

# ADR NEWS



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

## EDITORIAL :

This edition of ADR News sees the launch of a new NADR facility, namely the *International Commercial Law Reports* (Int.Com.L.R.). This is reflected in the extended new feature within, Commercial Case Corner, which carries short notes on a wide range of reported cases to date in 2008 that involve international commercial legal issues from the UK perspective. The key to **LINKS** on the NADR web site is labelled **SHIPPING TRANSPORT CASES**. Case transcripts are accessible in **PUBLICATIONS** at *Commercial Law Reports 1996-2008* together with an index and older cases. The object of this series as with the *Construction Law Reports* is to complement the *Arbitration Law Reports*.

The long anticipated EU Directive on mediation has at last been issued, with a long stop of May 2011 for the introduction of compliant domestic legislation in member states. Whilst limited to cross border civil and commercial disputes, member states are invited to extend the scope of consequent legislation to cover domestic disputes, though given the limited scope of the Directive and the extent of the support already provided by the Civil Procedure Rules to the mediation process in the UK, few changes would be necessary for the UK to comply with the directive. In as much as compliance should ensure that all other states in the Union must, if they have not yet done so, introduce compatible provisions, this should ensure an even playing field throughout the Union for the use of mediation in cross border disputes.

Those familiar with the EU "*Green paper on alternative dispute resolution in civil and commercial law*"<sup>1</sup> will not be surprised that, given the diversity of mediation practice across the EU, gaining agreement for the harmonisation of the rules governing mediation practice eluded the legislators. Rather, the Commission has settled for a light brush approach that invites member states to do more to encourage and facilitate the growth mediation as a process that can contribute to "access to justice". The general themes in the Directive mirror those set out in 2004 in the EU Code of Conduct for Mediators. Of interest in the UK are :-

**Article 4**, which *invites* member states to develop codes of mediation practice and rules in respect of training and accreditation. The directive provides no criteria, so each state which accepts the invitation is likely to go its own way.

**Article 8**, which *requires* amendment to domestic limitation legislation to ensure that time spent engaging in mediation is discounted from the statutory limitation period, though there are exemptions in respect of international convention time bars such as the 1 year post discharge time bar in The Hague-Visby Rules in respect of cargo claims against sea carriers. Whether contractual time limits are affected is unclear.

There are moves afoot to modernise the Limitation Act 1980 already, so it is likely that the requirements of Article 8 will be met, not as a piece meal reform but as part of a larger package. Whether the government would take this opportunity to include the training and accreditation matters set out in Article 4 would be something else since that would not sit well with the central remit of the limitation reforms. Rather, this might form part of a package to reinforce the mediations measures already introduced by HMCS, perhaps with an extension of the alliance already forged with the Civil Mediation Council, though it would be equally possible for the government to set up a brand new organisation to act as a vehicle for implementation of EU policy objectives with regard to the administration of regulations governing mediation accreditation, training and practice. With this professional mediation moves one step closer.



### Contents

- Editorial
- Mediation Directive : EU
- Irish ADR Consultation Paper
- Draft Construction Bill
- Case updates in respect of Arbitration, Commercial Law, Construction Law and Practice & Procedure.

### Editorial Board.

General Editor : G.R.Thomas  
Assistant Editor : C.H.Spurin  
N.Turner & R.Faulkner

The burning issue for adjudicators this Autumn will no doubt be the Draft Construction Bill. The content of the bill, which is out for consultation, will come as no surprise given the prior consultation reports. Rather the devil lies in consideration of the detail. Already the impact report by the "*Ministry of Guesstimation*" has given rise to some wry comment. How on earth it can be concluded that the industry will save so much money from the introduction of this legislation is a mystery. Cash will be redistributed, mostly in a beneficial manner, providing well needed cash flow for sub-contractors but that is all. As to whether the adjudication process will be more cost effective will depend on how successful the legislation is at limiting challenges to decisions, particularly in the light of the abolition of s107 HGCRA 1996.

The jury is still out on the new payment provisions. No doubt there will be legions of commentary on these proposals. Still, the drafting of Part II HGCRA 1996 on was universally panned by the industry so change was perhaps inevitable.

G.R.Thomas : Editor

<sup>1</sup> COM/2002/0196 final

**DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 21 May 2008  
on certain aspects of mediation in civil and commercial matters**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee <sup>2</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>3</sup>,

Whereas:

- (1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.
- (2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.
- (3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.
- (4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.
- (5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.
- (6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.
- (7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.
- (8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
- (9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.
- (10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.
- (11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.
- (12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seized to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seized requests assistance or advice from a competent person.

<sup>2</sup> OJ C 286, 17.11.2005, p. 1.

<sup>3</sup> Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129). Council Common Position of 28 February 2008 (not yet published in the Official Journal) and Position of the European Parliament of 23 April 2008 (not yet published in the Official Journal).

- (13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.
- (14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.
- (15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.
- (16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.
- (17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.
- (18) In the field of consumer protection, the Commission has adopted a Recommendation <sup>4</sup> establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.
- (19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.
- (20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters <sup>5</sup> or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility <sup>6</sup>.
- (21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.
- (22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.
- (23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.
- (24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

<sup>4</sup> Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

<sup>5</sup> OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

<sup>6</sup> OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).

- (25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.
- (26) In accordance with point 34 of the Inter-institutional agreement on better law-making<sup>7</sup>, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.
- (28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.
- (30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

**HAVE ADOPTED THIS DIRECTIVE:**

**Article 1**

**Objective and scope**

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.
2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).
3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

**Article 2**

**Cross-border disputes**

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
  - (a) the parties agree to use mediation after the dispute has arisen;
  - (b) mediation is ordered by a court;
  - (c) an obligation to use mediation arises under national law; or
  - (d) for the purposes of Article 5 an invitation is made to the parties.
2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).
3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 442001.

**Article 3**

**Definitions**

For the purposes of this Directive the following definitions shall apply:

- (a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge wised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

- (b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

**Article 4**

**Ensuring the quality of mediation**

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.
2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

<sup>7</sup> OJ C 321, 31.12.2003, p. 1.

**Article 5****Recourse to mediation**

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.
2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

**Article 6****Enforceability of agreements resulting from mediation**

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.
2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.
4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

**Article 7****Confidentiality of mediation**

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
  - (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
  - (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

**Article 8****Effect of mediation on limitation & prescription periods**

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

**Article 9****Information for the general public**

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

**Article 10****Information on competent courts and authorities**

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

**Article 11****Review**

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

**Article 12****Transposition**

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof. When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 13****Entry into force**

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

**Article 14****Addressees**

This Directive is addressed to the Member States.  
Done at Strasbourg, 21 May 2008.

## EUROPEAN CODE OF CONDUCT FOR MEDIATORS <sup>8</sup>

### 1. COMPETENCE AND APPOINTMENT OF MEDIATORS

#### 1.1 Competence

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

#### 1.2 Appointment

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

#### 1.3 Advertising/promotion of the mediator's services

Mediators may promote their practice, in a professional, truthful and dignified way.

### 2. INDEPENDENCE AND IMPARTIALITY

#### 2.1 Independence and neutrality

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include

- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

#### 2.2 Impartiality

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

### 3. THE MEDIATION AGREEMENT, PROCESS, SETTLEMENT AND FEES

#### 3.1 Procedure

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

#### 3.2 Fairness of the process

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation, if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

#### 3.3 The end of the process

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

#### 3.4 Fees

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

### 4. CONFIDENTIALITY

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

<sup>8</sup> v1.6 (040604)

## CONSULTATION PAPER : ALTERNATIVE DISPUTE RESOLUTION (LRC CP 50 - 2008) <sup>9</sup>

The Irish Law Reform Commission, as part of the Commission's *Third Programme of Law Reform 2008-2014*, (under which the Commission is committed to examining, and exploring reform options for, the main processes of alternative dispute resolution (ADR) and associated key principles) has produced a substantial report on mediation in Ireland. The paper is important because it appears to be driven by the EC Mediation Directive 2008, the content of which was already in the public arena when the Commission commenced its work. The paper makes a number of provisional proposals and calls for further submissions before it proceeds to a Final Report. Those who wish to make submissions are requested to make their submissions in writing by post to the Commission<sup>10</sup> or by email to [info@lawreform.ie](mailto:info@lawreform.ie) by 31<sup>st</sup> October 2008. A hard copy of the Report are available for 15 Euros from the Commission.

In as much as the Irish Legal System has not yet legislated for mediation practice and given the need for Ireland to fulfil the requirements of the EC Mediation Directive, this paper not only paves the way for Irish legislation, but is also likely to be taken into account by the UK government when it in turn considers how to respond to the Directive.

This paper is thorough and wide ranging, examining mediation law and practice in the UK, the US, Canada, Europe, Asia and Australia, providing a wealth of information, statistical analysis and acts as a major source of reference on mediation practice, with an abundance of footnoted URLs for ease of cross reference. It is a must read paper for academics and practitioners alike. The Introduction sets out the Commission's approach to ADR, namely the provision of a service to the users of the legal process and the needs of justice, concluding that ADR is complementary to and an integral part of the justice system, rejecting any view that it is an alternative and nothing to do with the courts.

Chapter 1 presents a general overview of ADR. Apart from a historical review, the paper develops a general theme about access to justice, what justice is, how ADR can contribute to justice and the limitations of the judicial system to meet clients needs in a modern society. It concludes that non-legal solutions are as significant as monetary awards in certain spheres of human activity.

Chapter 2 examines ADR processes and terminology. Of particular interest are the definitions that the Commission applies to Mediation and Conciliation. The Commission is at pains to assert that mediators should not provide solutions whilst Conciliators should only provide recommendations not decisions, which contrasts with Expert Determination. This precludes binding conciliation, popular in employment practice between Unions and Employers where the parties agree that in the event that the parties are not able to strike a bargain the conciliation panel will make a definitive and binding determination – which unlike adjudication is not based on law (*ex aequo bono* arbitration excepted). Expert determination differs in that hearings are uncommon and there is no scope for the parties to broker an agreement. Implications for med/arb are unclear at this stage. Surprisingly, given the ongoing and wide ranging Dublin Tunnel Dispute, Dispute Review Boards are not considered by the paper. In the light of the above, it may be that many mediators who, with the consent of their clients, give advice on appropriate solutions may have to re-brand what they do as conciliation – in line with the Australian experience. Furthermore, any resultant rules in this regard will need to be carefully drafted to permit leading questions that force the parties to evaluate their positions and clearly distinguish that from “*evaluative mediation*” (i.e. conciliation by their terminology) where a decision or recommendation is made for or to the parties.

