most helpful:

> 8. Although a considerable volume of historical material was placed before the House on the hearing of this appeal, Mr David Perry, for the Crown, invited us to focus our attention on the criminal jury in its modern setting. This is an invitation we accept. The conduct of criminal trials has been profoundly changed by according the defendant the right to testify, by establishing a criminal appellate court and by extending access to free legal representation. Little help is therefore gained from pre-twentieth century authority. But over the last century or so the conduct of a trial on indictment has been much as it is today. Thus the trial is by judge and jury working together, although, as judges routinely explain, their functions are different. The judge directs, or instructs, the jury on the law relevant to the counts in the indictment, and makes clear that the jury must accept and follow his legal rulings. But he also directs the jury that the decision of all factual questions, including the application of the law as expounded to the facts as they find them to be, is a matter for them alone. And he makes plain that, whatever views he may express or be thought to express, it is for them and not for him to decide whether, on each count in the indictment, the defendant is guilty or not guilty. It is, as Sir Patrick Devlin pointed out in his celebrated Hamlyn Lectures on *Trial by Jury* (1956), Appendix II, p 194, a very unusual relationship:
>
> > "There is a fundamental difference between juries and other fact-finding bodies. The function of all other fact-finding bodies is to find the facts so that the judge can apply the law to them. This form of process enables the judge to reject as a matter of law a finding of fact that he considers to be unreasonable. If, for example, the primary facts proved permit as the only reasonable inference a judgment that the accused is driving a motor-car dangerously, the High Court would direct a bench of magistrates to convict. So where statute creates one jurisdiction for finding the facts and another for the law, as under the Income Tax Acts, the court will set aside a finding apparently based on a view of the facts that could not reasonably be entertained; it will proceed on the assumption that the error was due to a misconception of the law.
>
> In trial by jury the process is the other way about. The jury does not tell the judge the facts so that he can apply the law to them; the judge tells the jury the law so that they can apply it to the facts. The responsibility for its correct application is laid upon the jury and not upon the judge. If a judge wants to apply the law himself, the only way he can do it is by asking for a special verdict."

The full judgment (quite short, in contrast to some recent mega-judgments) is on www.bailii.org/uk/cases/ukhl

---

15th February 2005

The ARBITRATOR GETS IT RIGHT – AGAIN !

The strong recent trend of judicial support for arbitrator conclusions on matters of law was reinforced in *Golden Straight Corporation v Nippon Yusen Kubishika Kaisha* (the Golden Victory) [2005 EWHC 161 Comm; Langley J; 15th February 2005] where in a s.69 appeal, following a meticulous survey of authority concerning quantification of damages following termination of a charterparty, Langley J concluded that the sole arbitrator, the distinguished LMAA Arbitrator, Robert Gaisford, "was right in his conclusion"; appeal dismissed

I say "AGAIN" in my header because the same parties, vessel, facts and arbitrator had been "up before the beak" once before ([2003] EWHC 18 (Comm); 17th January 2003) where Morison J had stated, inter alia: "[a]t the outset I would like to pay tribute to the care with which the Award has been prepared. If I might say so, the Award is a model of its kind, well-reasoned and, in my view, obviously right." The earlier case ("GV1"), principally an interpretation of the termination provisions of the C/P, was covered in my Newsletter #9 which is available on my website.

The issue in "GV2" was of the assessment of damages for repudiation of a long-term C/P. GSC submitted that, where there is an available market, damages are to be assessed once and for all at the date of breach at the charter rate less the market rate for the balance of the term of the charter. NYKK submitted that it was for GSC to prove that the breach had caused that loss and it could not do so if, in the events which occurred after the date of breach, the charterer would have been entitled to, and would have, terminated the charter during the course of its remaining period. E.g., if the C/P had had, say, another 4 years to run when the charterer repudiated it and there had then been an available market, but the charter had contained a "War Clause" which would have entitled the charterer to cancel on the outbreak of war 2 years after the repudiation, does the owner's claim for charter rate less market rate run for 2 or 4 years ?

The Arbitrator found that: (i) there had been, at the time of repudiation (17/12/01), an available market for the chartering in of vessels such as The Golden Victory whether in terms of a spot market or a market for period chartering; (ii) GSC in fact chose to trade the vessel on the spot market; (iii) the second Gulf war was "a war" within cl.33 of the C/P such as to give either party the right to cancel it; (iv) at 17/12/01, a reasonably well-informed person would have considered war between the United States/United Kingdom and Iraq "merely a possibility" but not "inevitable or even probable"; (v) NYKK would have cancelled the Charterparty relying on cl.33 had the vessel remained on charter to the Company at the outbreak of the second Gulf war.

Langley J considered the leading authorities carefully and concluded “In my judgment the Arbitrator was right in his conclusion despite his reluctance to reach it. Essentially and in summary I think: (i) [that] conclusion accords with the basic compensatory rule for the assessment of damages in that had the [C/P] not been repudiated but been performed it would have come to an end upon the outbreak of the second Gulf War; (ii) I can see no sound reason why the ordinary principles requiring a claimant to prove his loss and that it was caused by the impugned conduct of the defendant should not apply in this case nor why the "normal" approach to assessment of loss derived from the normal approach to mitigation should dictate another result; (iii) I also see no sound reason why there should be an "exception" to the rule for which [GSC] contends limited only to a case where at the time of repudiation the loss is predestined to end at a date earlier than the expiry of the charter period; (iv) The desirability of certainty and crystallisation is accepted but, I think, no more obviously achievable with than without [GCS's] rule and its supposed exception. The fact is that the [C/P] itself contained the uncertainty of the War Clause. That was what GSC lost. If [it] were right [it] would recover more than the [C/P] was worth to it and do so without in fact incurring any greater loss.”

Concluding, GSC has s.69-appealed Mr Gaisford twice and lost twice ……

18th February 2005

Questions of the Limits of Jurisdiction

In *Metal Distributors (UK) Limited v ZCCM Investment Holdings plc* [(2005] EWHC 156 (QB)), Cresswell J considered important issues relating to jurisdiction and ss.30 and 67 of the Arbitration Act 1996. I am indebted to Stewart Shackleton of Eversheds for sending me a copy of the judgement which had not otherwise appeared on my radar (see also below).

In the late 1990s, MDL, a London-based metals trader, had bought various consignments of copper and cobalt under six Sales Contracts with ZCCM, then a Zambian state-owned mining company, subsequently privatised (2000); disputes arose under those contracts and a Compromise Agreement was executed in May 2000 by which MDL agreed to pay approx $3m to ZCCM. The arbitration between the parties, under LME Rules, was pursuant to arbitration agreements contained in the Sales Contracts. Apart from an amount of $200,000, MDL had not made payments due under the Compromise Agreement, arguing that it was not obliged to make such payments since (i) the obligation to pay the balance had been novated to an affiliate, Ramcoz; MDL alleged that this novation was agreed between ZCCM, Ramcoz and MDL in May and June 2000 but ZCCM denied that the alleged novation was agreed or even discussed and (ii) MDL alleged that it had a counterclaim against ZCCM, the value of which exceeded the $2.8m owed to ZCCM under the Compromise Agreement.

MDL’s counterclaim, the focus of the present case, was for damages that MDL claimed to have suffered in relation to monies advanced by MDL to Ramcoz in reliance on an alleged representation by ZCCM, alternatively an alleged collateral agreement, i.r.o. a Debt Rescheduling Agreement (DRA) and that ZCCM’s failure to honour it had caused Ramcoz to become insolvent, thereby causing MDL loss and damage. ZCCM denied that the DRA had been concluded or that it had been party thereto and otherwise denied liability to MDL under the counterclaim.

MDL sought to have the merits of its counterclaim determined by the tribunal appointed under arbitration provisions contained in the Sales Contracts. ZCCM argued that the tribunal had no jurisdiction to hear the counterclaim. The parties agreed that the tribunal should deal with the matter of its jurisdiction over the counterclaim as a preliminary issue; it did so, and on 9 September 2004 held that it did not have jurisdiction to consider the counterclaim, finding (i) that there was no credible evidence that ZCCM had ever consented to arbitrate either the broad commercial matters arising out of debt restructuring efforts or any other disputes between the parties to the Sales Contracts and (ii) that the arbitration clauses which formed the premise of its jurisdiction here did not imply any intention by the parties to submit other matters to arbitration by it and that in the absence of any evidence of such an intention the word “counterclaim” as used in the LME Rules does not further extend its jurisdiction to such matters. It is this decision that MDL now challenged.

MDL’s case was that in relation to arbitration claims, arbitrators have jurisdiction over counterclaims if either (i) the counterclaim was transactional, i.e. arose under the same contract or a closely related contract, even if arising under a separate contract incorporating an exclusive jurisdiction clause in favour of another court or tribunal, or (ii) the counterclaim was independent (and not transactional) provided it did not arise under a contract containing an exclusive jurisdiction clause in favour of another court or tribunal.

Counsel for ZCCM argued that the jurisdiction of any arbitral tribunal was derived from the agreement of the parties: without that agreement there could be no arbitration. Any agreement to arbitrate was to be construed narrowly. The jurisdictional powers of Courts and Arbitral Tribunals were fundamentally different and case law as to the territorial jurisdiction of the courts was no authority for the jurisdiction of an arbitral tribunal. Submission to the jurisdiction of an arbitral tribunal did not result in the broadening of that jurisdiction beyond the scope of the arbitration agreement. Counterclaims were subject to the same formal requirements as any other claims brought before an arbitrator. The disputes surrounding the alleged debt rescheduling proposal ("DRP") were not referable to arbitration since (i) the DRP never evolved into a concluded or legally binding agreement; (ii) there was no evidence that any of the parties to the alleged DRP, including Ramcoz, ever considered that it was legally binding; (iii) the courts have consistently ruled that an arbitration agreement is inoperative where the underlying contract is not concluded; (iv) there was no agreement by any of the parties to the alleged DRP to submit disputes arising out of it to arbitration; (v) MDL was not alleged to be a party to the DRP and could not rely on its subsidiary Ramcoz in this regard; (vi) there was no reasonable relationship between the subject matter of the disputes under the DRP and the subject matter of the Sales Contracts.

Cresswell J held, citing passages from *Russell* and *Mustill & Boyd*, that the jurisdiction of arbitrators depended upon what matters had been submitted to arbitration in accordance with the particular arbitration agreement (see s.30(1)(c)) and the true construction of the particular arbitration agreement. Where the claimant has a disputed claim which falls within an arbitration agreement, and the respondent raises a cross-claim which lies outside the clause, the arbitrator did not have jurisdiction to entertain the cross-claim unless it provided a true defence, *Mustill & Boyd* (supra) at pp.130 and 131 and *ED&F Man v Société Anonyme Tripolitaine des Usines* [1970] 2 Lloyd's Rep 416 per Donaldson J.

The alleged collateral contract (relating to the DRA) was not alleged to contain any form of arbitration clause; the alleged DRA itself was not alleged to contain any form of arbitration clause and it was not alleged that MDL was a party to the DRA. The terms of the arbitration clause in the present case confer jurisdiction in relation to "any disputes under" four Sales Contracts and "any disputes" in relation to the arrangements comprised in the further two Sales Contracts, e.g. the terms/scope of the arbitration clauses would extend to claims for damages for defective goods but did not confer jurisdiction in relation to disputes arising in connection with a wholly-unrelated alleged agreement to which MDL was not a party, or in connection with alleged negligent misstatement concerning a wholly unrelated transaction or in connection with an alleged collateral contract concerning a wholly unrelated transaction.

For these reasons, Cresswell J concluded that the tribunal had been correct in ruling that it had no jurisdiction in respect of MDL's counterclaim; the present application was accordingly dismissed.

ZCCM's [winning] Counsel was none other than Stewart Shackleton !

23rd February 2005

S.44 and COURT SUPPORT of ARBITRATION - WHAT HAPPENS BEFORE THERE IS AN ARBITRATION ? [NOTE: see below for Court of Appeal decision]

This was the key issue in Cetelem SA v Roust Holdings Ltd {[2004] EWHC 3175 QB; 29th December 2004; Beatson J).

On 23rd December 2004 C applied for and was granted an injunction without notice, the injunction prohibiting RHL from dealing with any of the specified assets, in particular its direct shareholding in RTL and RCL and its direct shareholdings in Z and RSC, both Russian companies, and Russian Standard Bank, a Russian commercial bank. C had contracted to purchase shares in RCL from RHL in order to create a 50/50 shareholding C/RHL. [NB - you need the Atlas of World Tax Havens to locate the places of incorporation of these various companies !] The consideration for the transaction was in the region of US$320m. C was a subsidiary of a leading French bank and the Roust group was controlled by a Mr Roustan Tariko. The share transfer agreement C/RHL contained an arbitration agreement, for ICC arbitration in London under English law and in English. The reason for the urgency was that certain documentation concerning RSB had to be submitted to the Central Bank of Russia, before 31st December, for approval; securing such approval was the principal Condition Precedent to the completion of the share purchase.

C now sought a mandatory injunction obliging RHL to deliver the documentation to C's Moscow lawyers. C submitted that the Court had jurisdiction over the application because the arbitration agreement was subject to the Arbitration Act 1996; C argued that ss.44(3) and (5) applied and that the decision of Cooke J in Hiscox Underwriting Ltd v Dickson [2004] EWHC 479 showed that s.44(3) was permissive and not exhaustive of the court's powers, and that an interim injunction prior to the appointment of an arbitrator was permissible in an urgent situation where the injunction would be supportive of the arbitral process (in that case a mandatory injunction was given). Alternatively, in any event, the court had a residual jurisdiction under s.37 Supreme Court Act 1981 to act in the interests of fairness and justice. Cooke J had noted that in making an order of this type it was essential not to prejudge the issue which had to be determined by the arbitrator; further, the principles in exercising jurisdiction were that s.1(c) of the 1996 Act provided that the court 'should not', as opposed to 'shall not', intervene [NB Art.5 Model Law has "shall [not]"]. C also referred to other authority governing mandatory injunctions.

RHL submitted that there was no jurisdiction, the SPA involving the transfer of shares by a Cypriot company in a Cypriot company to a French entity by a British Virgin Islands entity with no assets in England & Wales. Further, the s.44 powers were in support of arbitral proceedings but here there was no arbitration in immediate contemplation hence the order sought would not be in support of arbitral proceedings but would be a usurpation of the powers of the arbitrators. Further, where there was no arbitration imminent the powers in s.44(3) were confined to the matters specified therein, i.e. preserving evidence or assets. Hiscox was distinguishable because in that case the arbitration had commenced although the arbitrator had not yet been appointed. Further, in Motorola Credit Corporation v Uzan (No 2) [2003] EWCA (Civ) 752 it had been held that parties without assets in the UK should not have a worldwide freezing order made against them by a UK court

RHL also relied on the well known decision in Redland Bricks v Morris [1970] AC 652, and in particular Lord Upjohn who stated, as the 4th general principle relating to the grant of a mandatory injunction that: "The court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact so that in carrying out an order he can give his contractors the proper instructions." Consequently, obliging RHL to procure documents that were for other companies to provide, without stating precisely what it was that RHL was to do, violated this principle.

Beatson J concluded that the decision in Hiscox showed that the court did have jurisdiction; in particular, s.44(3) refers to a *proposed party* to arbitration proceedings and he agreed with Cooke J that the language of s.44(3) was permissive. In particular, s.44 (3) did not distinguish between cases involving a party to an arbitration and a proposed party.

Further, Motorola v Uzan was distinguishable because in the present case the arbitration agreement made England the primary locus of jurisdiction for resolving disputes which had not been the case in Motorola. As regards the difficulty of enforcing any order, RHL's Bye-Laws and Mr Tariko's control of the Roust Group gave it the necessary flexibility of control.

Note: there were a number of other interesting issues addressed in submissions and in Beatson J's judgment but these do not impact on the Arbitration Act so are not covered here.

Comment

Common sense !! However, the order sought and granted did indeed go well beyond "preserving evidence or assets" while still, certainly, being "in support of arbitral proceedings", thereby taking a wide view of what is 'permissive'. What is of particular interest is that there was no imminent arbitration – I had always understood s.44(3) to cover the gap between commencement of proceedings (s.14) and constitution of the tribunal but the present case pushes s,44(3) further back in time.

24th February 2005

DABHOL POWER PROJECT - INSURANCES

Judgment was issued today in the English High Court in *Swiss Reinsurance Company and Others v. United India Insurance Company Limited* [2005] EWHC 237 (Comm), available at www.bailii.org

The case concerns a reinsurance policy written by Swiss Re in favour of UII. The ultimate assured was Dabhol Power Company (DPC) as principal together with 15 named contractors "and/or others to be agreed and/or associated/affiliated companies and/or subcontractors of any tier."

The subject of the insurance/reinsurance was Phase II works for the construction of the Dabhol Power Project which was a joint venture between Enron, Bechtel and the Maharashtra State Electricity Board [MSEB], these together forming DPC. MSEB agreed to buy the electricity generated by DPC under a Power Purchasing Agreement [PPA] but failed to pay sums due to DPC under the PPA. DPC was, therefore, without the funds required to complete Phase II, the contractors were unpaid and, as a result, they left the site on or about 18th June 2001, having terminated their construction contracts with the works incomplete. As at the date when the contractors walked off the site, there were outstanding claims under the Phase II Insurance Policy amounting to some US$6 million; there were also other claims. The dispute between Swiss Re and UII centred on the question whether, in the circumstances, UII was entitled to any refund of the reinsurance premium paid, and if so how much.

In a lengthy judgment, of interest only to insurance market practitioners and their advisers, Morison J concluded by (over-simplifying) dismissing UII's claim for a refund.

1st March 2005

CONNEX SE v MJ BUILDING SERVICES - COURT of APPEAL DECISION

In this hotly-debated adjudication case, the first instance Judge (HHJ Havery QC) had addressed four questions

"(1) Had there been an agreement to which the claimant and the defendant had been parties and which was an agreement "in writing" within the meaning of s.107 of the Act ? [YES]

(2) If the answer to question (1) was yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act on 24th February 2004 if the agreement had previously been discharged by the acceptance of the claimant's repudiation? [YES]

(3) If the answer to question (1) was yes, did the defendant still have the right to refer a dispute to adjudication under s.108 of the Act notwithstanding the letter of agreement dated 11th February 2002? [YES, in part only]

(4) If the answer to questions (1), (2) and (3) were all yes,

(a) was the defendant's notice of adjudication dated 24th February 2004 an abuse of process? [NO]

(b) If so, what is the consequence?" [N/A]

MY appealed on Q.3 and Connex SE on Q.4.

The Court of Appeal upheld MJ's appeal on Q.3 and dismissed Connex's cross-appeal on Q.4.

2nd March 2005

AWARD of COSTS in CONSTRUCTION LITIGATION

A favourite topic, and two dear friends, returned in *Skanska Construction UK Limited v Egger (Barony) Limited* ([2005] EWHC 284 (TCC) 2nd March 2005), a costs trial following several heated battles along the way. Fortunately, what could have been a dry and tedious judgment was enlivened by HHJ Wilcox QC in top form. Extracts follow – you are recommended to read the judgment !

"In a period of less than a year a redundant colliery site in Ayrshire with varying levels was transformed into a state of the art fully automated factory where virgin timber was fed in at one end and a sophisticated chipboard product emerged at the other. …. Regrettably the time devoted to the conception, planning and construction stands in stark contrast to the time thereafter devoted to the resolution of the many disputes arising from this complex and high speed project. The GMP originally stood at £12 million [but the] costs of resolving the disputes arising out of the project are said to amount to approximately £9 million. The amount of the claims recovered is a matter of dispute between the parties but on any reckoning is far less than half of the costs. … There have been many hearings. Two trials of preliminary issues occurred. …. Liability and quantum were tried separately and there have been a number of case management hearings and several visits to the Court of Appeal. The issues between the parties relate to the conduct and assessment of the extent of successful recovery. These two issues become inextricably interwoven at certain steps in the history of these claims. This case was about money. The dispute was between commercially sophisticated parties who throughout had access to professional advice, both technical and legal."

"The successful party is the one that emerges with a net payment of some substance in its favour:

> *"… In deciding who is the successful party the most important thing is to identify who is to pay money to the other. That is the surest indication of success and failure …"*

It is not the only measure of success since a consideration of the conduct of the parties obliges the court to evaluate the true cost of achieving that success. The conduct of a party may well make the cost of achieving a result disproportionate and also have the consequence of making a case less likely to settle because of the incidence of both mounting costs and interest. A failure to be open-handed, or candid, exaggeration, unwillingness to treat and delay are matters that may render costs disproportionate to the achieved result. Where fault is all one-sided the costs outcome is straightforward. Where, as in this case, there are faults on both sides a robust account must be struck and the effect upon the course and conduct of the litigation considered."

"The litigation in this case has exhibited many of the features that the CPR regime sought to cure. The Construction and Engineering Protocol was not in force at the time that these disputes emerged. Egger's administration of the contract was such that the necessary co-operation and contemporary open-handedness during the currency of the project works was never forthcoming. This was principally due to the under-resourcing of the administration, and the perception of the GMP contract held by … Egger's M/D, who had no concept of the difference between changes under the contract giving rise to an entitlement to additional monies and design development which did not. [His] views were sufficiently strong to affect the expert evidence and to be reflected in the positions later taken by the costs consultants … often, it became apparent, against their better and privately expressed judgment. Egger's failure to properly administer the contract by dealing with vital matters such as RODs and applications for extensions of time led to a hardening of attitude by SCL who were ultimately driven to accept an absurd view of events asserting that there was no concluded agreement and that on valuation 14, on a contract analogous basis, their total entitlement for the project was just under £27 million. Throughout the course of litigation there had been little softening of attitude by the parties despite the very best endeavours of their legal representatives and certain experts expressing their robust and independent views. Egger's approach was epitomised when the draft quantum judgment was published, substantial sums were awarded both on the claim and the counterclaim, pence were rounded up or down as was appropriate.

Egger sought to insist that the pence should be reinstated, as was their very strict entitlement. … The issues between the parties related principally to the respective conduct of each of the parties both pre-litigation and post- and the measure of success achieved in relation to the claims and the counterclaim pursued."

…

"Each party has conducted a blow-by-blow account as to the history of each aspect of the issues comprising the individual claims, identifying the high and low watermarks for each claim and the level of denial or admission. Complex litigation where there are multiple claims embracing highly technical issues depending on expert evidence and delay analysis has a dynamic of its own. This is not a case to which the Construction and Engineering Protocol applied, neither did the provisions of the Housing Grants Construction and Regeneration Act 1996. Had they done so the posturing and failure of each party to co-operate at various stages would have been frustrated. The imperative of proper contract and administration by the Defendants would have been reinforced had swift references to adjudication been available during the currency of the contract. Mr Gardner and Mr Dent would have been unable to bury their heads in the sand by refusing to promptly consider RODs or EOTs or to properly use the professional resource of Turner & Townsend. SCL's claims would have been contemporaneously examined and investigated and then paid, or rejected in a reasoned way. As to a negotiated or commercial settlement the conduct of both parties rendered the possibility remote."

…

"This is a case where the parties chose to have a separate liability and quantum trial, the forlorn hope being that resolution of liability issues would render a quantum trial unnecessary. In the light of the liability findings both parties had to recast their positions."

SCL recovered £2.9 million; HHJ Wilcox QC awarded it its costs not to exceed 55% of the total costs.

22nd April 2005

SINGLE JOINT EXPERTS

At the risk of renaming my occasional series of briefing notes "The Jackson Newsletter" I am pleased to report as hereunder from yet another very practical judgment by Mr Justice Jackson.

In *Quarmby Electrical Ltd v John Trant t/a Trant Construction* ([2005] EWHC 608) Q was electrical subcontractor to T; an order was made for the appointment of a single joint expert pursuant to CPR Rule 35.7, who would give his opinion on the valuation of the electrical works carried out and the deductions which should be made for defects and delays. Per Jackson J "The single joint expert, Mr. Gilfillan, was called by [me] as a witness of the court. He was then cross-examined by both counsel in order to elucidate certain matters. Both counsel made it clear that they accepted Mr. Gilfillan's findings in respect of variations and defects. This realistic stance adopted by both parties saved a considerable amount of court time and substantially reduced the burden of costs."

Jackson J made helpful direct comment on the use of single joint experts in lower value construction cases (judgment was given in this one for £12,000 + VAT) (see below) with particular reference to cross-examination.

Part 6. The use of single joint experts in lower value construction cases

51. The Court of Appeal has given much helpful guidance about the use of single joint experts in **Daniels v. Walker** [2000] 1 W.L.R., 1382. I shall not attempt to repeat or summarise the guidance which was given by the Master of the Rolls on that occasion. I do, however, wish to say something about the use of single joint experts in lower value construction cases.

52. The present action is the second case which I have decided in the space of a few days concerning a sub-contractor's final account. In both of these cases the sums involved are relatively small (though important to the parties) and legal costs are liable to exceed the amount at stake. In the present case his Honour Judge Grenfell made the extremely sensible order that a single joint expert should be appointed to deal with what may loosely be described as the technical issues. Both parties very sensibly accepted the expert's findings in respect of defects and the valuation of variations. This has achieved a very substantial saving of court time and legal costs.

53. I fully accept that in the larger construction cases the device of a single joint expert is generally reserved for subordinate issues or relatively uncontroversial matters. However, in the smaller cases, such as this one, if expert assistance is required, it is difficult to see any alternative to the use of a single joint expert in respect of the technical issues. If adversarial experts had been instructed to prepare reports and then give oral evidence in the present case, I do not see how there could have been a trial at all. The respective experts' fees and the trial costs would have become prohibitive. In lower value cases such as this one, I commend the use of single joint experts. The judge, of course, remains the decider of the case. He is not bound by everything which the

single joint expert may say. However, the judge is able to perform his functions within more sensible costs parameters.

54. The Civil Procedure Rules enable both parties to put written questions to a single expert: see Rule 35.6. This facility was used in the present case. Part 35 of the Civil Procedure Rules and the accompanying practice direction are silent on the matter of a single joint expert being called to give oral evidence. The commentary at paragraph 35.7.1 of the current edition of the White Book states:

> "If a single joint expert is called to give oral evidence at trial, it is submitted, although the rule and the practice direction do not make this clear, that both parties will have the opportunity to cross-examine him/her, but with a degree of restraint, given that the expert has been instructed by the parties."

It must be a matter for the discretion of the judge whether oral examination of a single joint expert is appropriate. In a case where the single joint expert is dealing with major issues, such oral examination might be appropriate and proportionate. In such a case it is the practice of other TCC judges to whom I have spoken, and indeed of myself, for the judge to call the expert, and then for both sides to cross-examine. However, where the report of the single joint expert comes down strongly on the side of one party, it may be appropriate to allow only the other party to cross-examine.

55. Before leaving the topic of single joint experts I wish to make four further comments:

(1) The choice of single joint expert is important. He should be someone in whom both parties have confidence.

(2) If the case is one in which it might become appropriate for the single joint expert to give oral evidence and be cross-examined, it is desirable to alert the expert to this possibility when he is invited to accept instructions.

(3) Experience shows that quite often the instruction of a single joint expert leads to settlement of the whole litigation.

(4) The procedure for dealing with single joint experts should, so far as possible, be addressed at case management hearings in advance of trial. Also provision should be made for securing payment of the fees of single joint experts before they undertake work."

22nd April 2005

THE RATIONALE for the TCC

Mr Justice Jackson, Head of the TCC, is fast developing a reputation for including in his judgments useful statements of general principle or general application, the best known being his "Seven Pillars of Wisdom" definition of "What is a Dispute ?" in *Amec v Secretary of State*, subsequently approved in the Court of Appeal.

In *Machenair Ltd v Gill & Wilkinson Ltd* ([2005] EWHC 445) he discussed the conduct of litigation in the TCC and the key passage in reproduced below.

Part 7. The conduct of litigation in the Technology and Construction Court.

56. "The case which I am currently dealing with is typical of many which come before the Technology and Construction Court ("the TCC"). Two perfectly reputable companies have been unable to reach agreement on the final account between them and on certain contra charges at the end of a construction project. There are of course many forms of dispute resolution available to contractors and sub-contractors in that situation. The options include mediation, arbitration, adjudication and litigation. Each of these procedures has its place, and each has its own particular advantages. In the case of litigation the advantages are that the decision is binding rather than persuasive, and the avenues of appeal are limited. In short, litigation has the advantage of finality. A further advantage of litigation is that there is a specialist court, namely the TCC, which is available to manage and try all actions concerning the construction industry. The chief disadvantage of litigation is the level of costs which will be run up if the parties and their lawyers do not exercise the utmost vigilance.

57. With this in mind I wish to make three observations arising from the present case:

(1) Costs would have been reduced if at an early stage the device of a Scott Schedule had been used to set out the parties' contentions in respect of variations. This should either have been proposed by the parties or, alternatively, ordered by the court as a matter of case management. Furthermore, the existence of a Scott Schedule would have made my task easier at trial.

(2) Much relevant evidence was omitted from the witness statements - in particular, that of Mr. Friend. The consequence was prolonged oral examination-in-chief. If I had not imposed a guillotine on the length of evidence-in-chief, this trial would have overrun its estimate, thus generating substantial further costs.

(3) The purpose of cross-examining witnesses is not to elicit their opinions about points of law or about the nature of the legal obligations imposed on the parties, nor is it the purpose of cross-examination to obtain a witness's general comments on the merits of the case. The purpose of cross-examination is to elicit factual or expert evidence which is within the witness's personal knowledge or expertise, and which is relevant to the issues before the court. In a case like the present, where the volume of fact is almost infinite, both restraint by counsel and occasional intervention by the court are necessary in order to confine the trial to its proper length.

58. I hope that none of my observations in this case are taken as personal criticism. They are certainly not intended as such. Both counsel responded constructively and with good humour to my efforts to confine this trial to its proper length. What I say in this part of the judgment is intended to give guidance for future cases.

59. There is one other point which I should make about cases like this. Once the trial starts, the parties have already incurred substantial costs. It is to be presumed that sensible attempts to settle have been made and have failed. What the parties want at this stage, and what the parties are entitled to, is the decision of the court. It is not generally a wise use of time or resources during the trial to send the parties out into the corridor to negotiate on the basis of some judicial indication of view.

60. Next may I say something about the TCC in Leeds. The Court Centre in Leeds designates three fortnights in the year for shorter TCC cases. During these fortnights TCC cases are listed back to back. Indeed, I shall be starting the next TCC trial later this morning. It not only saves costs, but also assists other litigants, if TCC trials can be confined to their estimated lengths. Furthermore, both the parties, the witnesses and counsel plan their diaries on the basis of the trial dates and estimates of length which have been given. The longer TCC cases in Leeds may be heard at other times of the year. These cases are assigned special fixtures.

61. The construction sector is a major contributor to this country's economy. It produces about 10 per cent of the gross domestic product. The TCC is the specialist court of the construction industry. The TCC provides an essential service to the industry in resolving its disputes. Very many of those disputes are like the present case. The sums in issue are modest in comparison with the potential costs. Both the court and the profession must be constantly examining the procedures which we use, in order to achieve justice in construction litigation at a proportionate cost. This is in accordance with the overriding objective contained in Part 1 of the Civil Procedure Rules. These observations are just as true in Leeds as they are in London. Leeds is a major financial and commercial centre, with a flourishing construction industry."

25th April 2005

Vee Networks Limited v Econet Wireless International Ltd

High Court (QBD); Colman J; [2004] EWHC 2909 (Comm); 14th December 2004;

Mr S Browne-Wilkinson QC (instructed by DLA) for the Applicant, Mr S Moverley-Smith QC (instructed by Kerman & Co) for the Respondent; hearing dates: 25/26th November 2004

Summary

S.7 Arbitration Act 1996 introduced into English statute the separability doctrine first developed in the English courts in 1992 but long established in other jurisdictions. S.30 of the Act introduced, also for the first time, the Kompetenz-Kompetenz doctrine and empowers the arbitrator to determine his own jurisdiction, subject to challenge in Court under s.67. But how do these two sections interface ? What is a valid arbitration agreement ? What is (or, rather, is not) an "objection to the arbitrator's substantive jurisdiction ? And what can/cannot be challenged under s.67 ? Colman J draws a clear distinction between jurisdiction arising under s.7 and that under s.30; in addition, he clarifies that a challenge to the arbitrator's jurisdiction must be explicit and cannot be inferred from argument on the merits.

The Facts and the Dispute

Vee Networks Ltd (Vee) wished to establish a mobile phone network in Nigeria and contracted under a Technical Support Agreement ("TSA") with Econet Wireless International Ltd ("EWI"), a Bermudan company, for the provision of support and technical services including engineering, planning, design, installation, marketing, training and development. The TSA was terminable by either party on 180 days notice and forthwith under certain default provisions. In October 2003 Vee claimed to terminate the TSA but EWI neither accepted that Vee was entitled to do so nor treated Vee as having repudiated it.

The dispute was referred to arbitration under the arbitration clause in the TSA. EWI claimed damages of over $20 million and subsequently raised an alternative claim that if the TSA was held to be void, it was entitled to recover a like amount by way of restitution or quantum meruit. Vee pleaded that the TSA was void and unenforceable because, under it, EWI was engaged in the business of developing and/or operating and/or advising and/or acting as a technical consultant to Vee's business and enterprise and such business was ultra vires EWI's Memorandum of Association

("MoA") by operation of Bermudan statute. Vee claimed US$856,973 as money paid to EWI under a mistake of fact or as money had and received, alleging that this was the amount of withholding tax which it ought to have deducted from monies paid to EWI but had mistakenly failed so to do.

The Arbitrator issued consent directions that he should hear and determine in a partial award various preliminary issues including: (i) whether Vee was estopped by convention from asserting that the TSA was ultra vires the powers of EWI; (ii) if not, whether the TSA was ultra vires; (iii) if it was ultra vires, whether any claim for restitution, unjust enrichment or quantum meruit could be advanced in the arbitration or whether the only further order that could be made was as to the costs of the arbitration. The Arbitrator concluded in his Partial Award that: (i) Vee was not estopped from asserting that the TSA was ultra vires the powers of EWI; (ii) the TSA was not ultra vires EWI's powers; and (iii) it was therefore unnecessary to decide the third issue.

The Challenge to Jurisdiction

Vee applied under s.67 of the Arbitration Act that the Partial Award should be set aside because the Arbitrator had wrongly construed EWI's MoA. Further if the TSA were ultra vires, the Arbitrator had had no jurisdiction conclusively to determine any of the preliminary issues because his jurisdiction was derived from the arbitration clause in the TSA and *he ought to have held that the TSA was void and therefore that the agreement to arbitrate contained within it was void*. Accordingly, Vee was entitled to have the whole of the partial award set aside under s.67.

EWI responded by raising a threshold point which is of considerable importance to the scope and application of the jurisdictional provisions of the 1996 Act. It submitted that Vee's application was fundamentally misconceived inasmuch as s.67 was inapplicable where, as in the present case, the issue to be determined by the Arbitrator was not whether he had substantive jurisdiction but whether the underlying or principal contract, as distinct from the arbitration agreement contained in the arbitration clause, was invalid. This submission was based on s.7. EWI argued that the effect of this section was to preserve the jurisdiction of the arbitrator to determine conclusively whether the underlying contract was ultra vires the powers of EWI notwithstanding that, if it were, the underlying contract containing the arbitration agreement would be null and void. The function of s.67 was not to challenge an arbitrator's determination of the issue whether an underlying contract was void, for whatever reason, but to challenge a determination by an arbitrator as to whether he has "substantive jurisdiction". The determination of substantive jurisdiction involved only the matters set out under s.30(1), namely (a) whether there was a valid arbitration agreement, (b) whether the tribunal was properly constituted or (c) what matters had been submitted to arbitration in accordance with the arbitration agreement. In the present case, the issue to be determined by the Arbitrator was not whether there was a valid arbitration agreement but whether the principal contract was ultra vires EWI's powers. The effect of s.7 was to give the Arbitrator jurisdiction conclusively to determine the latter issue. Therefore, the validity of the arbitration agreement was never in issue and accordingly s.67 had no application.

EWI further submitted that if it were held that the TSA was ultra vires, the effect of s.7 was to preserve the Arbitrator's jurisdiction to the effect that he had jurisdiction to determine non-contractual disputes such as its alternative claim for restitution and/or quantum meruit and the counterclaim for money had and received. Given that the scope of the arbitration agreement was wide enough to cover such disputes, the Arbitrator had had jurisdiction to determine such issues. Further, there had been an ad hoc submission of the issue of jurisdiction to the Arbitrator in the sense that there was agreement by both parties that he should conclusively determine that issue.

Other issues arose in the case which are not addressed in this Case Note which focuses on the separability/jurisdiction issue.

The Judgment – (1) – The Law

Colman J summarised the essence of the separability doctrine pre-1996, as expressed in *Harbour Assurance Co (UK) Ltd v Kansa General Insurance Co Ltd* [1993] QB 701, as being that of insulating the agreement to arbitrate from the principal contract with the effect that the agreement to arbitrate would not be rendered void or invalid or avoided solely because the principal contract was void or invalid or had been avoided. Unless the arbitration agreement was independently void or invalid, that agreement would remain in effect and the arbitrator could determine conclusively whether the principal contract was enforceable. Thus, for example, as in *Harbour Assurance*, if the principal contract was illegal and void, that matter of illegality could be conclusively determined by the Arbitrator unless the arbitration agreement was also independently rendered illegal and void by the legislation in question. S.7 of the 1996 Act reflected this concept of separability but left intact the requirement that the arbitration agreement should be valid and binding. If it was not valid and binding for reasons other than the bare fact that the principal contract was not valid and binding, then s.7 did not enable arbitrators to exercise conclusive jurisdiction in respect of any issue relating to the principal contract.

If, in accordance with s.7, a tribunal determined that the principal contract was, for example, void ab initio by reason of illegality and it was not in issue whether the arbitration agreement was also illegal and void, the tribunal could continue to exercise such jurisdiction under the arbitration agreement as its scope permitted. For example, if there was an alternative claim in tort or for restitution which was within the scope of the agreement, the tribunal would continue to have jurisdiction conclusively to determine that claim. Vee's argument that, once the tribunal had decided that the

principal contract was void ab initio, the Arbitrator's jurisdiction to determine other issues was automatically spent save as to orders for costs, was misconceived, reflecting a misunderstanding of the principle of separability underlying s.7.

If it was not only in issue whether the principal contract was void or otherwise non-existent but also whether the arbitration agreement itself was independently void or non-existent, that issue could be determined by the tribunal, but not conclusively; s.30 refers. The issue identified in s.30(1)(a), "whether there is a valid arbitration agreement", had to be understood as referring to an issue as to the validity of the arbitration agreement while giving full effect to the principle of separability under s.7. Accordingly, for the purpose of determining an issue as to substantive jurisdiction under s.30(1) it is not sufficient to proceed from a conclusion that the principal contract was or was not void or invalid to the conclusion that therefore the arbitration agreement was or was not valid. The relevant issue can only be whether the latter agreement is, independently of the validity or invalidity of the principal contract, valid or invalid.

If objection to the tribunal's substantive jurisdiction is made timeously the tribunal can either make a separate award on jurisdiction or "deal with the objection in its award on the merits" (s.31(4)); however, no such award or determination is conclusive because it remains subject to challenge under s.67. However, it was important to note that the function of s.67 was confined to challenging issues of substantive jurisdiction. It operates upon (a) awards as to such issues and (b) awards on the merits where the tribunal has dealt with the objection to substantive jurisdiction in the course of such an award. It does not enable a party to challenge an award on the merits unless that award also determines the objection already raised to substantive jurisdiction. But the parties can contract out of this regime by means of an ad hoc reference to the tribunal of the issue as to whether it had substantive jurisdiction, such conduct amounting to an agreement that the tribunal should be given not merely the competence identified in s.30(1) but jurisdiction conclusively to determine the issue of substantive jurisdiction. The problems involved in identifying such an agreement were exemplified in *LG Caltex Gas Co Ltd v China National Petroleum Corp* ([2001] 1WLR 1892). Further, if a party failed to object to the tribunal's substantive jurisdiction in accordance with s.31(1) or (2) the tribunal could admit a later objection under s.31(3) if it considered the delay justified or, if it did not so admit, it could ignore the objection and proceed to its award on the assumption that it had jurisdiction. If it took the latter course, it was not subsequently open to the party objecting to challenge the award under S.67 on the basis of want of substantive jurisdiction. Further, a party who first raised objection after the times indicated in ss.31(1), (2) and (3) could only deploy s.67 before the court if it satisfied the court of those matters set out in s.73(1).

The Judgment – (2) – The Law Applied to the Present Case

Colman J next considered whether or not the Partial Award was one to which s.67 applied. Vee submitted that it was an award as to the substantive jurisdiction under s.67(1)(a) since the case presented to the Arbitrator by Vee was that: (i) the TSA was ultra vires the powers of EWI; (ii) the TSA was therefore void; (iii) therefore the arbitration agreement was also ultra vires and void; (iv) if so, the only jurisdiction which the Arbitrator had had was to have determined the ultra vires point in respect of the TSA and the incidence of arbitration costs, (v) his jurisdiction on those points arose from s.7. Accordingly, when the Arbitrator had concluded in his Partial Award that the TSA was not ultra vires the powers of EWI, he had determined that he had substantive jurisdiction. Consequently, the partial award was one to which S.67(1)(a) applied.

However, Colman J held that the Partial Award had contained no express indication that the Arbitrator had considered and determined the question of whether or not he had had substantive jurisdiction. He had first determined the issue of whether Vee was estopped from contending that the TSA was ultra vires then, having decided that it was not, he had proceeded to consider whether the TSA was indeed ultra vires. Having decided that it was not, he had stated that the issue whether, if the TSA was void, he had jurisdiction to determine the restitution claims did not have to be determined. The Partial Award contained no other express consideration of his jurisdiction.

Colman J further held that there could be no doubt that an arbitration award which determined an issue which was determinative both of the substantive merits of the claim and of the arbitrator's substantive jurisdiction but which did not expressly indicate that it was determining substantive jurisdiction could in some circumstances amount to an implied award as to substantive jurisdiction (see *LG Caltex*). It was clear from the analysis in that case that the implication of a determination by the arbitrator of his substantive jurisdiction depended crucially on whether the issue of substantive jurisdiction had been specifically raised by either of the parties and referred for his decision and whether his decision was in substance, if not in form, directed to that issue. This methodology was consistent with ss.30 and 31: ***an arbitrator whose substantive jurisdiction is NOT challenged does NOT have to determine whether he has that jurisdiction***, although it is always open to him to raise the matter. Accordingly, if objection to substantive jurisdiction is not specifically raised in accordance with s.31, an arbitrator may conclusively determine an issue going to the merits even if such issue would be directly material to whether there was substantive jurisdiction. If the Arbitrator had adopted that course, s.67 would have had no part to play since, by definition, the objector had lost the right to object (s.73(1)). On the other hand, if objection to substantive jurisdiction had been taken timeously and the Arbitrator had determined in his award the issue on the merits which was also determinative of the objection but did not expressly include in the award a determination as to substantive jurisdiction, it would normally be held, by parity of reasoning with *LG Caltex*, that there had been an implied award or ruling on substantive jurisdiction which could be challenged under s.67.

In order to ascertain whether in the present case there had been an implied award or ruling on substantive jurisdiction in the Partial Award it was therefore necessary to investigate whether the issue of substantive jurisdiction in relation to the ultra vires point had effectively been referred to the arbitrator or, alternatively, had Vee effectively raised an objection to his substantive jurisdiction ? Vee submitted that its plea that the TSA was ultra vires was in substance a plea that the arbitration agreement within it was also ultra vires and therefore that the defence did effectively challenge the arbitrator's substantive jurisdiction. Colman J held that this could not be correct: a party who wished to challenge the substantive jurisdiction of the arbitral tribunal had to do so explicitly and timeously. Given s.7, a submission that the principal contract was void ab initio because it was ultra vires EWI's powers was not an explicit submission that the arbitration clause included within it was also independently void ab initio. That issue would depend on whether, on the proper construction of the MoA, it would have been ultra vires for EWI to have entered into an arbitration agreement which could, for example, be utilised to resolve disputes as to whether the principal contract was ultra vires on the true meaning of that MoA.

Correspondence from Vee to the Arbitrator had not only contained no assertion that the arbitrator lacked substantive jurisdiction to determine any issue on the pleadings, but also, by relying on s.7 as distinct from s.30 as providing the Arbitrator with jurisdiction to determine the ultra vires point, Vee had stated in express terms that the Arbitrator *did* have substantive jurisdiction to determine that point conclusively. The principle of separability led inexorably to that result unless the crucial additional point was raised that the arbitration agreement itself was independently invalid. In its response EWI had observed that it was well aware of s.7 and that it agreed that the arbitration agreement was to be seen as a separate agreement. This letter indicated that EWI understood Vee to be acknowledging that the Arbitrator did have substantive jurisdiction to determine whether or not the TSA was ultra vires.

Colman J concluded by stating that the essential question was whether the award that the TSA was not ultra vires was impliedly a determination of an issue as to the Arbitrator's substantive jurisdiction for the purposes of s.30: he had no doubt whatever that it was not, for the following reasons:

(i) at no stage prior to the skeleton argument for the main hearing had Vee asserted that the arbitration agreement was invalid because the TSA was ultra vires;

(ii) in relation to the ultra vires point the parties had throughout proceeded on the basis that, by reason of s.7, the Arbitrator had had substantive jurisdiction to determine that point conclusively;

(iii) it had therefore never been part of the reference to the Arbitrator, which defined the issues that he was invited to decide, whether, because the agreement to arbitrate would be invalid if the TSA were ultra vires, he lacked substantive jurisdiction to determine the ultra vires point; the preliminary issues, derived from the Arbitrator's consent directions, were conclusive on this;

(iv) until service of Vee's skeleton argument only nine days before the hearing, it had never been suggested for any purpose that, if the TSA were ultra vires and void, the arbitration agreement was also void and that s.30 was thereby engaged; until then Vee had asserted that the effect of s.7 was to clothe the Arbitrator with jurisdiction to decide the ultra vires point conclusively, but that, once that jurisdiction had been exhausted, he would have had no residual jurisdiction to decide the restitutionary claims and quantum meruit points, because of the meaning of the words "for that purpose";

(v) the submission that the arbitration agreement was void was made as part of Vee's case on the restitutionary claims point only: the skeleton argument did not explain why the arbitration agreement was invalid. As expressed, paragraphs 32 and 33 of the skeleton were indistinguishable from the "logic" argument comprehensively rejected by the Court of Appeal in *Harbour Assurance*, and which was impermissible under s.7 by reason of the doctrine of separability.

(vi) it was not until Vee's Counsel's intervention in the course of the hearing that it had ever been suggested that the arbitration agreement might be independently ultra vires: even at that stage Counsel had never attempted to articulate why that should be or what the implications would have been for the Arbitrator's determination of the ultra vires point as distinct from the restitutionary claims and quantum meruit points;

(vii) by the time that the skeleton argument emerged, it was far too late for Vee to object that the Arbitrator lacked substantive jurisdiction to determine any point on the grounds of the arbitration agreement being ultra vires - that was clear from s.31; the first step in the proceedings by Vee was the service of the defence, but that contained nothing about the Arbitrator's jurisdiction and it was not until a subsequent letter from Vee's Solicitor's that it was asserted that, if the TSA were held to be ultra vires, the effect of s.7 would be to deprive the Arbitrator of substantive jurisdiction in relation to the restitutionary claims. There was still no suggestion that the Arbitrator would lack jurisdiction on the grounds of the invalidity of the arbitration agreement: accordingly, Vee had not complied with S.31(1) or (2).

(viii) There was no evidence that the Arbitrator had ever admitted a s.31(3) late objection to his substantive jurisdiction to determine the ultra vires point on the grounds of the invalidity of the arbitration agreement. Indeed, he clearly never entertained the point and the agreed issues were never amended to cover this objection; had he considered the matter for the purposes of s.31(3) he would surely have stated as much in his award. In any event, he would inevitably have concluded that the delay was not justified since those

advising Vee had possessed all the relevant materials at the time when they had first taken the ultra vires point in the defence.

(ix) It followed that Vee had never effectively raised any objection to the Arbitrator's substantive jurisdiction to determine conclusively the ultra vires point and accordingly the determination of that point was incapable of amounting to an implied award as to the Arbitrator's substantive jurisdiction to determine that point.

(x) It followed that Vee's application failed and had to be rejected.

Comments

This analysis by Colman J is, in my view, correct but perhaps, initially at least, surprising in that the arbitrator has in effect ruled on his substantive jurisdiction but in an indirect way not permitting any challenge via ss.32 or 67. However, Merkin's "Arbitration Law" at §9.7 takes an opposing view, stating that

> "The right of the arbitrators to rule on the existence or legality of the substantive agreement may be regarded as a consequence of the severability principle under [s.7] or it may be regarded as governed by the Kompetenz-Kompetenz principle set out in [s.30]. Although the wording of [s.30] is sufficiently wide to encompass these matters, it is submitted that the better view is that the jurisdiction of the arbitrators in this context is governed only by Kompetenz-Kompetenz and not severability, as it should always be open to a party to have the existence of the arbitration agreement determined by a Court by means of a full judicial review under [s.67], and it should not matter whether the challenge to the arbitration agreement is direct (there is no arbitration agreement) or indirect (there is no substantive agreement). Such reasoning does not deprive any severability principle of its validity, as that principle remains necessary to empower arbitrators to decide issues such as the repudiation and frustration of the main agreement."

With respect, I do not share the view that "it should always be open …"

However, it remains open to the 'losing' party to attempt a challenge under s.69 assuming that application thereof has not been excluded by agreement; of course, leave of the Court is required to make any such challenge (s.69(2)(b)) unless agreed by all the parties (s.69(2)(a)). We are all well aware from recent jurisprudence of the height of the s.69 threshold, notwithstanding the Court of Appeal decision in *Northern Pioneer*. Further, the Courts are loth to grant leave where a s.69 application is in reality a s.67 challenge in a different guise.

A question arises at to what the arbitrator should do if he finds himself in the same situation as in the present case i.e. where the argument is a s.7 argument brooking no challenge or a s.30 one which is challengeable one. In the present case the Arbitrator responded to what was asked of him by the parties and he decided the issues they agreed as the issues. Was it for him to have raised the s.7/s.30 distinction assuming he had noted it ? I suggest not: as Colman J stated "an arbitrator whose substantive jurisdiction is NOT challenged does NOT have to determine whether he has that jurisdiction."

It remains the case that these are subtle and difficult decisions and, I submit, Coleman J's clarifications are of considerable value.

3rd May 2005

Issues i.r.o. a Tribunal-Appointed Expert

An interesting divergence of opinion has arisen in respect of a recent High Court case in Singapore: the issue concerns aspects of the role of a tribunal-appointed expert in an ICC arbitration, with a very distinguished Tribunal, seated in Singapore. The case is *Luzon Hydro Corporation v Transfield Philippines Inc* [2004] SGHC 204 [2004] 4 SLR 705 (judgment given 13th September 2004).

The dispute arose out of the construction of a large Hydro-Electric Power Station in the Philippines; the Tribunal appointed an expert to assist it and his Letter of Engagement provided, inter alia, that the parties would have a reasonable opportunity to comment on, and question him on, his written report(s). It should be noted in passing that, although not in direct issue in the present case, this provision is drawn more narrowly that Art.20(4) of the ICC Rules.

The Expert not only attended the hearing on liability but questioned the parties' respective expert witnesses during it. Subsequently, the Tribunal relied on the Expert's assistance in "administrative matters" concerning the technical issues in dispute – these included collating evidence on technical issues. However, post-Hearing the Tribunal wrote to the parties stating inter alia (i) that it had decided not to seek any written report from the Expert and (ii) detailing the administrative assistance the Expert had rendered; this included "identifying expert evidence, technical matters referred to by witnesses, … technical issues in submissions etc" and "responding to technical queries of the Tribunal". The Expert was also to review the draft Award to ensure the correct use of technical terminology. Neither of the parties raised any objection to the Expert's proposed tasks. However, post-hearing the Expert expended 486 hours on the case and his timesheet descriptions of his activities led Luzon's Solicitors to request copies of all correspondence between the Expert and the Tribunal – this disclosure was refused.

Following issue of a Third Partial Award (the "Award") on liability, where Luzon was part-successful, part not (see further comment below), it applied to set aside the Award on the grounds, inter alia, that

(i) the proceedings had not accorded with the agreement of the parties;

(ii) there had been a breach of the rules of natural justice in that the Expert had been permitted by the Tribunal an involvement substantially beyond that agreed by the parties; and

(iii) the Expert had assumed the task of reviewing and determining the relevance of the evidence.

In addition, Luzon raised several grounds of challenge which went to the merits and were, rightly, given short shrift by the Judge.

Luzon contended that the Expert had reviewed evidence, had responded to questions from the Tribunal and had had meetings with Tribunal members (see ***Hussman*** below). Further, Luzon also contended that, since it had not been provided with copies of the Expert/Tribunal correspondence it had been deprived of any opportunity to comment thereon, as required by both ICC Rules and the Model Law.

Prakash J dismissed this application on the basis that (i) there was "little reason to believe" [§16] that the Expert had exceeded his "administrative function", that (ii) since only his written report(s) was/were to be provided to the parties and since there had been none there was nothing that should have been submitted to them [§17], that (iii) since there was no "strong and unambiguous evidence of irregularity" in the conduct of proceedings [§18],, no aspersions could be cast on the Tribunal and that (iv) communications between the Expert and the Tribunal were confidential [§19].

Inter alia, the Judge referred to two timesheet entries, one referring to 8 hours dealing with "Evidence in respect of Issue X", the other referring to "Review of Closing submissions"; she accepted Transfield's submissions that these terse entries might equally have meant what the Tribunal said they meant as opposed to describing activities capable of criticism but such acceptance by her appears to have been based merely on reliance on the assumed integrity of the Tribunal, not on evidence and testing of that evidence.

With the greatest respect, this judgment misdirects itself in at least the following regards:

(1) the time-honoured aphorism of Lord Hewart CJ. in ***R v Sussex Justices, ex p. McCarthy*** ([1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234) that 'justice.... should manifestly and undoubtedly be seen to be done' was evidently not in this case with potentially crucial communications between Expert and Tribunal withheld from the parties and with the detail of the Expert/Tribunal relationship kept secret from them; this is fundamentally wrong – Model Law Article 18 (which the Judge wholly ignored) and ICC Rule 20(4) refer;

(2) imposition of a confidentiality bar prevented Luzon from acquiring the evidence necessary to assess and, if appropriate, challenge in Court the nature and scope of the Expert's activities in the context of Article 18; had that evidence supported the description thereof, Luzon's ground of challenge would have been severely impaired but it was wholly wrong for the Judge to have relied on untested assumptions in this regard;

(3) the Judge preferred a literal and restrictively exhaustive interpretation of the Letter of Engagement [refer §17 (3rd sentence)] over application of the fundamental principle of Article 18 and over application of ICC Rule 20(4); with respect, this must be wrong in law;

(4) the Judge did not justify her view that Expert/Tribunal communications were protected by the same confidentiality blanket as Tribunal internal communications; I submit that such view has no objective foundation and my view is confirmed, so far as England is concerned, by ***Hussman***; such view is also very difficult to reconcile with ICC Rule 20(4) which becomes meaningless if all the Expert has to do is to plead confidentiality and thereby refuse to answer questions;

(5) the Judge gave her decision purportedly under the Model Law (as enacted in Singapore) but without addressing it, particularly Articles 4, 18 and 34(2)(a)(ii) and (iv);

(6) In §20, Prakash J stated "there was no avenue for appeal [against the Award]"; with respect, I am unable to agree with this conclusion on the basis of her judgment since it is contradicted by Model Law Articles 34(2)(a)(ii) and (iv) which give express avenues for appeal;

(7) the Judge relies [§17] strongly on the integrity of the Tribunal, which is, of course, not in any doubt whatsoever, but this misses the point; there is, of course, no suggestion that the Tribunal acted in any way differently from what it said it did but, with respect to such a distinguished Tribunal and Judge, its description of the Expert's work and his timesheet entries do not constitute evidence of what he actually did – the short phrases used do not provide sufficient answer and untested statements cannot be regarded as evidence; the extent and scope of the Expert's activities cannot reasonably be defined, as appears to be assumed, in black-and-white but include grey areas.

It should be noted that the Judge was concerned, almost as a priority (so it seems), to avoid any "back-door challenge to the Award" [§20] on its merits; as stated above, if the Expert's actual work was as described, then Luzon's challenge fails and there can be no challenge on the merits. If the Expert "crossed the line", then the challenge must succeed (Article 18 and Article 34(2)(a)(ii) and (iv)) irrespective of the outcome on the merits.

It should also be noted that, at least in England, the opposite decision has (in my view, quite correctly) been reached in *Hussman v Al Ameen* ([2000] 2 Lloyds Rep 83) where one of the contended grounds for setting aside an award was the fact that the Tribunal had held a private meeting with the expert the existence of which and detail of which was not disclosed to the parties. I submit that, in England, s.37(1)(b) Arbitration Act 1996 leaves it open to no doubt that the facts of the Singaporean case would not survive exposure in an English court. In *Hussman*, Thomas J stated (§46)

> "I agree with the observation of Professor Merkin in his work ["Arbitration Law"] at paragraph 13.46(e):
>
> > "…. ***consultation with the experts should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment***".
>
> The point was taken that in the meeting with [the Expert], the tribunal was not taking evidence and so the provisions of s37(1)(b) did not apply; ***I do not agree***. They were plainly discussing with him the [subject-matter of his expert opinion] and the content of his report; in my judgment the provisions of the section were applicable to this meeting at which his evidence was discussed."

Further, delegation of decision-making by a Tribunal to its Expert will represent a serious irregularity in English law: in *Brandeis Brokers Ltd v Herbert Black & Ors* ([2001] 2 Lloyds Rep 359); Toulson J said at §68:

> "To show that an expert witness said things which he would not have been permitted to say in a court of law comes nowhere near to establishing that there was irregularity, let alone serious irregularity, within the meaning of section 68. *It would be a different matter if Brandeis could establish, as it asserts, that the arbitrators effectively delegated their decision making on important questions to [the Expert]. That criticism, if substantiated, would amount to serious irregularity*, but I reject it."

While there is no suggestion that the Tribunal in *Luzon v Transfield* did delegate any part of the decision-making to the Expert, there is no way of answering any question as to whether it might have done so (i.e. a "serious irregularity", applying English terminology) without disclosure to the parties of the Expert/Tribunal communications.

It should also be noted that it is arguable that Luzon's challenge on the 'expert issue' was made out of time being made some time after publication of the Award; Prakash J's judgment makes no substantive issue (e.g. by reference to Art. 4 of the Model Law) of such delay, mentioning it only in passing, stating at §17 that "After receipt of the [Tribunal's] letter of 14th October 2003, neither party raised any objection …." and at §19 "Luzon did not object at that time [last day of the hearing] …".

The Singapore High Court's decision that the Expert/Tribunal communications were confidential is wholly at odds with the principles inherent in these two English judgments and with that in ICC Rule 20(4), appreciating of course that the laws of Singapore and of England differ. However, I submit that the English decisions are fully consistent with Model Law Article 18 and its equivalent in England, s.33, whereas the Singaporean decision is not.

Comment

A highly-distinguished individual with knowledge of the case commented as follows, based on an earlier draft of this case note:

> "Thank you for sending me your note on Luzon. You will not be surprised to learn that I do not agree with you. It is unfortunate that you seem to overlook that the crucial point that the judge fastened on to was that the parties were told in clear terms what the T proposed to do and made no objection or comment whatsoever. Only 8 months later after the Award had been published did Luzon object. Surely the parties consented to the procedure proposed in the T's letter by not commenting or objecting. You say the Award was adverse (broadly) to Luzon but in fact they succeeded on the major construction issues. Furthermore the Judge assumed regularity as she had to because there was no evidence filed by Luzon that the T had acted otherwise than as it had stated."

However it should be noted that at §10 Prakash J referred to the Tribunal granting Transfield 310 days EOT and stated "Luzon was successful .. certain items. The Tribunal rejected many of Luzon's contentions on EOT and the tunnel claims". In §11 she stated "Luzon was extremely dissatisfied with the Award …" The judgment nowhere states that Luzon was successful on major construction issues. The commentator's other points have been addressed above and we have agreed to disagree on the issues raised.

There is an evident tension between what has been agreed Tribunal/Parties and what are the requirements of natural justice and Article 18. In this context *Tame Shipping Ltd v Easy Navigation Ltd (the "Easy Rider")* ([2004] EWHC 1862 Comm) (see my Newsletter #10 on my website for a fuller note on this case), an English s.68 application, is relevant regarding the principle. The issue in that case was whether, and if so in what circumstances, a party seeking to challenge an award could rely on the arbitrator's reasons published separately from the award and expressly on terms that no use could be made of them in any proceedings relating to it. Moore-Bick J held, inter alia, that (i) that the challenger could indeed rely on the reasons (ii) it was inappropriate for the Court to consider the reasons privately without hearing submissions from the parties – in practice that would amount to admitting them in evidence; (iii) whenever an application was made under s.68 the Court was being asked to find that there had been an irregularity of

a serious nature that would cause substantial injustice if it did not intervene, in which circumstances the Court had no alternative but to examine the relevant evidence including hearing the parties thereon; failure to do so would risk allowing a substantial injustice to go unremedied which could not be justified by any general public interest in allowing arbitrators to publish their reasons in that form.

I submit that the same logic applies in *Luzon.*

Conclusion

At the risk of over-simplifying, the discussion boils down to two contrasting approaches: (i) all matters between Expert and Tribunal are to be open to the parties (applying my Article 18, 'Hewart' and other arguments) (ii) such matters are confidential to the Tribunal and are not open without evidence of irregularity or an express disclosure requirement.

I close by thanking both my distinguished colleague for commenting on my draft and DLA Piper's Singapore office for drawing my attention to this interesting case; the latter produces an invaluable "Arbitration Bulletin" which I commend to all those with an interest either in arbitration in Singapore or in arbitration in a Model Law jurisdiction.

10th May 2005

CETELEM v ROUST – the SAGA CONTINUES

I reported recently (24th February) on an important case, *Cetelem v Roust*, where the scope of s.44(3) of the Arbitration Act was extended to cover the granting of an injunction before arbitration proceedings had been commenced so that the Court was not acting in support of an arbitration but, instead, of an arbitration agreement.

It appears that an affiliate of R has started proceedings in the Moscow Commercial Court and that C has initiated an ICC arbitration. C applied to the English High Court for an anti-suit injunction to restrain the Russian court proceedings.

In a very short judgment today ([2005] EWHC 873 Comm), Colman J has ordered that the appropriate ADR order be prepared and issued providing for a mediation to take place before 27th May; it is not clear from the judgment that he is "robustly encouraging" (as opposed to ordering) the parties to try mediation but the latter would appear to be inconsistent with the Court of Appeal decision in *Halsey*.

16th May 2005

Experts Falling Short Of Minimum Standards

There has been renewed discussion in various fora recently concerning what an arbitral tribunal can actually do if an expert witness falls short of the minimum acceptable standard, in English law whether CPR Part 35 (if adopted in the arbitration) or *Ikarian Reefer* (if not, bearing in mind that Part 35 does not diverge significantly from *Ikarian Reefer* in principle).

The answer in English law appears to be simple in that no less an authority than Lord Woolf, sitting in he Court of Appeal, upheld the judge who had not only ruled the Expert's report inadmissible but had also dismissed the expert from the proceedings. However the judge had also given permission for the appointor to appoint a new expert but Lord Woolf rejected that. As a result of having no expert and no expert report, the defendant appointor's case against a 3rd party evaporated. "Tough luck", to paraphrase his Lordship's elegant judicial prose.

Where Lord Woolf goes, we humble arbitrators can but follow …… !

My note on the case is appended

CASE DISMISSED BECAUSE EXPERT IGNORED PART 35

Stevens v Gullis & Pile (Court of Appeal 27th July 1999; Case CCRTI/1999/0711/2)

The importance of this case is evidenced by the then Master of the Rolls, Lord Woolf, sitting and giving the only judgment.

S was a builder and his claim was for the sum of £8,674.89 (+VAT) (approx) for works done in 1992/93 for G which were certified by the latter's architect, P, in connection with the alteration and improvement to G's premises in Wales: (i) the total value of the works was £122,000; (ii) there was no signed contract in existence; (iii) P certified Practical Completion on 24th August 1993; (iv) P issued a final Certificate on 23rd February 1995 in the sum claimed. G counterclaimed some £127,000 for defective work, incomplete work and delay. SI was instructed on behalf of G as an expert. The Judge issued directions covering the appointment by each party of two experts (one engineer, one

surveyor), exchange of expert reports etc; inter alia, the two pairs of experts were to prepare joint memoranda of matters agreed or disagreed.

After various to-ings and fro-ings, an experts' meeting took place on 11th November 1998 subsequent to which, a draft joint memorandum was sent to SI who, despite numerous reminders never responded satisfactorily, on 10th March 1999, the Judge ordered that: "(1) [SI] shall by 4.00pm on Monday 12 April 1999 set out in writing the details referred to in paragraph 2.2 in CPR [Practice Direction to] Part 35 … (2) In default of compliance with paragraph 1, [G] will be debarred from calling [SI] as an expert witness in the third party witness proceedings." SI did not comply with this Order so G was debarred from calling him as an expert. In a subsequent letter to the Court, SI stated "I submitted all reports to the best of my ability, and each report was a true and accurate account of the condition of the building at the time of the inspections." This self-evidently falls well short of CPR requirements which, the Judge decided, applied since the trial was to take place after 26th April 1999, the CPR's effective date.

SI's evidence was the only expert evidence which G intended to adduce and that evidence was not directed to the issue of P's alleged professional negligence, but to the alleged deficiencies in the building. The judge said: "It is absolutely essential, if this case is going to be heard in a month's time, that there be full compliance by [SI] with the requirements of the new rules, and with the requirement of paragraph 1 of the Order" (in relation to which SI was in default). He concluded: "In my view it is in the interests of the administration of justice that SI should not give his evidence in the circumstances which I have outlined. It is essential in a complicated case such as this that the court should have a competent expert dealing with the matters which are in issue between [G] and [P]. ***SI, not having apparently understood his duty to the court and not having set out in his report that he understands it, is in my view a person whose evidence I should not encourage in the administration of justice***." He continued: "I deduce from the letter of SI that he does not quite appreciate what his functions are as an expert witness" and "It appears that [SI] is not cooperating with the other experts in the case. He apparently came to the conclusion that, because he disagreed with their draft, no further steps needed to be taken and the appropriate step was merely not to sign it. The orders of the court have consequently been so much wasted paper because of [SI]'s non-compliance. … In those circumstances I ought to make an order that SI be debarred from acting as an expert witness in the case".

The dramatic consequence of this was that P automatically succeeded and the 3rd party proceedings were dismissed solely through failure of SI to comply with Part 35.

