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For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

EDITORIAL :

Easter is almost upon us. Will those of us in the Dispute Resolution business be able to afford an abundance of chocolate eggs, Easter Bunnies galore and a well deserved seasonal break? If the number of reported cases on construction adjudication in the first quarter of 2006 is anything to go by, the enthusiasm for adjudication remains undiminished. The courts continue to provide clarification of aspects of the process with further fine tuning. Anecdotal evidence suggests that arbitration has at last started to recover, with colleagues reporting that they are busier than ever in both domestic and international arbitration. By contrast, despite the significant effort put in by Her Majesties Court Service with the enthusiastic help and support of mediation practitioners in the October Mediation Week Initiative, reports suggest that court based mediation has expanded in some areas but that references have fallen away in others. Sadly, a number of colleagues have reported that they are moving away from mediation to concentrate on commercial litigation.

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The Wembley Stadium project does not appear to be proceeding to plan. It would appear that the Stadium will not be ready for quite some time to come. It would appear that construction adjudication has already been used extensively in relation to this project. Press assurances that the Stadium will be ready on time indicate that either there is a large dose of denial going on, or the parties are gearing up for litigation. Only time will tell. The financial consequences of late completion are such that litigation is likely to be extensive, protracted, bitterly fought and expensive.

The World Bank has produced its latest construction contract revision, with amended Dispute Review Board provisions. It features an interesting switch in favour of the dispute prevention aspect of DRB's favoured in the US, but it is unclear how this fits in with the duty to act in an impartial manner when delivering awards and recommendations. How well this will be received on the global market only time will tell and is worthy of further consideration.

The re-evaluation of construction adjudication continues apace. Sir Michael Latham, the initiator of the adjudication revolution, undertook to return to the fray and review progress of HGCRA 1996, delivering his report in September 2004. The DTI instigated an industry consultation process, publishing its analysis of the results in a report entitled "***Improving Payment Practices in the Construction Industry*** etc" in January 2006 and then held a post-consultation event in London on 14th February 2006. Reflections on the event range from highly critical and complaints that the event was unstructured and that there vas virtually no agreement on just about anything at all, to highly complimentary in that it provided an opportunity for a wide range of topics to be aired and for the central proposals within the report to be presented to the industry. The report contained eight proposals, namely a compulsory payment certification mechanism, removal of the s110(2) notice provisions, payment in the absence of certification, abolition of pay when certified provisions, extended rights of suspension, abolition of trustee stakeholder provisions, preventing interim rulings becoming final and conclusive and abolishing of contractual cost provisions. Further consultation will now take place before further proposals are published, which it is assumed will then be put into force, most likely by amendments to the Scheme, rather than through amending primary legislation.

G.R.Thomas : Editor

COMPROMISE & CONSIDERATION

Whilst there are exceptions to the doctrine, a basic premise of common law is that an agreement will not be enforced by a court of law unless supported by valuable consideration.[1] The aim of this paper is to examine when the courts will treat a compromise agreement as lawfully binding and when the courts will strike down an agreement to pay a lesser sum in satisfaction of a larger sum for lack of consideration.[2] Such agreements can come about in the absence of a dispute but the most common form is a settlement agreement, brokered prior to and thus pre-empting litigation or post issue of claim bringing the dispute and the litigation to an end.

This issue relates directly to civil mediation and the settlement of contract disputes. The reach of the doctrine of consideration goes beyond part payment of debt in that a failure to establish valuable consideration can also be fatal to the enforcement of an agreement to amend the terms of a pre-existing contract. [3] The reshaping of contracts is central to the concept of interest based mediation as an alternative to compromise.

The simplest way to avoid any question as to valid and sufficient consideration and to ensure the legal enforceability of a contract[4] is to issue it in the form of a deed.[5] However, recourse to deeds tends to be restricted to specialist areas where their value and significance is recognised in the trade. To what extent, if at all, is it either necessary or desirable that mediation settlements be issued in the form of settlement deeds? The drafting of a deed provides an appearance of an additional level of gravity which may inhibit the negotiation / settlement process. If not needed it is probably best avoided. The deciding factor is whether or not the mediation pre-empts litigation or displaces it after the action has commenced, since regarding the latter, a party can apply to the court for a ***"Consent"*** or ***"Tomlin Order"*** turning the agreement into an enforceable settlement judgement, under rule 40.6. CPR.

1 ***Thomas v Thomas*** *(1842) 2 QB 851.*

2 ***Foakes v Beer*** *(1884) 9 App Cas 605.*

3 ***North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron*** [1979] QB 705

4 Recourse to a deed can have the additional benefit of establishing the intention to create legal relations between individuals in social relationships, but will not cure any defects arising out of illegality.

5 Note that like any other contract, a contract by deed is subject to the doctrines of mistake, frustration, fraud, duress and undue influence and thus does not provide an absolute guarantee of enforceability.

The Civil Courts in the UK[6] have traditionally supported any attempt made by disputants to resolve their differences though negotiation, thereby avoiding litigation or arbitration.[7] Thus abandoning a bona fide claim (i.e. an honest belief that the claim is viable)[8] or defence[9] is deemed good consideration for the settlement of the case, evidenced by the abandonment of the action. There is no need to commence an action before settlement in order for it to amount to good consideration.[10]

Equally the courts will endorse a settlement brokered during the course of proceedings, at any time prior to issue of judgement, though leaving it very late in the day to inform the court may have adverse cost consequences.[11] Frequently a time arises during the course of a trial when a party realises the case is hopeless and a settlement is brokered to avoid further expense. The CPR 1998 goes further and actively encourages settlement as an integral part of the overriding objectives of the rules.

The consent element of a Consent Order refers to the parties consenting to ending the action. The application for the Order will include the terms of the settlement. The concept was initiated by Judge Tomlin, hence the popular / alternative name for the order. The settlement must be both unconditional and enforceable.[12]

A draft will be drawn up in the following form :- *"And the parties having agreed to the terms set out in the attached schedule.*
IT IS BY CONSENT ORDERED *That all further proceedings in this claim be stayed except for the purpose of carrying such terms into effect* ***AND*** *for that purpose the parties have permission to apply".*

6 Compare for instance the Lebanon where the courts pay no regard whatsoever to negotiated settlements and reserve the right to determine a matter once referred to them.

7 ***Callisher v Bischoffsheim*** *(1870) LR 5 QB 449*

8 ***Miles v New Zealand Alford Estate Co*** *(1885) 32 Ch D 266*

9 ***Banque de 1'Indochine v J H Rayner (Mincing Lane) Ltd*** *[1983] QB 711 ;* ***Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D)*** *[1985] 1 WLR 925, 933*

10 ***Wade v Simeon*** *(1846) 2 CB 548, 565, 567*

11 ***Brawley v Marczynski*** *[2002] EWCA Civ 756.* Where a dispute settles out of court the substantial winner is entitled to costs, but ***Yell Ltd v Garton [2004] EWCA Civ 87*** shows that where an appeal is pending the parties have a duty to notify the court if settlement negotiations are taking place, to avoid costs being thrown away.

12 ***Thakrar v Ciro Citterio Menswear PLC (in administration)*** [2002] EWHC 1975 (Ch). Per Sir Andrew Morritt VC. *"The purpose of a Tomlin order is to enable the enforcement of the terms of settlement of an existing action by summary process in that action."*

The same principle applies to arbitration. An arbitrator can issue a settlement award drafted by the parties. Thus section 51 Arbitration Act 1996 provides :-

(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.

(4) The following provisions of this Part relating to awards (sections 52 to 58) apply to an agreed award.

(5) Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

In lieu of a consent order, the parties can instead draft a full settlement contract, which can then be enforced by an action for specific performance.[13] Where the action has not yet commenced this is the principal way forward where a party fails to honour the agreement and pay. Alternatively, if the other party then pursued an action, the settlement would provide a defence to that claim on the grounds that no extant dispute exists between the parties. This would apply both to litigation and to arbitration. In both situations a settlement deed prevents further arguments about the existence of valid consideration.

This is standard procedure at the end of the mediation process. It is vital that the mediator ensures that the settlement agreement is reduced to writing if it is to be enforceable since the courts are reluctant to enforced oral mediation settlement agreements, partly because of the inherent uncertainty in determining the meaning and scope of the settlement.[14] Thus the scope for oral provisions to override the written terms of a contract have always been very restricted by the law.[15] Oral evidence is admissible to add to but not to contradict the written terms of a contract[16] and will be also admissible in order to complete an otherwise incomplete contract.[17] Exceptions to the admissibility rule are limited to situations where a party has explained the meaning of the contract and is estopped from relying on asserting the strict wording of the contract.[18] However, too much should not be read into this since the courts will consider oral evidence of waiver of the terms of a contract.[19] Thus, without going so far as to state that the courts would never enforce an oral mediated settlement, the conclusion must be that it would be unwise to rely on an oral settlement. Accordingly, best practice would dictate that the settlement is reduced to writing.

Finally, it is important to ensure that the terms of the mediation settlement are clear, since otherwise the way is opened up for a challenge in respect of the interpretation of the terms of the settlement, thus defeating the objective of finality and closure.[20] The same applies to the terms of a consent order. The court will not issue an order if it finds that the draft terms are not ***"unconditional and unequivocal."***

The courts are nonetheless reluctant to strike down agreements to settlements on the grounds of uncertainty where the settlement was intended to have legal effect. [21] In complex relationships, where there are many potential causes of action, a settlement which resolves the current dispute but introduces a mechanisms for settling related issues, may none the less be treated as binding.[22]

C.H.Spurin

[13] ***Horizon Technologies Ltd v Lucky Wealth Consultants Ltd.*** [1982] 1 WLR 24.