Chapter 3 examines the main objectives and principles of ADR. The paper ranges over party autonomy, self determination and voluntariness, flexibility in the ADR process, confidentiality, neutrality and impartiality, all with a view to the prescriptions of the EU Directive. Again a contrast is drawn between mediation and conciliation. The concept of mandatory mediation is introduced here though revisited in chapter 11.

Chapter 4, looks at the use of ADR in employment law. However, no recommendations are made in this regard.

Chapter 5 examines the role of ADR in resolving family law disputes. The chapter concludes with a quote “*The old adversarial model of a day in court with a winner and a loser was never designed effectively to address the profound human needs and vulnerabilities at the heart of family relationships and indeed even the most redeemed family law model has stark limitations to the difficulties and problems it can realistically address and help resolve.*” and expresses the view that mediation has an important role to play in the family law field.

Chapter 6 examines how ADR could assist in the resolution of medical disputes and explores the potential of ADR in providing alternative non-monetary redress, including an apology, medical negligence claims. Further submissions are invited.

Chapter 7 discusses ADR in the context of commercial disputes and invites submissions as to whether commercial mediation requires statutory attention in Ireland. The Commission reaffirms its view (see Chapter 3) that mediation and conciliation, should be seen as voluntary and non-binding and should be clearly distinguished from the adjudicative functions properly performed by arbitral processes and Court decisions.

Chapter 8 examines the development of ADR in resolving consumer disputes. In the 2005 Report of the Consumer Strategy Group it was noted that “*...what really matters is the gap, if any, between a consumer (or business) deliberately deciding not to take any action and a consumer (or business) wishing to take action but refraining from doing so because of the perceived disadvantages of an ordinary court procedure...mechanisms of ADR that bridge this gap have the unique*

<sup>9</sup> [www.lawreform.ie/publications/Consultation%20Paper%20on%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20LRC%20CP%2050-2008.pdf](http://www.lawreform.ie/publications/Consultation%20Paper%20on%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20LRC%20CP%2050-2008.pdf)

<sup>10</sup> Law Reform Commission, 35-39 Shelbourne Road, Ballsbridge, Dublin 4

*capability of increasing access to justice.*” The paper examines a broad range of consumer dispute resolution services available in various sectors and invites submissions on the incorporation of a code of best practice for consumer mediation and conciliation.

Chapter 9 explores the potential role for ADR in the resolution of property disputes, in particular disputes between neighbours and considers whether ADR has any role to play in the resolution of planning application disputes. The Commission sees mediation as a viable method for resolving all of the above and supports further developments in the field.

Chapter 10 addresses the accreditation and regulation of mediators and quality assurance. The Commission concludes that mediation services should be subject to further and better controls. Provisionally the setting up of a non-statutory body to accredit mediation service providers is advised. There is no detail at this stage as to the standards and criteria that the body would have to operate under and it may be that that body would be given the task of developing those in the first place. The body would then look to the service providers to meet its rules and regulations. The key objectives are as set out in Chapter 3. This is a key part of the EU directive and is likely to be realised in due course. Who is given the task and the detail that emerges thereafter will be crucial to the development of the mediation industry in Ireland. It would appear that mediation is moving towards professional status in Ireland and elsewhere, but the interrelationship between the “mediation profession” and the professional bodies that most mediators belong to in the rest of their working lives is not touched upon in this report. Many mediators are also lawyers for instance, and both the Law Society and the Bar have already laid down rules and regulation on mediation practice and representation at mediation by its members. Also, it should be noted that specific areas of mediation practice, such as Family Mediation is already regulated by a specialist body in the UK though not in Ireland. There is a danger that regulations on mediation practice will either be far too generalistic to be meaningful or would be too prescriptive to allow for the differing needs of specialist areas. The modus operandi of community, consumer, family and commercial mediators are quite distinct at the present time.

Chapter 11 examines the role of the Court in the development of ADR. The paper focuses on whether or not the courts should be able to compel parties to engage in mediation or merely encourage engagement, followed by an examination of coercion to participate through cost penalties. The test for engagement is examined in terms of good faith provisions and whether mediators should be required to report to the courts in this regard. This issue is put out to further consultation, though the paper excludes Family Mediation where penalties are not deemed to be appropriate.

Each chapter makes proposals which are pulled together in Chapter 12, which is set out in full below.

#### CHAPTER 12 SUMMARY OF PROVISIONAL RECOMMENDATIONS

- 12.01 *The Commission’s provisional recommendations in this Consultation Paper may be summarised as follows:*
- 12.02 *The Commission concurs with the view that ADR provides a suitable means of resolving disputes in appropriate circumstances and provisionally recommends that the key principles underlying ADR, in particular mediation and conciliation, should be set out in statutory form. [Paragraph 1.74]*
- 12.03 *The Commission defines ADR as a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes. [Paragraph 2.12]*
- 12.04 *The Commission provisionally recommends that the more commonly used ADR terms, in particular mediation and conciliation, should be clearly and consistently defined in legislative form. [Paragraph 2.127]*
- 12.05 *The Commission provisionally recommends that when provision for mediation is made in legislative form, it should be defined as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. [Paragraph 2.128]*
- 12.06 *The Commission provisionally recommends that when provision for conciliation is made in legislative form, it should be defined as an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement. [Paragraph 2.129]*
- 12.07 *The Commission provisionally recommends that, in civil claims generally, courts should be permitted, either on their own motion initiative or at the request of a party to such claims, to make an order requiring the parties to consider resolving their differences by mediation or conciliation. [Paragraph 3.92]*
- 12.08 *The Commission provisionally recommends that the participation of parties in mediation should be voluntary and that the mediator should play no advisory or evaluative role in the outcome of the process, but may advise on or determine the process. [Paragraph 3.95]*
- 12.09 *The Commission provisionally recommends the participation of parties in conciliation should be voluntary and that the conciliator should not have the authority to impose on the parties a solution to the dispute but may make recommendations to the parties for the settlement of the dispute, which the parties may or may not accept. [Paragraph 3.96]*
- 12.10 *The Commission provisionally recommends that a pilot Court annexed mediation scheme should be established in the District Court based on the principles of the voluntary participation of the litigants. [Paragraph 3.98]*
- 12.11 *The Commission provisionally recommends that the principle of confidentiality of mediation and conciliation should be placed on a statutory basis and invites submissions as to whether confidentiality in mediation should be subject to a distinct form of privilege. [Paragraph 3.139]*



- 12.12 The Commission provisionally recommends that parties to mediation or conciliation should be fully informed about the process by the neutral and independent mediator or conciliator before they consent to participate in it, that their continued participation in the process should be voluntary, and that they understand and consent to the outcomes reached in the process. [Paragraph 3.152]
- 12.13 The Commission provisionally recommends that parties should be encouraged to seek independent advice, legal or otherwise, before signing an agreement entered into at conciliation or mediation. [Paragraph 3.153]
- 12.14 The Commission provisionally recommends that any bodies responsible for providing ADR processes, in particular mediation and conciliation, should periodically review the procedures involved to ensure that the dispute is being dealt with expeditiously and appropriately. [Paragraph 3.176]
- 12.15 The Commission provisionally recommends that ADR mechanisms should aim at preserving the flexibility of the process. [Paragraph 3.184]
- 12.16 The Commission provisionally recommends that the requirement of neutrality and impartiality be included in any general statutory formulation that concerns mediation and conciliation. [Paragraph 3.187]
- 12.17 The Commission invites submissions as to whether the European Code of Conduct for Mediators should be given a statutory basis in Ireland, including in the form of a Code of Practice. [Paragraph 3.192]
- 12.18 The Commission provisionally recommends that a Court may enforce any agreement reached at mediation or conciliation. [Paragraph 3.217]
- 12.19 The Commission invites submissions as to whether the parties in a mediation or conciliation may agree in writing to suspend the running of any limitation period. [Paragraph 3.220]
- 12.20 The Commission invites submissions as to whether the 2008 EC Directive on Certain Aspects of Mediation in Civil and Commercial Matters should be applied to disputes that do not involve a cross-border element, that is domestic disputes. [Paragraph 3.223]
- 12.21 The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to information in family law disputes. [Paragraph 5.14]
- 12.22 The Commission invites submissions as to whether separating and divorcing parents should be encouraged to develop parenting plans. [Paragraph 5.30]
- 12.23 The Commission provisionally recommends that, where appropriate, mediation should be considered by parties to a family dispute before litigation. [Paragraph 5.44]
- 12.24 The Commission invites submissions as to whether children should participate in mediation proceedings affecting them. [Paragraph 5.66]
- 12.25 The Commission reiterates its previous recommendations set out in the Commission's 1996 Report on Family Courts (LRC 52-1996) in relation to enforcement and review of mediated agreements. [Paragraph 5.74]
- 12.26 The Commission invites submissions as to whether a statutory Code of Practice or Guidelines for collaborative lawyering should be introduced. [Paragraph 5.157]
- 12.27 The Commission provisionally recommends the extension to all Circuit Courts of case conferencing in family disputes by County Registrars. [Paragraph 5.162]
- 12.28 The Commission provisionally recommends that a Court should adjourn proceedings when appropriate to allow parties to a dispute arising under section 117 of the Succession Act 1965 to consider mediation. [Paragraph 5.174]
- 12.29 The Commission provisionally recommends that a statutory provision be considered which would allow medical practitioners to make an apology and explanation without these being construed as an admission of liability in a medical negligence claim. [Paragraph 6.21]
- 12.30 The Commission invites submissions as to whether a pre-action procedure providing for mediation in a medical negligence claims should be considered. [Paragraph 6.43]
- 12.31 The Commission invites submissions as to whether mediation and conciliation orders should be introduced in the Commercial Court which would set out the necessary steps that parties must follow when considering mediation and conciliation. [Paragraph 7.45]
- 12.32 The Commission invites submissions as to whether a general statutory framework for mediation and conciliation in commercial disputes should be put in place, which would include small commercial (including consumer) disputes and contracts covered by the Government's Standard Contracts for Public Works. [Paragraph 7.60]
- 12.33 The Commission provisionally recommends that mediation and conciliation may be appropriate for the resolution of shareholder disputes under section 205 of the Companies Act 1963 and should be considered prior to litigation. [Paragraph 7.66]
- 12.34 The Commission invites submissions as to whether the recommendations in the European Consumer Centre's 2008 Report The development of Alternative Dispute Resolution (ADR) in Ireland : An analysis of complaints, best practice and future recommendations should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes. [Paragraph 8.36]
- 12.35 The Commission commends the recommendations on online dispute resolution of consumer disputes made by the Information Society Commission in its 2002 Report Building Trust and by Forfas in its 2002 Report Legislating for Competitive Advantage in e-Business and Information & Communications Technologies and invites submissions as to whether they should be incorporated into a statutory Code of Practice concerning mediation and conciliation in consumer disputes. [Paragraph 8.54]
- 12.36 The Commission provisionally recommends that the jurisdictional limit of the Small Claims Court be increased to €3,000. [Paragraph 8.61]