G appealed on two grounds: (i) it was not appropriate in this case to disbar SI from giving evidence against P; and (ii) that, in any event, the Judge had been wrong to come to the conclusion that because of SI's bar, G's claim against P should be dismissed.

The Appeal

Lord Woolf was in no doubt whatsoever that the Judge had been perfectly entitled to have made the orders which he had: first, SI had demonstrated by his conduct that he had no conception of the requirements placed upon an expert under CPR Part 35, particularly following the decision of Cresswell J in the *Ikarian Reefer* [1993] 2 Lloyd's Rep 68. In Particular, Lord Woolf said "***It is now clear from the rules that, in addition to the duty which an expert owes to a party, he is also under a duty to the Court***."

Lord Woolf went on to say "The requirements of the practice direction that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters set out in paragraph 1 of the practice direction, are intended to focus the mind of the expert on his responsibilities in order that the litigation may progress in accordance with the overriding principles contained in Part 1 of the CPR. [SI] had demonstrated that he had no conception of those requirements and ***I am quite satisfied that the judge had no alternative but to take the action which he did*** … and [that] ***the consequences to G of the course which was taken [were] draconian and could deprive him of a claim which he might otherwise have against [P]***.

So there we land - the expert's Part 35 failure left his client with 'case dismissed'.

Postscripts

G tried again with a new expert and sought to call SI as a Witness-of-Fact which the Judge allowed, a mistake in Lord Woolf's judgment, since it would be extraordinarily difficult, if not impossible, for SI to give evidence as to fact without giving evidence as an expert. Lord Woolf continued "In any event, [SI] was so discredited that it would be pointless for his evidence to be included on the hearing of the claim between S and G. The court now has power to control evidence, even evidence as to fact, which is to be given in the course of the proceedings. In my view, it would have been more appropriate for the judge to have refused permission for SI to give evidence as to fact."

Further, S and G had agreed the form of a Consent Order whereby SI would give evidence of fact. Lord Woolf was "quite satisfied that it would be wrong for the court to allow the appeal in accordance with the proposed consent order. … I consider that it would be wholly wrong to impose [SI] as an expert upon the judge [who] has very properly indicated his view that [SI] is not an appropriate person to give expert evidence in a court having regard to his conduct to which I have referred. That being so, it would be quite wrong for this court, even by consent, to interfere with the judge's judgment. [SI] lacks the basic knowledge of the responsibilities which an expert has when giving evidence. Under the CPR, the court has power, as I have indicated, to control the evidence which is to be placed before the court. It would be wholly wrong, where

a judge has appropriately exercised his discretion in relation to that matter, for the parties to override that discretion merely because the parties are content to allow the matter to be dealt with otherwise. The order of the judge in the proceedings between the claimant/builder and the defendant should stand and [SI] should not be allowed to give expert evidence."

Brooke and Robert Walker LJJ agreed.

16th May 2005

"We Seek Him Here, We Seek Him There"

"We seek him here, we seek him there, we seek him everywhere – that d####d elusive Pimpernel" ("The Scarlet Pimpernel" by Baroness Orczy). So it can be in commerce, particularly in maritime adventure where the principal adventure may consist of actually identifying and locating the counterparty or respondent.

This was the main issue in an interesting case where the successful claimant in the arbitration sought to enforce an LMAA arbitration award in British Columbia where a company not immediately obviously party to the arbitration agreement, but against whom bunkers were arrested, challenged enforcement on the classic "it wasn't me, guv" excuse and sought remittal to the Arbitrator for decision on the question as to who was/was not party. In the Court of Appeal, their learned justices proved commendably robust in their support of the arbitral process, thereby handing the Very Hot Potato back to the unfortunate (?) arbitrator who had possibly thought that he had got rid of a nightmare case.

Levity apart, a note on the case follows.

Pan Liberty Navigation Co Ltd. & Anr v World Link (H.K.) Resources Ltd. (2005) BCCA 206

The plaintiffs ("Owners") were Cyprus-based ship owners owning inter alia the Cyprus-flagged ships "PANLI" and "ARCTIC". In November 2000, the ships were chartered to a company referred to in each charterparty as "Worldlink Transport Co Ltd of Beijing" ("WorldLink Beijing"). In 2001, it having defaulted re payment of hire, Owners launched LMAA arbitration proceedings; WorldLink Beijing did not respond in any way. Accordingly, in August 2001 the Sole Arbitrator issued a "final award" in favour of Owners for some $355,000 plus interest and costs. For the next two years Owners sought without success to enforce the award, their Solicitors' efforts to track down WorldLink Beijing leading them to suspect that if any entity bearing the name 'Worldlink Transport Co Ltd of Beijing' had existed at all, it had been a worthless shell which had been used by WorldLink HK to obtain the benefit of the charter without paying for it. Owners' Solicitors put WorldLink HK's Solicitors on notice of intention to arrest bunkers; they duly did so on the vessel EIRINI in British Columbia on 30th November 2003. In their application to the BC Court, Owners named four different WorldLink entities including the defaulting charter in what appeared to the Court to be four different ways of naming one defendant. Only World Link (HK) Resources Ltd ("Resources") was an appellant in this Court. WorldLink HK had paid C$850,000 into Court to secure the release of its vessel.

Owners argued that World Link HK was the directing mind and alter ego of WorldLink Beijing and at all times material had made use of WorldLink Beijing as a mere façade concealing the true facts and undertook a campaign to defraud Owners. Inter alia, (a) there was no company registered in Beijing with the name of WorldLink Beijing; (b) World Link HK operated WorldLink Beijing from its office in Beijing using the same telephone and fax numbers as was admitted by Solicitors for the former; (c) a Mr Wen Jianming controlled both World Link HK and WorldLink Beijing from Beijing; (d) World Link HK had previously paid hire due from WorldLink Beijing; (e) in or about June and September 2003 the Beijing office of World Link HK had responded to inquiries made to WorldLink Beijing as represented by a Ms Gu and World Link HK had responded by paying an arbitration award against WorldLink Beijing; (f) World Link HK, although a registered Hong Kong company, chartered vessels on the basis that it is "of Beijing" or a Beijing company with all contact details being the same as WorldLink Beijing.

Resources applied for a stay of proceedings pursuant to the Commercial Arbitration Act 1985 and submitted that the matter of its liability (if any) should be remitted to the Arbitrator; a judge in Chambers dismissed that application on the basis that the present proceedings were enforcement proceedings and did not fall under the Arbitrator's jurisdiction. Resources appealed to the Court of Appeal where Esson JA delivered the sole judgment with which Saunders (Mrs) and Oppal JJA agreed.

Esson JA agreed with Resources' contention that Owners' allegations fell squarely within the scope of the arbitration because the real issue was whether WorldLink HK was actually the "WorldLink Beijing". This aspect of the dispute was, in the words of clause 17 of the charterparty, one "arising out of or in connection with this Charter Party." He noted that Owners had sought to meet that submission by contending that the Arbitrator, having delivered a "final award", had no remaining jurisdiction in the matter. Esson JA held that that was a question which could only be determined by the Arbitrator by the application of English law.

After summarising BC authority, Esson JA cited Mr Justice Campbell in *Boart Sweden AB v NYA Stromnes AB* ((1988) 41 BLR 295 (Ont.HC) at 302-303, a passage cited with approval in the leading BC authority in respect of Art.8(1), the decision of the Court of Appeal in *Prince George (City) v. McElhanney Engineering Services Ltd* (1995) 9 BCLR

(3d)368(CA)): "Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract..." and, later, "To deal with all these matters in [the Canadian Courts] instead of deferring to the arbitral process in respect of part of the action, and temporarily staying the other parts of the action, would violate that strong public policy. It would also fail to give effect to the change in the law of international arbitration which, with the advent of Art.8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration. I conclude that nothing in the nullity provisions of Art.8 prevents this Court from giving effect to the clear policy of deference set out in the article. To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators."

Esson JA also noted the curious anomaly in the facts of this case in that Owners, although party to the charterparty, contended that the dispute did not arise out of it, whereas Resources, which contended that it was not party thereto, contended that the dispute arose under it. The dispute was, however, as to whether Resources, although not named in the charterparty, was nevertheless the charterer: that was clearly a dispute under the charterparty.

Esson JA cited with approval a passage in a judgment of Gross J in the English case *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm.)

> "[Ss.100ff of the 1996 Act] provide for the recognition and enforcement of New York Convention Awards. There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss.102-103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that Issue (I) falls to be considered.

Concluding, Esson JA allowed the appeal and granted Resources the relief it sought save that he fixed 60 days as the time for taking steps in England and, rather than providing for the C$850,000 in the BC court to be paid out at the expiration of that period should no steps be taken, ordered that World Link HK would then be at liberty to apply to the BC Supreme Court for payment out of the security.

Comment

A robust restatement of BC public policy, this is in stark contrast to those other jurisdictions where courts show an inclination to interfere in the arbitral process; however, this case is not the usual one of "hands off the arbitrator" but almost the opposite in returning the VHP to him.

However, Art.8(1) is evidently directed at the outset of proceedings, not post-Award, and it requires something of a leap of interpretation of public policy to apply it in the latter circumstances, a leap for which, I submit, the BC Courts are to be commended.

Further, the Art.8(1) 'nullity' principle ("the agreement is null and void, inoperative or incapable of being performed" was given the narrowest of public policy treatments which, again, must be correct. There is no appeal in BC against the Arbitrator's decision as to whether or not Resources was party to the C/P but there is in England under s.69.

It would be inappropriate for me to second-guess how the Arbitrator will address the issues remitted to him, particularly the question of whether, post-Award, he is functus officio and, if not, on what basis he can reopen the arbitration. While the 60 days granted by the BC Court of Appeal runs out on or around 7th June 2005, the Award was issued in August 2001 so is prima facie long time-expired in the contexts of ss.57 and 70(2) and (3).

The "disappearing counterparty" trick is not uncommon in doing business with Russia and neighbouring states, with the added twist of confusion through different transcriptions from the Cyrillic alphabet i.e. is 'Atlantiya …' the same company as 'Atlantya …' etc or in confusion between ZAOs (closed joint stock companies broadly equivalent to Ltd/Pte/Pty) and OAOs (open JSCs, equivalent to PLC) with the same name.

Finally, Owners' Solicitors are to be commended for remarkable diligence in tracking down the mystery Mr Wen Jianming and establishing what looks, prima facie, like a strong case against Resources.

Finally finally – I offer my very best wishes to the distinguished Arbitrator !!

21st May 2005

Negative Injunctions in English Law

The question of what is or is not covered by s.44 of the Arbitration Act 1996 is presently before the Court of Appeal in *Cetelem v Roust* with judgment expected shortly; to recap, in the High Court, Cooke J granted C a mandatory injunction ordering R to lodge certain documents with C's Moscow lawyers, on the basis (simplifying) that (i) following an earlier decision in *Hiscox v Dickson*, s.44(3) was permissive and non-exhaustive and (ii) disputes between C and R were covered by a London arbitration agreement even though no arbitration had commenced.

A different aspect of injunctions arose recently in *Lady Navigation Inc v Lauritzencool AB & Anr* [2005] EWCA Civ 576 (17th May 2005) where Mance LJ in the Court of Appeal thoroughly reviewed English authority, from *Lumley v Wagner* ((1852) 1 DeGM&G 604 – a fond memory from student days !) to the House of Lords decision in *The Scaptrade* ([1983] 2 AC 694).

The present issue concerns the making by Cooke J of orders which, so Owners contended as a matter of historical legal principle, the Court could not make. The reason for this was that such orders were said to be "pregnant with an affirmative obligation" (Lord Diplock's phrase in *The Scaptrade*) to perform the charter-party which was tantamount to specific performance and it was trite law that specific performance of a charter-party is not an available remedy.

Lauritzen operated a fleet of vessels on a pool basis, some in its ownership, some not; owners of the respective vessels earned hire based on a complex sharing formula which, in essence, distributed the hire revenues to owners less a management charge and a profit percentage. Two vessels owned by the appellant Owners were chartered to Lauritzen on this basis until 2010 but, on a change in control of the appellant company, the new controlling interests wished to withdraw the vessels. That dispute (involving several facets including an alleged breach of EU competition law) was referred to arbitration and Lauritzen had sought and obtained an injunction preventing Owners from employing their vessels in any way inconsistent with the time charters, pending resolution of the matter in arbitration.

Owners argued that Cooke J's orders effectively obliged them to perform the time charters and that these orders should not, following *The Scaptrade*, have been granted.

Reviewing the authorities very comprehensively, Mance LJ rejected Owners' argument that there was a general rule derived from *The Scaptrade* that injunctive relief was not available in any contract for services if the practical effect would be to compel performance. Further, he dismissed Owners reliance on *Warren v Mendy* [1989] 1 WLR853: "Even if one is considering a contract for services far more easily described as personal in nature than the present, there is no inflexible principle precluding negative injunctive relief which prevents activity outside the contract contrary to its terms." He also rejected another argument by Owners: "Further, I am unable for my part to see why the general differences between time and voyage charters … should be regarded as so fundamental as to merit an entirely different approach to the grant of negative injunctive relief"

Mance LJ concluded:

> "In conclusion, neither the fact that the contracts involved were for services in the form of a time charter nor the existence under such contracts of a fiduciary relationship of mutual trust and confidence represents in law any necessary or general objection in principle to the grant of injunctive relief precluding the appellants from employing their vessels outside the pool pending the outcome of the current arbitration. Nor does it afford any such objection to the grant of such relief that the only realistic commercial course which it left to the appellants was, as I am prepared to assume, to do what they have done, namely to continue to provide the vessels to the pool and to perform the charters. …"

Mance LJ's masterly judgment, substantially upholding Cooke J at first instance, makes vital reading; I have sought to capture only some of the main points raised therein.

27th May 2005

Cetelem v Roust in the Court of Appeal

On 23rd February I circulated a comment on the decision of Beatson J in *Cetelem SA v Roust Holdings Ltd* ([2004] EWHC 3175 QB; 29th December 2004). That decision was appealed and the Court of Appeal has now published its judgment ([2005] EWCA 618 Civ; 24th May 2005).

Summary of the Facts

On 23rd December 2004 C applied for and was granted an injunction without notice, the injunction prohibiting RHL from dealing with any of the specified assets, in particular its direct shareholding in RTL and RCL and its direct shareholdings in Z and RSC, both Russian companies, and Russian Standard Bank, a Russian commercial bank. C had contracted to purchase shares in RCL from RHL in order to create a 50/50 shareholding C/RHL. The share transfer agreement C/RHL contained an arbitration agreement, for ICC arbitration in London under English law and in English. The reason for the urgency was that certain documentation concerning RSB had to be submitted to the Central Bank of Russia, before 31st December, for approval; securing such approval was the principal Condition Precedent to the completion of the share purchase. C had sought a mandatory injunction obliging RHL to deliver the documentation to C's Moscow lawyers. It had argued that ss.44(3) and (5) applied and that the decision of Cooke J in

Hiscox Underwriting Ltd v Dickson ([2004] EWHC 479) showed that s.44(3) was permissive and not exhaustive of the court's powers, and that an interim injunction prior to the appointment of an arbitrator was permissible in an urgent situation where the injunction would be supportive of the arbitral process.

Beatson J had concluded inter alia that the decision in *Hiscox* showed that the court did have jurisdiction; in particular, s.44(3) refers to a *proposed party* to arbitration proceedings and he had agreed with Cooke J that the language of s.44(3) was permissive. In particular, s.44 (3) did not distinguish between cases involving a party to an arbitration and a proposed party.

Court of Appeal

In brief, the Court granted Roust leave to appeal against Beatson J's orders but dismissed the appeal. Clarke LJ, delivering the only judgment, concluded that:

(i) a decision of a judge which the court had no jurisdiction to make was not a decision "under the section" within the meaning of s.44(7);

(ii) on the true construction of s.44(3), if the case was one of urgency the court had jurisdiction only to make such orders as it thought necessary for the purpose of "*preserving evidence or assets*" [the narrower basis];

(iii) Beatson J [and Cooke J in *Hiscox v Dickson*] had purported to make an order under s.44(3) on 'the wider basis' and had therefore had no jurisdiction to make it on that basis;

(iv) the judge had, however, had jurisdiction to make the order under s.44(3) if he had thought that it was necessary to have done so for the purpose of preserving assets;

(v) the judge would have concluded that the order was necessary for preserving assets, namely Cetelem's rights under the SPA, and would have made the same order on the narrower basis if he had been asked to do so; and

(vi) in all the circumstances Roust should be granted leave to appeal but the appeal dismissed.

Comments

Clarke LJ considered in great detail the very interesting submissions on the 'wider/narrower' issue and I refer you to his judgment for the fascinating analysis. He found the arguments for and against the narrower and wider interpretations of s.44(3) finely balanced but decided in favour of 'narrower', not on analytical grounds or on any analysis of the statute or of case law but, instead, after consideration of and in reliance on the DAC Report §214-216; in my view, this judgment represents a powerful endorsement of that Report, not merely as an aid to analysis but as the decisive tool in such a finely-balanced case. The Report has been relied upon in several previous cases but never before with such judicial weight attached to it.

While the main thrust of Clarke LJ's judgment was consideration of the 'wider/narrower' issue concerning s.44(3), first raised by Cooke J in *Hiscox v Dickson* and followed by Beatson J, and despite going 'narrow', he did confirm both that "assets" was a very wide term. including choses in action and contractual rights and that 'assets' were not limited to Respondent's assets, so that the actual orders made by Beatson J against Roust were still good.

The issue in the first instance decision which I thought of most interest was that Beatson J had acted in advance of the commencement of arbitration; an OGEMID debate showed no other country which had done this notwithstanding Art.9 of the Model Law which states " It is not incompatible with an arbitration agreement for a party to request, ***before*** or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." This aspect of Beatson J's decision was not disturbed.

Clarke LJ also addressed the issue of the balance to be struck between (i) the making of a court order under s.44(3) and (ii) that such orders should not normally usurp the arbitrator's role or jurisdiction by being determinative of an issue (as both Cooke J and Beatson J had recognised); following Clarke LJ, "not normally" remains a continuing presumption but this is no stronger than a presumption and does not represent an absolute limitation on the Court.

Finally, Clarke LJ has clarified that the Court's power was to grant an *interim* mandatory injunction but this did not extend to granting final injunctions.

2nd June 2005

Is a Project Manager Obliged to be Impartial as Between Employer & Contractor

As previously indicated, there is a risk that my series of occasional notes on interesting cases has to be renamed the "Jackson Newsletter"; yes, Mr Justice Jackson has been "at it" again, this time in Costain & Ors v Bechtel & Anr ([2005] EWHC 1018 TCC) where two important issues of principle arose.

This highly-interesting case related to the Channel Tunnel High-Speed Rail Link Project (the CTRLP). The parties were (i) the Employer, Union Rails (North) Ltd (URN), (ii) the Project Manager, Rail Link Engineering (RLE), a 4-company consortium including Bechtel, Ove Arup, Halcrow and Systra and (iii) the main contractor, CORBER, a 4-company consortium of Costain, O'Rourke, Bachy Soletanche, and Emcor Drake and Scull. A key player in this fascinating story

was Mr Fady Bassily, the rail operations manager for Bechtel and Executive Chairman of RLE. It is also relevant that Bechtel had a direct financial interest in URN.

URN had contracted CORBER to provide civil engineering and construction works for the extension and refurbishment of St Pancras Station, part of the CTRLP. The contract was bespoke and provided, inter alia, for reimbursement of CORBER's costs at cost, less any disallowed costs, together with a fee and a gain/loss sharing mechanism; it also provided that RLE, as Project Manager, would assess the amount due to CORBER in the familiar way and also provided a 3-tier dispute resolution system with negotiations, adjudication and, ultimately, arbitration.

On 15th April 2005 Mr Bassily called a meeting of senior Bechtel staff employed on the CTRLP; in part, his presentation was evidently a pep talk with particular focus on the assessment of contractor costs, including those of CORBER. Seen from one perspective, the presentation was entirely normal for a project manager in stressing to his staff the importance of controlling costs (my own reading was "heard it all before"); seen from another perspective, it was an exhortation to Bechtel's staff (i) to operate the cost assessment functions of the project manager otherwise than impartially and in good faith and (ii) to breach the URN/CORBER contract. Solicitors for CORBER wrote letters before action both to Bechtel and Mr Bassily threatening proceedings unless certain undertakings were given regarding desisting from acting otherwise than impartially and in good faith. Mr Bassily replied on his own and on Bechtel's behalf denying any allegations of improper conduct or bad faith but refraining from giving any of the undertakings sought.

CORBER alleged that Bechtel and Mr Bassily had unlawfully procured breaches of contract by URN and applied for injunctions against both Bechtel and Bassily. In support of its application for these injunctions, CORBER exhibited witness statements made by its senior personnel, none of whom had been in attendance at the meeting on 15th April.

The key issues arising included:

(i) when assessing sums payable to CORBER under the contract, was it RLE's duty to act impartially as between Employer and Contractor or merely to act only in the interests of the Employer ?

(ii) was this an appropriate case in which to grant an interim injunction ?

A substantial proportion of the hearing time before Jackson J was devoted to the merits of CORBER case because a key argument on behalf of RLE and Bechtel was that that case failed to pass the threshold test set by the House of Lords in *American Cyanamid Co v Ethicon* (1975) AC 396 at 409D.

In applying for the injunctions, CORBER's evidence was hearsay evidence set out in its personnel's witness statements but the Judge had before him witness statements from six attendees at the meeting including Mr Bassily. The witnesses were not cross-examined and, as Jackson J stressed, he was not conducting the trial of the action but he summarised the evidence relating to the 15th April meeting as describing a forceful project manager reviewing the status of the project for his senior staff. CORBER had failed to satisfy the threshold test in *American Cyanamid* in this regard.

Jackson J then turned to consider the more significant issue as to what RLE's duty was when assessing sums payable to CORBER under the contract i.e. whether it had to act impartially as between Employer and Contractor or had only to act in the interests of the Employer. As Jackson J noted, this issue has significance extending far beyond the present case. The starting point was the House of Lords decision in *Sutcliffe v Thackrah* (1974) AC at 727 where the House of Lords held that an architect, in issuing interim certificates under a standard-form building contract, was not immune from liability in negligence to his Employer; inter alia, the House of Lords had considered the role and duties of an architect in such circumstances and had made it clear that the architect had to act fairly and impartially as between Employer and Contractor. The principles in *Sutcliffe v Thackrah* have been fundamental to construction management, and accepted by the industry, for more than 30 years and were not in dispute in the present case.

However, Counsel for Bechtel submitted that the CORBER/URN contract could be distinguished from conventional standard-form contracts (so that *Sutcliffe v Thackrah* did not apply) for four reasons:

(i) The applicable terms of the present contract were very detailed and very specific and did not confer upon the project manager a broad discretion similar to that given to certifiers by conventional construction contracts; therefore there was no need, and indeed no room, for an implied term of impartiality in the present contract.

(ii) The decisions made by the project manager were not determinative. If the contractor was dissatisfied with those decisions, he had recourse to the contractual dispute resolution procedures, the existence of which had the effect of excluding any implied term that the project manager would act impartially.

(iii) The project manager under this contract was not analogous to an architect or other certifier under conventional contracts but had specifically been employed to act in the interests of the Employer, as in . *Royal Brompton Hospital NHS Trust v Hammond (No. 8)* ([2002] EWHC 2037 (TCC); 88 Con LR 1) where HHJ Humphrey Lloyd QC had described the project manager as "co-ordinator and guardian of the client's interest".

(iv) The provisions of clauses Z.10 and Z.11 of the contract prevented any implied term arising that the project manager would act impartially.

Jackson J rejected Bechtel's first argument that the present contract differed from standard-form contracts such as to exclude the implied term; he could see no reason why the *Sutcliffe v Thackrah* principles did not apply. Secondly, the contract provided an extensively drafted 3-tier dispute resolution procedure but these provisions contained nothing militating against the existence of a *Sutcliffe v Thackrah* duty upon the project manager irrespective that the latter's decisions were open to subsequent review in adjudication or arbitration; there was no difference in principle between the dispute resolution procedures in the present contract and those of standard-form contracts. Thirdly, although under certain parts of the contract the project manager was clearly required to act solely in the interest of the Employer (e.g. in deciding which of two alternative quotations to accept), there was nothing in the contract detracting from the normal duty which any certifier had when holding the balance between Employer and Contractor; the role of project manager in the *Royal Brompton* case was far removed from that of RLE in the present one. Finally, Jackson J concluded that clauses Z.10 and Z.11 (inter alia, excluding terms implied by custom) had no impact on the present issue since the implied obligation on a certifier was a matter of law not of custom.

Jackson J was unable to give any final decision on the issue of whether or not RLE was obliged to act impartially as between Employer and Contractor despite the fact that this had been fully argued on both sides by leading counsel. The present case was an application for an interim injunction, not the trial itself, and Jackson J had only to decide whether CORBER could pass the threshold test in *American Cyanamid*; in any event, URN was not a party to the present proceedings and, as the counterparty to the contract, would have to be permitted to make submissions on this issue. However, Jackson J concluded that CORBER had clearly made out an arguable case that Bechtel and Mr Bassily were under a misapprehension as to RLE's legal duty; it was, at the very least, properly arguable that when assessing sums payable to CORBER, RLE's duty was to act impartially as between Employer and Contractor. This met the *American Cyanamid* test.

Was this case an appropriate one in which to grant an interim injunction ? Bechtel's principal submissions could be summarised as (i) there was no need for any injunction - if RLE made incorrect assessments, there were contractual remedies; (ii) if CORBER had any claim against the defendants for procuring a breach of contract, damages were an adequate remedy; (3) the proposed injunctions would require continual supervision by the courts and would unfairly affect third parties.

Jackson J accepted these arguments: it would be a wrong exercise of the court's discretion, particularly at an interim stage, to use the machinery of an injunction to correct any shortcomings in the certification process; secondly, if CORBER did indeed succeed in its claim, damages would be an adequate remedy; third, the sought-for injunctions would indeed be difficult for the court to supervise particularly given the involvement of several 3rd parties.

Summary

CORBER had satisfied the threshold test in *American Cyanamid,* having shown that there were serious issues to be tried in their claims against Bechtel but, considering the balance of convenience, it had failed to show that this was a proper case for the grant of an interim injunction.

Having decided the principal issues before him, Jackson J made two observations:

(i) the phrase "in good faith" had been used in various circumstances, sometimes as a synonym for "impartially" sometimes as a synonym for "honestly"; he saw no reason to engage in a semantic debate about the precise meaning of the phrase "in good faith" in the context of certification;

(ii) Bechtel and CORBER clearly disagreed about an important question of law but, in the context of the present application, it was not permissible for the court to give a definitive answer; the importance of the issue had been acknowledged by all sides but, if they wanted a definitive answer to it, either from an arbitrator or from the court, it would be better to raise the matter in proceedings to which URN was party.

Comment

Common sense (again !) – in my time building North Sea oil platforms, meetings such as that on 15th April were the norm ("go stuff the contractor") (and the contractors held similar meetings – "go shaft the client") and if, as was alleged, Mr Bassily's language was strongly critical of the contractors, am I surprised ? Not remotely. I am entirely onside Jackson J in refusing the interim injunctions and would only comment if that Mr Bassily's speech had gone close to the boundaries of acceptability, the present proceedings would have achieved for CORBER at least as much as an injunction would have done.

However, the key issue is the applicability of the *Sutcliffe v Thackrah* principle in bespoke contracts: now it may be possible to draft a contract expressly or by clear implication to exclude application of that principle (it seems that this had been achieved in Royal Brompton), it must be correct that that principle stands unless expressly contracted out of. The role of certifiers is fundamental to the construction industry that certainty must be retained.

6th June 2005

The Good News and the Bad News

The good news is that yet another challenge to an arbitral award has been dismissed by the court; the bad news, in this case for the claimant challenging the Award, is that the redoubtable Mr Justice Jackson, having sorted out adjudication, the TCC and the construction industry in rapid order, has now turned his attention to arbitration.

The case *Claire & Co Ltd v Thames Water Utilities Ltd* ([2005] EWHC 1022 TCC) concerned the expansion of an existing London SE8-based estate agency business into premises in SE6 in September 1997 under a 15-year lease executed in July 1997. In September 1997, TW commenced extensive tunnelling works (in relation to new sewers) just outside C's office and the disruption and disturbance, lasting 10 months, caused by these works made it impossible for C's new office to function. Clients were deterred from visiting the office, staff conditions became intolerable and the business failed, C's lease being forfeited for non-payment of rent. As a matter of statute (Sch.12 Water Industry Act 1991) TW was liable to pay compensation and duly admitted liability but the parties could not agree quantum. Pursuant to §1(3) of Sch. 12, the dispute was referred to arbitration and Mr Arthur Harverd, a chartered accountant of immense experience and a Chartered Arbitrator of great distinction was appointed arbitrator. He published his award on 28th October 2004, and corrected it on 23rd November 2004 pursuant to s.57. In the judgment and in this note "the Award " refers to the corrected award.

The Arbitrator assessed compensation payable to C as £108,000 representing loss of profits of £78,390 and loss of the business £29,453. The issue in the present case was the computation of loss of profits which in turn derived from estimating the volume of likely sales from the office, the profit margin on commission income and other accounting details. C felt that the award for loss of profits was inadequate and therefore claimed:

(1) an order declaring the Award to be of no effect, in part because the Arbitrator did not have substantive jurisdiction (s.67(1)(b)), and that the award be varied (s.67(3)(b));

(2) an order that the Award be remitted to the Arbitrator in part for reconsideration (s.68(3)(a))

The basis of C's first claim was that (a) TW's expert accountant had conceded in cross-examination a matter concerning the basis of quantification of turnover and profit margins (b) therefore there had been an agreement between the parties as to that basis; (c) therefore the Arbitrator had not had jurisdiction to have applied a different basis of quantification. C's second argument was that the Arbitrator had both made a serious error in failing to act on the evidence given by TW's Expert in cross-examination and had derived his figure for profit margin from the evidence given by TW's other Expert, a Chartered Surveyor/Estate Agent, thereby applying the wrong margin %age to the wrong turnover figure. The Arbitrator's conduct in this regard was, so C alleged, a breach of his duty under s.33 of and therefore a serious irregularity pursuant to s.68(2)(a).

In addition, C (by now represented by its principal, a Miss J, not by Solicitors) sought to amend its claim form to include alleged irregularities under s.68(2)(e) and (g) and an appeal under s.69

Jackson J dealt (unsurprisingly, to regular readers of "Jackson News") trenchantly with these grounds of claim.

(1) There was no evidence that TW's accounting Expert had made the concessions alleged, no note or transcript of his evidence having been produced, and TW's evidence indicated that he had not made any clear concession in cross-examination. However, even if he had made one, it would not have deprived the Arbitrator of any jurisdiction and determination of the appropriate profit margin would still have remained in issue for him in the reference. There had never been any agreement between the parties that this particular issue should be taken out of his hands and resolved by agreement. During the course of the hearing no arguments had been raised by either party concerning the scope of the Arbitrator's jurisdiction and his Award had not dealt with any jurisdictional challenge or issue. C's s.67 challenge was, therefore, misconceived and consequently failed.

(2) The essence of C's second argument was that, on the evidence, the Arbitrator ought not to have applied the profit margin he had, this allegedly being an error so egregious as to constitute a breach of s.33 of the 1996 Act. This argument failed for three reasons:

    (i) On the material before the Judge the evidence did not have the power C alleged; no transcript or note of either of TW's Experts' evidence had been produced; C's former Solicitors had admitted that the evidence on this issue had not been fully ventilated.

    (ii) The weight to be attached to each piece of evidence was entirely a matter for the Arbitrator (s.34) and he had been entitled to draw, and had drawn, upon his own expert knowledge and experience when assessing matters such as the appropriate profit margin. The Judge could see no possible basis for criticising the Arbitrator's decision regarding thereon.

    (iii) Even if the Judge was wrong in his conclusions so far, C's challenge must still fail since, even if the Arbitrator had fallen into error in his assessment of the evidence relating to profit margin, that error would be neither a breach of s.33 nor a s.68 irregularity. ***The Court would not permit parties to use ss.33 and 68 as devices to mount appeals against arbitrators' decision on questions of fact***.

Accordingly, C failed on both of the grounds set out in its original claim form.

C's application to amend was on four grounds: (i) [68(2)(e)] C alleged that the Award had been produced "to satisfy other vested parties" and was "not in the interests of the claimant"; (ii) [68(2)(g)] C criticised TW's two Experts and also

alleged that it was not given a voice at the arbitration; (iii) C argued that the Award was void because the Arbitrator did not have substantive jurisdiction, e.g. because the arbitration imposed an intolerable burden on C (effectively an arbitrant-in-person) and because, so C alleged, it had already proved its case on the balance of probabilities; (iv) [s.69] C asserted that two letters mentioned in the Award had not been discussed at the arbitration.

Jackson J held that each of these proposed new grounds of claim was not only unsubstantiated but incapable of being substantiated. First, the allegations made against the Arbitrator had been vigorously denied by him in an affidavit. Second. he saw no possible justification or support for the very serious criticisms which C had made in the draft amended claim form either of the Arbitrator or of the Experts (and others). The proposed new heads of claim had no prospect of success; in such circumstances, it was not right for the Court to extend time under s.80(5), nor was it right for this Court to allow the claim form to be amended out of time, in order to raise those new heads of claim (see Colman J in *AOOT Kalmneft v Glencore International AG [2002] 1* Lloyds Law Reports 128 at §73-74. It therefore followed that the applications to extend time and to amend the claim form must be dismissed.; in fact all the various applications made by Miss J o.k. C must be dismissed.

Although Jackson J (as did the arbitrator) felt considerable sympathy for C's plight caused by TW's tunnelling works, nevertheless, the Court had deal to with the challenges which were sought to be made to the Award pursuant to the terms of the Act. He concluded that "It seems to me that the arbitrator produced a very thorough and careful award. He took note of all the points made in the claimant's favour. Indeed, it seems to me that he expressed sympathy for the claimant's circumstances and he awarded such compensation as he properly could on the evidence which was before him. In those circumstances, the various challenges to the arbitrator's decision which the claimant brings, or seeks to bring, under the 1996 Act fail and the claimant's claim is dismissed."

Comment

Cases involving arbitrants-in-person more usually involve procedural difficulties in trying to accommodate and circumvent the potential substantial imbalance of power between the parties while not tripping up over s.33(1)(a) or (b) or otherwise. This decision suggests that there are real limitations on how far an arbitrator should travel in this regard, Jackson J trenchantly dismissing C's various s.68 claims.

So far as the ss.67/68/69 claims are concerned, while they look wholly futile and were properly dismissed in short order by Jackson J, they were substantially the product of an arbitrant-in-person. However, similar claims have emanated from sophisticated commercial entities in recent years and dismissed equally robustly. S.68 remains set at a very high threshold.

Note also that the Award's reference to, and part-reliance on, documentation allegedly not discussed at the arbitration, is not of itself an error of law under s.69; I have been s.69-challenged on precisely the same basis, i.e. where a significant document was in the bundle and was visible to both sides but was never formally cited in the Hearing or in submissions. I remain unpersuaded that the Arbitrator is necessarily limited only to those documents expressly cited to him or that he has to identify every such document from the bundle upon which he proposes to refer.

Jackson J also refers (without comment) to the Arbitrator's "drawing on his own expert knowledge and experience" which might have raised a frisson of interest for *Fox v Wellfair* fans – following the Court of Appeal decision in *Checkpoint v Strathclyde*, it is, I submit, entirely correct that such "drawing" does indeed pass without comment; as in *Checkpoint*, the Arbitrator was chosen for his very particular expertise and can use it (with some remaining caveats).

Finally, by way of postscript (since it was not in issue in the present proceedings), it is curious that the lease on the premises was executed in July 1997 and the works which destroyed the new business started only two months later; I wonder whether C was professionally advised i.r.o. the lease and, if so, whether that adviser should have discovered TW's intentions to engage in works on such a scale (presumably the 1991 Act obliged TW to give notice) that it destroyed the new business.

Subsequent note issued on 13th July 2005

On 6th June 2005 I circulated a note on *Claire & Co Ltd v Thames Water Utilities Ltd* ([2005] EWHC 1022 TCC) concerning the failure of an estate agency business consequent on the massive disruption caused by tunnelling works by TW in relation to new sewers just outside C's office. TW was liable in statute (Sch.12 Water Industry Act 1991) and duly admitted liability but the parties could not agree quantum so, pursuant to §1(3) of Sch. 12, the quantum dispute was referred to arbitration and the highly-distinguished Mr Arthur Harverd, of Carter Backer Winter (Chartered Accountants) was appointed arbitrator. C challenged his award (as litigant-in-person) under ss.68 and 69 and lost comprehensively. In my earlier note I stated inter alia:

> "Note also that the Award's reference to, and part-reliance on, documentation allegedly not discussed at the arbitration, is not of itself an error of law under s.69; I have been s.69-challenged on precisely the same basis, i.e. where a significant document was in the bundle and was visible to both sides but was never formally cited in the Hearing or in submissions. I remain unpersuaded that the Arbitrator is necessarily limited only to those documents expressly cited to him or that he has to identify every such document from the bundle upon which he proposes to refer."

Arthur Harverd has very kindly made the following comments which I am very pleased to circulate with his permission.

"Last month you published a summary of the case *Claire & Co Ltd v Thames Water Utilities Ltd* [2005] EWHC 1022TCC. In your interesting comments on the case at the end of the summary you made some observations on the reliance or otherwise of an arbitrator on documentation in the bundle that was not formally cited in the hearing or in submissions. You said that you remain unpersuaded that the arbitrator is necessarily limited only to those documents expressly cited to him or that he has to identify every such document from the bundle upon which he proposes to refer.

About 3 years ago I had this situation in an arbitration dealing with a loss of profits claim and it may be helpful to share the experience.

Sound accounting evidence was given on both sides, but in reviewing their arguments when preparing the Award, as an accountant/arbitrator I was not satisfied that the experts had fully identified all of the essential financial issues that needed consideration in determining the quantum.

Midway through the 5 day hearing a large number of new financial, sales and production documents were disclosed. They were added to the bundle, but no further reference was made to them during the remainder of the hearing or in Counsel's subsequent closing written submissions.

In pondering the decision that I had to make I examined this new material and could see that it provided the missing information that was necessary to make a determination which would be based on solid and irrefutable facts.

I was concerned about using the new documents because the parties had not addressed me on the critical information contained therein, even though the material was made available to them midway through the hearing.

I decided that the appropriate way to deal with the problem was to prepare the award in draft form and issue the draft to the parties for their comment, drawing to their attention the use that had been made of the new documents which had been added to the bundle. The parties were invited to address me in any form they wished, eg new expert opinions, written legal submissions, etc after which I would then finalise the award.

To my surprise one of the parties considered that the procedure I proposed was irregular and a challenge was lodged in the High Court. The challenge was dismissed on the grounds that the parties were given ample opportunity to deal with the new material used in the draft award.

This case leads me to make three general points:

1. This was a quantum only arbitration, liability having been accepted. It is sometimes helpful to issue a quantum award to the parties in draft form as it helps to ensure that the arbitrator has correctly captured what is often complicated and voluminous financial detail.
2. Examining documents in the bundle that were not cited by the parties during the hearing often yields points of interest that are helpful to the determination. They fall into two categories:-
   (a) the documents are crucial to the determination. Here, the arbitrator should invite the parties to address him on the documents before completing the award so that they are not taken by surprise.
   (b) the documents merely add further support to a point already taken. I do not think that it is necessary in these cases to invite the parties to make further submissions.
3. Having acted as an expert accountant in numerous litigation and arbitration cases over the years, I was surprised in the case I refer to above, that the parties were not willing to examine the new documents even though the hearing had two and a bit days to run. Most Counsel that I have had the pleasure of working with routinely hold conferences with their experts at the end of every day's hearing to go over the evidence adduced during that day, including the disclosure of new documents, and the experts then prepare briefing papers overnight to assist the presentation of the case next day."

Thank you to Arthur for these sage observations

13th June 2005

Who Goes First – Claimant A or Claimant B ?

You might consider that, in litigation or arbitration, it is obvious which party is the claimant and which the respondent and there is no argument thereto; in the great majority of cases this is undoubtedly so but, perhaps only occasionally, the position is rather less clear. Such a case arose recently in *ATOS Consulting Ltd versus AVIS Europe plc* ([2005] EWHC 982 (TCC)) heard, perhaps almost inevitably, before the redoubtable Mr Justice Jackson who was, entirely unsurprisingly, in his usual robust and practical "get to the point" form.

ATOS, an IT services provider, had contracted to provide AVIS with certain services in connection with the upgrade of the latter's financial systems and processes. Problems arose during the life of the contract but these were not directly the subject of the present proceedings: however, both parties took the view that the other was at fault and both parties asserted and purported to accept repudiatory breach by the other. Other than that AVIS claimed approximately £30m

and ATOS £10 million, the claim and counter-claim broadly mirrored each other and either party could have "got in first" with the claim form - in fact, ATOS did. However, AVIS took the view that it was the natural claimant in these proceedings and that ATOS' particulars of claim were unsatisfactory in a number of respects, and would consequently obstruct the just disposal of the proceedings. Accordingly, in order to bring these contentions before the court, AVIS issued an application (i) to strike out ATOS' particulars of claim and (ii) that it be allowed to bring its own claim. Its logic was, simplifying, that it would prepare a much better claim than that lodged by ATOS and the that the latter would be able fully to respond to AVIS' claim as well as make its own counter-claim but as respondent. AVIS relied on CPR 3.4(2)(b) "The Court may strike out a statement of case if it appears to the court that... (b) that the statement of case is an abuse of the court's process [not in issue] or is otherwise *likely to obstruct* the just disposal of the proceedings;".

Jackson J saw force in AVIS' assertion that it might have been better if it had claimed and ATOS had responded - if the parties had appeared before him in advance and had asked his opinion, that is what it would have been. However, that was not the issue before him: the issue was should ATOS' claim be struck out ? It should be stressed that AVIS' strike-out application was not made with a view to bringing proceedings to an end, rather to promote the orderly exchange of pleadings and the orderly management of the litigation. However, AVIS conceded that it would be able to do justice to its case in response to ATOS' pleadings, even if the latter were imperfect. Relying on that concession, ATOS submitted that it could not be said that the second leg of CPR 3.4(2)(b) was satisfied: in any event, the word "obstruct" did not mean 'absolutely prevent' but did mean 'impede to a high extent'.

Jackson J agreed: a court will not strike out a statement of case merely because either (i) that statement of case would generate some untidiness in the pleadings or (ii) merely because one will end up with a bundle of pleadings, some parts of which are redundant. A court will only strike out a statement of case pursuant to the second limb of CPR 3.4(2)(b) if it was such as to prevent the just disposal of the proceedings or, alternatively, such as to create a substantial obstruction to the just disposal of the proceedings. If there was an untidy bundle of pleadings or statements of case, counsel and the judge would rapidly become familiar with which parts of those pleadings were redundant and which parts relevant - there would be no true obstacle to the just disposal of the proceedings. Further, no authority was cited where the court had struck out a statement of case upon grounds of the kind relied upon by AVIS; it would be wrong in principle for the court to strike out on such grounds. The court must give directions in order to serve the overriding objective as set out in CPR Part 1 but, nevertheless, it was not appropriate for the court to step down into the arena and to tell either party how to plead its case. If there were infelicities in the pleadings or if some parts of the pleadings had to be disregarded because one party's case was re-pleaded in the reply in a different but permissible manner, the court must live with that.

Jackson J concluded that he had no jurisdiction to strike out ATOS' particulars of claim on the basis proposed by AVIS. Alternatively, if he was wrong and if he indeed had jurisdiction, it would be a wrong exercise of the court's power to strike out on the grounds proposed. For all of these reasons, AV IS' application to strike out was dismissed.

Comment

So what, you might well say - this is all CPR and nothing to do with arbitration; correct, but there is some application here for arbitrators faced with the parties sniping at each other on pleading points which, in my experience, often take up an inordinate amount of time to zero practical effect. Jackson J takes the robust attitude that the judge and counsel can work through imperfect pleadings without prejudice to the overall progress of the case. Quite clearly the same applies in arbitration whether or not there is, as in the present instance, an issue as to "who goes first" but also where, as so often happens, pleading points become an issue when they can be taken it in their stride and the proactive (jacksonesque ?) arbitrator can get on with the job always bearing in mind the costs sanction.

Note: in English litigation, it is traditional for the Claimant to have the last word; in Margulead v Exide *([2004] EWHC 1019 Comm*), Colman J held that to structure arbitration proceedings otherwise was not, per se, a breach of s.33.

16th June 2005

The Scottish Arbitration Code

The domestic law of arbitration in Scotland comprises several hundred years of case law, much of it of some antiquity with leading cases from the 18th century still authoritative, one of the leading extra-judicial authorities dated 1726 and recorded cases dating back to at least 1207.

The Arbitration (Scotland) Bill was completed privately in December 2002 and has would appear to have sat ever since in the Department of Justice of the Scottish Executive gathering copious quantities of dust; at a conference in Glasgow in March 2005 the Deputy Minister of Justice trumpeted his Department's commitment to arbitration but failed to explain the giant contradiction between that alleged commitment and the Department's 2½ years of inactivity in getting the Bill on the statute book.

In an effort to drag Scottish arbitration out of the 18th/19th centuries, in 1999 the Scottish Arbitration Code was published, representing a synthesis of existing Scots law (where relevant), recent good practice and jurisprudence from England and elsewhere and, of course the Model Law (which was introduced in 1990 for international arbitration in

Scotland but, so it appears, has never been used, even once. Under the Bill (s.71(3)), the Code is the default (with opt-out) set of rules for domestic arbitration.

The process of introducing the 1999 Code into standard conditions of contract is under way and the ICE Conditions of Contract (Scotland) were amended in 2001 to introduce the Code for any arbitration arising out of an ICE contract. The structure of the ICE (Scotland) Conditions of Contract is the usual sequence of (1) Engineer's Decision, (2) adjudication (3) arbitration; if no Notice of Arbitration is served within three months of an adjudicator's decision on any dispute, it becomes final and binding and not capable of any form of appeal. Of course it has taken time for the introduction of the Code to work through to the front line of construction activity and, so far as I am aware, (but am open to contradiction) the first case on the interpretation of the Code has recently been heard in the Outer House of the Court of Session in the case *Scrabster Harbour Trust v. Mowlem plc t/a Mowlem Marine* and *Mowlem Marine v. Scrabster Harbour Trust* (Opinion of Lord Clarke dated 23rd March 2005).

Mowlem had contracted with SHT to build a new breakwater and associated works as part of a new ferry terminal at Scrabster; disputes arose and were ultimately referred to adjudication. Mowlem was dissatisfied with the Adjudicator's Decision and, well within the three months, lodged a Notice of Arbitration. SHT argued that the Notice was ineffective since it did not comply rigidly with the provisions of the Code e.g. (§1.3(a)) it omitted the full names, addresses and telephone/fax/telex numbers of the parties. Mowlem argued that the Notice contained all the information necessary under the Code and that there was no obligation under the contract for rigid compliance with the Code's notice provisions. Inter alia, Mowlem referred to the draft Notice of Arbitration produced by the ICE which itself did not comply rigidly with Code requirements; further, the contractual language addressed the conduct of the arbitration being in accordance with the Code rather than the process by which the arbitration was initiated being so.

Lord Clarke took, thankfully, a commonsense approach to resolving this, holding that the Notice of Arbitration was sufficient within the context of the parties' contract and the Code; he noted, inter alia, that the Code's requirement to state full contact details in the Notice was otiose given that they had been engaged for some time upon the contract and knew all this information anyway. He also took note of the divergence between the ICE's draft Notice of Arbitration and the Code's requirements. The decision of HHJ Hicks QC in *Christiani & Nielsen Ltd v. Birmingham City Council* 52 Con LR 56 was approved

A triumph for common sense !

22nd June 2005

Postscript

On 16th June I circulated a short note concerning a case in the Court of Session where application of the Scottish Arbitration Code was considered judicially for what appears to be the first time. In my note I referred to "*the Model Law (which was introduced in 1990 for international arbitration in Scotland but, so it appears, has never been used, even once*)". [emphasis added]

It has been drawn to my attention that the Model Law has in fact been applied, albeit infrequently, but none of the few cases have seen the light of day and, so far as I can ascertain, have nowhere been reported or otherwise commented upon.

Furthermore, my attention has also been drawn to an interesting reported case *La Pantofola D'Oro v Blane Leisure Ltd* 2000 SLT105 where a distribution agreement provided that there should be arbitration of disputes in Milan. Pantofola commenced proceedings in Scotland and subsequently sought to have them sisted ("stayed") for arbitration; Model Law Art. 8(1) was never referred to in court proceedings (judgment was given applying principles of waiver) although it applies in Scotland per Model Law Art. 1(2) notwithstanding that the arbitration was to be in Italy. The Judge referred to Pantofola's contractual right to arbitrate but not its statutory right.

8(1) "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any time before the pleadings in the action are finalised, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

17th June 2005

Stays of Execution in Adjudication Enforcement Proceedings

In *Wimbledon Construction Co 2000 Ltd v Vago* [2005] EWHC 1086 [TCC], HHJ Coulson QC reviewed the authorities concerning stays of execution and derived some helpful general principles:

> "In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

(1) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(2) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

(3) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (1) and (2) firmly in mind (see *AWG*).

(4) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell*).

(5) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues* and *Rainford House*).

(6) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or

(ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see *Absolute Rentals*)."

Bouygues v Dahl-Jensen [2000] BLR 522

Absolute Rentals v Glencor [U/R 16th January 2000]

Herschell Engineering v Breen [U/R 28th July 2000]

Rainford House v Cadogan [U/R 13th February 2001]

AWG Construction v Rockingham Motor Speedway [2004] EWHC 888

18th June 2005

Enforcement of Foreign (Domestic) Awards in England

Some interesting enforcement issues were raised in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Company* [2005] EWHC 726 including (i) the enforceability in England of a Nigerian domestic award (ii) whether application to the Nigerian Courts to set aside the Award constituted suspension (s.103(2)(f) refers) (iii) sovereign immunity and (iv) security i.r.o. adjournment

On 29th November 2004 the English Court had ordered, *ex parte*, that NNPC pay IPCO $152m plus Naira 5m plus interest awarded in a Nigerian domestic arbitration. In the present proceedings NNPC applied (i) to set aside that order pursuant to ss.103(2)(f) and 103(3) of the Arbitration Act 1996 and (ii) in the alternative, pursuant to s.103(5) to adjourn enforcement. IPCO applied pursuant to s.103(5) that, in the event of NNPC failing on (i) but succeeding on (ii) above, NNPC should provide security in the sum of US$50 million (or such other sum as the Court thought fit), failing which IPCO be permitted to enforce the award (s,101(2)).

IPCO and NNPC are both Nigerian entities and IPCO had contracted to carry out works for the design and construction for NNPC of the Bonny Export Terminal Project near Port Harcourt; the substantive law of the contract was Nigerian Law and cl.65 provided for arbitration in Lagos under the Nigerian Arbitration and Conciliation Act 1990 (the ACA). Disputes arose and an arbitration took place, an Award being rendered on 28th October 2004. On 15th November 2004, NNPC applied to the Federal High Court in Lagos so set aside the award or stay its execution to which IPCO responded with an notice of objection alleging that NNPC's proceedings were frivolous, vexatious, an abuse of process etc.

Gross J summarised the authorities concerning enforcement in six key principles

4. reflecting NYC58, s.103 of the Act embodied a pro-enforcement disposition; even when a ground for refusing enforcement has been established, the court retains a discretion to enforce the award;

5. s.103(2)(f) applied when there had been an order or decision by the court at the seat suspending the award and it was not triggered automatically merely by a challenge brought before that court; NB - s.103(5) would be otiose, or at least curious, if a mere application to that court automatically resulted in suspension.

6. public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution since the reference thereto in s.103(3) was not intended to furnish an open-ended escape route for refusing

enforcement but, instead, was confined to the public policy of England (as the enforcement country) in maintaining the fair and orderly administration of justice.

7. s.103(5) achieved a compromise between two equally legitimate concerns: (i) enforcement should not be frustrated merely by the making of an application in that country; (ii) pending proceedings in the country of the seat should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions were sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of the seat i.e. that venue chosen by the parties for their arbitration.

8. the Act did not furnish any threshold test in respect of the grant of an adjournment and the power to order the provision of security was in the exercise of the court's discretion under s.103(5) but it would be wrong to read a fetter into this understandably wide discretion (see Art. VI NYC). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of the seat is brought *bona fide* and not simply by way of delaying tactics; (ii) whether the application before that court has at least a realistic prospect of success (the test in England for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice to the award creditor:

9. the NYC contains no nationality condition (unlike the Geneva Convention 1927) and was thus applicable, as here, when an award was made abroad in an arbitration between parties of the same nationality: it would be wrong to introduce a nationality condition into the NYC by the backdoor. However, the fact that the arbitration was domestic must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country.

The Set-Aside Application

NNPC argued on three grounds: (i) the order was defective in that it failed to comply with the requirements of CPR 62.18(10); (ii) the award had been suspended in Nigeria by virtue of the application before the Nigerian courts to set it aside; (iii) the enforcement of the award in England would be contrary to public policy.

Gross J was succinct in dismissing all three as lacking substance: (i) the CPR defects were minor and could be proportionately dealt with by way of costs; (ii) see above – s.103(2)(f) was not engaged; (iii) NNPC relied on a restriction on enforcement against NNPC in the NNPC Act (1977) but this did not engage English public policy and, in any event, to accede to NNPC's argument would be to grant it an immunity not conferred upon it by the State Immunity Act 1978.

Adjournment/Security Applications

Gross J considered the grounds given under the Nigerian ACA for challenge to awards and found that there were prima facie grounds of challenge which stood a realistic chance of success, including an apparent duplication of damages in the sum of $88m. Inter alia. He considered (i) there was no suggestion that NNPC's application to the Nigerian Court was other than *bona fide* or had involved delay; (ii) the application did have a realistic prospect of success even if it faced formidable hurdles, not least in converting criticism of the tribunal into a case of misconduct within s.30 ACA; (iii) in all the circumstances, proper deference must be shown to the pending Nigerian proceedings; (iv) even if NNPC's application in Nigeria was successful, it was common ground that an amount of some US$13m was indisputably due to IPCO and, in addition, even if NNPC succeeded on the duplication point, that would likely leave IPCO with an award >US$50m; (v) given the size of the award, any delay in enforcement was likely to prejudice IPCO and it must be right to seek to minimise any such prejudice, so far as it is practicable and appropriate to do so; (vi) factors affecting the nature and enforceability of security in Nigeria or England.

Gross J concluded by rejecting both (i) proceeding with the immediate enforcement of the order (even if accompanied by IPCO providing cross-security), thereby pre-empting the decision of the Nigerian court, and (ii) merely adjourning the enforcement of the order, thus giving too little weight to the importance of enforcement and the arithmetical realities in the Nigerian proceedings. Practical justice would best be done by adjourning the enforcement of the order on terms, *inter alia*, requiring NNPC to pay the agreed US$13m and to provide appropriate security in London (and thus free of any domestic constraints) in an amount of US$50 million.

Comment

Intuitively (if wrongly !) one would not expect the NYC to address enforcement of domestic awards but it does although, as Gross J observed, such cases are likely to be rare. The issues concerning security are interesting per se but omitted here for reasons of brevity. The balance between the English and the Nigerian courts is a delicate one, helpfully clarified here. However, I would take small issue with Gross J's omission, i.r.o. the public policy question, of clarifying that it is England's international public policy, not its domestic, which comes to the fore (see Westacre/Hilmarton et al).

21st June 2005

Arbitration Act 1996 S.68 - Yet Another Application Fails

In *Fidelity Management SA & Ors v Myriad International Holdings BV & Anr* ([2005] EWHC 1193 (Comm) 9th June 2005, yet another s.68 challenge failed, confirming my view of recent jurisprudence that the English Court is a bleak place for those wishing to challenge arbitral awards.

The challenge was to a Partial Award rendered by a very high-calibre LCIA Tribunal on grounds of serious irregularity in failing to 'deal with an issue' (s.68(2)(d)). The dispute had arisen out of contracts relating to pay-TV services in Greece: there were two 'players' in the market and the idea behind the agreements was to enable one of them to acquire the other's customers, a concept with obvious potential competition law implications. The contract incorporated a condition precedent of formal approval of the transaction by the Greek Competition Law authorities, both parties contemplating that by the critical date (22nd October 2002) such approval would have been obtained; this was, ultimately, not forthcoming and the parties instead sought a 'derogation', ultimately granted. Neither had contemplated the possibility of a 'derogation' being sought and obtained. The applicable law of the various agreements was Netherlands Law.

First, Morison J cited Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] EGLR 14 (a decision under the 1950 Act) as accurately representing English judicial policy:

> *"... as a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."*

A commercial court judge's should be extra-cautious when dealing with an Award because the parties have chosen an autonomous process under which they have agreed to be bound by the facts as found by the arbitrators and from whose findings of fact there is no appeal. The judge must approach the Award on the basis of an assumption that the arbitrators understood their function and knew how to perform it. Further, it would be wrong for the court to undertake a narrow textual analysis of the Award so as to conclude that there had been a serious irregularity of the sort required under s.68.

Further, in Hussman (Europe) Ltd v Al Ameen Development & Trade Co [2000] 2 Lloyd's Rep 83 at 97 Thomas J (as he then was) had said: "I do not consider that s.68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that."

S.68(2)(d) had also recently been considered by Colman J in *World Trade Corp v Czarnikow Sugar* [2005] 1 Lloyd's Rep.422 and the following propositions may be extracted from this decision:

(1) s.68(2)(d) is designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference.

(2) s.68(2)(d) is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues but was concerned with a failure, that is to say where the arbitral tribunal had not dealt at all with the case of a party so that substantial injustice has resulted, e.g. where a claim has been overlooked or where the decision cannot be justified as a particular key issue has not been decided that is crucial to the result. It is not concerned with a failure to arrive at the right answer to an issue. (HHJ Humphrey Lloyd in *Weldon Plant Ltd v The Commission for New Towns* [2001] 1 All ER 264)

(3) Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.

(4) Deficiency of reasoning in an award is the subject of a specific remedy under s.70(4). It is accordingly self-evident that: (i) failure to deal with an "issue" under s.68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it; (ii) Parliament cannot have intended to create co-extensive remedies for deficiencies of reasons one of which (s.68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (s.70(4)) was designed to provide a specific remedy for a specific problem; (iii) the court's powers under s.68(2) [become] engaged only in a case where the serious irregularity has caused substantial injustice so the availability of the s.70(4) facility would make it impossible to contend that any "substantial injustice" has been caused by deficiency of reasons.

(5) Accordingly, s.68(2)(d) was confined in its application to essential issues, as distinct from the reasons for determining them;

(6) If one simply approached that provision by asking whether that which has not been dealt with is capable of being formulated as an essential issue of the nature of what would be included in an agreed list of issues prepared for the purpose of a case management conference if instead of an arbitration the matters were to be determined in court, the answer should normally be obvious.

Morison J agreed with Colman J had said; however, he regarded it as the duty of the court to apply the clear wording of s.68, without any judicial gloss, in the light of the scheme of the Act and its legislative purpose. The 'issue' referred to in s.68(2)(d) must be an important or fundamental issue for only a failure to deal with such could be capable of causing substantial injustice; the 'issue' must have been 'put to' the tribunal; there is a difference between a failure to deal with an issue on the one hand and a failure to provide any or any sufficient reasons for the decision.

Following submission by the Parties of lists of outstanding issues (upon which they did not agree), the Tribunal had summarised the key issue as "Whether the derogation … fulfilled the contractual requirement of "…such approvals, licences or permissions as may be required from any governmental or regulatory authority for the conclusion and implementation of [the contract] and all related agreements and transactions." Morison J held that there was no substantive difference between this formulation and those of the parties.

Morison J then concluded that, having read the Award with care, it set out clearly and concisely what the issues were, and how they were to be resolved. Nothing that Fidelity had submitted to him had caused him to change that view; its position was quite untenable. The issue before the Tribunal was directed to one crucial question: did the derogation satisfy the condition precedent ? The Tribunal had asked the right question, one which Fidelity itself had invited it to ask and answer. The suggestion that the Tribunal had failed to carry out this task was obviously wrong. Any criticism made of the Award went to reasoning rather than to any failure to address any issue put. He had no hesitation in dismissing the present application and, if leave had been required he had no doubt that such would have been refused. As it was, this application had caused delay between the Award and the making and enforcement of its ancillary orders.

Comment

None necessary ! It seems to me that it cannot get much simpler

Note

The s.68(2)(d) issue has arisen in other cases with the same result

---

30th June 2005

Stop Press !! The House of Lords discovers the Arbitration Act 1996

Although leading members of the House of Lords, most notably Lord Saville of Newdigate, were closely involved in the process by which the Arbitration Act 1996 became law, the Act has hardly been seen in their Noble Lordships' House since that date although isolated cases from other jurisdictions have come before the Judicial Committee of the Privy Council. There are perhaps two reasons for the Act being such a stranger to the House one of which is, as demonstrated by several recent maritime arbitration cases, the genuinely high quality of English arbitrators whereby almost all awards that come under judicial attention either attract powerful praise or, at worst, no more than mere dismissal of ss.68/69 challenges. In addition, the Act includes several strong filters which, in combination with a robustly supportive judiciary, substantially minimise the likelihood of cases even getting into the Court of Appeal and thereby incorporate the necessary broad policy of pro-arbitration predisposition. However, an English arbitration case has now been heard in the House of Lords and judgment was issued today - *Lesotho Highlands Development Authority v Impregilo SpA & Ors* [2005] UKHL 43.

The case is interesting in that Lord Steyn, who gave the leading speech, was in an effective 1-4 minority on the central issue concerning currencies but it was not necessary to decide that issue to arrive at a 5-0 allowing of the appeal against a s.68(2)(b) challenge. However, Lord Steyn's meticulous analysis of the underlying principles of the Arbitration Act, particularly the s.68(2)(b)/s.69 interface, was not dissented from and can now be taken as cast in stone.

The undernoted digest of the speeches is longer than I would have preferred but time is short and I thought it better to get something out on the wire. Please treat the digest on an E&OE basis since it has been prepared very rapidly since I will not be available over the next few days after which I will circulate some considered comment.

The full text of the judgment can be located at:

http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd050630/leso-1.htm

Introduction

The central issue before the House was whether the Tribunal had exceeded its powers under s.68(2)(b) of the Act. The question arose how s.68(2)(b) and s.69, insofar as the latter excludes a right of appeal on a question of law, are to operate: can an alleged error by the Tribunal in interpreting the underlying or principal contract be an excess of power under s.68(2)(b), so as to give the Court the power to intervene, rather than an error of law, which can only be challenged under s.69 (excluded here under ICC Rules Art. 28.6) ?

Background, the Award and the Lower Courts

In 1991 the Authority engaged a multi-national consortium ("Highlands Water Venture" or "HWV") to construct a dam in Lesotho under a standard FIDIC 'Conditions of Contract' (4th edition), governed by the law of Lesotho. HWV made a number of claims for reimbursement of increased costs and for upwards adjustments to prices and rates. These claims included: (i) a claim for additional costs incurred due to an increase in Lesotho vehicle licence fees (claim 12); (ii) a claim for reimbursement of consequential costs resulting from the employer's instruction to increase labour wage rates (claim 37); (iii) a claim in respect of variations to the contract works (claim 53/66); and (iv) a claim for reimbursement of additional costs incurred as a result of the engineer's instruction to use increased amounts of shotcrete (claim 62). Following initial rejection by the Authority, the Engineer also rejected these claims and arbitration ensued under ICC Rules in London (with a very high-calibre Tribunal) with the 1996 Act to apply.

In 2002, the Tribunal made an interim award in a basket of currencies (Lira, Sterling, French Francs and Deutschmarks) and awarded simple interest from when the monies had become due. The Tribunal concluded that it had the relevant powers under s.48(4) and s.49(3) respectively. The commercial issue affecting the award was that if the amounts awarded had been made under the contract's currency provisions they would have been paid in Lesotho Maloti (a currency tied to the South African Rand) which had depreciated substantially between 1996/97 and 2002. HWV had had no use for Maloti (other than for conversion into hard currency), because the works had long since been completed and it had no continuing outlays in Lesotho. In order to remedy the Authority's failure to make the payments when they were due, the Award was made in hard currencies, converted from Maloti at a rate prescribed in the contract which pre-dated the Maloti's collapse. The Authority's objection related to the rate at which Maloti had been converted since it therefore bore the exchange losses.

The Authority challenged the Award in the High Court (*Lesotho Highlands Development Authority v Impregilo SpA* [2003] 1 All ER (Comm) 22) reported on in my Newsletter #8 available on my website www.dundasarbitrator.com), both i.r.o. currencies and interest, on the dual basis of lack of substantive jurisdiction (s.67) and excess of power (s.68(2)(b)). Morison J ruled that the tribunal had had substantive jurisdiction but held that it had exceeded its powers by (a) expressing the award in currencies other than those stipulated in the contract and (b) awarding interest in circumstances not permitted under Lesotho law. Accordingly, the judge remitted the decisions on currency and interest to the Tribunal with directions as to how it ought to carry out their task afresh.

On appeal to the Court of Appeal the Authority rightly abandoned its s.67 challenge and on 31st July 2003 the Court gave its unanimous judgment upholding Morison J on both points ([2003] EWCA Civ 1159).

The House of Lords

Lord Steyn summarised the issues before the House as:

(1) Did the tribunal have the power to express the award in the currencies it did pursuant to s.48(4) or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract ?

(2) Did the tribunal have the power to grant pre-award interest pursuant to s.49 of the Act or was any power that might otherwise have been available under that section excluded or modified by the terms of the principal contract or by operation of Lesotho law as the substantive law of the contract ? (b)

(3) If the decision of the tribunal on either point amounted to an error of law, did it constitute an excess of jurisdiction under s.68(2)(b)?

Following a historical survey stressing the "radical nature" of the Act being free both from judicial interference and from pre-1996 case law, he continued that the Court of Appeal had approached the construction of s.48(4) through the lens of pre-1996 case law, citing authorities from 1961, 1974, 1976 and 1979; but for this (wrong) approach, it would have had no reason to disagree with the natural and commercially sensible construction of the wide words of s.48(4) which the tribunal had adopted; the power under s.48(4) was unconstrained and was available to the Tribunal. On this simple basis he would reverse the Court of Appeal on the currency point.

Conversely, assume that the Tribunal committed an error of law, either erring in the interpretation of the underlying contract or in misinterpreting its powers under s.48(4); in either case, the highest the case could be put is that the Tribunal committed an error of law. However, the issue was whether the Tribunal "exceeded its powers" within the meaning of s.68(2)(b) which required addressing the question whether (a) the Tribunal had purported to exercise a power which it did not have or (b) whether it had erroneously exercised a power that it did have. If (b), no excess of power under s.68(2)(b) was involved. Once the matter was approached correctly, it was clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s.48(4). The jurisdictional challenge must therefore fail.