[14] In ***Oil & Mineral Development Corp v Mahdi Sajjad*** *[2002] EWHC Com 1258* the court declined to enforce an oral mediation settlement, partly because the mediator was subject to privilege constraints and could not give evidence, but compare ***United Building & Plumbing Contractors v Kajla*** *[2001] EWCA Civ 1740* where the court was prepared to hear evidence in support of assertions that there had been an oral settlement to a dispute.

[15] ***Jacobs v Batavia & General Plantations Trust Ltd.*** *[1924] 1 Ch 287.*

[16] ***Hillas v Arcos.*** *(1932) 147 LT 503 (HL)*

[17] ***Walker Properties Inc. v Walker*** *[1947] 127 L.T. 204 ;* ***Couchman v Hill*** *[1947] K.B. 554*

[18] ***Curtis v Chemical Cleaning*** *and Dyeing* ***Co*** *Ltd [1951] 1 KB 805.*

[19] A waiver may be express ***Bruner v Moore*** [1904] 1 Ch 305; but equally can be implied from conduct. ***Charles Rickards Ltd v Oppenheim*** [1950] 1 All ER 420, CA. In the case of a concession (as opposed to a failure to repudiate a contract for breach), there must have been an awareness, express or implied that it would be relied upon and an intention for it to be relied upon. ***Watson v Healy Lands Ltd*** *[1965] NZLR 511*

[20] ***Rodney David Haines v Lynne Valerie Carter*** *[2002] UKPC 49*

[21] ***Brown v Gould*** *[1972] Ch 53, 57-58,* ***Foley v Classique Coaches Ltd*** *[1934] 2 KB 1.*

[22] ***Cable and Wireless PLC v IBM UK*** *[2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041*

THE MOVE TO MEDIATION - LITIGATION PERIL AND THE COSTS SANCTION[23]

by Paul Newman, Barrister (Hugh James, Cardiff)

1. Litigation sometimes gets out of hand. A notable example of litigation, which backfired, was Mowlem's Carlton Gate claim. According to Contract journal, 10th August 1995:

> ***"What is amazing is that Mowlem continued its battle even after declaring a £123,000,000 loss for 1993. On what quality of legal advice? Some might ask. One lawyer speculated: "You always try to give the client some good news in the early days". Perhaps that's what... did, and a bandwagon was set up."***

2. Since 1999 the Courts have discussed the use of adverse costs' orders as a sanction against parties who wrongfully refuse to mediate. Let us look at a couple of cases.

3. On the 11th May 2004 the Court of Appeal made its important decision in ***Halsey -v- Milton Keynes General NHS Trust [***2004] EWCA (Civ) 576. The facts of the Halsey case were straightforward. Mr. Halsey had died whilst being treated in hospital. His widow alleged his doctors had been negligent. She was unsuccessful, following which the NHS Trust asked for costs. Mrs. Halsey relied on letters written to the NHS Trust, suggesting mediation. All endeavours to achieve mediation between the parties had been repelled by the NHS Trust on the basis that the Trust had formed the view that it had a good defence to the claim. From Mrs. Halsey's perspective, the NHS Trust had been unreasonable and ought to be denied its costs following the rejection of the first mediation offer. She failed to persuade the first instance judge that she was correct. The second, consolidated case, ***Steel -v- Joy & Halliday*** concerned two road accidents. The claimant was injured twice, once in 1996 and again in 1999. Both defendants admitted liability and the question for the court was whether the second defendant had caused the claimant to suffer any more damage. During the litigation, the first defendant wrote to the second defendant suggesting mediation. The second defendant refused on the basis that mediation was inappropriate as the dispute was a question of law that the court had to decide. The second defendant was later successful on the matter of causation and asked for costs. The first defendant argued that the failure to mediate meant that a conventional costs' order was inappropriate. In dealing with both cases the Court of Appeal (Dyson LJ in particular) formulated a number of guidelines, which might assist parties. These were:
   - Courts should actively encourage mediation but without compelling the parties to do so. Issues of law might not be suitable for mediation.
   - Lawyers should always consider with their clients whether disputes are suitable for ADR.
   - Although the CPR permit a judge to make a cost order against the successful party, to deprive a successful party of some or all of his costs on the grounds that he has failed to agree to mediation, is an exception to the general rule that costs should follow the event. The unsuccessful party must satisfy the court that the successful party acted unreasonably in refusing to agree to mediate. The defendant may have made a reasonable offer, which the claimant decided to reject. The cost of mediating might have been disproportionately high and / or delayed any trial. Would mediation have been largely a futile exercise?
   - The party who refuses to consider mediation is always at risk of incurring an adverse costs order, especially if the court has made an order requiring the parties to consider ADR. However, a claimant might simply propose mediation in circumstances where that party's case was unreasonably weak and seek to maximise the chances of a 'nuisance' payment from the defendant.
   - Public bodies and large organisations should be treated in the same way as all other litigants. For cases suitable for mediation, then it is likely that a party refusing to agree to mediation will be acting unreasonably.
   - Mandatory mediation would run a risk of falling foul of the general protections afforded to human rights under appropriate legislation.

4. The Court of Appeal dealt with the reluctant party in ***Burchell -v- Bullard*** [2005] EWCA Civ 358. This had all the hallmarks of the classic small building dispute. Mr and Mrs Bullard employed Mr Burchell to

[23] Presented at the **Employed Bar Conference - London**. 17th March 2006 by Paul Newman, Barrister (Hugh James, Car

construct two large extensions for them at their house in Bournemouth. The parties had anticipated four stage payments, the third of which was to be when the roof was on with the final payment being made on completion. The third stage payment of £13,540.99 was never paid. Mr and Mrs Bullard alleged that there were defects in the work carried out. Mr Burchell ended up consulting his lawyers, who did not leap into the role of the rottweiler. They took a course of action, which Lord Justice Ward later commended in the Court of Appeal. They conceded there was an argument so the obvious way forward was to talk about it. In his judgment (paragraph 3) Lord Justice Ward said "[the solicitors] wrote sensibly suggesting that to avoid litigation the matter be referred for alternate dispute resolution through "a qualified construction mediator". The sorry response from the respondents' chartered building surveyor was that "the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters."

5. Mr Burchell's solicitors issued proceedings on the 5th February 2002, claiming £18,318-45. The householders' counterclaim topped £100,000. Mr Burchell's roofing sub-contractor was sucked in too. After a 5-day trial in Bournemouth County Court Mr Burchell obtained judgment for £18,327-04. Mr and Mrs Bullard won on the counterclaim to the extent of £14,373-15 (or as Lord Justice Ward remarked later '15% of the counterclaim'). Following adjustments for VAT and interest Mr Burchell received the princely sum of £5,025-63. Presumably everyone took a deep breath as the Recorder turned to costs. Applying what the Recorder took to be the law he decided that the defendants should pay the claimant's costs on the claim with the claimant paying the defendants' costs on the counterclaim, i.e. let the costs follow the event. The sub-contractor lost to the extent of £79-50. The claimant was liable for his costs too. The claimant appealed. He should (a) have received the costs of the counterclaim; or if not (a) certainly (b) those of the roof element with no order as to costs on the remainder of the counterclaim and in any event (c) the sub-contractor's costs. Mr Burchell had even continued to offer mediation by unsuccessfully seeking the participation of Mr and Mrs Bullard in the Court of Appeal Mediation Scheme.

6. In giving judgment Lord Justice Ward acknowledged that trial judges have a wide discretion and appeals are difficult from their decisions on costs. The Recorder took as his starting point that costs should follow the event on each of the claim and counterclaim, which Lord Justice Ward thought to be understandable. He agreed with the Recorder that the conventional starting point nowadays was often an issue-by-issue analysis to work out the winner on each of those discrete issues. Both Lord Justice Ward and the Recorder rejected this as a useful starting point in the circumstances of the case.

7. Lord Justice Ward decided to deal with costs, identifying the following factors as relevant -
   - That costs follow the event remains a core principle of civil litigation.
   - The claimant recovered slightly more than his original claim. He was not guilty of exaggeration.
   - The defendants exaggerated their counterclaim.
   - The defendants had been more muddled in their case management (particularly experts) than had the claimant.
   - Some review of the parties' willingness to pursue particular issues was necessary.
   - Had there been any admissible offers or payments into court?
   - Could mediation have played a useful role and were the defendants unreasonable in rejecting mediation?

8. Mr and Mrs Bullard had in rejecting mediation taken a brave decision: *"...it seems to me, first, that a small building dispute is par excellence the kind of dispute which, as the recorder found, lends itself to ADR. Secondly, the merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. They were counterclaiming almost as much to remedy some defective work as they had contracted to pay for the whole of the stipulated work. There was clearly room for give and take. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense. Thirdly, the costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation."*

9. Lawyers did not escape the judge's wrath: *"...The [legal] profession can no longer with impunity shrug aside reasonable requests to mediate... [the] preaction protocol for Construction and Engineering Disputes ... expressly requires the parties to consider at a preaction meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."*

WHY MEDIATE?

