ADR NEWS

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

EDITORIAL :

The 10th anniversary of the coming into force of construction adjudication under the auspices of the Housing Grants Construction and Regeneration Act 1996 is fast approaching. It does not feel like nine years have passed since the ground breaking decision by HHJ Dyson (as his Lordship then was) in ***Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] EWHC TCC 254*** which firmly placed the process on the dispute resolution map, confirming that the courts would not only robustly enforce the process but were able to do so in a timely manner.

Despite the doom and gloom predictions of the Act's many detractors at that time, construction adjudication has firmly established itself both here in the UK and in foreign jurisdictions such as Australia, New Zealand and Singapore as a viable mechanism for the resolution of disputes. The light touch applied to the process by the Act in the UK which left it to the industry and to the courts to flesh out the detailed application of the process has not been emulated by these subsequent legislators. Whilst this has led to a flood of judicial clarification in the UK, remarkably, as the reports bear out, judicial clarification of the antipodean legislation has been no less abundant. Learning appears to be settling down here in the UK with a very small number of cases in 2008 (though this might change if and when the anticipated revisions to the Act arrive). What we are left with now is a fully worked out dispute resolution process (warts and all) in the UK which has virtually displaced both arbitration and litigation.

The adaptability of the UK construction industry to combine US and UK dispute resolution methods perhaps points to future developments in this field, as borne out by the recent decision of Mr Justice Ramsey *in* ***London Underground Ltd v Metronet Rail BCV Ltd [2008] EWHC 502 (TCC)*** reported below. Whilst a public private initiative outside the remit of the HGCRA, the contract incorporated a stepped dispute resolution process ranging from discussion, mediation, adjudication through to litigation. The adoption of adjudication boards for large scale developments such as those envisaged for the London Olympics would be welcomed.

It is fascinating to note that Eire has now emulated the UK stance on costs penalties for unreasonable failure to mediate pursuant to s15 Civil Liability and Courts Act 2004, as reported in the March issue of the Law Society Gazette, with the decision of Mr Justice Kevin Feeney in the case of ***Carmel McManus v Liam Duffy***. However, it is also interesting to note that the courts in the UK themselves are now taking a much more flexible approach to cost penalties than initially anticipated following the 2004 decision in ***Halsey***, particularly where there was little or no prospect of success – see ***Witham v Smith***. This should go a long way to ensuring that spurious offers to mediate are not floated as a mere insurance policy against prospective costs awards.

If the weight of judicial reporting is anything to go by it is gratifying to note that international arbitration continues to be strongly represented in the UK. The courts are very active providing measures in support of the arbitral process, but equally pleasingly, the number of successful challenges to awards on all three grounds under s67-69 Arbitration Act 1996, are few and far between.

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

The extent to which the courts will respect the privacy and confidentiality of arbitral proceedings in subsequent actions has again come under the spotlight in ***Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184***. *However, the courts have demonstrated yet again that to the extent that it is possible, they are prepared to respect privacy and limit reporting to essential matters under consideration – see* ***Mobil Cerro Negro Ltd v Petroleos De Venezuela SA [2008] EWHC 532 (Comm).***

This edition of ADR News is noticeably light on feature articles. Hopefully normal service will resume in due course as Mr Spurin, our main contributor, returns to good health. In the meantime, readers are reminded that all submissions for publication are welcomed, be they short or long articles or book reviews.

G.R.Thomas : Editor

ADJUDICATION CASE SUMMARIES 2007. *By Rachel Ewin.*

Harris Calnan Construction Co Ltd v Ridgewood (Kensington) Ltd [2007] Adj.L.R. 11/15

Initially, Ridgewood raised the argument that the adjudicator did not have the necessary jurisdiction to decide the dispute as there was no contract in writing. The adjudicator decided otherwise and as such the jurisdictional challenge failed. R did not, at any point, expressly reserve his rights on this issue and enforcement proceedings were brought to decide whether R was bound by the adjudicator's decision on jurisdiction. The court held that there was a contract in writing (even though most of the terms were contained in a letter of intent) and as such the adjudicator had jurisdiction. HHJ Coulson said that had R's position have been expressly reserved, the adjudicator's decision would not have been binding, but by not reserving his position, R was bound by the adjudicator's decision. Further the judge found that there was indeed a contract in writing, that all the terms had been agreed with the exception of a set of documents making the contract formal.

