

ADR NEWS



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

EDITORIAL :

Adjudication is gradually spreading out into the private sector, though it is noticeable that the two latest developments remain very closely linked to the construction industry.

IDRS (Independent Dispute Resolution Service), the commercial arm of the CIArb (Chartered Institute of Arbitrators) has secured the right to offer dispute resolution services for HIPs (Home Information Packs). According to the CIArbs Newsletter, "[The Resolver](#)", "The Property Adjudication for Consumers Scheme (PACS), which was due to come into operation on December 1, 2007, uses professionally qualified adjudicators to determine consumer and small business disputes involving estate agents and letting agents. The Scheme, which operates on a 'polluter pays' basis, will be free at the point of use to consumers. The maximum figure for an award under PACS will be £25,000 inclusive of VAT and including up to £1,000 for stress and inconvenience suffered. To join PACS estate agents will pay a joining fee of just £100 plus VAT per member office, irrespective of the size of the company. A discount of 30% per office will apply for multi-office registrations and registrations from members of any trade association or professional body that has accepted PACS.

A further case fee of £425 plus VAT is due from the company if they subsequently use PACS. If a member does not have any complaints made against them, then they will have no financial contributions to make other than their joining fee. Under PACS, the consumer may apply for a decision to be made by an adjudicator if they have been through the company's complaints procedure and the complaint has not been settled, or more than 8 weeks have passed since the initial complaint and there has been no settlement, as long as the application to PACS is made within twelve months of the original complaint. The adjudicator has the power to tell the member to give the consumer an apology or explanation, take some practical action that will benefit the consumer and/or pay the consumer an award. If the adjudicator decides the claim is unfounded then he or she can dismiss it.

PACS has been designed to take 6- weeks from the acceptance of a valid case to the adjudicator issuing a final decision. The consumer will be given 4 weeks to decide whether or not to accept the adjudicator's decision. If it is accepted then the PACS member is contractually bound to comply with the decision and it is then binding on both the consumer and the member. The decision cannot be appealed, but if the consumer rejects it, then both the consumer and the member retain the right to go to court." It will be interesting to see how much traffic the scheme generates.

The FMB (Federation of Master Builders) has teamed up with RICS (The Royal Institute of Chartered Surveyors) to set up a 21 day adjudication process to settle contractual disputes related to home building. The adjudication panel has been established by RICS. The process is price fixed at £110 / hour with a maximum of 10 hours per case, setting a ceiling of £1,100 per dispute. Further details of the scheme are eagerly awaited.



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Editorial Board.

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As the court based mediation service for small claims provided by HMCS is rolled out across England & Wales, dismay has been expressed by some commentators that the pre-existing mediation service in Exeter has been brought to an end. The experience gained over a number of years has been replaced by court staff newly appointed to the role of mediator. No doubt in due course comparisons between past and present performance will be brought into focus. It is to be hoped that the new service will pass muster. Time will tell. The question that is not being asked however, is whether or not severely time constrained "mediation" can ever live up to its name, or whether in reality it is a form of "conciliation" where after a quick sniff, the convenor presents the parties with a "considered opinion" and advises on settlement terms.

In the meantime the Civil Mediation Council has been calling for claimant and defendant forms to be amended to include a statement on the willingness or otherwise of the party to settle the dispute. Under the proposal, where a party indicated an unwillingness to settle to provide reasons. It would appear some courts are already using amended forms and the proposal could be rolled out across England and Wales in due course. These proposals are in addition to the amendments to the court allocation questionnaire that now require solicitors to confirm that they have explained the ADR / mediation process to their clients.

G.R.Thomas : Editor

PART IV : ADJUDICATORS AND REASONS

The duty of a construction adjudicator.

s108 Housing Grants Construction and Regeneration Act 1996 (HGCRA) requires construction contracts to provide a mechanism for the referral of disputes to an adjudicator "to make a decision" in respect of any dispute referred under the contract. What is the nature of this decision making task? S108 provides that the adjudicator will have to act *impartially*. The adjudicator is empowered *to take the initiative in ascertaining the facts and the law* to enable a decision to be made. This indirectly leads one to conclude that the decision is a quasi-judicial decision, based on fact and law, and thus of a similar kind and nature to an arbitration award or a judgment. This is reinforced by the requirements of the Scheme for Construction Contracts Regulations 1998, which applies where a contract is not compliant with the s108 minimum requirements. S20 of the Scheme states that :-

"The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute....."

However, there is no statutory duty for an adjudicator to provide reasons. Whilst s108 HGCRA is silent on the matter, s22 of the Scheme states that "If requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision." By implication, in contrast to arbitration, the default position is that the adjudicator is not generally required to provide reasons unless a party otherwise requires. Whilst it is common for the adjudication language in construction contracts to require reasons, some contracts expressly state that no reasons be provided.

The problem here is that, as in other areas of practice, whilst the HGCRA imposes a duty on an adjudicator to act impartially there may be no way of discerning whether or not he has done so in the absence of reasons. The HGCRA is silent as to whether, unless by implication as noted above, the adjudicator has to base his decision on facts (*including the governing contractual regime*) and law. It is usual for adjudication language in contracts to make this clear. The Scheme is more specific, s12 stating that "**The adjudicator** shall act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract" S17 further requires that "The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision." Again, in the absence of reasons, it may not be possible to discern whether or not the adjudicator has applied the law or considered and taken into account all relevant matters. Assuming sufficient reasons are provided to enable the decision making process to be analysed effectively, what are the consequences where the adjudicator is deemed to have failed to reach a decision in accordance with facts and the law?

What do the cases say ?

Clearly, as with arbitration the objective of adjudication is to provide the disputing parties with a resolution to the dispute at hand, though the nature of that resolution is different, in that it is not final. Whilst the parties can embrace the decision as a final solution, it is the right of either party to refer the dispute onwards to litigation or arbitration in pursuit of a final binding determinative outcome.

The nature of the adjudication decision making process was considered by Lord Justice Chadwick MR. in *Carillion v Devonport* [2005].¹ DML sought declarations in the following terms:

- (1) *The decision was made without and/or in excess of jurisdiction; and/or,*
- (2) *The decision was made on an intrinsically unfair basis and/or in breach of the rules of natural justice; and/or,*
- (3) *The decision is not compliant with the requirements of the HGCRA 1996 and the Scheme for Construction Contracts Regulations 1998."*

Jackson J at first instance summarised the submissions advanced on behalf of DML as follows:-

1. *The adjudicator's decision on target cost... was a decision which was outside his jurisdiction and therefore should not be enforced."*
2. *The adjudicator's decision on target cost was reached in breach of the rules of natural justice and therefore should not be enforced.*
3. *The adjudicator's decision on allowance for defects was reached in breach of the rules of natural justice and not supported by any or any adequate reasons; therefore it should not be enforced.*
4. *The adjudicator had no jurisdiction to award interest."*

Accordingly, "if the attack on the adjudicator's decision were to succeed under any one of the first three of those grounds, the decision would be unenforceable. But if the attack were to succeed on the fourth ground alone, then the award of interest would be severable and the balance of the decision could be enforced."

Jackson J reviewed the case law and derived the following four principles from those authorities :-

1. *The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).*
2. *The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see Bouygues,² C&B Scene³ and Levolutx;⁴*
3. *Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural*

¹ *Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358*

² *Bouygues, (UK) Limited v Dahl-Jensen (UK) Limited* [2001] All ER Comm 1041, [2000] BLR 522,

³ *C&B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93

⁴ *Levolutx AT Limited v Ferson Contractors Limited* [2003] EWCA Civ 11, 86 Con LR 98

- justice, the court will not enforce his decision: see *Discain*,⁵ *Balfour Beatty*⁶ and *Pegram Shopfitters*⁷.
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice: see *Pegram Shopfitters & Amec*.⁸
- Jackson J further stated five propositions which, as he said, bore upon the issues which he had to decide:
1. If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of para 17 of the Scheme. If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision. I reach this conclusion on the basis of the Court of Appeal decisions mentioned earlier. This conclusion is also supported by the reasoning of Mr Justice Steyn in the context of arbitration in *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyds Reports 187.
 2. On a careful reading of His Honour Judge Thornton's judgment in *Buxton Building Contractors Limited v Governors of Durand Primary School* [2004] 1 BLR 474, I do not think that this judgment is inconsistent with proposition 1. If, however, Mr Furst is right and if Buxton is inconsistent with proposition 1, then I consider that Buxton was wrongly decided and I decline to follow it.
 3. It is often not practicable for an adjudicator to put to the parties his provisional conclusions for comment. Very often those provisional conclusions will represent some intermediate position, for which neither party was contending. It will only be in an exceptional case such as *Balfour Beatty v London Borough of Lambeth* that an adjudicator's failure to put his provisional conclusions to the parties will constitute such a serious breach of the rules of natural justice that the Court will decline to enforce his decision.
 4. During argument, my attention has been drawn to certain decisions on the duty to give reasons in a planning context. See in particular *Save Britain's Heritage v No 1 Poultry Limited*, [1991] 1 WLR 153 and *South Bucks DC and another v Porter (No 2)* [2004] 1 WLR 1953. In my view, the principles stated in these cases are only of limited relevance to adjudicators' decisions. I reach this conclusion for three reasons:

⁵ *Discain Project Services Limited v Opecprime Development Limited* [2000] BLR 402

⁶ *Balfour Beatty Construction Limited v Lambeth London Borough Council* [2002] BLR 288

⁷ *Pegram Shopfitters Limited v Tally Weijl (UK) Limited* [2003] EWCA Civ 1750, [2004] 1 All ER 818

⁸ *Amec Capital Projects Limited v Whitefriars City Estates Limited* [2004] EWCA Civ 1418, [2005] BLR 1.

- (a) Adjudicators' decisions do not finally determine the rights of the parties (unless all parties so wish).
 - (b) If reasons are given and they prove to be erroneous, that does not generally enable the adjudicator's decision to be challenged.
 - (c) Adjudicators often are not required to give reasons at all.
5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances, such as those described by Lord Justice Clerk in *Gillies Ramsay*,⁹ that the court will decline to enforce an otherwise valid adjudicator's decision because of the inadequacy of the reasons given. The complainant would need to show that the reasons were absent or unintelligible and that, as a result, he had suffered substantial prejudice."

Was the adjudicator's decision on target cost a decision which was outside his jurisdiction and therefore should not be enforced?

Jackson J rejected that submission for six reasons :-

1. The adjudicator was required to determine the primary sum due to Carillion under the Alliance Agreement. This determination inevitably involved along the way making an assessment of the target cost. All this was spelt out in the notice of adjudication dated 4th January 2005.
2. In its notice of referral dated 6th January 2005, Carillion specifically asked the adjudicator to assess target costs in the sum of £113,953,000, as set out in Carillion's letter dated 30th October 2001. DML responded to this claim in its various written submissions to the adjudicator.
3. It is quite true that Carillion subsequently put forward an argument ... that target costs should be £110 million. Nevertheless, Carillion made it clear that it was not abandoning its original case on target cost. DML understood that this was the position, as can be seen from its rejoinder.
4. The method by which the adjudicator should determine target cost was a matter of controversy between the parties and ultimately for decision by the adjudicator. Both parties provided to the adjudicator voluminous factual and expert evidence to assist him in determining target cost by whichever route he chose to adopt.....
5. The adjudicator rejected Carillion's argument that a target cost of £110 million could somehow be derived from the documents disclosed concerning the settlement with MoD. In those circumstances ... the adjudicator was quite entitled, if he saw fit, to assess target costs at £113,953 million in accordance with Carillion's letter
6. The adjudicator's assessment of target cost is highly likely to be revised either upwards or downwards, if and when an arbitrator or this court comes to determine the matters in issue between the parties. The adjudicator's approach to or assessment of target cost may well embody errors of both fact and law. This would be unsurprising in view of the statutory constraints under which he was operating and the

⁹ *Gillies Ramsay Diamond and others v PJW Enterprises Limited* [2004] BLR 131

sheer volume of evidence and intricate submissions which were thrust upon him. Nevertheless, any such errors of law and fact cannot be characterised as excess of jurisdiction."

Jackson J's rationale was that the expression 'primary sum' in paragraph 1 refers to "the sum which is due to Carillion under clause 10 of the Alliance Agreement if one excludes the fee element." It is the aggregate of final actual cost and the gainshare/painshare element. It is impossible to compute the gainshare/painshare element without first determining a figure for target cost. That determination of the primary sum "inevitably involved along the way making an assessment of the target cost". Hence, it was within his jurisdiction.

Was that decision on target cost reached in breach of the rules of natural justice? It was submitted that the adjudicator had disregarded three arguments which he should have taken into account. DML "characterises these three disregards in two ways. First, he says that they amount to an exclusion of relevant considerations. Thus the adjudicator was in breach of para 17 of the Scheme. Secondly [he] says that these three disregards are a breach of the rules of natural justice". Regarding the three disregards :-

1. Failure to enter into the merits or otherwise of the discussion between DML & MoD under the main contract.

Per Jackson J this "... was no more than the implementation of a decision of law. The adjudicator concluded that negotiations between DML and MoD could not impact upon the calculation of target cost under the Alliance Agreement and its amendments. In this respect, the adjudicator was rejecting an argument advanced by Carillion and accepting an argument which had been advanced more than once by DML....

It was clearly an issue for the adjudicator to decide whether the negotiations between DML and MoD were relevant to the assessment of target cost and, if so, how. The adjudicator concluded that those negotiations were not relevant.

Whether the adjudicator was right or wrong in this conclusion cannot affect the validity of his decision. Having reached such a conclusion, the adjudicator, when assessing target cost, did not take into account the negotiations between DML and MoD. The adjudicator cannot be criticised for taking that course."

2. Failure to consider the alternative calculation of target cost provided by DML.

Jackson J observed that "... Mr Ennis undertook an alternative calculation. He took the target cost contained in amendment 2 and adjusted that figure in accordance with clause 13 of the Alliance Agreement. ... he disregarded amendments 3 to 6. This alternative calculation produced a target cost of £81 million to £84 million. The adjudicator rejected the contractual basis of Mr Ennis's alternative calculation. Therefore the adjudicator did not make use of Mr Ennis's [calculation] in assessing target cost. There was nothing objectionable in the adjudicator adopting that course."