10. Case selection for mediation can be tricky but more so in the context of choosing the right moment. Do you need to have proceeded some way with litigation or can you opt in even pre litigation? The danger in leaving it too late is the fact that substantial legal fees may have been wracked up. The principal need is to ensure that there is sufficient information 'on the table' to give mediation a chance. The following factors may assist a party in making that decision whether to litigate or mediate:
    - Do the parties have and want to maintain a commercial relationship?
    - Do the parties have a 'settlement' culture?
    - Have the parties been through an ADR process before (preferably successfully).
    - Do both parties have a mutual interest in a quick resolution of the dispute?
    - Do both parties recognise that litigation or arbitration mean (a) an unacceptable drain on their managerial time, (b) expense and (c) long drawn out and unpredictable proceedings?
    - Does either party wish to avoid the publicity that litigation may bring them?
    - What do the parties wish to achieve? Do they want their day in court, where they can sound off about 'principles and justice'? Do the parties understand that mediation may provide them with one way to have their day in court, acting as a form of catharsis, carried out in the most cost effective way possible?
    - Have the parties already tasted litigation or arbitration in other disputes and seen the downside of litigation?
    - How good will the witnesses be at trial? How good or complete are the available documents? Does the other side have a possible ace up their sleeve? Can the parties afford a full trial?
    - Has enough documentation been exchanged between the parties to give mediation a realistic chance of succeeding? Are there full pleadings, expert reports and witness statements in existence?
    - What are the parties' costs to date? What is the costs' projection to trial and beyond?

    Mediation may not work:
    - Where the dispute is centred largely on law rather than fact and established precedent strongly favours one party over the other.
    - Where one of the parties wishes to establish a clear legal precedent. An employer might eventually see the attractiveness in sorting out a sex discrimination case at 'local' level without the creation of a precedent. The Equal Opportunities Commission may support the applicant and see little 'public' benefit in a 'one-off' deal with a particular employee.
    - One party wishes to delay the resolution of the dispute for as long as possible. Most lawyers have or have had clients, who use lawyers to manage their business debts. If robbing Peter to pay Paul fails they create tenuous defences to resist payment. As such, settlement has little in it for them.
    - Either one or other, or even both, of the parties are not acting in good faith. Conceivably the insolvent party might wish to see how little he can get away with paying.
    - One or other of the parties believes that litigation will be a complete vindication of their position. In truth, those motivated by 'principle' may back down a long way if they are forced into mediation and reality test with a strong mediator.
    - There is inequality of bargaining position between the parties. At face value, this seems apparent in a large number of cases, e.g. the small sub-contractor and the rather larger main contractor. Often it is only in the private mediation sessions that the mediator learns that there is a factor, which may redress the balance to some degree.

- Where the position of one of the parties is strongly influenced by a particular individual within that organisation. Behind most litigation there is a driving force. In the construction industry this may be a managing quantity surveyor, who has a position to protect. Perhaps he knows there were errors in the original tender and the project was unprofitable beyond the 'negative margin' already known to his team, even without considering responsibility for various delays and the like. However, his quantity-surveying director has expectations from the project and must report to Board. The managing quantity surveyor can use litigation to bury the mistake for as long as possible. He may leave before the issue becomes a particularly 'hot potato', having perhaps swapped his Mondeo car key for one to a BMW elsewhere. If he remains with the team he can always blame the lawyers in due course. A reputable firm of construction law solicitors simply failed to deliver and let him down.
- Where one or other of the parties is a public body answerable to the district auditors or similar. Many such bodies claim they cannot negotiate because the settlement will not be transparent and logical.
- Where a client has the benefit of insurance to defend the claim. In the early days of ADR there was a fear that insurers never compromised or did deals. The reality was always different. Insurers attached great weight to the loss adjuster's comments, meaning that settlement was often achieved. Nowadays many professional indemnity insurers will permit mediation for a wide range of professionals from solicitors to consulting engineers, accountants and surveyors.
- Where one of the parties will be reluctant to close a deal in the form of a Tomlin Order or other legally enforceable document.

11. Lawyers

- can advise their clients on their legal rights, which do remain significant. Only a properly informed client can decide how far to go in not asserting his legal rights.
- can advise their clients in the choice of a suitable dispute resolution procedure. Everyone knows about litigation. Some know about arbitration. However, other semi formal dispute resolution methods exist - adjudication, expert determination, early neutral evaluation (get a retired judge to make a non binding assessment). Modern lawyers should be disputes' advisors, rather than good old-fashioned 'one track' litigators.
- can assist clients in the preparation of cases for ADR. Many clients have 'lives to lead' and prefer to leave mind numbing detail to others. Lawyers remain good at collating information into a workable and literate package and should be able to ask the 'right' questions.
- can represent their clients during mediation meetings and mini-trials. Formal advocacy is not required. However, clear thought, concision and persuasiveness are useful skills. As such, many solicitors, who would be fazed at the prospect of appearing in court, will find mediation 'advocacy' manageable. The value in appearing as 'advocates' in mediation is not lost on the Bar, with many barristers advertising their skills in the alternative advocacy requirements of mediation.
- can assist clients to prepare and complete appropriate settlement agreements, which are legally enforceable. It surprises many just how much time is devoted to getting the wording 'just right' in settlement agreements. Again, the lawyers' attention to detail and concern with the 'what if scenario can ward off future problems of interpretation.
- can assess what documentation should be prepared and possibly exchanged prior to the mediation sessions. Lawyers are well used to the disclosure exercise in litigation and know what is sensibly required to inform the mediator.
- can carry out a risk assessment of the likely outcome if the matter were to be pursued via litigation or arbitration. Many solicitors will have obtained counsel's opinion early in the case if only to cover their own backs. Has counsel provided a crassly optimistic assessment of the possible outcome?
- can consider any general policy considerations, or the requirement for legal precedent, which render litigation in the High Court more advantageous to the client.
- can assess if the dispute were to be litigated or arbitrated in the traditional way, is either party likely to have witness problems - witnesses who are now working overseas or for other employers, witnesses

who may be hostile to a former employer, witnesses whose co-operation will be expensive to buy, witnesses whose performance in court is likely to be poor.

- can decide if the documents in such a mess or lacking in completeness as to render recourse to litigation or arbitration undesirable.

THE MEDIATION PROCESS

12. Differentiate between Court Scheme Mediations and Private Mediations. The former take place in Court buildings and are time limited (3 hours) because of constraints on the use of the facilities and rarely exceed three hours. Sometimes the parties buy additional time at an alternative venue. Private mediations (where the parties may specifically choose the mediator, rather than necessarily rely on a nominating body, such as CEDR or ADR Group to assist the Court, often take place in a lawyer's office or that of another professional. Private mediations are often earmarked to last in excess of three hours (although some simple ones are time-limited) and may last the whole day, not infrequently into the early hours of the following day. In private mediations the lawyers and other consultants may have thought long and hard what written statements may be placed before the mediator and how much disclosure of documents should be implemented.

13. Court based mediation has few rules but some similarities with private mediation. Often the mediator will receive no more than the original Particulars of Claim, the Defence and the parties' sometimes very brief position statements, setting out their list of wants. The parties may choose to provide him with expert reports or other information. In private mediation the parties may agree a Bundle for the mediator's use.

14. Most mediators contact the parties a week or so before the mediation by telephone - (a) to introduce themselves and (b) to find out how familiar the parties and their lawyers / advisors are with mediation. During these telephone conversations the mediator will emphasise that mediation is (a) confidential and without prejudice and (b) offers a range of settlement opportunities that litigation lacks. The mediator may explain the role of lawyers and advisors, which is particularly significant if the lawyers / advisors are new to mediation. Come the mediation session the mediator may well seek to ensure that the lawyers / advisors play second fiddle to the clients.

15. Authority to settle? - Towards the end of the telephone interview the mediator may seek the following confirmation from the lawyers. Who is attending the mediation? Does the party attending have authority to settle? This is an important consideration. The mediator will be keen to confirm that his contact point is not a 'middle-ranking' or perhaps more junior employee, with no knowledge of the file and no authority to settle. An insurance-backed defendant often does not attend the mediation. Indeed, his insurers too are often absent with only the lawyer present. Will the lawyer have sufficient flexibility in his instructions? Some parties may choose to represent themselves, on occasions believing they can flannel their way through mediation. This can be a BIG mistake.

16. In principle, court mediations last three hours. The parties may need longer to settle when the court cleaners fire into action at 6pm, with the vacuum cleaner, or start switching off the lights and setting the alarm. Assuming the parties can find alternative accommodation - perhaps the offices of one of the lawyer's - it would be a pity for one party to be available to give the matter additional time on the mediation day, but not the other party. Therefore, the mediator may confirm that neither of the parties has a personal commitment on the mediation day. With a lawyer in attendance, a party might assume that it will be fine to slip out of the mediation after perhaps two hours to get ready to celebrate a wedding anniversary or similar. To lose the lay party may not necessarily be fatal but only if the mediator is satisfied that the lay party is available by telephone for the provision of additional instructions.

17. The capacity to settle - Authority to settle is only part of it. The capacity to perform any settlement is also important. Presumably a private individual can and will make his own decisions but those decisions may have financial consequences - possibly the payment by him of money to another party. If this is a possibility then the mediator may care to broach the 'what if' question. Depending on the amount possibly due, how would the lay party fund it? In so doing the mediator will obviously wish to show such tact as not to alienate the lawyer by creating the impression the mediator has formed a view on the merits. The underlying concern is a real one. The party may come, because of the later mediation, to a realisation that

a payment by him of £20,000 is, in the particular circumstances, a good result. Late in the day, the lawyer and his client may wish to avoid scrabbling around to find a loan. Better for the lawyer and his client to be real and to know before the mediation how the client will fund a possible settlement under the terms of which the client is called upon to dig deep into his pocket.