- 12.37 The Commission provisionally recommends the continued development of mediation and conciliation services by community law centres for the resolution of community and neighbour property disputes. [Paragraph 9.23]
- 12.38 The Commission provisionally recommends that property boundary disputes are appropriate for resolution through mediation and conciliation and that parties should be advised by their legal representatives to consider and attempt mediation or conciliation in such disputes prior to the commencement of litigation. [Paragraph 9.25]
- 12.39 The Commission provisionally recommends that the courts should continue to be pro-active in advising parties in property disputes to consider the adjournment of hearings to allow the parties to consider mediation or conciliation. [Paragraph 9.26]
- 12.40 The Commission invites submissions on whether ADR, in particular mediation, has a role to play in the resolution of planning application disputes. [Paragraph 9.50]
- 12.41 The Commission provisionally recommends that training and accreditation of mediators is essential to ensure the quality of the process and invites submission as to whether this should be included in any statutory framework for mediation. [Paragraph 10.09]
- 12.42 The Commission provisionally recommends that the relevance of ADR, including mediation and conciliation, should be incorporated into third level programmes in law and other disciplines and the professional programmes conducted by the Law Society of Ireland and the Bar Council of Ireland. [Paragraph 10.61]
- 12.43 The Commission invites submissions as to whether the regulation of mediators should continue at present on a non-statutory basis, subject to the principles to be set out in a statutory framework for mediation and conciliation. [Paragraph 10.64]
- 12.44 The Commission provisionally recommends that all family mediators should receive specialist training in this particular area. [Paragraph 10.65]
- 12.45 The Commission provisionally recommends that a non-statutory scheme should be established, under the auspices of the Department of Justice, Equality and Law Reform, to provide for the accreditation of organisations, which, in turn, accredit individual ADR practitioners. [Paragraph 10.66]
- 12.46 The Commission provisionally recommends a Court should not impose a good faith requirement in mediation or conciliation as this would risk undermining key principles, including the right to self-determination, the voluntary nature of the process, the neutrality of the mediator or conciliator and the confidentiality of the process. The Court should, however, encourage parties to mediate in good faith. [Paragraph 11.36]
- 12.47 The Commission invites submissions as to whether, in general, costs sanctions should be imposed on a party by a Court for an unreasonable refusal to consider mediation or conciliation and whether a Court should apply the following factors in determining that a party has unreasonably refused to consider mediation or conciliation: the nature of the dispute; the merits of the case; the extent to which other settlement methods have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up and attending mediation would have been prejudicial; and whether mediation had a reasonable prospect of success. [Paragraph 11.71]
- 12.48 The Commission provisionally recommends that family law cases should not be subject to costs sanctions for unreasonable refusal to consider mediation. [Paragraph 11.72]
- 12.49 The Commission provisionally recommends that the content of a mediator's or conciliator's reports to the court should be restricted to a neutral summary of the outcome of the mediation or conciliation. [Paragraph 11.78]
- 12.50 The Commission invites submissions as to whether mediation or conciliation costs should be recoverable costs of any subsequent litigation. [Paragraph 11.84]

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**Conclusions.** This paper provides an ideal platform for the further development of ADR services in Ireland. It is to be hoped that a wide range of interested parties accept the Commission's invitation and take the trouble to respond. What is not addressed in the paper is the high degree of ambivalence and skepticism about mediation both in Ireland and the UK, demonstrated by many potential users and most particularly by much of the legal profession. That needs to change, but how to bring about that change is another matter. Any solution is unlikely to be cost free.

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### Expert determination:

#### Owen Pell Ltd v Bindi (London) Ltd (2008) LAWTEL AC0117443

Expert determination in lieu of adjudication, arbitration or litigation. In the absence of bias, the determination is not subject to review by the courts where it had been pre-agreed that the decision be final and binding.

*Campbell v Edwards* [1976] 1 WLR 403, *Baber v Kenwood* [1978] 1 Lloyd's Rep. 175, *Dean v Prince* [1954] 2 WLR 538, *Arenson v Arenson* [1973] 2 WLR 553. *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103. *Jones v Sherwood Computer Services* [1992] 1 WLR 277, *Re Medicaments and Related Classes of Goods* [2001] 1 WLR 700. *Porter v Magill* [2002] 2 AC 357, *Macro v Thompson (No. 3)* [2002] BCLC 36, *Bernhard Schulte v Nile Holdings* [2004] Lloyd's Rep. 352, *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1 considered.

HHJ Frances Kirkham TCC Birmingham 19<sup>th</sup> May 2008

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## The “Construction Contracts Bill”<sup>11</sup> (Version 1, July 2008)<sup>12</sup>

A draft bill to amend Part 2 of the Housing Grants, Construction and Regeneration Act 1996.

### Introductory

#### 1 Application of this Act

- (1) In this Act “*the 1996 Act*” means the Housing Grants, Construction and Regeneration Act 1996 (c. 53).
- (2) Part 2 of the 1996 Act (construction contracts) is amended as specified in sections 2 to 9.
- (3) The amendments made by those sections apply in relation to construction contracts which are entered into after the coming into force of this Act.
- (4) In subsection (3) “*construction contracts*” has the same meaning as in Part 2 of the 1996 Act.

### Amendments to the construction contracts legislation

#### 2 Requirement for contracts to be in writing

- (1) Section 107 of the 1996 Act (provisions applicable only to contracts in writing) is repealed.
- (2) In section 108 of the 1996 Act (right to refer disputes to adjudication)-
  - (a) in subsection (2), after “*The contract shall*” insert “*include provision in writing so as to*”;
  - (b) in subsections (3) and (4), after “*provide*” insert “*in writing*”.
- (3) After section 115 of the 1996 Act insert
 

*“115A “In writing”*

  - (1) *For the purposes of this Part, provision of a construction contract is in writing if*
    - (a) *it is made in writing (whether or not it is signed by the parties),*
    - (b) *if it is made by exchange of communications in writing,*
    - (c) *it is made by reference to terms which are in writing, or*
    - (d) *it is evidenced in writing.*
  - (2) *For the purposes of subsection (1)(d), provision of a construction contract is evidenced in writing if it is made otherwise than in writing but recorded by one of the parties, or by a third party, with the authority of the parties to the contract.*
  - (3) *For the purposes of this Part, an exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of provision of a construction contract otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties provision of the contract in writing to the effect alleged.*
  - (4) *References in this Part to anything being written or in writing include its being recorded by any means.”*

#### 3 Adjudicator's power to make corrections: Scotland

In section 108 of the 1996 Act, after subsection (5) insert

- “(5A) For Scotland, this Part is to be read as if after subsection (3) of this section the following additional subsection were inserted*
- “(3A) The contract shall include provision in writing permitting the adjudicator to correct his decision so as to correct a clerical or typographical error arising by accident or omission.”*”

#### 4 Adjudication costs

After section 108 of the 1996 Act insert

##### *“108A Adjudication costs: effectiveness of provision*

- (1) *This section applies to any contractual provision made between the parties to a construction contract which concerns the allocation as between those parties of costs relating to the adjudication of a dispute arising under the construction contract.*  
*It is immaterial whether the contractual provision is contained in the construction contract or not.*
- (2) *Any contractual provision to which this section applies is ineffective unless it is made in writing after the appointment of the adjudicator.*

##### *108B Adjudication costs: costs of the parties*

- (1) *This section applies in a case where-*
  - (a) *a dispute arising under a construction contract complying with the requirements of section 108(1) to (4) is referred to adjudication,*
  - (b) *the parties have made effective contractual provision concerning the allocation as between the parties of costs relating to the adjudication, and*
  - (c) *that provision is not provision requiring a party to pay such of those costs as the adjudicator may determine.*

<sup>11</sup> For the Bill & explanatory notes see [www.berr.gov.uk/files/file47085.pdf](http://www.berr.gov.uk/files/file47085.pdf) and for an impact assessment see [www.berr.gov.uk/files/file47088.pdf](http://www.berr.gov.uk/files/file47088.pdf)

<sup>12</sup> Visit [www.nadr.co.uk/newsletter/published/August2008.pdf](http://www.nadr.co.uk/newsletter/published/August2008.pdf) for a draft of the HGCR as amended by these provisions.

- (2) In a case where this section applies
- (a) if the adjudicator considers that any of the costs (other than fees or expenses of the adjudicator) which a party is required to pay pursuant to the provision referred to in subsection (1)(b) are unreasonable, he may make a determination to that effect, and
  - (b) that provision is ineffective to the extent that it would require the payment of any costs in respect of which the adjudicator makes such a determination.
- (3) Where a party disputes such a determination, that party may apply to the court (upon notice to the other party and the adjudicator).
- (4) On such an application, the court may
- (a) quash, uphold or vary the determination, or
  - (b) substitute its own determination.
- (5) In this section "the court" means
- (a) for England and Wales, the High Court or a county court, and
  - (b) for Scotland, the Court of Session or the sheriff.

#### 108C Adjudication costs: fees and expenses of the adjudicator

- (1) Where -
- (a) a dispute arising under a construction contract complying with the requirements of section 108(1) to (4) is referred to adjudication, and
  - (b) the adjudicator determines the matter in dispute or his appointment is brought to an end for reasons other than his default or misconduct,
- the parties are jointly and severally liable to pay to the adjudicator such reasonable amount as he may determine in respect of fees for work reasonably undertaken and expenses reasonably incurred by him.
- (2) Subsection (1) does not affect
- (a) any contractual liability that a party to the construction contract may have to the other party to the construction contract in respect of the fees and expenses referred to in that subsection;
  - (b) any liability that a party to the construction contract may have in respect of those fees and expenses under a contract with the adjudicator.
- (3) Where there is any dispute as to
- (a) what for the purposes of subsection (1) is a reasonable amount, or
  - (b) whether for those purposes work was reasonably undertaken or expenses were reasonably incurred by the adjudicator, a party to the construction contract may apply to the court (upon notice to the other party and the adjudicator).
- (4) The court may on an application under subsection (3) -
- (a) determine the matter, or
  - (b) order that it be determined by such means and in such terms as the court may specify.
- (5) In this section "the court" has the same meaning as in section 108B."