3. The adjudicator's failure to refer in his Reasons to five specific defence arguments, viz:

- (a) CCL's failure to identify the factual and legal basis of its claim meant that its claim should fail ...
- (b) DML was not obliged to put forward the letter of 30th October 2001 to MoD, nor was it in a position to do so.
- (c) DML did not secure payment in the sum set out in the letter from MoD ...
- (d) Even if DML were obliged to put forward the letter of 30th October, CCL's remedy would be the loss of the chance to fix a target cost based on those figures ...
- (e) There was no obligation on DML to make disclosure of the DML -- MoD negotiation documents."

Jackson J rejected that criticism : "The adjudicator was the recipient of literally hundreds of pages of legal argument. The parties' positions shifted as the adjudication progressed..... The adjudicator did a remarkable job in keeping abreast of the battle and in keeping under control the torrent of incoming material. He made it plain in his written decision which arguments he accepted and how his figures were calculated. It is clear that the adjudicator was not persuaded by the five specific arguments ... of DML's skeleton argument. **There was no need for the adjudicator specifically to recite and address those five arguments in his decision.**"

Jackson J rejected an assertion of 'breach of natural justice.' He described it as "a variant of [DML's] first challenge to the adjudicator's decision". It was said that, in breach of natural justice, the adjudicator decided the issue concerning target cost on a different basis from that advanced by the parties and without giving DML an opportunity to make representations. Jackson J took the view that "... DML had proper opportunity to make representations concerning the assessment of target cost on the basis adopted by the adjudicator. Indeed DML did make such representations in the form of Mr Ennis's reports."

A third challenge to the adjudicator's decision was founded on the contention that **the adjudicator's allowance for defects was** reached in breach of the rules of natural justice and **not supported by any or any adequate reasons.** So, it was said, the decision could not be enforced.

The dispute notice submitted by DML to the Alliance Board evaluated defective items at £2,942,614. Subsequently DML revised its claim upwards to an amount of £20 million or thereabouts. CCL's stance was that there could be no allowance for defects because there had been no withholding notice, no crystallised dispute and no opportunity to remedy the defects. The adjudicator rejected those threshold defences. He took the November 2004 dispute notice as a starting figure and applied a discount. Jackson J summarised the challenge to the adjudicator's approach as follows : " DML considers that the allowance made for defects should have been higher. Mr Furst mounts three separate attacks on the adjudicator's assessment of £2,354,091. :-

1. The Adjudicator focussed on DML's original defects claim..... He did not address the expanded defects claims ... despite the fact that these had been prepared after further and fuller investigation.
2. The adjudicator applied a reduction factor of 20 per cent to DML's original defects claim: '... in an attempt to more accurately reflect the regular and routine nature of the intended works and their actual cost.'.... The adjudicator took this course without giving either party the opportunity to comment on his proposed reduction.

3. The adjudicator gave no, or no adequate, reasons for his decision in respect of defects."

Jackson J rejected that challenge. As to the first line of attack, it is clear from his reasons that the adjudicator specifically considered DML's expanded defects claim As can be seen from .. his reasons, the adjudicator considered that the defects alleged by DML in November 2004 had been properly notified to Carillion under clause 17(3) of the subcontract. However the adjudicator did not find that the second batch of defects had been properly notified to Carillion. Furthermore, the adjudicator took the view that the only satisfactory evidence relating to defects was the evidence supporting the first batch of defects.....

Although it is irrelevant to anything which I have to decide, I have read the evidence of Mr Evans and Mr Ennis supporting the second batch of defects. It can be seen that of the £21 million claimed for defects, only £56,614.10 had so far been expended. Also, the assessment of future remedial work involved a significant degree of speculation. The adjudicator was perfectly entitled to find that the expanded defects claim had not been satisfactorily proved at that stage. **The adjudicator may have been right or he may have been wrong in (a) his analysis of the effect of clause 17 of the subcontract and (b) his assessment of the expert evidence.** These are two separate and independent justifications of the decision which the adjudicator reached. **Whether the adjudicator was right or wrong in these matters, it cannot be said that he failed to consider and address DML's expanded claims for defects in the sum of about £20 million."**

Regarding the complaint that the adjudicator had applied a 20 per cent discount without giving either party an opportunity to comment on that course Jackson J stated that "The 20 per cent reduction in quantum which the adjudicator made was the result of casting a critical eye over the expert evidence. **This is precisely the kind of exercise which one would expect the adjudicator (who is himself an experienced engineer) to undertake.** It is unrealistic to expect an adjudicator, who is struggling under tight time limits with a growing mass of evidence and legal submissions, as well as a barrage of intricate correspondence, to contact the parties and to invite their comments on a matter of this nature" and went on to conclude that "**In my view, the reasons which the adjudicator gave for his decision on defects were perfectly adequate. The adjudicator explained why he rejected the expanded defects claim. He also explained the reduction factor which he applied to the original defects claim."**"

The grounds for the application for permission to appeal were broadly the same as the four 'final submissions' identified by Jackson J. The CA refused permission to appeal on all grounds save that relating to interest. The applicant's outline submissions were prefaced with a general criticism of the adjudicator's decision as follows: "This appeal relates to an adjudication which went seriously awry. In short:-

- a. The Adjudicator awarded the respondent ('CCL') more than CCL ended up claiming;
- b. The Adjudicator expressly ignored all the arguments advanced by both parties as to the basis upon which Target Cost should be calculated;

- c. Instead he decided that issue on a basis which had not been advanced by either party and which neither party had notice of;
- d. **The Adjudicator provided no reasons at all for rejecting the arguments put forward by the parties as to the basis upon which Target Cost should be calculated and/or his reasons are wholly inadequate;**
- e. Although the Adjudicator found there were defects, as contended for by DML, he evaluated the cost of remedying those defects at a figure well below the figures put forward, on a basis that neither party contended for and without providing any reasons at all for so doing.;
- f. He also discounted that figure for a reason which neither party had advanced and without notice to the parties or giving them an opportunity to make representations;

This is not a case where the unsuccessful party is simply scrabbling around to find some argument, however tenuous to resist payment. It is submitted that it is clear that the Adjudicator's decision was arrived at in breach of the rules of natural justice and fails to comply with the very basic and fundamental requirements prescribed by the 1996 Act and Scheme, as interpreted by the Courts. A very serious injustice has resulted."

The CA stated that "We find it difficult to understand and impossible to accept – the criticism that the adjudicator awarded CCL "more than CCL ended up claiming". The claim made in the notice of adjudication and in the referral notice was for £10,451,237.61 in respect of further amounts due pursuant to the Alliance Agreement. The comparable figure within the award is £7,946,422, i.e. the aggregate of the sums which the adjudicator awarded under para 2 and 4 of his decision the difference between the two figures is attributable (i) to the adjudicator accepting a revised (and lower) figure for final actual cost than that originally advanced on behalf of CCL and (ii) to the set-off in respect of defects (£2,354,091). But, even if that set-off were left out of account, the amount that would have been awarded in respect of the aggregate of unpaid primary cost and subcontractor's fee (£3,521,527 + £6,778,986 = £10,300,513) is less than the amount (£10,451,237.61) claimed in respect of those two elements.

The criticism that the adjudicator awarded CCL "more than CCL ended up claiming" is based on the premise that CCL abandoned the claim to be paid "further amounts due . . . pursuant to the Alliance Agreement". But that premise cannot be established. It is true that, in the referral notice, CCL advanced an alternative claim based on **Actual Cost plus Fee** which, on the figure then put forward in respect of final actual cost (£112,983,839), would have left an unpaid balance of £9,988,837. That figure reduced to £9,490,672 when CCL accepted that there should be a reduction in the final actual cost. But CCL's primary case remained that identified in the notice of adjudication : '**A dispute has arisen between Carillion and DML in respect of the sub-contract works either pursuant to and/or as damages for breach of the Alliance Agreement . . .**' In that context, as CCL asserted "Carillion has maintained its position that in the absence of DML providing documentation and facilitating a review the Target Cost should be the figure of £113,953,000. . ."

The primary case, that CCL's claim was made under or for breach of the Alliance Agreement was reaffirmed in a letter to the adjudicator: "Carillion rejects DML's assertions that new or different claims are advanced in the Reply. Carillion's

claim for the purposes of this adjudication has always been 1. made under or for breach of the Alliance Agreement and 2. for the difference between the amount due under or for breach of the Alliance Agreement and the £110 million paid by DML to date."

CCL advanced a claim based on the contention that (*in the absence of a review under the contractual machinery*) target cost was to be taken to be the settlement figure. CCL's primary case remained that advanced in the notice of adjudication. DML understood that position – as appears from DML's own summary of submissions which contained a clear recognition that CCL had not abandoned its primary claim based on target cost of £113.95 million.

This answers the criticism that the adjudicator awarded CCL more than it was claiming and the submission that the adjudicator's decision on target cost was a decision which was outside his jurisdiction. It is beyond argument that the questions (i) could target cost be determined in the light of the failure of the contractual machinery? and, if so, (ii) what figure should be taken as the target cost? were central to the determination of the dispute which was referred to the adjudicator by the notice of adjudication. Jackson J was correct to take that view, for the reasons which he gave. The CA was not persuaded that an appeal from Jackson J's order on the ground that he should have held that the adjudicator went beyond his jurisdiction in deciding those questions had any prospect of success. Accordingly the CA refused permission to appeal on grounds 1 and 2 of the appellant's notice further refused permission on grounds 7 and 9 in so far as those grounds relied on absence of jurisdiction.

The applicant also failed to persuade the CA that grounds 3 and 4 of the appellant's notice had any prospect of success. CCL had made it clear in the referral notice that it was inviting the adjudicator to evaluate target cost on the basis set out in the letter of 30 October 2001. That was the basis which the adjudicator adopted. It cannot be said that DML did not have the opportunity to make such representations on the methodology as it thought fit. It is said that the opportunity to make representations was confined to the calculation of the target cost; and that there was no opportunity to make representations as to the basis of liability. That, it seemed to the CA, borders on sophistry. It was obvious that, if the adjudicator were to evaluate target cost on the basis set out in the letter of 30 October 2001, he would, in effect, provide his own figure to fill the lacuna which arose from the parties' failure to agree. Jackson J was plainly correct to reject the submission that there had been a breach of natural justice in that respect.

Grounds 5, 6 and 8 of the appellant's notice sought to raise, in a modified form, the contentions advanced before the judge in respect of the first, second and third "disregards". In the applicant's skeleton argument the criticism was put in these terms:

"The Adjudicator expressly excluded from consideration two matters:

a The negotiations & settlement between DML & MoD ;

- b DML's case as to how Target Cost should be calculated. And, in his decision, he did not refer to
- c. DML's defences to CCL's primary claim."

It was clear that the adjudicator excluded from consideration the negotiations and settlement between DML and MoD. Jackson J observed that that was a necessary consequence of the adjudicator's conclusion that "*negotiations between DML and MoD could not impact upon the calculation of target cost under the Alliance Agreement and its amendments*" and accordingly that "*the adjudicator was rejecting an argument advanced by Carillion and accepting an argument advanced more than once by DML*".

Did Jackson J misunderstand the basis upon which the adjudicator had taken the view that he should leave out of account the negotiations and settlement between DML and the MoD? The CA held that there is no substance in that criticism. The adjudicator explained why he had taken the view which he did. The adjudicator pointed out, correctly, that he could not enquire into the merits of the outcome of negotiations between DML and MoD. Those negotiations were not undertaken under the Alliance Agreement (with or without the amendments). The relevance of those negotiations, as the adjudicator recognised, was that the amendments to target cost made by amendments 3 to 6 to the Alliance Agreement were to be subject to "*review arising out of the final agreement reached with the authority and DML*". But, as the adjudicator pointed out "*... any review of the Agreement contemplated by any "...final agreement reached with the Authority and DML..." did either not take place as agreed or alternatively did not culminate in agreement but actually in a dispute*." Accordingly any further amendment of the Alliance Agreement as contemplated by amendments 1 to 6 did not take place. The adjudicator saw it as his task to fill that lacuna by providing a figure of his own.

The CA held that "*Whether he was correct to take that view (as a matter of law) may be debated elsewhere; but not in these proceedings.*" As Jackson J, in restating "four basic principles" the CA "*has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law*". The adjudicator was properly seized of the issue which he addressed. "*Whether or not the adjudicator was correct (as a matter of law) to adopt the approach which he did is a question on which it would be inappropriate for us to express any view ... What is beyond argument is that, adopting that approach, he was bound to leave out of account the settlement reached between DML and MoD.*"

The CA was also satisfied that there was no substance in the criticism that the adjudicator failed to take account of DML's case as to how target cost should be calculated. Jackson J specifically referred to Mr Ennis' alternative calculation and the fact that Mr Ennis had disregarded amendments 3 to 6. and observed that it was because the adjudicator took the view that some effect had to be given to those amendments that he had rejected the approach on which the alternative calculations were based.

Did Jackson J fall "*into serious error*" in analysing the adjudicator's reason for disregarding the alternative calculation. DML asserted that : "*The Adjudicator did not reject the contractual basis of the alternative calculation he simply refused to consider it, believing it to be outside his*

"jurisdiction". The CA rejected that criticism. Jackson J's analysis was a fair reading of the reason which the adjudicator had given for the approach which he had adopted. "Whether or not the adjudicator was correct (as a matter of law) to adopt that approach is not an issue in these proceedings."

In the course of the appeal application DML subsequently accepted that the criticism that the adjudicator failed to refer to its defences to CCL's primary claim fell away if, on a true analysis, "the Adjudicator decided the issue [as to Target Cost] on the basis of the judgment of Solomon". The reference, in that context, to "the judgment of Solomon" is amplified at para 17 of the applicant's skeleton argument: "... [The Adjudicator] appears to have proceeded on the basis that absent the review contemplated by the Amendments to the Alliance Agreement or any agreement between the parties following the contemplated review, it was open to him to and/or he was required to undertake such a review. In short what he appears to have done is to provide his own view of the adjustment that should be made to Target Cost on the basis of what he thought was "fair" without regard to the issues raised by the dispute referred to him and without regard to (and indeed in two respects expressly disregarding) the arguments of the parties. In this sense the Adjudicator performed a judgment of Solomon."