18. The opening session - explaining the process to the parties - Assuming the parties appear at the agreed place and time and that the anticipated rooms are available, the first matter a mediator will attend to is that of explaining the process to the parties. The explanation will include:
    - The process is entirely voluntary and the parties may leave at any time.
    - The process is non-binding.
    - The mediator's role is as a facilitator. He is not there to judge the parties.
    - The mediator is there to reality test the views of the parties. He may ask questions, which parties may feel shows he is taking sides but he is not.
    - The mediator is not there to answer questions such as how one party may fare in court if no agreement is reached.
    - Anything said to the mediator in the individual sessions remains private and confidential unless that party specifically authorises the mediator to disclose it to the other party.
    - If the parties reach a binding agreement, then any agreement will be incorporated into a 'Tomlin' Order, which will become a court order.
    - The procedure for running the mediation.
    - The timetable for the allotted time slot of three hours.
19. All mediators have their own style. During the opening joint session the mediator will explain the purpose of mediation and his role. He will emphasise that he is not there to advise the parties - they have their lawyers / advisors for that. He is not a magician. It is the parties' responsibility to work hard and to achieve a solution, which they find acceptable. The mediator may also remind the parties that few people leave a mediation entirely happy. Successful mediation often occurs when the parties are not unhappy and perhaps chastened by seeing the strength of the other side's case. The mediator may care to emphasise the importance of the parties remaining open-minded. He will allow each of them to make an opening statement, which because of the time constraints in court-based mediation must be short, possibly no more than 5 minutes. The mediator will seek the parties' active confirmation that they are there in good faith, wishing to negotiate seriously to achieve settlement.
20. The timetable - Sticking to a timetable is extremely important. Therefore, the mediator will inform the parties how he wishes to divide up the available time. The parties must be allowed time to vent their feelings before the process of negotiation occurs. One of the basic lessons of mediation is that it is not about the avoidance of dispute and conflict. Rather, it is about putting the conflict along well-defined channels so that people are able to express themselves as they see fit and, in essence, to get matters off their chests. Often it results in a degree of clarity if the parties are first able to vent their feelings. However, mediators will not indulge parties beyond a certain point. Some lawyers find it surprising when mediators alter their tone after about 2 hours in the County Court becoming firmer with the parties, indicating that the time to talk figures has now arrived.
21. On occasions, parties have spent so long cosseted with their lawyers, avoiding direct communication that some mediators choose to leave them in the room for 5-10 minutes or so to allow them to talk potentially to narrow the differences between them. Of course, no mediator wishes to see the parties engaged in a '***slanging***' match. Therefore, the mediator may remain to ensure that the emotive level is reduced. For instance, if mutual recriminations begin to get out of hand, he may, rather than criticise the parties direct, indicate that he is beginning to lose the drift of what they are saying. At that juncture, this gives them the opportunity to take a deep breath, calm down and address their comments in a more rational manner.
22. Meeting the parties - Once the opening session is concluded, the mediator interviews the parties in their individual meeting rooms. The purpose is to permit the mediator to gain a clear understanding of the position of the parties. Alone with the mediator the parties may be more frank about their positions. For

the mediator, this can be stressful. If the mediator antagonises the participants, with a misunderstanding of issues or, the wrong choice of language, he has an enormous hill to climb. He has to:

- Exude confidence rather than arrogance.
- Never display condescension.
- Show an appropriate level of concern.

23. Showing concern can be dangerous. If, for instance, the mediator has displayed such apparent empathy with the claimant, that the claimant wrongly concludes that they mediator is endorsing the claimant's perceptions, the claimant may become even more intransigent in his demands.

24. In order to break the ice, the mediator may start by asking the particular party how they feel the joint session went. The mediator may also enquire whether the party feels that the correct information was placed 'on the table' during the opening session. Case exploration and the transition to a detailed discussion of negotiating options are tricky. If not done deftly or unless the claimant is particularly keen to place his requests immediately 'on the table' a party may resent the mediator's attempts to stop the party's flow and direct the conversation towards settlement. The techniques, which the mediator may deploy, include stating - "I would like to explore in greater detail...", "I do not fully follow... " and "... might benefit from further exploration". This is, in some senses, the soft approach. If that approach is exhausted the mediator may adopt a harder line - "Of course, this mediation is running in tandem with the litigation. If you do not conclude the mediation today successfully, then you will be back in Court. As your lawyers have indicated (I am sure) to you the purpose of the Court is to test evidence. You make a number of statements in your position statement. Are you confident that you will be able to back these up at trial? Do you have the witnesses available?"

25. Mediators use other techniques to direct a party towards the negotiating phase. A mediator may ask fairly nonchalantly what the position is on legal costs to date and how much will be spent taking the matter to trial. If the claimant suggests a figure, which objectively may be ludicrous as a basis of settlement, the mediator may deal with the matter in an oblique way - "I am interested to hear that you feel that the case merits a payment of £.... What are your reasons for that? How do you feel the defendant will react?" The claimant may well concede that the defendant will find the sum absurd, at which stage the mediator might ask the claimant why he thinks the defendant will take that view. The mediator may remind parties that settlement probably requires both claimant and defendant to move. The claimant must reduce his expectations whereas the defendant will need to be more generous in his assessment of the claimant's case.

26. Facilitating agreement - Part of the mediator's role is to shuttle between the parties, imparting information and revealing one party's emotions to the other as instructed. In this, he will seek to use neutral language. For instance, he may say - *"I have had a frank discussion with the claimant. It appears that the claimant is upset or concerned about ..." "The claimant believes a settlement of £.... is justified. The claimant's reasons for this are..."* This gives the other party thinking time. The mediator might invite the defendant to consider if he might make something of the claimant's figure given time to reflect.

27. If the individual sessions and 'shuttle' diplomacy are failing to narrow the gap between the parties, the mediator may choose to convene a further joint session and read the parties the 'riot act'. The language can be quite surprising - "I thought you came here in good faith to negotiate and we seem to be getting nowhere". Some mediators are more cautious, emphasising that it is the parties' decision whether to move forward or not. "If you have hit a blockage, then we can either adjourn the mediation to allow you all to think about things, or simply call it a day and let the judge decide." This may lead parties to consider the uncertainty litigation will mean if they abandon the process, which they control. The mediator may invite the parties to look again at their legal costs and risk assessment. If either party then announces that he has counsel's opinion, which offers him a 70% chance of success at trial, the mediator may ask how the party feels about the 30% risk factor?

28. Where agreement has proved impossible, most mediators still like to finish on a 'high' note. They may therefore review with the parties the progress, if any, which has been made, seeking to identify any bridgehead to further negotiations by congratulating the parties on the progress to date. To establish a

sense of good will and the presence of something to build on is vital for continued negotiations. Sometimes the mediator will allow the dust to settle, simply stating that parties are free to continue negotiating but he will contact each of them by telephone during the next few days in order to ascertain what progress, if any, has been made and what further assistance, if any, he can offer.

29. But if the parties have 'cracked' it the final task is to copy the settlement agreement for each of the parties and their lawyers.

NON CONTENTIOUS LAWYERS AND MEDIATION

30. Contractual mediation clauses are now common -
    1 "The Parties have entered into this Agreement in good faith and will do all that is within their power to avoid formalised disputes occurring between them. As such, the Parties value the principle of amicable negotiations. If it becomes reasonably apparent that amicable negotiations between the Parties will be insufficient to resolve any dispute and / or difference which arises between them, then the parties will actively consider use of an appropriate ADR technique to be administered by ----- . Such resort to ADR shall not limit or prejudice the rights of either of the Parties to commence or pursue any necessary or appropriate proceedings in any Court of competent jurisdiction.
    2 Except as otherwise provided for in this Agreement, any and all disputes arising under or in connection with Agreement shall be referred to the exclusive jurisdiction of the English Courts for resolution in accordance with English Law."

31. Mediation is an open-ended process. It does not necessarily result in settlement. By agreeing to engage in ADR the parties are doing no more than agreeing to negotiate. English law holds that an agreement to negotiate is unenforceable. Lord Denning MR stated in ***Courtney and Fairburn Limited -v- Tolaini Brothers (Hotels) Limited*** [1975] 1 WLR 2971 that such agreements were *"too uncertain to have any binding force"*. The House of Lords allowed no relaxation in ***Walford and Others -v- Miles and Another*** [1992] 2 AC 128. According to Lord Ackner: *"An agreement to negotiate has no legal content" and "... good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations."* at pages 301-302

32. A Commercial Court judgment of Mr Justice Colman J gave bite to ADR clauses? Disputes arose between the parties under a global framework agreement. Clause 41.2 of their agreement required the parties to attempt ADR:
    "The Parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement or any Local Services Agreement promptly through negotiations between the respective senior executives of the Parties who have authority to settle the same pursuant to Clause 40.
    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 the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any Party or Local Party from issuing proceedings"

33. First, the claimant argued the clause was unenforceable because it was uncertain. Second, the claimant asserted that the obligation to mediate was inconsistent with the right to litigate. The second point failed to impress the Judge: *"The dispute resolution structure to be found in clauses 40 and 41 of the GFA leaves no doubt that when the parties negotiated that agreement it was the mutual intention that litigation was to be resorted to as a last resort... The mere issue of proceedings is thus not inconsistent with the simultaneous conduct of an ADR procedure, such as mediation..."*

34. ADR clauses could be binding: *"There is an obvious lack of certainty in a mere undertaking to negotiate a contract or settlement agreement, just as there is in an agreement to strive to settle a dispute amicably ... That is because a court would have insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision. No doubt, therefore, if in the present case the words of clause 41.2 had simply provided that the parties should "**attempt in good faith to resolve the dispute or claim**", that would not have been enforceable.*

*However, the clause went on to prescribe the means by which such attempt should be made, namely "**through an (ADR) procedure as recommended to the parties by (CEDR)**"... Thus, if one party simply fails to co- operate in*

the appointment of a mediator in accordance with CEDR's model procedure or to send documents to such mediator as is appointed or to attend upon the mediator when he has called for a first meeting, there will clearly be an ascertainable breach of the agreement in clause 41.2."