#### 5 Interim payment decisions

In section 109 of the 1996 Act (entitlement to stage payments) after subsection (3) insert-

- "(3A) A provision of a construction contract is ineffective to the extent that it makes an interim payment decision by a person other than the parties to the contract binding between the parties.**
- (3B) Subsection (3A) does not apply where the provision is made after the interim payment decision has been made and notified to the parties.**
- (3C) In this section, "interim payment decision" means**
- (a) a decision as to the amount to which a party to the contract is entitled by way of payment by instalment, stage payment or other periodic payment for work under the contract, or**
  - (b) a decision which affects the calculation of that amount."**

#### 6 Payment by reference to other contracts

In section 110 of the 1996 Act (dates for payment) after subsection (1) insert

- "(1A) The requirement in subsection (1)(a) is not satisfied where a construction contract makes payment conditional on**
- (a) the performance of obligations under another contract, or**
  - (b) a decision by any person as to whether obligations under another contract have been performed."**

#### 7 Notices relating to payment

- (1) In section 109 of the 1996 Act (entitlement to stage payments), in subsection (4), for **"under the contract"** substitute **"provided for by the contract"**.
- (2) In section 110 of the 1996 Act (dates for payment), omit the following
- (a) subsection (2), and (b) in subsection (3), "or (2)".**

(3) After section 110 of the 1996 Act insert

**"110A Payment notices: contractual requirements**

- (1) A construction contract shall, in relation to every payment provided for by the contract
  - (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
  - (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after that date.
- (2) A notice complies with this subsection if it specifies
  - (a) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
  - (b) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies
  - (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
  - (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsections (2)(a) and (3)(a) may be zero.
- (5) In determining the sum referred to in subsections (2)(a) or (3)(a), any amount already paid in relation to the payment provided for by the contract is to be disregarded.
- (6) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.
- (7) In this and the following sections, in relation to any payment provided for by a construction contract-
 

"payee" means the person to whom the payment is due;

"payer" means the person from whom the payment is due;

"payment due date" means the date provided for by the contract as the date on which the payment is due;

"specified person" means a person specified in or determined in accordance with the provisions of the contract.

**110B Payment notices: payee's notice in default of payer's notice**

- (1) This section applies in a case where, in relation to any payment provided for by a construction contract
  - (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
  - (b) notice is not given as so required.
- (2) Subject to subsection (3), the payee may at any time before the final date for payment give to the payer a notice complying with section 110A(3).
- (3) If
  - (a) the contract permits or requires the payee, before the payment due date, to notify the payer or a specified person of
    - (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
    - (ii) the basis on which that sum is calculated, and
  - (b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).
- (4) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the payment due date that the notice was given."

## **8 Requirement to pay notified sum**

(1) For section 111 of the 1996 Act (notice of intention to withhold payment) substitute -

**"111 Requirement to pay notified sum**

- (1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum on or before the final date for payment.
- (2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means
  - (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
  - (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

- (3) *The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.*
- (4) *A notice under subsection (3) must specify*  
 (a) *the sum that the payer considers to be due on the date the notice is served, and*  
 (b) *the basis on which that sum is calculated.*
- (5) *A notice under subsection (3) -*  
 (a) *must be given not later than the prescribed period before the final date for payment, and*  
 (b) *in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.*
- (6) *Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).*
- (7) *In subsection (5), "prescribed period" means*  
 (a) *such period as the parties may agree, or*  
 (b) *in the absence of such agreement, the period provided by the Scheme for Construction Contracts*
- (8) *Subsection (9) applies wherein respect of a payment*  
 (a) *a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or*  
 (b) *a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.*
- (9) *In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than-*  
 (a) *seven days from the date of the decision, or*  
 (b) *the date which apart from the notice would have been the final date for payment, whichever is the later.*
- (10) *Subsection (1) does not apply in relation to a payment provided for by a construction contract where*  
 (a) *the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and*  
 (b) *the payee has become insolvent after the prescribed period referred to in subsection (5)(a).*
- (11) *Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section."*

- (2) In section 112 of the 1996 Act (right to suspend performance for non-payment) -  
 (a) in subsection (1), for the words from "**Where**" to "**given**" substitute "**Where the requirement in section 111(1) applies in relation to any sum but is not complied with,**";  
 (b) in subsection (3), for "**the amount due**" substitute "**the sum referred to in subsection (1)**".

## 9. Suspension of performance for non-payment

- (1) Section 112 of the 1996 Act (right to suspend performance for non-payment) is amended as follows.  
 (2) In subsection (1), after "**performance of**" insert "**any or all of**".  
 (3) After subsection (3) insert  
 "**(3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right.**"  
 (4) In subsection (4), after "**pursuance of**" insert "**, or in consequence of the exercise of**".

## Final

## 10 Extent

- (1) Subject to subsection (2), this Act extends to England and Wales and Scotland.  
 (2) Section 3 extends to Scotland only.

## 11 Commencement

- (1) This Act comes into force, so far as extending to England and Wales  
 (a) in relation to construction contracts which relate to the carrying out of construction operations in Wales, on such day as the Welsh Ministers may by order made by statutory instrument appoint, and  
 (b) in relation to other construction contracts, on such day as the Secretary of State may by order made by statutory instrument appoint.  
 (2) This Act comes into force, so far as extending to Scotland, on such day as the Scottish Ministers may by order made by statutory instrument appoint.  
 (3) An order under this section may include such transitional, incidental or supplementary provision as the authority making it thinks fit.  
 (4) In subsection (1) "**construction contracts**" and "**construction operations**" have the same meanings as in Part 2 of the 1996 Act.

## 12 Short title

This Act may be cited as the Construction Contracts Act 2008.

## COMMENTARY ON THE DRAFT CONSTRUCTION BILL

There has been widespread demand for improvements to the HGCRA adjudication process, so the publication of the draft bill and a timetable for implementation will not be un-welcomed by the industry. The draftsmanship of the original Construction Act left much to be desired but sadly, when it comes to the draft bill little seems to have changed in terms of clarity and succinctness. The proposals are drafted in a very complicated and clunky manner. Elegant, they are not.

### 2. Abolition of the requirement under s107 that a construction contract be in writing.

The provisions of s107 gave rise to a spate of litigation as to what amounted to a written contract in conformity with that section and was criticized widely for preventing disputes, that were otherwise eminently adjudicable, from benefiting from the process. The proposal to remove s107 has widespread support in the industry. The new proposal essentially mirrors that of arbitration in that in future references to the adjudication process will have to be in writing.

A **construction contract** or as per s104(1) **an agreement** to do anything covered by subsections a), b) or c) continues to be required in order for a dispute arising out of that agreement to be referred to adjudication by virtue of s108(1). In the absence of clarification in the text there is a danger that works carried out under "**Letters of Intent**" in particular could result in increased rather than decreased challenges in respect of the existence of a construction contract. It is submitted that this needs to be spelt out since the draftsmen have resisted the temptation to deal expressly with the jurisdiction of the adjudicator. The immediate question is whether an agreement should be subjected to the same test as that applied to a simple contract. The proposals discourage nitpicking but there remains scope for a determination during summary enforcement proceedings to rule that no legally binding contract exists and hence the dispute was "**outwith**" the Act.

### 3. Adjudicator's power to make corrections: Scotland

Since the proposals on the slip rule are covered in England already, no harm would occur to reaffirm the English position. Making special provision for Scotland complicates the legislation. 3A alone would suffice.

### 4. Adjudication costs

Banning recourse to the so called **Bridgeway v Tolent** clause,<sup>13</sup> placing all costs of the adjudication process on the applicant is welcomed. However, the proposals are to say the least quite convoluted, particularly when compared to the clear but comprehensive form adopted by the Arbitration Act 1996.<sup>14</sup>

### 5. Interim payment decisions and 6. Payment by reference to other contracts (6)

These two sections are thankfully short and concise. Ensuring all certification can be opened up for examination and the abolition of what are commonly referred to as "**pay when certified**" clauses are both welcomed reforms.

### 7 Notices relating to payment

The proposed payment notice mechanism is novel and to some extent disconcerting in the common terminology surrounding applications for payment is displaced by payment notices that may be issued either by the payer or the payee. (Note however that a payment application can still be issue in lieu of a payment notice – see 8 below). Briefly, under the proposals, a contract should specify whether it is for the payer to give a notice of what he thinks is due or alternatively for the payee to give a notice of what he thinks in due (i.e. what would previously have been a payment application. Where the contract requires the payer to give a notice, a payee can give a notice in the event of the payer's failure to give a notice. This will then push the final date for payment back by the number of days after the due date that the payee's notice is issued.

It could take the industry some time to become comfortable with the new regime. The notions of "**due date for payment**" and "**final date for payment**" endure. The label due date for payment does not accurately reflect the concept it stands for. It is not the date payment is due, but rather the cut off date for evaluating a stage payment.

### 8 Requirement to pay notified sum

Subject to the issue of a counter notice there is a requirement to pay the notified sum. **Withholding notices** are replaced by "**counter notices**" which can be issued by the payer against a payee's notice or even act as a revision to the payer's original notice of payment. In the absence of a specified date for issue of counter notice the scheme date applies.

Clearly, where a payee disagrees with the sum notified by a payer as initial notifier or as counter notifier this amounts to a dispute that can be referred to adjudication. If the adjudicator agrees with the payee payment is 7 days from the decision or if later, the final date for payment. This worrying envisages that the final date for payment could be pitched so far into the future that it could be possible to go through an entire adjudication process in the interim period, with time to spare, which would be unlikely to do much for the contractor / sub-contractor's cash flow.

Finally it is to be noted that the insolvency issue canvassed by the House of Lords in **Melville Dundas v Wimpey**<sup>15</sup> is confirmed but expressly limited in scope to insolvency occurring after period of time specified in the contract / or scheme for the giving of notice before the final date for payment.

### 9. Suspension of performance for non-payment

These short provisions clarify and improve the position of the unpaid constructor, making it easier to suspend works as a method of inducing the other party to pay up. It is likely that this will encourage prompt payment rather than result in greater numbers of suspensions.

<sup>13</sup> **Bridgeway Construction Ltd v Tolent Construction Ltd [2000] CILL 1662**

<sup>14</sup> See Sections 28, 60, 61, 62, 63 and 64 Arbitration Act 1996.

<sup>15</sup> **Melville Dundas Ltd v George Wimpey UK Ltd (Scotland) [2007] UKHL 18**

### QUESTIONS

**Escrow / stakeholder / trustee accounts :** Do the amendments ban stakeholder accounts? Certainly the new s111(1) requires payment of the notified sum and s112(1) gives a right to suspend performance for a failure to comply with s111(1). However, what amounts to payment is not addressed, so payment into a stakeholder account if provided for in the contract could amount to payment in compliance with s111(1). Whilst the courts might determine that **pay means pay in cash**, i.e. a sum of money at the immediate disposal of the payee, but then again they might not do so. A few additional words in the text could settle this matter once and for all.