The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, had overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; however, it was important to emphasise again that the powers of the court in public law and arbitration law are quite different, particularly post- (but also pre-) 1996. E.g. Mustill & Boyd state (2nd ed (1989) at p 555) "If . . . [the arbitrator] applies the correct remedy, but does so in an incorrect way - for example by miscalculating the damages which the submission empowers him to award - then there is no excess of jurisdiction. An error, however gross, in the exercise of his powers does not take an arbitrator outside his jurisdiction and this is so whether his decision is on a matter of substance or procedure."

Further, the DAC had observed (§280) that s.68 was "really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected". The idea that s.68 contemplated an adjudication which arrives at the "right" conclusion would have been wholly out of place in these recommendations. The DAC report was the matrix of the Parliamentary debates.

Lord Steyn made four observations about s.68: (i) intervention thereunder is only permissible *after* an award has been made; (ii) there must be a 'serious irregularity', requiring a high threshold; (iii) the irregularity has caused or will cause substantial injustice to the applicant; (iv) the irregularity must fall within the closed list of categories set out in s.68(2)(a) to (i). Nowhere in s.68 is there any hint that a failure by the Tribunal to arrive at the "correct decision" could afford a ground for challenge but the section does have a meaningful role to play e.g. where, in contradiction with an agreement in writing of the parties under s.37, the tribunal appointed an expert to report to it or where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard thereof awarded compound interest. There was a close affinity between ss.68(2)(b) and (e) since the latter deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.

NYC58 and Model Law Art. 34 were part-provenance of s.68 and Lord Steyn considered it likely that the inspiration of the words "the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)" in s.68 are the terms of Art. V(1)(c) (and related jurisprudence) which deals with cases of excess of power or authority of the arbitrator. It was well established that Art. V(1)(c) had to be construed narrowly and should never lead to a re-examination of the merits of the award. The erroneous exercise of an available power cannot by itself amount to an excess of power and a mere error of law will not amount to an excess of power under s.68(2)(b). For these reasons the Court of Appeal erred in concluding that the Tribunal exceeded its powers on the currency point; if the Tribunal erred in any way, it was an error within its power.

Lord Steyn concluded:

> "I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point."

Pre-Award Interest

The Authority had submitted that the Tribunal had exceeded its power by awarding interest pursuant to s.49(3) but had to show that the decision in question had caused or will cause a substantial injustice to the employer. As the Tribunal had noted, the present proceedings were concerned with sums that had ***not*** been certified under cl.60(10) of the contract so any comparison therewith was irrelevant. The only other possibility was to have regard to the law of Lesotho so far as it governs the substance of the dispute between the parties but there was, however, no finding about the law of Lesotho in the judgments of either Morison J or the Court of Appeal. The precondition of substantial injustice had not been established and, on that ground alone, the challenge to pre-award interest should fail.

In any event, the Authority faced other formidable difficulties: the Tribunal held that the power under s.49(3) was *prima facie* available - this conclusion was inescapable and the only remaining question was whether the provisions of cl.60(10) of the contract could amount to an agreement to the contrary. The Tribunal had noted that cl.60(10) related only to certified payments whereas the arbitration proceedings were concerned with sums which had not been certified. There was therefore no agreement to the contrary under s.49(1) of the Act. Morison J had appeared to have taken the view that the law of Lesotho might be relevant but only an agreement in writing as defined in the Act can qualify as an agreement to the contrary and the law of Lesotho was not an agreement to the contrary in writing. The power to award simple or compound interests as the tribunal "considers meets the justice of the case" was available to the Tribunal but, in any event, for the reasons given above, if it is assumed for the sake of argument that the Tribunal awarded interest which ought not to have been awarded as a matter of Lesotho law, it may have made an error of law but it certainly did not act in excess of power within the meaning of s.68(2)(b).

Lord Steyn therefore allowed the appeal with costs.

Other Opinions

Lord Hoffman agreed and allowed the appeal but that he thought it very likely that the arbitrators had make an error of law i.r.o. currencies, for the reasons given by Lord Phillips; however, he preferred to express no opinion on the point; for the reasons given by Lord Steyn, this was at worst an error of law and not an excess of power.

Lord Phillips agreed with Lord Steyn i.r.o. the award of interest but not i.r.o. currencies. The pre-1996 jurisprudence (which Lord Steyn had dismissed) dealt with the principles that governed the power of the court or an arbitrator and no distinction was drawn between the two i.r.o. award in a foreign currency and the dates at which foreign currency

obligations should be converted, when conversion was appropriate. Lord Steyn had considered that s.48(4) had replaced this body of substantive law, leaving it open to arbitrators to approach the currency of their awards, and any questions of currency conversion, in accordance with their discretion as to what is appropriate in all the circumstances; this is what the arbitrators in the present case had done.

There were two possible ways of interpreting s.48(4): (i) it did no more than make it plain that arbitrators had the procedural power to make an award in any currency i.e. reproduced in statutory form the position that already prevailed under English law; or (ii) the alternative interpretation, that of the arbitrators and Lord Steyn, it made a radical change to English substantive law but no decided case was cited to the House in support of either interpretation. *Merkin on The Arbitration Act 1996* had said that it is unclear from the Act whether s.48(4) gave the arbitrators an absolute discretion; *Mustill & Boyd*, and *Russell on Arbitration*, 22nd ed (2003) followed the traditional approach, i.e. that s.48(4) reflected the existing law.

Lord Phillips did not accept that s.48(4) had had the radical effect argued by Lord Steyn, finding the difference in language between ss.48(4) and 49 significant: had the draftsmen intended to have given arbitrators the power to deal with foreign currency obligations according to a broad discretion, this should have been made plain by the use of language such as the phrase "as it considers meets the justice of the case" as found in s.49.

The Tribunal had adopted an approach to currencies that departed from English law which, it is normally assumed in the absence of evidence to the contrary, was the same as the law of Lesotho. Was this simply an error of law, excluded from court review by s.69, or was this an example of a "tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)", so as to be capable of amounting to a "serious irregularity" under s.68 ? The latter was the true position: the concept of an excess of power that was not an excess of jurisdiction was not an easy one, but it applied to the Tribunal's conduct in this case. It had expressly stated that s.48(4) gave it a discretionary power which it did not in fact enjoy and then proceeded to purport to exercise that power. It followed that the Tribunal was guilty of a serious irregularity under s.68(2) provided that its conduct had resulted in "substantial injustice" to the respondents. That question required consideration of the effect of the Tribunal's approach to currencies which, following analysis, Lord Phillips doubted as amounting to serious injustice but, since he was in a minority, this question did not arise and both limbs of the appeal would be allowed.

Lord Scott agreed with Lord Steyn that the appeal should be allowed with costs but he disagreed on the currency issue, considering that the Tribunal might have committed an error of law but selection of the wrong exchange rates did not constitute an excess of jurisdiction under s.68(2)(b).

Lord Rodger agreed with Lord Steyn save as regards the currency issue.

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #12
DECEMBER 2005

5th July 2005

The Law of Privilege Made Easy

Privilege was "hot news" last year when the House of Lords delivered judgment in *Three Rivers DC v Bank of England (No 6)* [2004] 3 WLR 1274 about which case much has been written; however, in a recent case *Burkle Holdings v Laing* [2005] EWHC 638 (TCC), HHJ Toulmin QC gave a very helpful potted summary of the law at §14:

"I summarise the relevant law in a series of propositions:

(i) To involve legal advice privilege there must be a relevant legal context. To decide the question, the judge should answer the question whether the advice relates to the rights, obligations or remedies of the client under either private law or public law: see Lord Scott of Foscote in *Three Rivers*, p 1288, paragraph 38. The retainer may arise as a result of contract or be inferred from an objective consideration of all the circumstances.

(ii) Legal advice privilege arises out of a relationship of confidence between lawyer and client: see Lord Scott of Foscote in *Three Rivers*, paragraph 24.

(iii) The basic principle justifying legal professional privilege is that a client should be able to obtain legal advice in confidence: see *R v Derby Magistrates' Court ex parte B* [1996] AC 1987, per Lord Taylor of Gosforth citing his own formulation in *Balabel v Air India* [1988] Ch 317.

(iv) The privilege is a necessary corollary of the right of any person to obtain skilled, legal advice about the law: see Lord Hoffmann's speech in *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563, p 607.

(v) A solicitor's duty to his client is primarily contractual and depends on the express and implied terms of his retainer: see speech of Lord Walker in *Hilton v Barker Booth & Eastwood*, [2005] UKHL 8 at paragraph 28.

(vi) The relationship of solicitor and client is one in which the client reposes absolute trust and confidence in his solicitor: see Lord Walker in *Hilton*, paragraph 28 – and in which he must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent: see *B v Auckland Building Society* [2003] 2 AC 736 at 757 (paragraph 47) per Lord Millett.

(vii) Legal advice privilege once established is absolute. It cannot be overridden by some greater public interest: see Lord Scott in *Three Rivers*.

(viii) Legal advice privilege gives the person entitled to it the right to decline to disclose, or to allow to be disclosed, the confidential communication or document in question: see Lord Scott in *Three Rivers* (No 6).

(ix) The solicitor's duty of single minded loyalty to respect his client's confidences may be moulded and informed by the terms of the contractual relationship: see *Kelly v Cooper* [1993] AC 205 at 215, and Lord Walker in *Hilton*, paragraph 30.

(x) The solicitor's duty of single-minded loyalty to his client very frequently makes it professionally improper and a breach of duty to act for two clients with conflicting interests in the transaction in hand.

(xi) As Lord Jauncey put it in *Clark Boyce v Mouat* [1994] 1 AC 435, a solicitor may act for both parties in a transaction where the interests may conflict provided he has obtained the informed consent of both to him so acting: see also Lord Walker in Hilton, paragraph 31.

(xii) If there is a conflict in his responsibilities, the solicitor must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting. There may be circumstances, notwithstanding such disclosure, where it is impossible for the solicitor to act fairly and adequately for both parties: see *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, paragraph 90, and Lord Walker in *Hilton*, paragraph 31.

(xiii) Informed consent means consent given in the knowledge that as a result the solicitor may be unable to disclose to each party the full knowledge which he possesses as to the transaction, or may be disabled from giving advice to one party which conflicts with the interests of the other: see *Clark Boyce v Mouat* [1994] 1 AC 428 at 435, and Lord Walker in *Hilton*, paragraph 31.

(xiv) Instructions received from two persons or entities may be joint or several. The consequence of joint instructions is that in relation to communication with or from a solicitor in such circumstances, privilege cannot be asserted by one of the two parties against the other in proceedings brought by one against the other: see *re Konigsberg* [1989] 3 All ER 289 at 296, per Peter Gibson J. It is agreed in this case that if documents came into existence as a result of a joint retainer they must be disclosed.

(xv) As against parties which have a common interest, eg between partners, a company and its shareholders, trustee and cestui que trust, no privilege attaches to communications between solicitor and client in relation to the proceedings in which the parties have a common interest: see Stephenson LJ in CIA *Bara v Wimpey* [1980] 1 Lloyds Rep 598.

(xvi) Where the instructions for the solicitor are several, the circumstances of each case falls to be considered before the scope of a solicitor's duty in regard to that particular case can be defined: see the judgment of Ashworth J in *Hall v Meyrick* [1957] 2 QB 455 at 460. Ashworth J's conclusion on this point was accepted by the Court of Appeal, but his judgment was reversed on what was, essentially, a pleading point.

(xvii) "If there is a conflict of interest between two clients, the solicitor must not prefer one duty to another, but must perform both as best he can. This may involve him in performing one duty to the letter of the obligation and paying compensation for his failure to perform the other. A solicitor who acts for more than one party to a transaction owes a duty of confidentiality to each client, but the existence of this does not affect his duty to act in the best interests of the other." See the speech of Lord Walker in *Hilton*, paragraph 39. This affirms the decision of the Court of Appeal in *Moody v Cox and Hatt* [1917] 2 Ch 71.

(xviii) I also note that in relation to both access to justice through legal proceedings on the one hand, and legal professional privilege on the other, the applicable principles behind European Community law, the European Convention on Human Rights law and UK domestic law are virtually identical: see *Bowman v Fels* [2005] EWCA 226, CA, 8 March 2005, Brooke LJ, at paragraph 82.

6th July 2005

High Court Case – Braspetro v FPSO Construction

An interesting oil & gas case has been decided in the High Court (Cresswell J): Braspetro & Anr v FPSO Constriction Inc & Anr [2005] EWHC 1316 (Comm); the 29,000 word/35-page judgment can be found at

http://www.bailii.org/ew/cases/EWHC/Comm/2005/1316.html

In brief, this was a trial of preliminary issues relating to two major offshore construction projects: (i) the conversion of a very large crude carrier ("VLCC"), into a floating storage and off-loading unit ("FSO"), named P38, and (ii) the conversion of a crane platform into a semi-submersible floating production unit ("FPU"), named P40.

Cresswell J concluded his lengthy judgment as follows:

243. The preliminary issues to be determined at this trial are set out in the Order of Moore-Bick J of 18 March 2003 as amended on 5 May 2005: -

(1) On a true construction of the Side Letter Agreements (including but not limited to the phrase "may be recovered….by Brasoil from FCI") is Brasoil entitled, in principle, to payment from FCI of amounts paid to third party suppliers (including Jurong) by Brasoil pursuant to the Side Letter Agreements?

(2) On the assumption that the defendants would otherwise be entitled to assert an entitlement to any of the relief or to raise any of the defences set out in paragraph 5 of the List of Issues, whether they are nevertheless precluded from so doing as regards any or all of the sums claimed by the claimants (whether the claimants paid such sums to third party suppliers or to the Jurong Shipyard) by reason of and/or on a true construction of:

(a) the Jurong Settlement Agreement dated 14 November 2000 and the relevant factual matrix; and/or

(b) the Side Letter Agreements and/or Requests for Payment and the relevant factual matrix.

244. I answer issue (1) yes and issue (2) no.

6th July 2005

Adjudication – Canham's Law

Names of individuals can become part of the law (e.g. Calderbank offer (which arose from a divorce action between Mr & Mrs Calderbank), McKenzie friend, Toulmin order) as can the names of companies or vessels (Kinstreet Order, Mareva injunction, Anton Piller order etc). In an interesting recent High Court arbitration (s.67) case arising out of an adjudication, the distinguished English Arbitrator/Adjudicator/Mediator, Tony Canham, has advanced the law in one regard but it remains to be seen whether the Courts will grace this advance by calling it "Canham's law".

The case in question is Lafarge (Aggregates) Ltd v London Borough of Newham [2005] EWHC 1337 (Comm) which can be found at http://www.bailii.org/ew/cases/EWHC/Comm/2005/1337.html. Cooke J decided important issues of wide practical application concerning the timing of publication of an adjudicator's decision and of the subsequent Notice of Arbitration.

Lafarge was contracted by Newham to provide certain construction services and, subsequently, a dispute arose as to the proper method of valuation of Lafarge's work. Under the contract, Lafarge had the right to refer any dispute of this kind to adjudication and did so by a Referral Notice dated 7th July 2004; Tony Canham was appointed Adjudicator and at 11:02 on Friday 13th August 2004 he sent an e-mail to each of Lafarge and Newham attaching a cover letter and a document entitled "Adjudicator's Decision", both of which were dated but unsigned. That letter read, inter alia, as follows: "As intimated earlier I am publishing the Decision today. I attach this letter and the Decision to this e-mail. I

am now functus officio …." The hard copy letter and Decision were both signed and dated 13th August and were sent in hard copy to the parties on that day. Newham alleged that it was not received by it until Tuesday 17th August.

The contract provided that any Decision would become final and binding after three (3) months unless a Notice of Arbitration was served within that time; on Thursday 11th November Solicitors acting for Newham sent a recorded delivery NoA to Lafarge which date-stamped it as received the following day, i.e. within the 3 months. An arbitration ensued (the judgment does not name the arbitrator).

Four issues arose which the Arbitrator decided as preliminary issues in his Award

(1) the adjudicator had given his decision on 13th August 2004, the date when it was sent and received by e-mail and not on 17th August, the date when the written and signed copy was received by Newham;

(2) the reference in Clause G43(10)(b) of the contract to a decision by an adjudicator under sub-clause (6) had to be construed as referring to an adjudication under sub-clause (7) of the Contract.

(3) the NoA had to be served within three months of 13th August 2004 and that Clause G44(3) of the contract applied to all notices served under the Contract and service was therefore not effective until the expiry of two working days after the letter had been sent;

(4) Saturday was a working day for the purpose of Clause G44(3) so that the NoA was to be treated as served on Saturday 13th November i.e. within three months of the date of the Decision.

Lafarge applied under s.67(1)(a) seeking a determination that the Arbitrator's Award, in which he had determined as a preliminary issue that he did have jurisdiction, had been made without.

Cooke J held as follows:

Issue 1 – Date of Issue of Decision

Newham argued that the Decision had to be received by the parties and that the Adjudicator's directions referred to fax and mail only hence e-mail publication was not publication; the Arbitrator found that the parties had accepted the use of e-mail and that the Decision had been properly published at 11:02 on 13th August – this is Canham's Law (!!) The Judge agreed. Further, contractual provisions for the giving of notices referred to the giving of such by one party to the other (as required in several clauses of the contract) not to the publication of the Decision.

Issue 2 – Contract Drafting

There had been a drafting error in that a new sub-clause (2) had been inserted, causing the renumbering of the existing sub-clause (2) as (3) and of the following sub-clauses but consequential cross-references had not been changed. The Judge held that the point did not merit legal argument (mistake, contra proferentem etc).

Issue 3 – Service of Notices

The contract provided (i) that service of notices be by mail or hand delivery to Lafarge's registered office and (ii) that notices (including the NoA) be 'deemed served' two working days after service. Cooke J held that the server of such a notice must allow two working days to follow before the expiry of the relevant time limit.

Issue 4 – When was the NoA Served and was Saturday a Working Day ?

Cooke J first held that the two working days referred to 48 clock hours, not to two complete days. Next, the expression *"working day"* had a general meaning which was not dependent on the particular work which Newham might or might not require Lafarge to do, whether at ordinary rates or uplifted rates. In ordinary parlance in the UK, "working days" are Mondays to Fridays, excluding Christmas, Easter and other Bank Holidays. Cooke J disagreed with the Arbitrator's view that "working day" was not a term of universal use, its general meaning outside use in contracts being sufficiently clear for it to be used in contracts, whether construction contracts or other contracts, and to be given that general meaning where the contract itself did not provide a definition. There was no suggestion here that there was any customary meaning in the construction industry or any usage which would change the position, whether or not contractors often work at weekends.

On the facts of the case, there was no issue as to the specific times when the recipient offices were ordinarily open nor as to the exact time when the recorded delivery notice was sent on November 11th nor the exact time when the two working days expired following service. Since Saturday 13th November was not a working day, the earliest time at which service could have been treated as effective would be on Monday 15th November, i.e. outwith the three month time limit.

Jurisdiction

The Arbitrator had therefore had no jurisdiction.

Comment

Common sense, particularly as regards Canham's Law and Saturdays !

7th July 2005

Three Strikes And Out: Applications Under ss.24/68/69

If you throw three darts at a dartboard you are very likely to hit it at least once; however, the principle is less applicable in arbitration as was demonstrated in *Benaim (UK) Ltd. v Davies Middleton & Davies Ltd* ([2005] EWHC 1370 (TCC) (HHJ Coulson QC) where the claimant (known as RBA) tried ss.24, 68 and 69 and failed to hit the dartboard once.

Tarmac Construction Ltd (TCL) was the Main Contractor (to the Secretary of State for Transport) for the design and construction of the A13 viaduct in Dagenham. a major civil engineering project comprising a six-lane elevated viaduct structure that crossed a number of roads and railway lines as well as the vast Ford assembly plant. TCL was to construct the substructure of the viaduct, in particular the foundations and piers, DMD the superstructure of the viaduct, and RBA would design both the substructure and the superstructure.

A Tender Design Proposal (TDP) was created in 1996 on the basis of which the contract was awarded to TCL; it was changed in a variety of ways in late 1996 and early 1997 and the issue between the parties was how and why those changes had come about. DMD argued that, effectively, the changes had resulted from inherent inadequacies within the TDP and, since their tender had been based upon that TDP, they had suffered losses of £5 million or more as a result while RBA argued that there was nothing wrong with the TDP and the changes that occurred were part of usual design development. In addition to DMD's claims arising directly out of the TDP, there were additional claims against RBA arising out of late delivery of design information, the failure to identify the presence of overhead power cables that traversed the viaduct; and additional works said to be due to other errors, omissions and failures in RBA's design. The total value of the claim in the arbitration, including overheads, profit and financing charges, was put at £11.8m.

The Arbitrator published his 55-page Award (effectively on liability) on 21st February 2005, some 6 months after the close of proceedings; the Judge observed "Rather surprisingly, given its importance to the parties and the delay in its production, the paragraphs were not numbered." §§25-91 inclusive were a full summary of DMD's case, §§92-105 a much briefer recitation of RBA's main points and §§106-175 were 'Discussion and Findings'. RBA complained generally in these proceedings that the Arbitrator did not here do proper justice to its arguments. The Judge "certainly agree[d] that there is an apparent imbalance in this part of the Award, but that cannot of course on its own be a legitimate ground for complaint. What matters is whether, when he came to deal with the substantive issues between the parties, the Arbitrator fairly dealt with the evidence and RBA's submissions thereon."

Following quoting extracts from the Award, the Judge stated "[the Arbitrator's conclusions were founded to a large extent upon [his] clear view, as an engineer himself, on the factual and expert engineering evidence presented to him, both in documents and orally during the hearing. It was his view of this evidence that led him to conclude that the TDP was not buildable. Although his findings are sometimes terse, even brusque, his overall approach seems to me to be the very essence of specialist arbitration."

The Judge also said "I should make one final point about the Award generally before going on to consider the individual elements of RBA's applications. [Counsel for DMD] began his submissions by saying that RBA's attacks on the Award, although variously dressed up as questions of law or allegations of serious irregularity, in truth amounted to no more than an attempt by RBA to reargue many of the points of detail before me on which they had been unsuccessful before the Arbitrator, and that such an approach was wholly contrary to the spirit and letter of the 1996 Act. Whilst I consider that a few of the points raised by RBA are matters which fall properly to be considered under the 1996 Act, I do accept the overall force of [Counsel's] submission. I find that many of the matters relied upon by RBA in these proceedings are the product of an illegitimate attempt to reargue the detail of the arbitration. … the very fact that [Counsel for RBA] has been obliged to argue matters in such detail … demonstrates, in my judgment, how far RBA have strayed from the narrow path prescribed by the 1996 Act."

s.24 – Removal of the Arbitrator

In order to remove the Arbitrator under s.24, RBA needed to demonstrate that he had failed to conduct the hearing properly, either because he did not give it an opportunity to present its case, or because he failed to deal with the issues put to him, and that a substantial injustice has resulted in consequence. In addition, RBA had to show that his failure and its consequences were so serious that setting aside the Award under s.68 was not sufficient remedy, removal being the only appropriate remedy. RBA's case relied on the Arbitrator's treatment of certain delay issues, in particular whether consideration thereof should have been deferred to the (adjourned) quantum hearing. After a full review of "who did/said what", the Judge dismissed the s.24 application, concluding "Both parties agree, and always agreed, that certain questions of delay were definitely within the ambit of the first hearing. They disagree now solely as to the extent with which the first hearing was concerned with such matters. Since the parties did not clarify the position for the Arbitrator at any stage, and since the precise ambit of the hearing in respect of causation was left vague, perhaps deliberately, it is not now open to either party to turn round and criticise the Arbitrator for straying beyond the ill-defined boundary between liability and causation at the first hearing. In other words, the sort of clear-cut potential irregularity which I have identified … above simply did not occur in this case, and RBA are not now able to make a legitimate complaint about the Arbitrator's conduct."

s.68 – Setting-Aside of the Award (1) - s.68(2)(a)+(d)

RBA s.68 argument was (a) the Arbitrator's failure to act fairly and give each party an opportunity to present its case, and (b) the Arbitrator's failure to deal with all the issues that were put to him. The Judge stated "In my judgment the

Arbitrator was obliged to resolve the disputes which had to be decided en route to his ultimate conclusion. However, he did not have to address or deal with subsidiary issues. In addition, the parties are not now entitled to use s.68(2) as a means of launching a detailed inquiry into the precise manner in which the Arbitrator considered the issues. The relevant authorities for these propositions are set out below."

One of the most important issues in the arbitration was whether or not the TDP was buildable: the evidence apparently ranged over a variety of potential problems with the design and the Arbitrator concluded that the TDP was not buildable for reasons related both to the structural adequacy of the design and the practical difficulties inherent in building to such a design. In his Award, he provided a definition of buildability which, so RBA argued, was his own and was one on which it had had no opportunity to comment or make submissions. RBA also argued that this definition was not only not part of DMD's case but also ignored the evidence.

The Judge considered this criticism of the Arbitrator to be quite unfounded: both parties had spent a good deal of time and effort arguing about was meant by 'buildable' and how such a concept should be interpreted by reference to the TDP. Given the several differing and competing definitions submitted by the parties, and the fine distinctions between them, it appeared to the Judge that the Arbitrator had considered all the evidence and all those submissions and then, applying his own engineering experience, had supplied his own definition of buildability which he was quite entitled to do. Furthermore, his findings on buildability were based on the evidence and represented his considered conclusion thereon. RBA could not show that if the definition of buildability had been different any of the relevant findings in the Award would also have been different. Even if, which the Judge did not accept, the Arbitrator's definition of buildability had somehow resulted from a serious irregularity, it had not and would not cause substantial injustice to RBA.

In addition, RBA submitted a lengthy list of 'crimes' by the Arbitrator relating to engineering details; the Judge was unimpressed and, consequently, he rejected the s.68(2)(a)/(d) challenge.

<u>s.68 – Setting-Aside of the Award (2) – s.68(2)(f)+(h)</u>

RBA challenged the Award under s.68(2)(f) and/or (h) in that the Arbitrator had allegedly failed to provide proper or sufficient reasons for his decision; on the 18th March 2005, pursuant to s.57(3)(a), it had sent the Arbitrator a detailed list of questions which he declined to answer.

The Judge stated "The obligation to provide reasons is an important part of the arbitrator's function. At para.21.16 of **Arbitration Law**, by Professor Robert Merkin (December 2004 update) the learned editors say that, "***It is strongly arguable that unless a party knows the reasons for an award there is automatically substantial injustice to him***", and the relevant footnote suggests that, "This is indeed the very rationale of the requirement that arbitrators are to give reasons". I respectfully agree with those comments. … If there were no or insufficient reasons the substantial injustice would, in my judgment, be automatic."

There were three reasons why RBA's challenge (i.e. that the Arbitrator should provide additional reasons to clarify or remove any ambiguity in the Award or that his Award was somehow lacking in clarity) failed:

(i) The Award contained specific reasons for the Arbitrator's findings, including his conclusion that the design changed because the TDP was unbuildable, and his detailed criticisms of RBA by reference to the evidence. Whilst the findings were often expressed very shortly, none were unexplained or unclear. Since he had not been obliged to deal with every peripheral issue the Arbitrator could not therefore be criticised if he had not done so. There was nothing which required clarification and nothing which remained ambiguous in the Award.

(ii) The Arbitrator had expressly said that he would not deal with peripheral matters and had stated that "The parties should rest assured that I have been through all the evidence and the transcripts carefully, and taken due account of this material in formulating this award." The Judge stated "In the circumstances it seems to me that the Arbitrator has properly explained, within his Award, that it would be limited to the evidence and issues which he considered significant and necessary in order to reach his conclusion as to the TDP and any other criticisms of RBA's performance. I consider that the Award achieves that function. It would therefore be illegitimate to criticise the Arbitrator for taking the course outlined in these parts of his Award, particularly given that that is the approach expressly encouraged in the authorities to which I have referred."

(iii) Counsel for DMD had criticised RBA's so-called s.57 questions, saying that they amounted to a misconceived attempt to interrogate the Arbitrator. The Judge considered that, while that criticism did not apply to all of RBA's questions, many of them were inappropriate and in some instances unfair; he gave examples which he considered were not seeking to obtain clarification, but were cross-examining the arbitrator on the fine detail of his decision-making process.

The Judge was therefore entirely satisfied that no serious irregularity on the part of the Arbitrator had been demonstrated. In addition, no substantial injustice had resulted or would result from the matters complained of. Consequently, the application under s.68(2) must fail.

<u>The s.69 Application</u>

The Judge cited "Arbitration Law" (§21-9) to the effect that an error of law arises where the arbitrator errs in ascertaining the legal principle which is to be applied to the factual issues in the dispute, and does not arise if the

arbitrator, having identified the correct legal principle, goes on to apply it incorrectly. Furthermore, there can be no error of law if the arbitrator reached a decision which was within the permissible range of solutions open to him. A number of the alleged errors of law relied on by RBA arose out of findings by the arbitrator which, it contended, were not based on any evidence: whether or not there was a sufficient evidential basis for a finding of fact is undoubtedly a question of law, (Arbitration Law §21-10). However, it was clear that s.34(2)(f), by allowing an arbitrator to determine the weight of any evidence, made a s.69 challenge on that basis very difficult and likely to succeed only in the most exceptional cases (see "Arbitration Law" at §21-10 and DAC Report at §170). In *Fencegate v NEL Construction* [2001] 82 Con.L.R.41 HHJ Thornton QC had drawn a distinction between a finding based on very little evidence which he said could not be an error of law, and one based on no evidence at all, which he found could be an error of law. The Judge agreed.

Since RBA did not suggest that any of its five s.69 points were of public importance, it had to demonstrate that on each issue the Arbitrator had obviously been wrong and, under s.69(3)(c)(i), the obvious error must normally be demonstrable on the face of the award itself - unless the error of law relied on is clear and obvious, the s.69 application must automatically fail.

The Judge dismissed RBA's contentions (substantially based on engineering matters) fairly trenchantly. Typically, in dealing with one of RBA's arguments, he stated "It seems to me that, if it could be demonstrated that the Arbitrator had taken this view, there may in principle be an error of law. It would then ordinarily be for RBA to go on to show that the Arbitrator was obviously wrong. However, on this particular point, it is unnecessary to consider that second part of the test under s.69 because, in my judgment, the Arbitrator did not make the finding for which he is now criticised. Thus this ground appeal falls at its first hurdle." Etc etc. The Judge also made the interesting observation "I agree with the proposition that there is no rule of law that increased quantities are not of themselves enough to show negligence in the original design".

Conclusions

HHJ Coulson QC concluded: "For the detailed reasons that I have given, I believe that the Arbitrator was entitled to come to the conclusions that he did, in the way that he did. If the Award was rather short, and sometimes rather sharp, then that was, in reality, no more than a reflection of the parties' agreement to arbitrate, rather than litigate, their disputes. I am in no doubt that there were no serious irregularities and no points of law on which the Arbitrator was obviously wrong. In addition, no relevant instance of substantial injustice has been identified by RBA. For these reasons their applications are dismissed."

Discussion

So far as I am aware, this is the first arbitration application decided by HHJ Coulson QC and, at the risk of irreverence in borrowing a footballers' phrase, "the boy done good". Irreverence apart, the judgment is, in my respectful submission, obviously right and properly cognisant of the high thresholds applicable to ss.24/68/69. The judge is to be commended for including concise summaries of authority in several key areas.

A number of features of the judgment stand out including (i) the Judge's taking cognisance of the Arbitrator's subject-matter expertise and (ii) the helpful summary of what is an "error of law".

12th July 2005

Thrownaway Costs In Construction (and Other) Litigation

At the risk of opening the door to a barrage of witty and/or facetious responses, an interesting issue i.r.o. which there appeared to be no authority arose in *McGlinn v Waltham Contractors & Ors* (2005] EWHC 1419 (TCC). One of Waltham's co-defendants incurred costs, following the Pre-Action Protocol (the "PAP") for Construction and Engineering Disputes, i.r.o. heads of claim which were later withdrawn by the Claimant hence it applied for an interim costs order. Should this be granted ?

The Claimant commenced proceedings i.r.o. alleged deficiencies in building work at his property in Jersey; the Defendants included the Architects, Huw Thomas Associates ("HTA"). The claims involved allegations of defective work by Waltham which, allegedly, was so extensive that the property had had to be demolished. There was an additional claim against Waltham for over-payment arising out of a dispute over the true value of the Final Account. The various claims amounted in total to +/- £4.5 million. The Claimant had followed the construction PAP and a mediation had taken place, albeit unsuccessfully. The claims now made differed in part to those which existed at the commencement of the PAP procedure; inter alia, the surviving claims against HTA no longer included claims i.r.o. over-payment to Waltham, nor claims in respect of loss and expense also paid to Waltham. At the first Case Management Conference, HTA sought an interim payment of £20,000 i.r.o. the costs it allegedly threw away in the PAP procedure i.r.o. those two deleted heads of claim.

HHJ Coulson QC refused the application.

S.51(1)(b) Supreme Court Act 1981 provides (1) Subject to the provisions of this or any other enactment and to rules of court, ***the costs of and incidental to*** the proceedings in .. (b) the High Court … shall be in the discretion of the court". The Judge agreed with HTA's submission (which the Claimant did not dispute) that costs incurred by a party in complying with any PAP were capable of being costs "incidental to" any proceedings which were subsequently commenced. The Judge was fortified in this view by the decision of Sir Robert Megarry V-Ch in *In re Gibson's Settlement Trusts* [1981] Ch 179 in which he had decided that, on an order for the payment of costs of proceedings, costs incurred before the proceedings commenced would not be disallowed solely on that account; the V-Ch had said, inter alia, "Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes".

There was no direct authority on the question of the general recoverability of costs incurred in compliance with PAPs but in *Callery v Gray* [2001] 1 WLR 2112, Lord Woolf LCJ had said: "Where an action is commenced and a costs order is then obtained, the costs awarded will include costs reasonably incurred before the action started, such as costs incurred in complying with a [PAP]". The Judge concluded that, as a matter of principle, the costs incurred in complying with a PAP may be recoverable as costs 'incidental to' any subsequent proceedings.

The next question of principle concerned costs incurred by a defendant whose response during the PAP procedure was so successful that a head of claim was no longer pursued; such a defendant could assert, as HTA had, that they had thrown away costs in refuting an allegation no longer maintained. Were these recoverable ?

The Judge considered that, save in exceptional cases, such thrownaway costs could not be costs "incidental to" those proceedings: e.g., if the original claim included Claims 1-5, but subsequent court proceedings were limited to Claims 1-3, it was very difficult to see how, in ordinary circumstances, the costs incurred in refuting Claims 4 and 5 could be costs incurred "incidental to" such proceedings. He drew support for this view from the words of Sir Robert Megarry *In re Gibson's Settlement Trusts* at page 187: "It is obvious that the matters disputed before a writ or originating summons is issued, and the matters raised by a writ or the originating summons, and by any pleadings and affidavits, may differ considerably from each other. … How far does the ambit of the litigation extend or restrict the matters occurring before the issue of the writ or originating summons which may be included in the taxed costs on the common fund basis". If the proceedings were framed narrowly, then the Judge could not see how antecedent disputes which bore no real relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes were in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then he could not see why the Taxing Master should not be able to include these costs among those which he considered to have been "reasonably incurred".

Accordingly, as a matter of general principle, claims made at during the PAP procedure, but subsequently excluded, bore "no real relation" to the subject of the litigation and the related costs would not therefore be "incidental to" those proceedings. The present case gave a good example of that general principle: the proceedings had narrowed such that there remained only one claim, viz. the alleged defective work by Waltham, which bore "no real relation" to the subject matter of the proceedings against HTA. The Judge added that it would be contrary to the whole purpose of the PAPs, which are such an integral part of the CPR, if claimants were routinely penalised if they decided not to pursue claims in court which they had originally included in their PAP claim letters. Such purpose was to narrow issues and to allow defendants, wherever possible, to demonstrate that a particular claim was doomed to failure.

Further, the White Book Vol. 1 at §C1A-009 states: "Letters of claim and response are not intended to have the same status as a statement of case (a pleading). It would defeat the purpose of the protocols if a party were penalised for subsequently clarifying his/her claim or defence when proceedings were issued. However, parties should be wary of making substantial changes without explaining why this is necessary as, without good reason, this could amount to 'unreasonable conduct'". The Judge considered that, as a matter of principle, unless the circumstances were exceptional and thereby gave rise to some sort of unreasonable conduct, costs incurred by a Defendant in the PAP procedure in successfully persuading a Claimant to abandon a claim (either in whole or in part) were ***not*** costs "incidental to" any subsequent proceedings if, in those subsequent proceedings, such claims did not feature at all; such 'thrownaway' costs were therefore not recoverable under s.51.

Comment

Pre-commencement costs in arbitration have been the subject of some recent discussion with reference, inter alia, to *In re Gibson's Settlement Trusts*; while mindful of the fact that CPR does not apply in arbitration, the general principles of that case and of the present case are worthy of close consideration by arbitrators. Further, the detailed identification of such costs could prove problematic in many circumstances, the present case being straightforward in that HTA was, ultimately, 'off the hook'.

13th July 2005

Judge-Arbitrators and Leave To Appeal

You may recall that I circulated a note last year on the subject of sitting judges sitting as Arbitrators under s.93 and Sch. 2 of the Arbitration Act 1996. The first post-1996 appeal against an award by a Judge-Arbitrator (HHJ Humphrey Lloyd QC) has now been heard in the Court of Appeal - *Henry Boot Construction Ltd v. Alstom Combined Cycles Ltd* ([2005] EWCA Civ 814) where the Court upheld a s.69 appeal relating to issues of construction law which I will leave to others to address in detail but which, in brief, concerned the question of when a cause of action arose in respect of claims for interim and final payment under construction contracts; this was critical in the present case because of limitation – the Judge-Arbitrator had effectively decided, as a preliminary issue, that most of Boot's claims were time-barred. Although such issues were always a question of construction, the essential payment terms of the standard forms of contract have many features in common, including provisions for payment on certificates, usually issued by an engineer or architect. The contract in the present case incorporated the ICE Standard Form (6th edition) (with immaterial amendments). Per Dyson LJ "these issues are of considerable significance to those who are engaged in the construction industry".

The Court refused both (i) leave to appeal (LTA) (i.e. to the House of Lords) and (ii) leave to appeal the refusal to grant LTA and, in doing so, gave authoritative guidance concerning LTA in these rare circumstances.

Under s.69(8) + §2 of Sch. 2, LTA shall be refused unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the House of Lords. LTA be given only by the court which heard the first appeal from the Judge-Arbitrator (*Henry Boot Construction Limited v Malmaison Hotel Limited* [2001] QB 388). The issues raised in the present case were undoubtedly of general importance; Alstom conceded that this was not per se a sufficient condition for LTA to be given but submitted that the only other condition that needed to be satisfied was that the proposed appeal was arguable and that this condition was amply met in the present case.

Dyson LJ considered that the correct approach was to apply §4.5 of the House of Lords Practice Directions Applicable to Civil Appeals, which includes:

> "Leave is granted to petitions which raise an arguable point of law of general importance ***which ought to be considered by the House*** at that time, bearing in mind that the case will have already been the subject of judicial decision." [emphasis added]

The emphasised words were important, giving the House a broad discretion.

The principal question that arose on this appeal was whether the cause of action in respect of the Engineer's failure to have included a sum in an interim certificate was the same as the cause of action in respect of the failure to have included a sum in the final certificate. Dyson LJ considered that the answer to this question was sufficiently plain that he would hold, on that account alone, that the point was not one which ought to be considered by the House of Lords. The clause 60(7) issue did not raise an issue of general importance sufficient to justify giving LTA. In addition, it had to be born in mind that this was an appeal from an arbitrator's award. In *Malmaison*, Waller LJ had said:

> "I also reject Mr Black's submissions that once matters are in court the philosophy applicable to arbitrations somehow has no further application. Parties who have agreed to have their disputes arbitrated should have finality as speedily as possible and with as little expense as possible: see generally section 1(a) of the Arbitration Act 1996. Limitation on the rights of appeal is consistent with that philosophy and one tribunal dealing with the question is also consistent with that philosophy."

Dyson LJ considered that, in deciding whether the questions ***ought*** to be considered by the House of Lords, this was a relevant factor. Concluding, LTA refused.

Alstom requested LTA against that refusal. S.69(6) + §2 of Sch. 2 provides that "the leave of the [CoA] is required for any appeal from a decision of the [CoA] under this section to grant or refuse [LTA]". This power should be exercised very sparingly, particularly in relation to the grant of LTA to the House of Lords, and only where there was real doubt as to the criteria to be applied for the grant of LTA. Although it was common ground that the relevant criteria were contained in §4.5 of the HoLPD, there was an issue as to whether the statement by Waller LJ (above) was correct but this was not a sufficient reason for giving LTA against the refusal - the fact that this was an appeal against an arbitrator's award was no more than a relevant factor.

LTA against the refusal refused.

Comment

The threshold gets ever higher ! Further, if the parties choose a Judge-Arbitrator, they buy into a greater inflexibility than is the case in conventional arbitration – that is part of the deal.

2nd August 2005

Sherlock Holmes and the Burden of Proof

You can put away "Harry Potter and the Half-Blood Prince" and read instead a greater work of literature, not by a billionaire novelist but by a High Court Judge, and not a work of fiction (hard to believe on reading it !) but a judgment of the High Court in one of the longest civil trials of recent years (95 court days) which has concluded with judgment by

Lewison J in a truly enormous judgment of 1,929 paragraphs; the case was Ultraframe (UK) Ltd v Fielding & Ors [2005] EWHC 1638 (Ch) and the judgment can be found at http://www.bailii.org/ew/cases/EWHC/Ch/2005/1638.html.

The case was (for the moment) the culmination of a long war of attrition in which the real combatants were Ultraframe on one side and The Burnden Group plc ("Burnden") on the other. Ultraframe and Burnden were competitors in the market for the manufacture and supply of conservatories, and conservatory roofs in particular. Mr & Mrs Fielding were the majority shareholders in Burnden. The war was bitterly fought with accusations and counter-accusations of forgery, theft, false accounting, blackmail and arson, not to mention the widespread allegations that many of the principal witnesses are lying. At the heart of the litigation was a dispute about the ownership of businesses in the field of conservatory roof design and manufacture originally developed by a Mr Davies who had operated through a number of companies, all of which had become insolvent and he was adjudicated bankrupt.

For those who have little enthusiasm for the new Harry Potter book, I commend this case to you as a gripping (if lengthy) read but this is not the reason I bring it to your attention, rather that one of my favourite topics, Burden of Proof, resurfaces and Lewison J makes some helpful comment as set out below.

8. **Burden and standard of proof**

General

9. In view of the seriousness of the central allegations, it as well to recall, at the outset, that although the burden of proof resting upon Ultraframe is the ordinary civil burden, the evidence required to establish the dishonest scheme alleged must be cogent. As Lord Nicholls of Birkenhead explained in *Re H and Others* [1996] AC 563, 586:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

The Sherlock Holmes fallacy

10. The great detective famously said that once you have eliminated the impossible, whatever remains, however improbable, is the truth. While that may be true for detectives, it is not true for judges. As Lord Brandon of Oakbrook explained in *The Popi M* [1985] 1 WLR 948, 956:

"In my view there are three reasons why it is inappropriate to apply the dictum of Mr. Sherlock Holmes, to which I have just referred, to the process of fact-finding which a Judge of first instance has to perform at the conclusion of a case of the kind here concerned.

The first reason is one which I have already sought to emphasize as being of great importance, namely, that the Judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. …

The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a Judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the Judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden."

11. Lord Hoffmann has recently explained, albeit in a very different context, in *Gregg v. Scott* [2005] 2 WLR 268:

"[The] law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is... The fact that proof is rendered difficult or impossible … makes no difference. There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof."

12. However, a judge should not fall back on the burden of proof as a way out of making difficult decisions. In *Stephens v. Cannon* [2005] EWCA Civ. 222 Wilson J, giving the only judgment of the Court of Appeal said:

"(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.

(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.

(c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."

6th October 2005

Another Hopeless s.69 Case

The English courts have been cold and unwelcoming places for s.69 appellants and the success rate continues to be very low, notwithstanding the publicity given to the Lesotho case recently decided in the House of Lords (not directly a s.69 case since it was an ICC arbitration and ICC Rules exclude recourse to s.69 or equivalent). In addition, a series of recent judgments have made it clear that the applicability of s.69 will be regarded narrowly and that it will not be capable of use as a back-door attempt to reopen either matters of fact or those which fall under s.68 (requiring substantial injustice as well as a procedural failure).

Given this background, it is perhaps surprising that *Surefire Systems Limited v Guardian ECL Limited* [2005] EWHC 1860 (TCC) ever came to Court and, perhaps unsurprisingly, Mr Justice Jackson was in a trenchant, no-nonsense mood: "… the first ground of appeal set out in the claim form is quite hopeless. … [the 2nd] .. is hopeless … [the 3rd] … is fatally flawed. …" etc. However, Jackson J sets out certain matters or principle in more detail and this is of great relevance to us all.

Surefire was a contractor at the former County Hall, now owned by a Japanese company (see *Shirayama v Danovo*, an interesting mediation case - refer [2004] 70 ARBITRATION 2 at 150 subsequently reversed by the Court of Appeal in *Halsey*); Guardian was a sub-contractor to Surefire. Disputes arose in connection with Guardian's Final Account and arbitration proceedings ensued and, following an 8-day Hearing, an Award was issued in which Guardian was awarded approx. £205,000 as against the £650,000 it had claimed

Surefire applied for leave to appeal under s.69, on grounds that (i) the Arbitrator had failed to have regard to the burden of proof which was on Guardian in awarding sums in respect of which there was no supporting evidence; (ii) the Arbitrator had disregarded clause 10 of the subcontract in awarding sums to which Guardian were not entitled, since it had failed to comply with the mechanism contained therein. Surefire also applied for an extension of time. Guardian submitted that Surefire had not identified any question of law which the Arbitrator had been asked to determine, or in respect of which he had even arguably fallen into error. Both parties submissions included factual evidence, witness statements etc.

Extension of Time

The Arbitrator had issued a clarification on 2nd May 2005 which, Jackson J held, constituted "an arbitral process of… review" for the purposes of s.70(3) of the Act. Accordingly, no extension of time was necessary. However, if an extension of time had been necessary, he would not have granted it since Surefire had failed to explain the (assumed)

delay. Jackson J added, expressly obiter, that following Colman J in *Kalmneft v Glencore (*setting out seven principles governing extensions), this was not a case in which it was appropriate to grant any extension.

S.69 Application

The first ground of appeal set out in the claim form was “quite hopeless”, failing to identify any question of law upon which the Arbitrator had even arguably fallen into error and failing to satisfy any of ss.69(1), 69(3)(b), 69(3)(c), 69(3)(d) or s.69(4).

The Award had said "I accept that Guardian bears the burden of proof in establishing first, that a variation under the contract has occurred and second, what is its entitlement to extra payment." This was a correct statement of the law but Surefire argued that the Arbitrator did not proceed thereafter in accordance therewith. Surefire relied upon the decision of the House of Lords in *Rhesa Shipping Co SA v Edmunds [1985] 1 WLR 948* in which it had been held that where there was no satisfactory evidence on a particular point, the party bearing the burden of proof should fail in respect of that point. Jackson J accepted these propositions but did not accept that they were applicable to the present case. In respect of some issues, the Arbitrator had noted that there was a paucity of evidence but he had identified some evidence in respect of each variation, having had the benefit of not only the contemporaneous documents, but also the oral evidence. Per Jackson J “It is not the function of this court to review an arbitrator's assessment of the factual evidence. However, in fairness to the arbitrator in this case, I must say that I can see nothing remotely surprising in [his] assessment of the evidence in relation to each of the disputed decisions. Accordingly, the second proposed ground of appeal must be rejected.”

The third proposed ground of appeal (relating to Clause 10) did not satisfy the requirements of any of s.69(1), s.69(3)(b), 69(3)(c), s.69(3)(d) or s.69(4). Clause 10 had not been in issue in the arbitration.

Conclusions

Jackson J concluded [my emphasis added] “ …this case illustrates three propositions, which need to be emphasised and which need to be understood, both by the construction industry and by the profession. These are:

(1) Where the parties enter into an arbitration agreement, their rights thereafter to challenge the arbitrator's award are *strictly limited* by the Arbitration Act 1996.

(2) No application for leave to appeal will be granted unless the prospective appellant can surmount the *substantial hurdles* set up by s.69 of the Act.

(3) Where an application for leave to appeal is made, the court should not be burdened with vast tracts of inadmissible evidence, nor should the court be burdened with many pages of intricate argument about the factual issues which the arbitrator has decided. *The preparation of such material is a waste of time, effort and costs*.

The philosophy underlying the Arbitration Act 1996 has been expounded many times … There are good commercial reasons for parties in the construction industry to choose arbitration. The parties obtain a resolution (almost always a final resolution) of their disputes by a suitably qualified individual of their own choosing. There is, however, a price to be paid. The parties cannot have their cake and eat it. The parties cannot refer their factual or technical disputes first to an arbitrator and then to a judge of the Technology and Construction Court.

I make these remarks because, at least in some quarters, there seems to be a widespread misunderstanding about the role of the court in relation to construction arbitrations. I hope that this judgment will help to alleviate that misunderstanding.”

Comment

No comment necessary

13th October 2005

Public Disclosure Of Case Papers In English Litigation

To what extent should the case papers be available to the public ? This was the question decided by His Honour Judge Wilcox QC in Cleveland Bridge UK Limited vs Multiplex Constructions (UK) Limited [2005] EWHC 2101 (TCC).

The Facts and the Issues

Multiplex Construction UK Limited (“MCUK”) is a wholly owned subsidiary of Multiplex Limited which is ASX-listed; the Multiplex Group has interests all over the world; MCUK is main contractor for construction of the new National Stadium at Wembley Cleveland Bridge UK Limited (“CBUK”) is a well-known steel fabricators, a subcontractor to MCUK on the project. Disputes MCUK/CBUK had arisen and had been listed for a 42-day hearing commencing on 24th April 2006. MCUK has filed and served its consolidated particulars of claim, its reply to defence and counterclaim and CBUK has filed and served defence and counterclaim. There are many complicated factual and legal issues arising in the action requiring extensive factual witness evidence and detailed expert evidence.

A TV journalist, C, and her employer, ABC, applied for an order permitting them to see and take copies of the particulars of claim, the response, the consolidated defence and counterclaim and the consolidated reply and defence to counterclaim in the claim HT-04-314/HT-04-238 in the TCC. These documents fall within the provisions of CPR 5.4. The detailed pleadings fall within the description "other documents filed by the parties" within CPR 5.4(5) which provides, in so far as it is relevant: "Any other person may … (b): if the court gives permission, obtain from the records of the court a copy of any other document filed by a party ...." MCUK sought to resist the application hence the present hearing

C was producing a programme on Multiplex which included covering the dispute relating to the Wembley project; she referred to public interest considerations in support of her application.

MCUK's Solicitors explained the reasons for resisting the application. Inter alia:

> "Our client is obliged to observe the rules of the Australian Stock Exchange, in particular chapter 3 concerning continuous disclosure. If our client were to consent to your application, documentation concerning these proceedings could become disclosable by operation to the exception to Rule 3.1 of the ASX Rules which could in turn oblige our clients to comment on any and all market or other rumours concerning these proceedings, whether such rumours emanate from the documents found at Court or otherwise. Our Client does not wish to become involved in litigating these matters in the press, not least because the proceedings are at a relatively early stage and any speculation concerning the outcome of the proceedings would be unhelpful and more likely than not inaccurate.
>
> There are no public interest considerations in circumstances where your programme will not be aired in this jurisdiction. More generally (and to the extent that this is at all relevant), our Client was very surprised by the statements in your fax of 15 August which imply that our Client has not cooperated with your programme".
>
> …
>
> "The documents relating to the Court proceedings are voluminous and the issues involved are complex, thereby necessitating a lengthy trial next year. Our Client is concerned that, notwithstanding best intentions, it would be extremely difficult for a fair and balanced representation of those proceedings to be given in a short television documentary. The consequences to our Client and its stock price of your programme falling short in this respect could be substantial and irreparable. Our Client would, understandably, prefer for the issues in dispute to be resolved in Court at the appropriate time".

There had been a great deal of press and media interest about this dispute, including national newspapers (in both sports and business sections) and in the construction trade press, in the UK, in Australia and elsewhere.

The Judgment

Judge Wilcox stated that "open justice has long been a fundamental principle of English law and there is a strong presumption that cases should be heard in public and decisions made in public. … Further, it was clear from authority such as *Barings plc v Coopers and Lybrand* [2001] 1 WLR 2353 and *Law Debenture Trust Corp (Channel Islands) Limited v Lexington* [2003] All ER 165, that pleadings ought to be treated as though being read in open court, that anyone with a legitimate interest ought to be allowed reasonable access to them in accordance with the principles of open justice."

Counsel for CBUK submitted that the applicants had demonstrated clearly a legitimate interest, namely a serious journalistic interest to report on Multiplex, the Wembley project and the dispute with Cleveland Bridge UK. This was a consequence of the primary requirement for open justice, memorably stated in *Scott (otherwise Morgan) v Scott* [1913] AC 417 and the passage at 477: "Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial". In *Attorney-General v Leveller Magazine* [1979] AC 440, Lord Diplock had said at 450: "If the way the courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice".

Counsel for MCUK accepted that the applicants had a legitimate interest but submitted both that the trial is the final adjudication on the merits and that all reported cases concerned public disclosure, either during or after trial or compromise.

CBUK contended that the requirement for open justice must equally apply to interlocutory proceedings; refer *Hodgson & others v Imperial Tobacco Ltd***.** [1998] 1 WLR 1056. at page 1073H.

Judge Wilcox agreed: "There can be no legitimate distinction drawn between decisions made in interlocutory proceedings and those at final trial when the requirement for open justice is considered. Interlocutory decisions may often be decisive as to the whole or a significant part of a complex case."

MCUK further submitted that open justice and the continuing obligation of public disclosure throughout a potentially long interlocutory process may in truth be no justice at all. The ongoing provision of pleadings and other documents and the scrutiny of those pleadings and other documents by public and press would give rise to an ongoing need to respond to such scrutiny in the interests of shareholders. Should this application be permitted, floodgates would open

and further applications could be made any time after new documents were filed with the court. Judge Wilcox rejected this since an applicant would have to demonstrate a legitimate interest and the documents would have to be shown to have been judicially deployed.

Counsel for MCUK further contended that real prejudice to its parent could flow should a disclosure order be made in this case since there would be a real risk of injustice thereto, the public perception of Wembley being out of all proportion to its role in Multiplex's business activities as a whole which is apparently the subject of the ABC programme. He contended that Multiplex's ASX reporting obligations are already onerous and the spectre of a public airing of the pleadings either in Australia or in the UK would require Multiplex to answer the points raised, generating yet more material for its opponents.

Judge Wilcox considered the witness statement of an Australian commercial lawyer with extensive experience in company work and dealings with the ASX and the application of its Listing Rules; the General Rule provides: "Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have material effect on the price or value the entity's securities, the entity must immediately tell the [ASX] that information".

Judge Wilcox accepted this Expert's evidence: it was clear that if a reasonable person would expect the information in the documents sought to have a material effect on the price or value of Multiplex's securities, it would already be obliged to disclose them to ASX in any event. He therefore did not accept that the effect of the ASX Rules would impose any additional and onerous obligation. Further, he did not accept MCUK's submissions that because the consolidated action was complex and the pleadings long and detailed that disclosure at this stage could give rise to selective and therefore unfair coverage. In any event, the position would be the same were the trial to be reported after the final adjudication of the issues. The Judge continued "The court must not put itself in the role of nanny, judging whether or not matters are too complicated to disclose. An informed press is in the position to analyse and explain. The specialist press is well able to deal with the technical issues." He also rejected the approach that only those parts of the pleadings relevant to the particular specific disclosure application in May and June should be disclosed: the Court, considering such an application, had taken account of the whole pleaded case and it "would not be appropriate and it would be artificial, to embark upon an editing exercise, giving only partial disclosure of pleadings".

Judge Wilcox concluded that "it would be fair and just to order disclosure of the documents sought. I so order."

13th October 2005

Arbitration and the UN Convention on State Immunity

Last week I attended a most interesting Seminar on State Immunity at the Royal Institute of International Affairs (a.k.a. Chatham House), with a particular focus on the 2004 UN Convention; of course, much of the topic passes arbitrators by but RIIA/CH has published a very useful paper on the topic, available at

http://www.riia.org/pdf/research/il/BPstateimmunity.pdf

The issue of state immunity has a long history and, historically, States enjoyed absolute immunity from civil proceedings save with their express consent; however, as States began to engage in commercial transactions, either in their own names or on by way of state agencies or wholly-owned state enterprises, this absolute immunity began to break down to be replaced by "restrictive immunity" whereby States remain immune for acts carried out in the exercise of sovereign authority but do not benefit from immunity in respect of acts of a commercial or private nature. This is, of course, of significant relevance in arbitration whether in respect of Investment arbitration or in respect of ad hoc commercial contracts such as was recently seen in the English High Court (and is presently under consideration in the Court of Appeal) in *Svenska Petroleum AB vs Government of Lithuania* ([2005] EWHC 9 (Comm))

The statutory position in the United Kingdom is straightforward, represented by the State Immunity Act 1978 which substantially reflects the 1972 European Convention on State Immunity which came into force on 11th June 1976; however, only eight states (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the UK) are party to that Convention so it has been only a partial success. The 1978 Act reflects the principle set out above that States retain immunity for sovereign acts but do not for commercial transactions.

Unsurprisingly, former Soviet bloc countries and others which have democratised in the last 25 years or so have starting points reflecting absolute immunity; further, countries such as France, a non-signatory to the 1972 Convention, adopt a different approach to immunity to that in the UK. In 1977 the UN General Assembly decided to commence work on State Immunity under the auspices of the International Law Commission and, after many years of very difficult negotiation, a "Convention on the Jurisdictional Immunities of States and Their Property" was finalised in 2004 and adopted by the General Assembly. The Convention provides that it shall enter into force after it has been signed and ratified by 30 states; it appears that, to date, it has been signed only by Austria, Morocco, Portugal and Belgium.

Article 2(1)(c) of the Convention defines a commercial transaction as being "(i) any commercial contract or transaction for the sale of goods or supply of services; or (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; or (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of

employment at of persons. Further, Article 2(2) provides "in determining whether a contract or transaction is a "commercial transaction" under Art. 2(1)(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the Forum, that purpose is relevant to determining the non-commercial character of the contract or transaction." (Note: in some jurisdictions the nature/purpose distinction has great significance)

Article 10(1) provides that "if a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of the Court of another State, the State cannot invoke immunity from that jurisdiction in proceedings arising out of that commercial transaction". Article 10(2) provides that Article 10(1) does not apply either in the case of a commercial transaction between States or if the parties to the commercial transaction have expressly agreed otherwise. Further, Article 10(3) provides that "where a state enterprise or other entity established by the State which has an independent legal personality and is capable of (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorised it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 17 ("Effect of an arbitration agreement") provides that "If a state enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides."

Inevitably, the text of the UN Convention reflects the political compromise between participating states with widely differing views as to the extent to which States should or should not be immune and with widely differing legal interpretations thereof. In some aspects, the 1978 Act is clearer and more precisely defined than the Convention and the question then arises as to whether the UK should amend that Act in order to reflect the Convention. This is an interesting debate, currently the topic of a Foreign & Commonwealth Office consultation process, but which lies beyond the scope of this short note.

Summary

For countries such as the UK, the new UN Convention, even if the UK does sign and ratify it, will have minimal effect in respect of arbitration awards but, in other instances, where countries do sign and ratify they buy-in to a level playing field in respect of arbitral awards against the State which can only be beneficial in the context of and the improvement of world trade.

25th October 2005

Arbitration Awards and State Immunity

An important judgment has been delivered by Aikens J in the English High Court in the case AIG Capital Partners Inc & Anr v The Republic of Kazakhstan [2005] EWHC 2239 Comm (20th October 2005); the judgment can be found at http://www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html.

The RoK and its central bank, the National Bank of Kazakhstan ("NBK") claimed state immunity iro an ICSID award won by AIG in the sum of US$ 9,951,709 plus continuing interest. AIG obtained leave to register this award in the High Court under s.1 of the Arbitration (International Investment Disputes) Act 1966 and sought to enforce it as a judgment by obtaining final Third Party Debt and Charging Orders against cash and securities held in London by third parties ("AAMGS"), pursuant to a Global Custody Agreement dated 24 December 2001 with NBK. AIG contended that the cash and the securities are assets of the RoK that can and should be the subject of Final Orders. NBK intervened in the proceedings and applied to discharge both orders on the ground that the cash and securities held by AAMGS constituted "property" of the NBK and are the subject of immunity from enforcement under ss.13(2)(b) and 14(4) of the State Immunity Act 1978. AIG contended that those sections, properly construed and applied to the facts of this case, do not grant immunity, so that the Interim Orders should indeed be made Final.

The judgment is long, complex and important and will be the subject of comment shortly; for the present, it suffices to state the Judge's conclusions

95. "In summary, my conclusions are:

(1) As to the Third Party Debt Order, the cash accounts held by AAMGS in London are in the name of the NBK. The cash accounts constitute a debt owed by AAMGS to the NBK, which is the account holder. The RoK has no contractual rights to that debt against AAMGS. Therefore there is no "debt due or accruing due" from AAMGS (the third party) to the judgment debtor. So the court has no power under CPR Pt 72.2(1)(a) to make a Third Party Debt Order in respect of the cash accounts. The Third Party Debt Order must be discharged on this ground.

(2) The meaning of section 14(4) of the SIA, using "common law" rules of construction, is clear. In particular:

(a) the word "property" must have the same meaning in section 14(4) as it does in section 13(2)(b) and 13(4).

(b) "Property" has a wide meaning. It will include all real and personal property and will embrace any right or interest, legal or equitable, or contractual, in assets that are held by or on behalf of a State or any "emanation of the State" or a central bank or other monetary authority that comes within sections 13 and 14 of the SIA.

(c) The words "property of a State's central bank or other monetary authority" mean any asset in which the central bank has some kind of property interest as described above, which asset is allocated to or held in the name of the central bank, irrespective of the capacity in which the central bank holds the asset or the purpose for which the asset is held.

(3) The immunity created by section 14(4) does concern the rights of access to the court of a claimant who wishes to enforce against the assets of a central bank. In this case section 14(4) does affect the right of the Claimants to enforce an ICSID arbitration award that has been legitimately registered as a judgment under section 1 of the Arbitration (International Investment Disputes) Act 1966. Therefore section 14(4) does concern the right of a claimant to a civil right to have access to the courts, in accordance with Article 6(1) of the European Convention on Human Rights.

(4) However, that right is not absolute. The immunity granted to assets of central banks, as set out in section 14(4), is both legitimate and proportionate and is in accordance with the expectations of States. Therefore there is no violation of the Claimants' rights under Article 6(1).

(5) Section 14(4) does not deprive the Claimants of their possession, ie. the ICSID Award or the judgment that has been registered. The Award was always subject to the restrictions on enforcement that existed at the time it was made. Those restrictions are clear from Article 55 of the Washington Convention which set up the ICSID arbitration procedure. Therefore there is no infringement of Article 1 to the Protocol to the European Convention on Human Rights.

(6) Accordingly, there is no requirement to modify the "common law" construction of section 14(4) of the SIA in order to give it effect in a way which is compatible with Convention Rights, because it is compatible anyway.

(7) On the facts of this case, the London Assets, held by AAMGS on behalf of the NBK are "property of a central bank", ie. the property of NBK, within the meaning of section 14(4). This is because NBK has an interest in that property within the definition of "property" that I have set out above. Therefore all the London Assets are immune from the enforcement jurisdiction of the UK courts.

(8) If, contrary to my view, the London Assets are not the property of NBK within the meaning of section 14(4), then, on the facts of this case, they constitute "the property of a State" within the meaning of section 13(2)(b) and 13(4) of the SIA. The London Assets were not at any time either in use or intended for use for "commercial purposes" within the meaning of section 13(4) of the SIA. Therefore they are immune from the enforcement jurisdiction of the UK court by virtue of section 13(2)(b) of the SIA.

(9) Accordingly, the court must discharge the Interim Charging Order. As the same reasoning applies to both the cash and securities accounts within the London Assets, even if the court had otherwise had jurisdiction to make the Third Party Debt Order, it would have to discharge it because the cash accounts are immune from enforcement proceedings for the reasons set out above.

96. Therefore I must discharge both Interim Orders."

25th October 2005

Costs, Mediation and the Courts

His Honour Judge Coulson QC has, as a postscript to a costs-related judgment in which he provided helpful comment and a review of the authorities on when the Court will or will not award indemnity costs, issued a salutary reminder about the interaction of mediation and litigation in the English Courts.

Wates Construction Limited v. HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC) (10th October 2005) concerned an application by HGP for indemnity costs i.r.o. Wates' discontinuing Part 20 proceedings against HGP. In May 2002, the roof of a large retail unit, built by Wates for Waitrose in Salisbury in 1997, collapsed, causing considerable damage; it was agreed that the collapse was due to the build up of rainwater on the roof. The work had been carried out pursuant to a design and build contract, i.e. Wates had a contractual liability to Waitrose in respect of both the design of the unit, and its subsequent construction in accordance with that design. Wates engaged various professionals to carry out design work on their behalf including HGP as architects, and the latter designed the drainage

for the flat roof of the unit that collapsed. In 2003 Waitrose commenced proceedings against Wates for damages for breach of the D&B contract, including allegations of negligent design of the drainage system for the flat roof. Wates denied the claim but issued Part 20 proceedings against HGP and these were discontinued on the first day of the trial, Wates accepting that it had to pay HGP's costs. Should these be on the standard or indemnity basis ?

The leading recent authorities on this point are *Reid Minty v Taylor* 2002 1 WLR 2800 and *Kiam v MGN Limited No 2* 2002, 1 WLR 2810. In *Reid Minty*, Lord Justice May said, at paragraphs 28 and 32:

> "If costs are awarded on an indemnity basis in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted, but I do not think that this will necessarily be so in every case. What is, however, relevant, at the present appeal, is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity, or deserving moral condemnation…
>
> There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the Court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded, in all the circumstances, as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant, and if they come within Part 36 may, subject to the Court's discretion, be determinative."

In *Kiam v MGN No 2* Lord Justice Simon Brown explained that reasoning in this way:

> "I for my part understand the Court there [in *Reid Minty]* to have been deciding no more than that conduct, albeit falling short of misconduct deserving a moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree. Unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44, unlike one made under Part 36, does, I think, carry at least some stigma. It is, of its nature, penal rather than exhortatory."