"For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in ***Dunnett v. Railtrack****..."*

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ADR PRIVILEGE AND CONFIDENTIALITY

The inspiration for this article came from an exchange at the Chartered Institute of Arbitrators Branch Chairman's Meeting in December 2005 when a colleague demanded to know when the CIArb would stop advising its trainee mediators that the Mediation process was privileged. There is some validity to the objection. Whilst privilege generally attaches to the mediation process, there are exceptional circumstances where the protective veil of privilege can be pierced. What then is the rationale underpinning privilege in the mediation process and when might the privilege be compromised?

State interest in supporting ADR.

Whilst the courts stand ready to act as final arbiters in civil disputes between citizens in the interests of keeping the peace, justice does not come cheap be it for the parties who have to fund legal advice or for the State which subsidizes much of the costs of civil litigation. Unlike arbitration, the parties do not bear the full costs of the litigation process. They do no pay an economic price for the court amenities or the services of the judge. It is therefore in the public interest for the State to encourage the private settlement of disputes. Such encouragement goes beyond support of adjudication, arbitration, conciliation and expert determination, to negotiated settlement, with or without the assistance of a go-between such as a mediator.

Legal Privilege

The parties to litigation proceedings, including arbitration, benefit from legal privilege[24] which guarantees and protects freedom of speech during the trial process.[25] If this were not the case a party might be put in terror of saying something in court which might lead to a libel action.

There are limits on this freedom and to exceed the boundaries of court etiquette could amount to contempt of court, but the objective here is control of the process not to place restrictions on the parties' freedom to pursue a particular cause of action[26] or to present evidence. It is for the judge to determine what is admissible, oft-times after the event when counsel has let the cat out of the bag, resulting in an order to strike offending material from the record, accompanied perhaps by a judicial reprimand. Where privilege information is disclosed the judge or arbitrator has a duty to ignore that information.[27]

Legal privilege extends to expert witness meetings to establish a common opinion to be presented to a court or arbitral tribunal but does not extend to the contents of the report.[28] The objective here is that the integrity of the joint report is protected in that agreement is reached without fear or prejudice.[29]

Privacy and the public interest

The principal distinction here between the public courts and the private tribunal lies in that privacy attaches to private proceedings, so that absent recourse to the courts in support of the arbitral process, whatever is said and done during the course of arbitral proceedings remains confidential as between the parties. The courts can and will, to the extent that that is compatible with the court proceedings, preserve that privacy.[30] Much of factual information what is evident in a law report in respect of litigation is likely to be absent from a judgment about aspects of an arbitration, with the report restricting itself to the principles at state and directly related facts. The courts can restrict the public

[24] Privilege extends to legal representative's communications, their servants and agents and interpreters etc. ***Imam Bozkurt v Thames Magistrates Court [2001]*** *LAWTEL AC8001922.*

[25] ***Rush & Tomkins v Greater London Council*** *1988] 3 All ER* ***737:*** application for discovery of terms of a settlement between employer and main contractor denied to a sub-contractor in dispute with the main contractor. See also ***Alizadeh v Nikbin*** *[1993] LAWTEL AC 1605019* and ***South Shropshire District Council v Amos*** *[1985] S3275 CA*

[26] N.B. A litigant may nonetheless suffer penalties for pursuing a frivolous action and be held accountable for costs thrown away.

[27] ***Contac (800) Ltd & Phonenames Ltd v Iris Online Ltd*** *[2004] DRS 1404*

[28] ***Robin Ellis Ltd v. Malwright Ltd*** *[1999] EWHC TCC 256*

[29] Evidence of fact eg witness reports contained in an expert report is not privileged. Indeed it is something that should be disclosed in advance of a trial. ***Malcolm Electropainting Group v West Midlands Passenger Transport Executive*** *[2003] ACQ 59*

[30] ***Glidepath BV v Thompson*** *[2005] EWHC 818 (Comm)*

reporting of arbitral awards.[31] This aspect of confidentiality applies equally to the mediation process.[32] The courts will injunct a party to a mediation to prevent disclosure to third parties of mediation what took place within the mediation.[33]

By contrast, in support of public confidence justice should be seen to be done and hence the full machinery of justice is both open to the public and the press. Where a case contains an issue of public importance, proceedings will find themselves in the Law Reports. This is a necessary adjunct of the concept of binding precedent at common law, since the law of the land must be accessible. Arbitral awards are rarely published and only then with the consent of the parties. The absence of State authority apart, the privacy that attaches to arbitral awards acts as an immutable barrier to arbitral precedent.

Rationale underpinning Negotiation Privilege

The admission of fault or liability is likely to prove fatal to the maintenance of a claim or to the defense of an action at law. The litigation process can be likened to a cautious dance between two lethal adversaries. One false move and the game is over. Thus, the classic footprint of civil litigation will have followed the pattern of claim and outright denial of liability. Either that or the respondent maintains silence and does not even give the other side the benefit of a response, not due to a lack of courtesy but rather on the basis that unless one can afford to say something positive, it is best to say nothing, at least until one has consulted with one's lawyers.

As with the coin which has two sides, the same is likely to be true of litigation. Little in life is absolutely clean cut and crystal clear, a fact borne out time and again by litigation. Most times there are rights and wrongs of greater or lesser degree on both sides. The claimant rarely gets everything he asks for, particularly since many claims are inflated at the outset, on the basis that whilst it is possible to reduce the sum claimed, once quantified it is difficult, if not impossible, to increase thereafter. The prevailing defendant may avoid most but not necessarily all liability. No more is this so than when a case features claim and counterclaim. Clearly in such situations there will have been scope for negotiation, compromise and settlement.

Nonetheless, the only basis upon which the parties to pending litigation will be prepared to discuss the dispute will be subject to the caveat that any concessions offered amount to nothing more than ***"friendly gestures."*** It is a tentative offer to compromise a claim / counterclaim in the interests of closure or alternatively an "***ex gratia payment,***" to placate the other side and make the problem go away. Whichever of the above applies, it will be absent admission of fault or liability. The common terminology hence is that the compromise is made ***"without prejudice"*** to the concessionaire's legal position. Without such caveats negotiation would not take place at all. The courts acknowledge this and in order to encourage settlement negotiations at all stages, both pre and post commencement of legal action, accord negotiation privilege to settlement communications, be they written or oral.[34] In consequence, nothing said or written during settlement negotiations is admissible in evidence during court proceedings.[35] Negotiation in front of a judge or arbitrator are privileged.[36] The fact that negotiations have taken place is not privileged, only the contents of the negotiations.[37] The assertion of a claim, prior to negotiations is not privileged.[38]

The privilege rule applies whether or not the parties expressly state that the communications are privileged,[39] but it is common practice to make that fact clear by heading documents ***"without prejudice."***[40] Any move towards open offers removing an express reservation of privilege must be clearly indicated.[41]

As noted, there are exceptions to the privilege rule. These are set out below.

[31] ***Dept. Economic Policy & Dev. City of Moscow v Bankers Trust [2004] EWCA Civ 314***

[32] ***Percy v. Church of Scotland Board of National Mission (Scotland)*** *[2005] UKHL 73*

[33] ***Venture Investment Placement Ltd v Hall*** *(2005) ChD.*

[34] ***Grace v Baynton*** (1877) 21 Sol Jo 631; ***Kitcat v Sharp*** (1882) 48 LT 64; ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116.*

[35] ***Noga D'Importation v Australia & New Zealand Banking Group Ltd*** *[1999] LAWTEL AC9500508,* privilege extends to subsequent related litigation. It is less clear whether or not third parties can seek disclosure in unrelated litigation., see **La Roche v Armstrong** [1922] 1 KB 485. but contrast ***Rabin v Mendoza & Co*** *[1954] 1 All ER 247, [1954] 1 WLR 271, CA.* where an application for disclosure was refused.

[36] ***Stotesbury v Turner*** *[1943] KB 370*

[37] ***Specialist Ceiling Contractors v. ZVI Construction*** *[2004] EWHC 4T-0006 1 (TCC)***:**

[38] ***Kooltrade Ltd v XTS LTD [2001] ChD..*** *Lawtel AC9900018*

[39] ***Belt v Basildon & Thurrocks NHS Trust*** *[2004] EWHC 783*

[40] ***Paddock v Forrester*** *(1842) 3 Scott NR 715;* ***Re Harris*** *(1875) 44 LJ Bcy 33;* ***Peacock v Harper*** *(1877) 26 WR 109.*

[41] ***Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd*** *[1992] ADR.L.R. 02/28*

Mere contractual negotiations.