**Alterations to the Scheme.** Inevitably there will have to be a new amended Scheme : it would be helpful to have advance notice of content - to assess whether the overall package will work or has potential problems.

**Extension of Construction Act to PFI :** There had been suggestions that the exclusion of PFI contracts might be brought to an end, but this is not reflected in the draft. Perhaps a new ministerial order / Statutory Instrument might be used to accomplish this and if that is the case, again a draft of the order would be welcomed.

### TEST THE EFFECTIVENESS OF THE BILL

The following is an extract from a commonly used sub-contract form, which seeks to shift the balance of power in any dispute arising under the contract in favour of the main contractor, to the detriment of the sub-contractor. First spot the "abuses" of the dispute resolution process ; secondly consider whether they would survive the Construction Bill.

21.a) *In the event of any dispute or difference under the Sub-Contract arising at any time between the Contractor and the Sub-Contractor such dispute or difference may in the first place be referred to adjudication in accordance with the then current Scheme for Construction Contracts.*

*Any adjudication notice served by the Sub-Contractor on the Contractor must be sent to the Contractor's registered office, by recorded delivery, marked for the attention of the Contractor's company secretary.*

*The adjudicator, at the choice of the Contractor, will be one of the persons stipulated on the face of the Order. If no adjudicator is so stipulated, the Contractor shall choose an appropriate adjudicator depending on the nature of the dispute or difference.*

*The adjudicator's decision shall be final and binding upon the parties until completion of the Main Contract Works and shall forthwith be given to by the Contractor and the Sub-Contractor and the Sub-Contractor shall proceed with the Sub-Contract Works with all due diligence whether or not either party gives notice to the other as provided hereinafter. If either party is dissatisfied with the adjudicator's decision, that party may, within 20 working days after receiving the adjudicator's notice of his decision, give notice to the other party reserving the right to issue arbitration proceedings in respect of that matter.*

*If no such notice has been given by either party to the other within 20 working days, as aforesaid, such decision of the adjudicator shall remain final and binding upon the parties for all purposes.*

*All disputes or differences in respect of which a decision if any, of the Adjudicator has not become final and binding as provided above shall be determined by arbitration proceedings provided that no such proceedings shall be issued until after completion of the Main Contract Works.*

*If the dispute to be referred to adjudication above, or subsequently to arbitration, raises issues which are substantially the same as or connected with issues raised in a related dispute or difference between the Contractor and the*

*Employer under the Main Contract or between the Contractor and other parties connected with the Main Contract Works and if the related dispute has already been or is at any time referred for determination the parties hereto agree that if either so requires the dispute under this Sub-Contract shall, so far as possible, be referred to the same dispute resolution procedure as applies to that related dispute. Following completion of the Main Contract Works, any disputes or differences not finally resolved by adjudication may be referred to arbitration and the final decision of a single arbitrator to be agreed on between the parties or, in default of agreement, to be appointed at the request of the Contractor by the President of such body as the Contractor may, in its discretion, decide.*

b) *Irrespective of the outcome of any adjudication, the party serving the Notice to Adjudicate shall bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts' fees.*

c) *Irrespective of the outcome of any adjudication, the party serving the Notice to Adjudicate shall be liable for the adjudicators fees and expenses*

d) *At the conclusion of any adjudication, and in the event that the Adjudicator makes an award requiring one party to pay money to the other party, such payment shall be validly made if made into a stakeholder account to be agreed between parties, pending final determination of the matter at issue between parties, which were the subject matter of the adjudication, whether pursuant to these Conditions or otherwise.*

22. *In any such arbitration or other legal proceedings as provided for herein any decision, opinion, certificate or award of the Architect, Engineer, client's representative or Arbitrator appointed under or pursuant to the Main Contract which is final and binding on the Contractor under the terms of the Main Contract shall also be final and binding between the Contractor and the Sub-Contractor.*

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### Letters of intent revisited

#### **Haden Young Ltd v Laing O'Rourke Midlands Ltd [2008] EWHC 1016 (TCC)**

This dispute concerned M&E services, the nature of the relationship viz LOI or contract and consequent legal responsibilities. The formation of contract through continuing communications after work commenced discussed and **Pagnan S.P.A. v Feed Products Limited** [1987] considered. As to the existence of a contract displacing the LOI **G Percy Trentham Ltd v. Archital Luxfer** [1993], **Yorkshire Water v Taylor Woodrow** [2003] EWHC 1114 (TCC); **Jarvis Interiors v Galliard Homes** [2000]; **Mitsui Babcock v John Brown** (1996) considered. As to estoppel by convention and entitlement to a quantum meruit canvassed.

Mr Justice Ramsey. TCC. 8<sup>th</sup> May 2008



## ARBITRATION CASE CORNER

Case notes by Corbett Haselgrove Spurin

### Ace Capital Ltd v CMS Energy Corporation [2008] EWHC 1843 (Comm)

**Anti-suit injunction** : Successful application for a permanent anti-suit injunction in respect of Michigan litigation - in favour of LCIA arbitration of insurance disputes. Mr Justice Christopher Clarke Commercial Court 30<sup>th</sup> July 2008

### Ardentia Ltd. v British Telecommunications Plc [2008] EWHC B12 (Ch)

**S9 AA 1996 : Stay Jurisdiction** : Jurisdiction of Chancery to issue interim injunction : arbitral tribunal to issue permanent injunction. David Donaldson QC Chancery 19<sup>th</sup> June 2008

### Colliers International Property Consultants v Colliers Jordan Lee Jafaar Sdn Bhd [2008] EWHC 1524 (Comm)

**Set aside : award as judgement** : Set aside application of a s66 AA 1996 Order that an ICC award be made into a judgment of the court in the terms of the award. Allegations regarding personality - service etc. Set aside refused. Mr Justice Beatson Commercial Court 3<sup>rd</sup> July 2008

### Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm)

**Freezing order** : Cargo claim in respect of wetted grain : charterparty dispute : Unsuccessful application by ship owner to discharge freezing order, secured in support of arbitration proceedings to prevent dissipation of assets. Mr Justice Flaux Commercial Court 15<sup>th</sup> July 2008

### Crest Nicholson (Eastern) Ltd v Western [2008] EWHC 1325 (TCC)

**S31 AA 1996 Jurisdiction** : Jurisdiction - home build contract : Owner successfully lodged a complaint with NHBC which resulted in a ruling that the builder carry out £20,000 remedial work. Owner left with a £7,000 surveyor's bill in relation to the complaint and sought to recover this through arbitration. Question : Is the owner/purchaser a party to the NHBC arbitration provision? Held : No, this is only between NHBC & the builder and subject to CI Arb appointment. RICS appointed arbitrator invalidly appointed – no arbitration provision between owner/builder. Accordingly the costs of arbitral proceedings were not recoverable. Mr Justice Akenhead TCC 16<sup>th</sup> June 2008

### ETI Euro Telecom International NV v Republic of Bolivia [2008] EWHC 1689 (Comm)

**Freezing order** - risk of dissipation of funds : State Immunity : New York arbitration pending under ICSID : Costs on indemnity basis considered. Mr Justice Andrew Smith Commercial Court 11<sup>th</sup> July 2008

### ETI Euro Telecom International NV v Republic of Bolivia & Anor [2008] EWCA Civ 880

**Freezing order** - risk of dissipation of funds : State Immunity : New York arbitration pending under ICSID : unsuccessful appeal. CA before Tuckey LJ; Lawrence Collins LJ; Stanley Burnton LJ. 28<sup>th</sup> July 2008

### Gater Assets Ltd v NAK Naftogaz Ukrainiy [2008] EWHC 1108 (Comm)

**S101(3) AA 1996 – Interest post enforcement** : Can interest pursuant to s17 Judgments Act 1838 be ordered against an enforcement order where no interest ordered by the tribunal? Held : Yes. Beatson Mr Justice Commercial Court 2008/05/21

### Hodsoll v Hon Louisa-Jane Hanbury [2008] EWHC 1970 (Ch)

**S69 AA appeal** : Unsuccessful application to appeal an arbitrator's award on the liability of a surety / lessee for outstanding repairs on termination of a lease : Held : The award was not obviously wrong - right test applied by tribunal : even if wrong - no issue of general importance involved. Mr Justice Morgan. Chancery. 6<sup>th</sup> August 2008

### Orascom Telecom Holding SAE v Republic of Chad [2008] EWHC 1841 (Comm)

**State immunity : enforcement ICC award** : Application by the Claimant, for a final Third Party Debt Order (what used to be called a Garnishee Order) in respect of monies held by the Third Party, Citibank NA, for the First Defendant, the Republic of Chad, in order to enforce its unpaid Arbitration Award issued by the International Chamber of Commerce against the State of Chad. Mr Justice Burton Commercial Court 28<sup>th</sup> July 2008

### R v V [2008] EWHC 1531 (Comm)

**S68(2)(g) AA 1996 challenge – public policy** : Challenge to an award under section 68(2)(g) of the Arbitration Act 1996 on the grounds that the award is contrary to English public policy; and a challenge to enforcement of the same award under section 81(1) (c) of the Act on the grounds that the award is contrary to public policy at common law. Mr Justice David Steel Commercial Court 3<sup>rd</sup> July 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 23<sup>rd</sup> April 2008

### Uzinterimpex JSC v Standard Bank Plc [2008] EWCA Civ 819

**Mitigation of loss** : Breach of duty - Damages - impact of failure to mitigate loss by the innocent party. CA before Sir Anthony Clarke MR; Laws LJ; Moore-Bick LJ 15<sup>th</sup> July 2008

## COMMERCIAL CASE CORNER

Case notes by Corbett Haselgrove Spurin

### AIC Ltd v Marine Pilot Ltd [2008] EWCA Civ 175

**Dead freight : safe port** : Questions of law : entitlement to dead freight and / or action for breach of safe port obligations in the alternative. Three consecutive voyage charterparties in Asbatankvoy form  
CA before Sir Anthony Clarke MR: Longmore LJ : Sir William Aldous 7<sup>th</sup> March 2008

### Catalyst Recycling Ltd v Nickelhütte Aue GmbH [2008] EWCA Civ 541

**Illegality : repudiation by breach of implied term.** Held : Breach, if any technical. No implied term as to legality of operations - viz import of recycled waste from UK to Germany.  
CA before Waller LJ; Lawrence Collins LJ; Rimer LJ. 22<sup>nd</sup> May 2008

### CTI Group Inc v Transclear SA [2008] EWCA Civ 856

**S69 AA 1996 Frustration** : Suppliers refused to supply goods to cif seller in furtherance of a cartel agreement. Held : In the absence of terms in contract, the risk of supply falls on the cif seller. No frustration.  
CA before Ward LJ; Moore-Bick LJ; Rimer LJ. 22<sup>nd</sup> July 2008