An application for summary judgement was made. R challenged it on three heads all of which failed. R tried to reduce the costs, this action also failed and HC was awarded indemnity of costs.

Regarding jurisdictional challenges, cases referred to included ***Project Consultancy Group v Trustees of the Grey Trust*** [1999] BLR 377. ***Nordot Engineeering Services Ltd v Siemens plc***. ***Whiteways Contractors (Susses) Ltd v Impresa Castelli Construction (UK) Ltd*** [2000] 16 Const LJ 453.

Regarding contracts in writing, cases referred to included ***Bennett Electrical Services Ltd v Inviron Ltd*** [2007] EWCH 46 (TCC). ***Mott MacDonald Ltd v London & Regional Properties Ltd*** [2007] EWHC 1055 (TCC).

Regarding the opposition of the application for summary judgement, cases referred to included ***Gray & Sons (Builders) (Bedford) Ltd v The Essential Box Co. Ltd*** [2006] EWHC 2520 (TCC)

HHJ Peter Coulson QC TCC 15/11/2007

Claymore Services Ltd v Nautilus Properties Ltd [2007] Adj.L.R. 03/20

Nautilus engaged Claymore to carry out design and construction works. A dispute arose about the final account. In May 2004, some 18 months after completion, Claymore commenced adjudication proceedings. Having held there was no contract, the adjudicator decided he had jurisdiction to act and award Claymore £575k. Nautilus refused to pay and in May 2004 the matter came before the TCC, where the decision was not enforced. Proceedings were entered into in July 2006, and Claymore claimed £1.5m on a quantum meruit basis. The claim settled before the trial was heard, save as to interest and the period to which it applied.

The judge held that there where a claim was based on quantum meruit, interest for non payment should run from the date the sum was ascertainable. In this instance the date on which Claymore and issued its final account and Nautilus had had a reasonable time to respond.

Nautilus counter-claimed there was unjustifiable delay due to the adjudication and the judge upheld this. As such Claymore's entitlement to interest was reduced by one half for the period of one year.

Regarding interest, cases referred to included ***BP Exploration Co (Lybia) Limited v Hunt (No 2)*** [1979] 1 WLR 783 at 846 F to H. ***Birkett v Hayes*** [1982] 1WLR 816. ***Metal Box Ltd v Currys Ltd*** [1988] 1WLR 175. ***Kuwait Airway Corporation v Kuwait Insurance Company SAK***. ***Quorum AS v Shramm*** [2001]. ***Pinnock v Wilkins & Sons*** [1990]. ***Watts v Morrow [1991]***. ***Tate & Lyle Food & Distribution Ltd v Greater London Counci***l [1982] 1 WLR 783. ***Shearson Lehman Hutton Inc v MacClaine Watson & Co Ltd*** [1990] 3 All ER 723. ***Way v Latilla*** [1937] 3 All ER 759

Regarding unjustifiable delay, cases referred to included ***Allen v Sir Alfred McAlpine & Sons Ltd*** [1968] 2 QB 229. ***Wright v British Railways Board*** [1983] 2 AC 773. ***Athenain Harmony (No 2)***[1988] 2 LLR 425.

Mr Justice Jackson TCC 20/03/2007

PC Harrington Contractors Ltd v Multiplex Constructions (UK) Ltd [2007] Adj.L.R. 11/30

PCH was a subcontractor to Multiplex, the main contractor for the design and construction of the New Wembley National Stadium. In April 2007, PCH submitted an application for payment for £13,434,726.30. Multiplex issued an interim certificate plus grounds for withholding. The certificate stated a net payment of £2,301,608.45, with an additional withholding of £13,048,219.16, thus stating no money was due to PCH. Part of the £13,048,219.16 was a claim for £1,658,665 for alleged but disputed defects in the concrete floors poured by PCH. This claim soon rose to £2,070,110.50 and multiplex commenced adjudication seeking an order for that amount.