HGP's application for indemnity costs was based on Wates' failure (a) to comply with the pre-action protocol; (b) to deal with disclosure properly, which necessitated an order from the Court; (c) to plead a proper case which led to amendments and requests for further information which, themselves, were not properly answered and which, again, led to further orders of the Court; (d) to address the fact that they had deviated from HGP's design; (e) to pay the costs ordered on at least one occasion by the Judge who was case-managing the Part 20 claim.

Judge Coulson said "I am not sure that any of these matters, even when taken together, can amount to the sort of conduct that would ordinarily justify an order for indemnity costs. Of course, that is not to say that I in any way condone these various failings on the part of Wates and/or their solicitors; in my judgment, they are indicative of a relatively weak claim kept going with the minimum of expenditure. But they are not, in my view, examples of conduct which would ordinarily justify the draconian order sought." However he did order indemnity costs from a later date (11th August 2005) after which it should been wholly apparent to Wates that it should drop the Part 20 case.

Judge Coulson also said [emphasis added):

> "In the context of offers made, I have been referred to an offer by Wates' solicitors, on 21 September [2005], of a possible mediation. [Counsel for Wates] wisely did not push that point too hard. The mediation was proposed far too late for it to have any prospect of success, particularly given the impregnable position in which HGP found themselves so close to the start of the trial. ***Too often, in my recent experience, solicitors facing costs difficulties try to avoid them by making belated offers of mediation. That is not what mediation is for, and it is not a practice in accordance with the CPR***.

Comment

None necessary; the judiciary have previously (e.g. in *Halsey*) expressed strong disapproval of the use of mediation as a tactical device.

16th November 2005

Arbitration and State Immunity – Svenska v Lithuania

You will recall my earlier posting on 16th January 2005 reporting that the English High Court had dismissed an application by Svenska Petroleum AB to strike out or dismiss an application by the Government of Lithuania (GRL) seeking set-aside, on grounds of sovereign immunity, of Svenska's attempted enforcement in England of a Danish arbitral award despite the GRL's active participation in all aspects of the arbitral proceedings and despite its failure to challenge either the interim or the final award in the Danish Court.

The Deputy Judge had concluded, albeit reluctantly, that Svenska could not establish the required issue estoppel - "reluctantly" because the GRL had raised the jurisdictional issue before the tribunal, had requested that that issue be determined by the tribunal, had participated in a 2-day hearing on that very issue and, when it lost, had failed to avail itself of the challenge available in Danish law. However, it could not be shown in Danish law (but see below) that the

interim award had finally and conclusively determined that issue in Denmark and therefore Svenska could not establish the required issue estoppel.

The substantive case has now come before the redoubtable Mrs Justice Gloster DBE in the English High Court ([2005] EWHC 2437 (Comm) 4th November 2005); in a long (27,500 words) and detailed judgment she dealt with the following principal issues and reached the following conclusions:

(1) Had the GRL waived its immunity pursuant to Art. 35 of the JVA with Svenska ? Yes.

(2) Had this amounted to submission to the jurisdiction of the English Court (s.2 State Immunity Act 1978 refers) ? No.

(3) Was the GRL party to a commercial transaction and do the present proceedings relate to that transaction ? (s.3(1)(a) SIA 1978 refers) ? Yes; per Gloster J (§46)

> "it is clear in my judgment that, by signing its acknowledgement that it was "legally and contractually bound" and by accepting obligations and rights under various clauses of the JVA, the [GRL] was clearly a party thereto. In my judgment, therefore, the JVA was a "commercial transaction, entered into by the [GRL]".

(4) For the purposes of s.3 SIA 1978 were Svenska's enforcement proceedings (s.101 Arbitration Act 1996) proceedings "which relate to a commercial transaction" ? No, following the decision of Stanley Burnton J in *AIC Ltd v. The Federal Government of Nigeria* [2003] EWHC 1357 notwithstanding that such decision was not binding on Gloster J.

(5) Given that the Tribunal had decided in its 2001 Interim Award that the GRL was a party to the arbitration agreement (Article 9 of the JVA), was the GRL estopped from contending that it was not so bound ? After considering detailed expert evidence on Danish law, Gloster J held (§64) that

> "on the balance of probabilities, were the Danish Court now to address itself to the issue whether the Interim Award was binding, or whether the [GRL] was still free to challenge that Award before [it], as the supervisory court of the arbitration proceedings, [it] would conclude that it was no longer open to the [GRL] to do so. The Interim Award was rendered on 21 December 2001, now nearly four years ago. The [GRL] had every opportunity to challenge the Interim Award, had it chosen to do so. But it deliberately did not take advantage of that opportunity; instead it chose fully to participate in the arbitral hearing on the merits, which led to the Final Award. Moreover, as the passage at page 238 of the Final Award, which I have cited above, shows, after the Interim Award had been given, the [GRL] did not "argue .. that [Svenska's] .. claim for damages is not arbitrable or that the Arbitral Tribunal otherwise lacks jurisdiction with respect to this claim". No doubt the [GRL] fully participated in the substantive hearing hoping for success before the Tribunal. Had it been successful, it would then have been entitled to have relied upon the Award, for example in resisting any proceedings which might have been brought by Svenska against it in Lithuania. It passed the Governmental Resolution on 11 February 2004, referred to above, deciding effectively not to challenge the Final Award, and further resolving that the resolution be specifically communicated to Svenska. No doubt Svenska [had] relied upon that decision in informing its strategy as to what further steps it would take to enforce the Final Award. In all those circumstances it seems to me unlikely in the extreme that a Danish supervisory court would now permit the [GRL] to challenge the Interim Award in the Danish Courts. I consider that, on the balance of probabilities, a Danish Court would decide that any appeal at this point of time to the Danish Courts to challenge the Interim Award would not be an action within 'reasonable time' and that they would regard the [GRL], for the purposes of those proceedings and any enforcement proceedings, as effectively having waived its right to do so. I therefore agree with [Svenska's] submission that, in all the circumstances, the Interim Award gives rise to an issue estoppel and debars the [GRL] from arguing before the English court that it was not a party to the arbitration agreement in Article 9 of the JVA. Accordingly, in my judgment, because of the issue estoppel, the [GRL] is not entitled to rely on the fact that it alleges that it was not a party to the arbitration agreement in the context of its claim to state immunity."

(6) Does s.9 SIA 1978 apply to proceedings which are for the enforcement of an award delivered in foreign arbitration proceedings and can Svenska rely on the exception ? [NOTE: S.9(1) provides as follows: "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration." Gloster J held (§73) that

> "… it is therefore clear that section 9 was intended to apply to "any foreign arbitral award" and there is no justification to be found in the language used in section 9 (in particular when contrasted with that used in section 3) for limiting the exception to awards relating to purely commercial disputes."

(7) Was the GRL party to the Arbitration Agreement ? This question arose only if Gloster J had been wrong on the estoppel issue and, in any event, she had to reach an independent conclusion on the matter, rather than merely reviewing the decision of the Tribunal for the purpose of seeing whether the Arbitrators were entitled

to reach the decision which they had. Further, it was not sufficient to establish merely that the GRL was party to the JVA, it must also be established that the arbitration clause was intended to cover disputes between the GRL and Svenska and that the GRL had agreed to be bound thereby. Following extended analysis including that of Lithuanian law, Gloster J concluded (at §139):

> "In my judgment, the evidence of the parties' pre-contractual negotiations demonstrates the common intention of the State, Geonafta and Svenska that their disputes (including those involving the State) should be settled by arbitration and that the dispute resolution provisions of Article 9 of the Final JVA should apply to disputes between the State and Svenska, notwithstanding the inappropriate use of the words "Founders" and other words in that clause. In reaching this conclusion I have given due weight to the wording in clause 9. However, despite the fact that it does not *prima facie* reflect the actual intentions of the parties as I have held them to be, the relevant principles of Article 6.193 of the Lithuanian Civil code require the Court to search for the parties' real common intention notwithstanding the literal meaning of the words used. Accordingly, it follows that, in my judgment, the State was indeed a party to the arbitration agreement in Article 9 of the JVA and therefore it is not entitled to State immunity in the present proceedings by virtue of section 9 of the [SIA 1978].

Commentary to follow

18th November 2005

Jurisdiction and Natural Justice: an Adjudication Case In The Court Of Appeal

Carillion Construction Limited v. Devonport Royal Dockyard Limited arose out of a very high-value construction dispute which was referred to adjudication and duly decided thereon, the Adjudicator making a substantial award to Carillion. Devonport failed to pay and commenced proceedings in the TCC seeking declarations that the adjudicator's decision was invalid and unenforceable. Jackson J gave judgment on 26 April 2005 ([2005] EWHC 778 (TCC)), substantially upholding the Adjudicator's decision, granting summary judgment for £12.4m and refising permission to appeal. Devonport applied for leave to appeal (LTA) to the Court of Appeal and a full Court headed by the Master of the Rolls duly heard the LTA application and the latter has now delivered judgment ([2005] EWCA Civ 1358; 16th November 2005) substantially upholding Jackson J (and the Adjudicator) in refusing on Devonport's three principal grounds).

In doing so, the CoA set out some important (re)statements of the law governing the adjudication process. I extract as follows:

52. Before addressing those submissions the judge set out the legal principles which he was to apply. He examined a number of authorities, including five decisions of this Court – *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2001] All ER Comm 1041, [2000] BLR 522, *C&B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93, *Levolux AT Limited v Ferson Contractors Limited* [2003]EWCA Civ 11, 86 Con LR 98, *Pegram Shopfitters Limited v Tally Weijl (UK) Limited* [2003] EWCA Civ 1750, [2004] 1 All ER 818 and *Amec Capital Projects Limited v Whitefriars City Estates Limited* [2004] EWCA Civ 1418, [2005] BLR 1. At paragraph 80 of his judgment he stated the general principles to be derived from those authorities and from two decisions in the Technology and Construction Court – *Discain Project Services Limited v Opecprime Development Limited* [2000] BLR 402 and *Balfour Beatty Construction Limited v Lambeth London Borough Council* [2002] BLR 288:

    "1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).

    2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see *Bouygues, C&B Scene* and *Levolux;*

    3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision: see *Discain, Balfour Beatty* and *Pegram Shopfitters.*

    4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shopfitters* and *Amec."*

    We do not understand there to be any challenge to those general principles. They are fully supported by the authorities, as the judge demonstrated in his judgment.

53. The judge then went on, at paragraph 81 of his judgment, to state five propositions which, as he said, bore upon the issues which he had to decide:

    "1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of paragraph 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered

the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyds Reports 187.

2. On a careful reading of His Honour Judge Thornton's judgment in *Buxton Building Contractors Limited v Governors of Durand Primary School* [2004] 1 BLR 474, I do not think that this judgment is inconsistent with proposition 1. If, however, Mr Furst is right and if *Buxton* is inconsistent with proposition 1, then I consider that *Buxton* was wrongly decided and I decline to follow it.

3. It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty v London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.

4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular *Save Britain's Heritage v No 1 Poultry Limited,* [1991] 1 WLR 153 and *South Bucks DC and another v Porter (No 2)* [2004] 1 WLR 1953. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:

   (a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).

   (b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.

   (c) Adjudicators often are not required to give reasons at all.

5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in *Gillies Ramsay* [*Gillies Ramsay Diamond and others v PJW Enterprises Limited* [2004] BLR 131], that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice."

……

84. It will be apparent, from what we have said in giving our reasons for refusing permission to appeal, that we are in broad agreement with the propositions which the judge set out at paragraph 81 of his judgment and which we have ourselves set out at paragraph 53 in this judgment. Those propositions are indicative of the approach which courts should adopt when required to address a challenge to the decision of an adjudicator appointed under the 1996 Act. We are, perhaps, less confident than the judge that the decision in *Buxton Building Contractors Limited v Governors of Durand Primary School* [2004] 1 BLR 474 can be reconciled with the first of those propositions. We endorse that first proposition and, to the extent that *Buxton* is inconsistent with that proposition, the judge was right not to follow that decision.

85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme;

or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly."

Comment

None necessary

18th November 2005

Exercise of The Court's Discretion in Appointing an Arbitrator under s.18 AA96

S.18 AA96 provides a default procedure applicable if the parties have not agreed a default procedure of their own for appointing an arbitrator. "s.18(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside. S.18(2): If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section. S.18(3): Those powers are: (a) to give directions as to the making of any necessary appointments; (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made; (c) to resolve any appointments already made; (d) to make any necessary appointments itself."

What governs the Court's discretion in this regard ? This was a key issue in City & General (Holborn) Limited v AYH Plc [2005] EWHC 2494 (TCC) (Jackson J);

Kier Regional Ltd had contracted with C&G to rebuild/refurbish the former Patent Office Library in London; the contract was the JCT Standard Form of Building Contract 1998 Edition with amendments and some of the design obligations were undertaken by Kier; the contract sum was £11,650,000. Under a separate contract by way of Deed of Appointment, C&G appointed AYH to act as project manager for the development. The project ran more than a year late with substantially increased costs. Inter alia, the Deed provided for reference of disputes C&G/AYH to arbitration and, if such dispute raised issues substantially the same as or are connected with issues raised in, inter alia, any C&G/Kier dispute and if the latter had already been referred to arbitration, the Deed provided that it was to be referred to the arbitrator appointed to determine the related C&G/Kier dispute.

Disputes duly arose under both the C&G/Kier contract and under the C&G/AYH Deed and Rowan Planterose QC was appointed arbitrator i.r.o. the former; C&G sought to have him appointed in the latter and AYH resisted. Much of Jackson J's judgment focuses on what was referred to arbitration and whether the two sets of disputes were sufficiently related to trigger the applicable provision of the Deed (broadly, "yes" – in typical Jacksonian style, he said at §44 "Emboldened by this review of the authorities, I now turn to the task of interpreting [the Deed] …), but I shall address only the s.18 issue.

Jackson J concluded that there had been a failure of the appointment procedure as envisaged by s.18 so that the Court had the powers set out in s.18(3) including the [discretionary] power to direct that Mr Planterose be appointed as arbitrator. Counsel for AYH submitted that, since one component of the dispute fell outside the arbitration clause, that was a reason for not exercising discretion to appoint because that component would have to be litigated in any event. However, the Judge held that the fact that part of the dispute fell outwith the arbitration agreement was not a factor which should deflect the Court from appointing an arbitrator: the vast majority of the disputes between CG and AYH did fall within the arbitration agreement and while what remained might be the subject of abandonment or compromise or, alternatively, an *ad hoc* reference to arbitration or, alternatively, litigation. The Judge felt bound to say that to litigate one small point in isolation would not be a particularly sensible method of dispute resolution from anybody's point of view, but such must be a matter for the commercial judgment of the parties and this consideration was not a reason why the court should decline to exercise its discretion in favour of appointment.

Further, the issues in dispute between CG and Kier overlap to a material extent with the issues in the dispute between CG and AYH and if these disputes were referred to different arbitrators, the costs (and associated management time) would be greatly increased. C&G would be party to both arbitrations and AYH would be a party to one its staff would be called as witnesses in the other. In addition, there was also a substantial chance of inconsistent findings being made if there were two separate arbitrations. Per Jackson J "All of this is the mischief against which [the relevant clause in the Deed was] directed." Finally, the Judge noted that there was no personal criticism of Mr Planterose as an arbitrator and no suggestion that he did not possess the requisite qualifications.

Jackson J concluded that, in all the circumstances, the Court should exercise its discretion in favour of making the appointment.

Comment

None necessary

22nd November 2005

The Thornton Four - Freezing Orders On Special Project/Purpose Vehicles In Adjudication

SPVs are common in the construction and other sectors; a consequence of the use of an SPV is that its financial life does not extend beyond the lifetime of the single project that the vehicle has been established to undertake. What if adjudication is pending at the end of that life ? This was the key issue in *Pynes Three Limited v Transco Limited* [2005] EWHC 2445 (TCC) heard before HHJ Thornton QC

T (a company owned by a property developer family, not the gas infrastructure company) was the developer of a project for the extensive refurbishment of a large warehouse building in Bournemouth involving the conversion of that building into 27 high quality residential apartments. P3 (the refurbishment contractor) applied, ex parte and without notice, for a freezing order in relation to assets anticipated to come into T's hands since it had extensive claims arising out of the nearly-complete works. It intended to serve a notice of adjudication in relation to those claims but had good reason to believe that T's relatively limited remaining assets would be dissipated or charged so that there would be no reasonable prospect of recovery from any Adjudicator's Decision; in addition, (i) there had been a substantial previous course of dealing (without success) in relation to P3's reasonable attempts to obtain its entitlement by negotiation, agreement and compromise, (ii) P3 could argue that T's conduct had unconscionably increased the cost of the work and (iii) the balance of convenience, proportionality and fairness all pointed to P3's entitlement to have secured at least part of its substantial claims before it embarked on adjudication.

P3's application, described by the Judge as possessing "the appropriate candour of disclosure required for applications for such relief without notice" was for injunctive relief under s.37 Supreme Court Act 1981, particular attention having been drawn to the principles set out in CPR 25 and the notes, particularly those at CPR 25.1.3, 25.1.9, 25.1.23, 25.2.4, 25.3 and 25.3.3. Reference had been made to "Gee on Injunctions" and to the reference in that work to *Ninemia Maritime Corporation*, both the decision at first instance of Mustill J and in the Court of Appeal, and to the well-known *Mercedes Benz* authority from the House of Lords.

From these authorities the Judge derived a number of principles which he had in mind in considering the evidence:

(i) The court had the jurisdiction in an appropriate case to grant an interim remedy or freezing injunction to restrain a party from dealing with any assets, even where the subject matter of the dispute, the assets themselves, and any process to obtain relief in relation to those assets are all situated within the jurisdiction (see CPR 25.1(1)(f)).

(ii) That jurisdiction may be exercised where it was just and convenient and in the interests of justice, not only to preserve assets where a party would otherwise lose control of the assets on grounds of an insolvency or other financial difficulty, but also both cumulatively and separately where the interests of justice show that a freezing order before proceedings was appropriate.

(iii) ***The application may be made to support and in anticipation not only of litigation but also arbitration or, in this case, adjudication***. In the case of adjudication, both because it is a process provided for by statute and because it is a process which the parties have agreed govern their contract involving the rapid interim resolution disputes and the immediate payment of any sums decided upon, a process which the courts have consistently maintained should be supported by all appropriate means of enforcement and support.

(iv) The order should be sought at the earliest reasonable opportunity and may be sought without notice in cases of urgency and/or where the interests of justice require it to be sought in that way.

The Judge was satisfied from P3's documentation and submissions that this was an unusual case in the sense that P3 had made out a particularly high standard of reasonableness for it to be afforded without notice freezing order relief. Being an interim application, the matter would, absent agreement, return to the court soon for an 'on notice' hearing attended by both parties so the Judge offered only a 'thumbnail sketch' of his conclusions [detail omitted from this Note).

He was satisfied that this was a case in which P3 faced extensive costs in preparing for an adjudication and had already incurred considerable costs in obtaining legal and claims consultant advice. Further, he was also satisfied that T aimed to realise the remaining assets of the development and to dissipate them following T's inducing P3 to continue and complete the contract, notwithstanding a growing entitlement to unpaid sums which appeared to have been withheld by a process of refusal to pay, by the creation of cross-claims which had much less value than P3's financial

entitlement, by recourse to adjudication and then by not complying with the consequences of adjudication and by the creation of every possible practical difficulty to prevent commercial and speedy negotiation and resolution of the growing financial dispute.

The Judge concluded by granting the order as sought with a return date to be fixed, subject to discussion with counsel.

Comment

This is a very helpful summary of the authorities in four propositions.

23rd November 2005

An Oil Industry Case in the Court of Appeal

The Court of Appeal delivered judgment yesterday in Technip-Coflexip & Ors v Tube Tech International ([2005] EWCA 1369 Civ; the judgment can be found at http://www.bailii.org/ew/cases/EWCA/Civ/2005/1369.html

In 1999/2000 Tube Tech supplied equipment and personnel to clean pipes in condensers and heating exchangers in plant for the production of LNG at Bonny Island, Nigeria. Bonny Island is in the Niger delta, the plant being owned by Nigeria LNG Limited. The first four appellants formed a consortium which in turn formed three Madeiran companies for the purposes of entering into an EPIC contract, in December 1995, for the construction of a 2-train gas liquefaction plant. These three Madeiran companies entered into a further contract for an expansion project for a third plant in March 1999. Before the judge and, initially, before the CoA, there was considerable dispute over whether the work performed by Tube Tech was work performed under a contract with one of the Madeiran companies or with the consortium. It was now no longer necessary to resolve that issue but one of the three Madeiran companies, the fifth named appellant (5D), was now the only appellant concerned in the issues which remain to be determined in the appeal.

Tube Tech performed the work under what it alleged were four contracts known as contract 1, contract 2, contract 2A and contract 3. 5D contended that contract 2 was a variation of contract 1 and that it was not a party to contract 2A. Tube Tech submitted invoices during the course of the work, most of which were paid. It sued in respect of unpaid invoices and the consortium and 5D counter-claimed, raising not only the issue as to the correct identification of the parties to the contract but also seeking a refund of sums overpaid under the invoices. Many of the issues which arose before the judge, in a hearing which ran over a period of two months, did not fall for determination in this appeal. All that now remained to be resolved are two issues: (i) the correct meaning and effect of what became known as contracts 1 and 2 (the CoA did not pre-judge the issue as to whether contract 2 was merely a variation of contract 1) and (ii) whether contract 2A was an agreement which Tube Tech could enforce against 5D.

Moses LJ dismissed 5D's appeal (i) in relation to the terms of contracts 1 and 2 and (ii) in relation to contract 2A but not on the grounds Tube Tech, originally contended. Carnwath and Brooke LJJ agreed.

The case is interesting for the judicial analysis of confusing and imprecise contract terms giving the impression of having been developed on-site as opposed to carefully drafted in a quiet in-house counsel's office.

28th November 2005

Arbitration Case in English High Court - Bias/Removal Of Arbitrator

Last week some brief comment on the English High Court case *ASM Shipping Ltd v TTMI Ltd* ([2005] EWHC 2238 (Comm)) was circulated on OGEMID while I was unavailable to respond. It was suggested (by ASM's Solicitors) that the judgment was historic and important; recall the time-honoured legal maxim "no man shall be a judge in his own cause" - with respect to such a distinguished firm of Solicitors and its celebrated Principal, that maxim applies equally to comment by any law firm anywhere on a case in which it represented one of the parties. On my, hopefully objective, analysis, the decision is neither historic nor important but, at best, arguably wrong.

The Facts

In brief, ASM (Owners) and TTMI (Charterers) were engaged in a London arbitration arising out of a charterparty where Mr X QC was 3rd Arbitrator. ASM was represented by Z & Co (Solicitors), TTMI by WH & Co (Solicitors); Owners' principal witness was Mr M, a shipbroker. In a wholly separate (but relatively recent) arbitration (the "Other Arbitration") between entirely unrelated parties, M had been a key witness for one of the parties and WH had represented the other side and, for a short time and in respect of one preliminary issue only (which was settled), X had been instructed by WH. In these other proceedings, so M alleged, he had been the target of an attack by WH who had alleged impropriety in M's giving discovery and had personally accused M of producing fraudulent and fabricated documents – ie WH had alleged criminal acts by M; M alleged further that all these allegations had come to naught and that he had been completely exonerated. On Day 1 of the Hearing in the present arbitration just before he commenced giving evidence, M claimed to recognise X.

The essence of the attack on X was that he must have been aware of the allegations by WH against M in the Other Arbitration and therefore that X could not conduct, or have conducted, the present arbitration without bias. However, X

refused to recuse himself. It should be noted that the present case was a s.68 appeal against an Award (ie on ground of 'serious irregularity'), not an application under s.24 to remove X as arbitrator (see comment below).

The judgment makes no reference to any substantiation of M's assertions concerning the Other Arbitration but does quote (apparently in full) a statement by X to the parties made after he had considered his papers from the Other Arbitration overnight, Inter alia, X stated of the previous proceedings: "[t]he application raised no allegations of impropriety, let alone criminal conduct, on the part of [M] that I am aware of. … I have never met him before this hearing or had any contact with him as far as I am aware. … I do not recall making or WH or their clients making any allegation of [M's] producing fraudulent and fabricated documents and threatening forensic investigation and there is no reference to this in the preparatory note of oral submissions which I prepared for the hearing, but again I have no basis for thinking that any such allegation, even if made, was ever substantiated. …. As far as I am concerned nothing relating to that case gives rise to any doubt in my mind as to the propriety of [M's] conduct. …. I also observe that Z's fax … suggests some similarity of tactics on the part of WH in making allegations about impropriety in connection with disclosure. It is a feature of a very large number of cases these days that such allegations are made, they are not the trademark of any one firm." X went on to state that he had acted for WH's clients in 10 cases out of the 400 in which he had appeared in the previous 10 years; furthermore, while he had met WH personnel socially, he had also sat near Mr Z at an LMAA Dinner but Mr Z had not objected to X on that ground.

To summarise, X had had a brief and peripheral involvement in the Other Arbitration in respect of which M, so he alleged, had been the target of an attack by WH. X had no recollection of meeting M and had not conducted any part of any hearing or other proceeding involving M.

Interim Comment

Before turning to consider English law applicable to the case, let us stand back and look at the scenario based on the facts stated in the judgment: M has made certain allegations in respect of which there is no mention in the judgment of any substantiation. M is not even a party to the arbitration, merely a witness. His credibility has been attacked by Charterer's Solicitors as it had been in the Other Arbitration and as many witnesses are routinely attacked. X has stated clearly that he had no recollection of meeting M and this is consistent with the limited role X had had in the Other Arbitration. Further, these are not even circumstances contemplated by the IBA Green List, let alone the Orange or Red Lists.

English law (following Strasbourg jurisprudence) requires that the determiner of bias be a fair-minded, informed observer ("FMIO"). The test was formulated by Lord Hope in *Porter v Magill* [2002] AC 357 at §§102-103: "The question is whether the [FMIO], having considered the facts, would conclude that there was a real possibility that the Tribunal was biased." Put yourself in an FMIO's position – do you see a real possibility that X might be biased against Owners ?

English Law

It should be noted that "Trade Arbitrations", whether maritime (LMAA), commodity (GAFTA/FOSFA/LME/RSA etc) or other, are a major feature of London arbitration and substantial proportions of the world's shipping and commodities trading activities are on contract forms mandating the appropriate trade arbitration in London. Such arbitral bodies require from their members extensive experience IN the trade and, in some cases, that they be active traders themselves. In *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Law Reports 14, the commercial character of one of Rustal's consultants was being impugned. One of the arbitrators had, two years before, been involved in a trade arbitration against him. In rejecting a challenge to the arbitrator, Moore-Bick J stated that it could "fairly be assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders and so have direct knowledge of how the trade works. However, if the arbitrators themselves are to be active traders there is every likelihood that at least one member of the tribunal will at some time have had commercial dealings with one or both parties to the dispute. That is something which the parties must be taken to have had in mind." Or, in colloquial terms "it goes with the territory".

Further, under s.68, the test of "serious irregularity" requires both a procedural failure (e.g. bias) and that substantial injustice be done to the applicant. The jurisprudence has repeatedly shown that these are two separate tests. In *Groundshire v VHE* [2001] 1 BLR 395 400, HH Judge Bowsher QC had stated in considering further the meaning of substantial injustice: "The [1996] Act does not require the court to speculate what would have been the result if the principles of fairness had been applied, but the Act requires that the court is only to interfere if the court considers, not speculates, that the irregularity or unfairness has caused or will cause substantial injustice to the applicant." This decision is consistent with other English jurisprudence.

Professor Merkin's authoritative "Arbitration Law" (endorsed as such by the Courts) cites *Rustal* (at §10-33(c)) with tacit approval. However, it should be noted that he also states at §10-33(c) "… the mere fact that litigation is pending between the arbitrator and one of the parties will not give rise to the likelihood of partiality so long as it is unconnected with the matter which the arbitrator has to determine." However, with respect to the distinguished Professor, the authorities for this latter proposition date from 1892 and 1901 and can no longer be good law.

The Decision

The judge concluded: "In my view, given the facts and conclusions I have stated, X QC should not continue to act in this matter. …."

There are a number of issues arising from the judgment to which I take exception: inter alia,

(1) Owners' application was stated by the judge to be a challenge to an Award under s.68; nowhere does the judge decide upon this challenge and he nowhere exercises any of his powers under s.68(3). s.68 gives the judge no power to order the removal of an arbitrator (that is given in s.24 but there is no mention in the judgment of s.24 except in §48 where the judge criticises Owners for not making a s.24 application). It follows that the judge's conclusion is without any statutory basis.

(2) The judge considered that if the FMIO had detected a real possibility of bias, then that would be "serious irregularity" which had caused substantial injustice to the applicant since, in his view, there could be no more serious or substantial injustice than having a tribunal which was not, ex hypothesi, impartial, determine parties' rights. With respect, this both ignores the clear language of the statute and is contradicted by all other cases of s.68 applications to which I have access.

(3) The judge appears to have accepted M's allegations without substantiation, dismissing X's clear counter-statements concerning the Other Arbitration made after consultation of his papers. In effect M and his perceptions have been substituted for the FMIO.

(4) The judge relies on X having been instructed by WH in the Other Arbitration but places minimal weight (if any) on the fact that that involvement was brief and peripheral only; there is an "I" in FMIO which has been ignored.

(5) The judge relies on the fact that M apparently reacted with concern to the sight of X at the Hearing whereas M had been aware for some time that he was "up against" WH who had (or so M alleged, apparently without substantiation) given him a tough time in the Other Arbitration. X's statement was clear that he had no recollection of seeing M before and this is entirely consistent with X's very limited role in the Other Arbitration which had not included any Hearing at which M might have given evidence.

(6) The judge also relies on Charterer's skeleton argument having included a heavy attack on Owners in respect of breaches of disclosure orders which attack had been made by the same solicitors (WH) in the Other Arbitration and he stated (§41(6)) "… the uncomfortable feeling which [M] had that X would or might have detected a 'pattern' of misbehaviour in relation to disclosure based upon his knowledge acquired as a barrister in the [Other Arbitration] was genuine." With the greatest respect, this is a complete non sequitur: first, WH would not have been doing its job if it had not taken a robust line in these matters; second, WH's assault in its skeleton was targeted at Owners, not against M who was, to repeat, merely a witness, not a party; third, none of this has anything to do with X, if anything it was between M and WH.

(7) Following (6), the judge's conclusion that the FMIO "would share the feeling of discomfort expressed by [M] and [conclude] that there was a real possibility that the tribunal was biased" is, in my considered opinion, contradicted by the facts.

(8) The decision is wholly incompatible with that in ***Rustal*** which has stood the test of time and has never, to my knowledge, been criticised or dissented from,

Other Issues

The judgement deals with two other issues which are non-controversial and with which I an glad to agree:

(i) One week before the Hearing, Owners' QC had had to withdraw due to a family bereavement; Owners applied for an adjournment which was refused – was this due to bias ? No - given all the circumstances the judge agreed with the refusal ("the right decision in the circumstances") even though he considered that an adjournment, with costs consequences, might have been possible.

(ii) M claimed to recognise X in the middle of Day 1 just before he went 'on the stand' but Owners took no action at that moment (but did so after X's statement given on Day 2) – had Owners thereby waived their right to object to X ? No. However, they had lost it by continuing to take part in the arbitration (albeit under notice of objection) and taking up the Award. The judge stated (at §49): "Owners were faced with a straight choice: come to the court and complain and seek [X's] removal as a decision maker or let the matter drop. They could not get themselves into a position whereby if the award was in their favour they would drop their objection but make it in the event that the award went against them. A 'heads we win and tails you lose' position is not permissible in law as [s.73] makes clear. The threat of objection cannot be held over the head of the tribunal until they make their decision and could be seen as an attempt to put unfair and undue pressure upon them."

Summary

Is this judgment (i) historic or (ii) important ? In my opinion, no and no (except, in the latter case, if it has unfortunate consequences). Wrong ? In my opinion, yes.

If this judgment is indeed correct, it could follow that no one, whether judge or arbitrator, who has ever had any adverse involvement with a witness or party in any capacity can sit in judgment on a case involving that person, albeit

they may not be a party in the future matter. This is not Green List territory but a Persil whiteness far beyond any objective consideration of issues of bias.

1st December 2005

US Supreme Court to Consider Legality of an Arbitration Agreement

Cornell University's Faculty of Law provides an excellent service covering US Supreme Court business; it circulates both a summary of the cases before they are heard and subsequently a summary of the judgment(s). Both make fascinating reading, if not always of direct relevance to my practice. However, a case relating to an arbitration agreement has been filed with the Court and the underlying facts could be replicated in many other countries.

In England & Wales (and Scotland – refer s.108(3)), ss.89-91 would apply and the arbitration agreement would be unenforceable if the sum in dispute was less than £5,000 (E&W) or £1,500 (Scotland), and not necessarily enforceable above those limits (see Merkin "Arbitration Act 1996" 3rd edn pages 208-211).

I am most grateful to Cornell University for permission to reproduce the note below.

Hew
sdrc

Arbitration, Payday Loan Industry, The Federal Arbitration Act, Severability, Void Ab Initio

Buckeye Check Cashing v. Cardegna (04-1264)
Oral argument date: Nov. 29, 2005

Buckeye Check Cashing, a service provider in the payday loan industry, agreed to loan money to John Cardegna. The loan agreement contained an arbitration clause that compelled the parties to use arbitration, and not the courts, in case of dispute. Cardegna brought a class action lawsuit against Buckeye for allegedly charging interest rates higher than Florida usury law allows. Buckeye responded by filing a motion to compel arbitration pursuant to the arbitration clause. Cardegna resisted arbitration, maintaining that the arbitration clause was part of an illegal contract and therefore void ab initio -- the clause had never come into existence as a matter of law.

The issue before the Court is thus whether a court or an arbitrator should determine whether the underlying contract is void for illegality before enforcing the arbitration clause. The outcome will depend on whether the Supreme Court believes the separability doctrine applies to such contracts. If the Court affirms and holds that Cardegna's claims should be decided by the courts, the payday industry and its consumers, businesses that use arbitration clauses and the policies behind the Federal Arbitration Act may suffer. If the Court instead decides that the claims should be sent to arbitration, low-income consumers and consumer protection regulation may be negatively affected.

Continues: http://www.law.cornell.edu/supct/cert/04-1264.html

1st December 2005

New Depths of Hopelessness - Another S.69 Appeal Fails in the English Courts

I have written on several previous occasions about hopeless arbitration appeals in the English High court; inter alia, on 6th October 2005 I wrote about *Surefire Systems Limited v Guardian ECL Limited* [2005] EWHC 1860 (TCC) and summarised the difficulties in mounting any (let alone a successful) s.69 appeal and I said:

> "Given this background, it is perhaps surprising that [*Surefire*] ever came to Court and, perhaps unsurprisingly, Mr Justice Jackson was in a trenchant, no-nonsense mood: "… the first ground of appeal set out in the claim form is quite hopeless. … [the 2nd] .. is hopeless … [the 3rd] … is fatally flawed. …" etc."

Jackson J also stated "No application for leave to appeal will be granted unless the prospective appellant can surmount the *substantial hurdles* set up by s.69 of the Act. [my emphasis].

In his year as Presiding Judge of the TCC Jackson J has proved to be unforgiving indeed of hopeless challenges and, in *The Council of The City of Plymouth v DR Jones (Yeovil) Ltd* ([2005] EWHC 2356 (TCC)) HHJ Coulson QC not only proved no more forgiving than his Presiding Judge but added a sting in the tail of his judgment.

Summary

The Council sought leave to appeal (LTA) in respect of alleged errors of law arising out of an arbitrator's award dated 17 June 2005. The parties agreed that the Judge should determine the LTA application on documents only. The Judge's conclusion, put at the outset of his judgment, was trenchant:

> "I have no hesitation in concluding that this [LTA] application should be dismissed, with costs. … However, I am bound to say at the outset that, in my judgment, this is an application which never had any prospect of success."

The Facts

In October 1999, Jones tendered (in the sum of £497,229) for certain works at a school in Plymouth. This was not accepted by the Council who then reduced the workscope as part of a cost-cutting exercise. As requested, Jones submitted a revised tender (of £382,881) for the reduced workscope. On 26th January 2000 the Council wrote again to Jones referring to the tender "at the revised sum of £382,881 having been accepted". The letter enclosed contract documents for execution. The work started on site in mid-February and, on 14th February, the Council chased Jones for the executed contract documents which the latter returned on 28th February; the Council signed and dated the documents on 15th March 2000. The Council's appeal must be considered against the simple fact that there was a written contract in existence which had been signed by both parties.

The Arbitration and The Award

Notwithstanding that the contract was executed by Jones in the precise form sent out by the Council on 26th January it seems that the Council subsequently became convinced that the contract documents did not reflect the true agreement between the parties. It therefore commenced arbitration proceedings in which, inter alia, it sought to rectify their own contract documents. A one day hearing was held on 21st March 2005 to deal with certain preliminary issues which the parties had identified as being relevant to the claim for rectification. These were: (i) the date of the formation of the contract; (ii) which documents had been incorporated into the contract; (iii) which contractual dates had been incorporated into the contract; and (iv) the contractual working hours.

The Arbitrator's Award No.1 dated 17th June 2005 concluded (i) that contract was formed on 26th January 2000 when the Council's letter said that the revised tender was "agreed"; (ii) that the contract documents were those listed in the signed agreement dated 15th March 2000 and that rectification was unnecessary and mutual mistake unproven; (iii) that the contract period was 39 weeks from 14 February 2000 and that there were no binding sectional completion dates; and (iv) that the working hours were 8am to 6pm Monday to Friday (Public Holidays excepted). These four conclusions meant that the Council had failed on all four issues.

The Law - s.69(3)

"Leave to appeal shall be given only if the court is satisfied: (a) that the determination of the question will substantially affect the rights of one or more of the parties, AND (b) that the question is one which the tribunal was asked to determine, AND (c) that, on the basis of the findings of fact in the award either (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, AND (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question." [emphasis added].

It therefore followed that, at the outset, the Council needed to demonstrate ALL OF: (i) that there was a question of law; (ii) the outcome of which would substantially affect the rights of one or more of the parties; (iii) which the arbitrator was asked to determine; (iv) on which the arbitrator was obviously wrong (there being no "general public importance" issue); and that (v) it was just and proper for the Court to determine such questions. In the very helpful style of the TCC, the Judge summarised the authorities on these matters

1. Question of Law

There could be no error of law if the arbitrator had reached a decision which was within the permissible range of solutions open to him: see *The Matthew* [1992] Lloyds Rep 323.

2. Substantially Affecting the Rights of One or More of the Parties

In this case the Council needed to demonstrate how and why the particular point which it claimed that the Arbitrator had erroneously decided had a substantial effect on the rights of the parties at issue in the arbitration: see the test formulated by Lord Phillips MR in *Northern Pioneer* [2003] 1 Lloyds Rep 212.

3. Obviously Wrong

Absent a "public importance" argument, the Council needed to demonstrate that the Arbitrator had obviously been wrong. The authorities made it plain that the obvious error must normally be demonstrable on the face of the award itself: *Foleys Ltd v City and East London Family and Community Services* [1997] ADRLJ 401 and *HOK Sport Ltd v Aintree Race Course Co Ltd* [2003] BLR 155. In addition, the Second Edition of the TCC Guide (3rd October 2005) states at paragraph 10.2.4 that, "save in exceptional circumstances, the only material admissible on an application of this kind is the award itself, together with any documents attached to it."

The Four Issues

1. The Date of The Formation of the Contract

The Arbitrator had found that the date of the formation of contract was 26th January 2000; the Council's contention that this result either constituted or resulted from an error of law on the part of the Arbitrator hit an immediate and terminal obstacle in that the alleged error of law was nowhere identified by the Council. It hit a second major obstacle in that it was not at all clear that this alleged error could be a matter of law at all: the Arbitrator had concluded that the relevant date was 26th January because the Council described the revised tender of £382,881 as having been accepted, and it asked Jones to sign the enclosed contract documents. The Judge considered this a finding of fact and not a matter of law.

Even if it was a matter of law, the Judge did not consider that it was even arguable that the Arbitrator's finding was obviously wrong or that the alleged error could be seen on the face of the Award itself. How could it be, when, as the Award made clear, the Council's 26th January letter had referred to the acceptance of the revised tender, and sent out the very documents which the Council itself wanted to form the contract ? It was simply not possible to argue that the Arbitrator had been obviously wrong, but it seemed to the Judge that he was probably correct. In any event, the conclusion that the Arbitrator had reached was plainly one that was open to him, in accordance with the test in *The Mathew*.

There was a third reason for rejecting the LTA application i.r.o. the arbitrator's finding as to when the contract was formed: given that there was a written contract, executed by both sides, which came into existence in the manner described above, the date of the actual formation of the contract had no relevance whatsoever since it had no impact at all on the rights of the parties. Therefore, the test set out in *Northern Pioneer* had simply not been met.

2. Which Documents Were Incorporated into The Contract?

This was obvious - the documents listed at clause 2 of the contract agreement dated 15th March 2000 which set out, at sub-clauses (a)-(k) inclusive, an exhaustive list of the contract documents. The arbitrator, applying the logic of *Ronseal* (see postscript below), concluded that those indeed were the documents incorporated into the contract.

The Council had failed to identify the Arbitrator's error of law but seemed to argue that the Arbitrator should have rectified the contract in accordance with their submissions that the contract had been entered into on the basis of a mutual mistake. This was essentially a criticism of the Arbitrator's findings of fact, and in particular his flat rejection of the suggestion that there had been a mutual mistake. The Judge held that that was a finding of fact which could not be challenged under s.69 in any event. Even if he was wrong in this regard, he rejected the argument that the Arbitrator had obviously been wrong. Finally, the Council had complained that, because the Arbitrator had found that contract was made on 26th January, he had excluded as contract documents any documents which came into existence after that date. This argument was a plain misreading of the Award, the Arbitrator having found that the contract did not include any documents dated after 26th January for the extraordinarily simple reason that none of the documents listed at clause 2 of the contract were dated after 26th January.

The Judge concluded that that not only could it NOT be said that the Arbitrator had obviously been wrong, but that on the material before him, he had reached the correct answer, and for the correct reasons.

3. Which Contractual Dates Were Incorporated into the Contract?

The contract dated 15th March 2000 provided that the commencement date was 14th February 2000, and that the works were to be completed 39 weeks thereafter. No other dates were identified in the contract. Unsurprisingly, therefore, the Arbitrator found (applying *Ronseal*) that the commencement date was 14th February and that the period for completion was 39 weeks.

The alleged error of law made by the Arbitrator on the face of the Award was nowhere identified by the Council and the complaint made went to matters of fact rather than matters of law. If the Judge was wrong in this, the Council's arguments were completely erroneous. It was trite law that if an Employer wanted to ensure that the Contractor was obliged to complete parts of the work by specific intermediate dates, there had to be clear language that unambiguously imposed such an obligation upon the contractor. There was no such language in this case. The Council appeared to rely on Jones' programmes but these were not contract documents identified in clause 2 of the contract itself but, even if they had been, the fact that the contractor proposed in his programme to do the work in a certain sequence did not, without more, oblige him so to do.

The Arbitrator's findings had been careful and thorough and were beyond sensible criticism.

4. What are the Contractual Working Hours?

The contract specification provided that the working hours were 8am-6pm Mondays to Fridays (Public Holidays excepted). Applying *Ronseal*, that is what the arbitrator found. No error of law was identified by the Council. In any event, the Arbitrator had considered the contract documents and had construed them properly, the Council's arguments being self-evidently contradicted by its own specification.

Conclusions

For the foregoing reasons, the Judge dismissed the entire LTA application which, he said, had never had any real prospect of success. Throughout both the arbitration and this LTA application, the Council seemed to have ignored the

simple point that the contract had been executed by both sides in the form required by itself, so that, in order to get anywhere, it was going to have to show that it had signed up to its own terms by mistake, and that this mistake was mutual. That was always going to be a difficult task, and it was perhaps unsurprising that the Council had failed so completely to achieve it.

The failure of the rectification claim had depended on findings of fact and therefore could not properly be raised under s.69 and was consequently hopeless. The Judge observed that, in recent times, hopeless s.69 application had been made i.r.o. building arbitrations: see, for instance**,** *Sinclair v Woods of Winchester* [2005] EWHC 1631 and *Surefire*.

The Sting in the Tail

The Judge awarded Jones its costs to be assessed on an indemnity basis.

Comment

None necessary (at least as to the law) !

The Council Tax-paying residents of Plymouth, who so generously and enthusiastically financed this absurd performance by the Council, may wish to take the matter up with their local Councillor

Hew

sdrc

Note for non-UK readers

Ronseal is a leading brand of wood stains, preservatives, varnishes etc targeted at the DIY market. It is running a very successful advertising campaign where, for example, Ronseal Mahogany Wood Stain is demonstrated, the tin of stain is then presented to the TV camera and the catchphrase is “It does what it says on the tin”.

1st December 2005

An English Judge Refuses to Withdraw

The key issue in the recent English High Court case ASM v TTMI was whether or not an arbitrator should have recused himself. That case was the topic of an lengthy OGEMID post by the undersigned on 29th November.

In another English High Court case (judgment delivered today) an application was made for the Judge, Mr Justice-Evans-Lombe, to withdraw but he declined to do so. The case is AWG Group Limited (formerly Anglian Water PLC) & Anr v Sir Alexander Fraser Morrison & Anr ([2005] EWHC 2786 (Ch)); it can be found at http://www.bailii.org/ew/cases/EWHC/Ch/2005/2786.html.

The Facts

The application was made the week before trial commenced: in the course of the Judge’s pre-reading into the case he had noticed that AWG intended to call Mr J as a witness - J had been a director of AWG. The Judge knew J well and immediately alerted the parties. AWG indicated that, rather than risk the Judge’s withdrawal and the consequent delay in obtaining another judge, it would not call J to give evidence since he was only a peripheral witness. However, the defendants requested the Judge to withdraw.

The case had arisen from the take-over by AWG of Morrison plc ("PLC") of which M and his co-defendant McB had been chairman and CEO respectively; they had also held between them a substantial proportion of PLC's shares. AWG had taken over PLC and its case was that it was procured to do so pursuant to a misrepresentation by M and McB regarding PLC's profitability and that they had fraudulently procured that PLC conceal material facts from AWG’s "due diligence" inquiries, other than which AWG might well have withdrawn its takeover offer.

The Judge’s connection with AWG and with J was as follows: AWG’s primary business was supplying water to industry and the public in East Anglia. The Judge’s family were farmers/landowners in that area and he had had dealings with AWG (“not always harmonious”) over the years on such subjects as access for the purpose of sinking boreholes and running pipelines. J lived approx. 1 mile from the Judge’s village and the two families had known each other for at least 30 years; inter alia, their children were friends, they had dined with each other on a number of occasions and J and the Judge had been tennis partners.

The Judge stated that he would have the greatest difficulty in dealing with a case in which J was a witness where a challenge was to be made as to the truthfulness of his evidence.

The Law

In the judgment of the very strong Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* the Court, having set out a number of circumstances where it could not conceive that objection could properly be made, said:-

"By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…."

In *Taylor v Lawrence [2002] 3 WLR 640* at paragraph 60 the Court of Appeal, having cited decisions of the House of Lords including the *Locabail* case said this:-

"…the House of Lords has put to rest the conflicting views as to how the test in cases of apparent bias should be expressed. It can now be said that the approach should be:

'The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility… that the tribunal was biased." (See *Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 at 727 (para 85).)"*

The Withdrawal Proceedings

AWG undertook not to call J as a witness but instead to call any two of Messrs C1, M and C2, J's fellow non-executive directors of PLC. Further, Mr G, the non-executive chairman of AWG, was already a witness and was to be called. Clearly this would remove any embarrassment that the Judge might feel in having to decide directly whether he regarded J's evidence as reliable.

However, the defendants objected that this would deny them the opportunity to cross-examine J who would have been removed as a witness for a reason extraneous to the subject matter of the trial i.e. to save the embarrassment of the judge. In so doing *"the natural course of the trial will have been altered…".* Criticism of the failure to call a witness able to give relevant evidence and to ask the court to draw inferences from his absence would be impossible. The defendants might wish to call J as a witness and it was unfair that they should not be in a position to cross-examine him. Further, even in J's absence, the defence would involve criticism of decisions taken by the board of AWG during that period during which J remained a director. An FMIO might well think it to be inappropriate that a judge weighing the merits of such a defence had an established friendship, extending over a long period of time, with such a member of the board.

In deciding whether he should withdraw, the Judge had first to decide, applying the test derived from the authorities above, whether, given all the circumstances which had any bearing on the suggestion that he might arrive at a conclusion in the case through bias, an FMIO would conclude that "there was a real possibility, that that might be the result of his non-withdrawal.

The Judge concluded that his continuation would not fail the test. J's witness statement was mainly directed to the issue of causation of loss and to the impression made on the board of AWG of the representations made by the defendants in the course of AWG's *"due diligence"* inquiries. The Judge could see no reason why the proposed new witnesses C1, M and C2 would not be able to give the evidence which J would have given. The fact that they would be giving it in his place should not constitute any unfair disadvantage to the defendants. J's non-executive role, including that as Chairman of the Audit Committee, could not be relevant to any judgment that the Judge might give. It would be for the latter to decide, if necessary, whether AWG's accounts had properly recorded the relevant PLC information applying his view of the appropriate accounting principles.

J had not been an executive director of AWG responsible for its trading decisions after the takeover. The question would not be whether particular trading decisions had been ill-judged but whether or not they had caused relevant loss. The Judge did not consider that an FMIO would conclude that he was less likely to decide that trading decisions of AWG during the post-acquisition period were mistaken and causative of loss because at the time J was a non-executive director.

In the present case it seemed to the Judge that there was a second stage to be gone through in arriving at his conclusion. In a case such as this with complex facts, substantial documentary disclosure and large numbers of individual witnesses there was always the possibility that the course of the trial would be affected by the unexpected emergence of facts which place the role of individuals, in this case J, in a new light and which might lead the Judge, at any stage in the course of the trial, to conclude that he ought not to be the judge who decided whether or not the serious allegations made by the claimants against the defendants were made out. He had to balance whether the apparent role of J in the overall circumstances of the case led to a risk that such a changed picture might emerge. He also had to balance such risk against the undoubted disruption to the administration of justice generally caused by having to find a new judge to try a case of this length at short notice and also the inevitable further cost imposed on the parties resulting from the ensuing delay.

He concluded that such a risk, which must always be present, was too small to drive himself to the conclusion that he should withdraw.

Application dismissed

9th December 2005

Can (or Should) Arbitrators be Compelled to Testify In Court ?

This was one issue raised by Tore Wiwe-Nilssen arising out of the *CME v Czech Republic* case in the Svea Court of Appeals in which he acted as Counsel for the Republic.

1. As regards English Law, CPR 62.6(1) provides that "Where an arbitration claim is made under section 24 [removal of arbitrator], 28 [dispute over fees] or 56 [tribunal's withholding of award for non-payment of fees] of the 1996 Act, each arbitrator must be a defendant."

   For other arbitration claims (eg particularly including challenging an award under ss.67/68/69) CPR Practice Direction 62 allows, at §4.1, for an arbitrator either to be made a defendant in a case or for him/her to make representations to the Court. S.43 Arbitration Act 1996 in conjunction with PD62 §7.1 allows for the Court to summon witnesses without excluding the arbitrator from the net; however §7.3 requires that any such summons be made either with the permission of the tribunal or with the agreement of all the parties. This leaves open the questions as to (i) how a tribunal should respond to an approach for permission (ii) the anomaly of a tribunal giving or refusing permission for its members to be summoned.

   Arbitrators have been made defendants several times e.g. in *AOOT Kalmneft v Glencore International AG and AW Berkeley* ([2002] 1 Lloyds Rep 128) where the latter is a distinguished London-based arbitrator. The case was a s.24/67/68 challenge to an award on jurisdiction. Arbitrators do not always suffer from being dragged in as defendant – at §33 of Mr Justice Colman's distinguished judgment (important in setting out the law on applications for extensions of time in arbitration cases – see §49-60, especially §59), said "The arbitrator then proceeded directly to his ruling on jurisdiction which he issued on 24 November 2000. In an impressive and carefully reasoned analysis be concluded that he had jurisdiction."

   Another recent case was *Sinclair v (1) Woods of Winchester Ltd and (2) Harrison* ([2005] EWHC 1631 (QB)) where Mr Harrison was the sole Arbitrator in a house-building dispute. You will get the flavour of the case from §46 of HHJ Coulson QC's judgment: "This purported criticism of the arbitrator is therefore rejected. Not only was it a hopeless point, but it also revealed another all-pervasive feature of the Claimants' application before me, namely a tendency to attack the arbitrator for an underlying situation, in this case delay, for which, on analysis, they themselves were responsible." and again at §71: "Accordingly, the criticisms of the arbitrator's conduct in the hearing on 10th February 2005 are wrong in principle and must fail. Not only has no serious irregularity been made out, but there is also no evidence of any substantial injustice. I consider it a great pity that these two allegations were ever made."

   The Chartered Institute of Arbitrators has produced a Guideline as to how arbitrators should respond in these various circumstances; in broad terms, it recommends that they should not become involved unless compelled to do so, inter alia, there being real risks of being dragged into the bear pit and/or made liable for costs.

2. A US perspective, if a limited one, is given in an item on the ADR Institute's website headed "Arbitrator May Be Deposed Regarding Undisclosed Business Relationships" –

   http://www.adrinstitute.org/edit/Nov_05/112805InreEquiMedInc..htm

   However this states "while an arbitrator may not be deposed regarding the though processes behind his or her decisions…" and "Testimonial immunity is an important protection for arbitrators. They perform quasi-judicial duties and should thus be entitled to protections similar to judges' protections …". The item concludes "Discovery from an arbitrator ought not to be allowed based on allegations of partiality. Before allowing such an intrusive invasion of an arbitrator, a court should require a requesting party to establish material evidence of partiality" This last is ADRI's [critical] comment on the judgment, not part of the judgment.

   [I am grateful to Kathleen Scanlon of Heller Ehrman who drew this to my attention]

13th December 2005

English Judicial Criticism of Witnesses, Parties and Others

In some jurisdictions and legal cultures, it is 'not the done thing' for judges (or arbitrators) to express any strong views on the quality and, in particular, credibility of witnesses, parties or others. The English tradition, at least in court, is rather more robust and English judges do not normally hold back, notwithstanding a tendency to elegant circumlocution, e.g. HHJ Seymour QC in *Discain v OpecPrime #2*: "Mr L was not, in my judgment, a very proficient purveyor of untruths. His tactic to deal with the unwelcome experience of cross-examination was to give his evidence quite unnecessarily loudly. He was virtually shouting. No explanation for such behaviour was offered or emerged."

There is often an uneasy relationship between English judges and Expert Witnesses, the latter frequently having the ability to upset judges; e.g. in *Stevens v Gullis/Gullis v Pile:* "X, not having apparently understood his duty to the court and not having set out in his report that he understands it, is in my view a person whose evidence I should not encourage in the administration of justice." On appeal, Lord Woolf MR said "In any event, [X] was so discredited that it would be

pointless for his evidence to be included in the hearing of the claim between S and G." (See my Paper delivered to an ICC Seminar in March 2005 for more examples.)

Mr Justice Morison, recently the subject of widespread criticism i.r.o. *ASM v TTMI*, has proved himself no more tolerant of an unsatisfactory witness or party than his judicial colleagues, but with two new twists I do not recall in the English High Court. In *Walker International Holdings Ltd v Republic of Congo & SNPC & Fininco* [2005] EWHC 2813 (Comm), he said, relatively conventionally (for an English judge), at §17:

> "… Mr X, whose evidence was so evasive and defensive, and at times remarkable, that I am unable to place any credence on it save where what he told me was supported by the documents and even where there are documents I have to consider whether the documents are for 'show' rather than reflecting reality. …" [Morison J then gave one splendid example of X's evasiveness under cross-examination].

Where Morison J goes further than most of his colleagues is this addendum to the judgment:

> "Since writing my judgment and sending it to the parties for correction, I have had the chance to read the judgment of Cooke J in the matter of *Kensington International Limited v Republic of Congo & (as third parties) Glencore Energy UK Limited, Sphynx UK Limited, Sphynx (BDA) Limited, Africa Oil & Gas Corporation and Cotrade SA* ([2005] EWHC 2684 (Comm)). In his judgment, as in mine, Cooke J concluded that Congo had:
>
> (a) put forward dishonest oral evidence;
>
> (b) failed to disclose relevant documents;
>
> (c) relied on documents which did not evidence the true situation and were backdated.
>
> These are serious matters. Witnesses who deliberately lie in court may be prosecuted for perjury. The creation of false and misleading documents for use in court may expose those who participate in it to prosecution for forgery. Deliberately trying to mislead the court may also involve proceedings for contempt of court. I simply express the hope that those who advise Congo/SNPC will take note of this for the future."

Ouch !!

The Facts

By an arbitral Award made on 20 July 2000, the République Populaire du Congo (the RPC) was ordered to pay Walker an amount in excess of F.Fr 100 million and in August 2001, Walker secured an Enforcement Order under s.66 for the Euro equivalent of the debt plus interest and the costs of the arbitration. The debt on which Walker had sued arose out of a loan agreement made between the RPC and an unconnected lender, SC, whose rights had subsequently been assigned to Walker. Walker was/is one of a number of organisations which have bought debts due from the RPC at a substantial discount and was seeking to enforce their rights against the RPC. There has been a steady stream of litigation relating to enforcement action in France, the Cayman Islands, the USA and in England. The RPC appeared determined not to pay these debts and has taken steps to try and put its assets out of the reach of creditors such as Walker. Société Nationale des Pétroles du Congo (SNPC) was an entity closely connected with the RPC (how closely forms part of the case) which handled most if not all of the State's oil production

Other Issue

Witness-bashing is 'normal' in England but State-bashing is rare; no less rare is apparent foreign-Chief-Justice-bashing or, more accurately, elegantly implied criticism. It is conventional in most countries, when considering a decision of a foreign Court which is under appeal in that foreign jurisdiction, to refrain from comment on that decision. The Chief Justice of the Cayman Islands appeared to see this rather differently, expressing, in related litigation involving Walker, the RPC and SNPC, strong criticism of a Paris Cour d'Appel decision under appeal to the Cour de Cassation; Morison J had this to say at §14:

> "There is an appeal from the decision of the Paris Court to the Court of Cassation and an appeal has been lodged. There is a dispute between the French Law experts as to whether the Appeal Court has correctly applied the law. ***Unlike the Chief Justice, I decline to express any conclusion on that. It is for the French Courts and not this court to determine whether the law has been correctly applied***. I simply take note of the decision of the Appeal Court and the reasons for it so far as relates to this case."

Comment

It's rarely a dull day scanning the English Court reports !!

15th December 2005

Oh No ..... Not Another S.68/69 Appeal !!

There was a song some years ago whose refrain was “when will they ever learn” – the songwriter should have been the Court Reporter at the TCC. In *Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd* ([2005] EWHC 2715 (TCC)) HHJ Coulson QC delivered what, at first sight, is fast becoming a standard-form TCC judgment – change the names, change a few facts, restate the law for the Nth time … Soon my arbitration pupils will be able to recite these from memory

The Facts

Beechdale had purchased from WMBC approx. 1,500 housing units for the sum of £3,750,000; under the Sale Agreement, WMBC had represented and warranted that certain information contained therein was true, accurate, fairly presented and neither incomplete nor misleading …" The Agreement provided Beechdale with a monetary remedy for any breach of that warranty. The Agreement also contained an arbitration agreement.

The Arbitration

WMBC eventually admitted liability and an Award was made by Ms Victoria Russell, the well-known construction law solicitor, in favour of Beechdale. WMBC lodged s.69 LTA and s.68 applications.

S.69 Principles

As is now well-known to all except, it appears, the majority of applicants, WMBC needed to demonstrate each of: (i) there was a question of law; (ii) the outcome of which would substantially affect the rights of one or more of the parties; (iii) which the Arbitrator had been asked to determine; (iv) on which the Arbitrator was obviously wrong (there was no general public importance issue); and that (v) it was just and proper for the court to determine such questions.

(i) There could have been no error of law if the arbitrator had reached a decision which was within the permissible range of solutions open to her: see *The Matthew* [1992] Lloyds Reports 323.

(ii) The court must be satisfied that any question of law will substantially affect the rights of one or more of the parties. Too often, this was 'taken as read', rather like the requirement for substantial injustice under s.68. As Lord Steyn had made plain in *Lesotho*, it was not good enough for the parties simply to assume that there was a substantial injustice. Similarly it was not good enough simply for a party to assert that the alleged issue in question must have affected its rights because it went to an aspect of the dispute in the arbitration. The party asserting that its rights are adversely affected needs to demonstrate the various options open to the arbitrator and how and why the particular point which the arbitrator had decided erroneously had a substantial effect on its rights. As Lord Phillips expressed it in *The Northern Pioneer* [2003] 1 Lloyds Rep 212, the applicant must show that the issue had a substantial impact on the rights of the parties at issue in the arbitration.

(iii) On a s.69 LTA application, it was not appropriate to refer to transcripts, submissions and evidence in the arbitration: unless the error of law relied on was clear and obvious from the face of the award, the application ***must automatically fail*** (s.69 (3)(c)(i)). See *Foley's Ltd v City and East London Family and Community Services* [1997] ADRLJ 401 and *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2003] BLR 155 and see also the TCC Guide (2nd Edn – 3rd October 2005) at §10.2.4 which states that, save in exceptional circumstances, the only material admissible on an application of this kind is the award, and any documents attached to the award.

The s.69 LTA Appeal

There was a threshold reason why WMBC's LTA application had to fail: the material (extensive detail from the arbitration) upon which it sought to rely was inadmissible although it might be relevant to an s.68. Not only was there no error of law, much less an obvious error, visible on the face of the Award, but in fact WMBC advanced no such case. However, in case the Judge was wrong about that, he considered the detail of the LTA application under s.69 by reference to the inadmissible material provided by WMBC but rejected the application in any event

WMBC’s second line of argument failed to identify any legal principle on which it could be said that the arbitrator had obviously been wrong, instead merely seeking to re-argue some of the technical and evidential points raised by WMBC in the arbitration, which the arbitrator had rejected; such an approach is wholly illegitimate in an LTA application and no question of law was raised at all. However, even if the Judge was wrong about that, and this was a matter of law, WMBC’s arguments themselves made plain that it could not possibly be said that the arbitrator's approach on this topic was "obviously wrong". In the Judge’s view, given the wording of the warranty, she was arguably right; in any event, the conclusion she reached was clearly open to her therefore this second leg of the LTA application.

S.68 Principles

There are numerous cases concerning what (rare) types of situation are properly covered by serious irregularity under s.68, and what are not, e.g. HHJ Lloyd QC in *Weldon Plant v The Commission for New Towns* [2000] BLR 496, quoted with approval by Colman J in *World Trade Corporation v Czarnikow Sugar Ltd* [2004] 2 All ER (Comm). Judge Lloyd said that s.68 was concerned only with the ***complete failure*** by the arbitrator to address a claim or a key issue; "it is not concerned with a failure on the part of the tribunal to arrive at the right answer to an issue." For the section to operate, the judge said, it was necessary to show that "the tribunal has not done what it was asked to do".

Furthermore, the serious irregularity (if established) must have resulted in substantial injustice to the complainant. According to the DAC report (recently given powerful Court of Appeal endorsement in *Cetelem SA v Roust Holdings Ltd* ([2005] EWCA Civ 618) at §280 "the parties cannot validly complain of substantial injustice unless what has happened cannot, on any view, be defended…s.68 is really designed as a long stop available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected." Thus, if the result of the arbitration would most likely have been the same or very similar, despite the irregularity, there is no basis for overturning the award: see Ward LJ in *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84. As noted above, the fundamental importance of demonstrating a substantial injustice was recently emphasised by Lord Steyn in *Lesotho*.

The s.68 Appeal

WMBC's principal s.68 argument related to an alleged agreement with Beechdale (neither confirmed nor denied) concerning the quantification of loss, which alleged agreement the arbitrator had ignored. It was unnecessary for the Judge to make any findings i.r.o. this allegation because it was clear beyond doubt that no substantial injustice had resulted from the alleged irregularity. There had been a breach of warranty that had to be quantified: the arbitrator had clearly thought that she could value that by reference to the actual cost of repairs. There was nothing that could lead the Judge to conclude that, if the value of the breach had been measured any other way, it would have resulted in a significantly different figure. Therefore, even assuming that WMBC was right, and there was an irregularity in that the arbitrator had used an abandoned methodology, it was not possible to say that it was serious; more importantly still, it had not been shown that such an irregularity had caused any substantial injustice at all. The application under s.68 in this regard must fail. Further, the Judge had no doubt that the arbitrator's use of the actual cost figure represented a just and fair conclusion which brought finality to this aspect of the proceedings. On the facts, therefore, this case was a long way from the sort of "extreme cases" for which s.68 was designed.

On WMBC's second argument, there was no material at all to allow the Judge to conclude that there had been any serious irregularity, let alone one which had caused substantial injustice. The arbitrator had considered the valuation evidence and had come to a series of conclusions that she was quite entitled to reach: she had decided the issue referred to her and, while WMBC might not like the result, there had been no injustice. He rejected the suggestion that somehow her conclusions had not been not open to her, or had been arrived at without giving the parties a proper opportunity to address the valuation evidence. On the contrary, he concluded that the parties had had a full opportunity to set out their respective cases to the arbitrator, and that, thereafter, she had resolved the valuation disputes in a careful and considered way. This second leg of the s.68 application therefore failed.

Conclusion

All WMBC's applications were dismissed.

Comment

As in previous cases, there is little I can add to HHJ Coulson QC's robust exposition of the law in this area and its application to yet another failed appeal. Not being a Council taxpayer in the Walsall area (nor Plymouth – see the previous hopeless case involving its Council), I refrain from comment on the use of taxpayer money pursuing hopeless appeals.

Postscript

I am unable to locate any previous post-31.1.97 s.67/68/69 appeal case on my database involving an arbitrator who is a representative of that superior life form colloquially and irreverently known as "women". No doubt this is because superior life forms are as close to infallible as is possible.

27th December 2005

Natural Justice In Adjudication

Questions of the applicability of the principles/rules of natural justice (RNJ) in adjudication have been covered by me before, both in these newsletters and in "ARBITRATION". A cynic might observe that once losing parties had exhausted the possibilities of trying to resist enforcement on jurisdictional grounds, they turned to RNJ; however, the judiciary have not fallen for this and, in *All In One Building & Refurbishments Limited v Makers UK Limited* ([2005] EWHC 2943 (TCC) – 19th December 2005), a robust a commonsensical HHJ Wilcox QC was offering no early Xmas presents. The case has another interesting feature, addressed below, concerning stay of execution.