### Golden Fleece Maritime Inc v ST Shipping and Transport Inc [2008] EWCA Civ 584

**Seaworthiness : Cargoworthiness** : Time Charter. Changes to the law meant that a chartered vessel was no longer legally fit to carry its intended cargo - without undergoing refitting. Held : Shipowner in breach of charter.  
CA before MR; Longmore LJ; Lawrence Collins LJ. 23<sup>rd</sup> May 2008

### Golden President Shipping Corporation v Bocimar NV [2008] EWHC 130 (Comm)

**Terms of charter : pain & gain** : Whether or not the terms of a contract made years 6 & 7 subject to pain and gain provisions and hence a share of profits. Award partially amended.  
Mr Justice Cooke Commercial Court 31<sup>st</sup> January 2008

### Gulf Agri Trade Fzco v Aston Agro Industrial AG [2008] EWHC 1252 (Comm)

**Anticipatory repudiatory breach** : Did a notice of breach - given under the mistaken belief that shipment had not occurred on time - amount to a breach of contract that could be accepted by the other side? Held - YES. Could it be withdrawn? No.  
Mr Justice Aikens Commercial Court 6<sup>th</sup> June 2008

### Mansel Oil Ltd v Troon Storage Tankers SA [2008] EWHC 1269 (Comm)

**Laycan : cancellation** : Is a right to cancellation of a charter when laycan has passed subject first to a nomination of delivery port as a condition in circumstances where the vessel is in dry dock and incapable of meeting the deadline? Held : No.  
Mr Justice Christopher Clarke Commercial Court 9<sup>th</sup> June 2008

### Pirelli Cables Ltd v United Thai Shipping Corporation Ltd [2000] EWHC 195 (Comm)

**Conflicts : HVR** : Choice of law - Thailand - HVR - Cargo damage. Application for stay to Thailand - implications for HVR time bar.  
Mr Justice Langley Commercial Court 7<sup>th</sup> May 2008

### Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd [2008] EWHC 992 (TCC)

**Withholding notice** : Validity - right to set off counterclaims - enforcement of / appeal against summary judgement.  
Mr Justice Ramsey TCC 7<sup>th</sup> May 2008

### RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co Kg [2008] EWHC 1087 (TCC)

**Letters of intent** - installation of production plant for Muller Rice : What contract terms if any could be identified and what payment provisions applied to that contract? Mr Justice Christopher Clarke Commercial Court 16<sup>th</sup> May 2008

### Seagate Shipping Ltd v Glencore International AG [2008] EWHC 1904 (Comm)

**Rightship approval system** : In a situation where an absence of certification under the Right ship approval system excluded a vessel from trading effectively was there an obligation for the owner to obtain and maintain RSA ? Held : No - the duty had been intentionally omitted from the charter. However, since an RSA rating is a prerequisite of many ports is an order by the charterer to submit to RSA inspection an order of employment of the vessel? Yes.  
Mr Justice David Steel Commercial Court 31<sup>st</sup> July 2008

### Serena Navigation Ltd v Dera Commercial Establishment Standard Chartered Plc [2008] EWHC 1036 (Comm)

**Limitation Article IV Rule 5(a)Hague Visby Rules** : "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.77 [Special Drawing Rights] per package or unit or 2 [SDRs] per kilogram of gross weight of the goods lost or damaged, whichever is the higher." Is limitation based on gross cargo loaded or the damaged cargo. Held : Gross cargo.  
Mr Justice Burton Commercial Court 15<sup>th</sup> May 2008

### Shandong Chenming Paper Holding Ltd v Saga Forest Carriers INTL AS [2008] EWHC 1055 (Comm)

**Limitation : HVR** : Time bar HVR - one year : time of delivery - on discharge - or when collected from warehouse. Held : Arguably on discharge - claim could be time barred.  
Mr Justice Walker Commercial Court 14<sup>th</sup> May 2008

**Sony Computer Entertainment UK Ltd v Cinram Logistics UK Ltd [2008] EWCA Civ 955**

Damages for loss of goods by bailee : where goods are in short supply relative to demand, damages will include lost profit and not simply the cost of replacing the goods : Warehouse lost, through third party fraud, a consignment of computer cards.  
Rix LJ; Wilson LJ; Rimer LJ. 8th August 2008

**Stocznia Gdynia SA v Gearbulk Holdings Ltd [2008] EWHC 944 (Comm)**

**Termination : contractual & repudiation:** Distinction between terminating a contract on contract terms and terminating by acceptance of repudiatory breach. United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 QB 54 applied.

Mr Justice Burton Commercial Court 2<sup>nd</sup> May 2008

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

**Offer and acceptance :** Contract - 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 NSW 24<sup>th</sup> April 2008

**Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48**


**Late redelivery – time charter :** Damages : Late redelivery - legitimate last voyage : Held : Liability under charterparty limited to the commercial expectations of the chartering industry – viz. - loss of the going market rate : the fact that an owner loses out on a lucrative charter due to extra-ordinary market conditions not to be taken into account.

House of Lords before Lords Hoffmann ; Hope ; Rodger ; Walker & Baroness Hale. 9<sup>th</sup> July 2008

**Verity Shipping SA v Norexa [2008] EWHC 213 (Comm)**

**Anti-suit injunction & 3rd party interests :** Charterparty and bills of lading. Anti-suit refused because it would impact adversely on 3rd party rights – where the third parties were not parties with notice to arbitration proceedings.

Mr Justice Teare Commercial Court 13<sup>th</sup> February 2008




## CONSTRUCTION CASE CORNER

Case notes

By

### Corbett Haselgrove Spurin



**UNITED KINGDOM****CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC)**

In this action for summary enforcement the applicant put in an application for a stage payment on the 25<sup>th</sup> January 2008 and gave notice of adjudication on the 25<sup>th</sup> April. Referral was made on the 2<sup>nd</sup> May 2008. Following both standard practice and the terms of DOM/2 the respondent was advised that a response was due by the 9<sup>th</sup> May but the respondent's requested an extension to the 19<sup>th</sup> May to enable the respondents to detail extensive defects and over-valuation. On the basis that the contract required a defence within 7 days the applicants initially refused an extension but progressively gave way, resulting in an agreement for submission by mid day on the 14<sup>th</sup> May. The defence was eventually emailed at 5:30 that day, i.e. 5 1/2 hours late. The adjudicator concluded that he could not consider the defence and went on to determine the application in the absence of any defence.

In the meantime a 2<sup>nd</sup> adjudication was commenced this time by Verry in respect of defects. The same adjudicator was appointed – but some way through the process, having received an intimation from the adjudicator that things were not going their way, Verry withdrew from the adjudication. The adjudicator then determined this dispute also in CJP's favour.

After some preliminary jousting as to which contract applied and whether the right adjudicator had been appointed, whether he had jurisdiction and whether he decided the right dispute in the first adjudication the central issue revolved around whether or not Clause 38A,5.1.2. DOM/2 "[the respondent] MAY ... send to the Adjudicator within 7 days of the date of a referral ... a written statement of the contentions on which he relies and any material he wishes the Adjudicator to consider"- placed a final date for submission of defence?

The court held that it did not and went on to decide that in addition under Clause 38.A. 5.15 "[the adjudicator] ... SHALL ... set his own procedure and at his absolute discretion may, take the initiative in ascertaining the facts and the law as he considers necessary...." the adjudicator had the power to extend time and had breached the rules of natural justice by not doing so. Accordingly the decision was not enforceable.

**Buxton Building Contractors Ltd v Governors of Duran Primary School** [2004] EWHC 733 distinguished. **Thomas Frederic's (Construction) Ltd v Keith Wilson** [2004] BLR 23 and **The Project Consultancy Group v The Trustees of the Grey Trust** [1999] BLR 377 referred to regarding objections to jurisdiction. **Cantillon Ltd v Urvasco Ltd** [2008] BLR 250; **Balfour Beatty Construction Company Ltd v The London Borough of Lambeth** noted regarding breach of natural justice.

Mr Justice Akenhead : TCC. 15th August 2008.

#### **Cubitt Building & Interiors Ltd v Richardson Roofing (Industrial) Ltd [2008] EWHC 1020 (TCC)**

**Stay : arbitration to adjudication** : Cubitt seeks declaratory relief that its terms and conditions were incorporated into the sub-contract between the parties and injunctions that Richardson should be restrained from continuing with an arbitration and that adjudication should proceed before any further proceedings. Application refused. Richardson seeks a declaration that the DOM/1 Sub-Contract Conditions were incorporated into the sub-contract and that Cubitt's application that the arbitration should be stayed pending adjudication should itself be stayed under S9 Arbitration Act 1996. Application granted.

As to letters of intent : battle of the forms, **British Steel Corporation v. Cleveland Bridge & Engineering Co.** [1981] 24 BLR 94 considered. As to precedence of hand written terms over printed terms in a standard form contract **Robertson v French** (1803) 4 East, 130 cited. As to non-incorporation of standard terms referred to but not attached to documents, **Poseidon Freight Forwarding Ltd. v. Davies Turner Southern Ltd.** [1996] 2 Lloyds Rep 388 considered.

There is a right to refer, but not a default obligation to refer, disputes to adjudication. **DGT Steel & Cladding Ltd v. Cubitt Building & Interiors Ltd** [2007] EWHC 1584 (TCC) considered. Clear words in a contract are required to make adjudication a prerequisite to arbitration or litigation.

Mr Justice Akenhead TCC. 9<sup>th</sup> May 2008

#### **Diamond Build Ltd v Clapham Park Homes Ltd [2008] EWHC 1439 (TCC)**

**Letters of intent** : Formal signing of contract by deed required to create a contract on JCT terms under a letter of intent. Stage payments process used on standard JCT Intermediate form during progress of works. Developer issued an instruction to end the works. Under the LOI only obligation was to pay reasonable costs up to a specified sum. Court rejected submission that a contract on JCT terms came into being by estoppel. The court found using JCT payment processes was no incompatible with the terms of the LOI.

**British Steel Corporation v Cleveland Bridge & Engineering Co Ltd** (1981) 24 BLR 94; **Jarvis Interiors Ltd v Galliard Homes Ltd** [2000] BLR 33, in **Trentham (G Percy) Ltd v Archital Luxfer** [1993] 1 Lloyd's RP 25, **Stent Foundations Ltd v Carrillion Construction (Contracts) Ltd** (CA) 13 July 2000, **Bryen & Langley Ltd v Martin Boston** [2005] BLR 508 considered.