PCH argued that they were at least owed £2,301,608.45 stated by Multiplex in their interim certificate, the judge disagreed. He said that under Clause 21 of the contract, this figure was the aggregate of the positive amounts. It did not therefore amount to a representation of what Multiplex certified to be a sum that PCH was entitled to receive. On the contrary, the contract and the certificate made it clear that Multiplex did not accept that PCH was entitled to anything. He further stated that if PCH sought to recover a monetary from Multiplex, it would have to commence an adjudication of its own.

Regarding interim payments, cases referred to included ***Rupert Morgan Building Services (LLC) Ltd v David Jervis and Harriet Jervis*** [2003] EWCA Civ 1563.

Mr Judge Christopher Clarke TCC 30/11/2007

Ledwood Mechanical Engineering Ltd v Whessoe Oil and Gas Ltd [2007] Adj.L.R. 11/20

A dispute arose out of the defendant Joint Venture's assessment of their interim application 19. An adjudicator held that the JV had wrongly withheld £1.2m. No challenge was made to the decision, but the JV claimed their right to set off against the decision.

Ledwood made application 19 in July 2007. A further three applications had been made prior to the issuing of the adjudicator's decision. The JV took account of the decision in application 22 and set off against the risk/reward element within the contract.

Mr Justice Ramsey had to decide whether it followed logically that the JV was entitled to recover a specific sum by adjustment of the risk/reward element. The judge held that whilst there was a natural corollary of the decision was that it increased the number of expended hours in the pain/gain calculation, the calculation of the effect was not undisputed or indisputable. In this instance the position differed from the calculation of liquidated damages and as such it was held that Ledwood was entitled to the summary judgement.

Regarding payments, cases referred to included ***Balfour Beatty Construction v Serco*** [2004] EWHC 3336.

Mr Justice Ramsey TCC 20/11/2007

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd No4 [2007] Adj.L.R. 12/21

Multiplex were the contractor and Cleveland Bridge were the original steelwork subcontractor for the reconstruction of Wembley Stadium. The main issues within this appeal were the costs attributed to the meaning of the words "Temp Works – Roof Props" and the construction of one short clause of a one-off construction contract.

The Heads of Agreement and the Supplemental Agreement set out work packages and their cost. This appeal had to decide the extent of the Temp Works – Roof Props. The judge in this instance was not persuaded on the evidence given that whoever erects the roof must also be responsible for the design and fabrication of the temporary works. Therefore one can be omitted from the contract without the other as was alleged here.

The court held that the appeal was allowed in part, stating that the fabrication and supply of all the temporary roof steelwork was omitted from Cleveland Bridge's subcontract works, and that design and fabrication of drawings for that work remained Cleveland Bridge's responsibility.

Regarding Heads of Agreement for the purpose of understanding meaning, cases referred to included ***HIH Casualty and General Insurance Ltd v New Hampshire Insurance*** [2001] 2 Lloyds Rep 161.

Regarding construction sequencing, cases referred to included ***Investors Compensation Scheme v West Bromwich Building Society*** [1998] 1 WLR 896; ***Jumbo King Ltd v Faithful Properties Ltd*** [1999] HKCFFAR 279

Pill LJ, May LJ, Smith DBE LJ. CA 21/12/2007

CONSTRUCTION CASE CORNER

Corbett Haselgrove Spurin

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) : Bailli

Jurisdiction : Natural justice : Challenge to enforceability of adjudication decision in respect of extension of time : Which period of time should apply to an EOT and on what basis should damages be calculated. Defence resulted in adjudicator determining a different period to that initially claimed – this however did not deprive the adjudicator of jurisdiction and since it was a result of assertions by the defence it was not a breach of the rules of natural justice.