The Facts

AIO was a building contractor, engaged by Makers to refurbish flats in a development at Northampton; it had been incorporated on 19th May 2004 and used agency labour and hired-in plant. There appeared to have been no difficulties with the interim payment provisions during the early part of the contract. However, by July 2005 issues had arisen regarding AIO's provision of labour and, on 26th July 2005 Makers proposed that, in relation to 28 flats, other sub-contractors should undertake AIO's work and it prepared an agreement to that effect. AIO was subsequently (so it asserted) ordered off site in a written instruction, signed by Makers' QS, a Mr Bullen. AIO then wrote to Makers stating, inter alia, "*Your company's action is a repudiatory breach of contract and as such, we are no longer bound by the sub-*

contract and hereby terminate our employment under the sub-contract. We shall be forwarding our account shortly, which will include our claim for damages flowing from your breach. A dispute now exists under the sub-contract."

AIO served a notice of referral to adjudication, claiming £547,411.05, made up of five items, four of which were supported by detailed spreadsheets. However, the fifth item, amounting to £159,912.59, was for "claim for loss of overheads and profit on element of incomplete works". The only detail given was that this was 21.10% - no breakdown was given and it was not a figure that was implicit in the build-up of figures provided.

Was There a Dispute ?

A notice of referral must (i) give the receiving party notice of the dispute to be referred, (ii) give the appointing body precise details of the dispute to avoid appointing an adjudicator who may have conflicting interests, and (iii) must enable the adjudicator to be able to consider the acceptance of an appointment to resolve such a dispute within a very tight timescale.

Makers contended that the notice defined the extent of the adjudicator's jurisdiction and that at the time of the referral there were no disputes between the parties at all whereas AIO submitted that the notice of referral should be read together with AIO's letter which had clearly identified the claims for each of (i) money owed (ii) a declaration that Makers had wrongfully repudiated the contract and (iii) damages for breach.

Judge Wilcox stated that "It was clear that disputes had arisen. It is a matter of fact whether a dispute has arisen. Denial of a claim gives rise to a dispute. A denial of a claim may be express or by conduct. In *Collins Ltd v Baltic Quay Management (1994) Ltd* [2005] 1 BLR p.63 the Court of Appeal approved the [Jackson Seven, i.e.] relevant considerations for a court ascertaining whether or not a dispute had arisen in *Amec Civil Engineering Ltd v Secretary of State for Transport*, ([2004] EWHC 2339 TCC) [see my report on that case dated 31st October 2004]" The Judge continued "It is evident that the proper approach is to adopt a rigorous and common sense approach, bearing in mind that these issues arise in a comparatively modest construction dispute and there is no warrant for being legalistic and overly technical when considering what labels are used when identifying whether and what dispute has arisen. The court must look to the substance of the claims identified and denied and not to the descriptive labels variously attached by lay persons and professionals."

Consequently, the Judge rejected Makers' arguments that (i) since the original demand for payment was described in terms of an interim application, the claim could not be considered as a dispute until the 30 days contractually allowed for interim payments had lapsed and (ii) the assessed figures were akin to a draft final account so that no dispute could crystallise until the expiration of the two months allowed by the contract for payment of a final account. A distinction had to be drawn between the date for payment and an entitlement to payment and it was the latter that was being denied in relation to these claims. The timing of payment was not determinative of whether a dispute has arisen.

Status of the Claim for £159,912.59

The first four items of AIO's claim were straightforward but no evidential detail was provided to support the 5th item' however, the entitlement to such a claim was something that, in principle, could be accepted or rejected by Makers and had in fact been rejected because it flowed from, so Makers argued, AIO's repudiatory breach. The Adjudicator had requested, and had been given, particularisation and evidence of the claim and he had requested an extension to allow Makers time to respond. Judge Wilcox held that, at the time of the notice of referral there was a dispute as to issues of profit and overhead and that this was not a nebulous or vague claim as submitted by Makers. The Adjudicator had jurisdiction over this claim.

Natural Justice

Makers' secondary case was that the decision of the adjudicator to deal with the fifth head of claim offended the RNJ, contending that the Adjudicator had carried out an independent exercise which had not been contended for by either party, namely to fix a figure of 8.6% as appropriate for lost profit and overheads. The Judge considered that the Adjudicator was an experienced QS so that such assessments were within his expertise and in part justified why he was appointed. He had used material put before him by AIO and some documentation which originally had emanated from Makers showing that a figure of 8.6% had been canvassed by Makers as an appropriate mark-up in relation to the 28 flats. Makers had sought, and had been granted, time to deal with this issue and had done so and the Adjudicator had made a decision, within his professional and legal competence, on the evidence before him. There was therefore no basis for concluding that there had been any procedural unfairness causing prejudice to Makers.

In response to Makers' attack on the Adjudicator's Decision on the basis that the vital issues of fact underlying the disputes were resolved in an unfair way, thus prejudicing Makers and offending against the RNJ, the Judge cited Dyson LJ in *Amec Payments Ltd v White Friars City Estates Ltd* [2005] 1 BLR p.1 ([2004] EWCA Civ 1418) at §22):

> *"It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the scheme of the 1996 Act is now well known. It provides a speedy mechanism for setting disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicator's decisions. It is only*

where the Defendants advance a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground."

Central to the resolution of who was the contract breaker was whether Makers' QS had in fact ordered AIO off the site by written instruction on 29th July 2005: that QS, Mr Bullen, had given a sworn statement that he had not signed the instruction and that AIO were not in fact on site at that date and further that no instruction had been given by him removing them from site or debarring them from the site. An issue that the Adjudicator might have had to decide was whether the signature had in fact been a forgery and, by implication, who was a party thereto. The Adjudicator had, sensibly, decided that he had to hear evidence both from Mr Bullen (believed uncontactable) and from Mr Barlow, AIO's M/D and "the other half" of the written instruction, and he issued appropriate directions. Subsequently, the Adjudicator had been advised of a purported retraction by Mr Bullen of his sworn statement, the latter alleging that he had been forced to make the statement by Makers under the threat of his being made redundant by them; a flurry of correspondence ensued.

Makers contended that the Adjudicator had never made it clear whether he had intended to take account of the 'retraction evidence' until he gave his decision: the Judge considered that he had been right not to do so. He had made it clear that he was able to come to a conclusion without receiving the 'retraction evidence' and on the papers as was contemplated by both of the parties.

Makers further submitted that since the Adjudicator had rightly recognised that the repudiation issue involved allegations of fraud it was extraordinary that he had proceeded to a decision without giving either party an opportunity to adduce this essential evidence or to hear Mr Bullen. The Judge observed "It is a striking feature of this case that neither of the parties, nor the Adjudicator, contemplated adjusting the timetable to enable Mr Bullen to give evidence if he consented." There had been no question of denying any party the opportunity to adduce the oral evidence of Mr Bullen and the manner in which the Adjudicator should treat that evidence had been the subject of submissions by both parties. The Judge considered that the manner in which the issue had been resolved, compared with the strict litigation approach, was not satisfactory, but Makers had failed to demonstrate that there had been breach of any RNJ in relation to the resolution of the issue of repudiation. It was not for the Court to analyse the reasoning of the Adjudicator as to how he had arrived at his primary factual conclusions and had then applied the law to those facts: this had been a decision within the Adjudicator's competence. Criticisms of how the adjudicator had dealt with the apparent contradictions of Mr Bullen and the like were not a matter for the Court.

Judge Wilcox consequently granted summary judgment for AIO as claimed.

Stay of Execution

Makers sought a stay of execution on the ground of the probable inability of AIO to repay any judgment sum. The latter had ceased trading in about October 2005, no company accounts were presently available and it no longer had either trading premises or other work in progress or other work. A labour agency had obtained judgment against AIO for £27,000 and AIO's solicitors had confirmed to that agency's solicitors that any proceeds from the present adjudication would be used to discharge the judgment debt.

AIO submitted that there was nothing particularly unusual in this situation, such building companies, particularly single-project ones, often having no fixed assets and relying upon agency labour and hired-in plant. AIO's status of was either known, or could have been readily ascertained, at the time that Makers contracted with it. The fact that AIO might intend to pay off a lawful trade debt was irrelevant to Makers, AIO being entitled to do what it wished with its money. Further, it could reasonably be inferred that AIO's impecuniosity had in all probability been brought about by Makers' failure to satisfy, at least in large part, its claim although there was no direct evidence from AIO that this is the case.

Judge Wilcox considered that AIO's profile and substance was essentially the same at the time of contract as now. This was not a company that had had vast assets which it had dissipated in order to frustrate Makers should it succeed in litigation or in arbitration. The considerations to be taken into account had helpfully been collected in the judgment of HHJ Coulson QC in *Wimbledon Construction Company (2000) Ltd v Vago* [2005] EWHC 1086 (see my report dated 17th June 2005). The Judge continued "The lifeblood of small construction companies is cashflow. Once that is interrupted or brought to an end the viability of such a company may be put to risk and thus the ability to repay. That too is part of the commercial risk that is taken on board by those who trade with such a company. On the brief information before me I come to the following conclusions: (i) that in all probability [AIO] is insolvent; (ii) its present ability to repay is doubtful; (iii) if it is able to return to trading there is no evidence that it will or will not be able to repay the debt should it be called upon to do so; (iv) there is no evidence as to when, if at all, [AIO] might be called upon to repay. No proceedings or arbitration [had] been embarked upon [by Makers]. (v) The financial status of the company now is not dissimilar to that which presented itself at the outset. (vi) the inference is warranted with a one-project company such as this, that its impecuniosity derives from non payment by the Defendant. (vii) were it to have been demonstrated that [AIO] was in insolvent liquidation then it would have been appropriate to refuse summary judgment, see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR p.522 Court of Appeal, in the judgment of Chadwick LJ para 29-36.

Judge Wilcox concluded by exercising his discretion by refusing a stay.

Comment

I am pleased to opine that the waves of robust common sense in the TCC continue unabated.

28th December 2005

Service of Notice of Arbitration by e-Mail (revised)

We nearly all use e-mail daily, both in our business and personal lives; we perhaps sometimes assume (sometimes wrongly !) that (a) all e-mails sent are received and (b) transmission is more or less immediate. What if an arbitration (on documents) was commenced by e-mail and proceeded by e-mail but one of the parties claims it never received any such e-mails ? This was a key issue in *Bernuth Lines Limited v High Seas Shipping Limited* ([2005] EWHC 3020 (Comm) – 21st December 2005) in which Mr Justice Christopher Clarke also addressed two other key issues. The case was an application to set aside the Final Award of an LMAA Arbitrator dated 26th July 2005 on the ground that the arbitration had purportedly been commenced by e-mail but that that notice had not been effectively served.

The Facts

Bernuth, a Cayman company, chartered the vessel "Eastern Navigator" from High Seas, a Marshall Islands company, on an amended NYPE form. The charter was for a period of "*one time charter trip to Nicaragua via good/safe ports. Duration 6 days without guarantee*". The vessel was to be delivered, as in the event she was, at the arrival pilot station at Miami. Clause 45 of the charterparty contained a London arbitration clause which provided for arbitration by a single Arbitrator, failing agreement on whom, by two Arbitrators being both members of the Baltic Exchange and engaged in Shipping, with power to such Arbitrators to appoint an Umpire…. For disputes <$50,000 the LMAA's SCP was to apply.

The vessel departed Miami on 24th August 2004 bound for Nicaragua and on 27th August the Master sent a message to the effect that he would not be able to enter the nominated port because of inadequate draft. Consequently, the vessel was sent to the nearest appropriate port where she discharged. On 1st September 2004 High Seas issued a revised invoice in the sum of $34,100 for hire (less commission) and bunkers. The invoice was addressed to Bernuth at the postal address in Miami of its agent, Bernuth Agencies Ltd (BAL), who, on 7th September sent a fax to High Seas' agent enclosing BAL's invoices, as agents for Bernuth, totalling $ 93,384.77. On 13th and 16th September 2004 High Seas forwarded a second hire invoice by e-mail to BAL's Captain Davis, which BAL forwarded to its Mr Polo, also by e-mail. On March 22nd 2005, a Florida law firm representing High Seas wrote (in hard copy) to BAL's Mr Polo in connection with the unpaid charter hire.

The "info@....." e-mail address

On 5th May 2005, High Seas' London Solicitors (SM) sent an e-mail to info@....., inter alia inviting Bernuth to settle the $34,100 so as to avoid arbitration proceedings. This e-mail address was one that had not appeared on any previous BAL communication but it was, however, an address for Bernuth that appeared (a) in the Lloyds Maritime Directory 2005 and (b) on a website, www.bernuth.com, where it followed the postal address, telephone and fax numbers of BAL in Miami. According to Bernuth's London Solicitor (JP), the address given on the website was only intended for cargo bookings for Bernuth's liner service but there was, however, no indication either on the website or in Lloyd's Maritime Directory that it was only to be used for that purpose.

Thereafter a series of e-mails were sent by SM, by the Arbitrator and by the LMAA to info@..... These included all the substantive proceedings of the arbitration including High Seas' claim submissions, notification of the appointment of the arbitrator, his Directions, a request by SM to the arbitrator seeking a peremptory order requiring service of a defence within 7 days, the Arbitrator's request for Bernuth's comments on SM's request, the Arbitrator's Peremptory Order requiring defence submissions by c.o.b. on 22nd July 2005, a request at c.o.b. on that date by SM to the Arbitrator to proceed with his award and the Arbitrator's confirmation that he would do so. All SM's e-mails generated e-mail 'confirmation of delivery' receipts. On 29th July the Arbitrator issued his final award which was sent to info@..... and also by post. This was the first communication with Bernuth since 5th May 2005 otherwise than by e-mail to info@.....

The Arbitrator's Award and the Appeal

In the recital to his Award the arbitrator recorded the procedural history, including, as recital K: *"No Defence submissions were received at any time. I was and am satisfied that the Charterers are aware of these proceedings and that they have had a reasonable time to serve Defence Submissions. Accordingly I proceeded to my Award".* He did not state on what basis he was so satisfied. By his Award the Arbitrator held that High Seas were entitled to $40,220.93 for hire, less commission and payment received and a sum for hold cleaning, and he awarded interest and costs.

On 12th August 2005 JP wrote to the Arbitrator and SM expressing their client's surprise at receiving the Award and stating that their client had been unaware thereof until receipt of the Award by post. They said that: *"..it appears that email notices may have been sent to our client's department for cargo bookings for liner service and would have been*

ignored by the clerical staff in receipt of such messages. Our client is perplexed that the other channel of communication established through your client's Miami lawyers appears to have been bypassed."

Bernuth applied under s.68 contending that the arbitration proceedings had not properly been brought to the attention of Bernuth with the consequence that there had been a serious irregularity affecting the proceedings which has caused or will cause them substantial injustice; it also sought to advance a claim under s.72.

Had the Notice of Arbitration been validly served by e-mail ?

S.14(4) provides that arbitral proceedings are commenced when one party serves on the other party notice in writing requiring him to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of the relevant matter. It was not disputed that SM's e-mail of 5th May 2005 constituted "writing" for this purpose: see s.5(6).

Bernuth submitted that High Seas had not served notice by any effective or agreed means (s.76(1) refers), no issue being taken as to any distinction between Bernuth and BAL, since service by e-mail was not recognised as effective service under the CPR, save under closely defined conditions not applicable to the present case. By analogy, the Court should not regard sending a notice initiating an arbitration to *any* e-mail address of the person to be served as effective service. Service in a manner totally at variance with that prescribed by the CPR should not be treated as effective service. E-mail service would only be good if the recipient had agreed to accept service at the e-mail address to which the document had been sent, or if the service was effective in the sense that the notice reached the relevant legal or managerial person.

CPR 6.2(1)(e) provides that (in litigation) a document may be served by e-mail in accordance with the relevant practice direction, CPR 6 PD, which requires express written indication by the recipient that he is willing to accept such service by electronic means, sufficient indication including an e-mail address set out in a statement of case or a response to a claim filed with the court". Further, paragraph 3.2 of CPR 6 PD provided that: *"Where a party seeks to serve a document by electronic means he should first seek to clarify with the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means including the format in which documents are to be sent and the maximum size of attachments that may be received."*

*C*learly High Seas' service of notice would have failed the CPR requirements but the e-mails sent to info@..... were received at that address and not rejected; however, JP indicated that they *"….. would have been ignored by the clerical staff in receipt of such messages"* since the persons who received the e-mails did not know what to do with them and therefore ignored them as "*spam*". It was apparent from the evidence that the representative in question saw the e-mail of 5th May and consciously decided to ignore it.

The Judge did not regard the provisions of CPR Part 6 as an appropriate benchmark for arbitration since the CPR had to cover litigants of all kinds from major corporations represented by large law firms to individuals represented by more modest firms and those who are not represented at all. In contrast arbitrations were usually conducted by businessmen represented by, or with ready access to, lawyers. S.76(4), when providing that a notice could be served on a person by any effective means was, he considered, purposely wide, contemplating that any means of service would suffice provided that it was a recognised means of communication effective to deliver the document to the party to whom it is sent at his address for the purpose of that means of communication (e.g. post, fax or e-mail). There was no reason why, in this context, delivery of a document by e-mail – a method habitually used by businessmen, lawyers and civil servants – should be regarded as essentially different from communication by post, fax or telex. However, clicking on the "send" icon did not automatically amounts to good service: inter alia (i) the e-mail must, of course, have been despatched to what was, in fact, the e-mail address of the intended recipient; (ii) it must not have been rejected by the system; (iii) if the sender did not require confirmation of receipt he may not be able to show that receipt had in fact occurred.

None of these difficulties had arisen in the present case. The e-mail of 5th May 2005 and, so it would appear, all subsequent e-mails, were received at an e-mail address that was held out to the world as the, and so far as the evidence shows, the only e-mail address of Bernuth. Someone at Bernuth had looked at the e-mails on receipt and, apparently, decided that they could be ignored, without making any contact with the sender. The position was, the Judge considered, no different to the receipt at a company's office of a letter or telex which, for whatever reason, someone at the company decides to discard. In both cases service has effectively been made, and the document received will, in the first instance, be dealt with by a clerical officer.

The Judge found confirmation of his view in *The Pendrecht* [1980] 2 Lloyd's Rep 56 where a telex had been received by charterers at their head office in Japan outside office hours on a Friday so did not come to the notice of a responsible employee until the office re-opened on the Monday; time had expired over the intervening weekend. Parker J, as he then was, held that – for the purposes of s.27(4) of the Limitation Act 1939 - the telex was served, both in the case of an English and a foreign company, when it was received, irrespective of whether this happened within business hours and whether or not the office was closed. It was not necessary that it should come to the attention of the company or to any particular individual at the company at the time it was served. The decision in that case was not dependent on the telex's having come to the attention of the responsible personnel on the Monday, passages at p.65 of Parker J's judgment indicating that service would have been valid even if the document served had not come to the attention of the party to be served for some time.

There was no requirement implicit in s.76(4) that service had to be on, or brought to the attention of, any particular personnel, service being effective if the notice was addressed and delivered (by post) to the relevant address. Similarly, a notice was to be treated as effectively served if it was delivered to the party to be served by e-mail.

The Judge rejected Bernuth's contentions regarding spam because, when the e-mail was received, a particular employee had not thought that a serious legal matter would be sent to that address. That e-mail and those that followed it, were plain and straightforward in their terms and bore none of the hallmarks of "spam". On the contrary they called for serious attention: the critical e-mail of 5th May was sent with "High Importance", it referred to a vessel which Bernuth had in fact chartered by the charterparty mentioned in it, it identified SM as High Seas' London solicitors and referred to an outstanding hire claim which had been the subject of earlier correspondence. It purported to initiate arbitration proceedings by calling for agreement as to an arbitrator. The Judge would have been surprised if much junk e-mail purported to do that or to emanate, as later e-mails did, from an LMAA arbitrator. If the e-mails never reached the relevant managerial and legal staff, that was an internal failing which did not affect the validity of service and for which Bernuth had only itself to blame. Having put info@..... into the current Lloyd's Maritime Directory as its only e-mail address, they could not be surprised to find that an e-mail inviting them to agree to the appointment of an arbitrator in a maritime matter was sent to that address.

The Judge did not accept that, in arbitration, in order for service to be effective it was essential that the e-mail address at which service is purportedly made had been notified to the serving party as an address to be used in the context of the relevant dispute (i.e. as per CPR): this was not provided in s.76 and there was no basis upon which it could be implied.

Was the Arbitrator's Decision to Rely on Service by E-mail a Question of Law

High Seas submitted that, if Bernuth had any claim, it lay under s.69 and was unmaintainable because it had not secured the necessary leave and was out of time to do so. In any event, SCP Rule 4 excludes any such right of appeal. This submission flowed from Recital K of the Award i.e. that the arbitrator was proceeding on the basis that service by e-mail was a valid method of commencement, such proposition being either correct or incorrect in law and the Arbitrator must have taken the view that it was correct. Consequently Bernuth was seeking to *"appeal to the court on a question of law arising out of an award made in the proceedings"* (s.69(1) refers).

The Judge rejected this argument: (i) that recital was not part of the Award; (ii) neither the Award nor the reasons for it purport to determine any question of law in relation to the commencement of the arbitration; (iii) even if Recital K was to be taken as part of his Award, it did not purport to determine any question of law concerning service; (iv) the logical conclusion the submission was that, whenever an arbitrator proceeds to an award, and a question arose as to whether he had had jurisdiction, he must be taken impliedly to have answered, in a manner favourable to the party in whose favour the award is granted, every question of law bearing on whether or not he had jurisdiction; so that all such questions can be challenged only pursuant to s.69 and not under s.67. This is not, the Judge said, correct since if it were it would rob s.67 of much of its apparent effect.

The Judge identified an additional consideration, not raised in argument, and upon which he expressed no view. Ss.67/68/69 allow "*a party to arbitral proceedings*" to apply to the court. Such a person is to be contrasted with "*a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings*" per s.72. Mustill & Boyd suggest (p.362 of 2001 Companion) that if a person who takes no part in the arbitral proceedings is excluded from any of the rights under the Act of a "*party to arbitral proceedings*" other than those specifically conferred on him by s.72, the effect of High Seas' argument would be to restrict the rights of an alleged party who takes no part in the proceedings to a challenge to the jurisdiction based on fact alone.

Further, a party to arbitral proceedings, who contends that the tribunal lacks substantive jurisdiction, and who is in receipt of an adverse ruling involving a determination of law, may apply under s.67 to challenge that conclusion. There is nothing in s.69 or s.67 to compel him to proceed under the former and it would be natural for him to proceed under the latter. If so, a person who has taken no part in the arbitral proceedings can invoke s.67 by reason of s.72(2)(a).

Other Issues

The Judge having reached his conclusion that service had been effective, it was unnecessary for him to decide whether or not, if service by e-mail was not, in the present case, effective under s.76(3) it was rendered effective because of the provisions of the LMAA's SCP or to decide the type of relief, if any, that would be appropriate. Since both matters had been the subject of considerable argument, the Judge indicated his obiter conclusions on them. These are the subject of a separate e-mail.

Comment

This is an excellent decision, combining practical common sense with an ability to reiterate (one of my hobby-horses !) that CPR principles do not apply in arbitration even if they might provide helpful guidance in some areas (e.g. where there is no arbitration authority).

Permit me to add some observations of my own:

(i) I can envisage enforcement difficulties since Bernuth has at least an arguable case under Art.V(1)(b) NYC58 and there are several jurisdictions who take a less 'modern' view of e-communications and might not accept electronic "Read Receipts" or the absence of any "System Rejection" notices as sufficient;

(ii) In the light of (i) and also given the CPR's requirements for litigation notices, it is a little surprising that SM did not send High Seas' submissions in hard copy to minimise the Art.V(1)(b) risk;

(iii) Further, and with respect to the arbitrator in this case (who is known to me), as arbitrator I would have sent at least some of the documentation/correspondence by fax and courier or recorded delivery to minimise the NYC risk; I see my obligation as being to deliver an enforceable award and I therefore see it as incumbent on me to avoid unnecessary enforcement risks; I have recently been involved in such a case in the Far East where a key notice had to be delivered to a Respondent in a relatively remote part of a large country and, although the arbitration agreement provided for fax delivery, extensive (and time-consuming) efforts were made to ensure proof of delivery of a hard copy (actually two – one by courier from a SE Asian city, one by in-country registered mail);

(iv) Bernuth's argument on being deluged by spam is demonstrably without merit since there are readily available spam filters (mine, powered by Symantec, is an integral part of the BT Internet service and is 99% effective) able to block advertisements for certain "performance-enhancing" drugs, solicitations from widows of billionaire dictators, announcements of lottery wins, etc etc;

(v) further, in my last role as Head of Legal for a large oil company, it was a rigid rule across the company's worldwide operations that any communication such as Bernuth received at info@..... should be forwarded to me without delay so I have no sympathy for Bernuth if its clerical staff ignored the various communications;

(vi) in the context of SCP and any other fixed fee and/or time-limited arbitration procedure, it is, I suggest, axiomatic that the arbitrator be permitted to work at maximum efficiency and this, at least for me, requires substantial reliance on e-mail in comparison with the time taken to print out, send, file and locate faxes (or, worse, hard copy mail !)

28th December 2005

LMAA SCP and Other Issues in Arbitration

I published today a commentary on one aspect (service of notice of arbitration by e-mail) of the recent case *Bernuth Lines Limited v High Seas Shipping Limited* ([2005] EWHC 3020 (Comm) – 21st December 2005). The case was an application to set aside the Final Award of an LMAA Arbitrator dated 26th July 2005 on the ground that the arbitration had purportedly been commenced by e-mail but that that notice had not been effectively served and, in dismissing that application, Mr Justice Christopher Clarke stated that he did not have to deal with the other issues raised but would do so anyway but on an *obiter* basis.

The Facts

Bernuth, a Cayman company, chartered the vessel "Eastern Navigator" from High Seas, a Marshall Islands company, on an amended NYPE form. The charter was for a period of "*one time charter trip to Nicaragua via good/safe ports. Duration 6 days without guarantee*". The vessel was to be delivered, as in the event she was, at the arrival pilot station at Miami. Clause 45 of the charterparty contained a London arbitration clause which provided for arbitration by a single Arbitrator, failing agreement on whom, by two Arbitrators being both members of the Baltic Exchange and engaged in Shipping, with power to such Arbitrators to appoint an Umpire…. For disputes <$50,000 the LMAA's SCP was to apply.

Disputes arose with High Seas claiming approx. $40,000 for hire and other costs and with Bernuth Agencies Ltd (BAL), as agent for Bernuth, counter-claiming approx. $94,000.

Applicability of the LMAA SCP

High Seas, in the alternative to its main (and successful) argument on the effectiveness of service by e-mail, relied upon the provisions of the SCP as entitling it to commence arbitration by e-mail, §5(i) SCP providing: "*(i) All communications or notification under this procedure may be by … or e-mail"*., thereby constituting an agreement on the manner of service (s.76(1) refers) – this is, of course, correct but only if SCP applied.

Bernuth contended that, since it had asserted a claim in excess of $50,000 prior to the purported commencement of the arbitration, the dispute did not fall within the SCP. High Seas accepted that, if Bernuth had asserted a counterclaim of over $50,000 the SCP would, or might, have been inapplicable but Bernuth had not done so and neither High Seas nor the Arbitrator was bound to proceed upon the footing that there was a continuing dispute involving such a claim. Accordingly the SCP was applicable to High Seas' claim. Bernuth's response was in effect, that there was a circularity in High Seas' relying on SCP 5(i) permitting service by e-mail if the applicability of SCP could be determined only after the arbitration had commenced. High Seas submitted that claims were often made under SCP where counterclaims had previously been asserted in excess of $50,000, which, in the event, were not pursued by respondents. If awards made in these circumstances could be challenged on the basis that, because of the counterclaim previously asserted, the arbitration could not proceed under the SCP, its utility would be much reduced.

High Seas drew attention to §9 of the Commentary on the SCP which inter alia envisages the arbitrator "upgrading", by consent, a dispute to [full] LMAA Terms or, absent consent, resigning. The Judge did not accept that paragraph 9 was applicable since the parties' arbitration agreement (Clause 45 of the charterparty) gave a counterclaimant for $90,000 a *contractual entitlement* to have the dispute resolved otherwise than by the SCP. Paragraph 9 addressed the situation where an arbitrator was minded to resign, despite the parties' agreement to his jurisdiction, but not the situation where an arbitrator sought to continue under SCP despite the arbitration agreement excluding it. It was also material that, if the dispute fell within SCP then any right of appeal to the Courts was excluded (SCP §4), whereas otherwise it was not.

The Judge took the view that the parties' arbitration agreement should be taken to mean that SCP applied to disputes where the total amount claimed by either party *in the arbitration* did not exceed $50,000. If the respondent intimated a counterclaim in excess of $50,000, the SCP would no longer be applicable and the claimant and respondent would each have to appoint their own arbitrators and proceed to a 'full-blown' arbitration. If the dispute was unquestionably one within SCP (i.e. no claim in excess of $50,000 had ever existed or had ever been asserted on either side) the parties were bound by any agreed method of service thereunder.

The Judge concluded that High Seas had been entitled to proceed in the first instance on the basis that any arbitration would be under the SCP.

What was the Appropriate Remedy if Service by E-mail Was Not Effective ?

See earlier report for discussion of s.67/69/72 issues.

Bernuth argued that, because the proceedings were never validly notified to it there had been a serious irregularity in the form of a failure by the tribunal to comply with its duty to give each party a reasonable opportunity of presenting its case. However, the Judge was unimpressed, considering that Bernuth's complaint was substantially that the Arbitrator had lacked substantive jurisdiction and that the Award should be set aside upon that ground whereas s.68 was intended for cases where the tribunal had substantive jurisdiction but had failed properly to comply with its obligations. Bernuth's present complaint therefore fell within s.67, as permitted by s.72(2)(a). Bernuth had not contended (nor could it), that if the arbitration had been validly commenced by e-mail, it was nevertheless entitled to succeed under s.68. In any event, the Judge saw no failure of compliance with s.33 since the proceedings had been validly commenced by e-mail and the Arbitrator had notified Bernuth by e-mail at every stage (Recital K refers)

Bernuth, sought, in the alternative, a declaration under s.72(1) that the Award was of no effect and it contended that it could make such an application, without limit of time and without showing substantial injustice. The Judge was persuaded by High Seas' submission that the relief available under s.72(1) must have a narrower scope than that contemplated by s.72(2)(a) taken with s.67 since, if all the relief available under s.67 could be obtained under s.72(1), a person who had taken no part in the proceedings would never proceed under s.67 as applied by s.72(2)(a). If he were to do so, he would unnecessarily subject himself to a time limit under s.70(3) and to a restriction on his entitlement to appeal under s.67(4). Further since Bernuth had not sought to claim under s.67, as opposed to s.72, it could not apply at all. The distinction between s.72(1) and s.72(2) appeared to reflect the distinction between an application for a declaration under s.67(1)(b) and a challenge to an award under s.67(1)(a) with a consequent order under s.67(3) but the distinction between (a) declaring an award to be of no effect because the tribunal did not have substantive jurisdiction and (b) setting it aside would not appear to be major, and it was not immediately apparent why an application under s.72(1) should be subject to no time limit, whereas one under ss.67 and 72(2)(a) would be subject to the time limit for an application under s.67 specified in s.70(3). S.72(1) seemed to be primarily intended to deal with the position at an interlocutory stage, when the Court may be prepared to declare that an applicant was not bound by the arbitration agreement and to restrain the respondent from further continuance of the arbitration.

The Judge said that, had he reached the conclusion that the arbitration had not been validly commenced because of failure of effective service, he would *not* have refused to set aside the award on the ground that s.72(1) did not permit it and that s.67 had not been invoked. It would have been necessary, on that hypothesis, to have considered the substance of the matter. Bernuth had brought its application within 28 days of the award, although it should more pertinently have been brought under s.67 as applied by s.72(2)(a). If that was so, the Judge could see no relevant prejudice to High Seas in granting Bernuth the necessary permission to amend its application. If the proceedings had originally been brought under ss.67 and 72(2)(a), High Seas would have made exactly the same arguments, save that the question of substantial injustice would not arise. The Judge would, therefore, have given Bernuth permission to amend and would have set aside the award under s.67.

Substantial injustice

High Seas submitted that, although there was, as had now become apparent, a prima facie dispute of fact as to whether or not the Master had unreasonably refused to follow orders, serious questions had arisen as to the validity of that contention. Moreover there could be no substantial injustice in allowing the Award for hire (predominantly) to stand, leaving Bernuth to make its counterclaims in the arbitration that it had now launched.

Bernuth counter-submitted that the injustice lay in the fact that, unless the Award was set aside, it would be faced by an award against which it would not be able to set off any of its counterclaims, whereas, if the Award was set aside it would be able to do so, at least in respect of some of them. In the former case it would have to pursue those claims

against a company based in the Marshall Islands. In reality the value of any counterclaim lay in Bernuth's ability to set it off against a claim for hire and, if it could not do that, it might suffer the real injustice of being liable under the Award but, in practice, unable to recover in respect of their counterclaims.

The Judge held that, if the proceedings had not been validly served so that, on that account, Bernuth had not had a reasonable opportunity of putting its case, it would have suffered a substantial injustice and it would have a case to make in that regard although it was not suggested that such case was unarguable and, if well-founded, some at least of the counterclaims were capable of being set off. On this hypothesis the proceedings against Bernuth were never validly constituted and the relevant legal and managerial personnel never received notice of what was going on until after the Award was made. In those circumstances it would not be just to allow the Award to stand since to do so would be to deprive Bernuth both of the opportunity of seeking to set off its claims and expose it to the need to enforce its claims against a company in the Marshall Islands, an exercise which seemed to the Judge likely to involve, as a minimum, significant expense and delay and which might be fraught with difficulty.

Comment

The Judge's decision on the applicability of SCP appears both pragmatic and commonsensical, not least because a wholly spurious assertion (never substantiated) of a counterclaim of $50,001 should not be allowed to derail the train.

Further his conclusions "in the alternative" lend weight to my concern (see earlier report) over the unnecessarily-imported Art.V(1)(b) enforcement risk.

The s.72 arguments are very interesting but I reserve comment until I have had time to consider them in conjunction with appropriate authoritative commentaries.

All-in-all, a truly fascinating case and I look forward to further valuable contributions to the development of the law of arbitration from Mr Justice Christopher Clarke; as regards, the proliferation of Clarkes (and Walkers) in the English judiciary, I am reminded of a period in 1917 when my family's law firm, Dundas & Wilson CS, had only four partners, all called Dundas – they were known as Mr Robert (my grandfather), Mr John, Mr William and Mr David.

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #13
JUNE 2006

21st January 2006

An English Judge Refuses to Withdraw

The Court of Appeal Judgment was released yesterday afternoon under Neutral Citation Number: [2006] EWCA Civ 6; it can be accessed at http://www.bailii.org/ew/cases/EWCA/Civ/2006/6.html.

The judgment is quite short and, I suggest, unsurprising: the appellant's sole objection to Evans-Lombe J trying the case was the real possibility of apparent bias, there being no suggestion of actual bias or personal interest, the judge having no personal interest, pecuniary or otherwise, in the outcome of the litigation. However, upholding the bias objection on the eve of the trial would cause considerable disruption: the trial would have to be adjourned, as there would be practical problems in finding a new trial judge at such short notice and the parties would suffer additional costs resulting from the adjournment and there would be delay in fixing a new trial date.

To repeat the key fact, a principal witness, J, for AWG was a 30-year friend and neighbour of the Judge; AWG offered to remove J as witness but the Appellants objected to this. They would be denied the opportunity to cross examine J; they would be unable to ask the Judge to draw inferences from the J's failure to give evidence; since J had been chairman of the audit committee, any criticism of his fellow directors in the discharge of their duties was likely to constitute a criticism of J himself; and the Appellants might even wish to call J as a witness, even if AWG did not.

Mummery LJ, with whom Lathan and Carnwath LJJ agreed, said (inter alia):

6. Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance.

……

19. What is the position of this court on an appeal from the judge's decision not to recuse himself ? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.

20. As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

Conclusion

21. "In my judgment, the judge ought to have recused himself in the unfortunate circumstances in which, through no fault of his own or of anyone else, he was placed. This was the conclusion I reached at the hearing on 5 December 2005. My assessment of the circumstances bearing on the issue of apparent judicial bias is as follows" [*NOTE: here follows §22-30 summarised by HRD*]. (i) J and the judge knew each other well; (ii) J was heavily involved in the case; (iii) the case was large and complex; (iv) J's position with AWG was such that he had relevant evidence to give; (v) AWG's calling of other witnesses was not an answer; (vi) see §29; (vii) the possibility of apparent bias was nott so small that the court would be justified in taking the risk of allowing this judge to try the action.

29. "Sixthly, while I fully understand the judge's concerns (see paragraph 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

Result

31. With the greatest possible respect, the judge's well intentioned decision not to recuse himself was wrong. It is in the interests of all concerned that he does not hear this case. As already indicated, the appeal was allowed on 5 December 2005 and the judge was directed to recuse himself from the trial of this action. I hope that suitable arrangements can be made as soon as possible to find another judge to try the case early in 2006.

22nd February 2006

Us Supreme Court Decides Key Arbitration Case

As advised on 1st December 2005, the US Supreme Court recently had to address whether a court or an arbitrator should determine whether the underlying contract is void for illegality before enforcing the arbitration clause. The outcome substantially depended on the application of the separability doctrine to such contracts.

By a 7-1 majority (Thomas J dissenting; Alito J taking no part in the case), regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court.

Cornell University's Faculty of Law provides an excellent service covering US Supreme Court business; it circulates both a summary of the cases before they are heard and subsequently a summary of the judgment(s). Both make fascinating reading, if not always of direct relevance to my practice. However, a case relating to an arbitration agreement has been filed with the Court and the underlying facts could be replicated in many other countries.

I am most grateful to Cornell University for permission to reproduce the note below.

BUCKEYE CHECK CASHING, INC. v. CARDEGNA ET AL. CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 04–1264. Argued November 29, 2005—Decided February 21, 2006

For each deferred-payment transaction respondents entered into with Buckeye Check Cashing, they signed an Agreement containing provisions that required binding arbitration to resolve disputes arising out of the Agreement. Respondents sued in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida laws, rendering it criminal on its face. The trial court denied Buckeye's motion to compel arbitration, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void ab initio. A state appellate court reversed, but was in turn reversed by the Florida Supreme Court, which reasoned that enforcing an arbitration agreement in a contract challenged as unlawful would violate state public policy and contract law.

Held: Regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specificallyto the arbitration clause within it, must go to the arbitrator, not the court. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U. S. 395, and Southland Corp. v. Keating, 465 U. S. 1, answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. See Prima Paint, 388 U. S., at 400, 402–404. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. See id., at 403–404. Third, this arbitration law applies in state as well as federal courts. See South-land, supra, at 12. The crux of respondents' claim is that the Agreement as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge. Because this challenges the Agreement, and not specifically its arbitration provisions, the latter are enforceable apart from the remainder of the contract, and the challenge should be considered by an arbitrator, not a court. The Florida Supreme Court erred in declining to apply Prima Paint's severability rule, and respondents' assertion that that rule does not apply in state court runs contrary to Prima Paint and Southland. Pp. 3–8. 894 So. 2d 860, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., took no part in the consideration or decision of the case.

9th March 2006

An Extraordinary Arbitration

A specially-constituted English Court of Appeal, including the Lord Chief Justice and the Master of the Rolls, has just decided a major issue of principle in a truly extraordinary case, *Weissfisch v Julius & Ors* [2006] EWCA Civ 218. The full judgment (given by the LCJ) is at http://www.bailii.org/ew/cases/EWCA/Civ/2006/218.html.

The case was an application for permission to appeal from an order of David Steel J dismissing the claimant's) application for an interim injunction against the first defendant, a Mr Julius, with the appeal to follow should permission be granted. The injunction was sought in order to prevent J continuing as arbitrator, including holding a jurisdiction hearing, prior to the determination in the English High Court in April 2006 of whether or not a stay of legal proceedings should be granted. In the words of the LCJ "this is an unusual case raising important issues of principle and,

accordingly, we think it appropriate to give permission to appeal. We shall proceed to deal with the appeal, which was fully argued."

The claimant, A, and the second defendant R are brothers; the first defendant, Mr Julius (J), is an English Solicitor. The third defendant, D, is a lawyer practising in the Bahamas, who is the trustee of a discretionary trust (the "APW Trust") whose beneficiaries were A and his children, or such others as might be appointed by the nominated protectors under the terms of the trust. R was a nominated protector.

A sought, inter alia, (i) a declaration that the parties' arbitration agreement (Swiss law/Swiss seat) was void and (ii) an injunction restraining J, the nominated arbitrator, from acting as such. The three defendants, J, R and D, sought orders that the English court should not entertain A's claims, but should leave him to advance them in Switzerland. The issue is listed in the High Court in April 2006 before Colman J. J intended, before that trial, to hold his own hearing on the issue of his jurisdiction. The present proceedings raise the question of whether he should be injuncted from doing so.

The Disputes and the Arbitration Agreement

A and R had made substantial monies from metal trading, conducted through the MRG Group, part-owned by the APW Trust. J acted (as Solicitor) for MRG and, on occasion, he had acted personally for R and, separately, for A. Disputes arose between the brothers and J attempted to mediate but without success. In 2004 D, on A's instructions, transferred certain assets from the APW Trust to other trusts controlled by A. D subsequently made a criminal complaint in the Bahamas against A, alleging that he had falsely stated that this transfer of assets had had the approval of R as Protector. R was anxious that the assets should be returned to the APW Trust. A was anxious that the criminal inquiry should be discontinued.

An agreement ('the Agreement') was entered into by A, R, J and D, the first part of was a very unusual arbitration agreement (the "Arbitration Clauses") whereby J was expressly appointed as sole arbitrator with the broadest possible powers including the discretion to act *ex aequo et bono*. Further, J, despite his appointment, was expressly permitted to represent A or R outside the arbitration and the parties expressly waived any rights they might have to challenge the appointment of the Arbitrator on any ground, including on the grounds that he had (a) endeavoured to help the relevant parties settle matters amicably, and/or (b) had been engaged in the mediation of their disputes, and/or (c) had been legal advisor to A, to R and to companies owned by them or by the APW Trust. Even further, the Arbitrator was expressly permitted to draw on information acquired as adviser to the parties. His awards were required to be unreasoned unless otherwise requested by all parties. The parties expressly waived their rights (a) to challenge any award(s) through set aside proceedings or any other proceedings; (b) to oppose enforcement of the Arbitrator's award(s) in any jurisdiction. Finally, the Agreement was expressly stated to be is governed by Swiss law, the arbitration was to be *ad hoc*, and the seat of the arbitration was to be Geneva.

A's Claims

A alleged that the Agreement was void, or had been avoided by him, on the ground that it was procured by misrepresentations and fraud on R's part. Further, A alleged that J, as a solicitor, not only owed A fiduciary duties, in part non-waivable, but was also obliged to observe the rules of professional conduct as an English solicitor. These duties had been broken by J's accepting appointment as an arbitrator in a matter between two existing clients (A and R) with conflicting interests, where he had advised and acted for both parties in the matter and closely connected matters previously. This conduct was alleged to entitle A to an injunction restraining J from continuing to act as Arbitrator.

R and D sought orders declaring that the English Court (i) had no jurisdiction to try the claims made in this action, or (ii) should not exercise any jurisdiction which it might have.

The Arbitrator sought an order that the action against him be stayed on the grounds that, inter alia,: (1) the proceedings concern an arbitration seated in Geneva, expressly governed by Swiss law; (2) the matters raised by A were all matters for decision by the Arbitrator (subject to any permitted review by the Swiss Courts); (3) accordingly, the proceedings should be stayed under s.2(2)(a) and 9 of the Arbitration Act 1996 and/or under the inherent jurisdiction of the Court; (4) … (5) … (6).

The Jurisdiction Hearing and the Injunction

J wrote to the other parties stating that he intended to hold a hearing in Geneva to determine his jurisdiction and invited submissions from them concerning A's case. A's lawyers responded by asking J to undertake not to act as arbitrator until final determination of the application for a stay. J consulted R and D, neither of whom agreed to his giving this undertaking so he declined to do so. A reacted by applying for an injunction restraining J from 'taking or continuing to take any steps whatsoever as an arbitrator' under the Agreement until the determination of the stay application 'and thereafter until further order'.

The present case concerned that injunction application.

The Key Questions

(1) Should the English Court entertain A's claims or decline to do so on the ground that they should be pursued in Switzerland because it concerned the validity of an Swiss Law, Swiss-seated arbitration agreement ?

(2) Should the English Court grant the injunction to prevent J continuing as arbitrator pending determination of Q.1 ?

Steel J's judgment

The Judge said (at §17) "The starting point for any consideration of the merit of [A's] application must be Switzerland and Swiss law. The seat of the arbitration is in Geneva. Both the curial and governing law of the contract is Swiss law. … On the face of it, the obvious forum for any challenge to the contract and to the appointment or performance of the arbitrator at this stage is Switzerland." He observed further that it was a well-established principle of English law that the courts of the seat should have supervisory jurisdiction, reflected in the disapplication, pursuant to s.2(2), of ss.30/32/67/72 whereas ss.9 and 44 did apply, giving the English court express jurisdiction to intervene in support of a foreign arbitration.

However, the Judge could find nothing that justified the injunction sought: A could appear before the Arbitrator in Switzerland to challenge his jurisdiction without affirming the arbitration agreement. The fact that there was a claim against J personally, that A's allegations related to matters of which J was a witness, and that it was alleged that, by acting as arbitrator, J was acting in breach of the Solicitors' Professional Rules, were all matters to be considered by J at first instance in the light of the parties' express waiver in the Agreement. Both the structure of the 1996 Act and the spirit of the New York Convention militated against the grant of the injunction sought. The balance of convenience weighed against the grant of the injunction in that A could challenge J's jurisdiction at the hearing before him and renew that challenge before the Swiss courts.

The Appeal

Central to A's appeal against the refusal to grant an injunction was the contention that he had brought an action in England making claims against J personally, which were not the subject of the Arbitration Clauses, could not be made the subject of a stay and were only justiciable in England. Further, because these were claims of breach of fiduciary duty and breach of J's professional duty as a Solicitor in procuring the Agreement and agreeing to act as arbitrator under it, they could not be met by a plea of waiver. Further, the court was obliged to exercise its jurisdiction over J pursuant to the Brussels and Lugano Conventions, as incorporated into English law by the Civil Jurisdiction and Judgments Act 1991. In particular, the claim against J did not fall within the 'arbitration' exception in Article 1 of the Lugano Convention. Finally, the English court must itself consider allegations of misconduct against an officer of the court. A also contended that it would be wholly inappropriate for J to rule on his jurisdiction when this was being challenged on the ground of his own breaches of duty in relation to matters of which he was the primary witness - he was proposing to be both judge and witness in his own cause.

The parties to the Agreement, including J, had agreed that he was to perform a role which came close to being an amalgam of arbitrator and mediator despite, indeed because of, previous professional connections that he had had with the subject matter of the dispute and with the parties that, on normal principles, would have precluded him from acting as an arbitrator. Under the Agreement, however, A and R had expressly waived reliance on these principles as a ground of objection to J's jurisdiction. A's assertion that this waiver was ineffective in law was not axiomatic and would fall for consideration in the forthcoming trial. The issue before Steel J and before the Court of Appeal was solely whether J should be restrained from acting as arbitrator pending the April hearing.

Conclusions

The Court was not impressed by A's complaint that J was proposing to be both judge and witness in his own cause, the principle of *Kompetenz-Kompetenz* sometimes requiring this. It was not uncommon for arbitrators to be called upon to consider submissions that they were not competent to act by reason of bias. In such circumstances the decision of the arbitrator would not be final, at least where the seat of the arbitration is in a country such as Switzerland where the courts exercised an appropriate supervisory jurisdiction over arbitration. There was nothing untoward in J considering the question of his own jurisdiction now that this had been put in issue. This would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or, if Colman J so ruled, in England.

There were cogent reasons (essentially mirroring the conclusions of Steel J) why the Court of Appeal should not at this stage restrain J by injunction from holding a hearing to consider his own jurisdiction. These were:

(i) A and R, each of whom was receiving independent legal advice, had expressly agreed that their disputes should be resolved by arbitration, governed by Swiss law and seated in Switzerland, with J as Arbitrator.

(ii) The natural consequence of the Agreement was that any issues as to the validity of the unusual provisions of the Arbitration Clauses would fall to be resolved in Switzerland according to Swiss law.

(iii) This consequence accords with the principles of the law of international arbitration agreed under the New York Convention as recognised by the UK in the 1996 Act.

(iv) For the English court to restrain an arbitrator under an agreement providing for arbitration with its seat in a foreign jurisdiction to which the parties had unquestionably agreed would infringe those principles.

(v) Exceptional circumstances might, nonetheless, justify the English court taking such action; whether such circumstances existed would be a matter to be resolved by Colman J and nothing in these reasons was intended to influence his decision in that regard.

(vi) No special circumstances had been shown which justified taking such action on an interim basis, pending the hearing before Colman J.

For these reasons A's [present] appeal was dismissed.

Postscript

An issue which this Court had not resolved arose as to whether this appeal concerned an 'arbitration claim' within CPR 62.10; whether it did or not, the Court had decided that this judgment be delivered in open court.

11th March 2006

Ecuador v Occidental - Stage 2 - Challenges On Jurisdiction And Serious Irregularity

As reported yesterday, judgment (by Aikens J, Judge-in-Charge of the English Commercial Court) has been released (dated 2nd March 2006) in the 2nd stage of the Oxy/Ecuador litigation arising out of disputed VAT refunds allegedly due under a PSC where Oxy had commenced arbitration under the UNCITRAL Rules pursuant to the US/Ecuador BIT. The arbitration agreement did not identify the seat of the arbitration and the Tribunal chose London, hence the arbitration applications in the English Court. The Tribunal had had to deal with Ecuador's challenge to its jurisdiction and to the admissibility of Oxy's claims and its Award (1st July 2004) dealt with both jurisdiction and the merits (s.31(4)(b)).

The case raised very interesting issues concerning BITs and public international law (which will, no doubt, be the subject of authoritative comment on OGEMID by others) but the following note focuses on the application of the Act to BIT-based claims. Further, I do not propose to address in detail the very skilful arguments run by respective Counsel (see postscript).

Following issue of an award in Oxy's favour, Ecuador challenged it under ss.67 and 68, contending that the Tribunal had exceeded its jurisdiction as defined in the terms of the BIT. Oxy counter-challenged Ecuador's right to question the arbitrators' jurisdiction under s.67, asserting that the issue of the arbitrators' jurisdiction was not "justiciable" before the English Court in that such a challenge could not be dealt with thereby because the arbitration arose out of a Treaty between States and was on the plane of public international law. This "justiciability" issue (already debated on OGEMID) was determined by Aikens J as a preliminary issue ([2005] EWHC 774 Comm), with his deciding that Ecuador's s.67 challenge was "justiciable" but with his giving Oxy permission to appeal; that appeal was heard by, and dismissed by, a very strong Court of Appeal ([2005] EWCA Civ 1116). The present case comprises the ss.67/68 challenges themselves.

Ecuador's s.67 challenge was, essentially, that the Tribunal's award covered "matters of taxation" excluded by Art.X of the BIT, therefore incapable of being the subject of an arbitration claim under the BIT. Alternatively, the Tribunal had exceeded its powers in such a way as to constitute a serious [procedural] irregularity, which had resulted in a substantial injustice to Ecuador, hence the s.68 challenge. Oxy both contested Ecuador's assertions and cross–challenged under s.67 asserting that that the Tribunal had wrongly concluded that it had lacked jurisdiction to determine an Oxy claim based on alleged expropriation; this cross-challenge was contingent on Ecuador succeeding in its challenges. In response, Ecuador contended that Oxy's contingent challenge was invalid being a thinly-disguised attempt to challenge the award on the merits, which challenge could only be made under s.69 and then only with leave to appeal (LTA) thereunder; neither Oxy nor Ecuador had applied for LTA.

The s.67 Challenge

Under the Act, a s.67 challenge proceeds by way of a de novo re-hearing of the issues, the test for the Court being "was the Tribunal correct in its decision on jurisdiction ?", NOT "was the Tribunal entitled to have reached the decision that it did ?". As envisaged by s.31(4)(b), the Award had dealt with both jurisdiction and merits, the Tribunal deciding the jurisdiction points first, holding that it had jurisdiction to deal with Oxy's Art.II claims, then deciding in Oxy's favour on those claims; it followed that s.67(1)(b) applied.

Ecuador's jurisdictional challenge was that Oxy's Art.II claims were not matters that could be properly determined by the Tribunal because they were "*matters of taxation"* and, on the facts, these fell outside any part of Article X.2, properly construed. So what should the Court consider in order to decide whether the arbitral tribunal had "*substantive jurisdiction"* to determine Oxy's Art.II claims ? Given the structure of the BIT and the nature of Oxy's claim, the Court had to examine not only the scope of the dispute resolution provisions in the BIT but also the way in which the parties had presented the dispute to the Tribunal. Therefore the Court had to have regard to factual aspects concerning the merits of Oxy's claim and Ecuador's defence thereto, whilst taking care not to deal with the merits of the claims. It followed that the Court had, first, to consider the nature of the dispute between the parties and, second, to decide whether, on the true construction of the BIT, and Article X.2 in particular, the Tribunal had had jurisdiction to determine the dispute.

Following the necessary analysis (consideration of which I leave to others), the Judge concluded that the Tribunal had been correct in its decision on jurisdiction. In doing so, he dealt with Ecuador's argument that, before the Tribunal, Oxy

had not relied on Art.X.2(c) of the BIT as a foundation of the Tribunal's jurisdiction and could not rely on it now. The Judge held that the fact that Oxy had not put forward the particular plea that there was jurisdiction under Art.X.2(c) but, instead, that there was a more general basis for it, did not preclude the Tribunal from holding, as it had, that it had jurisdiction by virtue of Article X.2(c). It had been Ecuador's own case that only Article X.2(c) was applicable (if at all) but it had argued that, on the proper interpretation of that provision and the facts, the dispute did not fall within it. The Tribunal had disagreed with Ecuador's construction of Article X.2(c) and held that it had jurisdiction. In these proceedings, Oxy had specifically based its jurisdiction case on Article X.2(c) and Ecuador could not, and did not, argue that Oxy had been debarred from putting that case forward.

The S.68 Challenge

Ecuador's s.68 challenge focused on particular parts of the award in which the Tribunal had made various statements and orders concerning the "Servicio de Rentas Internas" ("SRI"), submitting that doing so constituted a serious irregularity pursuant to s.68(2)(b) since such purported to interfere with the sovereign, internal affairs of Ecuador i.r.o. which the Tribunal had no powers to interfere and such interference had caused or would cause a substantial injustice to Ecuador (Counsel for Ecuador emphasised that that the bona fides of the Tribunal were not in question).

The Judge considered the various statements and orders in detail, holding that three numbered orders by the Tribunal (objected to by Ecuador) were consequential declarations following from the its decision that Oxy was entitled to monetary compensation from Ecuador for breaches of the BIT. In principle, he said, the Tribunal must have the power to make orders that are intended to give proper effect to its primary order granting monetary compensation. Further, and inter alia, the first numbered order was directed at Oxy, not at Ecuador as was the third which did not, as Ecuador argued, make any declaration on the effect or validity of any national law of Ecuador; nor did it order Ecuador to perform its international law obligations in any particular way but, instead, its effect was to make a declaration as regards Oxy's attempts to make claims in the Ecuadorian courts. This order was also consequential on the order granting Oxy monetary compensation and was made so as to ensure that Oxy did not obtain a double recovery. Similar analysis applied to other challenged sections of the Award so the Judge concluded that the Tribunal had not acted in excess of its powers in the statements criticised by Ecuador and had certainly not been in breach of the principles of public international law to which Counsel for Ecuador had referred. Moreover, even if one of the orders might possibly be regarded as made in excess of the Tribunal's powers, that order could not possibly be said to have caused "*substantial injustice"* to Ecuador - on the contrary, that order, together with all the others that are criticised, were made so as to protect Ecuador therefore caused Ecuador no injustice whatsoever.

Aikens J therefore dismissed Ecuador's s.68 application.

Oxy's Contingent s.67 Application

Since both Ecuador's s.67 and s.68 applications failed, Oxy's contingent s.67 application did not arise for decision but, since the matter was argued in detail, Aikens J dealt with it briefly.

Oxy's case was that, in the arbitration, it had submitted that the VAT refunds to which it was entitled were part of its "investment", within Art.I of the BIT and that Ecuador had expropriated that part of the investment by "unlawfully, arbitrarily, discriminatorily and retroactively taking Oxy's rights to VAT refunds", so that Ecuador was in breach of its treaty obligations under Art.III. In the Award, the Tribunal had stated that "A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility".

Following consideration of the chronology and of the Parties' submissions, the Judge held that it was clear that, by the time of the hearing on jurisdiction and the merits, Ecuador had conceded that the Tribunal had jurisdiction to deal with Oxy's expropriation claim but was submitting that that claim was hopeless as a matter of fact and law. It was equally clear that the Tribunal was dealing with the merits of the expropriation claim although reference to "admissibility" might seem curious to English lawyers; it was evident, looking at the substance of the relevant part of the award, that the Tribunal was making an award on the merits of the expropriation claim and had not decided that it had no jurisdiction to entertain that claim.

Accordingly, there was no basis on which Oxy could mount a s.67 challenge in this regard; it had wanted the Tribunal to consider the expropriation claim on its merits and the Tribunal had done so, duly dismissing the claim.

Concluding Remarks

One may ask whether the drafters of the Act had ever contemplated such a dispute coming before the Court and Ecuador's challenges are very far removed from the recent run of s.68 challenges (nearly all failed) in domestic case but the Act has proved remarkably robust and flexible, a tribute to the skill in its drafting.

It can reasonably be assumed that this case will go to appeal; this requires the permission of the Judge (ss.67(4) and 68(4)) which I suggest can be taken to be forthcoming. I do not discern any significant prospect of success for the appeal.

Following the *City of Moscow* case, arbitration applications under s.67/68 can be heard in private with judgment delivered privately; such is evidently not applicable to a BIT case.

Postscript

Co-Counsel for Ecuador was Daniel Bethlehem QC who, w.e.f. 1st March 2006, has taken up the position of Legal Adviser (i.e. Head of Legal Department) to the UK Foreign & Commonwealth Office.

15th March 2006

Novel Issues i.r.o. s.69

In recent months we have seen many parties try to scale the Himalayan thresholds of a s.69 appeal but few have succeeded (one has recently, in a maritime case I will publish about very shortly) and we are growing used to the TCC's mantras of "fatally flawed" "hopeless" etc. We might think that the boundaries of s.69 were reasonably clear but, however, a recent case *Sukuman Ltd v The Commonwealth Secretariat* ([2006] EWHC 304 (Comm); Colman J; 27th February 2006) raised two wholly novel issues.

The Secretariat is London-based and is an international organisation, entitled as such to diplomatic immunity to the effect that it cannot be impleaded in the courts of the UK by reason of the terms of the International Organisations Act 2005. One of its functions is to assist Commonwealth States, inter alia contracting with outside providers of goods and services, such contracts sometimes including an arbitration clause which refers disputes to the Commonwealth Secretariat Arbitral Tribunal (CSAT) in accordance with the 'Statute of the Arbitral Tribunal of the Commonwealth Secretariat'.

In 2001 the Claimant's predecessor in title, Asset Management Shop Ltd ("AMS"), entered into a contract with the Secretariat under which AMS was to create a prototype website for the Government of Namibia which, if approved, might have led to the creation of a fully functional website. The contract included a CSAT arbitration clause providing for "arbitration in accordance with [CSAT's] statute ***which forms part of this contract and is available on request***." [emphasis added]. The Statute included at Article IX.2 the following provision: "The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal. This provision shall constitute an "exclusion agreement" …."

Following completion of the prototype website a dispute arose as to its ownership, the Secretariat's ST&Cs granting it title but where AMS' proposal for the work, expressly incorporated into the contract, retained title. The dispute was referred to CSAT arbitration and the Tribunal held that the website was owned by the Secretariat and not by AMS.

AMS applied under s.69 for LTA but the Secretariat submitted that the Court had no jurisdiction to grant LTA since the arbitration agreement included, by reference, a s.69(1) exclusion agreement. The Secretariat submitted further that it was not necessary to spell that out in the body of the arbitration agreement. In response, AMS submitted that the exclusion of the right of appeal was such a draconian measure when, as here, imposed by the standard arbitration system relied on by a public authority, such as the Secretariat, that there must be an express reference to that exclusion on the face of the agreement to arbitrate (the "Express Reference Issue"). Alternatively, if that was not necessitated by common law, it must be necessary in order to comply with Article 6 of the European Convention on Human Rights (the "ECHR Issue").

The Express Reference Issue

Neither Counsel nor the Judge could locate any direct authority on whether it was sufficient for the purposes of the first six words of s.69 that an arbitration clause incorporated an exclusion agreement only by reference. However, under the much more elaborate provisions of s.3(1) AA79, a mere reference in an arbitration clause to a set of Rules was sufficient (per Leggatt J in *Arab African Energy Corporation v Oliproduckten Nederland* [1983] 2 Lloyd's 419. Leggatt J referred (p.423) to that approach to construction being conditioned by the change in English public policy towards the desirability of finality in arbitration as against the demands of supervisory control by the courts.

Further, in *Marine Contractors v Shell Petroleum Development of Nigeria* [1984] 2 Lloyd's Rep 77 the Court of Appeal upheld a decision of Staughton J who had followed the approach of Leggatt J; Staughton J had said "The question of whether there has been an exclusion agreement in a business contract should be decided on ordinary principles of construction of contracts without any predispositions one way or the other." In the Court of Appeal, Ackner LJ identified reasons why the parties might have given up the right of appeal: (i) the determination of the appeal by a tribunal of the parties' choice, (ii) that finality would be achieved as soon as possible, (iii) that the dispute be dealt with in private.

Colman J considered that the 1996 Act had been intended to have left intact these aspects of privacy and confidentiality (DAC Report Ch.2 §9-17) and to preserve the twin objectives of finality and party autonomy (Ch.2 paras §18-19). The right to contract out of even s.69's restricted supervisory regime presented an optional facility for the reinforcing of finality and party autonomy in preference to the court's power of intervention.

The arbitration clause in this case expressly provided that the Statute was to form part of the contract and stated that it was available on request but AMS did not make any such request. It had been told that CSAT arbitration was a requisite and it ought to have appreciated that it was the Secretariat's belief that it could not be impleaded in the English courts in respect of this arbitration. At the time when the contract was entered into both parties were under the misapprehension (as was subsequently established as the law in *Selina Mohsin v The Commonwealth Secretariat* ((Unrep) 1 March 2002); David Steel J) that, quite apart from the applicability of any exclusion agreement, there could be no appeal to the courts from any award.

As a matter of general principle, contractual terms which have the effect of excluding liability can be incorporated by reference to general conditions provided that the notice given is reasonable in all the circumstances (*Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427). However, the s.69(1) exclusion differs from an exclusion of liability since it does not go to the substantive rights of the parties but only to the ancillary dispute resolution process. It followed that the consensual s.69(1) exclusion enhances party autonomy and the achievement of finality and that the test of what is reasonable notice of an s.69(1) exclusion agreement should not present a particularly high threshold, in particular, not one higher than that under the 1979 Act.

Colman J concluded that, leaving aside ECHR considerations, the provisions of s.69(1) did permit the incorporation of exclusion agreements by reference without spelling them out in the body of the arbitration clause.

The ECHR Issue

Does ECHR and s.3 of the Human Rights Act 1998 affect this conclusion ?

AMS argued that since the Secretariat was a public authority for ECHR purposes, there would be a breach of Art.6 by the Secretariat's reliance on its exclusion agreement and by the Court's enforcement of it. Accordingly, the Court should construe s.69(1) so as to require an exclusion agreement to be explicitly set out and agreed to. AMS also submitted (i) that exclusion of the right of appeal other than on the face of the arbitration agreement deprived it of its right to a “fair and public hearing by an independent and impartial tribunal established by law”, (ii) that a derogation from a party's Art.6 rights ought to be made explicit and (iii) that applying the approach to construction of Acts of Parliament under s.3 HRA98 identified by the House of Lords in *Ghaidan v Godin-Mendoza* ([2004] 2 AC 557), s.69(1) should be construed as requiring by the words "unless otherwise agreed by the parties" an express reference to an exclusion agreement. In that case it was held that even if the unambiguous construction of a legislative provision gave a particular meaning, if and to the extent that such meaning would involve permitting a breach of the requirements of the ECHR, the courts could adopt an ECHR-compliant meaning for that provision provided that such meaning was not inconsistent with a fundamental feature of the legislation. AMS’ arguments were therefore founded on the effect of an enforceable exclusion agreement being to deprive the parties of "a fair and public hearing … by an independent and impartial tribunal established by law."

Colman J considered that parties to a commercial contract, including a public authority, could undoubtedly without breach of Art.6 enter into arbitration agreements disentitling them to access to "a public hearing by a tribunal established by law". If Parliament had decided in 1996 that the public interest had required deletion of s.69, no argument could have been advanced that arbitration agreements entered into thereafter by public authorities infringed Art.6 since neither party would be permitted to resile from its ***agreement*** that all disputes should be resolved otherwise than by “public hearing by a tribunal established by law”. The right of access to the courts would have yielded to the public policy of adherence to freely contracted agreements for the means of dispute resolution.

It followed that parties whose arbitration agreements brought them within the restricted supervisory regime of s.69 were not thereby acting inconsistently with the ECHR rights of the opposite party, regardless of whether one of them was a public authority. Although they had a very restricted right of appeal, that was not impermissible under the ECHR. Equally, if they had mutually agreed to go down the s.69(1) exclusion route, they were also acting entirely consistently with Art.6 in the sense that they had preferred s.69(1)’s finality and privacy to the prospect of subsequent court proceedings and, having so agreed, they could not be permitted to rely on Art.6 and complain that there had been anything unlawful in one party, whether or not a public authority, inviting agreement to the exclusion of a restricted right of appeal.

The Judge rejected the submission that, unless there was a special requirement prohibiting incorporation of s.69(1) exclusion by reference, there would be an infringement by the Secretariat of Art.6. The mechanism of communication of terms which gave rise to a binding arbitration agreement in the first place, and one which largely excluded the jurisdiction of the courts save on appeal, was that which was ordinarily required to prove a binding contract in English law. There was no logical reason why any special mechanism of communication should be introduced for the purpose of going one stage further by utilising the s.69(1) facility and wholly excluding such right of appeal. That additional stage required no more protection than the initial stage of agreeing to arbitrate, for both involved a statutorily permissible consensual disengagement from what would otherwise be an Art.6 entitlement; neither could justifiably require special rules for contracting. Accordingly, the court's powers under s.3 HRA98 to give a special convention-compliant meaning to s.69(1) were not engaged.

Colman J therefore concluded that, in this case, there was an effective and enforceable exclusion agreement and that the Court had no jurisdiction to entertain a LTA application under s.69.