The CA stated that

"Leaving aside the question whether the process by which the adjudicator is said (in that passage) to have reached his decision bears any meaningful analogy to the judgment recorded at I Kings 3.16-27 – which had little, if anything, to do with "**fairness**" and much to do with wisdom - the second sentence of that passage is not a true representation of the adjudicator's approach to his task. It is correct to say that the adjudicator saw as his task the need to supply a figure for target cost in the circumstances that the agreed or contemplated machinery had failed. But it is not correct to say that he provided his own view on the basis of what he thought was "fair" without regard to the issues raised by the dispute which had been referred to him and the terms of the agreements between the parties. Rather, the adjudicator accepted the calculation set out in the letter of 30 October 2001 as the best guide to the figure which would have been agreed between the parties if effect had been given to the machinery. The adjudicator may or may not have been correct (as a matter of law) to adopt that approach; but that is not the issue. **The issue, in the present context, is whether – given the approach which the adjudicator did in fact adopt – he was required to give reasons for rejecting submissions which (on the basis of that approach) were irrelevant.** The judge was right to hold that the adjudicator had done all that he needed to do in that respect."

Accordingly grounds 5, 6 and 8 were rejected.

The CA also rejected the appeal on grounds 10 and 11 of the appellant's notice criticising the adjudicator's decision as to the set-off to be allowed in respect of defects, agreeing with Jackson J's reasons for rejecting the assertion of a breach of the rules of natural justice as having no real prospect of success.

The following extracts from paragraphs 84 – 87 of the CA's judgment have been subsequently referred to in 8 succeeding cases :-

- 84..... we are in broad agreement with the propositions which the judge set out at paragraph 81 of his judgment ... Those propositions are indicative of the approach which courts should adopt when required to address a challenge to the decision of an adjudicator appointed under the 1996 Act. We are, perhaps, less confident than the judge that the decision in **Buxton Building Contractors Limited v Governors of Durand Primary School** [2004] 1 BLR 474 can be reconciled with the first of those propositions. We endorse that first proposition and, to the extent that **Buxton** is inconsistent with that proposition, the judge was right not to follow that decision.
85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".
86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. **The task of the adjudicator is not to act as arbitrator or judge.** The time constraints within which he is expected to operate are proof of that. **The task of the adjudicator is to find an interim solution which meets the needs of the case.** Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or subcontractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. **The need to have the "right" answer has been subordinated to the need to have an answer quickly.** The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that

he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs incurred in the present case will demonstrate only too clearly.”

It is hardly surprising, given the detailed analysis of the impact of an adjudicator's decisions on fact and law, provided by the CA that this judgment has been referred to in subsequent cases. However, the concluding statements in para 86 call for some comment. Whilst the warning from the CA that challenges to adjudicators' decisions on the grounds of breach of the rules of natural justice should be reserved for “*the plainest cases*” that still requires that one is able to recognize a plain case.

The assertion that the adjudicator **does not act as an arbitrator or judge** (clearly true since he is an adjudicator and produces an interim decision) does little to explain how the adjudicator should act. After all Jackson J observed that to *cast a critical eye over the expert evidence is precisely the kind of exercise which one would expect the adjudicator to undertake*.

Jackson J was clearly impressed by the labours of the adjudicator, remarking at para 102 that “The adjudicator did a remarkable job in keeping abreast of the battle and in keeping under control the torrent of incoming material.” Not only that but both Jackson J and the CA took considerable trouble to determine whether or not the reasons provided by the adjudicator were adequate.

At first blush this places importance on the provision of adequate reasons, but it would appear the reason for so providing is to demonstrate that the adjudicator has considered all relevant submissions. The test for adequacy is not about whether the reasons stack up. The adjudicator can get the decision wrong but still it will be enforceable. That being the case, whilst we might expect the adjudicator to cast a critical eye, what if his eye is not very critical? What is the measure of whether or not the adjudicator's decision **meets the needs of the case?** and if not, does it really matter if the **need for a quick answer takes priority over the need for the right answer?**

The **Gillies Ramsay** error is highlighted as an extreme example of breach of natural justice that will lead to an adverse judgement,¹⁰ namely that an adjudicator asks the wrong question or addresses the wrong issue. Provided the adjudicator addresses all the issues and asks and answers the right questions and remains within his jurisdiction that is all that is required of him. The answers do not have to be correct. That is for a subsequent proceedings to address in pursuit of finality. Where does all this leave us? From one perspective it is difficult to understand what value lies in the provision of reasons if any error disclosed by those reasons is not amenable to a challenge.

The status of the dictum of Thornton J in **Buxton v Durand**,¹¹ was called into question by the CA. **Buxton** concerned the construction of a residential block for a school under JCT IFC 98 Form. Interim, practical completion and expiry of making good defects certificates had been issued. All that remained was final

certification and release of the 2nd tranche of retentions. There was a longstanding dispute about door handles, toilet flushes and low water pressure. Buxton failed to deal with the complaints. Outsiders were brought in and amongst other works the drain set out was altered. The school sought to recover the costs of remedying the defects. The school issued a notice of withholding against the 2nd retention sum to recover £16K. An Interim certificate was then issued. The certificate was non compliant with JCT IFC 98 which only allowed for the issue of a final certificate. Buxton commenced adjudication to secure release of retentions on the basis of the Interim Certificate. The adjudicator dealt with the matter on a paper only basis and concluded that the Interim Certificate was for sums due and in the absence of a valid withholding notice, decided that the sum was due. It is clear that the adjudicator was wrong to treat the sum as monies earned. It was clearly retention money. Buxton asserted that even if wrong the decision was wrong it was nonetheless enforceable. The relevant elements of Thornton J's judgment are set out below :-

16. The Adjudicator's decision showed that the Adjudicator did not consider at all the nature, content, validity or quantification of the school's cross-claim. He did not investigate the material provided to him by the school, did not decide whether the school's cross-claim had in fact been taken into account by the Supervising Officer when certifying, but instead made an erroneous assumption that it had been. He did not consider whether the certificate was issued with contractual validity, and instead wrongly assumed that the certificate was one that was duly authorised by the contract conditions and that its payment was provided for by those conditions and did not take into account or consider the validity of the correspondence from the school which amounted or arguably amounted to a valid withholding notice that had been served timely.
17. The Adjudicator also erroneously concluded that the sum being certified represented part of the value of the work which had not previously been certified and did not consider at all the possibility that this was a partial release of retention that had been previously certified and then validly retained. The significance of that error was that the Adjudicator did not consider one of the school's principal arguments to the effect that one of the purposes of the retention fund was to provide a fund to reimburse the school for the kind of loss that made up its cross-claim. The withholding notice had been served on the advice of the supervising officer and he had envisaged that the sum he had certified as being due, would then be subject to a withholding equal to the school's cross-claim. In consequence, the cross-claim could and should be set against the retention release in question.
18. Miss Gillies in her cogent and succinct submissions on behalf of Buxton, contended that, whether or not the Adjudicator's decision was erroneous in the respects that I have summarised, it was still a valid decision whose errors, which were not conceded, were ones within jurisdiction and were therefore not ones which could or should impugn that decision or render it unenforceable.
19. I accept these submissions so far as they go. However, they do not and cannot address the fundamental flaw that attaches to the Adjudicator's decision and which Mr Martin, the school's head who represented the school at the hearing with admirable courtesy and clarity, pointed to.

¹⁰ *Gillies Ramsay Diamond v PJW Enterprises Limited* [2004] BLR 131

¹¹ *Buxton Building Contractors Ltd v Governors of Durand Primary School* [2004] EWHC 733. Thornton J.

That flaw is that the decision had been reached or must be taken to have been reached, without the Adjudicator having considered or decided upon the contents of the submissions, documents and issues referred to him by the school. This is not surprising because the Adjudicator had been invited to ignore the documents submitted by the school by Buxton's reply submissions. Given the content of his decision, set against the issues referred to him, the Adjudicator had clearly acceded to that invitation and had set aside unconsidered the material that had been referred to him by the school.

20. The consequence of that failure to consider the school's referred issues and materials is twofold. Firstly, the Adjudicator did not fulfil his statutory duty to decide the dispute referred to him. He only decided that part of the dispute referred to him by Buxton, whilst failing to decide that part referred by the school. This duty to decide the entirety of the dispute referred is a duty imposed by s108(2)(c) HGCRA 1996. Secondly, the Adjudicator failed to decide all matters in dispute or to consider the representations of the school. These failures constituted serious irregularities in the adjudication procedure since they amounted to serious failures to conform to paragraphs 17 and 20 of Part 1 of the Scheme for Construction Contracts applicable to the Adjudication. These paragraphs required the Adjudicator to consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute.
21. It follows that the decision is one that is now unenforceable, certainly on a summary judgment application. It is a decision which is intrinsically unfair in that it was arrived at following a failure to consider or decide core referred issues that were and remained in dispute and was also arrived at following a decision to take into account relevant material and information that had previously been placed before the Adjudicator. In consequence, the decision is one which potentially exceeds the Adjudicator's jurisdiction, has potentially been reached in breach of his statutory obligations and is in a public law sense sufficiently unfair as to lack enforceable validity."

How compatible, if at all is the above with Jackson J's proposition that "If an adjudicator declines to consider evidence which, on his analysis of the facts or the law, is irrelevant, that is neither (a) a breach of the rules of natural justice nor (b) a failure to consider relevant material which undermines his decision on *Wednesbury* grounds or for breach of paragraph 17 of the Scheme." Jackson J thought it was compatible, the CA was less sure? To the extent that there is incompatibility, *Buxton* is now overruled. What then in *Buxton* is overruled? This depends on whether or not there is an incompatibility and if so what is it?

Presumably if the adjudicator did not consider the submissions at all, there was a *Gillies Ramsay* error, i.e. a failure to address the submissions. This appears to be Jackson J's reason for compatibility. If the adjudicator did consider the submissions, but rejected them, which is likely to be the CA's view and hence the reason for their doubts, then Thornton J's judgement is incompatible with Jackson J's first proposition.

Post Carillion Developments

Nine cases have since taken judicial notice of *Carillion*, namely Jackson J unsurprisingly in *Kier v C&G*,¹² *McConnell v NGS*¹³ and *Rohde v Markham-David*,¹⁴ Coulson J in *Gray v Essential*,¹⁵ *Hart v Fidler*¹⁶ and *Knapman v Richard*,¹⁷ Wilcox J in *Southwest v Birakos*,¹⁸ Gilliland J in *Rankilor v Igoe*,¹⁹ and Mr. Justice Ramsey in *Multiplex v West India*.²⁰

How much further light do these throw on the role of the adjudicator and the need, if any, for reasons and the consequences of invalid reasons leading to a wrong decision?

Jackson J observes in *Kier v City & General* at para 35 that "One issue which has been debated in the present litigation concerns the status of Judge Thornton's decision in *Buxton* in the aftermath of *Carillion*. Having considered the rival submissions of counsel, I have come to the conclusion that the status of *Buxton* may be summarised as follows:

- (1) It is now unclear whether or not *Buxton* was rightly decided.
- (2) In the light of *Carillion* certain passages in Judge Thornton's judgment in *Buxton* must now be regarded as incorrect. These are the passages in which the judge asserted that the Adjudicator's failure to consider the school's evidence rendered the Adjudicator's decision unenforceable."

i.e. this seems to acknowledge that Jackson J's own original basis for concluding compatibility on the basis of a *Gillies Ramsay* error was incorrect.

McConnell v NGS is less contentious since it deals with the question of costs, point 4 of the *Buxton* case. Jackson J's observations at para 48 need no further comment.

"In relation to interest Mr. Baatz has made out a strong case to the effect that the adjudicator took too high a rate. This is because the contract was made before the 1998 Act came into force. It is unfortunate that no-one drew this fact to the adjudicator's attention during the course of the reference. Mr Nissen has an argument by which he proposes in future proceedings to support the adjudicator's rate of interest. This argument appears to me to be somewhat thin, to say the least. Such considerations, however, are irrelevant to the question of enforcement. This court must enforce the adjudicator's decision, whether right or wrong. See the Court of Appeal's decision in *Carillion Construction Limited v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15 and the cases there cited."

In *Rohde v Markham-David* a contractor submitted a payment dispute to adjudication. The defendant separated from his wife and they both moved to separate addresses.

¹² *Kier Regional Ltd (t/a Wallis) v City & General (Holborn) Ltd* [2006] EWHC 848 (TCC)

¹³ *McConnell Dowell Constructors (Aust) P/L v National Grid Gas plc* [2006] EWHC 2551 (TCC)

¹⁴ *Rohde Construction v Markham-David* [2006] EWHC 814 (TCC)

¹⁵ *Gray & Sons Builders (Bedford) Ltd. v Essential Box Co Ltd.* [2006] EWHC 2520 (TCC)

¹⁶ *Hart Investments Ltd v Fidler* [2006] EWHC 2857 (TCC)

¹⁷ *Knapman R J Ltd v Richards* [2006] EWHC 2518 (TCC)

¹⁸ *South West Contractors Ltd v Birakos Enterprises Ltd* [2006] EWHC 2794 (TCC)

¹⁹ *Rankilor (1) & Perco Engineering Service Ltd (2) v Igoe (M) Ltd* [2006] Adj.L.R. 01/27

²⁰ *Multiplex Constructions (UK) Ltd v West India Quay Development Co (Eastern) Ltd* [2006] EWHC 1569 (TCC)

The property was occupied by tenants who were in dispute with the defendant. All communications in respect of the adjudication were sent to this address and not forwarded on to the defendant. Consequently neither the notice of intention, appointment or referral were communicated to defendant. The adjudicator delivered a default judgment. This was not honoured and the contractor commenced this enforcement action. The question for the court was whether or not this default adjudication decision be enforced? In the circumstances the court held that there was a real possibility of the claim being successfully defended. Accordingly, the court set aside the decision and the case was set down for trial.