Edmund Nuttall v R G Carter *[2002] CILL 1853;* ***Balfour Beatty v Mayor & Burgess of London Borough of Lambeth*** *[2002] BLR 288.* ***Carillion v Devonport Royal Dockyard*** [2006] BLR 15, ***KNS v Sindall Ltd*** [2001] 75 Con LR 71. ***Amec v S.S. for Transport*** [2005] BLR 227 ; ***Collins v Baltic Quay*** [2004] EWCA (Civ) 1757 ; ***Discain v Opecprime*** [2001] BLR 285 ; ***Macob v Morrison*** *[1999] BLR 93;* ***Amec v Whitefriars*** [2005] BLR 1, ***RSL v Stansell Ltd*** *2003;* ***Griffin v Midas Homes Ltd*** *[2001] 78 Con LR 152.* ***Homer Burgess v Chirex*** [2000] BLR 124. ***Farebrother v Frogmore*** [2001] CILL 1589. ***Shimizu v Automajor*** [2002] BLR 113. ***Durtnell v Kaduna*** [2004] 20 Const LJ: ***Bouygues v Dahl- Jensen*** [2000] BLR 522 considered.

Mr Justice Akenhead. TCC. 27th February 2008

London Underground Ltd v Metronet Rail BCV Ltd [2008] EWHC 502 (TCC) : Bailli

Contract interpretation : de nouvo trial : contract interpretation - was the adjudicator (Non HGCRA - PPI stepped dispute process) correct in determining that a particular interpretation, whilst ostensibly correct, led to an absurdity and should not be applied? Held : It did not lead to an absurdity and should therefore be applied. Oddly, the proceedings have the feel of an appeal rather than a de nouvo trial. It provides an example of adjudication for PPI contracts – even though excluded by HGCRA.

The Antaios [1985] AC 191; ***Mannai Limited v. Eagle Star Life Assurance Co Ltd*** [1997] AC 749; ***ICS v. West Bromwich*** [1998] 1 WLR 896; ***Wickman Machine Tools v. Schuler*** [1974] AC 235; ***BCCI v. Ali*** [2002] 1 AC 251 considered.

Mr Justice Ramsey. 14th March 2008

Reinwood Ltd v L Brown & Sons Ltd [2008] UKHL 12 : Bailli

Withholding provisions HGCRA : JCT clause 24 : Certificate of non completion issued together with notice : Certificate subsequently withdrawn but no replacement notice served. Did the original notice continue to be valid? Yes – in the circumstances since nothing to the contrary in the contract terms. ***Melville Dundas Ltd v George Wimpey UK Ltd*** [2007] UKHL 18 considered. House of Lords before Lords Hope; Scott ; Walker ; Brown ; Neuberger. 20th February 2008

Multiplex Construction Ltd v Cleveland Bridge Ltd [2008] EWCA Civ 133 : Bailli

Costs : Appeal against costs in previous actions before Jackson J. CA before May LJ : Smith LJ : 6th February 2008

CONSTRUCTION ADJUDICATION DOWN UNDER

David Hurst Constructions Pty Ltd v Shorten [2008] NSWSC 164 .

Summary judgment on adjudication : Whether BCISPA 1999 applies; whether construction contract within s 7(2)(b) – whether claimant entitled to payment claim – claimant's application for summary judgment under Uniform Civil Procedure Rules 2005, Pt 13, r 13.1 Nicholas J : Equity Division. Supreme Court of New South Wales 4th March 2008.

Katherine Pty Limited v The CCD Group Pty Ltd [2008] NSWSC 131.

Enforcement – unconscionable : BCISPA 1999 – adjudication determination – judgment founded on adjudication certificate – restraint of enforcement of determination or judgment where unconscionability – Trade Practices Act 1974 (Cth), s51AA and s51AC McDougall J Equity Division. Supreme Court of New South Wales 18th February 2008.

Adelaide Bank Limited v BMG Poseidon Corp Pty Limited [2008] NSWSC 68.