Mr Justice Akenhead TCC 25<sup>th</sup> May 2008

#### **Fleming Builders Ltd v Forrest or Hives [2008] ScotCS CSOH\_103**

**Domestic adjudication** : This dispute concerned a non-HGCRA domestic house-build contract under the SBCC Scottish Building Contract Contractors designed portion with quantities standard form. In an unsuccessful attempt to resist summary enforcement the defendants questioned whether a contract existed and if so who were the parties to it – viz Mr & Mrs Forrest, or a company that they were directors of. The court found that they had contracted in a personal capacity.

A secondary defence questioned whether the adjudicator had been in breach of natural justice for failing to conference call a witness. The court held that since the adjudicator was in charge of process, he was entitled to decide whether or not to call a witness (it should be noted that the defendants had not asked for the witness to be called) in order to clarify any aspect of the case that had been put to him and accordingly there had been no breach.

A further question as to whether a non-HGCRA adjudication is akin to arbitration and subject to different rules of judicial review to HGCRA adjudication was answered in the negative. The treatment is the same for both.

**John Stirling v Westminster Properties Scotland Ltd** [2007] BLR 537 distinguished. **Diamond v PJW Enterprises Ltd** 2004 SC 430; **Domsalla v Dyason** [2007] EWHC 1174, **Costain Ltd v Strathclyde Builders Ltd** 2004 SLT 102 considered. **Rupert Morgan Building Services (LLC) v David Jervis** [2004] BLR 18 applied.

Lord Menzies Outerhouse Court of Session 15<sup>th</sup> July 2008

#### **Makers UK Ltd v London Borough of Camden [2008] EWHC 1836 (TCC)**

**Adjudicator appointment : suggesting named individual** : In this application for summary enforcement of an adjudication decision the defendant questioned whether the nomination of the adjudicator was valid. The dispute centred around a JCT Intermediate Building Contract (1998 Edition) in standard form and concerned the validity of termination or alternatively repudiation of the contract by Camden. Makers considered a legally qualified adjudicator desirable and having ascertained that a specific lawyer on the RIBA panel was available, suggested / requested his appointment. RIBA acceded. The question here was firstly whether there was a duty to consult with Camden and /or secondly whether there was apparent bias in the appointment. Held : No to both. Adjudication summarily enforced.

Regarding implied terms in contracts **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1979) ALJR 20; **Mosvolds Rederi A/S v Food Corp of India** [1986] 2 Lloyd's Rep. 68; **Crossley v Faithful & Gould Holdings Ltd** [2004] 4 All ER 447 referred to. Regarding practice of suggesting individuals for appointment **AMEC Capital Projects Ltd v Whitefriars City Estates Ltd** [2004] EWCA Civ 1418 noted. Regarding bias **AMEC v Whitefriars; Porter v Magill** [2002] 2 AC 357; **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 considered. As to desirability of enforcement **Carillion v Devonport** [2005] EWCA Civ 1358 noted.

Mr Justice Akenhead. TCC 25<sup>th</sup> July 2008

## FEDERAL AUSTRALIA

### **Sandos Painting P/L v Southern NSW Maintenance P/L (In Liquidation) [2007] FCA 975**

**Set aside application** : Corporations – application to set aside statutory demand – whether prospective or contingent liability – whether genuine dispute as to whether s 569 Corporation Act 2001 (Cth) operates.

Emmett J Federal Court of Australia, Victoria District Registry 29<sup>th</sup> June 2007

### **Vatera P/L v Meribal Interiors NSW P/L [2008] FCA 404**

**Insolvency & adjudication** ; Corporations Law – insolvency and administration – deed of company arrangement – application seeking termination of deed – cross-claim seeking declaration of validity of deed – false or misleading information contained in administrator's report to meeting of creditors – deficiency in notice of meeting to creditors – terms of deed in unsatisfactory form – whether any proper reason for not making order for termination of deed and winding up of company.

Gyles J Federal Court of Australia, Victoria District Registry 1<sup>st</sup> April 2008

## NEW SOUTH WALES

### **Calsun v Lovton (No1) [2008] NSWDC 74 & (No 2) [2008] NSWDC 133**

**Defects period – claim** : Security of payment - payment claim for construction work - whether properly categorised as one for damages for breach of contract - claim for work undertaken during defects liability period - whether permitted by the contract.

Sidis DCJ. District Court New South Wales 16<sup>th</sup> May & 11<sup>th</sup> June 2008

### **Ontrac v BHCF (No1) [2008] NSWDC 76 & (No 2) [2008] NSWDC 132**

**Payment claim – validity – service** : Security of payment - content of valid payment claim - service of payment claim.

**Set aside judgment** : Security of payment - judgment set aside - costs - refund of monies paid under judgment.

Sidis DCJ. District Court New South Wales 16<sup>th</sup> May & 11<sup>th</sup> June 2008

### **Pacific Islands Express P/Lv Empire Building Development P/L [2008] NSWSC 576**

**Set aside application : insolvency** : Corporation - winding up in insolvency - statutory demand - requirement for an affidavit supporting an application to set aside a demand - failure to satisfy "Graywinter principle" - whether court may extend period for compliance with demand. BCISPA 1999 (NSW), ss 23, 24, 25, 32.

Austin J. Equity Division. Supreme Court of New South Wales 12<sup>th</sup> June 2008

### **Plaza West P/L v Simon's Earthworks (NSW) P/L [2008] NSWSC 753**

**Calculation method of adjudicator differed to contract** : BCISPA s9(a) - Requirement that progress payment be calculated in accordance with the terms of the contract - adjudicator determines amount to be calculated by reference to a provision which is a mechanics provision rather than according to criteria set by contract - approach to calculation a matter for adjudicator - adjudication determination not invalid even if adjudicator makes error of law provided he makes bona fide attempt to exercise the power conferred by the Act - no denial of natural justice by adjudicator in not dealing with further submissions of respondent where to do so is unnecessary by reason of acceptance of claimant's primary submission - adjudication valid - claimant obtains judgment in District Court based on adjudication - respondent seeks repayment of part alleged to be liability of claimant to sub-contractor where respondent alleges it paid sub-contractor directly - failure to establish fact of payment - properly matter for cross claim under s 32(3)(b) of the Act - or matter for District Court with respect to its own judgment.

Hammerschlag J. 15<sup>th</sup> July 2008

### **Richard Shorten v David Hurst Constructions P/L; David Hurst Constructions v R.W. Shorten [2008] NSWSC 546**

**Defective notice** : BCISPA 1999 - Natural justice - Whether denial of natural justice could not possibly have made a difference to the outcome - Materiality - Nullus commodum capere potest de injuria sua propria principle – no one can benefit from their own wrong. Plaintiff entitled to relief setting aside material adjudications determinations because of discrepancies in the notice of adjudication – viz several pages missing.

Einstein J. 5<sup>th</sup> June 2008

### **Richard Shorten v David Hurst Constructions P/L [2008] NSWSC 609**

**Costs on indemnity basis** : Practice and procedure - Principles - Claim for costs on indemnity basis - Calderbank letter containing no element of compromise - Principles. Claim for indemnity costs refused. First defendant ordered to pay plaintiffs costs as agreed or assessed.

Einstein J 17<sup>th</sup> June 2008.

### **Richard Shorten v David Hurst Constructions P/L [2008] NSWCA 134**

**Construction contract – residence exception** : Contract for construction of residential units, one of which was intended to be the developer's residence – whether contract excluded under s 7(2)(b) from the operation of BCISPA 1999 (NSW) – Statutory interpretation – use of extrinsic material - Interpretation Act 1987 (NSW) ss 33, 34. Held : only that unit but not the rest.

Hodgson JA; Basten JA; Bell JA. 18<sup>th</sup> June 2008

### **Thiess P/L v Lane Cove Tunnel Nominee Co P/L [2008] NSWSC 729**

**Notice period for schedule** : BCISPA s14(4)(b)(i) & (ii) - whether relevant construction contract requires different time for provision of payment schedule from 10 business days otherwise required.

Hammerschlag J. 4<sup>th</sup> July 2008

### **Xycrete P/L v David Taylor Building Services P/L [2008] NSWCTTT 779**

**Rectification of decision by tribunal** : Whether the work for which payment is sought was additional work or rectification work? Whether there was a subsequent agreement made for accord and satisfaction of the Applicant's claim? Whether the Tribunal has jurisdiction to hear the matter as the matter?

Pickard B. Consumer, Trader and Tenancy Tribunal. New South Wales. 17<sup>th</sup> January 2008

## NORTHERN TERRITORIES

### **Boutique Venues P/L v JACG P/L [2007] NTSC 5**

**Set aside application** : Corporations Act - construction contract – Construction Contracts (Security of Payments) Act 2004 (NT) - payment dispute - application to set aside creditor's statutory demand – payment of progress claims – failure to issue progress certificates – whether genuine dispute and offsetting claim established – amount of statutory demand varied.  
Southwood J. Supreme Court Northern Territories. 5th February 2007.

## QUEENSLAND

### **Hervey Bay (JV) P/L v Civil Mining and Construction P/L No2 [2008] QSC 128**

**Substitution of decision** : Application to determine the correct sum due where adjudicators decision previously set aside by the court. The court declined since there were on-going disputes as to what was due. McMurdo J. 7<sup>th</sup> May 2008

### **Hitachi Ltd v O'Donnell Griffin P/L [2008] QSC 135**

**Cherry picking disputes : double jeopardy** : Adjudication considered selected larger variation claims but not numerous small claims – where applicant/respondent sought an order that adjudication decision was void – whether having regard to legislative intent, s 26 Payments Act requires an adjudicator to examine each and every variation in a large claim – whether the adjudicator acted bona fides – whether the adjudicator observed procedural fairness. Whether same dispute before subsequent adjudicator.  
Skoien AJ 17<sup>th</sup> June 2008

### **Jag Interiors P/L v A-Trane Plumbing P/L [2008] QCCTB 85**

**Restitution of stage payment** : Jurisdiction – claim for restitution – Building and Construction Industry Payments Act 2004 – section 100.  
Mr P Lohrisch Commercial Consumer Tribunal Queensland 5<sup>th</sup> June 2008

### **Ram Contractors Qld P/L v Kryscop P/L [2008] QCCTB 41**

**Defective works** : Claim of contractor against sub-contract carpenters – restriction of adjudicated amount and payments under Building and Construction Industry Payments Act 2004 – claim for defective work.