Comment

An excellent decision, not only protecting arbitration from two new avenues of attack but also both reinforcing the principle of party autonomy and stressing the underlying principle laid down in s.1(c) of the Act. Further, the judgement echoes other recent ones where the principle of "if you agreed to arbitrate then to arbitration thou shalt go" has been very evident.

15th March 2006

"A" or "The" ? Dismissal of (yet) Another S.69 Application

An interesting issue of law arose in Kamilla Hans-Peter Eckhoff KG v A.C. Oerssleff's Eftf. A/B ("the Kamilla" ([2006] EWHC 509 (Comm); Morison J; 15th March 2006) and gave rise to a s.69 appeal. Perhaps more accurately, I should say "issue of application of the law". The case has implications not only in the maritime sector but also for the broader law of contract. While it does not "advance" our understanding of s.69 to any great degree, I will address, inter alia, the question of whether leave to appeal (LTA) should have been granted (no information regarding the LTA application is given as is usually done in s.69 judgments).

Claimant Owners chartered the MV KAMILLA to the Charterers for an initial period of 12 months on an amended NYPE Form and a dispute arose from contamination of a cargo of lentils which was referred to arbitration before a 3-person tribunal. The judgment does not say whether this was on LMAA Terms (which can be presumed). The disputes between the parties centred on the application of the Inter-Club Agreement which was incorporated into the charterparty.

The vessel had loaded a cargo of 2,800MT of lentils in Canada and carried them to Algeria but was unseaworthy in that the hatch covers were not completely watertight so that a small (or, perhaps 'very') small amount of seawater entered the hold and wetted approx. 30-75MT of the cargo (the exact amount was in dispute). For the purpose of the preliminary issue to which the challenged Award related, the amount of damaged cargo was assumed to be 30Mt; that is, slightly over 1% of the total cargo carried.

On arrival, the cargo receivers complained to the Algerian Authorities (the DCP) who rejected the entire cargo; the vessel was arrested and Owners suffered losses of approx. US$380,000. Whilst they accepted that they must bear a proportion of the loss (est. $10,000), they disputed the balance of some US$370,000.

Owners argued that Charterers and the receivers, whom they alleged were the Charterers' agents, did not take any or any adequate steps to reverse or set aside the DCP's decision. If that proposition was correct then they argued that the third party cargo claims which the Owners had had to settle had to be regarded as a claim for a shortage due to the act, neglect or default of the Charterers' agents, the receivers. Thus, Owners argued, the Charterers must bear 100% of the liability arising from the settlement with the cargo interests. Alternatively, if the claim was properly to be categorised as a short delivery claim, then the Charterers' liability under the Inter-Club agreement was no more than 50%.

The parties, with the co-operation of the Arbitrators, fixed upon a preliminary issue which they were to decide upon certain assumed facts. The issue was: "*In respect of the cargo … which was in sound condition on the Vessel's arrival [in Algeria] …, and for the purposes of the Inter-Club Agreement …: Are the facts set out in the schedule hereto relevant to the categorisation of the cargo claim in respect of which the Owners seek an indemnity?*"

The Tribunal had to decide two issues of principle: (i) what was the meaning of the words "due to unseaworthiness" in the ICA as incorporated in the charterparty and (ii) whether the receivers' alleged failure to have taken sufficient action to contest the decision of the DCP was a failure committed as a servant or agent of the Charterers.

Owners submitted that the assumed facts gave them a strong case for saying that unseaworthiness was not a proximate cause of the claim, in particular that only about 1% of the cargo was wetted, that the damaged cargo was separated out by the crew, that the receiver's request for inspection by the DCP was unusual and was not within the reasonable contemplation of the parties and that the decision of the DCP was irrational, unjustified and unreasonable and not within the reasonable contemplation of the parties. The Tribunal had decided that only one fact needed to be proved or assumed and had therefore ignored the other facts. They had applied the 'but for' test of causation and, by excluding the alleged facts and by rejecting a proximate cause test and in excluding remoteness, the Tribunal had erred in law.

Charterers submitted that Owners were arguing that a claim was not "due to" unseaworthiness unless unseaworthiness was "*the dominant or effective cause*" of the claim; Owners had stressed the definite article and had not argued or refer to 'proximate cause'. By contrast, although the Charterers had started with a 'but for' test, by the end of the argument their case was that "provided that unseaworthiness of the vessel was, in a practical sense, a cause of the loss, the test is satisfied". The Tribunal had accepted that argument, as was apparent from the Award.

Morison J considered that the issues were clear cut and the answers to them equally clear. The test for causation was whether the act or default complained of was a 'proximate cause' of the alleged damage. The 'but for' test was appropriate to establish whether there was a causal link between the act or default and the alleged damage; it was a

necessary but not a sufficient test. But for the choice of this vessel the incident would not have occurred but no-one could suggest that the choice of vessel was a proximate cause of the damage.

The Judge agreed with Charterers that the Tribunal had applied the correct test of causation in finding that "*provided the unseaworthiness of the vessel could be said in a practical sense to be a* [and he stressed the use of 'a'] *cause of the loss, it was not appropriate to embark upon a further inquiry as to whether it was the* [and I stress the 'the'] *effective cause of the loss…*" The Tribunal had dealt with causation in precisely the way required in law and they had not been distracted from their task by some of the submissions which counsel made to them.

Applying common sense to questions of causation, a distinction can be drawn between acts and events that are normal and abnormal, usual or unusual. Leaking pipes were not to be regarded as other than normal so that when the sewage flowed into rivers "*one does not say: that was an extraordinary coincidence which negatived the causal connection between the original act of accumulating the polluting substance and its escape*." Here, the argument about remoteness or *novus actus interveniens*, which was, essentially, the point being made under the foreseeability umbrella had been answered by the Tribunal who had considered that what happened at the disport was "*by no means unprecedented in our experience*". Further, "*the admitted unseaworthiness in this case and the decision of the DCP to prohibit the import of the cargo were not mere coincidences*". The Tribunal was also surprised by the argument that "*because the consequences of a situation involving damage to cargo as a result of the undeniable unseaworthiness of the vessel were far greater than any reasonable person could have anticipated, the basic responsibility of [Owners] for damage due to unseaworthiness should somehow be qualified.*" Unseaworthiness was an effective cause of the whole loss, even if some of the loss came as a surprise to Owners.

Morison J considered that the Tribunal was right in the way it had approached the question as to the impact of those findings on the ICA. Was the alleged damage comprised in the claim due to unseaworthiness ? Yes. The Tribunal's approach to the ICA could not be faulted. Whether the words "due to unseaworthiness" would include damage which was too remote to be recoverable as a head of damage did not need to be determined by the Judge because the Tribunal had, in his view, rejected Owners' arguments on remoteness as presented. The Tribunal had held that the damages claimed were "due to unseaworthiness" within the meaning of the ICA; the Judge agreed and it followed that the appeal must be dismissed.

Comment

This is all very interesting as regards causation but the law relied upon in the judgment is that enunciated by Lord Hoffman in *Environmental Agency (Formerly National Rivers Authority) v Empress Cars Co (Abertillery) Ltd* [1999] 2 AC 22 at 34. It is evident that the tests in s.69(3)(a) and (b) are satisfied but equally evident that that in s.69(3)(c)(i) is not; consequently, LTA must have been given on the basis of both s.69(3)(c)(ii) and s.69(3)(d) being satisfied and this is by no means clear from the limited information provided.

The scenario where 1% of the cargo is damaged and 98% recovered but the recovered cargo is rejected by a Government agency at the delivery port in what appears to be a capricious and unjustified manner shouts "1-off case" to me which is the polar extreme to s.69(3)(c)(ii) and necessitates application of the s.69(3)(c)(i) test.

In summary, this appears to me on the information provided to be a correct decision on the merits of the appeal but where LTA never have been granted.

A mystery – perhaps someone "out there" (with better information) can assist ?

16th March 2006

Arbitration and the US District Court

The courts of the US occasionally attract criticism for giving decisions in arbitration cases which demonstrate that some of the US judiciary appear to live on a remote planet bereft of communications with the rest of the universe; levity apart, the recent US Supreme Court decision in *Buckeye v Castegna* shows polar extremes in the judiciary's approach to the interface between arbitration and the courts. Further, in the oil industry, non-US parties go white and begin to shiver when the dreaded phrase "District Court of Harris County, Texas" is mentioned.

It is, therefore, something of a pleasure to report on a case, not only in a US District Court but in Texas, where Judge Ron Clark has shown himself to possess not only a clear understanding of the fundamental principles of international arbitration but also a robust common sense which would make him an ideal candidate to be a s.68/69-killing Judge in the English TCC.

The case was in any event interesting in that the losing party to an international arbitration in Switzerland sued the winning party and the arbitrators for fraud, bribery, corruption etc but Judge Clark was wholly unpersuaded and avoided the temptation to dive into murky waters.

The case is Gulf Petro Trading Company, Inc. & Ors v. Nigerian National Petroleum Corporation & Ors (Case No. 1:05CV619; US District Court, Eastern District of Texas, Beaumont Division).

The plaintiffs had been in dispute with NNPC over a 1993 contract for an oil joint venture; the contract included an arbitration agreement providing for arbitration in Geneva under Swiss lex arbitri. All arbitration proceedings were held in either Switzerland or England between 1998 and 2001, ending with a Final Award in 2001 in NNPC's favour. The plaintiffs unsuccessfully appealed the final award to the Federal Court in Switzerland in 2002. They then sued NNPC in the US District Court (Northern District of Texas) seeking to modify or vacate this award but that Court held that it lacked jurisdiction to vacate or modify a foreign arbitral award.

The plaintiffs tried again in the present proceedings, claiming that there had been a scheme to corrupt and bribe the international arbitration panel and alleging violations of the RICO, the FAA, etc etc etc. In response, the NNPC Defendants moved to dismiss all claims for lack of subject matter and personal jurisdiction. The three arbitrators took no part on proceedings at all.

Lack of Jurisdiction to Vacate a Foreign Arbitral Award

Under NYC58 as enacted in the US, a US court is precluded from vacating a foreign arbitral award: the country in which an award was made is said to have primary jurisdiction over award, all other NYC58 countries having only secondary jurisdiction. In the latter, the only decision that can be made is whether that country should enforce the arbitral award.

Here it was undisputed that the parties had agreed to arbitration in Geneva under Swiss law; the Award had been challenged in, and upheld by, the Swiss Federal Tribunal (i.e. Court). For the reasons discussed fully by the Northern District Court in the previous round in this litigation, a court in a country with secondary jurisdiction lacked jurisdiction to modify or vacate the award. However, the plaintiffs argued that the present case differed from the previous proceedings because of new evidence of a scheme to bribe the arbitrators.

Judge Clark held that, even if this were true, the result would be the same because the present court sits in a country with secondary jurisdiction and, under NYC58 as enacted in the US, it cannot vacate a non-US arbitral award which did not in any way involve the laws of the US.

Further, the Judge said (in Jacksonesque style !) "Plaintiffs were competent adults who entered into a contract with a Nigerian company. They agreed that disputes would be arbitrated in a neutral forum, under Swiss law. This court is not going to revisit the resulting decision of the arbitration panel, nor the decision by the Swiss Court. Such a practice by courts in the [US] would invite similar treatment by foreign courts of arbitration awards rendered in this country. Any losing party in one country could run to a court in another country with tales of bribery, corruption, and injustice. The proper forum for such collateral challenges is the country with original jurisdiction over the arbitration. In this case, as the parties agreed in their contract, that country is Switzerland. Any other ruling would disrupt the reliability of international arbitration established under [NYC58] over four decades.

The plaintiffs sought their costs of the arbitration, lost revenue and profits (which they allege should have been awarded at the arbitration proceedings), damage to reputation from losing the award, and loss of business opportunities from losing the award. A valid award would preclude recovery for any of these damages. The plaintiffs could not transform what would constitute an impermissible attack on an award simply by altering the relief sought. The Judge said, robustly, "This is precisely the type of second guessing of foreign arbitral awards that [NYC58] was designed to eliminate. Because this court would have to vacate the … award to give Plaintiffs the relief sought, the court concludes that all of Plaintiffs' claims are an impermissible attack on a foreign … award. This court lacks subject matter jurisdiction to hear such claims."

Case dismissed.

Foreign Sovereign Immunities Act Claims by NNPC and Two Other Defendants

The Judge dismissed plaintiffs' arguments that two individual Nigerian co-defendants could not invoke sovereign immunity since an exception to immunity applied in this case. Except in one regard, this interesting aspect of the case is outwith the scope of this note.

The Foreign Sovereign Immunities Act covers the two co-defendants provided they were acting in an official capacity on behalf on NNPC, itself immune as a State Entity. The FSIA states that a court has jurisdiction when "the action is brought either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration... or to confirm an award made pursuant to such an agreement to arbitrate." (28 USC §1605(a)(6)). The plaintiffs had directly asked the court to vacate the award but this was outside the language of the exception since Section 1-605(a)(6) is inapplicable where the plaintiffs did not seek to enforce an arbitration agreement or to enforce an award. Therefore, no exception to the FSIA applies and the two individual co-defendants were immune under the FSIA from all claims in this case.

Comment

No comment necessary, Judge Clark scoring 180 with ease, so at least two US District Courts are on Planet Earth. May there be many more !

25th March 2006

Aspects of the Role of Experts

This is a regular topic, both in my newsletters and in other fora, but Mr Justice Eady made interesting observations in *Perkins & Perkins v Devoran Joinery Co Ltd & Ors* ([2006] EWHC 582 (QB)).

Mr & Mrs Perkins were having a house built for themselves around 2000 and contracted Devoran to supply windows and doors of a high quality for fitting by the main building contractor; unfortunately, it soon became apparent that there were joinery defects in two bay windows and Mr and Mrs Perkins required that they should be remedied. Nothing was done, and they withheld the final payment of £9,500 plus VAT. Devoran chose not to inspect the alleged defects but simply issued proceedings for the outstanding balance. As time went by, further significant defects became apparent, which were also drawn to Devoran's attention. There was a trial, principally over issues of faulty workmanship, in May 2002 before HHJ Peter Cowell, during which it was said that all the Perkins' complaints raised in the present proceedings should have been addressed and disposed of at the same time.

It became clear that there were fundamental design errors (by Devoran) in the windows and the Perkins commenced further proceedings, relating to defective design and the tort of deceit (see below), in the CLCC; the Recorder (a QC) decided that the new proceedings were an abuse of process and ordered them struck out. The present case was an appeal against the Recorder's order and was taken by way of review rather than rehearing (see *Johnson v Gore Wood & Co* [2002] 2 AC 1). Mr Justice Eady allowed the appeal but the reason for this note is to highlight three interesting issues relating to expertise.

(1) The Recorder had characterised some of the Perkins Expert's (from the Glass and Glazing Federation) evidence as usurping the function of the trial judge but Eady J thought that unfair, since what he had been doing was describing the nature of the defects and putting forward a possible (indeed compelling) hypothesis as to how they might have come about. ***That was a legitimate function for an expert to perform***. What the Expert had said was: "There is no doubt in my mind that the inherent defects were known to Devoran and to [the glazing sub-contractor] prior to delivery of the goods ... [and included] fundamental acts and omissions such that it was clearly a wilful decision by the supplier to proceed with the fabrication and delivery of the windows and doors, after those defects had become obvious during manufacture" and, after describing the [horrific !] defects "To any experienced glazier, each of these acts and omissions would be known to be negligent leading to the inevitable failure of the windows and doors in the short term". Eady J said: "Of course, so expressed, that evidence might appear to be usurping the role of the court, but what he was plainly intending to say (***and say permissibly in the role of an expert***) was that these defects were not only obvious, but so obvious that they must have been deliberately brought about".

(2) The Recorder had appeared to take judicial notice of the fact that, as a Chartered Surveyor, Mr Perkins should have been familiar with drawings and plans and have had an awareness of the existence of British Standards. This was an error of both law and fact since there was no evidence before the Recorder to that effect. In essence, Mr Perkins was being blamed for not noticing something which the parties' respective experts (and other specialists involved), who had inspected the windows for the purposes of the original trial, had not noticed either.

(3) Further, Devoran's expert's failure to draw the very obvious defects to the attention of the Court was explained by the Recorder, consequent on Mr Perkins' assumed expertise, as 'ignor[ing] the adversarial system'; this was an error of law. Such a conclusion ignored the fact that the primary duty of an expert is to the Court, not to his instructing party. Eady J said: "[the Recorder's judgment] was based on the erroneous proposition that the expert has some adversarial role. Obviously that is wrong."

The case is also of interest in (i) addressing several issues relating to relitigating apparently the same dispute and (ii) for the force of Eady J's criticisms of the Recorder's judgment – his present judgment covers "error of law" "misdirected herself" "wrong" "failure" [to follow Johnson v Gore Wood] – this does not make happy reading.

25th March 2006

Judicial Wit – Another Hoffmanism

I do not propose to waste your time with an analysis of the "Jilbab/Luton Schoolgirl Case" covered extensively in last week's newspapers, but merely to highlight a typical Hoffmanism.

Lord Hoffman is considered by many to be one of the most overtly brilliant House of Lords judges in a generation but he is prone to unleashing highly barbed comments on, inter alia, erroneous Court of Appeal decisions – a classic is his comment "Lord Justice X's proposition is as startling as it is novel" (ie monumentally and massively wrong). In the Jilbab case, he characterised the Court of Appeal's approach to Art.9 ECHR as setting itself an examination paper with six [listed] questions; he continued "***Quite apart from the fact that in my opinion the Court of Appeal would have***

failed the examination for giving the wrong answer to question 2, the whole approach seems to me a mistaken construction of article 9."

I am glad that the are two levels of court between me and his Lordship although in a recent arbitration I had to address a issue of law expressly not addressed by Lord Hoffman (giving the leading judgment) in the leading HoL case in the relevant area (the point was not central to the matter they were addressing and, I suspect, had not been fully argued). My decision was s.69-appealed (case settled before trial) and I did (briefly) speculate on what Lord Hoffman might have said …. the appellant's (losing respondent) submission used the word 'bizarre' 16 times, 'erroneous' 13, 'incomprehensible' 7 etc so his Lordship was given a strong hint (and see PS below).

Postscript

It comes a real shock the first time, as arbitrator, you see one of these appeals. splattered with abuse and criticism; fortunately, the winning claimant's submission praised the penetrating analysis and the profound erudition of the arbitrator, his ground-breaking ability to develop new law in uncharted territory, his meticulous command of vast detail and complex submissions etc etc etc.

26th March 2006

Remission of Awards under s.69(7)

S.69 challenges generally fail, often dismally (see previous editions of "Jackson News" regarding some truly lamentable cases destroyed in the TCC) but not all; as I have argued before, e.g. i.r.o. *Lobb v Aintree* or *Northern Pioneer*, s.69 has a real purpose, however rarely that may manifest itself consequent on the high threshold established in the jurisprudence. However, there is a risk (and I might be seen to have propagated it) of portraying s.69 as an "all or nothing" provision, where either the tribunal could not agree on a fundamental and complex issue of law (i.e. *Northern Pioneer*) or the appellant was wasting its time (i.e. most recent TCC cases). That this is not always the case is shown by the decision of Tomlinson J in *Pentonville Shipping Ltd v Transfield Shipping Inc (the "Johnny K")* ([2006] EWHC 134 (Comm)), a maritime case where I do not propose to discuss, in this newsletter, the issues of law involved,

The case was a s.69 appeal brought (with leave by Cooke J but no information is given as to how he navigated s.69(3)) against an award made by a Tribunal of two distinguished LMAA arbitrators following a documents-only arbitration in which Owners claimed, inter alia, US$135,000 from Charterers i.r.o. what was described as freight/deadfreight/damages. The Tribunal dismissed this claim and Owners appealed against that decision.

The key fact was that MV "Johnny K" had sailed from a port (necessary to avoid being stranded in port by neap tides) with less than a full load - but who had ordered it to sail ? The critical issue was whether the order to sail was an order for which Charterers were responsible or which was to be attributed to them. The considerations which inform a decision on such an issue are discussed in a well known trilogy of cases *Cosmar Compania Naviera S.A. v Total Transport Corp. "The Isabelle*" [1982] 2 Lloyd's Rep 81 (Robert Goff J) affirmed by the Court of Appeal without additional reasons [1984] 1 Lloyd's Rep 366; *Mediolanum Shipping Co v Japan Lines Ltd "The Mediolanum"* [1984] 1 Lloyd's Rep.136 (CA) and *Newa Line v. Erechthion Shipping Co SA "The Erechthion*" [1987] 2 Lloyd's Rep180 (Staughton J).

The Tribunal's Reasons contained a clear holding or finding that Charterers could not be held liable for the instruction to vacate the berth given by the port authorities. However, there was no clearly and consistently expressed finding by the Tribunal on the critical question by whom the order to sail had in fact been given. The question was not whether Charterers could be blamed for the decision by whomsoever the order was made, but rather whether that decision was one which, as between the two contracting parties, was to be attributed to them or for which they were responsible. The Award was, on its face, confusing by referring, in separate places, to the relevant order as emanating from (i) the terminal/port authorities and (ii) the port authorities (the port and terminal authorities were wholly separate parties). Furthermore the fact that the order may have been given by the port authority was not in itself determinative of the question whether it was an order for which Charterers had been responsible.

In granting leave to appeal, Cooke J had observed that Owners had clearly argued in their written submissions that Charterers had been responsible for the action of the shippers/terminal/port authorities. In the substantive appeal, Tomlinson J, with some reluctance, came to the conclusion that the Tribunal *might* not have addressed itself to this question. If it had, it *might* not have directed itself correctly by reference to the appropriate considerations, as discussed in the trilogy of cases (above). In any event, it was not clear from the Reasons that they had done so.

Tomlinson J concluded that he should exercise his power under s.69(7)(c) to remit to the Tribunal, for reconsideration, that part of the award wherein it dismissed Owners' claim for deadfreight/damages (together with consequential costs implications). Critically, for the purposes of this newsletter, he stressed that in so doing he made it clear that it was perfectly open to the Tribunal to reach the same ultimate conclusion as its initial one – see also double reference to "might" above.

Comment

The s.69(7) process mirrors, but does not equate to, that of s.70(4)(b) in that, under the former, the Court has already determined that a wrong decision on a question of law has been made. However, the question of "who issued the

order to sail" appears, prima facie, to be one of fact and I am therefore unpersuaded (on the incomplete information available) that s.69 is engaged at all. The steer at the end ('same decision') seems to support that view.

Further, s.69(3)(c)(ii) appears not to have been engaged, there being no suggestion at all in Tomlinson J's judgment that an issue of "general public importance" arose. Consequently, Cooke J's grant of leave to appeal must have been that, on the basis of the findings of fact in the award, the decision of the tribunal on the question was obviously wrong; however, that is visibly inconsistent with Tomlinson J's conclusions.

This is the second case in recent weeks which does not obviously lend itself to a successful s.69 LTA application: is the judiciary opening the door just a fraction ? If so, given the initial responses to the Survey of the Arbitration Act, is this appropriate ? I suggest not.

Postscript

Feedback shows that I did not make it sufficiently clear that I thought Cooke J wrong to have granted leave to appeal; Tomlinson J effectively confirms my view; s.70(4) was the appropriate remedy.

28th March 2006

The Scope of s.57 and its Relationship to s.47

Very interesting issues concerning ss.47 and 57 arose in *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (the "Athena")* ([2006] EWHC 578 (Comm); Clarke J). The judgment can be found at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2006/578.html

In brief, Sea Trade's vessel "Athena" was damaged in Sri Lankan waters, allegedly by an explosion caused by Tamil Tiger Terrorists. Despite having failed to have given the required notice under the Policy that the vessel was going to Sri Lanka (an additional premium area), Sea Trade presented a war risk claim to its insurer, Hellenic, which made a discretionary payment. Thereafter, Sea Trade (ungratefully, given that it was in receipt of a significant concession !) commenced multiple legal proceedings, including proceedings in New York, stayed by an order of the New York Supreme Court on the ground that there was a (London) arbitration agreement; appeals to the Appellate Division of the New York Supreme Court and the New York Court of Appeals failed (and entirely correctly so).

Thereafter, Hellenic commenced arbitration against Sea Trade but the latter continued to contest jurisdiction. In January 2005 a very distinguished tribunal was formed and it ordered the hearing of, inter alia, all jurisdictional issues. Thereafter, the Tribunal issued a first interim award, finding unanimously in Hellenic's favour both on jurisdiction (save for one minor issue) and on the other non-jurisdictional issues the subject of that hearing.

Sea Trade applied (i) to set aside the whole of that award for lack of substantive jurisdiction (s.67(1)(a) and (3)(c)) and (ii) for LTA under s.69 in respect of certain issues and (iii) for the award to be set aside in two specific regards for serious irregularity (s.68(1) and 3(b)).

Sea Trade contended that, as events had happened, the Tribunal had lost the power to have made any order as to costs, relying in this respect on the provisions of s.57(5). Hellenic had made no s.57(4) application to the Tribunal, its application appearing to have been made 91 days later. Nor had the Tribunal made any award of its own initiative (s.57(5)) within 56 days of the original award. Accordingly, so Sea Trade submitted, by end-2005, the Tribunal was out of time in purporting to make an additional award of costs.

In July, the Tribunal made a second interim award rejecting, inter alia, Sea Trade's contention that it could no longer award costs, accepting that there had been an implied request for costs to be dealt with and that, in one sense, a claim for costs had been submitted because a claim for costs had been included in the points of claim, and s.61 obliged the Tribunal to determine by award the recoverable costs of the arbitration. However, the Tribunal held that s.57(3)(b) did not apply because it had not omitted costs from its award: on the contrary, it had dealt with them by expressly postponing consideration thereof to a subsequent occasion. The Tribunal considered that it had the power to do so under s.47, and ordered Sea Trade to pay 90% of Hellenic's costs.

Sea Trade's Challenges

Its s.67 challenge was on the ground that the tribunal had not had substantive jurisdiction to award costs outside the strict time limits imposed by s.57 and part of its s.69 LTA application was on the ground that the Tribunal had misinterpreted s.57. It contended that the Tribunal had erred in law in assuming, and purporting to exercise, a power under s.47 of the Act. The s.67 challenge was, correctly, abandoned since the issue dividing the parties did not go to substantive jurisdiction.

The s.68 challenge, on the ground that the Tribunal had exceeded its powers, was out of time but Hellenic did not oppose Sea Trade's application for permission (i) to invoke s.68, as opposed to s.67 and (ii) to do so out of time or (iii) to apply for LTA under s.69.

It was noted (i) that s.47 provided no time limit within which an award other than the first award had to be made and (ii) that, while s.61 empowered the Tribunal to make an award allocating the costs of the arbitration as between the parties, the section provided no time limit for such an award.

Sea Trade's Submissions

Should s.47 or s.57 govern the rights of the parties ? The two sections were directed to different situations and were mutually exclusive. Although s.57(3)(a) was concerned with correction of certain errors and ambiguities, s.57(3)(b) was not limited to curing oversights, but also covered the Tribunal's failure to have dealt with a claim after presentation. A claim for costs had been, as the Tribunal had held, presented to it by virtue of an implied request that it should deal with costs, such implication arising from the incompleteness of an award not dealing with costs but the Tribunal had failed to deal with that claim. Reservation of the issue for further consideration did not 'deal with' a claim, it postponed dealing with it. Accordingly, s.57 applied and the Tribunal had been out of time to have made an award i.r.o. costs.

S.47 was an adjunct to the Tribunal's power to regulate its procedure and to decide when and in what sequence issues should be determined. The Tribunal could have decided to have restricted the hearing so as not to cover the question of costs but it had made no such order, and it was not open to it to do so in its award, or to reserve costs for further consideration. This was because (i) it had been the Tribunal's duty to have dealt in its award with all the issues that had been presented to it and (ii) it could not unilaterally have decided that it would leave costs for further consideration. It could have done so with the agreement of the parties or, having given the parties an opportunity to be heard prior to the making of the award, it could thereafter have decided to defer costs for further consideration. But, in contrast to s.57, s.47 conferred on the Tribunal no power to decide, on its own initiative, to make costs the subject of an additional award. Further, general principles of fairness required that, unless otherwise agreed, the parties should have been given the opportunity to address the suggestion that costs should be reserved for a further hearing. Case management decisions could be made before the award was given but not in the award itself. Even if, therefore, contrary to Sea Trade's submission, the claim for costs had been dealt with in the July award, that would not have affected the position that s.47 was not applicable and that the Tribunal's purported exercise of a power thereunder, however apparently sensible, had been invalid.

Hellenic's Submissions

Hellenic submitted that s.47 was a wide general power, neither governed by any time limits nor obliging the Tribunal to have made a case management order prior to its first award before deciding in that award that it would deal with costs in a subsequent award. The purpose of s.57 was to enable the Tribunal to correct errors and, if of omission, to supplement an original award which simply overlooked a particular issue, such as costs; this was the reason for the tight time limit. Here, however, there had been no discussion of costs at the hearing, or in the submissions, so that no claim had been presented to the Tribunal, within the meaning of s.57. Even if a claim could be said to have been presented, it had been dealt with by the Tribunal expressly reserving on it. Whilst in other contexts 'dealt with' could mean 'completely adjudicated upon', in the present context the words had to be interpreted in accordance with the purpose underlying the section, i.e. to afford a means of redress without having to resort to the Court in circumstances where the Tribunal, in breach of its duty, had wholly failed to address a particular claim.

The Judgment

The Judge did not accept that s.47 had not enabled the Tribunal to have decided in its July award to have dealt with the costs of the preliminary hearing in a subsequent award. That section conferred an entirely general power to make more than one award and to determine only part of the claims in a first award and there was nothing in the section which indicated that the Tribunal's decision to have dealt with costs in this way could not have been made in its first award. Further, the Judge did not accept that there was anything unfair in the Tribunal, absent any submissions on costs, having decided, without further reference to the parties, that it would deal with costs at a further hearing and in a further award.

The Judge considered that, so far as s.57 was concerned, the Tribunal had not been in error in having deciding that a claim for costs had been presented to it, even absent submissions thereon: given the Tribunal's general duty to deal with costs, and the fact that they were claimed in the points of claim, then for the purposes of s.57 such claim had been presented and the fact that it reserved costs indicates that it regarded that to be so.

The Judge held that the parties' costs had been 'dealt with' in the award and not omitted: the Tribunal had addressed costs and had determined that they would be the subject of another award. That was, for the purposes of s.57, 'dealing with' the claim. The DAC report had said (at §261): "This clause reflects Art.33 of the Model Law. In our view, this is a useful provision, since it enables the arbitral process to correct itself rather than requiring application to the court. In order to avoid delay, we have stipulated time limits for seeking corrections". S.57 existed to avoid the pre-1996 situation where, post-award, an arbitrator was *functus officio* so that only the Court could correct errors. While there might be cases where it was not clear whether the Tribunal had reserved costs for further consideration or had intentionally said nothing because it intended to make no order, the present case was not one such since the Tribunal had made its position entirely clear. It was neither the purpose nor the effect of s.57 to impose upon the Tribunal or the parties a timetable within which the Tribunal must produce a second award on a different matter upon which the Tribunal had deliberately reserved determination.

The Judge commented that in this case, if the position were otherwise, the legislation would contain a trap leading to a perverse effect: if Sea Trade was correct, Hellenic had lost any right to costs because the Tribunal's "entirely appropriate" (Sea Trade's own words) decision to reserve costs to a future occasion was a breach of its obligations. He also found it difficult to believe that, when no-one had addressed the Tribunal on costs, its decision to reserve the

question for further consideration had come as any surprise. If Sea Trade's analysis of the Act was correct, that result would follow, but it would "be a reproach to the law".

Accordingly, Clarke J dismissed Sea Trade's s.68 application and refused LTA under s.69.

Comment

This must be correct, notwithstanding some ingenious argument by Sea Trade; inter alia, the Act cannot be taken to apply in such a way as to lead to Clarke J's "perverse effect". As a general rule of construction, where there are two options and one leads to an absurdity or impossibility, the other is to be preferred.

Further, the Judge's reliance, in part, on the DAC Report reflects the authoritative status conferred thereon by the Court of Appeal in *Cetelem v Roust* (see my report of 27th May 2005).

Although this s.69 appeal failed, these are important issues which required an airing followed by judicial decision, thereby demonstrating that s.69 has a valuable purpose to serve even if the LTA success rate is low and even if the subsequent appeal success rate is also low.

29th March 2006

Another s.69 LTA Wrongly Given

I have argued in the last few days that s.69 LTA appeared to have been wrongly given in two separate cases (the *Kamilla* and the *Johnny K*). I can now add a third case, *Compania Sud American Vapores v M/S ER Hamburg Schiffahrtsgesellschaft Mbh & Co KG* ([2006] EWHC 483 (Comm).

The case was a s.69 appeal against a final declaratory award where a dispute had arisen iron an explosion on board a vessel which severely damaged it; Owners brought a claim against Charterers for loss of hire and loss and damage which they contended had been caused by the loading of a container of calcium hypochlorite, the amount of the claim being some US$63 million with Charterers counterclaiming for some US$12 million. The cause of the explosion has yet to be determined by the arbitrators, all distinguished LMAA members of the LMAA. The present proceedings concerned two issues (which do not concern me in this note) arising from the Hague-Visby Rules. No information is given in the present judgment concerning the LTA proceedings especially s.69(3).

Vapores' submissions (by a leading QC) were roundly dismissed by Morison J who, in respect of one of the two issues, regarded

> "the question as to the application of Article IV.2(a) as quintessentially one of fact for experienced Arbitrators. The legal principles are clear and the parties accepted the statement of them in *Cooke [on Voyage Charters]*. There is no doubt that the Arbitrators were aware of the correct legal principles and I find it odd that it should now be submitted that in some way or another they have failed to apply the very test which they carefully set out in their Award, and which was common ground."

Iron the other issue, he said " … this ground of appeal is hopeless and should be dismissed", and more importantly, continued: "At the end of the day, I have come to the conclusion that [Vapores'] arguments are quite unsustainable. Indeed, I think I can say that I would not have given permission for this point to be argued on the s.69 procedure."

Interestingly, Morison J concluded

> "Since the judgment was drafted and circulated, in draft, to counsel the Court has been informed that the parties have reached a settlement of the claim and counterclaim. Despite this, I have decided that this judgment should, nonetheless, be handed down."

Comment

This is the third case in a matter of days where LTA should not have been granted: is this a trend or mere coincidence ? If the former, then this is more than unfortunate, it is erosion of s.69(3) and the nine years of jurisprudence supporting it. It appears that the Survey of the Act shows a majority (and, taken separately, a majority within the maritime sector) for retaining the s.69 status quo; why then is the judiciary apparently changing the ground rules ? Given my two recent disagreements with Morison J, I am pleased to express wholehearted agreement with him on this occasion.

31st March 2006

"Without Prejudice Save As To Costs"

This time-honoured phrase was revisited by the redoubtable HHJ Coulson QC in *Baris Ltd v Kajima Construction Europe (UK) Ltd* ([2006] EWHC 31 (TCC)), an unusual dispute in which the only outstanding claim was for interest and costs, the Judge expressing surprise that the parties had apparently not been able to compromise. The judgment (short and punchy in the distinctive Coulsonesque style) can be located at

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/TCC/2006/31.html

Following a construction contract dispute, an adjudicator's decision ordered that that £181,895.60 should be paid by Kajima (main contractor) to Baris (a subcontractor) by 8th December 2005; Kajima failed to pay. On 13th December 2005, Baris wrote to Kajima making a Part 36 pre-action offer, headed "without prejudice save as to costs" to which Kajima responded "We acknowledge receipt of your letter … and confirm that funds will be in your account on or before 3rd January 2006." There was no dispute that Baris had received this response and there was no suggestion that it was unclear or uncertain in any way. The monies were duly paid.

On 19th December, Baris commenced proceedings in the TCC for the sum of £181,895.60 plus interest and costs on an indemnity basis. Having commenced proceedings, Baris applied for summary enforcement of the Decision, the accompanying statement from Baris' company solicitor making no reference whatsoever to the 13th/14th December correspondence.

Kajima's defence was that its letter of 14th December had accepted Baris' offer of 13th December so that there was therefore a compromise before these proceedings had commenced so that it had a complete defence to the claim now being made, on the basis of accord and satisfaction. Baris objected to the reference to the letter of 13th December on the basis that it was clearly marked "without prejudice save as to costs". Baris also contended that there had been no binding agreement because Kajima had not agreed or paid any sums in respect of interest and had not accepted any liability in respect of costs. Baris offered no explanation whatever of its decision to commence High Court proceedings when, on one view of the December correspondence, there had been an apparent agreement between the parties, and, even on Baris' own case, there had been an agreement on everything except interest. There were, consequently, two issues for the Judge to decide: (i) whether or not Baris' offer letter was admissible in these proceedings; (ii) whether that offer had been fully accepted by Kajima so as to give rise to a defence of accord and satisfaction.

Admissibility

The Judge said that, while a letter marked "without prejudice save as to costs" should not ordinarily be considered by the court until all substantive matters had been dealt with, if an offer embodied in a 'without prejudice' letter had been accepted, so that there was a binding compromise between the parties, then the "without prejudice" tag fell away and the letter could be referred to: *Walker v Wilsher* (1889) 23 QBD 335. Baris had relied on *Rush and Tompkins v GLC* [1988] 3 WLR 939 but that was largely concerned with a completely different point, namely the inadmissibility in court of without prejudice admissions, although the HoL speeches in that case had also made clear that, for the limited purpose of deciding whether or not there had been a settlement, the court could, and should, have regard to without prejudice correspondence. Kajima had asserted that there was a binding compromise so that the 13th December letter was admissible in order for the court to ascertain whether or not there had indeed been the binding compromise it alleged. Denying the court a sight of the offer letter would be absurd because it would effectively deprive Kajima of the opportunity of raising the compromise point as a defence to Baris' claim. Accordingly the letter was admissible on the issue as to whether or not there had, in fact, been accord and satisfaction.

If there had been a binding agreement, Baris' proceedings would necessarily fail; if there had not, Kajima's only defence would fail and Baris would be entitled to judgment in respect of interest of £2,482.60 and, in that event, the letter would be inadmissible for any purpose other than the question of costs. The Judge noted that in some cases where it had been found that there had been no compromise, the fact that the assigned TCC judge had seen an inadmissible document would mean that another TCC judge would have to take over the case.

Interest

The Adjudicator's Decision had awarded Baris interest of £1,675.49 (included in the £181,895.60) to the date of the Decision, thereafter at a daily rate of £62.06. While Baris' offer letter had referred to the £62.06 daily rate, its actual offer had made no reference to any figure other than the £181,895.60 and, inter alia, did not stipulate that interest up until 3rd January was to be added and did not mention any other figure - the offer was expressly confined to "£181,895.60 only". The offer therefore did not include or incorporate any request for the payment of any sum in addition to the £181,895.60 and was limited to that lump sum. Further, Kajima's 14th December letter had been an acceptance of that offer and it had thereafter paid the sum requested. Consequently, it followed that there had been complete agreement that payment of £181,895.60 constituted full and final settlement of all claims arising out of the adjudication.

Costs

Baris' offer was expressly limited to those costs "incurred by Baris Ltd in issuing and serving proceedings in the High Court" but, at the time that it was made, there were no such proceedings, hence reference to such costs had to be read as qualified "if any such costs were incurred before the acceptance of the offer". It would be nonsense to have read the offer as somehow suggesting that, if the parties compromised the claim in the sum of £181,895.60 before the commencement of proceedings, Baris was still entitled both to commence such proceedings and to recover its costs of so doing.

Further, as of 14th December a binding agreement existed prior to issue of any proceedings and prior to any costs being incurred in issuing and/or serving such proceedings. The reference to costs in the offer letter had to be read as being limited to any such costs that might have been incurred before the offer was accepted; no other interpretation made commercial sense and since, at 14th December, there had been no such costs, no such costs could therefore

have formed part of Kajima's acceptance. It would be wholly wrong to find on the facts that there had been no binding agreement between the parties prior to 19th December and it would be absurd to make Kajima liable for Baris' costs of issuing and serving proceedings (i) which were not commenced until after the parties had reached an agreement; (ii) which therefore had no discernible purpose; (iii) in which Baris had chosen not to explain why they had been commenced without any reference to the relevant correspondence; (iv) prior to the commencement of which Baris had failed to have raised expressly with Kajima the only point which remained in issue, viz. interest.

Conclusions

There had been a binding compromise agreement, the principal term of which was that Kajima would pay Baris "£181,895.60 only" by 3rd January 2006 which it had; it had expressly been agreed that the fixed lump sum of "£181,895.60 only" had been sufficient to settle all the matters arising out of the adjudication. The compromise had not been subject to any further term as to the payment of costs by Kajima because the compromise had been reached before any of the applicable costs had been incurred. Kajima's defence of accord and satisfaction was successful and Baris' letter of 13th December 2005 was admissible to demonstrate that there was such a binding agreement and its claim was therefore dismissed.

Comment

An extraordinary case ! What was Baris thinking ? Perhaps it misunderstood *Rush & Tompkins* and overlooked *Walker v Wilsher*. In any event, HHJ Coulson QC has laid that ghost to rest.

31st March 2006

The Interface Between Adjudication, Costs And Bankruptcy Proceedings

Interesting issues arose in *Harlow & Milner Ltd v. Linda Teasdale* [2006] EWHC 54 (TCC) which was an application for summary judgment to enforce an adjudicator's Decision, together with interest and costs. In addition, there was a separate application by H&M for the costs of bankruptcy proceedings issued against Ms Teasdale and subsequently withdrawn. She did not appear and was not represented, her solicitors having no instructions to defend the summary judgment application but their letter to the Court said nothing about the second application.

H&M carried out building works on a JCT Minor Works Form at Ms Teasdale's properties in Leeds. A dispute arose between the parties which was referred to an adjudicator who awarded H&M £90,194.53 including interest up to that date; that sum was not paid and was the basis for the application for summary judgment. However, H&M had initially sought to enforce the Decision by issuing a statutory demand and pursuing bankruptcy proceedings in the County Court, not by commencing enforcement proceedings in the TCC. Ms Teasdale applied, out of time, to set aside that statutory demand and an extension of time was granted. She then produced a lengthy affidavit in support of her application and eventually the statutory demand was set aside by consent and the parties agreed that the issue of liability for costs would be reserved to a TCC Judge. Two days earlier, H&M had issued enforcement proceedings in the TCC.

Ms Teasdale's affidavit in the bankruptcy proceedings relied on three points arising out of the adjudicator's decision: (i) H&M's work was defective and there was therefore a counterclaim in her favour; (ii) the adjudication proceedings were in some way unfair, partly because the proceedings were so quick; (iii) there was a risk that H&M would be unable to repay any sums that may eventually be found to be due to her.

Judge Coulson was "in no doubt at all that these three points [could] not possibly amount to a defence to the summary judgment application.

(i) the matter of defective work could have been, and up to a point was, raised in the adjudication proceedings but, in any event, Ms Teasdale was not entitled to set up such matters by way of a defence of set off to a claim based on an existing adjudicator's decision: see, amongst many other cases on this topic, *VHE Construction v RBSTB Trust Company* [2000] BLR 107;

(ii) Ms Teasdale's complaint concerning the speed of the adjudication simply missed the point altogether since adjudication was supposed to be quick - that was its main feature. The only 'fairness' question open to the court was to consider whether or not the adjudicator had failed to allow her to raise or answer points made by H&M, or in some other way ignored her submissions. There was nothing to suggest that the adjudicator had conducted the adjudication in anything other than an entirely fair and appropriate way. Ms Teasdale had been allowed to make all the points that she had wished to make during the adjudication, and there was no question of any breach of the rules of natural justice.

(iii) The risk that H&M might be unable to repay any sums awarded was no defence to an application for summary judgment; at best it might be a reason to stay any judgment, the principles governing such stay having been summarised in *Wimbledon Construction v Vago* [2005] BLR 374. There was no evidence here on which the Judge could find that H&M might be unable to repay any of the sums ordered by the adjudicator, or that there were any other factual matters which should lead him to exercise his discretion in favour of a stay.

There could, therefore, be no doubt that H&M was entitled to summary judgment in the sum of £90,194.53 plus interest at the rate awarded by the adjudicator. H&M had agreed, on Ms Teasdale's request, that this sum could be paid in 28 days rather than the usual 14.

There was no defence to the claim, and it had been quite unreasonable for Ms Teasdale to have forced H&M to incur the costs of these enforcement proceedings in circumstances where Ms Teasdale had, and must have known that she had, no defence to this claim. In accordance with the principles set out by May LJ in *Reid Minty v Taylor* [2002] 1 WLR 2800 it was appropriate that H&M be awarded its costs on an indemnity basis.

H&M had asked the Judge to make a summary assessment of its costs: this was plainly appropriate since this was an application which had taken considerably less than half a day. The draft bill was in the sum of £9,668.67 which was generally both proportionate and reasonable, although the Judge considered the hours to be slightly high. Notwithstanding the order for indemnity costs, this should be reflected in the amount assessed, therefore, the Judge summarily assessed H&M's costs in the sum of £9,000 and, in accordance with CPR 44.7 and 44.8, he ordered that this sum should be paid within the 28 day period.

The remaining point concerned the costs of the bankruptcy proceedings in the County Court and there were two difficulties with H&M's application for these costs:

(1) In the circumstances when a Court had not dealt with the underlying issues, it was never easy to deal with a dispute about liability for costs; e.g. it could sometimes be hard to say what "the event" had been that the costs must follow. Indeed it has been said that, in some circumstances, it is not appropriate even to ask a court to deal with costs alone: see *R v Holderness Borough Council* TLR 22nd December 1992. In this case the statutory demand was set aside by consent so, in one sense that made Ms Teasdale the successful party in the bankruptcy proceedings. Conversely, since the principal product of the bankruptcy proceedings was Ms Teasdale's affidavit which set out the alleged grounds for her defence to this claim, all of which the Judge had rejected, it would be wrong to suggest that she was in some way the "successful party" in the bankruptcy proceedings. For that reason alone, a possibility suggests itself that the right answer would be to make no order as to the costs of the bankruptcy proceedings.

(2) The Judge found it difficult to understand why the bankruptcy proceedings were ever issued since the appropriate way of enforcing an adjudicator's Decision was to issue enforcement proceedings in the TCC. If such proceedings had been issued six months earlier, H&M would have had its money five months earlier and a good deal of time and costs would therefore have been saved. Of course, the issue of a bankruptcy petition was not *per se* the wrong way of enforcing these proceedings but, on the other hand, given that there was a procedure expressly tailored by the TCC to allow the prompt and efficient enforcement of adjudicators' decisions, the court had to consider very carefully an application for the costs of other proceedings, commenced in addition to the enforcement claim, particularly in circumstances where, in the end, it was the enforcement route that had proved to be the right course for H&M to have taken. Again, the appropriate order, in accordance with the over-riding objective at CPR 1.1, was an order that both sides pay their own costs of the bankruptcy proceedings.

The second edition of the TCC Guide, published in October 2005, made it clear that the TCC would deal with all applications to enforce the decisions of adjudicators, regardless of the value of the decision, and would do so quickly and efficiently in accordance with a procedure worked out in consultation with the construction industry and TCC users. In this case, no specific criticism could attach for ignoring the Guide, because the bankruptcy proceedings predated the second edition thereof. It was important that all parties to adjudication realised that, save in exceptional circumstances, the most efficient way of enforcing an adjudicator's decision was by enforcement proceedings in the TCC. Other ways of enforcing such decisions (such as, for instance, bankruptcy proceedings) are something of a blunt instrument and raise potential issues which have little or nothing to do with the decision which was at the heart of any enforcement application. Ordinarily, therefore, the issue of a statutory demand will not be the appropriate means of enforcing an adjudicator's decision.

The Judge concluded that the right course to take, in accordance with the over-riding objective of CPR 1.1, was to order that both sides should pay their own costs of the bankruptcy proceedings in the County Court.

Postscript

Ms Teasdale failed to pay the £102,000 judgment sum and an Interim Charging Order was sealed and despatched but, on the following day, the Judge's Clerk noted that, as a result of an error on the face of the Order, the property to which the charge was to attach had not been expressly identified. This error was corrected, but this meant that the amended version of the Interim Order was not provided to H&M's, solicitors until 23rd February and they served it on Ms Teasdale on the next day (a Friday) after 4:30 p.m. so the deemed date of service was Monday 27th. Her Solicitors, in correspondence, raised two objections: (i) pursuant to CPR 73.5, they were entitled to a period of 21 days' notice prior to the present hearing but they lost 3 working days because of the failure to serve the Interim Order until the 27th February; (ii) they contended that the ICO should not be made Final because there was an ongoing construction arbitration between the parties so that the present application in respect of an FCO should either not be allowed at all, or should in some way be suspended until the resolution of that arbitration.

Judge Coulson considered this second argument "quite hopeless" and a wholly insufficient ground under CPR 73.8 on which to oppose an FCO. What Ms Teasdale (and her solicitors) continued to fail to appreciate was that adjudication was designed to give rise to a prompt (albeit temporary) result, with which the parties are obliged to comply in full - see HGCRA96 and *Macob Civil Engineering v Morrison Construction* [1999] BLR 93 and *Bouygues (UK) v Dahl-Jensen (UK*) [2000] BLR 522. In this case Ms Teasdale had, nine months ago, been ordered to pay H&M £90,000 but she had continued to refuse to do that despite the judgment of the TCC (above) which expressly required her to pay the sum awarded by the adjudicator. The Judge emphasised that she was not entitled to ignore the judgment of the Court. The suggestion that the FCO should in some way be suspended until the result of the arbitration was known would wholly undermine the adjudication process. If her contentions were right, it would mean that any party who was on the receiving end of an adjudicator's decision could, if they wanted to avoid the result, commence arbitration proceedings against the successful party, and then argue that the adjudicator's decision should abide the eventual outcome of that arbitration. It was precisely to avoid such delaying tactics that the statutory adjudication process was created in the first place. There was, therefore, nothing to allow the Judge to conclude that the ICO should not be made Final.

As regards the timing issue, H&M needed to apply retrospectively for the abridgement of time so that the Claimant's service of the Interim Order on 27 February could be deemed to be effective, even though that was less than the period of 21 days, referred to in CPR 73.5, before the final hearing. There was nothing in CPR 73.5 to suggest that the Court could not, in appropriate circumstances, shorten the 21-day period in accordance with the wide powers set out in CPR 3.1(2). H&M relied on three separate factors in urging the Judge to do so: (i) it would be in accordance with the overriding objective; (ii) service was only three working days late and the order was served as soon as reasonably practicable in all the circumstances; (iii) most important of all, given that there was no written evidence from Ms Teasdale provided in accordance with CPR 73.8(1), and given that the only argument raised in the correspondence was the point already dismissed above, there was no possible reason why the Court should not shorten time so as to make the ICO Final.

The Judge agreed, for three reasons: (i) Ms Teasdale had no proper ground on the facts for opposing the application to make the ICO Final so, since he had considered and rejected on the merits her only argument, it would not only be wrong not to go on and make the ICO Final, it would be unduly wasteful of time, effort and expense not to make it today; (ii) there was no evidence from Ms Teasdale pursuant to CPR 73.8(1); (iii) there was a complete absence of any evidence of prejudice caused as a result of the shorter notice period.

9th June 2006

Use of Legal Experts

At ICCA 2006 in Montreal, a session was devoted to consideration of the use of legal experts in international arbitration; some very interesting contributions were made and should shortly be available on the ICCA 2006 website.

An interesting and relevant judgment in the High Court in England has just been released - *Abu Dhabi Investment Company and Ors v H Clarkson & Company Limited & Ors* [2006] EWHC 1252 (Comm) (Morison J). This was an application for a stay of court proceedings pending arbitration and the principal issue between the parties was the proper interpretation of the arbitration clause, which was governed by the law of the UAE "as applied by the Courts of Abu Dhabi". The case is a good example of the English Court's treatment of foreign law, both sides instructing distinguished, yet contrasting, Experts in UAE/Abu Dhabi law.

The arbitration agreement provided that

> "In the event of any dispute, controversy or claim arising from this Agreement *or the matters related thereto*, the same shall be referred to arbitration before three arbitrators to be chosen from the approved list/panel of arbitrators maintained by the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC") at the relevant time." [my emphasis added]

The critical question was the interpretation of the emphasised language.

Claimant's Expert, Mr N, was a UAE national, formerly a judge in Sharjah for many years, who was a licensed advocate practising in the courts of Abu Dhabi and Dubai. Defendant's Expert, Professor B, was a UK national who was both a qualified solicitor and barrister [E&W] and had been, for nearly 20 years, Professor of Arab Laws at a world-renowned UK university. Prior to taking up his professorial chair, he had been a consultant on Arab laws based in Kuwait and the UAE and he had practised as an advocate in the courts of Kuwait and Bahrain.

Unsurprisingly, even after exchanging two Reports, the two Experts did not agree on all the issues and they met in June 2005 and thereafter produced a joint report wherein they agreed (i) upon the crucial question (ii) that certain other issues in the proceedings were not matters for them. Following their meeting and joint report, the Experts filed their third reports.

The Judge's analysis of the Experts' respective views is both insightful and valuable; the subject of this note is his comparison of the two men and analysis of their evidence. The Judge said this:

26. "Both experts gave evidence and were cross examined about their opinions. Of the two, Mr N was the better witness; he was thoughtful, made concessions and argued his case well. Professor B's presentation in court

was, as one would expect from a distinguished lawyer as he unquestionably is, somewhat more broadly-based and he lacked the experience of the courts which Mr N, as a practising lawyer, possessed. I agree with [Claimant's Counsel] that there were matters where, perhaps, the Professor did not display the same ready familiarity with the subject he was dealing with as Mr N: for example, the effect of termination of a contract upon the arbitration clause within it; the provisions of Abu Dhabi law which made misrepresentations actionable and his need to ask whether Dubai was also bound by the Code [which is a federal statute]. I also think it was surprising that he had not picked up the point on timing being made about the joinder of the second claimant. Although the determination of foreign law issues are treated as questions of fact in the English Court, their resolution is not, I think, to be made by the conventional tools which assist a court in deciding where the truth lies, where there is a conflict of factual evidence. It was of benefit to the court that the expert evidence came from two distinguished experts from slightly different backgrounds: academia (with some practical experience) and legal practice."

Typically, the Judge said later:

27(2) "Thus, I accept Mr N's evidence that, unless permitted by the UAE Code, an agreement to arbitrate could not oust the jurisdiction of the courts. ……."

And, addressing another issue raised at ICCA, he said

"27(3) There is a difficulty about the proper interpretation of this provision of the Code since there is no authorised English language version of it. But its sense seems to me to be reasonably clear: it covers disputes which arise out of the performance or execution of a contract. … I am prepared to accept Mr N's thesis that the words "or matters related thereto" do not sufficiently precisely define the ambit of disputes which can be referred to be enforceable. This is not so much a question of contractual interpretation as of interpretation of the Code itself."

and

"27(5) The issue between the parties relates, primarily, to the interpretation of the Code rather than the interpretation of the contractual clause. It seemed to me that Mr N went too far when he described the words "or matters related thereto" as mere surplusage. Professor B persuaded me that the rules of construction are designed to give contractual words their intended meaning and that means 'all the words used'. As a matter of contract, I would be inclined to think that misrepresentations which led to the making of a contract could have fallen within the words of the clause in UAE law as in English Law. But the question is whether they fall within the scope of Article 203 so as to exclude the court's jurisdiction. And the answer to that is no, as Mr N described. The issue for the courts in Abu Dhabi would be directed towards Article 203 rather than those sections of the Code which deal with interpretation of contracts. Since Article 203 provides an exception to the general principle, I am inclined to accept Mr N's categorisation of the approach as a narrow one, having regard to the principle contained in Article 30.

Consequently, Morison J declined to stay the English court proceedings in favour of arbitration.

Comment

There was some criticism at ICCA (and elsewhere) of the English law treatment of foreign law as a question of fact to be proved by evidence; discussion, inter alia, addressed the question whether it was preferable to have Legal Experts on the foreign law (who could be cross-examined) or Co-Counsel (who could not). The present case, arrived at through two Expert Reports, a joint Report and then separate 3rd Reports, followed by cross-examination in Court, seems to me to have arrived at solid conclusions in an effective manner and, I submit, demonstrates the potential strength of the 'English system'.

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #14
DECEMBER 2006

23rd August 2006

Unrepresented Parties & Litigants-in-Person

I mentioned earlier [on OGEMID] a case where Counsel for Party A submitted a skeleton of what Counsel for Party B (who was unrepresented and did not appear) might have submitted by way of argument; Jeremy Lack has kindly drawn my attention to a different case with yet another variation on this theme. The case is *EIC Services Ltd & Anr v. Phipps & Ors* at [2004] EWCA 1069 on appeal from a decision of Neuberger J. It concerned issues of shares and share options in a limited company.

Peter Gibson LJ said

"2. The appeal is brought with the permission of the judge. At the hearing before him the Claimants, appearing by Mr Philip Gillyon, adopted a largely neutral stance. The First Defendant, Stephen Phipps, and the Second Defendant, Jonathan Paul, appearing by David Chivers QC, represented all who were interested in arguing for the validity of the issue of bonus shares. Mr Lee Barber, appearing by Mr David Mabb QC, represented all whose interest it was to argue that the bonus shares were not fully paid, that the capitalisation of the share premium account and the issue of bonus shares were not properly authorised and that the bonus shares were not validly issued. On this appeal, neither the Claimants nor Mr Phipps and Mr Paul have chosen to appear or to be represented and Mr Lee Barber appears in person. *He relies on two skeleton arguments which Mr Mabb prepared for the appeal*. No inference can be drawn from the non-appearance of Mr Phipps or Mr Paul other than that they are content with the judge's judgment and conclusions. Those of the issues which are live on this appeal are very technical, and *it is unfortunate that there is no professional representation of any party on this appeal*. *However, the judge's full and detailed judgments, running to 241 paragraphs, and Mr Mabb's skeletons for the appeal, coupled with the skeleton argument and other written submissions of Mr Chivers before the judge, are sufficient to enable us to reach conclusions on all the issues, much as we would have welcomed the opportunity to test those conclusions in a dialogue with counsel in the ordinary way*."

What is perhaps remarkable about this case is that the Court of Appeal reversed Neuberger J.

24th August 2006

Judicial Involvement in Settlement

On 5th August I circulated a previous version of the notes below; I have added contributions from Indonesia, Singapore and the USA – my thanks are due both to the original contributors and to the new ones.

To recap, I recently researched (in a focused and limited manner) the extent, if any, to which judges in applicable jurisdictions became directly involved in the dispute settlement process; the model on which I based my [limited] research was Germany's ZpO §278 (see below). My interest related to a development in England, hence my sample was limited to certain relevant (common law or European) jurisdictions although I sought to include at least one from each region around the world.

My questions were: is there anything similar to the German ZpO §278 in your country ? Can/do your judges act as mediators/conciliators ? If so, can they continue to try the case thereafter or is it reassigned to another judge ? If a judge acts as mediator, can/does he/she caucus with one party only and, if so, does that prevent him/her subsequently trying the case ?

I received interesting responses from 21 jurisdictions which I am pleased to circulate, in edited form (and I accept responsibility for any errors arising from the editing) for wider consumption. I should stress that the responses were both informal and rapid (some came from airports or holiday resorts !) and do not purport to be definitive legal authority or opinion. I am most grateful to all the contributors.

Germany

§278(1) ZpO obliges judges to try to settle all or part of the case before or during trial. Judges do act as mediators but without caucusing and there is no objection to the judge continuing to try the case if settlement attempts fail. §278 has some other interesting features: §278(2) mandates a pre-trial conciliation hearing at which only the parties may be heard, not their lawyers and §278(3) obliges the court to order the parties to appear in person; if neither party attends, the case is stayed (§278(4)). Per §278(5), the court can require the parties to appear before a different judge. The court can also suggest mediation proceedings to the parties.

The Netherlands

There was a pilot scheme in (as I recall) the Rotterdam District Court that the case management conference (much as an English CMC) was also a Settlement Conference with the judge conducting a mediation/conciliation with all parties present. Initial results were very positive but I have not been able to ascertain any new/updated information. At the time, this was not the case in the Courts of Amsterdam or Den Haag

Austria

Very briefly, the position is similar to that in Germany.

Belgium

Belgium has no provision comparable to §278(1) ZpO. Belgian judges cannot act in court as mediators but there is a new law on mediation which provides in §1734 that the parties may always (except before the Supreme Court) at any stage of the process request the court to appoint a mediator and in this case the trial is postponed. §1734 incorporates various procedural matters.

France

Art.21 of the New Code of Civil Procedure (NCCP), obliges French judges to attempt to conciliate the parties. Normally, during a judicial procedure the French judge must indicate such a possibility to the parties. In some specific proceedings, the judge has the obligation to attempt a conciliation (i.e. in proceedings before the "tribunal d'instance" or the "tribunal paritaire des baux ruraux"). However, the parties have to give their consent in both cases, according to the interpretation given by the courts to articles 12 and 58 of the NCCP.

Generally, it is up to the judge (who has the power to decide) when to suggest a conciliation to the parties. He/she may also suggest the nomination of a third party who would help the parties to find an amicable solution for their dispute. If the parties do not settle after a conciliation attempt of the judge, the latter may resume the trial - there is no need to reassign the case to another judge.

Conciliation and mediation are considered as distinct procedures in France but it is difficult to give a clear definition of the distinction. The conciliation does not imply a full involvement of the judge in the discussion on the arguments on the merits of the dispute. A mediation instead implies such an involvement. A French judge may not act as a mediator. The NCCP provides for both conciliation (Arts 127-131) and mediation (Articles 131-1 to 131-15), although it does not distinguish both systems.

The NCCP contains several other provisions regarding the role of the judge in case of conciliation (e.g. Article 127 et seq.; Article 830 et seq.) – details to follow.

Italy

Italian law has a very similar approach to that in France. Again Italian judges are obliged to try to conciliate the parties. They can exert this power whenever they think appropriate during the judicial proceedings. In some specific proceedings, they are obliged to suggest conciliation.

Art. 183 of the Code of Civil Procedure provides for a mandatory attempt to settle conducted by the judge during the first hearing of the case, which was supposed to be devoted to hear the parties directly (and not their lawyers); there was no specific procedure for that attempt, which was left to the absolute discretion of the judge. It appears that the intention of Art.183 was to have a frank and open discussion before the judge (not privately - it would be contrary to Italian ethical rules) about the facts of the case and to have the judge, acting as an amiable compositeur. In practice, 99% of the time the judge simply asks the parties if they were willing to settle and mentioned their negative answer in the minutes of the hearing. In the remaining 1%, the judge invited one of the parties to settle, by anticipating what would be the result of the proceedings.... in other words, it does not work, even if intention were good and the effects of the agreement (immediately enforceable at law) were correctly regulated.

However, the most recent reform of the Code of Civil Procedure (effective from 30th March 2006) deleted the reference to the mandatory attempt to settle during the first hearing (mandatory when the *"nature of the litigation was such that allowed an attempt to settle"*, so, at least, for all commercial disputes) and now provides for an attempt to settle (not mediation) conducted by the judge in the case of joint request by all the parties involved in the litigation, not only at the first hearing but during the entire proceedings. In other words, the end of the story: the judge will only be a judge, not a mediator nor a facilitator as it was previously supposed he should have been, part-time (if only at the first hearing….).

England

There is no equivalent of the German ZpO §278; However the Civil Procedures Rules impose an overriding objective "of enabling the court to deal with cases justly"; the Court "must further the overriding objective by actively managing cases" (CPR 1.4) and "Active case management includes (a) encouraging the parties to co-operate with each other in the conduct of the proceedings; … (e) encouraging the parties to use an alternative dispute resolution procedure if the

court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case …" etc. There is little guidance as to what (f) means but the Technology & Construction Court, a division of the Commercial Court, has recently circulated a consultation document envisaging the Judge taking a pro-active settlement-focused role without specifying what that role should be i.e. leaving it flexible – perhaps ENE is appropriate ? Can issue X be hived off to Expert Determination ? And Issue Y to mediation ? The document has been widely misread as providing for judges to act as mediators (in the conventional English sense of facilitators, not evaluators) and this has raised widespread protest. The Settlement Judge cannot continue to try the case.

Scotland

Commercial mediation is in its infancy in Scotland and the take-up is microscopic, in part because there is no Lord Woolf or CPR or ***Dunnett*** to provide any impetus and the legal profession is wholly uninterested. However, there are pilot mediation schemes in the Edinburgh, Glasgow and Aberdeen Sheriff Courts but in small claims cases only; the Mediation Co-ordinator sits in Court and remissions to mediation are agreed in a 4-way dialogue Sheriff/MC/the parties with the mediators being selected from a panel. However a proposed revision to the Sheriff Court Rules envisages Sheriffs conducting settlement discussions with the parties in private, as opposed to open court; it appears in context that this means the parties together with no caucusing.

Poland

The Polish Civil Procedure Code (PCPC) addresses the subject in sevetral ways: Art. 223 provides that at any time during court proceedings, but especially at the first hearing, the trial judge should 'lean on the parties' to persuade them to amicable resolution and settlement. Arts.184-186 provide that, before the suit is lauched and the summons filed, a party may ask the court to enter an amicable resolution and settlement. Next, the court will call the parties to attend a settlement meeting conducted by a single judge. The judge does not participate in the setllement process as mediator or conciliator. Note that, In Poland, the terms "mediation" and "conciliation" are considered almost identical and are used interchangeably.

Under Arts. 183(1) -183(15) judges can order parties to mediation and appoint a mediator, but only once in the course of proceedings and they themselves cannot act as mediators.

Lithuania

The conciliation procedure ("CP") is established by Arts 227-231 of the new Civil Procedure Code of the Republic of Lithuania ("CPC") which came into force on the 1st of January 2003. Although a settlement agreement can be concluded at any time, a specific CP has to be carried out by the judge during the preparatory hearing. Such preparatory hearing is mandatory under Art. 228 of the CPC if the court believes that settlement is possible or if the court is responsible to take measures to reconcile the parties under the law (e.g. in divorce cases) and in some other cases. The CP has to be implemented during the initial stage of the preparatory hearing ***before*** the specific claims and defences are investigated. Furthermore, pursuant to Art. 293(1), the court shall dismiss the case after it approves any settlement agreement.

Regulation of the CP is rather general than detailed. This allows the court to be creative and flexibly apply the law. Since the CPC does not provide the answers to such questions as: whether the court has discretion to propose conditions of peaceful settlement agreement, to demand parties to appear before the court in person, to communicate with one party only while requesting the other party to wait outside the courtroom etc., legal scholars are of the opinion that the court has discretion to use all tactics mentioned above.

The legislation encourages applying the CP as frequently as possible: e.g., stamp-duty is partly refunded when a peaceful settlement agreement is reached.