Jackson J, having referred to para's 85-87 in **Carillion** observed at para 38 that “*If, after hearing evidence in the present case, it turns out that the claimant took a deliberate decision, which deprived the defendant of the opportunity to make representations in the adjudication, then I consider that this may be one of those rare and exceptional cases in which the court will decline to enforce an adjudicator's decision by reason of breach of natural justice.*”

Contrary to the general rule that adjudication procedures should not be finely nit-picked through, as per **Carillion** in the circumstances the business address of the defendant was well known. It would not have been difficult to contact the defendant to make sure he knew of the proceedings, so this was a rare case where enforcement might be denied.

In **Gray v Essential** paras 85-87 are reproduced by Coulson J as “*an important statement of principle.*” There relevance to the case is not entirely clear since it concerned liability for costs in circumstances where a defendant finally conceded that there was no valid defence to an adjudication, having held out that enforcement would be contested.

In **Hart v Fidler** the applicant for summary enforcement was hit by a triple whammy of reasons. 1) No contract resulted from the letters of intent 2) The referral document was timed out (8 days where 7 is the cut off for referral post issue of notice) and 3) contractor insolvency. Coulson J highlights para 85 of **Carillion**, no doubt in relation to the reference to “*the manner in which he has gone about his task is obviously unfair*” as a ground for vitiating an adjudicator's decision. Again, given the reasons for refusing enforcement, it is not clear that para 85 adds much at all to the judgment.

Knapman v Richard concerned an unsuccessful attempt to set off subsequent unquantified claims against an adjudication decision. Coulson J set out paras 85 to 87 of **Carillion** as “*Perhaps the clearest recent statement of the general principle.*” The remainder of the judgment demolishes the defendant's argument that a liability had crystallised which was capable of being set off against the decision. As a statement of the robust attitude to enforcement adopted by the court, 85-87 to re-emphasis why the challenge should fail the reiteration was perhaps justified, but again this judgement throws no light on which element of 85-87 is a shining exemplar of clarity.

In **Southwest v Birakos** the claimants entered into two contracts with the respondents, namely a Fee Contract for 3% of the total of all the work to cover the Claimant's profit element and a Management Contract related to the Claimant's costs involved in managing the works. The respondents terminated the project. The claimants submitted disputes in respect of unlawful termination to adjudication, claiming £152K + VAT for the terminated management cost contract and 3% of £4.2M less sums paid to date, in respect of the Fee Contract. The same adjudicator was appointed to both disputes. This action concerned an enforcement action in respect of the Fee Contract, the adjudicator having awarded and the respondent having failed to pay the sums of £72K and a further £21K on practical completion. The respondent asserted that the adjudicator had failed to address whether or not the claimant had taken sufficient steps to mitigate his losses between termination and practical completion, whereas the issue was fully aired in the Management Contract adjudication. The court rejected this assertion. The two awards were closely related and could be read together. It is clear that the mitigation issue was fully canvassed and taken into account by the adjudicator – but the adjudicator had simply not bothered to replicate the discussion in the second decision. Having stated that “*What is not permissible is for this court to minutely examine the reasons for an award to see if an adjudicator might have made a mistake*” Wilcox J reproduced elements of paras 85 and 87 of **Carillion** to reinforce that message before concluding that “*Where there has been any substantial waste of time and expense the Court has sufficient powers to make costs orders reflecting such abuse.*”

Rankilor v Igoe concerned two enforcement actions (1) for monies due pursuant to an adjudicator's decision and (2) payment by the losing applicant for a equal share of the adjudicator's fee. Perco had been retained to carry out boring works. The boring machine failed to bore out one area and took additional time to bore out another. The contract was terminated and traditional excavation methods adopted using an alternative contractor. Due to insufficient data on ground conditions, the contractor had undertaken to carry out the work within 10 days on the basis of normal ground conditions, excluding liability for delay or inability to bore if he encountered unexpected ground conditions.

The client's view was that he had tendered out for boring through clay. The ground was clay and thus there was nothing unexpected about the ground conditions. The problem was due either to worn out boring machinery or inexperienced operators. The contractor's case was that the ground conditions were not normal and prevented the machine functioning or functioning properly. Paperwork established that the boring machine was only 18 months old.

The adjudicator found that the ground conditions were unexpected. This decision was reinforced by his conclusion about why the boring equipment did not perform effectively, which he reached by relying on his own geological expertise. This view differed from that of the claimant and the defendant. The defendant asserted that he has been deprived of an opportunity to address this latter issue which was not canvassed in the adjudication.

The court found that the claimant in the adjudication (here the defendant) had failed to prove his case viz. normal conditions. Whilst the contractor's theory as to the cause of the loss differed from that of both the client's expert and

also the adjudicator's alternative explanation (adduced from technical reports of both parties), the adjudicator was entitled to conclude that the conditions were unexpected.

The adjudicator did not have to share all provisional views with the parties. The parties between them had raised all the technical data relied upon by the adjudicator. The defendant had chosen to rely on a bold assertion that the ground conditions were normal, without adducing any proof. He had failed to prove that the machine was defective or adduce evidence of incompetence. He did not adduce any evidence as to why the machine was ineffective. That was his choice. He was not obliged to do so, but a failure to do so meant that the adjudicator was left to reach his own preliminary conclusions. These conclusions were not at odds with the evidence. Accordingly there was no breach of the rules of natural justice. Both decisions were enforced. At para 32 Gilliland J stated that :-

*"On the point that Dr. Rankilor should have notified the parties of his preliminary view that the density of the soil had been the cause of the difficulties encountered during the boring, I take the view that this falls within the principle of the third proposition stated by Jackson J. in the **Carillion Case**. It is not the case that an adjudicator should be expected to refer back to the parties every time he reaches a conclusion of fact which may not have been contended for by the parties. The adjudicator is under strict time constraints and it is simply not practicable to refer back each time he may reach a provisional conclusion which neither party has actually contended for. A common example of this type of situation is where an adjudicator reduces the amount of a claim, as for example Dr. Rankilor did, because he considered the amount claimed by Perco for the number of man hours was in his experience of site practices excessive. The present case is in my judgment very far removed from a case such as **Balfour Beatty v London Borough of Lambeth** [2002] EWHC 597 where an adjudicator had in fact accepted that the claimant's case on delay had been deficient as the defendant had claimed but had then in effect remedied the defects by constructing his own critical path analysis and using it to reach a conclusion in favour of the claimant without giving the defendant an opportunity to comment either on the critical path analysis or on the inferences as to the causes and effects of delay when applying that analysis. In **Balfour Beatty** the adjudicator in substance made a case for the claimant which had not been pleaded or raised. In the present case Igoe did not put forward any technical argument or submissions in response to Perco's case that skin friction had been the cause of the difficulties. Although Dr. Rankilor rejected the mechanism which Perco had suggested, nevertheless he found that Igoe's own evidence supported the contention that skin friction had been the cause of the difficulties. That is in my view very different from making a case for a party who has not pleaded its case properly. If it is the case that Igoe was taken by surprise and now wishes to revisit the matter, the real cause of any difficulty is that Igoe did not in its submissions attempt to deal with Perco's contention that skin friction had been the problem. It may be that it was under no obligation to do so, but not having done so, it was always at risk that the adjudicator might accept that explanation especially as the contract did refer to*

unexpected ground conditions. This is not a case where in my judgment any serious injustice or breach of the rules of natural justice has occurred as a result of the procedure followed by Dr. Rankilor and his decision cannot be characterised as obviously unfair."

None of this is really contentious. The intriguing element in **Rankilor** is an obiter by Gilliland J with regard to the right to recover fees in para 33.

It is, I must say, a surprising submission that if an adjudicator's decision has been reached in serious breach of the rules of natural justice and thus would not be enforced by the court, that the adjudicator should nevertheless be entitled to claim payment for producing what was in fact a worthless decision without even any temporary binding legal effect. I prefer however to leave that question for determination in a case where it is necessary to do so. The present is not such a case."

Again the implication is that there are exceptional circumstances when an adjudicator's decision will not be enforceable and that he will not have fulfilled the functions of an adjudicator (whatever they are since he is not an arbitrator or a judge). A number of these have been clearly demarcated by the courts, but there are still fuzzy areas regarding the circumstances when a failure to provide adequate reasons might be considered to demonstrate sufficiently exceptional circumstances, particularly if no reasons are required and or provided. Certainly nothing exceptional occurred in **Multiplex v West India Quay**. Mr Justice Ramsey stated "I do not, however, consider that a criticism of a failure to give reasons or adequate reasons is a breach of the rules of natural justice in the context of an adjudication."

What is required is that the adjudicator gives each party an opportunity to put their case. Reasons thereafter may be brief or even cursory. Multiplex provided a basis for an EOT that was not disputed by West India. The court rejected an assertion that a failure to expand further upon why the EOT was granted by the adjudicator amounted to an absence of reasons.

CONCLUSIONS.

The various ANB's have worked steadfastly to up the qualifications required of adjudicators. There has been a cull of adjudicators to ensure higher standards. CPD is now the norm for any adjudicator to continue in practice. The industry looks to the reputation of those serving as adjudicators and expects and demands very high standards of them. However, the statement that an adjudicator is required to produce an "**interim solution which meets the needs of the case**" does little to inform us of what is required of the adjudicator, nor does it seem to reflect what adjudicators actually do, or what the adjudicator in **Carillion** actually did, which received high praise from Jackson J. Again, the throw away line that "**The need to have the "right" answer has been subordinated to the need to have an answer quickly**" does not reflect the fact that the adjudicator in **Carillion** had been given an extension of time which enabled him to produce a highly detailed and well considered decision.

It is submitted that the CA can do better than this and that the industry deserves a considered definition of the role and function of adjudicators and a clearer line on the role of reasoned decisions.

Corbett Haselgrave-Spurin

DOMESTIC ARBITRATION AND REASONS IN AUSTRALIA

Introduction. Whether or not the enforceability of a domestic arbitral award might be impugned by a failure to provide adequate reasons came before the high court (2006)²¹ and subsequently before the court of appeal (2007)²² in Victoria in the case of **BHP Billiton v Oil Basins**. The central issues were 1) whether inadequate reasons constituted an error of law on the face of the record and 2) whether inadequate reasons might have a substantial impact on the rights of a party and amount to technical misconduct, leading in turn to whether 3) the court should set aside an award on the grounds of inadequate reasons. The case is all the more remarkable since two of the arbitrators were retired senior judges, one from the High Court Victoria, the other from the Federal court. The court's affirmative answer to all three questions has led to criticism in some quarters that this undermines the arbitral process, particularly since this was not a case where no reasons at all were provided. The central issue in future cases may turn on what amounts to "adequate reasons" and whether or not the reasons provided are to the satisfaction of the court.

The Facts : Oil Basins are the successors in title to the contractual consultancy rights of Dr Weeks, an eminent geologist, whose expertise led to the opening up of valuable oil fields. The crux of the matter turned on whether an "**overriding royalty**" agreement with a return of 2 ½ % of gross turnover continued in operation after the fields had been opened up to competition by the government and new licensing arrangements were introduced which saw Billiton co-operating with other extractors, or was limited to the original extraction program. Clearly a lot of money was at stake, so inevitably the decision of the tribunal tasked with adjudicating on this dispute would have a substantial impact of the rights of the respective parties. The meaning of "**overriding royalty**" was stated under the contract to be subject to the law of New York. The tribunal received expert opinion on interpretation of the phrase from a wide range of sources. The challenges concerned the way that the tribunal dealt with this interpretation and its preference for one interpretation (area based) which favoured Oil Basins by a majority of two to one and the exclusion an alternative (property based) which would have favoured Billiton. Critically, the tribunal failed to set out why the alternative interpretation was rejected. The problem was exacerbated by the fact that the accepted opinion as to the legal interpretation of the phrase under US Law contained contradictions. The reasons simply referred to and adopted that opinion without indicating which elements of the opinion were being endorsed and which elements were rejected.

Governing Law : Whilst the focus of the examination was inevitably the provisions of the governing legislation namely the **Commercial Arbitration Act 1984** (Vic), with specific reference to sections 29, 38, 42 and 43, the court examined English jurisprudence prior to the Arbitration Act 1996 and the authorities regarding the powers of the court to set aside an award for misconduct in Western Australia.

Reasons : There being no agreement to the contrary, the arbitrators were required under s. 29(1)(c) of the Act to provide reasons. The scope of this duty was examined in the light of Nettle JA's judgement in **Hunter v T.A.C.**²³, viz :- "When a judge decides an application ... the judge is under a duty to provide reasons for his or her decision. Furthermore, while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law."

As to whether this "**general duty**" extended to arbitrators, Hargrave J at first instance cited the following extract from the judgment of Byrne J in **Peter Schwarz v Moreton**²⁴ :-

"It is the duty of an Arbitrator to consider and deal with all matters the subject of the reference. Commonly, the arbitrating parties will present contentions of fact and law in support of their own case in opposition to that of the opponent. Often there will be multiple contentions put forward, sometimes in the alternative to those which have preceded them. The Arbitrators must have regard to them all. When it comes to preparing the award pursuant to s. 29(1), and to 'a statement of reasons for making the award', the obligation is not identical. The statutory requirement that the reasons be '**reasons for making the award**', means that the Arbitrators are not required to provide reasons which did not lead to the determination of the disputes referred to arbitration. Accordingly, it is not necessary for them to deal with an alternative basis of claim or defence when the primary claim or defence has been accepted.

The requirement for reasons in s. 29 means that the Arbitrators must set out the facts which they have found and the legal principles which they have relied upon as the foundation for the award and that this should be in terms sufficient for the

²¹ **BHP Billiton Ltd v Oil Basins Ltd [2006] VSC 402** per Hargrave J. 1st November 2006.

²² **Oil Basins Ltd v BHP Billiton Ltd [2007] VSCA 255** per Buchanan, Nettle, Dodds-Streeteron JJA. 16th November 2007.