The existence of a dispute (be it founded in contract or tort etc) is central to negotiation privilege.[42] Whilst privacy is something valued by commerce, particularly in respect of competitive contractual negotiations, negotiation privilege is not the way to secure privacy, since pre-contract communications are admissible in court to establish the meaning of the terms of contracts.[43] Rather commerce must rely on the general rules of confidentiality,[44] albeit that they may be subject to anti-trust rules to prevent anti-competition agreements which prescribe the conduct of secret negotiations. The scope for negotiation is restricted when prospective partners know in advance of what has been offered to their competitors and whilst competitive tendering has its advantages it precludes negotiation. Commerce therefore is forced to rely on the fact that it is not in the best interests of their business partners to disclose the terms of contracts to their competitors. Post settlement negotiations are not privileged, a fact easily overlooked. Thus it is necessary to have recourse to privacy strategies at this stage.[45]

The contract documents that gave rise to a dispute which was settled are not privileged and similarly whilst insurance settlement negotiations are privileged the insurance policy itself is not.[46] Whilst the content of negotiations may be privileged, any record including that of a lawyer recording that a conversation took place is not,[47] paving the way for application for disclosure. The fact that negotiations have taken place is admissible evidence to defeat a defence of laches (failure to prosecute a claim with due diligence).[48]

Contract interpretation

If there is a dispute as to whether or not there has been a settlement, it may be necessary to look to the detail of the negotiations to determine the terms[49] of that settlement, a fortiori where the court has to determine whether or not there has been a repudiatory breach of the agreement.[50] If the terms are clear and unambiguous this should not be necessary, and thus disclosure will be a last resort by the court, not the first port of call.[51]

Evidence of legal rights.

Where settlement negotiation communications disclose evidence of legal entitlement,[52] that information is admissible as evidence both as between the parties[53] and as between a party and a third party.[54] Thus where a landlord conceded during a mediation that a tenancy included use of a loft, even though not expressly included in the lease, that evidence was admissible as a defense to an action by the landlord to deprive the tenant of use of the loft. [55] This does not extend to evidence of waiver of a right, being restricted to proof of existing rights, so that the veil remained intact in respect of an alleged reaffirmation of liability that was otherwise statute barred.[56] Evidence of a fact, for instance that someone had written and signed a document, not related to the terms of the settlement are admissible.[57]

Waiver

If a party refers to negotiation communications in the course of a trial Pandora's Box is opened and cannot subsequently be closed.[58] This is deemed to be a waiver of the privilege and assuming the other party has not objected on the grounds of privilege to admissibility they can in their own turn rely on any thing in the communications which is in their

42 ***Prudential Insurance Co America v Prudential Assurance Co Ltd*** *[2002] EWCA 1154;* ***Norwich Union Life Insurance Society v Tony Waller Ltd*** *[1984] LAWTEL AC2747471* ***Standrin v Yenton Minster Homes Ltd*** *(1991) Times, 22 July, CA.*

43 ***Schering Corp v CIPLA Ltd*** *[2004] EWHC 2587 (Ch)* attaching the words "without prejudice" to communications has no effect whatsoever unless a clear intention to negotiate a settlement is demonstrated.

44 An express confidentiality agreement between the parties is enforceable, subject to public policy limitations. ***Prudential Assurance Co Ltd v Prudential Insurance Co of America*** *[2003] EWCA 1154 (CA)*

45 ***Dixons Stores Group Ltd v Thames Television plc*** *[1992] LAWTEL AC0010428.* ***Holdsworth v Dimsdale*** *(1871) 19 WR 798;* ***Re River Steamer Co*** *(1871) 6 Ch App 822*

46 ***Standrin Phillip & Patricia v Yenton Minster Homes Ltd & NHBC*** *[1991] LAWTEL AC1602201*

47 ***Parry Deborah Jayne & Whelan Michael Timothy v News Group Newspapers Ltd [1990]*** *LAWTEL AC1912031*

48 **Walker v Wilsher** (1889) 23 QBD 335, CA

49 ***Tomlin v Standard Telephones & Cables*** *[1969] 3 All ER 201*

50 ***FAL Oil Trading Co Ltd v Petronas Trading Co*** *[2002] EWHC 1825 (QB):*

51 ***Assicurazioni Generali SPA v CGU International Insurance Plc*** *[2004] EWCA Civ 429:*

52 E.g. severance of a joint tenancy, ***McDowall v Hirschfield Lipson & Rumney*** (1992) Times, 13 February.

53 ***Bath & N.E.Somerset DC v Nicholson*** *(2002) 10 EG 156 (CS)*

54 ***Gnitrow Ltd v Cape Plc*** *[2000] 3 All.E.R. 763 CA*. Evidence of the terms of a settlement to be disclosed to underwriters to establish the extent of contribution due under a policy.

55 ***Munt v Beasley*** *[2006] EWCA Civ 370*

56 ***Bradford & Bingley Plc v Mohammed*** *Rashid [2005] EWCA 2005. see also* ***Cory v Bretton*** (1830) 4 C & P 462; ***Re River Steamer Co, Mitchell's Claim*** (1871) 6 Ch App 822, but compare ***Froysell v Lewelyn*** (1821) 9 Price 122.

57 ***Waldridge v Kennison*** *(1794) 1 Esp 143*

58 ***Somatra Ltd v Sinclair Roche & Temperley*** *[2000] 1 WLR 2453*

favour.[59] A reference in satellite litigation to information privileged in the principal forum amounts to a waiver for the purposes of the satellite proceedings.[60] However, whatever the circumstances, the reference must be intentional. An accidental reference or oversight may not be sufficient to pierce the veil.[61] Both parties can expressly consent to waive privilege.[62]

Privilege and Costs.

Once the substantive issues are settled there is no longer a justification for asserting privilege in respect of risk assessment documents and allied documents upon which a costs claim are based,[63] ***a fortiori*** where a party relies on such documents for cost purposes, the waiver discharges the privilege.[64] By contrast, since the substantive matters have not yet been dealt with, the veil cannot be pierced in support of a defence to an application for security of costs.[65] Where an offer is made ***"without prejudice save as to costs"*** the veil is pierced for the purposes of taxation.[66]

Bad Faith

Where a settlement has been induced by bad faith,[67] blackmail,[68] duress,[69] undue influence or fraud[70] the veil of privilege may be pierced. Disclosure will be restricted to evidence related to bad faith. Other aspects of mediation proceedings would remain privileged.[71] The test is unambiguous impropriety.[72] Thus evidence of an intention to dispose of assets by a party who had entered into insolvency was held to be admissible.[73] Where the threat is perfectly lawful the veil remains intact.[74] Evidence of perjury is admissible, but not of a future intention.[75]

Impartiality : Misconduct of mediator.

Where there is an allegation that a mediator has acted in a manner prejudicial to the interests of the parties the court will hear evidence as to that misconduct. [76]

Med/Arb and Mini-trial

Where a judge, adjudicator or arbitrator acts at some stage during the proceedings as a mediator he will perforce be privy to confidential information disclosed during the mediation. Whilst once out of the bag the cat cannot be returned, thus preventing the application of the mediation privilege in such circumstances, it is generally considered best that the mediator and judge are not one and the same. Where they are the same individual the adjudication may be struck down in the absence of clear advice on the potential risk and hence informed consent to taking that risk.[77]

Conclusion

The above are exceptions to the rule that correspondence related to dispute settlement negotiations is privileged. It is not easy to pierce the veil. The first hurdle to overcome is to demonstrate to the court that there is a need to do so. This requires independent evidence, so that the privileged information alone is insufficient to render it admissible.[78]

Finally, information disclosed in a failed mediation whilst inadmissible as evidence in court can provide the other party with sufficient inside information to be able to successfully apply for discovery of documents, the existence of which they might not otherwise have been aware of.[79]

59 ***Turner v Fenton [****1982] 1 All.E.R.* ***Somatra Ltd v Sinclair Roche & Temperley*** *[2002] EWHC Com 1627*

60 ***In the matter of a company*** *(2005) Lawtel No. AC9100809*

61 ***Smith Group Plc v Weiss*** *(2002) Ch.D* **:**

62 ***McTaggart v McTaggart****, [1948] 2 All ER 754, CA;* ***Blow v Norfolk C.C.*** *[1966] 3 All ER 579, [1967] 1 WLR 1280, CA.*

63 ***Donald McCrerry v Massey Plastic Fabrications Ltd*** *[2003] Lawtel AC0104769 :* ***RBG Resources Plc v Rastogi*** *[2005] EWHC 994* (Ch) where evidence regarding a insistence on an apology which in the circumstances was not possible resulted in a failed mediation, leading to cost penalties.

64 ***Goldman v Hesper*** *[1988] LAWTEL AC1266056*

65 ***Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd*** *[1978] RPC 287. QBD;* ***Simaan General Contracting Co v Pilkington Glass Ltd*** *[1987] APP.L.R. 07/31 .*

66 ***Cutts v Head*** *[1984] 1 All ER 597*

67 ***Muller v Linsley & Mortimer*** *(1994) CA.*

68 ***Kristjansson v R Verney & Co Ltd*** *[1998] EWCA Civ 1029*

69 ***Carillion Construction Ltd v Felix UK Ltd*** *[2000] HT/00/223 & 232*

70 ***Vedatech Corp v Crystal Decision UK Ltd & Crystal Decisions (Japan) KK*** *[2003] EWCA Civ 1066*

71 ***Hall v Pertemps Group*** *Ltd [2005] EWHC 3110 (Ch) LAWTEL AC9900805*

72 ***Forster v Friedland*** (CA, 10th November 1992), ***Unilever Plc v The Procter & Gamble Co*** **[***2000] 1 WLR 2436* **:** ***Savings & Investment Bank v Fincken*** *[2003] EWCA Civ 1630*

73 ***Optimum Solution Ltd v Yorkshire Electricity Group Plc*** *[2001] ChD Lawtel AC0101855 :* see also ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116* regarding an admission of bankruptcy.