A pilot court mediation project was launched on 26th January 2006 in the 2nd Local Vilnius Court. As it is ongoing for a relatively short time there is no information about any results of this project or any relevant statistics. No court mediation practice existed before. The Council of the Courts of the RoL issued the decision approving the Rules of Court Mediation according to which court mediation is to be conducted by specially-trained judges or judges' assistants. Mediation is carried out in the court premises and is free of charge. The court mediators have to follow the European Code of Conduct of Mediators. Judges or judges' assistants who acted as mediators cannot try the same case if no settlement is reached. A special action group will evaluate the results of the above mentioned court mediation project after one year from its beginning and adjudicate if it is expedient to continue it or to expand it to other courts as well.

Australia (NSW/Victoria)

Mediation is almost universal in Victoria and coming in NSW. In all commercial cases judges encourage mediation and adjourn cases to direct it to happen. Over 90% settle. NSW has Court-ordered mediation. While judges encourage/order the mediation, they do not do it themselves. There are moves for the case judge to become more

activist with a fresh judge doing the trial. In Victoria at least very few commercial cases run to trial because the mediation process is so successful; in most cases the parties arrange their own mediation and Court direction is not required.

PRC

Under current PRC law, a judge sitting in civil cases can act as Mediator and seek settlement of the dispute; this is seen as a positive reflection of the Good Faith principle, i.e. parties are in good faith and should thus seek settlement. Chinese judges tend to do all they can, sometimes to "force", either unconsciously or otherwise, 'their' settlement instead of the parties' settlement. A Chinese judge-mediator can go on to conduct the trial and eventually decide the case. It is suggested that some pressure is unavoidably and unduly put on the parties, i.e. if the parties do not agree with the judge's desired settlement, they will still end up having the same result, because, the judge is going to decide the case in his/her own desired way eventually, no matter what !

Singapore

In the Subordinate Courts (for claims below USD160,000) there is an institutionalized scheme of compulsory mediation where all cases deemed suitable for mediation come before a Judge (known as the Settlement Judge) after close of pleadings where the Judge will attempt to settle the case. If this attempt is unsuccessful, then the case will be heard by a different Judge (the Hearing Judge). The scheme has been highly successful, with a success ratio above 70%.

In the High Court, there is ad hoc mediation, where Registrars (who are in charge of case management) or even Judges, can recommend to parties to mediate the case under the auspices of the Singapore Mediation Centre, an independent body serviced by a panel of trained mediators. The case is then suspended from being fixed for hearing in court. If mediation does not succeed, then the case comes back into the court system.

There is nothing specific in our legislation that allows or prevents a Judge from trying to mediate a case, but there is a long tradition of this happening, particularly in family or partnership disputes. The Judge normally hears parties in chambers with counsel present, but each judge has his/her own style of mediation, and may caucus with one party. It is uncommon for a Judge to see a party without counsel present, but this practice is not unknown. The judges know from experience that they do not discuss the merits of the issues in controversy, but can point out the implications of the litigation and suggest extra-curricular ways of resolving the dispute. Sometimes the Judge can call in parties after a certain point in the hearing where the evidence shows that the case of one party has been seriously jeopardized and it may be time for a reconsideration of that party's approach. If the Judge's attempts at mediation are unsuccessful, there is never a challenge as to the Judge's ability to carry on hearing the case, even if the Judge has caucused with one party

Indonesia

Supreme Court Regulation 02/2003 (11th September 2003) concerns mediation in the Indonesian Courts. Inter alia, Judges are required to order parties to mediation prior to trial. The parties may choose a mediator from a Court-provided list or agree their own choice; failing agreement, the Judge will choose a name from the list which includes judges and non-judges but the trial judge may not act as mediator.

Argentina

Since Argentina is a federal state, there are national and local laws and procedural laws are local. There is no single national law responding to the questions and any answer will be found in the respective provincial/state Civil Procedure Codes (CPCs).

In Buenos Aires, Art.36(2) of the CPC includes among the powers vested in a judge the authority to attempt to conciliate, partially or in full, the parties in dispute. He or she may also propose and encourage the parties to submit their dispute to any ADR method; at any time he/she may order the personal appearance of the parties to try to conciliate them. Art. 36(3) expressly recognizes the authority of judges to make a proposal to the parties to simplify and diminish the issues in dispute that may have arisen during the proceedings or during the trial; the mere proposal of a conciliation formula made by the judge to the parties does not purport pre-judgment. In addition, Art. 360(1) sets forth that, at the preliminary hearing of the evidentiary period, the Judge will invite the parties to conciliate or to find another dispute resolution arrangement. The Judge is under no obligation to persuade the parties to settle but has the authority, to be exercised at his/her own discretion.

There is a debate in Argentina as to whether mediation and conciliation are the same, the difference being argued that conciliators are obliged to, and mediators are not permitted to, propose solutions. If such a distinction exists, it follows from the CPC that if conciliation attempts fail, the Judge will continue to try the case and he will not be considered 'tainted' or that the conciliation formula proposed to the parties purport pre-judgment. Since the conciliation attempts take place during a hearing it is unusual for Judges to caucus with the parties.

Buenos Aires has a Mediation Statute (ca. 1996) providing for mandatory mediation in most civil and commercial cases with some exceptions, conducted by a registered mediator and it takes place before the filing of the complaint. There is no judicial mediation per se as opposed to conciliation.

Colombia

In civil cases, parties are obliged go to conciliation (mediation) prior to trial but this can be an artificial exercise. They require to file with the court papers a certificate that the mediation centre or the mediator gives to them about the impossibility to achieve settlement. Until 2001 or so, the judge had a direct duty to mediate at the outset of the process - he was the mediator and the law permitted him to continue as judge in the case thereafter. Today, in cases that have mandatory mediation pre-trial, there still exists the option for the parties to try mediation mid-trial in which event, the judge will act as mediator and there is no obligation to send the case to another judge. In labour law cases, the judge is obliged to be a mediator/conciliator. In administrative law, the mediation, including cases where pre-trial mediation is mandatory, is given to the agent of the Ministry Public (?), and then any settlement agreement goes for judicial review/approval; this is not necessary in civil proceedings.

Colombian law does not regulate how the judge (nor the conciliators or mediators) do his/her/their job. Caucusing is very rare in Colombia but sometimes the conciliator/mediator, including a judge-conciliator, convenes such individual meetings during a mediation/conciliation. In litigation judges do not see the parties individually.

USA

(1) Texas/Southern USA

There is no law obliging a judge to try to get the parties to settle but they do it anyway applying their case management powers Judges can act as mediators and still handle the case for trial although some reassign the case if they act as mediator (but that is a minority). There is no hard and fast rule disqualifying a mediator-judge from continuing with the trial; my colleague has had a case where the judge acted as mediator, and did meet the parties individually and did intend to try the case if it had not settled. However, he had committed all parties to agree to the process which he proposed so “no-one was really brave enough to object”.

(2) Massachusetts

No court-ordered mediation. Judges do not mediate but, if they did, they certainly could NOT return to the trial.

(3) New York City

Both the federal court and the state court commercial division each have a long-established mediation office. The cases in federal court involve a wide range of civil cases; the Commercial Division is obviously geared to commercial cases. The mediators serve pro bono and are appointed by the mediation office from a roster of qualified mediators. Cases are sent to the mediation office by the judge for assignment to a private mediator either on the judge's own initiative or at the request of the parties. Judges may also send the matter to mediation to another judge who serves as part of his regular duties at no extra pay or in federal court, more likely, to a magistrate (effectively an assistant judge) who also does it as part of the regular duties at no extra pay. The mediation, no matter by whom it is conducted, is confidential and none of what transpires is reported to the trial judge. Judges may try to settle the case as part of their regular job but do not conduct ex parte discussions with the parties (and do not receive additional compensation).

20th September 2006

Giving Evidence by Videolink

What considerations apply when an application is made for a Claimant (in litigation) to give evidence by videolink ? Is it relevant that the Claimant’s reluctance to visit England relates to his potential exposure to some £50m of Capital Gains Tax ? If the Court grants the application, is it conniving in tax avoidance or evasion ? These interesting issues were addressed by the splendidly robust HHJ Coulson QC in *McGlinn v Waltham Contractors & Ors* [2006] EWHC 2322.

The Facts

Mr McGlinn is well-known as the 1970s neighbour of the Roddicks of Body Shop fame who lent them £5,000 to get started and was recently bought out for >£100m; he had been Jersey-resident for >20 years, inter alia for well-established (and entirely lawful) tax reasons. He commissioned the construction of a large house in Jersey and contended that defects in it had been so extensive that the house had had to be demolished and rebuilt. The Defendants were, respectively, the building contractor, the architects, the M&E engineers, and the QS. The trial of the defects case, where the damages claimed are in the region of £4 million, is due to commence in October 2006.

Mr McGlinn sought an order, pursuant to CPR 32.3, that he be allowed to give evidence by videolink, his reason being that if he came to London to give evidence, there was a real risk that he would become liable to pay £50m of CGT.

The Law

The House of Lords have considered CPR 32.3 in *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637 where the film director Roman Polanski sought an order that he be allowed to give his evidence in a libel action by video link, his concern being that if he came to London, he faced a real risk of arrest and extradition to the USA where, in the late 1970s, he pleaded had guilty to unlawful sexual intercourse with a 13y/o girl before fleeing the country. He was therefore properly described as "a fugitive from justice". At first instance, Eady J had granted the order but the Court of Appeal overturned that decision but the House of Lords, by a majority, reinstated the Judge's ruling. It was important to note that the HoL was unanimous that, as between the parties, the order had been rightly made. Mr Polanski would have been severely prejudiced if the order had not been made, whilst the making of the order had no prejudicial effect upon the defendants. The point on which the HoL was divided was the public policy issue of whether the courts should be seen as assisting a fugitive from justice and the majority had decided that the public policy consideration did not outweigh the other factors in favour of the order. Lord Nicholls of Birkenhead said:

"30 I understand the intuitive dislike of relieving a fugitive of a disadvantage which until recently was inherent in his self-created status …

31 … But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is and remains a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights, even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive."

HHJ Coulson's Decision

The court has a wide discretion under CPR 32.3 (see also Annex 3 at para 2).

The Defendants opposed the application since (i) there was no evidence of any risk that a visit to London by the Claimant would lead to any substantial CGT liability; (ii) there would be prejudice if the order was made because the Claimant would not be subject to the pressures of the witness box and it might logistically be more difficult to cross-examine him by way of a video link; (iii) the application had been made late, deliberately so because the Claimant was keen to avoid a careful scrutiny of his tax position.

The Judge regarded the application as inherently unattractive since the Claimant wanted to use England's system of justice but did not want to pay for it via UK taxes. However, the facts in *Polanski* were much more extreme than the present ones and the Judge was bound thereby. The points set out in the speech of Lord Nicholls, therefore, applied with the same or perhaps more force in this case since there was no suggestion that the Claimant, far from being a fugitive from justice, had done anything unlawful whatsoever.

Exercise of the Court's Discretion

The Judge concluded that there was a very clear case in favour of granting the order sought, for four reasons:

(1) The making of the order sought would not cause or could cause any significant prejudice to the Defendants - they could cross-examine the Claimant effectively over a videolink which, of course, is never quite as satisfactory as direct cross-examination but no real prejudice to the Defendants had been identified as a consequence of this. In *Polanski*, the House of Lords did not see any prejudice to the defendants in the mere fact that Mr Polanski's cross-examination was going to be conducted by way of a videolink rather than in person, yet that was a case where his credibility was directly in issue and where the circumstances of his cross-examination were therefore of the greatest significance. While there were times when cross-examining a witness in a video suite is not the easiest task, such potential difficulties were of no real weight in this case.

(2) The Claimant's own evidence would not be of critical importance at the trial, being outweighed by expert evidence e.g. concerning the reasonableness or otherwise of the decision to demolish the house.

(3) The Claimant would be prejudiced if the order was not made because there was a real, rather than a fanciful, risk that if he came to London, he might become liable to pay substantial CGT. Although the Defendants had argued (citing tax law) that it had not been shown that CGT could be levied on the Claimant on the basis of one brief visit to London, Counsel for the Claimant contested this, giving rise to a threshold question: was it appropriate for the Court to endeavour to decide a detailed question of tax law or was it sufficient for the court to determine whether there was a real, rather than a fanciful, risk that CGT liability would be imposed ? The Judge held that the court could not, and should not, determine a complex tax issue on an application of this kind, necessitating consideration of all the relevant material and then giving a binding judgment on the

Claimant's potential tax liability. Therefore the right approach was for the court to determine whether, on all the evidence, there was a real, as opposed to a fanciful, risk of such liability. There were four reasons why the risk was real, not fanciful: (a) the Claimant had received specialist financial advice that there was such a risk and the court should be very slow to substitute a completely different view on the basis of a handful of documents, one or two cases and a couple of hours' argument; (b) if the Claimant did not come to the UK, there was no risk of any CGT liability whereas if he did come he laid himself open to the possibility of CGT liability; (c) the Body Shop sale was a high profile news story and HMR&C can be assumed to be very interested; (d) the sum involved was a sufficiently large sum that the Claimant was entitled to be protected against the possibility of such liability, even if that risk was a modest one.

(4) The Judge did not accept the proposition that the application had been made late. Paragraphs 12.4.1 and 12.4.2 of the second edition of **The TCC Guide** provided that, if there was a possibility of a witness giving evidence by way of videolink, that possibility should be raised in advance of the PTR so that any dispute about it can be dealt with at the PTR. That was precisely what had happened here. It was therefore not fair to criticise the application as having been made late. In addition, no prejudice to the Defendants had arisen as a result of the timing of the application.

The Judge granted the order sought by the Claimant pursuant to CPR 32.3.

Comment

Following *Polanski*, the Judge did not, perhaps, have an onerous task in this case, in particular since there was no suggestion that Mr McGlinn had ever been, or was, in any way acting unlawfully in contrast to the wholly repellent circumstances in *Polanski*.

The principles underlying the House of Lords decision in *Polanski* represent the law and, I suggest, apply equally in arbitration. Judge Coulson's commonsensical analysis of the factors concerning exercise of his discretion had provided, in my view, excellent guidance for arbitrators.

Postscript

The same dispute has given rise to an earlier article entitled "Thrownaway Costs in Construction (and Other) Litigation" dated 12th July 2005 (see my Arbitration Hewsletter #12 available on my website) which commenced

> "At the risk of opening the door to a barrage of witty and/or facetious responses, an interesting issue i.r.o. which there appeared to be no authority arose in *McGlinn v Waltham Contractors & Ors* (2005] EWHC 1419 (TCC). One of Waltham's co-defendants incurred costs, following the Pre-Action Protocol (the "PAP") for Construction and Engineering Disputes, i.r.o. heads of claim which were later withdrawn by the Claimant hence it applied for an interim costs order. Should this be granted ?"

20th September 2006

Judicial Evaluation of Experts

As regular readers of my occasional reports will know, I have a keen interest in the evaluation of expert witnesses and a good recent example is given in Research In *Motion UK Limited v. Inpro Licensing S.a.r.l*. [2006] EWHC 70 (Pat) (Pumfrey J). The case is also interesting in that it is all about Blackberry and related technology and some useful background information is provided in the judgment.

The Experts

4. [Professor H], who gave evidence on behalf of RIM, was a careful witness. He had been involved in the art at the relevant time and was deeply involved in the process for the establishment of technical standards in the internet world. His evidence was criticised on the basis that it was too standards orientated. I found him intelligent and helpful. From time to time he did obviously think quickly, but the area in which this was most apparent (the knowledge to be attributed to the skilled man of something called MIME and its prescribed file formats) is not something that ultimately I have found it necessary to decide. His evidence was cogent and helpful.

5. This action has been unusual, at least in my experience, for the very strong attack made on the qualifications and abilities of [Professor E], for Inpro. [Counsel for RIM] ultimately submitted that no weight could be attached to his evidence. [Professor E] has a very distinguished list of qualifications and he has been president of the IEEE … . He has taught graduate and undergraduate courses in telecommunications technology, digital signal processing and circuit design. On the face of it, he was an ideal expert, and I was surprised when his cross-examination started with an examination of his qualifications. The fuller picture is as follows. He is an electrical engineer. He is not a computer scientist, his area of research interest being digital signal processing. He has not taught or researched computer science, despite having suggested in an

interlocutory witness statement that he had. He has published three papers since 1991. He was not familiar with the engineering aspects of the internet, and he was, it seems, unaware of the standards promulgated in the form of RFC's, of which more later. This action is in part concerned with browser programs for the World Wide Web. Although he accepted that anyone writing browser programs would have to be familiar with the relevant RFCs, he had never read them. He was an experienced witness, having given evidence in at least fifty sets of proceedings with diverse subject matter, ranging from RF-controlled garage doors to the siting of cellular communications towers. It was put to him directly on the basis of his website that he was, in effect, a professional expert. The words 'hired gun' were not used, but that was plainly the flavour of the accusation.

6. None of these matters is in itself an objection to a witness, with the exception of the suggestion that he had taught computer science. A witness who lacks expertise in the particular area with which a patent is concerned can read himself in to the state of the art at the priority date and can be of great assistance even if he lacks contemporary experience, his general knowledge providing a framework for his analysis. Such an expert must, like all experts, carefully preserve his independence from those employing him and must do his best objectively to assist the court.

7. There are a number of minor points in which it is clear that he did not research the position properly. More important to me was that he made a number of exaggerated statements, one of which in particular stood out when I first read his statement. This concerns the state of the art in late 1995. My reading of paragraph 35 of his report is that he was suggesting that the World Wide Web and its protocols were not part of the common general knowledge in late 1995–early 1996. He suggested that from October 1995

   > 'The "Web" has gone from a term requiring explication when used among university computer researchers to a household word understood by children.'

8. The whole of his cross-examination on this topic (transcript 347-9) should be read. It is very unsatisfactory. So too was his general behaviour under cross-examination. This has nothing to do with his demeanour. It is a complaint about the way he answered questions. He was a remarkably obstructive witness, and repeatedly quibbled. I was persuaded on at least two occasions to intervene not for the purpose of elucidating answers or to obtain information, but to attempt to break into a refusal to answer a question. Transcript 457-459 and 516-520 are examples. He commented on counsel's reasons for asking questions from the point of view of the case being advanced, and appeared to be conscious on many occasions of the potential impact of his answers. On one or two occasions he answered comparatively detailed questions with what can only be described as speeches: see 443-444. He was occasionally hyperbolic: one of the cited documents, Bartlett, 'approached in an open-minded way, from my opinion, would teach me nothing'. This was not a sensible statement. Occasionally it was clear that he was familiar neither with the documents under discussion nor his own evidence.

9. [Counsel for RIM] multiplies examples in Annex A to his skeleton argument, but for my purposes what is set out above is enough. I am afraid that [Professor E] was simply an unsatisfactory expert. I will not entirely ignore his evidence, because it was so uniformly favourable to Inpro that it represents the highest at which Inpro's case might be put, and because not all his answers struck me as unsatisfactory. In the end, I came to regret his lack of objectivity, because it deprived me of a reasonable view based on a thorough knowledge of the case that was contrary to that being advanced by [Professor H]. [Counsel for Inpro] did a great deal by way of a very well constructed cross-examination and well-judged submissions to fill this gap, but it is still there, and I have endeavoured to make allowances for it.

Comment

None necessary !

Acknowledgement

My grateful thanks are due to Clive Freedman (Barrister, 3 Verulam Buildings, and one of the English Bar's leading IT experts) for drawing this case to my attention since I do not normally consider patent cases.

16th October 2006

Bias in Arbitration: Applicability of ECHR

On 29th November 2005 I reported on an English High Court case, *ASM v TTMI*, where the judge reached a remarkable and, in my view, wholly wrong conclusion concerning perceived bias in the chairman of an arbitral tribunal, formerly known as Mr X QC. I refer you to that earlier note for the full facts of the case.

In brief, ASM (Owners) and TTMI (Charterers) had been engaged in a London arbitration arising out of a charterparty where Mr X QC was 3rd Arbitrator. ASM was represented by Z & Co (Solicitors), TTMI by WH & Co (Solicitors); ASM's

principal witness was Mr M, a shipbroker. In a wholly separate (but relatively recent) arbitration (the "Other Arbitration") between entirely unrelated parties, M had been a key witness for one of the parties and WH had represented the other side and, for a short time and in respect of one preliminary issue only (which was settled), X had been instructed by WH as Counsel. In these other proceedings, so M alleged, he had been the target of an attack by WH who had alleged impropriety in M's giving discovery and had personally accused M of producing fraudulent and fabricated documents – i.e. WH had alleged criminal acts by M; M alleged further that all these allegations had come to naught and that he had been completely exonerated. Inter alia, the Judge concluded that Mr X QC should resign from the tribunal.

The case has been heard by the Court of Appeal and judgment was delivered today.

The present application was an application for permission to appeal from the High Court decision that ASM's s.68 application to set aside an arbitral award for serious irregularity be dismissed. Having dismissed the application, the judge refused permission to appeal and s.68(4) provides: "The leave of the [High Court judge] is required for any appeal from a decision of the court under this section." The question before the CoA was whether, given that statutory provision, it had jurisdiction to entertain an application for permission to appeal from the substantive decision of the judge. The serious irregularity alleged was that the award had been infected by the apparent bias of the third arbitrator (who had been appointed by the other two). However, the judge had held that ASM had waived its right to object, principally in taking up the award.

ASM contended that the judge's waiver holding was so clearly and obviously wrong that one of two consequences must follow: first, there had been no s.68 decision at all either for that reason or because, while waiver might operate as a defence to the claim of a serious irregularity, a decision on waiver was a decision on a defence to the assertion of serious irregularity not a decision on the assertion itself and, secondly, the judge's decision had been an unlawful contravention of Art. 6 ECHR which guaranteed a fair hearing before an impartial tribunal. If the tribunal had apparently been partial as the judge had found, he had no option in law other than to set aside the award and a refusal to do so made his decision unlawful.

Distinguishing *Cetelem v Roust* (refer my OGEMID posting on 24th February 2005), the CoA held that there was no doubt that the judge had had jurisdiction either to grant ASM's application or to refuse it. Whichever way the decision went, it was still a decision under s.68 and a refusal of permission to appeal was likewise a decision under that section. It could not, therefore, be challenged by way of appeal even if the decision was wrong or, even, obviously wrong. The fact that waiver (or indeed estoppel) could be said to operate as a defence to a prima facie entitlement was irrelevant.

The allegation of bias had been dealt with by the judge at first instance in a public and impartial hearing and there was no apparent contravention of Art. 6 in respect of either the s.68 application or in respect of the further determination whether there should be permission to appeal. The present case was therefore entirely outside the residual jurisdiction identified in *North Range Shipping Ltd v Seatrans Shipping Corpn* [2002] EWCA Civ 405. ASM's contention that, if a judge fails to remedy the breach of an ECHR obligation he is himself in breach of the ECHR because he has not upheld the right which the ECHR has itself guaranteed, was misguided for a number of reasons. First, the European Court is not concerned with the merits of the decision which is under attack, only to see that the procedure has been fair, see *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605. Secondly there is no overarching principle laid down by the ECHR that an award tainted by apparent bias must be set aside, instead national courts are allowed to decide whether or not it should (refer (i) *Bulut v Austria* (1996) 24 EHRR 84 (ii) *Nordström-Janzon v Netherlands* (28101/95 of 27th November 1996) (iii) *Suovaniemi v Finland* (31737/96 of 23rd February 1999))

Nordström-Janzon concerned the alleged partiality of an arbitrator. Netherlands law, as enunciated by the Hoge Raad, distinguished between cases which arose before/after issue of the award. In the former case an objectively justified fear of lack of independence or impartiality would justify an application for recusal; once the award had been made and issued to the parties, however, a stricter rule applied viz. that an award could only be quashed if the arbitrator was shown to have not been independent and impartial "in fact" or if "the doubts as regards his independence of impartiality were so grave that the disadvantaged party could not be required to accept the arbitral award". The European Court declared the applicants' case inadmissible saying that: (1) by choosing arbitration, the parties had renounced the requirement of a procedure before the ordinary courts which satisfied all Art. 6 guarantees; (2) nevertheless account had to be taken of any legislative framework affording a measure of control of the arbitration proceedings and whether that control had been properly exercised; (3) different states could legitimately afford different grounds for challenging awards and could decide for itself what grounds should suffice for set-aside; (4) neither Netherlands law nor the Netherlands courts had acted in breach of the Convention and the application was manifestly ill-founded. If Netherlands law had in addition provided that there was to be no appeal unless the judge gave permission, the Court would have likewise decided that the application was ill-founded.

CoA Conclusion

Given the absence of any realistic argument that the judge's decision had contravened ASM's EHCR rights, the CoA had, as a matter of English law, no jurisdiction to grant permission to appeal and the present application had necessarily to be dismissed. Further, while there had been some argument in whether the judge's decision had been based on s.73 or on waiver at common law, nothing could turn on that distinction and permission to appeal without the judge's leave was prohibited by s.68(4) in either case.

Comment

A detailed comment will follow but, for the present and writing as a practitioner, the Court of Appeal's robust dismissal of yet another ECHR-based arbitration challenge is greatly to be welcomed, inter alia because of the greater finality consequent on its refusal to disturb the first instance judge's decision.

18th October 2006

Arbitration: Costs, Service of Notices and a s.72 Appeal

We saw recently (see my report dated 27th December 2005) the *Bernuth* case where details of arbitral proceedings were served by e-mail on an address given by Bernuth in a Lloyds Maritime directory but where the company claimed it had never had notice of the proceedings since the e-mail address quoted/used was of a different company within the same group. Clarke J was, correctly in my view, wholly unimpressed, holding inter alia that if Bernuth held out to the world that *info@...* was its e-mail address, then so be it.

An even more recent Court of Appeal case, *Bulk Trading SA v. AP Møller* ([2006] EWCA Civ 1294) has strong parallels but also addresses issues of parties apparently trying to hide behind the corporate veil to frustrate creditors. It must be emphasised that the CoA addressed only the costs issue, not the s.72 issue but I will return to the latter below.

Bulk Trading had applied for permission to appeal against a costs order made in the Central London County Court where the judge had made a "no order for costs" order following a successful s.72 application by Bulk Trading made on the basis that Møller had failed to establish that the former had had proper notice of the arbitration, the judge taking the view, in considering costs, that to a "significant extent" Bulk Trading had brought the problem on itself.

In the transcript of the oral judgment ultimately produced on the merits of the s.72 application, the judge gave two reasons why Bulk Trading had brought the problem on itself: (i) it had adopted the "unorthodox practice" of maintaining a fax line which was kept alive against the possibility of future business but not for operational reasons, and (ii) it was responsible for its agent's failure to answer correspondence. However, in giving oral judgment, the judge did not refer to that second reason but he did state that the judgment was subject to correction when he saw the transcript, and one of the corrections he made was to add that second reason.

Bulk Trading sought to argue that since the judge's order had been drawn up before he corrected the transcript, the correction should be deleted but Waller LJ dismissed this as a bad point since in civil cases there was no reason why a judge should not correct a transcript of an oral judgment so as to add to or vary his reasons. However, the question before the CoA was whether Bulk Trading had any prospect of succeeding before a full court in an attack on the exercise of the judge's discretion by reference to the reasons the judge ultimately gave.

"Bulk Shipping SÁ" or Bulk Trading "as nominees of Bulk Shipping" chartered vessels for the carriage of ten cargoes of steam coal from AP Møller pursuant to a COA made in January 2002. Clause 33 of that COA provided, so far as material is followed: "Notices … to ... 1. Bulkshipping Ltd, Switzerland -- Telex 841286 BULK CH -- Fax +41 91 6104 355 ... loading and sailing from loadport to cable following information: ... to: 2. Bulkshipping Ltd, Switzerland -- Telex 841286 BULK CH -- Fax +41 91 6104355."

A dispute arose concerning demurrage and on 18th August 2003 Møller's Defence Club sent a fax to the fax number above notifying Bulk Shipping of Møller's claim. Bulk Shipping then instructed an agent, Ferpandi, to deal with the matter. Arbitration was threatened in a fax to Ferpandi on 18th November 2004 and it was asked to agree a nominated arbitrator by fax of 18th February 2005 but never responded

On 12th September 2005 Møller initiated the appointment of an arbitrator in respect of its dispute with "Bulk Shipping SÁ, Manno, Lugano Switzerland" or, "Bulk Trading SÁ, Manno, Lugano Switzerland as a nominee of Bulk Shipping," copying the same by fax to the same fax number, but not to Ferpandi or to any other fax number. However, almost a year earlier Bulk Shipping had apparently ceased trading and its business had apparently been "transferred" to Bulk Chartering and Management SÁ. That had happened simply by virtue of the fact that a Mr MM, who had previously operated Bulk Shipping's business, moved to Bulk Chartering, situated on the floor below in the same building. Furthermore Bulk Shipping had operated its business from the same (2nd) floor as Bulk Trading which continued to trade therefrom. Bulk Chartering and Management SÁ acted for Bulk Trading SÁ in exactly the same way as Bulk Shipping had done up until that time. MM said in a witness statement: "… AP Møller was not advised [of the change in management] because I believed that all operational matters between Bulk Shipping and themselves had been concluded. All correspondence relating to the dispute arising out of the charterparty dated 18th January 2002 had been handled by Ferpandi. Accordingly, I was satisfied that everything was catered for in this regard and there was no need to advise AP Møller of the change. There was nothing operational outstanding between AP Møller and Bulk Shipping. Since the cessation of trading, Bulk Shipping has retained a small office space on the 2nd floor …. [a single desk, phone line and computer tucked away in a corner]. … I certainly have never had any reason to go upstairs to the second floor and check the Bulk Shipping computer."

On 20th September 2005 notice of the appointment of a sole arbitrator was given to Møller's lawyers following an application by them to have an arbitrator appointed and that notice was copied by fax to the machine at the desk in the

corner of the second floor. The judge found that MM did not go and check the fax at the desk and he found thus that Bulk Trading had no notice of the arbitration. The arbitration proceeded and an award was made and was sent by post to Bulk Trading at its address and it was in those circumstances that the s.72 application was made. The application was made on two grounds: the first on the basis of lack of notice and, second, on the basis that it was uncertain because it did not make clear which of Bulk Shipping SÁ or Bulk Trading SÁ was liable. The judge found in Bulk Trading's favour on the notice point since the fax number given in the COA was given for "certain purposes", thereby by implication not as an agreed method of service. He found there was no relevant distinction between Bulk Shipping and Bulk Trading, that those entities did not have actual notice in the sense of opening an envelope and that "they" only had themselves to blame for keeping the line open for commercial reasons; if the line had been closed down he found no-one would have been able to get through and it would have been known that the notice had not been given, but he found there was no effective notice because he found that the agent, Ferpandi, had had conduct of the claim delegated to him and there was no reason for Bulk to be anxiously reviewing the fax machine.

Having made those findings, the judge had also made clear his provisional view on costs: " [it] seems to me that the costs burden caused by this unusual series of events should be equally shared between the parties, and that the best way to reflect that will be for me to make no order for costs on this claim."

The question is whether the Court of Appeal should grant permission to appeal this costs decision. This was a small claim, in respect of which Møller had obtained an arbitration award. The fact that it was a small claim was relevant, inter alia relating to the judge's decision on costs, notoriously an area in which a judge exercises a discretion with which the CoA is reluctant to interfere. The judge, having found that he should set aside the award, had taken the view that, to a significant extent, it had been Bulk Trading's conduct which had led to it having had an award made against it. The latter had argued that the decision to have left the fax machine in operation was a decision by Bulk Shipping and not by Bulk Trading but the judge had held, even when setting aside the award, that no distinction should be drawn between those two entities.

Whatever the position might be in relation to the fax machine and even if technically that had to be construed as the act of a third party, the judge's second reason, relating to Ferpandi's failure to act, was also very compelling since if it had acted in any regard at all i.r.o. the looming arbitration, it would never have taken place and to a large extent that had to be down to the conduct of Bulk Trading.

Waller LJ concluded that the judge had been entitled to have formed the view that he had: he had been exercising his discretion and he would have been well aware that would have incurred substantial costs in resisting the setting-aside of the award, such occurring as a result of its failure, as identified by the judge, to have made proper enquiries as to the proper address for service but, equally, the judge had been entitled to have taken the view that significant blame should be placed on Bulk Trading for the position in which it found itself. There was no reasonable prospect of arguing that the judge had acted outside the range of the discretion accorded to him in relation to costs and Bulk Trading's application therefore fell to be dismissed.

Comment

First. The CoA decision is, with respect, obviously right both as regards the merits of the costs appeal but, more importantly, as regards the underlying principle expressed in eighteen (18) places in the Act (most notably ss.67(4), 68(4), 69(6) and 69(8)) that there shall be no appeal from the first instance judge's decision except with the leave of said judge. Achieving finality of arbitral awards is an important part of arbitration and these severe restrictions on the right of appeal are, in my view, entirely appropriate.

Second, on the facts given it appears clear to me that the first instance decision was wholly wrong for the co comprehensive reasons given by Clarke J in ***Bernuth***. It appears that the judge in Bulk Trading applied CPR concepts of service which, as Clarke J stated, are inapplicable in arbitration. We cannot ascertain from the CoA judgment in the present case when the first instance decision had been given so we have to assume that it preceded ***Bernuth***. Bulk Trading had (i) omitted to advise AP Møller of its change of business and change of address (moving a mere one floor in the same common-ownership building) and (ii) ignored its own fax machine whose fax number was stated in the C/P; it is incomprehensible that AP Møller should be penalised (by set-aside) for these substantial failings by Bulk Trading and, in my view, it is wholly inconsistent to set aside the award in such circumstances.

18th October 2005

"Without Prejudice": Experts' Meetings And The Mediation/Litigation Interface

As a matter of general (but not absolute) principle, all matters relating to a mediation are "without prejudice" (WP) to any associated litigation; the public policy underlying this dates back to the 19th century. However, the interface is not always straightforward as HHJ Coulson QC explained in *Aird & Aird v Prime Meridian Ltd* [2006] EWHC 2338 (TCC). He also addressed key issues relating to WP meetings of experts.

By an order of the court, made on 18th August 2005, HHJ Thornton QC had required that:

> "By 23.9.05 the parties' architectural experts … do meet without prejudice and prepare a statement of the issues upon which they are agreed and those upon which they are not agreed with a brief statement of the reasons for the disagreement."

He also ordered that the action be stayed from 1st October 2005 to 31st December 2005 to allow the parties to try mediation.

The experts complied with that order and, by 1st September 2005, they had agreed a statement of matters agreed/not agreed (a "Statement"). In December 2005 there was an unsuccessful mediation and the proceedings re-commenced in early 2006. The Claimants sought to amend their pleadings in a way that was apparently inconsistent with the views expressed by their expert in the Statement and the Defendants objected to those amendments. The Claimants also claimed that, since the Statement had been produced for the mediation, it was a WP document, therefore privileged therefore no reference could be made to it. The Defendants now sought a declaration that the Statement was not a WP document, and that it could be referred to in the ongoing litigation. In the alternative, the Defendants submitted that, even if the Statement was a WP document, the differences between the Statement and the Claimants' new case are "so grotesque" that there had been an abuse of privilege and (at least for certain purposes) the WP tag should be removed.

Privilege

There were two potentially competing public policies here: (i) the Statement was a vital component of effective case management and it would generally be contrary to the overriding objective (CPR 1.1) if statements which had been signed by both experts were then to be kept secret from the court; (ii) in order to encourage the parties to settle their differences in a frank and open manner, the documents generated by or for mediation were privileged. The court's power to order experts to meet WP and produce a Statement is set out at CPR 35.12.

The Judge identified four key principles concerning WP expert meetings

(1) The meetings themselves are WP; the privilege that therefore attaches to the meetings is a joint privilege and its waiver requires the consent of both parties.

(2) A Statement is, in the ordinary case, not privileged, its production being ordered by the court so that it can be relied on by everyone, including the parties and the court, in any trial of the substantive issues.

(3) The parties are not automatically bound by the matters agreed by their experts, although they can agree to be so bound (CPR35.12(5)). However, the lack of such agreement does not make the statement privileged (*Robin Ellis Ltd v. Malwright Ltd.* [1999] BLR 81).

(4) The conduct of the meetings and the content of the Statement are solely for the experts themselves. Interference in this process by the parties or their lawyers may amount to a breach of the court order and lead to a refusal by the court to allow that expert's evidence to be admitted (*Robin Ellis*).

The public policy which encourages parties to speak frankly in attempting to settle their disputes has been reiterated on a number of occasions, e.g. in *Rush & Tompkins* ([1989] AC 1280) Lord Griffiths had said

> "The without prejudice rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate to a finish …. I would therefore hold that as a general rule the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible, whether or not settlement was reached with that party."

The rule that documents generated by or for a mediation will be treated as being covered by WP protection was no more than an extension of this public policy: see *Halsey v. Milton Keynes* [2004] 1 WLR 3002.

However, none of the cases cited by counsel dealt with the particular situation here, in which a statement signed by both experts, which would ordinarily be a document that was not protected by privilege once it had been agreed, was produced initially for use in mediation.

Was the Statement Privileged?

The Statement would not normally be privileged being required by order of the court and for the assistance of the court in the exercise of its case management and trial management functions. The mere fact that it is used in a subsequent mediation would not make it privileged or inadmissible in the ongoing court proceedings. If parties to court proceedings wish to ensure that documents that would not ordinarily be WP should be protected then they need to spell that out clearly to each other and to the court.

However, on the particular facts of this case (which are tortuous and unconventional), this was not a usual situation and the Judge found that (a) the orders in respect of the experts' meetings and the Statement came about *only* as a result of the imminent mediation since without the mediation, the order of 18th August 2005 would not have been made at all; (b) the judge did not think that he was making a conventional order pursuant to CPR 35.12(3), believing that the order was made for the purposes of the mediation, to assist the parties and to give the mediation the greatest possible chance of success; (c) the Claimants' solicitor and the Claimants' expert both believed that the purpose of the

statement was for use in the mediation and the Defendant's expert believed that the statement had a dual purpose, i.e. initially in the mediation and, if that failed, possibly in any subsequent court proceedings.

The 'WP' tag usually applicable to documents provided for mediation should only be waived in clear and unequivocal circumstances but this was not a clear and unequivocal case. HHJ Coulson QC concluded that the Statement was privileged and could not be referred to in the court proceedings unless both sides agreed.

Abuse of Privilege

The Defendant's alternative argument was that, because of the scale of the departure from the statement in the Claimants' new pleadings, there would be "unambiguous impropriety" in allowing the WP label to remain on the Statement, thereby depriving the Defendant of the opportunity to cross-examine the Claimants' expert on the reasons for the difference between the statement and the new claims.

The exception to the rule governing WP communications has at its heart an abuse of a privileged occasion. Moreover, it is an exemption which will rarely be found to be applicable. Thus, for instance:

(a) In *Forster v. Friedland* [1992] CAT 1052 Hoffmann LJ (as he then was) said that the value of the without prejudice rule would be seriously impaired if its protection could be removed for anything less than unambiguous impropriety.

(b) In *Fazil-Alizadeh v. Nikbin* [1993] CAT 205 Simon Browne LJ said:

> "There are powerful policy reasons for admitting in evidence as exceptions to the without prejudice rule in only the very clearest of cases. Unless this highly beneficial rule is most scrupulously and jealously protected it will all too readily become eroded."

(c) In *Unilever v Proctor & Gamble* ([2000] 1 WLR 2436) Robert Walker LJ referred on a number of occasions in his judgment to the abuse of privilege and the need for something "oppressive, dishonest or dishonourable" in the defendant's conduct at the without prejudice meeting in order for the without prejudice protection to fall away."

HHJ Coulson QC considered the observation by Rix LJ in *Savings & Investment Bank v. Finkin* ([2004] 1 WLR 684) at §57 particularly relevant:

> "It is not the mere inconsistency between an admission in a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege: see the first holding in *Fazil-Alizadeh*. It is the fact that the privilege is itself abused that does so. It is not an abuse of the privilege to tell the truth even where the truth is contrary to one's case. That after all is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement, and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

Accordingly, the Defendants' alternative argument, even if made out in full on the facts, could not amount to an abuse of the privileged occasion and fell a long way short of the sort of circumstances in which the exception of unambiguous impropriety had been triggered in the reported cases. Rix LJ's observation above was fatal to the Defendants' argument on this point.

Conclusions

(a) Ordinarily, a court order for the provision of a statement signed by both experts as to what they agree and disagree will mean that, once the statement has been agreed, the without prejudice protection will be removed and the statement can be referred to by all parties in the subsequent litigation. That is so even if the statement is used for the purposes of mediation.

(b) On the facts of the present dispute this was not an ordinary case. The judge made the order only for the assistance of the parties in the mediation and the Claimants' solicitor and the Claimants' expert acted on that basis. As a result, in this case, the prima facie position was that the document was privileged; this was not a clear and unequivocal case where privilege had been waived.

(c) In view of the limited time and financial constraints on the Claimants' expert period prior to the agreement of the Statement, it would be unfair to rule that the Statement was now not privileged. The Judge considered that, if the Claimants' expert had known that the Statement was to be used in the litigation if the mediation was unsuccessful, then he would not have signed it.

(d) The Defendants' alternative argument failed: the mere fact of inconsistency between the Statement and the new pleadings, no matter how wide, cannot amount to an abuse of the privileged occasion or unambiguous impropriety. Even if that was wrong, then it was clear that an unambiguous impropriety had simply not been made out on the facts.

For those reasons therefore the Defendants' application failed.

Comment

None necessary; this is, in my respectful view, entirely correct.

25th October 2006

English Judicial; Style

As you will be aware, I am a collector of judicial wit, pithiness and invective; my attention has been drawn to *Bradley v Jockey Club* [2005] EWCA Civ 1056 where, at §27, Lord Phillips MR, after quoting the key conclusion of the first instance judge (Richards J) said:

> 27. I can see no basis for dissenting from this view [of the judge]. The last line of his judgment might have been its only one: "This is a hopeless appeal. I would dismiss it."

26th October 2006

Expert Evidence in English Litigation

If a party is dissatisfied with the opinion of his expert after the experts' discussion, can he obtain permission to rely upon additional expert evidence ? This was the interesting question raised in *Stallwood v David & Anr* ([2006] EWHC 2600 (QB)) decided by the newly appointed Mr Justice Teare, formerly Nigel Teare QC, a leading expert on maritime law who was also the LOF Appeal Arbitrator.

Following two traffic accidents, the Claimant was examined by two Experts (both orthopaedic surgeons), one (CE) instructed by her, one (DE) by the Defendants. They disagreed as to her condition so, pursuant to a Court Order, the two experts discussed their respective opinions with a view to identifying areas of agreement and disagreement. They did so, agreeing that the Claimant's present alleged inability to work full-time was unrelated to the two accidents, a change in CE's opinion over his initial report, such change of opinion significantly impairing the Claimant's prospects of obtaining damages.

The Claimant and her advisers did not consult CE to ask him to explain why he had changed his opinion; instead they decided that it was necessary to consult another orthopaedic surgeon (3E) and to seek leave to adduce his expert evidence. The District Judge rejected this application for three reasons: (i) the accidents happened >5 years ago; (ii) trial was imminent; (iii) it was necessary only because CE had changed his mind.

Teare J held that the District Judge's decision had been a case management decision and that such decisions would rarely be the subject of an appeal because they were the result of an exercise of discretion and it would usually be very difficult to show that the judge had taken into account matters which he ought not to have taken into account, or had failed to take into account matters which he ought to have taken into account or had reached a decision which no reasonable judge could have reached.

What factors should be taken into account by a court on an application such as this ? The express purpose of an experts' discussion is to reach, if possible, an agreed opinion on the expert issues; CPR 35.12(1)(b) refers. It necessarily follows that the rule contemplates that as a result of the discussion an expert may modify or change the opinion he had previously expressed in his report. In the context of case management this is desirable because it will tend to reduce the duration and expense of the trial and encourage settlement. Thus the mere fact that an expert has changed or modified his opinion following an experts' meeting cannot by itself be a reason for permitting for a disappointed party to adduce evidence from another expert. It would not be possible in such circumstances to suggest that further expert evidence was "reasonably required to resolve the proceedings"; see CPR Part 35.1.

However, an agreement between experts does not bind the parties unless they expressly agree to be bound thereby (CPR 35.12(5)); it followed that no modification of an expert's opinion can bind his instructing party. Further, a note to §35.12.1 in the White Book states "But in practice it could be very difficult for a party dissatisfied with an agreement reached at a experts' discussion to persuade the Court that this agreement should in effect be set aside unless the party's expert had clearly stepped outside his expertise or brief or otherwise had shown himself to be incompetent."

Counsel had cited cases which dealt with a different question, namely, the circumstances in which it is appropriate to allow expert evidence where there has already been a report from a single joint expert but Teare J did not consider that these gave guidance on the present question. It followed that the Court should, in circumstances such as the present, allow fresh expert evidence only where there was good reason to suppose that CE has agreed with DE or has otherwise modified his opinion for reasons which cannot properly or fairly support his revised opinion; such cases will be rare. Where good reason is shown, the Court will have to consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, it can properly be said that further expert evidence is "reasonably required to resolve the proceedings" (CPR 35.1).

Teare J held that the District Judge did not appear to have considered either (i) whether there were or might be good reasons why the Claimant should be permitted to adduce evidence from another expert or (ii) when a trial was likely to take place if the application were successful and then to have considered whether the resulting delay would be sufficient to justify denial of the Claimant's application. The District Judge had therefore not had regard to all relevant

matters so that this Court had to consider the Claimant's application afresh even though the Judge's decision concerned case management.

After detailed consideration of all the circumstances, Teare J concluded the Claimant could show no good reason to permit adducing of a new Expert's opinion; inter alia, it was not unusual for opinions to alter after informed discussion between experts and the CPR contemplates this; the fact that an expert had changed his opinion was not a ground for suggesting that his revised opinion was or might have been unfounded or not based upon sound reasoning. If the Claimant had questioned her Expert about the change to his opinion, his reasons therefor might have shown to be sound or unsound or based upon a mistaken view of the facts. If 'sound', the second expert would be unnecessary; if 'unsound' or 'mistake', Claimant might have been able to show good reason for adducing additional expert evidence. But no such enquiries were made and so the Claimant was simply left with the bare fact that CE had modified his opinion after discussing his opinion with DE; that could not suffice to show good reason for needing an additional expert.

However, in *Cosgrove v Pattison* [2001] CP Rep.68 Neuberger J (as he then was) considered the approach to be followed when a party who was dissatisfied with the report of a single joint expert (SJE) might be granted permission to adduce evidence from another expert. He listed a number of factors to be taken into account, the last two of which were any special features of the case and the overall justice of the case. In considering the overall justice of the case he had asked himself two questions which he thought were of help. The first was, if the applicant was not entitled to call the additional evidence sought and lost the case would he have an understandable sense of grievance judged objectively and the second was, if the applicant was entitled to call the additional evidence and won the case would the respondent have an understandable sense of grievance judged objectively.

In the present case there was a special feature, namely, the unsatisfactory manner in which the District Judge had dealt with the application during the hearing; Teare J considered that the Claimant, if she were not permitted to rely upon evidence from 3E and the Court accepted the opinion of DE, would have an understandable sense of grievance, judged objectively. Since her application was originally rejected in the unsatisfactory circumstance where the District Judge had appeared influenced by his own opinion of the claim, based upon his own experiences rather than upon the evidence in the case, the Claimant would have an understandable sense of grievance judged objectively. If she was permitted to rely upon 3E's opinion and the Court accepted that opinion and rejected DE's, the Defendants would have no sense of grievance judged objectively. They would no doubt be disappointed but, in circumstances where the trial judge would have considered all the expert evidence and reached a carefully considered conclusion, such disappointment could not properly be regarded as a sense of grievance, judged objectively.

Teare J concluded that, having regard to the very special circumstances of this case, dealing with the case justly required permission to be granted for 3E's evidence to be adduced.

Comment

Arbitrators have, in many ways, an easier life than judges and we are not constrained by CPR, in particular CPR1.1 and all the baggage of "dealing with the case justly", particularly as here in a P/I case. I suggest that it will indeed be a remarkable case (absent fraud, collusion etc) where a Claimant can show good reason to bring in a new expert solely because he/she didn't like the old one.

21st November 2006

Service of Litigation Proceedings by Fax

You will recall that on 28th December 2005 I circulated a note about the *Bernuth* case, an arbitration where the arbitrator and the claimant served the various directions, orders, submissions etc on the respondent by e-mail. The latter claimed not to have received the e-mails but Clarke J was unimpressed; in particular, he made it clear that CPR rules for service in litigation did NOT apply in arbitration.

In *Hart Investments v Fidler & Anr* ([2006] EWHC 2857 (TCC)), the "other side of the coin" arose and HHJ Coulson QC had to deal with interesting issues arising in connection with service of litigation proceedings by fax.

Introduction

In 2002, Hart engaged Larchpark Ltd (2nd Defendant, presently in liquidation) to carry out extensive building works at a property in North London and Mr Fidler provided engineering services in respect of those works. On 5th February 2004 a large part of the flank wall of the property collapsed. This gave rise to three separate sets of proceedings transferred to the TCC but in thus note I will address only issues relating to service.

On Thursday 13th July 2006 Hart issued a claim form in the main action in the TCC and, on the following day, its solicitors sent a fax to the liquidator of Larchpark purporting to serve a claim form and particulars of claim with the response pack to follow by post. It was agreed that the fax was received by the liquidator before 4 pm on Friday 14th July. The claim form, particulars of claim and response pack were also served by post on that Friday and were actually received on Monday 17th July. Larchpark's acknowledgement of service was faxed to the court on Tuesday 1st August 2006 and the defence was served on Sunday 13th August. It was only after the defence had been served that

the liquidator discovered that judgment in default had been entered against Larchpark on 31st July 2006. The default was specified as the failure to file an acknowledgement of service within 14 days of the date of service which, according to Hart's certificate of service, was said to have occurred on 14th July 2006.

CPR 6PD3.1(1) provides that if service by fax is to be validly effected, a party or his legal representative "must previously have expressly indicated in writing to the party serving … that he is willing to accept service by electronic means." Paragraph 3.1(2) provides that: "The following shall be taken as sufficient written indication for the purposes for para.3.1(1): (a) a fax number set out on the writing paper of the legal representative of the party who is to be served; or (b) a fax number, email address or electronic identification set out on the statement of case or a response to a claim filed with the court."

CPR 6.7 provides that, where documents are served by post, the date on which service is deemed to have occurred is "*the second day after it was posted*." There is conflicting Court of Appeal authority as to whether "day" includes or excludes Saturday or Sunday (see below).

Hart maintained that service by fax had been properly effected on Friday 14th July, and that, therefore, certainly by Monday 31st July, the 14 days for the acknowledgement of service had expired and it was entitled to judgment in default. Larchpark maintained that service by fax had been invalid and that therefore valid service in this case had been by post, the deemed date of service being Tuesday, 18th July so that the filing of the acknowledgement of service on Tuesday 1st August was within time. Hart countered by contending that if valid service had indeed been by post, then the deemed date of service was Sunday, 16th July, which meant that the acknowledgement of service had been filed out of time.

Had Service been Validly Effected by Fax ?

Larchpark contended that service by fax was not proper service because, contrary to CPR 6PD3.1 Larchpark's liquidator had not "previously … expressly indicated in writing" to Hart that he was "willing to accept service by electronic means" (refer *Molins Plc v. G.D. SpA* [2000] 1 WLR, 1741 at paras. 24 and 25) Hart contended that Mr P, the man in the liquidator's legal department who was dealing with the claim on behalf of the liquidator, was Larchpark's legal representative and that the inclusion of a fax number on the liquidator's notepaper was a sufficient indication of a willingness to be served by fax in accordance with CPR 6PD3.2(a). In the alternative, Hart contended that the liquidator's use of a fax number on a document sent to the CLCC indicating that the previous solicitors had come off the record and had effectively been replaced by the liquidator was sufficient notice under CPR 6PD3.2(b).

HHJ Coulson QC rejected both of Hart's submissions on this point. First, although Mr P worked in the liquidator's legal department, he did not hold himself out to be Larchpark's legal representative, nor was he described as such in any document emanating from the liquidator, Hart's solicitors or the various courts involved. The reference to "legal representative" in 6PD3.2(a) is a reference to a person who is retained by a client to represent it in the proceedings in question; Mr P was not in such a position but was part of the liquidator's organisation, and therefore, prima facie, part of the client. He was not, and had not represented himself to be, the client's legal representative. Second, 6PD3.2(b) provided specific requirements which were wholly evidently not met in this case.

The Judge noted that Hart's solicitors used notepaper with a fax number but with an express disclaimer at the bottom that service by fax was not accepted so that, as it seemed to him, Hart was seeking to stretch the envelope of 6PD3.1(2) in a particular way against a liquidator, not another firm of solicitors, when it would not allow others to serve documents by fax on them. There was therefore no acceptance by Larchpark of a willingness to accept service by fax.

When Was the Effective Date of Service by Post ?

Hart contended that in accordance with CPR 6.7, because the documents were posted on Friday 14th July, the effective date for service was deemed to be the second day after those documents were posted, i.e. Sunday 16th July. Larchpark contended that the second day after posting had to be calculated by excluding the Saturday and Sunday, so that effective service had to be deemed to have occurred on Tuesday 18th July with the consequence that acknowledgement of service was filed within time. It was agreed, quite correctly in the Judge's view, that the date of actual receipt by post was irrelevant for the purposes of CPR 6.7.

The White Book notes at para.6.7.2 indicate that the correct way to calculate the two day period is not free from doubt: in *Godwin v. Swindon Borough Council* [2001] EWCA Civ 1478 the CoA excluded Saturday and Sunday but in *Anderton v. Clwyd* [2002] EWCA Civ 933, it concluded that the reference to 'day' in CPR 6.7 meant calendar day. The Judge, understandably, found these two decisions impossible to reconcile, in particular because in *Anderton* Mummery LJ had made it clear that the CoA had considered *Godwin* and now expressly disagreed with itself.

Having considered these two judgments carefully, the Judge considered himself bound by the decision of the CoA in *Anderton* because of what Mummery LJ had said about *Godwin*. Therefore he was obliged to find in the present case that the deemed date for service of the claim form was Sunday 16th July so that the acknowledgement of service had been filed more than 14 days after the effective date for service and was therefore out of time.

Comment

In “Alice in Wonderland” there is an oft-quoted passage to the effect that words meant what Humpty Dumpty says they meant; I had not been aware until reading *Hart v Fidler* that the dictum of Humpty Dumpty was an integral part of Court of Appeal practice.

Aside from Humpty Dumpty’s imaginary world, HHJ Coulson QC, suffering (on my reading) no little embarrassment in having to follow an absurd appellate decision, is to be commended for robustly dismissing Hart’s contentions regarding service by fax, particularly including its own solicitors’ refusal to accept any such service while insisting that such service on others was valid.

2nd December 2006

Yet Another Failed s.69 Appeal

“They shall not pass” appears to be the motto of the redoubtable judiciary of the TCC, at least in dealing with s.69 leave to appeal (LTA) applications, the latest casualty falling at the first hurdle (i.e. failing to obtain LTA) being *Sinclair v Woods of Winchester Ltd (in Liquidation) (No.2)* ([2006] EWHC 3003 (TCC)). However HHJ Coulson QC gives us a helpfully compact summary of the authorities and addresses an interesting issue concerning costs and CFAs.

We have, however, been here before: on 9th December 2005, I said of *Sinclair v Woods No.1* (refer [2005] 71 ARBITRATION 4 at 353ff for a detailed analysis)

> “Another recent case was *Sinclair v Woods of Winchester Ltd and Anr* ([2005] EWHC 1631 (QB)) … . You will get the flavour of the case from §46 of HHJ Coulson QC’s judgment: “This purported criticism of the arbitrator is therefore rejected. Not only was it a hopeless point, but it also revealed another all-pervasive feature of the Sinclairs' application before me, namely a tendency to attack the arbitrator for an underlying situation, in this case delay, for which, on analysis, they themselves were responsible.” and again at §71: “Accordingly, the criticisms of the arbitrator's conduct … are wrong in principle and must fail. Not only has no serious irregularity been made out, but there is also no evidence of any substantial injustice. I consider it a great pity that these two allegations were ever made.”

Woods had been the building contractor for a swimming pool complex designed by an Architect, Mr Shipp, and built for the Sinclairs; it had substantial defects. The Sinclairs sought s.69 LTA against Award #3 on two grounds (i) concerning "concurrent causes of damage to flat roofs" and (ii) concerning Woods' liability for the "defective specialist design" of the boiler and associated pipe work, which design work had been carried out by a nominated sub-contractor, Penguin Pools Limited.

The Judge reminded us that, broadly speaking, there are four ingredients necessary for a successful s.69 LTA application: (i) the identification of a true question of law, not a complaint about the Arbitrator's findings of fact dressed up as a point of law; (ii) where that question substantially affected the rights of the parties; (iii) where the Arbitrator had obviously been wrong or, if a point of general or public importance, where the Arbitrator's decision was at least open to serious doubt; (iv) it is just and proper for the Court to determine the question; items (i) and (ii) were critical here

In *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC) Jackson J had said:

“[50] ...The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. There is no philosophy or ethos of the 1996 Act which should deter the court from answering those questions correctly, in the event that the arbitrator has erred. I reach this conclusion for five reasons: (i) party autonomy is one of the three general principles upon which Part 1 of the 1996 Act is founded (see section 1(b) of the 1996 Act); (ii) the parties in the present case, in the exercise of their autonomy, have agreed that an appeal shall lie to the courts on any questions of law; (iii) the principle of non-intervention stated in section 1(c) of the 1996 Act is qualified by the important words, "except as provided by this Part". Section 69(2)(a) of the 1996 Act is a provision falling within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties; (iv) *Lesotho Highlands* should be distinguished because it concerned proceedings under section 68 of the 1996 Act; (v) ….

[57] .... (i) The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis. (ii) Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer."

The Judge respectfully agreed with and adopted these general principles.

It was not always easy for the applicant to identify a pure point of law, many s.69 LTA issues coming before the Court being in reality questions of mixed law and fact. In such circumstances, provided that the decision reached by the Arbitrator had been within the permissible range of solutions open to him, no error of law arise: see *The Matthew* [1992] Lloyd's Rep 323 and *Benaim (UK) Ltd. v Davies Middleton & Davies Ltd* [2005] EWHC 1370 (TCC). It was simply not possible for a party to seek permission to appeal on Arbitrator's findings of fact no matter how wrong they

might seem to be: see *The Baleares* [1993] 1 Lloyd's Report 215 and *Demco Investments & Commercial SA & Ors v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm**).**

The Judge was satisfied that both of the two questions raised would have the necessary substantial effect and therefore that part of the test is met.

It is usually not possible to argue that a point of public importance arose In construction disputes, unless that point arose on the interpretation of Statute or on the proper meaning of a term within a standard form of contract; accordingly, in most construction disputes, and certainly in this one, it was necessary for the Claimant to show that the Arbitrator had obviously been wrong in reaching the conclusion he had. That was not only a difficult burden to discharge but it had to be discharged by reference to the award itself and, in certain circumstances, the documents referred to in the award, but not other extraneous material: see *HOK Sport Ltd v Aintree Racecourse Ltd* [2003] BLR 155 and *Kershaw*.

It must always be shown that, even if the other criteria above are made out, it is still just and proper for the Court to intervene bearing in mind the parties' original decision to arbitrate rather than litigate: see *Reliance Industries Ltd v. Enron Oil & Gas India Ltd* [2002] 1 All ER Comm 59. The Judge was satisfied that this was so in the present case.

Question 1: Concurrent Causes of Damage to the Flat Roofs.

The first alleged question of law raised by the Sinclairs was that the Arbitrator had found that the failure of the flat roofs in the swimming pool building had been caused both by defective design by the Architect and by Woods' breaches of contract in (a) failing to warn the Architect of aspects of the defective design; and (b) executing the specified works defectively. However, he had only awarded the Sinclairs £728 in relation to the cost of the remedial works which the Sinclairs have carried out. Their claim had been for £82,868.71. The sums awarded were described as "notional" and were expressly unrelated to the actual cost of the remedial works. The Sinclairs contended (a) that the Arbitrator had failed to apply correct principles of law as to liability in contract for damage caused concurrently by some factors which are not and other factors which are breaches of contract by the Defendant; and (b) that application of the correct principles would result in a finding that Woods was liable for the whole cost of the remedial work.

The Judge set out extracts from the Award (itself lengthy and meticulously detailed) and concluded that the Arbitrator's decision on this issue had been entirely clear: he had decided that the operative cause of the problem with the flat roofs was their design, for which Woods was not liable. He had found that such errors as were attributable to Woods (and there were some minor ones) had not caused the underlying problem with the flat roofs so he arrived at a small sum that should be paid by Woods to the Sinclairs in consequence of their breaches. The Sinclairs' LTA application failed because: (i) the alleged question of law was no such thing; (ii) more importantly, the Sinclairs' point was entirely a matter of causation and causation disputes are rarely pure questions of law – refer Chitty on Contracts 29th Edition 2004 volume 1 paragraph 26-029; (iii) the Sinclairs' submissions were based on a misconception of the Award in which the Arbitrator had found that the cause of the problem was the Architect's design; Counsel for the Sinclairs accepted that the Arbitrator had used the word "concurrent". Instead, the Arbitrator had found that there had been a single operative cause of the failure of the flat roofs. Given that he had decided in his earlier Award that Woods had no design liability, Woods could not be found liable for the costs of replacing or repairing those roofs.

The Judge concluded, not only that the Arbitrator had been far from obviously wrong, he was in fact plainly right; The LTA application i.r.o. Question 1 therefore failed.

Question 2: Liability for Defective Specialist Design

The second alleged question of law raised by the Sinclairs concerned liability for defective specialist design; they had claimed the cost of replacing an undersized heating system viz. £70,850.64. The defective items had all been installed in accordance with Penguin's design and the Arbitrator had found that Woods had no liability to the Sinclairs in respect of defects in said specialist design work because, being design work, the Architect was solely liable for defects therein. The Sinclairs contended that the said finding was wrong in law and that the Arbitrator should have found that Woods was liable to the Sinclairs i.r.o. such defective design.

The Judge repeated his extracts from the Award which had concluded that the Architect, not Woods, had been responsible for the design of the heating system.

The Judge was unpersuaded that Question 2, as submitted, was [even] a question of law. If it was the case that the that the Sinclairs were asking "if a main contractor sub-contracts work to a nominated sub-contractor, and that nominated sub-contractor carries out design work as well, is the main contractor, without more, liable to the employer for that design work ?", then the answer was emphatically in the negative. First, in his earlier Award, the Arbitrator had found that Woods had no design liability to the Sinclairs under the terms of the main contract; this was a complete answer to the Sinclairs' LTA application in respect of Question 2. Secondly, even without that finding, the Sinclairs' case was wrong in law: Woods was not obliged by the contract to perform any design work at all (there was no reference thereto even as a possibility) therefore there was no main contract design work for Woods to sub-contract to Penguin.

Further, there appears to be no reported case in which it had been held that a main contractor, whose work scope excluded any design, somehow acquired a design liability simply because it entered into a sub-contract with a nominated sub-contractor who was in fact carrying out design work. The Judge considered that such a finding would be contrary to common sense. The design work performed by Penguin should either have been the subject of a direct warranty or remained part of the Architect's non-delegable obligations. The Arbitrator had therefore been correct to have concluded that Woods was not liable for Penguin's design work. The Judge therefore rejected the Sinclairs' application for LTA in relation to Question 2.

Costs

It was plainly appropriate for the Sinclairs to pay Woods' costs and the Judge assessed these at £5,000 i.r.o. Woods' solicitors and £5,000 for Counsel. However, both the solicitors and Counsel were on a CFA with the liquidators entitling them both to a 100% mark-up on their fees. To what extent should that mark-up be reflected ?

Both CFAs were in similar terms, inter alia setting out the reasons for the 100% uplift including: (i) the risk to counsel that the claim will not succeed; (ii) the deferment of payment of counsel's base rate until the conclusion of the action; (iii) the level of basic rate fees incurred in the consideration of the claim before the action is commenced; (iv) the complexity of the facts; (v) the size of the claim; (vi) the urgency of the matter; (vii) the importance of the case to the client and to its insolvent state; (viii) the public benefit in recovering for creditors. Further, when Counsel was advising as to the prospects of success, he had put Woods' prospects on the merits of this application at 60%; he accepted that that figure (not the 100%) should be used for the summary assessment, giving an uplift of 67% in accordance with the tables at paragraphs 42.137 and 42.128 of **Cook on Costs 2006,** published by Butterworths.

The relevant guidance to the Court in dealing with success fees on a summary assessment is to be found at paragraph 28 of the Guide to the Summary Assessment of Costs 2005 edition. That states: "The factors to be taken into account when deciding whether a percentage increase is reasonable may include: (a) the risk that the circumstance in which the costs fees or expenses would be payable might or might not occur; (b) the legal representative's liability for any disbursements; (c) what other methods of financing the costs were available to the receiving party." Item (a) has been dealt with, (b) does not arise and, regarding (c), it was not disputed that in all the circumstances the CFA was the best method of financing the costs as far as the liquidator was concerned. Counsel for the Sinclairs accepted that there should be an uplift but argued for <50% since there was no question of these costs not actually being paid and, therefore, there is no real deferment element and no real risk of delay. The real point was therefore the risk of failure on the application itself.

HHJ Coulson QC found that an uplift was payable in this case; he was (and remained) of the view that at the time that this application was made Woods' prospects of success could fairly be put at 66.66% (i.e. that it was two-thirds likely that they would win and one-third possible that they would lose) because this was an application for LTA against an Arbitrator's Award. The authorities explain, in one way or another, how and why the particular application being made for permission must fail, therefore a 66/33% split was the appropriate assessment of the risk, and should form the basis of summary assessment. Taking the 66.66% and applying **Cook on Costs** would give rise to a 50% uplift on the fees charged by Woods' solicitors and Counsel. The Judge considered this a fair, reasonable and proportional uplift, giving rise to a figure of £7,500 in respect of each of solicitors and Counsel. The Judge also said that he considered those figures to be entirely proportionate, reasonable and appropriate.

Comment

Eminent common sense !

The Sinclairs launched a dismally hopeless s.69 appeal in 2005 against the Arbitrator's first Award and here lost again (fairly badly); one has to ask the question as to why did they take such action ? Did their advisers not understand s.69 ? It appears not.

In the context of yesterday's IFSL conference in London, it is unfortunate that such cases, however hopeless, add to the statistics which persuade non-UK observers to perceive the English courts as unduly interventionist. Distinguished representatives from several countries had no immediate answer to the question of why hopeless cases arise in England but not in their own countries; on my suggesting that the lawyers in those other countries were doing a better job, none of my colleagues disagreed.

The question must also be asked as to how a firm of Solicitors can lodge such a hopeless application; the first question was not even a question of law, the second was plain wrong. Do firms not have obligations to their clients to prevent such disasters ? Blame the lawyers – that's always the easy answer (not often wrong, in my experience) !!