²³ **Hunter v Transport Accident Commission [2005] VSCA 1**, at [23].

²⁴ **Peter Schwarz (Overseas) P/L v Morton [2003] VSC 144**

parties to understand why they have won and lost and for them to decide whether to make and for the Court to determine an application for leave to appeal or enforcement.

I have mentioned the purposes which the statement of reasons is to serve. The statement of reasons, at a minimum, must be sufficient to achieve these purposes. I say 'at a minimum', because I am concerned with the point at which the Court will take an active interest in the insufficiency of reasons; the prudent Arbitrator will not be tempted to stray close to this cliff edge. The question may arise whether a particular contention must be dealt with in the statement of reasons. Judges, mindful of their own judgment-writing experience, have been careful not to impose upon Arbitrators a burden greater than their own. And so, there is no need to deal with contentions which are frivolous, irrelevant or even peripheral to the matters in issue.

This has led the Court to stipulate that Arbitrators must deal with every 'submission worthy of serious consideration'. In **Fletcher Construction Australia Ltd v Lines MacFarlane and Marshall Pty Ltd** the Court of Appeal in this State said that a reasoned judgment of a court must "deal with the central contentions advanced by the parties". However the test is expressed, the minimum requirement is not that the Arbitrators deal with every contention. Precisely where the line is to be drawn in a given case will depend upon the circumstances, including the relevance of the contention to the Arbitrators' conclusions. The decision to deal in the reasons with a particular rejected submission may also depend upon an assessment of its weight, particularly in a case where the arbitrating parties are not legally represented. Putting it bluntly, some points are so obviously bad that no good purpose is served by dealing with them in any detail. I need hardly add that the prudent Arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties.

A further matter bearing upon the application of this principle is that the Arbitrators will commonly not have had the benefit of legal training. Accordingly, Smart J in a much quoted passage has said this: "**Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the court should not construe his reasons in an overly critical way.**"

In what are often called trade arbitrations, the parties and the Arbitrators are all engaged in a particular trade. In such an arbitration the reasons may be expressed in the jargon of the trade or they may ignore matters which will be well known to the participants. Such an award which may appear deficient to an outsider, may nonetheless satisfy the fundamental purpose of the statement of reasons. It cannot be the case that an award should be drafted only with an eye to informing an appeal court which may be unfamiliar with the trade and its practices."

Standard Required : Adequacy : The court canvassed whether or not a different test as to adequacy applied to legal trained as opposed to lay arbitrators, but concluded the same test applied to all, but it was noted that where legal qualified arbitrators are appointed there is an expectation that the standard will be high and goes a long way to explaining why such individuals are appointed, particularly to complex cases which demand erudite exposition.

Error of Law & Inadequate Reasons : S38 Commercial Arbitration Act 1984 provides for an appeal on the grounds of a manifest error of law on the face of the record. That a failure to give adequate reasons constituted an error of law was not contested,²⁵ the central issue being whether or not the error was manifest. Hargrave J noted that "**Manifest**" in this context means an error of law which is "**evident and obvious rather than merely arguable.**"²⁶ In determining this question the court should limit itself to the documentation relied upon by the tribunal when making the award.²⁷

Misconduct : Section 42 of the Commercial Arbitration Act 1984 (Vic) provides that, where there has been misconduct by an arbitrator, the Court may set the arbitrator's award aside either wholly or in part. "**Misconduct**" involves "corruption, fraud, partiality, bias and a breach of the rules of natural justice" according to s4(1) of the Act. However, relying on **Williams v Wallis & Cox**²⁸ the court concluded that impropriety is not a prerequisite to the setting aside of an award. The court concluded that "A failure by an arbitrator to deal with a substantial and serious submission, or to consider evidence which is vital to the determination of the issues raised for decision, will constitute technical misconduct within the meaning of ss.42 and 44 of the Commercial Arbitration Act 1984." The Court of Appeal agreed with Hargrave's judgement. The following passage regarding the scope of the duty to provide reasons is informative :

49 The appellant contends that .. to criticise the majority arbitrators' reasons portrays a misunderstanding of the arbitral function. Counsel ... argued that it was unnecessary for the reasons to be anything like as rigorous or complete as those demanded by the judge. ... the dual requirements that arbitrators provide a statement of their reasons for making the award & do so 'as soon as reasonably practicable' fundamentally distinguished this arbitration from a curial proceeding,²⁹ & implied that it was enough that the arbitrators set out the factors that supported the meaning of the expression which they preferred, had regard to contextual matters, contrasted the context of the private mineral holdings in the US with the context of the Royalty Agreement, including the statutory regime prevailing at the time the agreement was entered into, & found on the evidence before them that 'overriding royalty' does not & never has had one fixed meaning.

50 We do not accept those submissions either. As already noted, the requirement to give reasons arose out of s29(1)(c) CAA 1984. The extent of that requirement is informed by the purposes of the Act. As Giles J observed in **R P Robson Constructions v D & M Williams**,³⁰ the Act fundamentally altered the approach to the provision of reasons in commercial arbitration, by taking away the jurisdiction to set aside an award on the ground of error on the face of the award and

²⁵ **Re Poyser and Mills' Arbitration** [1964] 2 QB 467, 478.

²⁶ **Leung v Hungry Jacks Pty Ltd** [1999] VSC 477, [15] (Hedigan J) ; **Promenade Investments Pty Ltd v New South Wales** (1992) 26 NSWLR 203.

²⁷ **Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd**, [2003] VSC 275, [31]-[43]. Per Dodds-Streton J.

²⁸ **Williams v Wallis & Cox** [1914] 2 KB 478. per Lush J : "Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen by him to be vital, that is, within the meaning of the expression, 'misconduct' in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside."

²⁹ In **Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd** (1991) 22 NSWLR 653 Rogers CJ observed (at 661) that '[t]he heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues'.

³⁰ (1990) 6 Building and Construction Law 219, 221-2.

replacing it with a right to seek leave to appeal on any question of law arising out of the award which the court considered could substantially affect the rights of one or more of the parties. In order to enable the court to see whether there has been an error of law, s 29 provides that the award must be in writing and that the arbitrator must include a statement of reasons. And in order to be *utile*, the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. To that extent, the requirement is no different to that which applies to a judge. Of course it is understood that arbitrators may not always be skilful in the expression of their reasons. Consequently, it is accepted that a court should not construe an arbitrator's reasons in an overly critical way. But it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion. Accordingly, if a party has relied on evidence or material which the arbitrator has rejected, it is ordinarily necessary for the arbitrator to assign reasons for its rejection."

Whilst findings of fact are not open to review, this does not mean that the tribunal should not set out the evidence relied on to make those findings. S29 CAA 1984, s52(4) AA 1996 and Art 31 Model Law are all to similar effect. As Sir Harry Gibbs explained : "The arbitrator is required to explain in the reasons which form part of the award why he or she reached the decision which the award embodies. To do that it is necessary to state the relevant facts and to explain why each issue of fact was resolved in the way in which the arbitrator resolved it. It is further necessary to state what conclusion the arbitrator reached on each question of law or of mixed law and fact and how that conclusion was reached..."³¹ Later the court noted at para [57] that "in complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating than the mere *ipso dicit* of a 'look-sniff' ³² trade referee."

Set Aside : The respondents asserted on appeal that even if there was an error of law, it was not such as to justify setting the award aside. The court disagreed noting the dicta of Kirby P ³³ in **Warley Pty Ltd v Adco Constructions Pty Ltd**: "A failure to give '**reasons**' as the Act envisages would amount to an error of law. It would be such as to attract the operation of s 38 of the Act..." Set aside supports the ethos and objectives of the Act and adds an element of compulsion to the duty to provide reasons.³⁴ The court also considered whether or not set aside was now considered to be appropriate under English Law. The following is informative :-

66 Counsel .. referred to two recent English decisions, **ABB AG v Hochtief Airport GmmbH** ³⁵ and **Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No 2)** ³⁶ as support for the view that an award should not be set aside for manifest error of law on the face of the award unless the error amounts to a '**serious irregularity**' and that an insufficiency of reasons ought not be regarded as a serious irregularity for that purpose.

67 .. in our view those authorities do not assist Each is based on s 68 Arbitration Act 1996 (Eng) (which significantly restricts the circumstances in which a court is to set aside an arbitral award for error to '**serious irregularity**' as defined). There is no such restriction on the power of the court to set aside an award for error of law pursuant to s 38 of the Commercial Arbitration Act 1984 (Vic). A second difference between the Commercial Arbitration Act 1996 (Eng) and the Commercial Arbitration Act 1984 (Vic) is that s 70(4) of the former confers on the court an express power to order further reasons and thus by necessary implication excludes from the power to set aside an award for substantial injustice those cases in which the subject defect is constituted solely of a deficiency in reasons.³⁷ Thirdly, and more generally, as was noted by Lord Steyn in **Lesotho Development v Impregilo SpA**³⁸ the 1996 English Act has: "given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities...have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature."³⁹

CONCLUSIONS :

This award was flawed in a way that could not survive the surgical deconstruction it was subjected to by the court. Such judicial attention is not uncommon these days. In consequence, nowadays the arbitrator is required by the courts to adhere to very high analytical standards, particularly in complex, high stake disputes. The tribunal needs to beware of the dreaded, though beguiling, "*leap in logic*" and particular to be alert to the potential of leaps in logic within expert opinion and contradictions within the projected thesis. A failure to do so can lead to the undoing of an award. Remission of the award in this instance was pre-empted by the intervening demise of a tribunal member. Accordingly the outcome would probably have been the same in England & Wales, though of course for very different reasons. Nonetheless, remission in such a case invites the tribunal to contrive to support an award they might not have made if the leap in logic had been spotted in time, which is to some extent worrying and unsatisfactory.

³¹ "The John Keays Memorial Lecture: Reasons for Arbitral Awards" (1988) 7 *The Arbitrator* 95, 102: see also **Soulemezis v Dudley (Holdings) Pty Ltd** (1987) 10 NSWLR 247 per McHugh JA's

³² **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping** [1981] AC 909, 919.

³³ As his Honour then was.

³⁴ **Promenade Investments Pty Ltd v State of New South Wales** (1992) 26 NSWLR 203, 225 (Sheller JA). : **Friend and Brooker Pty Ltd v Council of the Shire of Eurobodalla NSW CA**, Kirby P, Clarke and Sheller JJA, 9 November 1993), 9. See also, **Energy Brix Australia Corporation Pty Ltd v National Logistics Coordinators (Morwell) Pty Ltd** [2002] VSCA 113; (2002) 5 VR 353, 368; **Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd** [2003] VSC 275 (Unreported, Victorian Supreme Court, Dodds-Streton J, 28 July 2003) [31]-[49] and the cases there cited; **Gunns Forest Products Ltd v North Insurances Pty Ltd** (2006) 14 ANZ Ins Cas 61-691.

³⁵ [2006] 1 All ER (Comm) 529, [2006] 1 Lloyd's Rep 1.

³⁶ [2005] EWHC 1370 (TCC).

³⁷ See **Fidelity Management SA v Myriad International Holdings BV** [2005] 2 Lloyd's R 508.

³⁸ [2005] UKHL 43; [2006] 1 AC 221, 230 [17].

³⁹ Citing Lord Mustill and Stewart Boyd QC (*Commercial Arbitration: 2001 Companion Volume to the Second Edition*, preface).

CHALLENGING AN AWARD : PART IV : NEW YORK CONVENTION AWARDS.

Introduction

The recognition of, enforcement of and challenge to foreign arbitration awards is dealt with by a distinct and separate part of the Arbitration Act 1996 which specifically reincorporates the Arbitration Act 1979 provisions on the incorporation of the New York Convention into English Law. The mere fact that an award is in respect of an international dispute will not be sufficient. Where the award was governed by English Law and jurisdiction s66 applies.

An arbitral award will not be enforced if the arbitration agreement was not in writing, which is more stringent than the requirement under s5 of the Act that for the Act to apply the agreement must be in writing, though that fact will not render the award unenforceable at law.

Whilst of limited importance today, it should also be noted that s99 Arbitration Act 1996 states that "Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards."

The primary remit of Part III of the Arbitration Act 1996 is the recognition of foreign arbitral awards, but for present purposes this includes provisions for the refusal of recognition and thus an effective mechanism for the challenge to the a foreign award.

INTERNATIONAL ARBITRATION AND JURISDICTION



Recognition and enforcement of New York Convention awards

New York Convention awards.

- 100(1) In this Part a "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.
- 100(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards-
 - (a) "arbitration agreement" means an arbitration agreement in writing, and
 - (b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.
 In this subsection "agreement in writing" and "seat of the arbitration" have the same meaning as in Part I.
- 100(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.
- 100(4) In this section "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

Recognition and enforcement of awards.

- 101(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
- 101(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
As to the meaning of "the court" see section 105.
- 101(3) Where leave is so given, judgment may be entered in terms of the award.

Evidence to be produced by party seeking recognition or enforcement.

- 102(1) A party seeking the recognition or enforcement of a New York Convention award must produce-
 - (a) the duly authenticated original award or a duly certified copy of it, and
 - (b) the original arbitration agreement or a duly certified copy of it.
- 102(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Mixing domestic arbitration and international arbitration law.

The CA held that an award was 'made' for the purposes of s 7(1) Arbitration Act 1975 Act when and where it was perfected, which was where it was signed, in the absence of anything in the arbitration agreement or the rules under

which the arbitration was conducted, requiring some further formality in *Hiscox v Outhwaite [1991]*.⁴⁰ The award was signed and dated in Paris. It was made in Paris and was accordingly a Convention award. Where an English court was both the curial court and the enforcing court the High Court remained capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thought fit, any decision on the enforceability of the award until the pending proceedings for review had been determined. On appeal the House of Lords in *Hiscox v Outhwaite (No 1) [1991]*.⁴¹ noted that whilst the hearing had been held in London where the award was also drafted it was in fact signed in Paris. Where then is an arbitration award 'made' for the purposes of s7(1) Arbitration Act 1975? The House confirmed that this was Paris and the award was accordingly a Convention Award. This however led to the further question as to what extent, if at all, do the Arbitration Acts 1950 and 1979 apply to a Convention Award where the procedural law of the arbitration is that of England & Wales and thus whether or not the appellant was estopped by his conduct from raising either point? The court concluded that the High Court had jurisdiction to exercise supervisory powers over conduct of the arbitral proceedings. Compare now s100(2)(b) which avoids this conundrum since the seat is the governing factor.