Mr P Lohrisch Commercial Consumer Tribunal Queensland 8<sup>th</sup> April 2008

### **RJ Neller Building P/L v Ainsworth [2008] QDC 129**

**Stay, adjudication & court proceedings** : Where respondent to adjudication brought proceeding in District Court arising out of same contract as adjudication – where proceeding in District Court brought after adjudicators certificate served on respondent to adjudication but before adjudicators certificate filed in District Court – whether enforcement warrant issued upon judgment in District Court on filing of adjudication certificate should be stayed. Dodds DCJ 25<sup>th</sup> June 2008

## WESTERN AUSTRALIA

### **Merym P/L v Methodist Ladies College [2008] WASAT 164**

**Late certification** : Whether previously rejected claims amenable to adjudication by reason of superintendent's failure to certify in time - Whether decision to dismiss characterised as a decision made under s 31(2)(a) Construction Contracts Act 2004.  
Mr C Raymond. Western Australia State Administrative Tribunal. 21st July 2008

## NEWZEALAND

### **Donovan Drainage & Earthmoving Ltd v Halls Earthworks Ltd (in liquidation) [2008] CA CA463/07**

**Time bar to appeal : extension** : Successful application for extension of time, over and beyond the statutory six months time limit, for the appeal against a successful summary enforcement action in respect of an adjudication decision.

CA before William Young P, Glazebrook J Baragwanath J 23<sup>rd</sup> May 2008

### **Kells v Auckland City Council [2008] ORS HC AK CIV 2008-404-1812**

**Weathertight Homes Adjudication – jurisdiction** : Appeal against jurisdictional ruling or Weathertight Homes Tribunal adjudication / application for judicial review - Held : not appropriate to engage in judicial review to circumvent absence of right to appeal particularly in respect of interlocutory matters. Asher J Auckland Registry. 30<sup>th</sup> May 2008

### **Saint-Alexis v Hanna [2008] HC BLE CIV 2008 406 108**

**Legal personality** : Successful appeal against summary judgment in respect of an outstanding progress payment. Demonstrated that the claimant trustee was not the legal entity entitled to payment. Cross action against the claimant pending. Claim and counterclaim to be heard together by the district court. Dobson J Blenheim Registry. 24<sup>th</sup> June 2008

### **Sugulogovale & Sanielo Suanu v Hi-Qual Builders Ltd CIV 2008-404-001576**

**Payment schedule – code compliance** : Unsuccessful application to set aside summary judgement enforcing an adjudicator's decision for payment of final account and variations - and application to set down hearing on standard track on grounds that Council had withdrawn Code Compliance certificate. Held : This was an issue that should have been put in the payment schedule and put to the adjudicator. Outstanding claims by defendants could still be recovered but they must "Pay now, re-claim later."  
Wylie J High Court New Zealand Auckland Registry. 26<sup>th</sup> June 2008

### **Taylor v LaHatte [2008] HC AK CIV 2007-404-6843**

**Enforcement / set aside of adjudication determination** : Irregularities in conduct of site visit : Reliance by lay-adjudicator (non-construction expert) on opinion of value of remedial works - failure to appoint a joint expert.

Stevens J. High Court New Zealand, Auckland Registry. 24th June 2008

## MEDIATION CASE CORNER

Case Commentary by  
Corbett Haselgrove Spurin



### Bradford v Keith James [2008] EWCA Civ 837

**Boundary disputes – need for early mediation :** *“There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.”* CA before Mummery LJ; Jacob LJ; Wilson LJ. 18<sup>th</sup> July 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. 30<sup>th</sup> April 2008

### Nicholson v Knox Ukiwa & Co (a firm) [2008] EWHC 1222 (QB)

**Advisor’s liability for terms of settlement :** Dispute as to whether client had consented to his advisor concluding a mediated settlement exclusive of costs and or interest. Client protested at the terms of a subsequent Tomlin Order which was stated to be exclusive of costs and interest, leading to this action to recover costs and interest from the advisor. Claim rejected on the findings of fact of the court – viz at the time he knew it was exclusive.

Mr Justice Saunders : 2<sup>nd</sup> June 2008

### Strachey v Ramage [2008] EWCA Civ 804

**Costs : failure to mediate :** Refusal to mediate following strong advice from trial judge during case management : Costs penalty. CA before Sedley LJ; Rimer LJ; Sir Paul Kennedy. 16<sup>th</sup> July 2008

### Whapples, R (on the application of) v Birmingham East & North Primary Care Trust [2008] EWCA Civ 465

**Public Law : Judicial review : whether a duty to mediate pre-litigation :** Application for permission to claim judicial review on the ground that the defendant public body acted unreasonably in not agreeing to mediation of the dispute between the parties refused; On appeal : Whilst *“it is surprising how frequently even the most intractable case produces a satisfactory outcome in mediation ... that is a million miles away from saying that it is so unreasonable of a party not to undertake mediation at a stage before litigation. That argument, in my view, simply cannot run.”*

CA before Ward LJ; Thomas LJ. 7<sup>th</sup> April 2008

## PRACTICE & PROCEDURE CASE CORNER

Case Commentary by  
Corbett Haselgrove Spurin



### Barlow Clowes International Ltd. v Henwood [2008] EWCA Civ 577

**Jurisdiction : Domicile :** For the purposes of a winding up petition was the respondent domiciled in England & Wales or overseas at the relevant time. Test for domicile restated. Held : Yes, on the facts, he was domiciled in E & W. CA before Waller LJ, Arden LJ, Moore-Bick LJ. 23<sup>rd</sup> May 2008

### Berghoff Trading Ltd v Swinbrook Developments Ltd [2008] EWHC 1785 (Comm)

**Freezing Order : summary judgement** Application for summary judgement on counterclaim granted : no real prospect of success : accordingly freezing order removed. Mr Justice Teare Commercial Court 28<sup>th</sup> July 2008

### Cherney v Deripaska [2008] EWHC 1530 (Comm)

**Forum conveniens :** purported oral contract subject to English Law & Jurisdiction : Court determined that the risks inherent in a trial in Russia (assassination, arrest on trumped up charges and lack of a fair trial) are sufficient to make England the forum in which the case can most suitably be tried in the interests of both parties and the ends of justice and, accordingly, the proper place for the determination of this claim.

Mr Justice Christopher Clarke Commercial Court 3<sup>rd</sup> July 2008

**Dadourian Group International Inc v Simms [2008] EWHC 1784 (Ch)**

**Legal privilege** : Information acquired by whistle blower - downloaded from hard drive of legal consultants computer : admissibility. Mr Justice Patten Chancery 25<sup>th</sup> July 2008

**Greene Wood & McLean v Templeton Insurance Ltd [2008] EWHC 1593 (Comm)**

**Writ : service out of Jurisdiction** : Unsuccessful challenge to order allowing service out of jurisdiction : Isle of Man : grounds of challenge : failure by the Claimant to make full and frank disclosure when seeking permission and the absence of reasonable prospects of success for the claim - but service restricted to a contribution claim.

Mr Justice Teare Commercial Court 10<sup>th</sup> July 2008

**Jackson v Dowdall [2008] ScotCS CSIH\_41**

**Case management : role of Sherrif : Competence : Communications between judge and parties by phone and email.** This case explores the boundary between the proper role of the judge in adversarial procedure as an impartial arbiter between the parties to an action. The Court emphasised that everything done by the Sherrif was with the best of intentions. At one stage a one sided conversation arose because the other party did not pick up the phone as prearranged for a conference call. The case highlights problems that can occur in virtual hearings and the dangers of relying on standard electronic communications systems without an applications program.

Case management requires the taking of steps which concern the substance of the dispute between the parties : ensuring that the matters in dispute are clearly focused ; that the issues which require to be resolved by judicial decision, rather than other means, are identified; establishing the order in which issues should be determined and how : but making a party's case is not permissible. Lord Reed ; Lord Clarke ; Lord Menzies. Outer House Court of Session. 8<sup>th</sup> July 2008

**Jirehouse Capital v Beller No1 [2008] EWHC 725 (Ch)**

**Security of Costs** : application.

Mr Justice Briggs Chancery 16<sup>th</sup> January 2008

**Jirehouse Capital v Beller No2 [2008] EWCA Civ 908**

**Orders for security of costs** : Does CPR 25.12 & 13 apply to unlimited companies ? and Does the condition in the 2nd limb of CPR 25.13(2)(c) that "there is a reason to believe that it will be unable to pay the defendants costs if ordered to do so" mean that the court must be satisfied on a balance of probabilities that the company will be unable to pay those costs when ordered to do so. ? CA before Mummery LJ; Arden LJ; Moore-Bick LJ. 30<sup>th</sup> July 2008

**Koo Golden East Mongolia v Bank of Nova Scotia [2008] EWHC 1120 (Admin)**

**Wasted costs order** : Unsuccessful application for a wasted costs order. Mr Justice Silber Admin Court 20<sup>th</sup> May 2008

**TJ Brent Ltd v Black & Veatch Consulting Ltd [2008] EWHC 1497 (TCC)**

**Costs – breach of pre-action protocol** : Cost application for breach of Pre-Action protocol : Held : In order to award costs 1) there must have been a substantial as opposed to mere technical breach 2) the breach must have prevented a potential settlement of the action. Here, the breach was technical - whilst filed prior to a stay to mediation, and hence a valid application - the only objective was to gain an edge in the mediation. Application refused.

Mr Justice Akenhead TCC 13<sup>th</sup> June 2008

**UBS Ag v HSH Nordbank Ag [2008] EWHC 1529 (Comm)**

**Jurisdiction : Conflicts** : interpretation of clause - viz whether New York Court or English Court had jurisdiction. Held : New York. Mr Justice Walker Commercial Court 4<sup>th</sup> July 2008

**Underwriting Members of Lloyd's Syndicate 980 v Sinco SA [2008] EWHC 1842 (Comm)**

**Conflicts : Insurance : Damages**: Insurance dispute between underwriters and brokers : Actions in Greece & UK. Claim for damages for breach of English jurisdiction clause by commencing action in Greece.

Mr Justice Beatson Commercial Court 29<sup>th</sup> July 2008

**West London Pipeline and Storage Ltd v Total UK Ltd No1 [2008] EWHC 1296 (Comm)**

**Discoveries : Extent of insurance cover** : Application for disclosure of extent of insurance cover refused : made no difference to question of liability : only value was to determine whether party worth suing - on par with disclosure of assets for similar purpose.

Mr Justice David Steel Commercial Court 9<sup>th</sup> June 2008

**West London Pipeline and Storage Ltd v Total UK Ltd No2 [2008] EWHC 1729 (Comm)**

**Discoveries : Post incident report** : Application for disclosure of post incident accident report produced to satisfy requirements of the Control of Major Accident Hazard Regulations 1999, as amended (COMAH). Held : Document subject to legal privilege - for primary use by lawyers in respect of potential claims and defences. Application refused.

Mr Justice Beatson Commercial Court 22<sup>nd</sup> July 2008

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