Set aside – default judgement : Default judgment, application to set aside, whether arguable defence to judgment debt, promisory representation, reliance. McCallum J Equity Div. Supreme Court of New South Wales 12th February 2008.

Altys Multi-Services Pty Ltd v Grandview Modular Building Systems P/L [2008] QSC 026

Judicial review – pro and con : Judicial review of adjudication under BCISPA 2004; Disadvantages in review procedure ; preferability of curial litigation. Skoien AJ. Supreme Court of Queensland. 22nd February 2008.

Marshall, B. v Stimson, S. t/a SAS Roofing [2008] QCCTB 6

Non-payment : Defective roofing works – non-payment of contract price – effect of adjudicator's decision pursuant to the BCISPA 2004. Ms C Heyworth-Smith Commercial Consumer Tribunal Queensland. 16th January 2008.

Silent Vector P/L t/a Sizer Builders & Squarcini [2008] WASAT 39.

Reasons : adequacy : Application for review of decision by adjudicator dismissing application without determination on the merits - Whether application could not be fairly determined because of complexity - Whether application not made within prescribed time - Adequacy of reasons for decision.

Raymond C State Administrative Tribunal Western Australia. 22nd February 2008.

Moroney v Murray River North P/L [2008] WASAT 36.

Jurisdiction – reasons – procedures : Adjudicator has not made a determination if a matter falls within its jurisdiction or if he has made a determination the reasons for his decision are not clear - Inviting adjudicator to clarify the determination and provide reasons for same - Procedures an adjudicator may utilise to obtain sufficient information to make a determination - complexity of a matter. De Villiers B State Administrative Tribunal WA 19th February 2008.

Holmes Constructions Wellington Ltd v Rees [2008] HC AK CIV 2006-404-004219

Enforcement order : final for insolvency ? The question of whether an order pursuant to s 74 of the Construction Contracts Act 2002, made by District Court Judge DM Wilson QC, that an adjudicator's determination be enforced by entry as a judgment of the Court, is a final judgment for the purposes of s 19(1)(d) of the Insolvency Act 1967 shall be determined separately and before the determination of the balance of the matters required to be determined in the application to set aside the bankruptcy notices.

JA Faire Associate Judge High Court New Zealand Auckland Registry. 3rd March 2008.

M Spencer v Jed Rice Building Contractors Ltd [2008] HC AK CIV 2007-404-007539

Stay of liquidation hearing : Failed application to stay liquidation hearing arising out of failure to pay two costs awards. Whilst Rice stands potentially to recover debts over counterclaim and is otherwise solvent – this would be a matter for the court to determine. Associate Judge Abbott High Court NZ Auckland Registry. 21st February 2008.

T R Welsh v Gunac South Auckland Ltd [2008] HC AK CIV 2006-404-7877

Residential occupiers : First instance judgement set aside because there was no evidence that the party was a residential occupier as required by the legislative provisions applied by the judge.

Allan J High Court New Zealand Auckland Registry. 11th February 2008.

Sheree Ann Taylor v W & D Mellis Builders Ltd [2007] HC NAP CIV 2007-441-411

Bankruptcy notice : appeal : Failed appeal against bankruptcy notice arising out of a final judgment based on determination of adjudicator. No set aside.

Associate Judge Robinson. High Court New Zealand Napier Registry. 11th February 2008.

R T Phillips & S Phillips v L Petrou [2008] HC AK CIV 2007-404-1771

Strike out – summary judgement : Castor Bay Partners, seek to strike out the plaintiffs' claim and apply for summary judgment in their favour on the ground that the plaintiffs' claim is time-barred.

Associate Judge Robinson. High Court New Zealand Auckland Registry. 1st February 2008.