Refusal of recognition or enforcement.

Challenging the Award.

The challenge under s103 takes a negative form in that as opposed to setting aside an award or declaring that it is invalid the court simply refuses to recognise or enforce it. The consequence is broadly the same but achieved by other means. However, whilst a decision to set aside an award by a competent authority of the country in which of under the law of which it was made would render the award completely unenforceable, a refusal to recognise an award by the court of one state would not prevent a party seeking to enforce the award in another jurisdiction (s103(2)(f)). Thus where the losing party has funds in more than one country an applicant could seek enforcement sequentially in more than one jurisdiction until the award had been satisfied.

This is not an appeal mechanism. A party wishing to appeal the award must do so before the courts of the state where the seat of the arbitration is located. Thus an error of law is not included as a s103 ground to resist enforcement, but if the court of the arbitral seat sets aside an award a foreign court governed by the Convention no longer has jurisdiction to enforce the award. However, as noted above, since another foreign court (i.e. not the court of the seat of the tribunal) rules against enforcement (as opposed to setting aside the award which it would not have the power to do) for whatever reason, that would not preclude an action for enforcement before a court of another Convention state. In *Yukos Oil v Dardana [2001]*⁴² Tuckey LJ confirmed that the reasons for resisting a New York Award are contained exclusively in s103. There is no room for introducing additional grounds.

Refusal of recognition or enforcement.

- 103(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
- 103(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-
 - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
 - (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
 - (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
 - (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
 - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- 103(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
- 103(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
- 103(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.
It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

⁴⁰ *Hiscox v Outhwaite (No 1) [1991] 3 All ER 124*. before Donaldson MR; McCowan LJ : Leggatt LJ. 11th March 1991

⁴¹ *Hiscox v Outhwaite (No 1) [1991] 3 All ER 641*. before Lords Mackay : Keith; Brandon; Ackner; Oliver. 24th July 1991

⁴² *Yukos Oil Company v Dardana Ltd [2001] EWCA Civ 1077*. Tuckey LJ. However, see later regarding State Immunity

Permissive not mandatory.

Subsections 103(2) and (3) both state that “Recognition or enforcement of the award **may** be refused...” it does not require refusal. Thus the discretion of the court is established, which can lead to differing outcomes before different courts.

Natural justices challenges.

Audi alterem partem : the right to take an active part in a trial applies equally to New York Convention awards. Accordingly in *Kanoria v Guinness [2006]*⁴³ the court declined to enforce an award in circumstances where a party had not been notified of the arbitration, depriving him of the opportunity to defend himself. By contrast in *Minmetals v Ferco [1999]*⁴⁴ there was an unsuccessful attempt to set aside order to enforce two Chinese Arbitral Awards. The applicant's assertions that they had had no opportunity to put their case on a particular issue not accepted by the court, which held that they had simply failed to take up the opportunity to pursue the matter. They were not prevented from doing so.

Nemo iudex in Causa Sua : Bias : the basic rule that an adjudicator should have no interest in the dispute and should act in an unbiased manner, whilst of universal recognition and can taint a New York or any other award, nonetheless whether the parties have appointed a tribunal knowing of its connections it is more problematical to establish bias. Thus in *Irvani v Irvani [2000]*⁴⁵ an application to set aside award was only partially successful in an appeal against a 1st Instance judgement that had upheld the award. Two brothers had appointed their sister as arbitrator. The court found against certain aspects of the award on the grounds of breach of the rules of natural justice, but nonetheless remitted the award back to the arbitrator for further deliberations.

Breaches of the rules of due process : Whilst challenges for breaches of rules of engagement are not uncommon, the English courts have been slow to refuse enforcement on such grounds, as demonstrated by the following cases :-

China Agribusiness v Balli Trading (1997).⁴⁶ This enforcement action was resisted on the grounds that the arbitration rules had been changed. Whilst this was true, as is common in many arbitral clauses, there was an agreement to use the rules or successor rules, and accordingly there was no reason to refuse enforcement of this CIETAC award.

General Construction v Aegon Insurance [1997].⁴⁷ The question here concerned whether or not a paper only arbitration procedure was satisfactory under the Law of Mauritius and resulted in a enforceable award. The court upheld the award.

Tongyuan v Uni-Clan (2001).⁴⁸ **S103 AA 1996.** Here a New York Convention award enforcement application was resisted on the grounds that there had been a change of venue for the arbitration. The court found that no prejudice had been caused by this change and further found that despite the fact that the award took an unusual format this did not afford grounds to refuse enforcement.

Personality challenge

Svenska v Lithuania [2005].⁴⁹ Lithuania took part in an arbitration in Denmark. They objected to jurisdiction. The tribunal made a preliminary ruling in favour of jurisdiction which Lithuania did not object to. The successful claimants secured an enforcement judgement in England. Lithuania sought here to set aside enforcement on the grounds of State Immunity. The court held that whilst in usual circumstances this would amount to an issue estoppel, evidence that the tribunal's determination was not final and binding under Danish Law meant Lithuania could still rely on state immunity.

Norsk Hydro v Ukraine [2002].⁵⁰ **S100 AA 1996 : Set aside orders.** Application to set aside two court orders. Swedish Arbitral award. Order for enforcement of foreign award. Interim third party debt order. Order set aside – made against the wrong legal personality.

Public policy challenges.

Illegality under domestic and or foreign law. It is a longstanding rule of public policy that the courts will not, under the guise of contract, sanction what would amount to illegality, fraud or other wrongdoing such as blackmail, coercion or duress in the UK or the EC,⁵¹ whether the conduct took place in the UK or elsewhere, conduct of a kind essentially lawful in the UK but illegal abroad (e.g. usury in Islamic States) excepted.⁵² **Omnium v Hilmarton [1999].**⁵³ is a case in point. Hilmarton had acted as a lobbyist in Algeria. Algerian statute prohibits the intervention of a middleman in connection with any Public Contract or agreement within the ambit of foreign trade. However, such activity would be lawful in Switzerland which was the seat of the tribunal and the tribunal, having determined that no bribery had been established, determined that the lobbying contract was enforceable under Swiss Law. Omnim had paid the first installment of

⁴³ *Kanoria v Guinness [2006] EWCA Civ 222.* before Lord Phillips. Sir Anthony Clarke. May LJ 21st February 2006.

⁴⁴ *Minmetals Germany GmbH v. Ferco Steel Ltd [1999] C.L.C. 647.* Colman J.

⁴⁵ *Irvani v Irvani [2000] 1 Lloyd's Rep 412.* CA. before Nourse J., Buxton LJ, Ferris J. 9th December 1999.

⁴⁶ *China Agribusiness development Corp v Balli Trading (1997) Lawtel AC7100112.* Before Longmore J. Commercial Court. 20th January 1997

⁴⁷ *General Construction Ltd v Aegon Insurance Co (UK) Ltd [1997] EWHC TCC 368.* HHJ. Bowsher. 21st May 1997.

⁴⁸ *Tongyuan (USA) International trading Group v Uni-Clan Ltd (2001) Lawtel AC0100770.* Before Moore-Bick J Commercial Court. 19th January 2001

⁴⁹ *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 9 (Comm).* Nigel Teare QC 11th January 2005.

⁵⁰ *Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm)* : Gross Mr Justice. Commercial Court. 18th October 2002

⁵¹ *Eco Swiss China Time (Competition) [1999] EUECJ C-126/97* : Before Iglesias, President. Where a domestic court would set aside an award for policy reasons – it should likewise for policy reasons regarding breach of EU law.

⁵² *Soinco SACI v Novokuznetsk Aluminium Plant [1997] EWCA Civ 3014* : Whilst unenforceable in Russia – there was nothing against English Policy to convince the court that a New York award should not be enforced. CA on appeal from Mr Justice Butterfield before Phillips LJ; Waller LJ; Chadwick LJ. 16th December 1997

⁵³ *Omnium de Traitement et de valorisation. v. Hilmarton Ltd [1999] 2 Lloyd's Rep 222.* Before Walker J. Commercial Court 24th May 1999

commission but had then sought to evade liability for the second installment. The tribunal awarded damages for breach. The English Court enforced the award.

By contrast foreign tax evasion, whilst the subject of foreign law, would be an offence in the UK if UK tax law was evaded. Thus in *Soleimany v Soleimany [1998]*⁵⁴ it was held that an English Court will not enforce an award that involves enforcing an illegal contract, whether that illegality arise out of English Law or the law of a friendly foreign country. A father and son had been engaged in the illegal export of carpets from Iran, with the objective of evading tax laws. Whilst a Beth Din arbitral court in London ignored the illegality during the course of the resultant award, the English Court declined enforcement.

On the other hand, the court will be quick to identify late allegations of fraud or illegality, where the issue was not raised during the arbitral proceedings and the other party had had no opportunity to address the matter. Thus in *Daad Sharab v Usama Salfiti [1996]*⁵⁵. A late attempt to resist enforcement of an award in relation to agency commissions by introducing new evidence that the commercial activities of an agent were allegedly considered to be conduct categorised as illegal "mediation" in Libya were resisted by the court.

A mere allegation of fraud is insufficient, even to establish a stay of an enforcement action as demonstrated by *Billadean v Snamprogetti [1997]*⁵⁶ which concerned an appeal under s3 Arbitration Act 1950 against a refusal to stay enforcement of two New York Awards on policy grounds, namely fraud and no actionable case to enforce by arbitration. The CA held that both issues had already addressed adequately at first instance and again rejected the application for a stay pending application to appeal.

Similarly in *Westacre v Jugoimport [1999]*⁵⁷ an order for enforcement of New York award was appealed on the grounds that the underlying contract induced by bribery. The Swiss Arbitration had already considered and rejected the allegation. The Court of Appeal refused to take the bribery point and rejected the appeal.

In *Minmetals v Ferco [1999]*⁵⁸ a further ground for challenge to the enforceability of this CIETAC award was unsuccessfully made on the basis that it was contrary to public policy.

Reprehensible conduct during the course of the arbitration. *Gater Assets v Nak Naftogaz Ukrainiy [2008]*⁵⁹ involved an appeal against an enforcement order on the grounds of public policy – namely an absence of full and frank disclosure. The court concluded that if material now available had been put to the tribunal it would not have altered the outcome and hence the award stood.

Temporary stay of enforcement.

It is not uncommon for a party to resist enforcement on the grounds that the award is subject to a pending challenge in the court of another state. Similarly a stay of English proceedings can be granted in favour of foreign arbitration. Thus *Ssanyong v Daewoo Cars (1999)*⁶⁰ involved an application for a temporary stay of action pending the issue of Korean award. The court considered that there was no reason to impugn the tribunal which was provided for by choice of law & arbitration clause and accordingly a stay was ordered.

*Apis v Fantazia (2000)*⁶¹ involved an application for stay of enforcement of an award pending hearing of application to set aside award. The award a New York Convention award from Slovia's perspective, where an enforcement action was pending.

Similarly *IPCO v Nigerian National Petroleum [2005]*⁶² concerned an application to set aside enforcement order or to stay enforcement pending challenge and cross application for security of costs. The court held that there was an arguable defence in respect of duplication in award. 13M was un-disputably due – and immediate payment ordered plus 50M security to be paid into court pending outcome of challenge before Nigerian court. In due course the matter came back before the court in *IPCO v Nigerian National Petroleum [2008]*⁶³ with an application for partial enforcement of the award which was subject to a previous adjournment of enforcement action pending the outcome of a challenge before a Nigerian Court, in circumstances where 3 years had passed and that challenge still ongoing. The court held that it could award partial enforcement of elements of award not seriously subject to challenge and duly did so.

*Yukos Oil v Dardana Ltd [2002]*⁶⁴ concerned a challenge to an enforcement ruling. At first instance the court stayed enforcement pending trial but subject to security by the applicants. The CA rejected an appeal against those conditions, The court at first instance and the CA both considered that the challenge was very tentative at best. A Swedish award was currently being challenged in Sweden. The CA stayed enforcement pending the outcome of Swedish proceedings and a prior security or costs order was discharged.

⁵⁴ *Soleimany v Soleimany [1998] EWCA Civ 285* CA before Morritt LJ; Waller LJ; Sir Christopher Staughton. 19th February 1998.

⁵⁵ *Daad Sharab v Usama Salfiti [1996] EWCA Civ 1189*. CA before Nourse LJ; Judge LJ; Waller LJ. 12th December 1996.

⁵⁶ *Billadean International SA v Snamprogetti Ltd [1997] EWCA Civ 1036*. CA before Saville LJ; Brooke LJ.

⁵⁷ *Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd [1999] EWCA Civ 1401*. Before Waller LJ; Mantell LJ; Sir David Hirst.

⁵⁸ *Minmetals Germany GmbH v. Ferco Steel Ltd [1999] C.L.C. 647*. Colman J.

⁵⁹ *Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWHC 237 (Comm)* : Before Tomlinson Mr Justice 15th February 2008.

⁶⁰ *Ssanyong Motor Distributors Ltd v Daewoo Cars Ltd & Daewoo Corp (1999) Lawtel* : Before Wright J, Commercial Court . 23rd April 1999.

⁶¹ *Apis AS v Fantazia Kereskedelmi KFT (2000) Lawtel AC0300496*. Before Raymond Jack J. Commercial Court 21st September 2000.

⁶² *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2005] EWHC 726 (Comm)*. Gross, Mr Justice 2005.04.27

⁶³ *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] EWHC 797 (Comm)*. Before Mr Justice Tomlinson. 17th April 2008.