ARBITRATION HEWSLETTER

by

Hew R. DUNDAS

Issue #15

JUNE 2007

Another Failed s.69 Appeal

In *Independent Petroleum Group Limited v. Seacarriers Count Pte Limited* ("the Count") [2006] EWHC 3222 (Comm), a s.69 appeal was firmly rejected. The following necessarily truncates the maritime law issues in order to consider the implications for s.69

Defendant Owners chartered the vessel *Count* to the claimant Charterers for the carriage of a cargo of petroleum products to Beira; the C/P was on an Asbatankvoy 1997 form and included a safe port warranty (SPW).

The *Count* duly arrived at Beira and tendered NOR but another inbound vessel had grounded, blocking the channel linking the port to the sea and the *Count* proceeded to her discharge berth after a 5-day delay. Following completion of discharge by the *Count*, she was unable to sail from port because another inbound vessel, the *Pongola*, had grounded in the approach channel; the Count was held for a further 4 days.

Owners claimed from Charterers the amount of their loss resulting from the delay to the *Count* caused by the blockage of the channel by the *Pongola* on the ground that this loss resulted from breach by Charterers of the safe port provisions. The claim was referred to arbitration and dealt with on documents only and, in a reasoned award, the two arbitrators, both distinguished LMAA arbitrators, upheld Owners' claim, quantified at US $63,241.58.

Charterers obtained leave to appeal (LTA) against the award on the following four questions of law: (i) in determining whether a port is unsafe for the purposes of a SPW in a VC/P, is the relevant question whether the port is unsafe for the chartered vessel itself or is it sufficient for Owners to show that the port is unsafe for other vessels ? (ii) Is delay caused by a temporary obstacle which is not such as to frustrate the commercial venture capable of making a port unsafe for the purposes of a SPW ? (iii) Where a chartered vessel is delayed by another vessel grounding as a result of the port being unsafe for that other vessel, are the charterers in breach of the SPW where: (1) the grounding is temporary and occurs after the date when the port was nominated by the charterers; and (2) the delay is not one which frustrates the commercial venture ? (iv) On the facts found, was there a breach by the charterers of the SPW?

Charterers sought an order reversing the award or remitting it to the arbitrators for further consideration on the following grounds: (a) that the tribunal had been wrong to have found that the port of Beira had been unsafe and that in consequence the charterers were liable to the owners in damages for detention; (b) That the tribunal was wrong to find that the port was unsafe in the abstract by reference to the fact that two other vessels had grounded there. It should have asked itself, following authority, whether the port had been safe for the *Count* itself. Had it asked itself that question, it would have found that the port was safe for the *Count* which had entered and left the port without running aground. (c) Having held that the *Count* had been delayed for a little over four days by the *Pongola's* grounding, the tribunal should have held that since that grounding post-dated the date of the nomination, the port was not prospectively unsafe and further, following the decision of the Court of Appeal in the *Hermine* [1979] 1 LL Rep 212, that since the delay was temporary, and not one which frustrated the adventure, the port was not unsafe.

Charterers submitted that the arbitrators had made two errors of law: first, they had not directly addressed Charterers' arguments and had not explicitly found that the *Count* had been exposed to danger and had suffered a loss as a result of such exposure, nor could they have so found since the *Count had* berthed and had left port in safety; instead, the arbitrators had made a general finding that the port had been unsafe and had concluded that, because conditions existed at the time of the nomination which led to the grounding of the two other vessels, Charterers were therefore in breach of contract and liable for the consequences of the delay resulting from the grounding of the latter - this was a flawed approach in law. Second, the arbitrators had been wrong in distinguishing the *Hermine*. The only impediment to the *Count* leaving the port was that the channel had been blocked, but this had been a temporary obstruction, which could not give rise to a claim for damages for breach of contract.

Owners submitted, first, that the arbitrators had concluded that the port of Beira was prospectively unsafe for the *Count* at the date of the nomination and that, on a fair reading of the award, their reasoning led to the conclusion that the loss had therefore been caused by Charterers' breach of contract. Second, the *Hermine* was indeed distinguishable because in that case there had been no finding that the port had been prospectively unsafe for the *Hermine* at the time of the nomination whereas in the present case Owners did not suggest that the obstruction caused by the *Pongola* was what had made the port unsafe, rather, they relied on the grounding of the *Pongola* as evidence of pre-existing conditions which made the port unsafe at the time of the nomination, and also to establish causation of Owners' loss.

Toulson J summarised the general principles of law applicable here and proceeded to address the question of whether, on the facts found, there had been a breach of the SPW.

As regards Charterers' first argument, the Judge considered it implicit in the arbitrators' reasoning that they had judged the port to have been an unsafe port at the time of nomination; if he had been in any doubt about that, he would have considered requesting additional reasoning (s.70(4)), but he regarded that as unnecessary.

As regards Charters' second argument, the Judge considered Charterers' analysis of the *Hermine* to be incorrect and also inconsistent with previous authority approved at the highest level. Further, in the present case the

arbitrators' finding that the port had been unsafe had been on characteristics (buoys out-of-position + no adequate system for monitoring the channel) which were not merely a temporary hazard. The reasoning in the *Hermine* did not bar a finding by the arbitrators that these characteristics, existing at the time of the nomination, were such as to create a continuing risk of danger to vessels, including the *Count*, when approaching and leaving the port, and it was therefore an unsafe port to nominate.

Further, in the course of oral submissions Charterers sought to argue that the grounding of the *Pongola* was a breach in the chain of causation between Charterers' breach of contract in nominating the port and Owners' loss; this was not a point on which LTA was sought or given, but in any case the Judge could not see that it would have had any realistic prospect of success.

For those reasons, Toulson J dismissed the appeal, thereby upholding the arbitrators' award.

Comment

As is the norm in the Commercial Court (in contrast to the TCC), LTA applications are dealt with on paper separate from the subsequent appeal hearing so we are not privy to any information concerning how the LTA issues and how the s.69 tests were addressed by the LTA judge. That said, such information as is in Toulson J's judgment does support the granting of LTA, particularly in reviewing leading authorities dating back to 1861.

From the standpoint of a commentator, the TCC approach of hearing the LTA application and the actual appeal together is to be commended since we can then examine the application of s.69(3) in detail which is not possible in these Commercial Court cases.

I have previously expressed the opinion that the argument that the s.69 thresholds should be relaxed to "permit the development of commercial law" is both fundamentally flawed (unless perhaps at the joint expense of the Judge and the Solicitors/Barristers involved but certainly not at the client's expense) and wholly inconsistent with the underlying principles of the 1996 Act and, a year ago, I expressed concern about an apparent opening of the door in the Commercial Court (there were three LTA cases in rapid succession where LTA should never have been given). The *Count* does not appear to extend that brief, unfortunate, trend.

Finally, it is (as always) reassuring to report that "The Arbs Wuz Right"

Postscript

In *Sinclair v Woods of Winchester Ltd (in Liquidation) (No.2)* ([2006] EWHC 3003 (TCC)), HHJ Coulson QC reminded us that, broadly speaking, there were four ingredients necessary for a successful s.69 LTA application: (i) the identification of a true question of law, not a complaint about the Arbitrator's findings of fact dressed up as a point of law; (ii) where that question substantially affected the rights of the parties; (iii) where the Arbitrator had obviously been wrong or, if a point of general or public importance, where the Arbitrator's decision was at least open to serious doubt; (iv) it is just and proper for the Court to determine the question.

24th January 2007

Arbitration Agreements: Separability, Bribery and Stays

The English Court of Appeal has today delivered an important, even fundamentally-important, judgment in the case *Fiona Trust & Holding Corporation & Ors vs Yuri Privalov & Ors* ([2007] EWCA Civ 20), the latest stage in a wide-ranging legal war concerning the Russian merchant fleet. The case raised, apparently for the first time, the question whether, if there was a plausible argument that contracts had been induced by bribery and had been rescinded on discovery of the bribery, that constituted a dispute which could (and should) be determined by arbitration in the context of a common form of arbitration clause.

The overall dispute is between the Russian state-owned Sovcomflot group ("the Group" or the "Owners")), as owners of various vessels, and a Mr N who is alleged to have successfully bribed one or more directors or employees of the Group. It was alleged that contracts were procured by this bribery and contained terms highly favourable to the charterers. It was also alleged, inter alia, that (1) vast sums were paid by way of commission to companies nominated by N, on ship purchases and both new and existing ship building business, (2) Sovcomflot interests were deceived into making an enormous payment to acquire a debt owed to a Russian bank, (3) uncommercial sale and leaseback transactions were made for the benefit of N's companies, (4) shipbuilding options and shares in Sovcomflot companies were traded at a gross undervalue and (5) a fictitious service contract was entered into designed to injure owners' financial and commercial interests.

An intricate and complex action has therefore been instituted in England by a large number of Group claimants seeking damages for the tort of conspiracy and making claims by way of damages or restitution as a result of the payment of bribes and a claim for compensation or an account of profits in respect of what is said to be a breach of fiduciary duty by those who have entered into the charterparties. There is also a claim that the eight charterparties which are the subject-matter of these proceedings have been validly rescinded and that restitution of benefits should be made.

Each of the 8 disputed charterparties in the present action conferred on either party the right to elect to have any dispute referred to arbitration in London under LMAA Rules. The 8 charterers sought to enforce their rights in

arbitration and appointed the well-known Mr MH as sole arbitrator. On 12th June 2006, Owners made an arbitration application pursuant to s.72 AA96 seeking to restrain the arbitration proceedings on the basis that they (the owners) have rescinded both the charterparties and the arbitration agreements contained in them for bribery and that there could therefore be no arbitration. Charterers responded on 12th July 2006 by seeking a s.9 stay of the owners' rescission claims, as well as of any further time charter claims by the owners.

At first instance (refer [2006] EWHC 2583 (Comm); 20th October 2006), Morison J had declined to stay Owners' claims for rescission and had granted interlocutory injunctions to restrain the arbitration proceedings pending the trial of the action. This decision was widely criticised as denying the parties access to arbitration and in usurping the intended role of the tribunal.

The Court of Appeal addressed three principal issues:

(1) the construction of the arbitration clause including the question as to whether the claim that the charters had been rescinded for bribery came within the arbitration clause;

(2) the separability of the arbitration clause;

(3) the relationship (if any) between ss.9 and 72.

The Construction Issue

English law and English lawyers have long been riveted with excitement over the difference (if any) between disputes "arising under" a contract or those "arising out of" one. Longmore LJ patiently recited and summarised the numerous (not readily reconcilable) authorities before stating that

> "the time had now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so."

Longmore LJ considered that the jurisdiction or arbitration clause in any international commercial contract should be liberally construed; in particular, although in the past the words "arising under the contract" had sometimes been given a narrower meaning, that should no longer continue to be so. One of the reasons for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It was not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract was held to be valid, required the tribunal to resolve the issues that had arisen.

Counsel for Owners argued that their claim for rescission for bribery could not be brought in England because it was not a claim "under the contract" since it was a claim to have the contract set aside. However, it could not really be supposed that the businessmen negotiating these charterparties (however much they intended honest negotiations) intended that any claim suggesting the contract was invalid would have to be brought wherever the defending companies were incorporated (here the British Virgin Islands) while claims for breach of contract were brought in England. The fact that jurisdiction may have been established in England for other reasons against the three charterers who are applying for a stay could not affect the oddity of the result of Counsel's submissions on this aspect of the matter.

Longmore LJ therefore concluded that ***a dispute whether the contract could be set aside or rescinded for alleged bribery did fall within the arbitration clause on its true construction***. (It should be noted that the present case was different from a dispute "as to whether there were ever a contract at all").

The Separability Issue

S.7 AA96 provides that: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." This codified the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by the tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement was itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contact.

The question for decision here was whether the assertion of invalidity went to the validity of the arbitration clauses as opposed to the validity of the charterparties including them. Owners argued that they would not have made any contract with the charterers at all if they had been aware that their employees had been bribed by N and argued further that it was enough for them to say that whatever it was that impeached the main agreement also impeached

the arbitration clause. Longmore LJ stated that that was precisely the opposite of what the authorities on separability had laid down viz. that it was NOT enough to say that the contract as a whole was impeachable - there must be something more than that to impeach the arbitration clause and that extra element was missing in the present case.

Morison J had said that Owners' case that they had not truly consented to the relevant charterparties by reason of bribery was no different from a case of *non est factum* or mistake; he distinguished *Harbour v Kansa* on the basis that the illegality there did not impeach the arbitration clause "whereas the bribery arguments, if sustainable, do impeach the whole contract"; he concluded (§25) that the question whether Owners ever made the contracts was not a dispute arising out of or under the contract and that the tribunal did not have jurisdiction to decide that issue, only the court did.

Longmore LJ disagreed: if a tribunal could decide whether a contract was void for initial illegality, there was no reason why it should not decide whether a contract had been procured by bribery, just as much as they could decide whether a contract had been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as *non est factum* or the sort of mistake which goes to the question whether there was any agreement ever reached. It was not enough to say that the bribery impeached the whole contract unless there was some special reason for saying that the bribery impeached the arbitration clause in particular. There was no such reason here.

Procedural Issues: ss.9 and 72

Morison J had also said that, even if the tribunal had had jurisdiction to have decided the bribery issue, he would have exercised his powers under s.72(1)(a) AA96 to grant an injunction to restrain the arbitration so that there could be a one-stop hearing of the issue and would not exercise his power to grant a stay of the claims to be entitled to rescind the charterparties or of the other time charter claims brought by owners. This required the Court of Appeal to decide what it considered to be essentially procedural matters pursuant to the 1996 Act but the judge's conclusions under this latter head were potentially far-reaching. If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there was a prima facie breach of the UK's obligations under NYC58.

AA96 (ss.30-32 and 67) shows, together with the prescriptive s.9(4), that it AA96 contemplated that it would, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it was contemplated by s.72 that a party who took no part in the proceedings should be entitled in court to "question whether there is a valid arbitration agreement", the court should, in the light of s.1(1), be very cautious about agreeing that its process should be so utilised. ***If there was a valid arbitration agreement, proceedings could not be launched under section 72(1)(a) at all.*** That would be the situation (as here) where the arbitration agreement was wide enough to comprise the relevant dispute and the arbitration clause, being a severable agreement, is not directly impeached by whatever ground is used to attack the invalidity of the contract in which the arbitration clause is contained. Section 72 has, accordingly, no application.

Longmore LJ went further, saying that, if the party who denied the existence of a valid arbitration agreement had himself (as Owners have here) instituted court proceedings and the party who relies on the arbitration clause has applied for a stay, the application for a stay is the primary matter which needs to be decided. It would only be if a stay were never applied for or were refused, but for some reason the party relying on the arbitration clause insisted on continuing with the arbitration that any question of an injunction should arise.

S.72 might well be applicable if the party denying the existence of an arbitration agreement had not started English proceedings and did not wish to do so and such a party would then be entitled to apply under s.72 for a declaration that there was no valid arbitration agreement; even then an injunction would usually be necessary only if there was some indication that the other party was intending not to comply with any declaration which the court might make. This was all a long way from the present case in which court proceedings had been instituted and an application had been made to stay (some part of) those proceedings. S.9 governs the position and for that section to apply there must be an arbitration agreement. If the existence of an arbitration agreement is in issue, that question would have to be decided under s.9 and there was no reason, in the present case, for any invocation of s.72 at all.

As HHJ Lloyd QC had pointed out in *Birse Construction v St David* (1999) BLR 194 there were four possible approaches to deciding whether an arbitration agreement existed to which s.9 applied:

(1) to determine on the evidence before the court that such an agreement did exist in which case (if the disputes fell within the terms of that agreement) a stay must be granted, in the light of the mandatory "shall" in s.9(4); it was this mandatory provision which was the statutory enactment of Art.II(3) NYC58;

(2) to stay the proceedings on the basis that it will be left to the arbitrators to determine their own jurisdiction pursuant to s.30 AA96, taking into account the subsequent provisions in the Act for challenge to any decision eventually made by the arbitrators;

(3) not to decide the issue but to make directions pursuant to what is now CPR Part 62.8 for an issue to be tried as to whether an arbitration agreement did indeed exist;

(4) to decide that no arbitration agreement existed and to dismiss the application to stay.

In the present case, said Longmore LJ, it was clear that option (1) was appropriate and that a stay should be granted.

Morison J had decided as a matter of his discretion that it was more convenient for the court to decide the question whether the charterparties and the arbitration clause were invalidated by the alleged bribery of the owners' agents because it was best that the matter should be decided only once. Longmore LJ said that if the matter were truly a matter of discretion, such exercise of it might well be difficult to criticise, but the discretion of the court only arose if there was truly a "question whether there is a valid arbitration agreement" but, ***once the separability of the arbitration agreement was accepted, there could not be any question but that there was a valid arbitration agreement***.

Conclusion

The Court of Appeal imposed the s.9(4) stay and lifted the injunction on the arbitration proceedings.

Comment

No doubt others will comment in more detail having had time to digest this highly important judgement but, in simple terms, at first read this appears the most rousing endorsement of arbitration in the English appellate courts in years. Having been very critical of a recent CoA decision, I am please to opine that "they got it right" in the present case.

26th January 2007

An Important Adjudication Case

In *Cubitt Building & Interiors Ltd v Fleetglade Ltd* ([2006] EWHC3413 (TCC)), HHJ Coulson QC reached a number of highly significant conclusions. I regret that pressure of time does not permit me to circulate a full analysis but I will summarise the key matters and conclusions:

Factual Background

(1) Cubitt claimed approx £1.65m on top of an FC valuation of £11.2m;

(2) the contract provided that the Final Certificate be conclusive after the expiry of 28 days from the date of issue, save to the extent proceedings (adjudication, arbitration or other) had been commenced within the 28 days and then save only to in respect of those matters to which the proceedings related; it follows that the precise time of effectiveness of the referral notice was highly significant since on Day 29, Cubitt's claim evaporated except to the extent referred to adjudication

(3) on Day 7, Cubitt offered Fleetglade the draft referral notice but without the documents; the RN and documents were served on the next day;

(4) after various extensions, the adjudicator was obliged to reach his decision on Friday 24th November 2006; it was available, subject to arithmetic checks and final proof-reading, for transmission at 2245 that day and was transmitted at 1221 on Saturday 25th November, i.e. on "Day 29"

Conclusions and Other Matters

(5) there was no authority for any argument that a matter was too complex or too large for adjudication (fn.1 to §10); conversely, there is partial authority to the contrary (*CIB v Birse*);

(6) where a contract contains provisions which meet the requirements of HGCRA, those provisions are to be applied, not those of the Act itself [§24-25]; the Judge observed that in certain reported cases, too much had been made of the language of the Act and not enough on the terms of the contract;

(7) time limits, whether in the contract or in the Act, are fixed and not flexible [§29-30];

(8) Cubitt argued that a document served by fax after 4pm was deemed to be served the next day – CPR 6.7; the Judge held that this applied only to litigation and not to adjudication (and, by inference, not to arbitration either) [§39];

(9) CPR is not to be imported wholesale into adjudication [§35];

(10) Where an adjudicator is appointed late on Day 7, service of the RN "ASAP" can mean on Day 8 [§42];

(11) the Judge criticised the RICS strongly for taking six (6) days to appoint the adjudicator: "[the] delay was unacceptable … the RICS failed to act promptly" [§46];

(12) an adjudicator's decision rendered out of time will probably be a nullity [§75, 76(c)]; in the present case, had this occurred Cubitt's claim would have wholly evaporated;

(13) there is a 2-stage process, first the reaching of a decision, second the communication of that decision to the parties [§76]; where the decision is reached within 28 days but not communicated until after the expiry thereof, it will still normally be valid if communicated forthwith [§76(d)];

(14) the adjudicator endeavoured to impose a contractual lien over his decision pending payment of his fees; the Judge agreed [§80] with Lord Wheatley in *St Andrews Bay* that there was nothing to allow such a lien, such not being permitted to override statutory provisions, either in law or in contract [§81];

(15) in terms of communicating a decision, "forthwith" means just that [§89];

(16) had the adjudicator not completed his decision in time (2245 on the notional Day 28), Cubitt would have been left with no remedy concerning its claimed £1.65m; that would have been the adjudicator's fault; although clause 41A.8 of the contract protected him in respect of anything done in the discharge of his functions, it was plainly arguable that that would not have protected him in such circumstances, because the failure to complete within the agreed period would have represented a complete failure on his part to have discharged those functions at all.

30th January 2007

Issues Of Fraud And Public Policy

Judgment has been issued in *Elektrim SA vs Vivendi Universal SA & Ors* ([2007] EWHC 11 Comm); the judge was Aikens J, well-known from *Ecuador v Occidental* and other high profile international arbitration cases in the English courts. The full text is available at:

http://www.bailii.org/ew/cases/EWHC/Comm/2007/11.html

Elektrim SA made three applications to the Court in relation to an ongoing LCIA arbitration:

(i) under section 68(2)(g) of AA96, Elektrim sought an order to set aside a Partial Award dated 22nd May 2006 on the grounds that it had obtained by fraud or, in the alternative, that the way in which the Partial Award had been procured was contrary to public policy;

(ii) under s.80(5) for an extension of time for making the s.68(2)(g) application beyond the permitted 28 day period after publication of the Partial Award;

(iii) for a declaration to the effect that the Vivendi defendants had collectively repudiated or renounced the arbitration agreement and that an injunction be granted to restrain any further conduct of the arbitration.

The central allegation made by Elektrim was that Vivendi, but not its lawyers, had deliberately concealed a vital Memorandum that had been written at a crucial stage of the negotiations for the contract (the "TIA") between Vivendi and Elektrim; these negotiations were themselves at the heart of the disputes in the LCIA arbitration. The Memorandum allegedly revealed that, contrary to representations made by Vivendi at the time of the negotiations with Elektrim for the TIA, Vivendi were in negotiations with Deutsche Telecom ("DT") about the sale of shares in Telco, one of the co-defendants in the present proceedings. It was said that any negotiations with DT would be contrary to Elektrim's rights under the TIA and its expectations about Vivendi's strategic intentions concerning Elektrim, Telco (then owned partly by Vivendi) and through Telco, Vivendi's investment in PTC whose shares were partly owned by Telco and where PTC is the largest mobile phone network in Poland. A battle for ownership of PTC has been in progress since 1999, involving Elektrim, Vivendi and DT

Elektrim submitted that if this Memorandum had come to light in the course of the arbitration and before the oral hearing in January 2006, then the Partial Award would have upheld Elektrim's case and the tribunal would have found that Elektrim had entered the TIA as a result of a mistaken view of Vivendi's intentions or as a result of Vivendi's deceit. The arbitrators would have accepted Elektrim's submission that the TIA was void and made a declaration accordingly.

The tribunal comprised Alan Redfern (nominated by Vivendi), Professor Jerzy Rajski (nominated by Elektrim) and Wolfgang Peter (Chairman).

In front of Aikens J, Elektrim was represented by Richard Millett QC, son of Lord Millett, the recently-retired House of Lords judge, and the Vivendi defendants by Toby Landau.

The detailed facts of the case are exceptionally complex and do not require repetition in this short posting; similarly, I will not endeavour to summarise the detailed arguments of such distinguished Counsel.

In an important judgment (at least as regards s.68(2)(g)) Aikens J:

(i) granted the s.80(5) application for an extension (approx. 5 weeks) of time;

(ii) agreed with Moore-Bick J who had held (in a previous case) that in the context of disclosure, documents had to be deliberately withheld to the knowledge of a party to the arbitration (or its solicitors), before it could be said that the award had been procured contrary to public policy. He had said that normally it would have to be shown that there had been some "*reprehensible or unconscionable conduct*" by the party concerned, that had contributed in a substantial way to obtaining an award in that party's favour. Therefore, at least in the context of allegations of perjury and deliberate concealment of relevant documents, the phrase "*an award procured contrary to public policy*" went no wider than the phrase "*an award obtained by fraud*" for the purposes of section 68(2)(g).

(iii) concluded that it had not been demonstrated that anyone in Vivendi, or its lawyers, had deliberately concealed the Memorandum, nor (if relevant) had it been demonstrated that the discovery exercise

conducted by Vivendi and its lawyers following the tribunal's procedural orders relating to discovery had been deliberately narrow or perverse; there was no evidence from which to infer that any of the actions (or inactions) by relevant people were done with the intent to conceal either the Memorandum specifically, or with an intent to ensure that possibly damaging memoranda would not come to light;

(iv) held that even if it was assumed that the Memorandum had been deliberately concealed by Vivendi or the "failure" to produce it had been a fraud, and even assuming that it could be shown that some of the evidence given by the writer thereof had been false and he had known that it was and that his fraud must be regarded as Vivendi's fraud, it could not be shown that the Partial Award in favour of Vivendi on the relevant points had been obtained by fraud. Further, it could not be shown that the award had been "*procured contrary to public policy",* the necessary causative links between the (assumed) deliberate concealment of the Memorandum or fraudulent failure to produce it, the (assumed) perjured evidence and the conclusions in the Award being absent.

(v) dismissed Elektrim's s.68(2)(g) application.

(vi) held that the obligations placed on parties by s.40 AA96 did not constitute an implied term in the arbitration agreement.

5th February 2007

Arbitration vs Litigation

The Court of Appeal made an interesting, albeit not novel, observation in *Attheraces Ltd & Anr v British Horseracing Board Ltd & Anr* [2007] EWCA Civ 38.

Per Mummery LJ

2. This case involves a challenge, on competition law grounds, to the lawfulness of the financial and other terms on which a party in sole possession of valuable information (pre-race data about British horse races) is willing to supply it to another party. The legal basis of challenge is that the party possessing the information has allegedly abused a dominant position in connection with ongoing access to, and the pricing of, information, the supply of which is an "essential facility" for the established business of the other party (the supply of audio-visual services about British horse races).

3. Protracted negotiations between the parties have failed. People willing to do business with one another usually reach agreement on terms without going to court. If they do not reach agreement, the court cannot usually do much about it. It has no power, in the absence of an express statutory jurisdiction, to negotiate an agreement for them or to impose terms on them. In this case the relevant power of the court under competition legislation is to award a legal remedy if it finds that there has been an abuse of a dominant position in the relevant market by an unreasonable refusal to supply the information, which is the product in question, or by the demand for payment of excessive, unfair or discriminatory prices for access to it. In this case all of these types of abuse are alleged and relief is claimed by way of declarations and an injunction.

4. The proceedings presented the trial judge (Etherton J) and this court with a range of factual and legal problems of a kind which even specialist lawyers and economists regard as very difficult. This is the view of Professor Richard Whish in Competition Law (5th ed - 2003): "The law on abusive pricing practices is complex and controversial" (p.685) and "In practice it is immensely complex to determine what is the appropriate price for access to an essential facility" (p.693).

5. The trial judge concluded that there was excessive, unfair and discriminatory pricing, in addition to an unreasonable refusal to supply in relation to an essential facility. Essential facilities arguments have most commonly arisen in relation to access to unique physical structures or facilities, such as seaports, airports, pipelines, cables and wires. The problems inherent in the pricing exercise can also arise when the essential facility in question is access to an intangible, unique and ephemeral product, such as information generated solely by the party in possession of it. In this unusual case the information in question is not gathered from generally available materials, or for its own sake, or as a primary activity. Its creation is a secondary activity associated with broader primary responsibilities of the party possessing the information.

6. The claim of abuse of dominant position in relation to the information poses this crucial question: when is the price charged by the person controlling access to the information so high as to be excessive or unfair? This question prompts other questions. Is there a pricing principle which can be applied to such a case? If so, what is a non-abusive "right price" and how is it to be ascertained by the court? Is it, as was held in this case, the cost of production of the information plus a reasonable profit (called "cost +")? If the possessor of the information may only lawfully charge a price calculated in this way, how does the court set about ascertaining the cost + price? In comparing the price charged and the cost incurred, what should be included in the allowable costs incurred? Is it only the costs directly involved in the secondary activity of creating, collating and compiling the information, or does it include, or reflect, all, or only some, and, if so, which, of the costs incurred in conducting the primary activity to which the information relates?

7. The nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties

fail, be solved more satisfactorily by arbitration or by a specialist body equipped with appropriate expertise and flexible powers. The adversarial procedures of an ordinary private law action, the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation.

18th February 2007

Bias In Arbitration: an Appeal Overturned but the Ghost Of ASM v TTMI Returns ...

I have previously reported (on 15th March 2006) on an interesting case *Sukuman Ltd v The Commonwealth Secretariat* ([2006] EWHC 304 (Comm); Colman J; 27th February 2006) which raised, inter alia, an interesting Art. 6 ECHR issue. Sukuman (called Sumukan in the present judgment by Toulson J ([2007] EWHC 188 (Comm)) has tried again to defeat an arbitral award against it, this time on ss.67 and 68 grounds, having failed on s.69; a case of two bites of the cherry ? Read on !

Sumukan contracted with the Secretariat to develop a prototype procurement website but a dispute arose over ownership thereof, determined in the Secretariat's favour by an independent arbitral tribunal, the Commonwealth Secretariat Arbitral Tribunal (CSAT) comprising very senior Commonwealth lawyers (e.g. including the former Chief Justice of Bermuda. An oral hearing took place in London from 8th to 11th February 2005. The Tribunal was presided over by an Australian law professor of immense distinction, Professor Duncan Chappell.

Sumukan applied under s.69 for LTA but Colman J concluded that an appeal was excluded by Art. 9.2 of the CSAT statute; he also concluded that s.3 HRA98 and Art. 6 ECHR did not impact on the enforceability of the exclusion agreement - an appeal against his judgment has recently been heard.

Sumukan was given permission to amend its claim form to cover whether the award should be declared to be of no effect or set aside, under ss.67 or 68, on grounds of lack of substantive jurisdiction or serious irregularity. Its new complaint under s.68 was that the CSAT was incapable of complying with the general duty of fairness under s.33 or with Art. 6 because it was not a tribunal independent of the Secretariat. In addition, Sumukan invoked s.67 and s.24. The Secretariat contended that all the complaints are misconceived, but that in any event under s.73 Sumukan had lost its right to make any of its objections by taking part in the arbitration and waiting until after it had lost before advancing them. Responding to the s.73 point, Sumukan contended that it did not know, and could not with reasonable diligence have discovered, the grounds for its objections at the time of the hearing and therefore s.73 had no application. It also argued that s.73 should be construed so as to comply with ECHR jurisprudence relating to the waiver of Art. 6 rights and that there had been no such waiver.

Sumukan's s.67 complaint centred on the manner and duration of the appointment of Professor Chappell since, it argued, Professor Chappell lacked jurisdiction to act as a member of the Tribunal both because of deficiencies in his manner of appointment and because his appointment had expired. The s.68 complaint was that there had been serious irregularity causing substantial injustice; Sumukan relied in particular on the judgment of the Privy Council delivered by Lord Steyn in *Lawal v Northern Spirit Ltd* [2003] ICR 856 where he had cited the speech of Lord Hope in *Porter v McGill* [2002] 2 AC 357 at §§102-103, to the effect that the question is whether the FMIO, having considered the facts, would conclude that there is a real possibility that the tribunal was biased, and continued:

Sumukan's s.68 complaint was two-part: (i) there was a structural lack of independence in the Secretariat/CSAT giving rise to an appearance of bias; (ii) the internal processes surrounding Professor Chappell's appointment were such as to give rise to reasonable perception of a risk of unconscious bias.

Toulson J outlined the circumstances of Professor Chappell's appointment in great detail, following the retirement in 2001, on health grounds, of the then President of CSAT. These details lie outwith the scope of the note but suffice it to say that Professor Chappell received two appointments: (i) in 1999, as a member of the Tribunal and (ii) in August 2001, as [temporary] President of CSAT intended to be only until January 2002 but in fact his Presidency continued until 31st December 2004, so overlapping with his serving on the Tribunal hearing the Sumukan case. The Judge disposed of the s.67 issue by concluding that the panel was by that stage seized of the arbitration and CSAT Rule 3 authorised Professor Chappell to continue to act as arbitrator until its conclusion.

The s.68 Issue

On the first leg of its complaint, Sumukan argued that: (i) the Tribunal was appointed by the head of the Secretariat which would always be a party to the case before the Tribunal; (ii) the Secretariat was responsible for providing administrative arrangements for the Tribunal and meeting its expenses, and (iii) (3) the Secretary-General had power to amend the Secretariat Statute, so that an FMIO would conclude that there was a real possibility of the Tribunal being biased, regardless of who the individual arbitrators were.

Toulson J rejected this argument since the provisions of Article IV.4 and IV.5 of the Statute were reasonably designed to ensure that any member of the Tribunal would be a person of high moral and professional standing, who could be relied upon to act independently. In so concluding, he had taken note of concerns expressed by the Joint Committee on Human Rights in its comments on the International Organisations Act 2005 to the effect that, if

immunity from suit was to be compliant with Art. 6 ECHR, the CSAT needed to be institutionally independent of the Secretariat, but that Act had no effect in relation to the contract between the parties and, since in the present case the court would have jurisdiction to intervene if there had been serious irregularity causing substantial injustice, the latter was not established merely by the lack of institutional independence under the Statute.

The second leg of Sumukan's argument raised more difficult issues since there had been a series of irregularities concerning Professor Chappell's appointment(s) (for which, of course, he was not responsible). Would an FMIO have concluded that there was a reasonable possibility, or a real danger, of the Professor being biased in the Secretariat's favour ? An observer who had considered looked only the internal processes of the Secretariat might well have reached that conclusion but the Judge considered that an FMIO would have gone further and have considered the eligibility of the person appointed and to what extent the process of appointment might fairly be regarded as tainting the trust which could be placed in the appointee to exercise independent judgment, because it is his possible propensity to bias which was in issue. Taking all those matters into account, the Judge was not persuaded that an FMIO would have reached the conclusion that there was a real possibility or real risk of Professor Chappell being biased towards the Secretariat.

Toulson J added that, if he had decided that an FMIO would have concluded that there was a real possibility of bias, he would have found that there was serious irregularity causing substantial injustice within the meaning of s.68 and he would have adopted the reasons given by Morison J in *ASM Shipping Limited v TTMI Ltd* [2006] 1 Lloyd's Rep 375 at §39(3).

The s,73 Waiver Issue

This issue did not arise in view of the rejection of the ss.67 and 68 complaints but the Secretariat contended that Sumukan was barred from advancing either complaint by s.73(1); the issue was fully argued and Toulson J, with an eye to the Court of Appeal, stated my conclusions briefly.

Sumukan was controlled by Ms J and, inter alia, she had not been not aware at the time of the arbitration of the irregularities in the appointment of Professor Chappell, these matters only emerging from disclosure of documents in the current proceedings. The Secretariat submitted that Sumukan could with reasonable diligence have discovered those matters by making the request for disclosure of documents which it later made in these proceedings. In *Rustal v Gill and Duffus* [2000] 1 Lloyd's Rep 1 at page 20 Moore-Bick J had said: “There is, however, a more fundamental objection of principal to a party's continuing to take part in proceedings while at the same time keeping up his sleeve the right to challenge the award if he dissatisfied with the outcome." The objectionableness of such behaviour would apply equally to a person who had actual knowledge of an irregularity and to one who had grounds to believe that there was an irregularity but chose not to raise the matter but would not apply to someone who neither knew the essential facts constituting the irregularity nor had grounds to believe that there was an irregularity.

Art. 6 ECHR supported this approach: to hold that a party had waived its right to an impartial tribunal without knowledge of the relevant facts, or of grounds to believe facts which the party chose not to pursue although having the means to do so, would be an unjust and disproportionate restriction of the right to be protected by Art. 6; In *Miller v Dixon* [2002] 1 WLR 1615, Lord Hope had said (at §58): "the Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal."

Toulson J held that it would be wrong to construe and apply s.73 so as to hold that Sumukan could, with reasonable diligence, have discovered facts which it neither knew nor believed nor had grounds to suspect existed; by participating in the arbitration without raising proper objection, Sumukan would have forfeited the right to raise such an objection later, but it did not forfeit its right to make a later complaint based on matters of a different kind beyond its previous knowledge or belief, merely on the basis that it would have discovered the latter by pursuing the former.

Conclusion

Toulson J concluded by dismissing Sumukan’s application, not on grounds of waiver, but because, notwithstanding procedural irregularities regarding Professor Chappell's appointment, there was no lack of jurisdiction nor real possibility of bias.

Comment

While I welcome Toulson J’s conclusion, I am concerned that the modern move towards greater objectivity in testing for bias has been sidetracked. While no-one would question the ethics and integrity of someone of Professor Chappell’s evidently immense distinction, will I or Fred next door benefit from the same judicial approval irrespective of the facts of my or Fred’s circumstances ? If not, where is any line to be drawn ? Is it that Professors, retired Judges and QCs are “good”, non-QC barristers and ordinary mortals “”bad” ? Do we distinguish between full Professors and Associate Professors ? If not, do we distinguish between a US Associate Professor and an English University Lecturer ? How do we classify the full Professor at a UK university who, according to

newspaper reports (not denied), achieved his status in part by exhibiting a fraudulent CV (but whose appointment was not rescinded) ? And how many angels dance on the head of a pin ?

I am also concerned at the citation (with approval), for the second time now (see Colman J in *Norbrook Laboratories v Tank & Anr* (2006) EWHC 1055 (Comm) at §144), Morison J's judgment in *ASM v TTMI* which decision, as I have argued before, is patently wrong on its facts even if it purports to state the law. Further, and perhaps much more significantly, Morison J and Toulson J each relied on Lord Steyn's speech in *Lawal v Northern Spirit* but Lord Steyn himself has publicly expressed "surprise" at Morison J's reliance thereon, indicating that *Lawal* had nothing to do with arbitration (of course, Sumukan involves a public body so there may be a *Lawal* argument but that was not the case in *ASM v TTMI*)

The persistence of Ms J/Sumukan is noteworthy; she/it has now lost twice in the High Court and a Court of Appeal decision is imminent. It is fervently to be hoped that the end of this case is indeed nigh.

21st February 2007

Punitive Damages in the US Supreme Court

While the notion of "punitive damages" is alien to many of us, we are well advised at least to be aware of the several considerations underlying awards of of punitive damages in US Courts. These considerations have just been reviewed in the US Supreme Court in a smoker's case where a 5-4 majority threw the award out but on narrow procedural grounds, expressly reserving the Court's position on whether the award was constitutionally "grossly excessive".

These considerations can apply in the UK eg iro the CIArb's NASD Panel which hears US securities arbitrations in London but with London as venue, not as seat, and the FAA applies.

I am greatly indebted to the Legal Information Institute of Cornell Law School for permission to reproduce their notes below; these are daily reports on US Supreme Court business and I find these of real educational value in widening my perspectives on judicial (and therefore also arbitral) thinking.

==========

PHILIP MORRIS USA v. WILLIAMS (No. 05-1256)

Web-accessible at:

http://www.law.cornell.edu/supct/html/05-1256.ZS.html

Argued: October 31, 2006 -- Decided: February 20, 2007

Opinion author: Breyer

==========

In this state negligence and deceit lawsuit, a jury found that Jesse Williams' death was caused by smoking and that petitioner Philip Morris, which manufactured the cigarettes he favored, knowingly and falsely led him to believe that smoking was safe. In respect to deceit, it awarded $821,000 in compensatory damages and $79.5 million in punitive damages to respondent, the personal representative of Williams' estate. The trial court reduced the latter award, but it was restored by the Oregon Court of Appeals. The State Supreme Court rejected Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court, and that the roughly 100-to-1 ratio the $79.5 million award bore to the compensatory damages amount indicated a 'grossly excessive' punitive award.

Held:

1. A punitive damages award based in part on a jury's desire to punish a defendant for harming non-parties amounts to a taking of property from the defendant without due process. pp. 4-10.

   (a) While '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition,' BMW of North America, Inc. v. Gore, 517 US 559 , unless a State insists upon proper standards to cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice â€¦ of the severity of the penalty that a State may impose,' id., at 574; may threaten 'arbitrary punishments,' State Farm Mut. Automobile Ins. Co. v. Campbell, 538 US 408 ; and, where the amounts are sufficiently large, may impose one State's (or one jury's) 'policy choice'upon 'neighboring States' with different public policies, BMW, supra, at 571-572. Thus, the Constitution imposes limits on both the procedures for awarding punitive damages and amounts forbidden as 'grossly excessive.' See Honda Motor Co. v. Oberg, 512 US 415 . The Constitution's procedural limitations are considered here. (pp. 4-5).

   (b) The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation. For one thing, a defendant threatened with punishment for such injury has no opportunity to defend against the charge. See Lindsey v.

Normet, 405 U. S. 56 . For another, permitting such punishment would add a near standardless dimension to the punitive damages equation and magnify the fundamental due process concerns of this Court's pertinent cases-arbitrariness, uncertainty, and lack of notice. Finally, the Court finds no authority to support using punitive damages awards to punish a defendant for harming others. BMW, supra, at 568, n.11, distinguished. Respondent argues that showing harm to others is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harms to those nonparties. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury is asking the right question; and given the risks of arbitrariness, inadequate notice, and imposing one State's policies on other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. (pp. 5-8).

(c) The Oregon Supreme Court's opinion focused on more than reprehensibility. In rejecting Philip Morris' claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties, it made three statements. The first-that this Court held in State Farm only that a jury could not base an award on dissimilar acts of a defendant-was correct, but this Court now explicitly holds that a jury may not punish for harm to others. This Court disagrees with the second statement - that if a jury cannot punish for the conduct, there is no reason to consider it -since the Due Process Clause prohibits a State's inflicting punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility. The third statement-that it is unclear how a jury could consider harm to nonparties and then withhold that consideration from the punishment calculus-raises the practical problem of how to know whether a jury punished the defendant for causing injury to others rather than just took such injury into account under the rubric of reprehensibility. The answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. Although States have some flexibility in determining what kind of procedures to implement to protect against that risk, federal constitutional law obligates them to provide some form of protection where the risk of misunderstanding is a significant one. pp. 8-10.

2. Because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award, this Court will not consider the question whether the award is constitutionally 'grossly excessive.' p.10.

340 Ore. 35, 127 P. 3d 1165, vacated and remanded.

Breyer J delivered the opinion of the Court, in which Roberts CJ and Kennedy, Souter, and Alito JJ joined. Stevens, J and Thomas J filed dissenting opinions. Ginsburg J filed a dissenting opinion in which Scalia and Thomas JJ joined.

21st February 2007

Common Sense in the English Courts

In *Aveat Heating v Jerram Falkus* ([2007] EWHC 131 (TCC)) HHJ Havery QC said:

13. [Counsel for Jerram] submitted that the adjudicator's decision was out of time even if not due until 17th November. The adjudicator [had] acknowledged receipt of the notice of referral by letter dated 13th October 2006 apparently faxed at 16:24. Thus the time for reaching the decision would expire at 16:24 on 17th November at latest (I have given times which appear to me to be correct and which differ from those given by [Counsel], but that difference does not affect the argument). The decision appears to have been sent to the parties by fax timed at 18:29 on 17th November. Moreover, 18:29 was after business hours, and the fax message was not in fact received by the defendant until opening of business at 09:00 on Monday, 20th November. In my judgment, no account is to be taken of fractions of a day. The adjudicator reached his decision on 17th November, within the time allowed.

This is consistent with HHJ Coulson's decision in *Cubitt v Fleetglade* where the adjudicator's decision was reached at 2245 on the notional Day 28; Keep It Simple !!

In *Ravennavi v New Century Shipbuilding* ([2007] EWCA Civ 58), Moore-Bick LJ said:

12. As will already have become apparent, this case raises no more than two short points of construction ….. In my view this is a case which has suffered from over-elaboration and an over-analytical approach on the part of the parties. The result has been skeleton arguments of considerable complexity running to a total of

101 paragraphs (in the case of the Buyer) and 112 paragraphs (in the case of the Yard) respectively … Unless the dispute concerns a detailed document of a complex nature that can properly be assumed to have been carefully drafted to ensure that its provisions dovetail neatly, detailed linguistic analysis is unlikely to yield a reliable answer. It is far preferable, in my view, to read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both parties in order to ascertain what they were intending to achieve.

A case of over-lawyering ?

23rd February 2007

Anti-Suit Injunctions: EU Regulations vs NYC58 – who Will Win ?

The case *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & Ors* ([2007] UKHL 4), decided in the House of Lords on 21st February, has the potential to change, significantly and adversely, the face of arbitration in the EU with consequent damage to London and other EU arbitration centres. At the heart of the issue is a tension between EU regulation on the one hand and the realities of international commercial arbitration on the other; one view of the likely outcome of the present proceedings is that the ECJ may, in effect, deny EU Member States the opportunity to prevent other Member States from defaulting on their NYC58 treaty obligations and thereby deny parties their NYC rights.

As stated by Lord Hoffman in giving the principal judgment "The main question in this appeal is whether a court of a Member State may grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings in breach of the agreement in a court of another Member State which has jurisdiction to entertain the proceedings under EC Regulation 44/2001 ("the Regulation") … It is … the duty of the House to refer the question to the ECJ under Article 234 [Treaty of Rome].

The Facts

In August 2000, a vessel owned by Tankers and chartered to an Italian company, ERG, collided with a jetty owned by the latter at Syracuse, causing damage. The C/P provided for English law/London arbitration. ERG claimed upon its insurers up to the limit of cover and commenced arbitration in London against Tankers for the policy excess. Tankers counterclaimed that it was not liable for any of the damage caused by the collision. The pleadings in the arbitration are complete.

In July 2003, Insurers commenced proceedings in delict against Tankers before the local court in Syracuse to recover the amounts which they had paid ERG under the policies. Subject to any application for a stay pursuant to NYC58, to which Italy is a party, the Italian courts have jurisdiction under Art. 5(3) of the Regulation.

In September 2004, Tankers commenced the present proceedings against Insurers, claiming declarations, inter alia, that Insurers were bound by the arbitration agreement. Tankers also claimed an injunction to restrain Insurers from taking any further steps in relation to the dispute except by way of arbitration and in particular requiring them to discontinue the proceedings in Syracuse. On 21st March 2005, Colman J decided that, both in English and Italian law, the right to the delictual claim which had been transferred to the insurers by subrogation was subject to the arbitration clause in the charterparty and he therefore made the declarations claimed by Tankers. He held that he was bound by the decision of the Court of Appeal in *TTMI v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67 that it would be consistent with the Regulation to grant an anti-suit injunction and he therefore granted the injunction. Given the CoA decision in *TTMI*, the present case was leap-frogged direct to the House of Lords.

The jurisdictions of the Courts of Member States are governed by the Regulation but Art. 1(2)(d) thereof provides that it is not to apply to arbitration. S.37(1) Supreme Court Act 1981 confers on the High Court the jurisdiction to grant an injunction (whether interlocutory or final) "in all cases in which it appears to the court to be just and convenient to do so." English courts have regularly exercised this power to grant injunctions to restrain parties to an arbitration agreement from instituting or continuing proceedings in the courts of other countries (e.g. see *The Angelic Grace* [1995] 1 Lloyd's Rep 87); in addition, by ss.44(1) and (2)(e) AA96 the court has power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings".

Lord Hoffman's Observations

In case it should be of any assistance to the Court of Justice, Lord Hoffman stated his own opinion (with which Lords Nichols, Steyn, Rodger and Mance agreed) on the question referred.

Gasser (which decided that a court of a Member State on which exclusive jurisdiction has been conferred cannot issue an injunction to restrain a party from prosecuting proceedings before a court of another Member State if that court was first seised of the dispute) and *Turner v Grovit* (which decided that a court of a Member State may not issue an injunction to restrain a party from commencing or prosecuting proceedings in another Member State which has jurisdiction under the Regulation, on the ground that those proceedings have been commenced in bad faith) were both based upon the proposition that the Regulation provided a complete set of uniform rules for the allocation of jurisdiction between Member States and that the courts of each Member State had to trust the courts of other Member States to apply those rules correctly.

However, arbitration is excluded from the scope of the Regulation by Art. 1(2)(d), inter alia because the basic principles by which the Regulation allocates jurisdiction, giving priority (subject to exceptions) to the domicile of the defendant, are entirely unsuited to arbitration, in which the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction. There is no set of uniform Community rules which Member States can or must trust each other to apply. While all Member States are party to NYC58 (which Art. 71 of the Regulation declares to be unaffected) the Convention is not a Community instrument and does not create a system for the allocation of jurisdiction comparable with the Regulation.

It was settled by the ECJ decision in *Marc Rich v Impianti* ("the *Atlantic Emperor*") that the exclusion applies not only to arbitration proceedings as such but also to Court proceedings in which the subject-matter is arbitration. In *Van Uden Maritime BV v Deco-Line* the ECJ decided that the subject-matter is arbitration if the proceedings serve to protect the right to have the dispute determined by arbitration.

The present proceedings existed solely to protect Tankers' contractual right to arbitrate the dispute, therefore fell outside the Regulation and could not be inconsistent with its provisions; the arbitration agreement lay outside the system of allocation of court jurisdictions which the Regulation created. There was no dispute that, under the Regulation, the local court in Syracuse had jurisdiction to try the delictual claim but the arbitration agreement is an agreement ***not to invoke*** that jurisdiction and it is that agreement which Colman J's injunction required to be performed. An exclusive jurisdiction clause was quite different since it took effect within the Regulation under Art. 23 and its enforcement must therefore be in accordance with the terms of the Regulation (in particular Art. 21) but an arbitration clause took effect outside the Regulation and its enforcement is not subject to its terms.

The contrary argument was that any court order in any proceedings (whether falling within the scope of the Regulation or not), which restrained a party from invoking a jurisdiction available under the Regulation, conflicted with the Regulation because it amounted to an indirect interference with that jurisdiction. Lord Hoffman agreed with a leading German academic's description of this argument as 'divorced from reality'. To extend the application of the Regulation to orders made in proceedings to which the Regulation did not apply went far beyond the reasoning in *Gasser* and *Turner v Grovit* and ignored the practical realities of commerce.

Lord Hoffman considered that perhaps the most important consideration was the practical reality of arbitration: people engaged in commerce chose arbitration in order to go outside the procedures of ***any*** national court, preferring the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. It was not only a matter of procedure: the choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broad equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices. However, arbitration could not be self-sustaining, needing the support of the courts but, as eloquently stated by the A-G in *The Atlantic Emperor*, it was important for the commercial interests of the EU that it should give such support: different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.

UK Courts have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. This is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration, promoting legal certainty and reducing the possibility of conflict between the arbitration award and the judgment of a national court; it also saved a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction (as happened in *The Atlantic Emperor*) and so little as to lead to a default judgment. This was just what parties had intended to avoid by having an arbitration agreement.

It was entirely a matter for the parties to decide whether to submit themselves to English jurisdiction by choosing London arbitration and the [English] courts existed to serve the business community rather than vice versa; no-one was obliged to choose London (but see below). The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly did not deter parties to commercial agreements, but, on the contrary, was one of the advantages which the chosen seat of arbitration had to offer. In proceedings falling within the Regulation it was right, as the ECJ had said in *Gasser* and *Turner v Grovit*, that courts of Member States should trust each other to apply the Regulation but in arbitration cases, it was equally necessary that Member States should trust the arbitrators (*Kompetenz-Kompetenz*) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.

Finally, it should be noted that the EU was engaged not only with regulating commerce between Member States but also in competing with the rest of the world; if Member States are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will (e.g. New York, Bermuda and Singapore exercises the jurisdiction which is challenged in this appeal. Lord Hoffman saw no doctrinal necessity or practical advantage requiring the EU to handicap itself by denying its courts the right to exercise the same jurisdiction.

Lord Mance agreed, finding the views advanced against the Regulation's extension to the arbitral context powerful, such extension being a major step, affecting the choice of venue and efficacy of international arbitration generally.

The purpose of arbitration was that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. His experience as a commercial judge showed that, once a dispute had arisen within the scope of an arbitration clause, it was not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed (and, he emphasised, carefully applied) tool which had proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements. It would in practice be no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being, however clearly, disregarded) the only remedy was to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wished to draw the other party into, but is precisely what the latter party aimed and bargained to avoid.

Comment

Logically there can be only one answer to the question referred by the HoL to the ECJ but academic discussion over the internet has failed to identify anyone who firmly believes that the ECJ will reach the "right" conclusion, the majority generally taking a negative (or worse) view of the prospects therefor.

So what happens if the ECJ "gets it wrong" ? First, Tankers will have to engage in the litigation in Syracuse which is precisely what it should to avoid by contracting under a C/P with a London arbitration clause. Second, EU courts which are either rogue, incompetent or merely ill-informed will be given a licence to trample over arbitration agreements and over NYC58. Third, smart cookies will play the litigation game, preferably in courts which take years to come to a substantive hearing, in order to derail arbitrations. Fourth, international parties will, as Lords Hoffman and Mance sagely observe, look elsewhere for an arbitration centre (perhaps, with my being a member of many non-EU Panels, I should not complain !).

While it is not for me to criticise the Regulation, its fundamental assumption that courts in different Member States are of equal stature and should 'trust each other' appears, to put it mildly, to be no less fundamentally flawed; to impose that flawed foundation on international commercial arbitration is as absurd as it is unwarranted. Some contributors to the academic discussion suggest that if the Syracuse court finds some reason that the arbitration agreement is void or unenforceable, that decision should be respected; in the real world, 'respect' is earned by performance and merit, not by imposition by a regulatory authority. A large number of ECHR cases are reportedly pending against Italy for breach of the Art.6(1) right to trial within a reasonable time (I was involved in a case where we were told we should allow 10-12 years for obtaining a final decision); in contrast, the CoA judgment in *Fiona Trust* (reversing a poor first instance decision) was issued <14 weeks later and *Tankers* took <2 years from High Court to HoL.

So we wait.

Postscript

Lord Hoffman stated that no-one was obliged to choose London arbitration but the Insurers might argue that they were since they were "dumped in it" by ERG. There is no merit in any such argument - it was always open to Insurers to impose policy restrictions on ERG's choice of dispute resolution process, location and governing law (this is routinely done in the insurance sector).

22nd May 2007

Effect of ECHR Art.6 on Arbitration Appeals

An arbitration agreement is, inter alia, an agreement to exclude the full effect of Art.6 ECHR this is amply clear from ECtHR jurisprudence as I have summarised in previous reports and will not repeat here; it is not an absolute exclusion since Art.6 may apply in certain circumstances e.g. (in several of the ECtHR cases) where the arbitration agreement is mandated by statute and was not freely negotiated or where there was some fundamental failure in the process by which an allowable appeal to the court was made. In a case such as the latter, the CoA retains a residual jurisdiction to act (the "*North Range* jurisdiction"). In *CGU v Astra Zeneca* ([2006] EWCA Civ 1340, [2007] 1 Lloyds Reports page 142) Rix LJ said at §100

> "It is important to underline what was also said in *North Range* about the dangers of this residual jurisdiction being misused. There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not only wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration."

RoK v Istil revisited this territory generating what I read as a rather terse judgment with more than a hint of "don't waste our time"; the weakness of Istil's arguments is demonstrated by RoK's Counsel winning his case without making any oral submission beyond "Good morning My Lords" and Thank you my Lords". In the TCC, the classic judgement by Jackson J opens with language such as "I will state at the outset: this appeal is utterly

hopeless/devoid of merit/wholly unsustainable/…" The CoA could reasonably, and perhaps should, adopt the same approach in dealing with hopeless appeals.

The Facts, the Arbitration and the 1st Instance Proceedings

The case is one of those typically complex ones involving great corporate complexity, involving numerous tax havens, arising out of privatisation of state assets of a former state of the USSR. The details do not concern us here save that, inter alia, Istil's predecessor in title, MR (a BVI company), had claimed it was owed >$10 billion by RoK. First, MR started proceedings in the Paris Commercial Court which held that the French courts had no jurisdiction. MR then initiated an LCIA arbitration and the tribunal duly dealt with the question of jurisdiction in a partial award but by that time MR had merged into Istil. According to BVI law that meant that MR had ceased to exist but no-one told the tribunal of that fact, so that the partial award, which decided that it did indeed have jurisdiction, was in favour of MR. The tribunal subsequently issued a final award in favour of Istil and this final award decided, inter alia, that the partial award was a nullity, since MR had ceased to exist. The tribunal then substituted Istil as claimant and confirmed its original conclusion as to jurisdiction, holding, in addition, that RoK had acquired liabilities to Istil.

RoK then issued proceedings before the Commercial Court under s.67 of the Arbitration Act 1996, on the grounds that the award of the tribunal had been was outside its jurisdiction. On 3 April 2006, David Steel J held: (1) any contention by Istil that the tribunal had exceeded its powers in setting aside its partial award should have been pursued under s.68 of the Act but that it had not been; (2) the parties were therefore now bound by the decision that the partial award was a nullity; (3) *Obiter*, that the partial award was not in fact a nullity since Istil had succeeded to MR's right to arbitrate under BVI law and that, although English law required notice of Istil's succession to be given, once it was given the arbitration could continue and any orders or awards already made would be effective; (4) RoK had never made any ad hoc agreement to the effect that the tribunal could finally decide the question of jurisdiction; (5) Karmet (the steel producer at the heart of the dispute) and RoK were separate legal entities so that RoK could not be liable just because Karmet was; (6) none of the disputed steel supply contracts had been made by companies called Sauda or Oltex as agents of RoK but only, if at all, as agents for Karmet; (7) ROK had never become party to any arbitration clause; (8) The claim before the tribunal was essentially the same as that made before the Paris Commercial Court, which had decided that the claim did not fall within the arbitration clause, and Istil was now estopped from arguing the contrary.

For all these reasons, David Steel J decided that the tribunal lacked substantive jurisdiction to consider Istil's claims and that the award should be set aside; critically he refused permission to appeal and Istil now sought permission to appeal and the question now before the CoA was whether it had any jurisdiction to grant permission to appeal once the judge has refused.

The Court of Appeal

AA96 ss.67(4), 68(4), 69(6) and 69(8) require the leave of the first instance judge to appeal his decision to the Court of Appeal. In order to maintain the compatibility of ss.68 and 69 with Art. 6, the CoA is permitted a very limited inroad on the finality of the judge's decision and have held (in *CGU v AstraZeneca*) that if there was any procedural unfairness in the judge's decision, in relation to the question of an appeal or, if this is different, a failure to engage with the arguments on that limited question this court can set aside the judge's decision. At §79 in CGU, Rix LJ had said "What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision." and at §80 "For these purposes, it is clear that perversity in itself, a decision that no reasonable decision-maker could make, is not enough. It might be enough in judicial review: but in this context, perversity is an error of law like any other."

Istil argued, on four grounds (one of which it withdrew), that permission to appeal should have been given and that the CoA should so decide or refer the matter back to the judge:

(i) s.67(4) was incompatible with Art. 6 and should be construed so as to provide that the leave of the court of first instance "or the Court of Appeal" is required for any appeal from a decision under s.67;

(ii) the judge had failed to engage with a key point in Istil's argument and the judge had also failed to appreciate that the point, if decided in Istil's favour by him or on appeal, would dispose of the application;

(iii) in the judge's written reasons, as opposed to his oral reasons, he had applied a test which was stricter than the test which should be applied: namely, whether there was any reasonable prospect of success.

The s.67(4) Argument

Longmore LJ described this as "impossible", partly because the CoA had already decided this question of construction in *Athletic Union of Constantinople v National Basketball Association* [2002] EWCA Civ 830, [2002] 1 WLR 283, by holding that once the first instance judge has made a decision on the arbitration tribunal's jurisdiction and has refused permission to appeal, the CoA had no jurisdiction to grant permission to appeal. The proposed construction was not necessary to protect Istil's human rights despite no ECHR point having been raised in *Athletic Union*, but it had subsequently been raised and comprehensively dealt with in *North Range* [2002] 1 WLR

2397 and in *CGU*, and indeed in *ASM Shipping Limited v TTMI* [2006] EWCA Civ 1341, [2007] 1 Lloyds Reports 136, in relation to s.68 of the Act.

Since the CoA possessed residual jurisdiction to ensure that a fair hearing of the LTA application has been conducted, it was, as a minimum, doubtful whether any special construction had to be given to s.67 (4). However, Istil argued that the safeguards afforded by *North Range* and *CGU* were not sufficient for cases where there was alleged to be an excess of jurisdiction since, unlike the situation which arose under ss.68/69 of the Act where the parties have agreed to arbitration and the court is a second tier, the court is the first tier for jurisdiction or disputes in cases where, on one view of the matter at least, there has never been any arbitration agreement. Consequently, the CoA should return to ECHR basic principles and the Art. 6 right became engaged and for the s.67(4) restriction to be justifiable, it must not only be in pursuit of a legitimate aim but the means used musts be proportional to that aim.

Longmore LJ accepted that Art. 6 was engaged where a state granted a right of appeal but sought to restrict that right; the CoA has so held in relation to s.69 in *North Range* and *CGU*. In the latter, there was cited *De Ponte Nascimento v United Kingdom* (decision 55331/00), a decision on admissibility of an application to the court in relation to the CoA's restrictions on second appeals. *De Ponte* is of relevant because effectively the restrictions on appeals in the relevant sections of the Act relate to second appeals. That was obviously so in relation to s.69 but, despite submissions to the contrary, is scarcely less so in relation to s.67 since when the jurisdiction of arbitrators is under challenge it should be the arbitrators who in the first instance decide their jurisdiction per s.30 which also provides for challenge thereto e.g. under s.67. The parties will, in most if not all cases, have had the benefit of two decisions by the time an award has been made and a challenge to that award has been made in front of the first instance judge.

In these circumstances it was legitimate for Parliament to have sought to restrict further appeals. That was particularly so when s.1(1) provided, inter alia, that the court should not intervene except as provided by the Act. Those aims were legitimate and one way of achieving those aims is by restriction of appeals. The restriction had to be proportionate and the question was whether it was proportionate to restrict what are effectively second appeals to those cases where the judge deciding the application considered that there was no reasonable prospect of success. This restriction was itself a broader concept than the more restricted test for appeals under s.69 of the Act.

Longmore LJ held that it was proportionate because it was in the interests of the legitimate aim that only second appeals which do have a reasonable prospect of success should be permitted to proceed. The only way in which the restriction in this case differed from second appeals in general is that it was the judge rather than the CoA that was given the final say. It was, of course, true that the decision was vested in the judge who had himself decided whether the point argued had been right or wrong but that was not relevant. Judges are "independent tribunals" and one of their common, though no doubt unenviable, tasks was to decide whether to give permission to appeal against their own decisions. In other parts of the civil system, their decision may not be the final one but it is nevertheless a decision which they are accustomed to make. In the context of arbitration cases, where disputes have to be resolved without unnecessary delay or expense, it was proportionate that it should be the judge who knew the case and who had decided the dispute who should be entrusted with the decision whether there is a reasonable prospect of success.

Longmore LJ therefore held that s.67(4) was human rights compliant, provided that it is read in the same way that CGU v AstraZeneca has decided that s.69 should be read viz that it is open to the court to review the fairness of the process of the determination of the question whether leave to appeal should be given.

The Judge's Alleged Failures

Istil argued that the Judge had failed to have dealt with the argument that the partial award was a fully enforceable award which RoK had not sought to set aside and that, pursuant to s.58, Istil therefore had an unassailable right to rely on it. This argument failed for two reasons: (i) the partial award would be likely to be useless to Istil because it was in favour not of Istil but in favour of MR; (ii) a partial award which a later award has declared is a nullity can scarcely be said to be an enforceable award, whether by reason of s.58 or at all. More importantly however, contrary to Istil's submissions, the judge had in fact engaged with that argument by saying that Istil would have had first to apply to set aside the decision in the final award that the partial award was a nullity but had never sought to do so and he had given an oral judgment on the LTA application. In the course of that he had said this:

> "The position it seems to me is perfectly plain. The arbitrators if and to the extent they exceeded their powers in setting aside the partial award were responsible for an irregularity which if either party had objected to they could and should challenge. The [MR Group], if I may call them that, did not do so and the time for that has expired, so I confidently feel that the submission that the [Group's] objection to RoK's attempt to set aside the final award because there was in existence an earlier award is not made out and thus there is no reasonable prospect of success on any appeal."

Istil argued that that was wrong but whether right or wrong was beside the point: the judge had engaged with the point and had given a decision on it; it was impossible to say that he had not engaged with Istil's argument.

Alleged Differences between Written & Oral Judgment

Istil argued that the judge's written reasons had not made any reference to "reasonable prospect of success" but had said that the absence of any entitlement to seek permission from the Court of Appeal emphasised the reason for finality. Longmore LJ noted "If we are going to get to a stage where the written reasons the judge has to provide, some time after his oral judgment, are going to be compared with his oral judgment and nitpicking points are going to be made about whether the same is said in the written reasons as in the oral judgment, we have come to a sorry pass. [Ouch !] The judge clearly had the correct test in mind or, more accurately, the test which [Istil says] is the correct test in mind, and that is no reason to suppose that his written reasons were in any sense overruling what he said in his oral reasons."

Longmore LJ repeated §100 of Rix LJ's judgment in *CGU* and sought to emphasise it as emphatically as he could:

> "It is important to underline what was also said in *North Range* about the dangers of this residual jurisdiction being misused. There may be a temptation, even an unconscious one, to present an unfavourable decision as one which is not only wrong but arrived at unfairly. But in the nature of things it is likely to be an exceptionally rare case where the submission of unfairness is justifiably advanced. The courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration."

It was all too easy to dress up an argument on paper seeking to persuade the CoA that the process of the hearing in respect of the permission to appeal had been unfair or that the judge had not engaged properly with the submissions made but such an application would only very rarely succeed and "this application does not come within several miles of it". [Ouch !]

Istil's application should be refused on the basis that it was one which the CoA had no jurisdiction to grant.

Toulson LJ agreed, adding one short point in relation to the first issue. "The point, which may seem rather obvious, is that arbitration is an optional regime. This is relevant when considering the proportionality of the legislative restrictions on rights of appeal. The principal attractions of arbitration are seen as speed, privacy and the limited control available to the court through challenges and appeals. A party which wishes to challenge the jurisdiction of arbitrators must take the point before the arbitrators, and will lose the right to challenge it before the court unless it has taken the point before the tribunal or can show that the party did not know the grounds of objection and could not with reasonable diligence have discovered them (s.73). Therefore, ordinarily in the case of a s.67 challenge there will be hearings at two levels. I can see nothing inimical to Article 6 in Parliament leaving it to the judge to decide whether the case is fit to go onto a third tier. As I have said, the limit in the number of permissible court challenges is an integral part of the package for which parties, in the free exercise of their autonomy, opt when they contract out of the ordinary process of litigation and refer their disputes to arbitration."

Arden LJ agreed with both judgments and added three short points which do not concern us here.

Comment

It is indeed helpful, but not remotely surprising, that the *North Range*/*CGU* authorities cover s.67(4) as well as ss.68(4), 69(6) and 69(8).

I must repeat my sincere hope that this is the last we hear of Art.6 in this context; the CoA cannot be any blunter short of adopting Jacksonian language.

291,795 words