74 ***Unilever plc v Proctor & Gamble*** *[2000] FSR 344.* A threat to pursue a copyright action made during settlement negotiations was lawful and not admissible in evidence in separate proceedings.

75 ***Berry Trade Ltd v. Moussavi*** *[2003] EWCA Civ 715*

76 See ***B v O*** [2004] EWHC 2064 (Fam) regarding allegations of mediator bias and ***John Amorifer Usoamaka v Conflict & Change Ltd*** ***[****1999] CCRTF 98/0709/2* regarding an incompetent mediator.

77 ***Glencot Dev. & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*** *[2001] BLR 207:*

78 ***Wilkinson v West Coast Capital [****2005] EWHC 1606 (Ch)*

79 ***Re Anglo American Insurance Co Ltd [2000] ChD****. Lawtel AC0100565*

MEDIATION CASE CORNER

C.H.Spurin

With the launch of the Alternative Dispute Resolution Law Reports, ADR.L.R. through the publications section of the NADR web-site, Mediation Case Corner will in future feature only selective topical mediation case summaries.

The full text in pdf form of all reported mediation cases is provided year by year in NADR house style. Summaries are available in the index, along with the NADR ADR Case data base.

Burne v A [2006] EWCA Civ 24

This case involved a medical negligence claim. The trial judge ignored the evidence of both expert witnesses and accordingly the appeal was successful. The judge was not permitted to rule on the basis of "common sense" alone without reference to evidence. A retrial was therefore ordered. However, the court strongly recommended that the parties first engage in mediation whereby they would be forced to take stock of their respective strengths and weaknesses. Thus the court commended reality check (self evaluative) mediation.

Before the CA. Ward LJ; Sedley LJ; Wilson LJ. 25th January 2006.

CONSTRUCTION CASE CORNER

C.H.Spurin

CFW Architects (A Firm) v Cowlin Construction Ltd [2006] EWHC 6 (TCC)

De Nouvo Trial : 3 adjudication decisions and an enforcement action embraced in an all embracing de nouvo trial of all the issues in a claim against architects and counter claim to recover monies from adjudication. Essentially 1st two adjudications substantially upheld : 3rd reversed. Counterclaim failed.

His Honour Judge Thornton. TCC. 23rd January 2006.

Kuenyehia v International Hospitals Group Ltd. [2006] EWCA Civ 21

The claimant had contracted to provide construction contract procurement services to the defendants. Some time later he died. An action was commenced to recover asserted outstanding fees. The claimant's solicitors inquired of the defendant's solicitors whether or not they were empowered to take service on behalf of the defendants. They replied but did not answer this particular question.

On the last day before limitation would set in the claimant's solicitors served notice by fax and post. The defendant's had not given consent to electronic service. The court at first instance waived strict compliance with the CPR Rules on service, thus keeping the action alive (the postal service arrived too late). The defendants successfully appealed. The CA held that the procedures for service of claim forms set out in CPR must be strictly adhered to. Inconsequence the limitation time bar kicked in, bringing the action to an end. The court made it clear that this was due to the professional negligence of the claimant's solicitors. Whilst this might be unfair to the claimant, the implication was that their remedy now lies elsewhere. The court was not prepared to save the claimant solicitor from embarrassment.

CA. Waller LJ; Dyson LJ; Neuberger LJ. 25th January 2006.

COMMENT : Cross reference ***Scrabster Harbour Trust v Mowlem plc [2006] CSIH 12*** *and* ***Peacocks Ltd v Chapman Taylor [2004] EWHC 2898 (TCC) Lawtel AC0108593.*** Where the rules on notice and methods of communication are clear, as in the CPR rules, it is essential to comply fully with the rules. In **Scrabster v Mowlem** it was only the imprecise nature of the rules that allowed an exception. This emphasises the importance of construction claims managers being fully conversant, not only with Construction Adjudication, but also the terms of construction contracts, allied adjudication rules and the CPR, particularly where there is a need to engage the legal profession to assist with enforcement proceedings or onward litigation post adjudication.

Morrison v AWG Group Ltd [2006] EWCA Civ 6

This concerned an appeal against the decision of Mr. Justice Evans-Lombe. Chancery Division who had dismissed an application by the defendant to recuse himself from the trial on the grounds of conflict of interests and perception of bias. The trial judge had admitted that he would have difficulty ruling on the character of a potential witness but had then decided that no prejudice would arise since the claimant had chosen to call other members of the board instead. The Court of Appeal held that the option of the claimant calling alternative witnesses to save the judge embarrassment was prejudicial to the defendants who might wish to cross question that witness. Accordingly the judge should recuse himself.

CA before Mummery LJ, Latham LJ, Carnwath LJ. 20th January 2006.

Peakwell Management Ltd v Globalsantafe Drilling UK Ltd [2006] S.Ct A2661/05

A contract for the hire of a drilling rig contained payment provisions in very similar terms to those in use in the construction industry, in particular it provided for stage payments, by application, subject to a withholding provision.

An application was duly made and a withholding notice issues. The applicant, nonetheless applied to the court to enforce payment on the application, substantially basing its case on the balance of convenience, in particular because the payment was supported by a documentary credit which was due to expire.

The sheriff at first instance and the Sheriff Principal on appeal held that the issue of a withholding notice under the terms of the contract resulted in a dispute crystallising : consequently, in the absence of resolution of the dispute no sums became due - so no action for summary enforcement of sums allegedly due under an interim payment scheme could lie.

Sheriff Principal Sir Stephen S T Young Bt QC. 7th February 2006

Comment : The facts of this case illustrate the strengths of the construction adjudication process and provide compelling grounds for the extension of the process to other industries, in particular satellite construction industries and some of the activities currently exempted from the HGCRA, where cash flow is of prime importance. Once the dispute had crystallised an adjudication procedure could have provided a rapid determination of the dispute as to whether or not monies were due and which rates of remuneration applied.

Robert Cunningham v Collett & Farmer (a firm) [2006] EWHC 148 (TCC) : Bailli

This report is concerned with an interim costs hearing. The court provides a detailed analysis of the procedure to be applied when assessing costs thrown away. ***Lownds v Home Office*** [2002] EWCA Civ 365; and ***Bryen & Langley Ltd v Martin Boston*** [2005] EWCA Civ 973 applied. A two stage process should be adopted. First, were costs disproportionate and second, assess what would be reasonable, rather than simply comparing the costs summaries of the parties.

The claimant property developer cancelled a construction contract, dismissing the contractor and the architect. The claimant was previously ordered by an adjudicator to pay outstanding fees to the architect and sought to recover his losses by commencing a professional action to recover £0.5M. Costs (the subject of this hearing) were thrown away by delays caused because the claimant's pleadings were not in good order. The claimant's first legal team asked for a postponement because the claimant might be a might be a patient under the Mental Health Act. The claimant refuted this and appointed a replacement legal team. An agreement was brokered whereby the first legal team agreed to pay the costs thrown away by the applications for postponement. This trial was therefore concerned with the assessment of those costs, and the costs of this assessment. The court concluded that the claimant was responsible for most of the problems related to the conduct of the trial to date, noting that the final figure that would be claimed for negligence once the pleadings were put in good order, was likely to be considerably less that appeared at that time.

The trial of the negligence action is pending, so no comment can be made at the current time.

Coulson QC HHJ Peter. TCC. 9th February 2006.

Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC)

A construction contract for a substantial housing development in Central London envisage a tripartite relationship between developer (Defendant) Contractor (Claimant) and Project manager/certifier. MACE was appointed as project manager by the developer but this relationship came to an end and the developer sought to appoint itself as Project Manager. An initial point fell for decision in this case, namely as to whether or not an employer can appoint itself as Construction Manager / Contract Administrator / certifier ? In a very detailed and highly structured analysis, the court held that it could not. Whilst an employee can be given that role - the employer himself cannot fulfil that role - there must be a degree of independence/professional separation. His Honour held at para 45 that :-

SJH had no power to appoint itself as construction manager. I reach this conclusion for nine reasons:

(1) It is such an unusual state of affairs for the employer himself to be the certifier and decision-maker that this can only be achieved by an express term. In the present case there is no express term authorising this, as there was in ***Balfour Beatty****. The general words at the end of Part E of Appendix 1 to the trade contract are not sufficient.*

(2) The whole structure of the trade contract is built upon the premise that the employer and the construction manager are separate entities. Endless anomalies arise if the employer and the construction manager become one and the same. For example, under clause 1.6 the employer issues certificates to himself. Under clause 21 the scheme for dispute resolution becomes distorted. The employer will, by definition, be in agreement with his own decisions. The only party which might feel the need to challenge certificates or decisions would be the contractor.