⁶⁴ *Yukos Oil Company v Dardana Ltd [2002] EWCA Civ 543*. Before Thorpe LJ; Mance LJ; Mr Justice Neuberger

State / Sovereign Immunity⁶⁵

Contrary to the earlier statement that the grounds for resisting an award set out in s103 are mutually exclusive, this has not prevented challenges to enforcement on the grounds of State Immunity, both in terms of jurisdiction of the tribunal and secondly regarding jurisdiction in enforcement proceedings and execution proceedings.⁶⁶ The English Courts are governed by the State Immunities Act 1978, which by virtue of s9 will enforce an arbitral agreement where the resisting state had agreed in writing to submit a present or future dispute to arbitration. Thus the following are instances where the plea of state immunity against enforcement of an award was rejected by the English Court :-

Sabah Shipyard v Pakistan [2002],⁶⁷ Sabah sought to enforce an award against the Government of Pakistan. The Government and its trading party sought to appeal the award and procured an indefinite injunction in Pakistan. The English Court issued an injunction against those proceedings. The Government of Pakistan had waived state immunity before the English Court. The decision was upheld on appeal.

Svenska v Lithuania [2005],⁶⁸ Lithuania took part in an arbitration in respect of an exploration venture defending a claim for damages in relation to the issuing of licences. The arbitral tribunal held that the State was a party to the arbitration agreement. Enforcement action in England unsuccessfully resisted on grounds of state immunity.

Svenska v Lithuania [2006],⁶⁹ The question here was whether or not the State of Lithuania was a party to a commercial contract and an arbitration agreement, in an appeal against an enforcement of award action. In the circumstances the State was a party. The award was enforceable.

Ecuador v Occidental [2005].⁷⁰ The court here was concerned with whether or not questions as to tax involving a state party are justiciable either by arbitration or the court. A challenge to an award was met by a sovereign state immunity plea by the defendant asserting that the award was a treaty. The court held it had jurisdiction since the sovereign had submitted to the jurisdiction of the arbitrator.

Occidental v Ecuador [2005] EWCA Civ 1116:⁷¹ The appeal from the above case was met by a challenge to the jurisdiction of English court to hear a challenge to an award, whose seat was stated to be London England. The court held that it had jurisdiction, and the plea of state immunity and non-justiciability was rejected.

Selina Mohsin v Commonwealth Secretariat [2002].⁷² In this case the court affirmed that the Commonwealth Secretariat does not enjoy State Immunity from arbitral proceedings.

Related matters impacting upon New York Arbitrations and Awards.

Saving for other bases of recognition or enforcement.

104. Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.

First it should be noted that many English Arbitral awards are potentially New York awards outside the UK. For this reason the significance of the New York Convention is canvassed in many judgements regarding s66 jurisdiction applications and s67-69 challenges.

In addition, a wide range of cases deal with applications in support of or challenging aspects of New York convention arbitrations, where s100-104 are not specifically raised. Some of these are noted below.

Security of costs. Gater Assets v Nak Naftogaz Ukraniy [2007].⁷³ concerned a successful application for security of costs against a defendant's application to set aside a New York Convention enforcement award where the defence had little likelihood of success. This was subsequently confirmed by the Court of Appeal in **Gater v Nak [2007].**⁷⁴

Garnishee Order : New York Award. Soinco v Novokuznetsk Aluminium [1996].⁷⁵ Attempt to overturn a garnishee order in support of a Swiss Award on the grounds that there was a risk that the guarantor might have to pay out twice on the guarantee. Held : No real danger established. Garnishee order sustained.

Stay & denial of justice under Scottish Law. The issue in **Crouch Mining Ltd v British Coal [1996].**⁷⁶ pursuant to s4 Arbitration Act 1950, was whether a stay to arbitration, due at end of project, likely to be in 2004 deprived a party of opportunity of justice? The court held that it did not. This is what the parties contracted for and must therefore live with.

⁶⁵ See for instance **Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm).** [2005] EWCA Civ 1116

⁶⁶ For a successful challenge see **Tsavliris Salvage (International) Ltd v The Grain Board of Iraq [2008] EWHC 612 (Comm)** : Mr Justice Gross. 10th April 2008

⁶⁷ **Sabah Shipyard (Pakistan) Ltd. v Pakistan [2002] EWCA Civ 1643** : CA before Pill LJ; Waller LJ; Sir Martin Nourse. 14th November 2002.

⁶⁸ **Svenska Petroleum Exploration AB v Lithuania [2005] EWHC 2437 (Comm)**. Before Mrs Justice Gloster. 4th November 2005

⁶⁹ **Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529**: CA before Sir Anthony Clarke, MR; Scott Baker LJ; Moore-Bick LJ. 13th November 2006.

⁷⁰ **Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm)** : Mr Justice Aikens. 29th April 2005

⁷¹ **Occidental Exploration & Production Company v Republic of Ecuador [2005] EWCA Civ 1116**: CA before Lord Phillips MR, Clarke LJ; Mance LJ. 9th September 2005

⁷² **Selina Mohsin v. The Commonwealth Secretariat [2002] EWHC 377 (Comm)** : Mr Justice David Steel. 1st March 2002.

⁷³ **Gater Assets Ltd v Nak Naftogaz Ukraniy [2007] EWHC 697 (Comm)**. before Mr Justice Field.

⁷⁴ **Gater Assets Ltd v Nak Naftogaz Ukraniy [2007] EWCA Civ 988**: Before Buxton LJ; Rix LJ; Moses LJ. 17th October 2007.

⁷⁵ **Soinco SACI v Novokuznetsk Aluminium Plant [1996] EWCA Civ 620 before Phillips LJ ; Waller LJ; Chadwick LJ**

⁷⁶ **Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] EWCA Civ 981 : before Saville LJ; Brooke LJ.**

Stay to arbitration – anti-suit : *Bankers Trust v Jakarta Hotels [1999]*.⁷⁷ involved a successful anti-suit injunction against Indonesian litigation in support of an LCIA arbitration agreement.

Notice of discontinuance. In *Sheltam v Mirambo Holdings [2008]*,⁷⁸ a party gave a notice of discontinuance of a challenge to a New York Convention arbitration. The discontinuance notice was challenged to prevent outstanding issues before the English Court being used as a ground for resisting enforcement abroad. The court held that the discontinuance would be permitted subject to assurance that the ground would not be relied upon to prevent a foreign enforcing court obtaining jurisdiction.

Joinder : *ABCI v Banque Franco-Tunisienne [2002]*,⁷⁹ involved an application for joinder regarding an action for enforcement of a New York Award. The court held that the purpose of joinder was for matters not relevant to enforcement / resistance under the New York Convention and accordingly the application was refused.

Anti-suit injunction : *American Insurance v Abbott Laboratories [2003]*,⁸⁰ concerned an application pursuant to CPR r. 6.20(5)(c). challenging the validity of arbitration agreement.

New York Awards and The Republic of Eire

Brostrom Tankers AB v. Factorias Vulcano SA [2004],⁸¹ It was asserted that since the award purportedly may have infringed Spanish Law it would be against Irish Public Policy to enforce the award resulting in a 90% greater recovery than would be available under Spanish Law. Opposing council asserted that the dispute was governed by Norwegian Law and further disputed whether under the facts the claim was caught by Spanish Insolvency Legislation. In the circumstances Mr Justice Kelly concluded that enforcement did not offend Irish Public Policy and upheld the award.

Corbett Haselgrove Spurin

MEDIATION CASE CORNER

Case Commentary by
Corbett Haselgrove Spurin



Cumbria Waste Management Ltd v Baines Wilson (A Firm) [2008] EWHC 786 (QB)

Privilege : Disclosure : Whether the defendant is entitled to disclosure of documents arising out of or in connection with two mediations between the claimants and the DEFRA and which are not subject to legal professional privilege. DEFRA are not a party to these proceedings but have been invited to make representations pursuant to CPR 31.19(6)(b). They resist the making of an order for disclosure. The claimants do not resist the application. They take a neutral stance.

HHJ Frances Kirkham. 16th March 2008.

Galliford Try Construction Ltd v Mott MacDonald Ltd [2008] EWHC 603 (TCC)

Without prejudice : Privilege : Successful application to strike out portions of a witness statement on the grounds of negotiation privilege.
Mr Justice Coulson. 14th March 2008.

Gower Chemicals Group Litigation v Gower Chemicals Ltd [2008] EWHC 735 (QB)

Costs : Disclosure : expert report : Series of group mediations settlements save as to costs : Para. 40.14 of the Costs Practice Direction. Costs litigation - party to elect whether to disclose expert report or rely on other documents. Whether order fair.
Mr Justice Davis. 17th April 2008.

Lobster Group Ltd v Heidelberg Graphic Equipment Ltd [2008] EWHC 413 (TCC)

Costs of failed mediation : recovery at trial : Whether and or in what circumstances costs of a failed mediation might be subsequently be recovered along with other costs by successful party to a trial.
Mr Justice Coulson. 6th March 2008.

Newall v Lewis [2008] EWHC 910 (Ch)

Costs : Trust dispute : Benefit of partial settlement by beneficiaries through mediation : Removal of trustees. Costs incurred by trustees in resisting removal, with regard to the impact mediation had on limiting the scope of the trial.
Mr Justice Briggs. 30th April 2008.

Reynolds v Stone Rowe Brewer (a firm) [2008] EWHC 497 (QB)

Fees : Recovery : Costs spiralling up beyond estimate : £90K to recover £55K at trial. Casual advice to resort to ADR late in the day insufficient to protect lawyer's fees. Clear and timely warnings required. Fees capped at 15% above estimate.
Mr Justice Simons Tugendhat & Master Mr Robert Carter. 18th March 2008

⁷⁷ *Bankers Trust Co v P.T. Jakarta International Hotels & Developments [1999] 1 Lloyd's Rep 910*: Before Cresswell J. Commercial Court 12th March 1999

⁷⁸ *Sheltam Rail Company (Proprietary) Ltd v Mirambo Holdings Ltd [2008] EWHC 829 (Comm)* : Before Mr Justice. Aikens. Commercial Court. 21st April 2008

⁷⁹ *ABCI v Banque Franco-Tunisienne [2002] EWHC 2024 (Comm)*. Before HHJ Chambers QC

⁸⁰ *American International Speciality Lines Insurance Co. v Abbott Laboratories [2003] 1 Lloyd's Rep 267* : Before Cresswell J Commercial Court. 28th November 2002

⁸¹ *Brostrom Tankers AB v. Factorias Vulcano SA [2004] IEHC 198* (19 May 2004).



CONSTRUCTION CASE CORNER

Corbett Haselgrove Spurin



Aedas Architects Ltd v Skanska Construction UK Ltd [2008] ScotCS CSOH_64

Application for summary decree in respect of outstanding stage payments. Whether or not valid withholding notices had been issued was a triable issue, so summary decree refused.

Lord McEwan. Outer House Court of Session. 17th April 2008.

Amber Construction Services v London Interspace HG Ltd [2007] Adj.L.R. 12/18 : [2007] EWHC 3042(TCC)

The Claimant sought to enforce an Adjudicators decision, which the Defendant had failed to comply with and was disputing for various reasons, albeit these issues did not form the basis of this hearing. The Claimants solicitors had advised the Defendant that if they failed to comply with the Adjudicators decision they would, without further need for notice, seek Summary Judgement. Amongst other correspondence disputing the decision and threatening a counterclaim, the Defendants solicitors issued a "without prejudice save as to costs" letter containing an offer to settle at a reduced sum.

The Claimant subsequently and without further notice issued a Part 7 Claim form, requesting payment in accordance with the Adjudicators decision and that the Defendant shall pay all costs of the Claim. The Defendants filed an Acknowledgement of Service which admitted the full amount claimed by the Claimant. The Defendant argued that the Claimants costs should be limited to £100, per CPR 45.1 and 45.3, which it claimed is said to be the fixed amount when liability in full is admitted. The Claimant argued that the rules regarding fixed costs do not apply in this case and in any event the Court has jurisdiction to order fuller costs.

The Court noted that some four weeks had elapsed from the Adjudicators decision before enforcement proceedings were commenced. The Claimants solicitors had provided a clear warning that failure to comply with the Adjudicators decision would result in proceedings without further notice. Also the Defendants solicitors had stated various reasons why they would not pay and the without prejudice letter also made it clear that they did not accept the Adjudicators decision. For these reasons the Court held that the Defendants argument that the Claimants solicitor had acted secretly in incurring substantial costs was without foundation. The Court did not consider it fair that the Claimant, having complied with the steps called for in the Rules and the Guide, should be limited to the £100.00 for costs. Held: Summary assessment of the Claimants costs £6,162.00. Summary by Nick Turner. Judgment: Mr Justice Akenhead. TCC. 18th December 2007

Avoncroft Construction Ltd v Sharba Homes (CN) Ltd [2008] EWHC 933 (TCC)

Set off : Stay pending 2nd decision : payment into court. The defendant resists the application for enforcement of an adjudicators decision on the ground that it is entitled to set off LADs against the sum awarded. Alternatively, the defendant seeks a stay of execution, or an order that the money be paid into court and not distributed until the outcome of a second adjudication. *Bramall & Ogden v Sheffield City Council* (1983) 29 BLR 73 applied regarding non-availability of LADs post partial possession. *Balfour Beatty Construction Ltd v Serco Ltd* [2004] EWHC 3336 applied regarding basis for allowing set off against a decision. *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 741 (TCC) considered regarding whether or not a stay pending a second adjudication be granted. Her Honour was not persuaded that the size of that claim altered the status quo and provided a ground for a stay - *Wimbledon Construction Co 2000 Ltd v Derek Vago* [2005] BLR 374 test for security applied. HHJ Frances Kirkham : TCC 29th April 2008.

Brown (L) & Sons Ltd v Crosby Homes (North West) Ltd [2008] EWHC 817 (TCC)

Arbitration – appeal out of time s68(2)(g) AA 1996 : Application to serve appeal 66 days late against an arbitration award (No1) that overturned an adjudication decision. Assertion that documents disclosed in a subsequent arbitration (No2) would have resulted in a different result in No1. Held : Disclosure of the documents had not be ordered - an unlikely to change anything. Perjury allegations not sustainable. No good reason for the delay.

Mr Justice Akenhead. TCC. 23rd April 2008.