(3) The construction manager is under a legal duty to perform his decision-making function in a manner which is independent, impartial, fair and honest. In other words, he must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer: see Part 4 above. Whilst I reject Mr. Hughes' submission that the employer is incapable of performing this task, I do consider that this task is more difficult for the employer than it is for a professional agent who is retained by the employer. Furthermore, this task is more difficult for the employer as an entity than it is for a specific individual who is employed by the employer. A senior and professional person within an organisation can conscientiously put his employer's interests on one side and make an independent decision. See ***Perini.*** *It is more difficult for the organisation itself to make a decision which is contrary to its own interests. The employer could of course ask a named professional employee to make the relevant decision, but the employer would still have to go on and adopt that decision as its own.*

*(4) In the course of argument Mr. Dennison conceded that the words in Part E of Appendix 1 "****any further or other person****" cannot mean literally any other person. The term must be limited to persons who have the requisite competence. When I asked whether this limitation was express or implied, Mr. Dennison inclined to the view that the limitation was express but he wished to reserve his position. It seems to me that Mr. Dennison's concession was an entirely proper one. The phrase "****any further or other person****" cannot be read literally, it must be read subject to at least some limitation.*

(5) Mr. Dennison is correct that, in one sense, both the employer and the contractor have an interest in securing that the construction manager makes correct decisions and issues correct certificates. There are dicta in the authorities to this effect. On the other hand, this argument of identity of interest cannot be pressed too far. Anyone who has practised or sat in this court will have seen many cases where the stance of both employer and contractor is driven by their own commercial interests rather than by any more lofty ideal. Property developers are in business to make a profit. They do not always welcome large awards of loss and expense to the contractor, however well merited such awards may be.

(6) Under the trade contract in this case, and indeed under most standard forms of construction contract, the contractor has two separate protections which reduce the likelihood of under-assessment or under-certification occurring. First, the assessment or certification is made by an identified professional person or firm who (despite being employed and paid by the employer) is nevertheless separate from the employer. Secondly, the decision-maker has a duty to act in a manner which is independent, impartial, fair and honest. If the employer suddenly becomes the assessor and certifier, the contractor loses one layer of protection. As Mr. Hughes forcefully put it in argument, a contract in which the employer acts as construction manager is very different from the contract which Scheldebouw priced at tender stage.

(7) The involvement of other professionals in the construction manager's decisions is not a sufficient protection for the contractor. Neither the architect nor the cost consultant can compel the construction manager to issue a certificate which is unacceptable to him. In the case of extensions of time no certificate is required. The construction manager must consult the architect, but he need not accept the architect's advice. Extensions of time are, of course, relevant not only to damages for delay but also to loss and expense.

(8) So far as my researches go, every case in which the certifier was a direct employee of the employer is a case in which this circumstance was known to the contractor at the outset. The contractor went into such a contract with his eyes open. The seventh edition of ***Keating on Building Contracts*** *(edited by Vivian Ramsey Q.C. and Stephen Furst Q.C.) indicates that the contractor's knowledge may be an essential element: see the second paragraph on p. 147. The one reported case where this aspect of the facts is not entirely clear is* ***Panamena.*** *However,* ***Panamena*** *proceeded on the basis that the repairers had expressly consent to Dr. Telfer acting as certifier: see the judgment of Lord Justice Scott at p. 123.*

(9) As Mr. Dennison conceded in the course of argument, if his interpretation of Appendix 1, Part E is correct, the employer is entitled at any time to dismiss the entire professional team and appoint himself to act in their place. The employer would thus become the construction manager, the architect and the costs consultant. In response to my suggestion that this situation could not have been intended by the parties, Mr. Dennison characterised this as "the Armageddon scenario". The analogy with chapter 16 of the Book of Revelation is appropriate. The contract would be utterly transformed from that which Scheldebouw had priced. This possible scenario is a further reason why I reject the broad interpretation of Part E of Appendix 1 for which Mr. Dennison contends."

The following cases amongst others are referred to in the judgement : ***Frederick Leyland & Co. Ltd. v. Compania Panamena Europea Navigacion Limitada*** *[1943] 76 Ll.L.Rep. 113.* ***Panamena Europea Navigacion Compania Limitada v. Frederick Leyland & Co.*** *[1947] A.C. 428.* ***Perini Corporation v. Commonwealth of Australia*** *[1969] 12 B.L.R. 82,* ***London Borough of Hounslow v. Twickenham Garden Developments Ltd.*** *[1971] 1 Ch. 233,* ***Sutcliffe v. Thackrah*** *[1974] A.C. 727,* ***Beaufort Developments Ltd. v. Gilbert Ash NI Ltd.*** *[1999] AC 266,* ***Northern Regional Health Authority v. Derek Crouch Construction Co. Ltd.*** *[1984] Q.B. 644, In* ***Amec Civil Engineering Ltd. v. Secretary of State for Transport*** *[2005] E.W.C.A.Civ. 291;* ***Costain Ltd. v. Bechtel Ltd.*** *[2005] EWHC 1018 (TCC).* ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** *[1998] 1 WLR 896 at 912 to 913, and* ***BCCI v. Ali*** *[2001] UKHL 8;* ***Lubenham Fidelities and Investments Co. Ltd. v. South Pembrokeshire District Council*** *[1986] 33 B.L.R. 39,* ***Balfour Beatty Civil Engineering Ltd. v. Docklands Light Railway Ltd.*** *[1996] 78 B.L.R. 42.* Mr Justice Jackson. TCC. 16th January 2006.

Comment : similarly, party to a dispute or difference could not be an adjudicator/arbitrator in his own cause.

Snookes v Jani-King (GB) Ltd [2006] EWHC 289 (QB) : Bailii

A franchise contract (non-construction - non HGCRA) specified that claims be brought before a competent court in London. The claim was commenced in Swansea District Registry. The court held that Swansea did not have jurisdiction. The claim could not be transferred. The claim had to be withdrawn and re-commenced in London. The court noted however that had the claim been commenced in London, a claim could then be transferred at the discretion of the court.

The Honourable Mr Justice Silber. QBD. Swansea District Registry. 23rd February 2006.

PRACTICE & PROCEDURE CASE CORNER C.H.Spurin

Antec International Ltd v Biosafety USA Inc [2006] EWHC 47 (Comm)

Forum Non-Conveniens : Jurisdiction. QBD. Mrs Justice Gloster, DBE 27th January 2006.

Cunningham v Collett & Farmer (a firm) [2006] EWHC 148 (TCC)

Costs Thrown Away : Interim costs hearing. Detailed analysis of the procedure to be applied when considering assessment of costs thrown away. HHJ Peter Coulson QC : TCC. 9th February 2006

Ecuador v Occidental Exploration & Production Co [2006] EWHC 345 (Comm)

Challenge s67 : s68. Jurisdiction to deal with taxation excluded. Did this extend to application for return of VAT. Held No. Mr Justice Aikens. Commercial Division. 2nd March 2006.

Horn Linie GmbH & Co v Panamericana Formas E Impresos SA [2006] EWHC 373 (Comm)

Choice of Law : Conflict : UK or Columbian Law. Whether HVR apply. Anti-suit injunction.

Mr Justice Morison. Commercial Court. 6th March 2006.

Kanoria v Guinness [2006] EWCA Civ 222

Challenge : s103 A.A. 1996. challenge to an arbitration award on the grounds that the challenging party had not been notified of the arbitration and was not able to defend himself. The court held that the award was not unenforceable. CA. Lord Phillips MR.Sir Anthony Clarke; May LJ. 21st February 2006.

Leibinger v Stryker Trauma GmbH [2006] EWHC 690 (Comm)

s67 Arbitration Act Challenge : Was the Curial Law that of England or Germany?

Commercial Court. Mr Justice Cooke. 31st March 2006.

Meadow v General Medical Council [2006] EWHC 146 (Admin)

Even where an expert witness acted in good faith and there was no evidence of calculated or wilful failure to use his best endeavours to provide evidence a finding of serious professional misconduct is not precluded but it will only be in a very rare case that such a finding will be justified.

Mr Justice Collins. QBD. Administrative Court. 17th February 2006.

Sea Trade Maritime Corp v Hellenic Mutual War Risks Assoc (Bermuda) Ltd. [2006] EWHC 578 (Comm)

Costs : Reservation to subsequent award. Where a tribunal reserves costs to a subsequent award it deals with the matter (s47) so that the provisions of s57 do not come into play.

Mr Justice Christopher Clarke. : Commercial Court. 24th February 2006.

Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242

Bias : Recorder was from the same chambers as counsel for one of the parties and had acted for related firms : CA allowed an appeal - setting aside the recorder's decision because of an appearance of bias. Also deals with appeal out of time. CA. Phillips LCJ, Sir Anthony Clarke MR: May LJ. 21st March 2006

Snookes v Jani-King (GB) Ltd [2006] EWHC 289 (QB) : Bailii

A franchise contract (non-construction - non HGCRA) specified that claims be brought before a competent court in London. The claim was commenced in Swansea District Registry. The court held that Swansea did not have jurisdiction. The claim could not be transferred. The claim had to be withdrawn and re-commenced in London. The court noted however that had the claim been commenced in London, a claim could then be transferred at the discretion of the court.

The Honourable Mr Justice Silber. QBD. Swansea District Registry. 23rd February 2006.

Stretford v Football Association Ltd & Anor [2006] EWHC 479 (Ch)

s69 Arbitration Act 1996 : Contractual term excluding appeal not contrary to Human Rights Act.

Sir Andrew Morrit. Chancery. 17th March 2006

Sukuman Ltd v The Commonwealth Secretariat [2006] EWHC 304 (Comm)

s69 Arbitration Act 1996 : Contractual term excluding appeal not contrary to Human Rights Act.

HHJ Colman. Commercial Court. 27th February 2006.

Weissfisch v Julius [2006] EWCA Civ 218

Jurisdiction : Unsuccessful appeal against refusal of application for an interim order to stay arbitral jurisdiction hearing. Arbitration agreement - seat - Switzerland : Swiss choice of Law : Kompetenze/Kompetenze. CA. LCJ; MR. Moses LJ. 8th March 2006

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Tel : 0044 (0)1443 486122 : Fax : 0044 (0)1443 404171 : e-mail : The Editor@nadr.co.uk. Web-site : www.nadr.co.uk