BSF Consulting Engineers Ltd v MacDonald Crosbie [2008] All ER (D) 171 (Apr)

Written contract : s15 SGSA 1982. Summary enforcement application : Claimant relied upon s15 Supply of Goods & Services Act 1982 to claim a reasonable charge for professional construction services : adjudicator found for claimant, but court held that in the absence of any written agreement as to scope of works or charges, arguably the adjudicator had no jurisdiction under s107 HGCRA. Accordingly leave granted to defend. *RJT Consulting Engineers Ltd v DM Engineering [2002]* applied. HHJ David Wilcox. TCC. 14th April 2008.

Edenbooth Ltd v Cre8 Developments Ltd [2008] EWHC 570 (TCC)

Residence exception to HGCRA : Action to enforce adjudication decision: No defence available. Did the residential exception apply to a construction contract with a company where a director of the company occupied the premises? Initial reference in director's name abandoned and fresh reference made in the name of company. Held : No. Furthermore, drainage and ground works for landscaping are construction works under the HGCRA.

Mr Justice Coulson. TCC. 13th March 2008.

Enterprise Managed Services Ltd v East Midland Contracting Ltd [2008] EWHC 727 (TCC)

Strike out enforcement action : Application to strike out action to enforce an adjudication decision on the grounds that the contract stated that any litigation of disputes should be delayed till after final completion. On the facts that application failed.

HJJ Stephen Davies . TCC Manchester District Registry. 27th March 2008.

Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2008] EWCA Civ 286

Fire : Insurance : recovery of adjudication award : Successful appeal : sums paid out pursuant to an adjudication recoverable under terms of insurance policy.

CA before MR, Rix LJ; Keene LJ. 2nd April 2008.

CONSTRUCTION ADJUDICATION DOWN UNDER NEW SOUTH WALES

Brian Leigh Smith v Coastivity P/L [2008] NSWSC 313

Construction Contract : BCISPA 1999 – adjudication determination – whether 1) a construction contract to which the Act applied existed – definition of “related goods and services” 2) consideration for related goods and services was calculated other than by reference to the value of the goods and services supplied 3) discretionary grounds exist to warrant withholding the grant of declaratory and injunctive relief. McDougall J. Supreme Court NSW. 11th April 2008.

Brian Leigh Smith v Coastivity P/L [No.2] [2008] NSWSC 450

Costs – follow the event – no question of principle. BCISPA 1999. McDougall J. Supreme Court NSW. 9th May 2008

John Holland P/L v Made Contracting P/L [2008] NSWSC 374

Withdrawal of adjudication application : Procedure for adjudication under BCISPA 1999 – whether withdrawal of adjudication application valid – whether adjudicator failed to determine adjudication application – whether entitlement to make new adjudication application established – whether claimant estopped from making new application – whether adjudicator’s determination of new application void – statutory construction.

Nicholas J. Equity Division. Supreme Court of New South Wales. 28th April 2008.

Masterton Homes P/L v Palm Assets P/L [2008] NSWSC 274

Rectification – evidence – admissibility : Contract - Construction and interpretation of contracts - Equity - Rectification - General principles - Requirement of clear and convincing proof of a common intention inconsistent with the words deliberately employed - Evidence - Admissibility of post-contract communications - Admissibility of post-contract admissions - Distinction between evidence admissible upon construction of contract as opposed to rectification - Contract under consideration set out in undertaking given to the Court - Onus of proof.

Einstein J : Equity Division. Supreme Court of New South Wales. 1st April 2008.

Project Architecture P/L v Peter's of Kensington P/L [2008] NSWDC 24

Non-Disclosure : Claim under BCISPA 1999 - Application for Summary Judgment - Relevant principles - Whether triable issue of fact or law had been disclosed - Whether party raising triable issue of fact required to cross-examine opposing party.

Rolfe DCJ. District Court New South Wales. 5th March 2008.

Trysams P/L v Club Constructions (NSW) P/L [2008] NSWSC 399

Due process – whether issue put to adjudicator : BCISPA 1999 – adjudicator’s consideration of an issue not raised by parties – parties denied opportunity to put submissions on issue – whether issue material to determination – whether denial of natural justice – adjudicator’s failure to consider relevant contractual provisions – power of Court to order adjudicator to reconsider adjudication application.

McDougall J. Supreme Court NSW. 6th May.

QUEENSLAND

Cavanah v Advance Earthmoving ; Haulage P/L [2008] FMCA 427

Insolvency : Bankruptcy notice – set aside – judgment upon which the notice was founded was not a final judgment – counter-claim – set-off or cross-demand. Burnett FM. Federal Magistrates Court of Australia at Brisbane. 18th April 2008.

Greg Beer t/a G & L Beer Covercreting v J M Kelly (Project Builders) P/L [2008] QCA 35

Interpretation or rules : where the appellant carried out works for the respondent under a licence class “Painting and Decorating” –where a condition restricted the licence to “residential spray on painting” – construction of s 42(1) Queensland Building Services Authority Act 1991 (Qld) – whether “licence of the appropriate class” can be read subject to any work-restrictive condition on a licence – limitations of the power of the court when construing a statute, to interfere with the language chosen by the legislature. whether s 30(3) Queensland Building Services Authority Act 1991 authorised the creation of a class of licence of “painting and decorating restricted to residential spray on painting” – whether, alternatively s 29 of Sch 1 of Mutual Recognition (Queensland) Act 1992 allowed the creation of the specific class of “painting and decorating restricted to residential spray on painting.”

Holmes JJA Muir JJA Mackenzie AJA. Court of Appeal. Supreme Court of Queensland. 29th February 2008.

Greg Beer t/a G & L Beer Covercreting v J M Kelly (Project Builders) P/L [2008] QCA 82

Costs : Where the respondent opposes the costs orders proposed in the reasons - where the respondent sought to uphold orders of the primary judge which were found to be erroneous - whether costs of the appeal should be costs in the cause or should be reserved pending the outcome of District Court proceedings - where grounds in the notice of contention were left undecided - where the grounds will be determined in the District Court - whether there should be an order as to costs at first instance. Holmes JJA Muir JJA Mackenzie AJA. Court of Appeal. Supreme Court of Queensland. 11th April 2008.

Hervey Bay (JV) P/L v Civil Mining and Construction P/L [2008] QSC 58

EOT & entitlement to progress payment : Payments – appeal from decision of an adjudicator – validity of a decision about entitlement to a progress payment – entitlement to progress payment where no extension of time was claimed : entitlement to progress payments – entitlement to delay costs – where parties have modified the standard conditions of contract– entitlement to extensions of time – power of Superintendent to grant extensions of time – effect of modification of the standard terms upon the powers of the Superintendent.

McMurdo J. Supreme Court of Queensland. 14th April 2008

Inter Hospitality Projects PIL v Empire Interior (Australia) PIL & Peter James Hanlon [2008] QCA 83

Judicial review : governing contract : Where the second respondent adjudicator made a decision under the BCISPA 2004 – where the primary judge dismissed the applicant's application for a statutory order of review of the decision – where the underlying object of the BCISPA 2004 is to provide a mechanism for swift interim adjudications – where the court may dismiss an application for judicial review where it would be "inappropriate" to grant the application under s 48 Judicial Review Act 1991 (Qld) – whether the application for leave to appeal under s 13(b) Judicial Review Act 1991 (Qld) should be dismissed.) – where there was a dispute between the parties as to which document formed the basis of their agreement – where the adjudicator found that the earlier agreement governed the parties, as the later subcontract was signed under duress – whether the adjudicator was capable of maintaining a finding of common law duress. Holmes JJA Muir JJA Chesterman J. Court of Appeal. Supreme Court of Queensland. 11th April 2008.

McAlpine v Wieland [2008] QDC 76

Error of law : Whether findings of Commercial and Consumer Tribunal amounted to an error of law.

Nase DCJ. District Court of Queensland. 8th April 2008.

NEW ZEALAND**Page & MacRae Ltd v Real Cool Ltd HC TAU CIV 2007-404-5774**

Charging Order Jurisdiction District or High Court : Adjudicator gave permission to issue a charging order under s 49 of the Act, and order duly entered into in the High Court. Claimant notified court of the decision in *Laywood and Rees v Holmes Construction Wellington Ltd* that only the District Court could enter a charging order. Court noted an appeal pending in Laywood. Determined to continue order pending application to District Court.

Heath J. 2008.04.29. High Court New Zealand Tauranga Registry

PRACTICE & PROCEDURE CASE CORNER

Case Commentary by
Corbett Haselgrove Spurin

**Artibell Shipping Co Ltd. v Markel International Insurance Co Ltd [2008] EWHC 811 (Comm)**

Strike out : abuse of process : Defendant underwriters seek an order striking out the action brought against them by the claimant shipowners on the grounds of abuse of process and/or delay. In the alternative they seek an order imposing conditions on the continued prosecution of the claim and, in any event, security for their costs.

Mr Justice David Steel Commercial Court. 24th April 2008.

Carleton v Strutt & Parker (A Partnership) [2008] EWHC 616 (QB)

Interest : Whether interest should be awarded.

Mr Justice Jack QBD. 24th April 2008.

Carver v BAA Plc [2008] EWCA Civ 412

Costs : Part 36 payment : If a claimant beats a payment of money into court by a modest amount, even £1, has she obtained a judgment more advantageous than the defendant's Part 36 offer or is the Court entitled to look at all the circumstances of the case in deciding where the balance of advantage lies? His Honour Judge Knight QC sitting in the Central London County Court on 4th June 2007 took the latter, broad view and so he ordered the claimant to pay the defendant's costs of the claim after the time for accepting the payment had expired. He also made no order for costs for the prior period covered by an earlier Calderbank offer. Failed appeal. Ward LJ; Rix LJ; Keene LJ.. 22nd April 2008.

Ide v ATB Sales Ltd [2008] EWCA Civ 424

Burden of proof : judicial approach : The approach a judge is entitled to take to the determination of proof of causation where alternative mechanisms of causation were put before the court. In each case the sole issue before the court was whether the respondent to the appeal who had suffered the damage could prove on a balance of probabilities that a defect had caused the damage sustained; each appellant contended that the judge had adopted a train of reasoning which the House of Lords made clear in *The Popi M* [1985] 1 WLR 948 (*Rhesa Shipping Co SA v Edmunds*) was impermissible.

Mills v Birchall [2008] EWCA Civ 385

Liquidation - suit - costs : Appeal against cost judgment that company in liquidation liable for failed costs of litigation : attempt to render administrator liable for costs : Held : Appeal failed - it was for the defendant to apply for security of costs : failed to do so. Now too late. Mummery LJ; Lawrence Collins LJ; Mr Justice Munby. 18th April 2008.

Taylor Woodrow Construction v RMD Kwikform Ltd [2008] EWHC 825 (TCC)

s14, 32. 45 AA 1996 Challenge : Appointment : Whether a valid notice of arbitration given : unilateral appointment contrary to contract provisions. The so called notice was not unequivocal – a mere enquiry as to whether the other party would insist on arbitration – so arbitration process not commenced – 14 day period to agree appointment not triggered – so unilateral appointment invalid.

Mr Justice Ramsey. TCC. 10th April 2008.

Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd [2008] EWHC 843 (Comm)

S69 AA 1996 – challenge : While the approach of the Arbitrator was not justified, on the proper construction of the Binder, Temple is not entitled to conduct the run-off. Accordingly, notwithstanding the reasoning, the Arbitrator's decision was correct. The question of law is thus determined in favour of QBE, and this appeal is dismissed.

Mr Justice Beatson. Commercial Court. 23rd April 2008.

Tsavliris Salvage (International) Ltd v The Grain Board of Iraq [2008] EWHC 612 (Comm):

s67 Challenge : Jurisdiction : state immunity : Jurisdiction : No arbitration agreement : State Immunity. Mr Justice Gross Commercial Court. 10th April 2008.

Regent Company v Ukraine 773/03 [2008] ECHR 254

Human Rights Art 6. It is a breach of convention rights for a contracting state party to fail to honour an arbitration award.

Peer Lorenzen, President European Court Human Rights. 3rd April 2008.

Reynolds v Stone Rowe Brewer (a firm) [2008] EWHC 497 (QB)

Fees : Recovery : Costs spiralling up beyond estimate : £90K to recover £55K at trial. Casual advice to resort to ADR late in the day insufficient to protect lawyers fees. Clear and timely warnings required. Fees capped at 15% above estimate.

Mr Justice Tugendhat ; Master Simons; Mr Robert Carter. QBD. 18th March 2008.

Royal & Sunalliance Insurance Plc v BAE Systems (Operations) Ltd [2008] EWHC 743 (Comm)

S47 & s69 AA 1998 – Leave to appeal : Reinsurance : LCIA arbitral award. Is leave required to appeal on a point of law regarding contract construction & interpretation. Held : No. Mr Justice Walker Commercial Court. 15th April 2008.

Sudojo Consulting P/L v Africa Pacific Capital P/L [2008] NSWSC 353

Contract formation – electronic communication : Plaintiff and defendant agreed that they were parties to a consultancy agreement but disagree as to the precise terms - Letter/email later sent by plaintiff purporting to summarise terms agreed upon and seeking signature but never signed on behalf of defendant - Proceedings exemplify difficulties of pressing too far, the classical theory of contract formation based upon offer and acceptance in certain circumstances - Proceedings represent an example of a case where it is necessary to look at the whole of the relationship and not only at what was said and done when the relationship was first formed, it being the case that in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled.

Einstein J. Supreme Court New South Wales. 22nd April 2008.

South East Asia Metal Ltd v Zahoor [2008] EWCA Civ 437

Evidence admissible on appeal : CPR 52.11(2) : Grounds for introducing new evidence on appeal. Ladd v Marshall [1954] 1 WLR 1489 applied : TEST : New evidence to be admissible i) could not have been obtained with reasonable diligence for use at the trial; ii) must be such that it would probably have an important influence on the result of the case; iii) must be apparently credible, though it need not be incontrovertible.

CA before MR; Longmore LJ; Lawrence Collins LJ. 29th April 2008.

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