PRACTICE & PROCEDURE
ARBITRATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

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

S69 AA Act 1996 challenge : Questions of law : entitlement to deadfreight 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. 7th March 2008

Apollo Engineering Ltd v James Scott Ltd [2008] ScotCS CSOH_39 : Bailli

Expenses : Judicial review of power of arbiter in inter-locutories to order payment of expenses. Arbitration not governed by rules – only the common law. Lord Malcolm : Outer House Court of Session. 7th March 2008

Braes of Doune Wind Farm (Scotland) Ltd v Alfred McaLpine Business Services Ltd [2008] EWHC 426 (TCC): Bailli

S2 AA 1996 Seat of tribunal : s69 Challenge : Place of arbitration Glasgow : Arbitration Act 1996 & CIMAR Rules goverened the process : Where was the seat? Held : England & Wales. Liquidated damages clause under a Silver Book ICE contract held to be an unenforceable penalty by the arbitrator. Held : Not obviously wrong – and in the circumstances whilst a strange result – not wrong either – application to appeal refused.

Mr Justice Akenhead. TCC. 13th March 2008

Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184 : Bailli

Confidentiality : privacy : piercing the veil : interests of justice : Whilst it is clearly established under English law that the arbitration process is both private and confidential, there are exceptions to the rule : a beneficiary might waive the protection – particularly when challenging or enforcing a award – and the courts can override the privilege in the interests of justice – to allow arbitral proceedings to be disclosed to a domestic or foreign court.

CA before Carnwath LJ; Thomas LJ; Lawrence Collins LJ. 12th March 2008

Entico Corp Ltd v United Nations Educational Scientific & Cultural Assoc. [2008] EWHC 531 (Comm) Bailli

Immunity - UN: arbitration agreement : Whether the immunity from suit of the UN precluded arbitral jurisdiction in a contract for the production of a calendar. UN pulled out of contract – claimant seeks damages for loss.

Mr Justice Tomlinson. Commercial Court. 18th March 2008

Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWHC 237 (Comm) : Bailli

S103 AA 1996 Challenge to enforcement of award : Appeal against an enforcement order on grounds of public policy – based on absence of full and frank disclosure. Assertion that if material now available had been put to the tribunal the outcome would have been different. The court concluded that it would not have altered the outcome and hence the award stands. Mr Justice Tomlinson. 15th February 2008

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

S69 AA 1996 challenge : Whether or not the terms of a contract made 6 & 7 years ago subject to pain and gain provisions and hence a share of profits enforceable. Award partially amended. Mr Justice Cooke : 31st January 2008

Mobil Cerro Negro Ltd v Petroleos De Venezuela SA [2008] EWHC 532 (Comm) Bailli

S44 AA 1998 – Freezing order – privacy : Successful application for set aside of a freezing order pursuant to an arbitration. Confidentiality / privacy respected so that underlying commercial matters not disclosed in the report.

Mr Justice Walker. Commercial Court. 18th March 2008

Scottish & Newcastle International Limited v Othon Ghalanos Ltd [2008] UKHL 11 : Bailli

Jurisdiction : export contract to EC member state. Where is delivery made in an fob export contract ? At ships rail in export country – impact upon jurisdiction ; application of Council Regulation (EC) No 44/2001.

House of Lords before Lords Bingham; Rodger; Brown; Mance; Neuberger. 20th February 2008

Tor Corporate AS v. Siopect Group Start Petroleum Corp Ltd & Ors [2008] ScotCS CSIH_9 : Bailli

Art 34 Model Law – set aside challenge : Application to set aside an award : Art 34 Model Law considered.

Before Lords Macfadyen; Eassie; Kingarth. Extr Div. Inner House of Session. 18th January 2008

Verity Shipping SA ("Owners") v NVNorexa [2008] EWHC 213 (Comm) : Bailli

Anti-suit injunction : 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. 13th January 2008

Watkins v Jones Maidment Wilson (a firm) [2008] EWCA Civ 134 (04 March 2008): Bailli

Limitation Acts : Whether action ran from occurrence of a contingency, bringing action for negligent advice on a construction contract within the limitation period. Held : Action time barred.

CA before Arden LJ; Longmore LJ; Thomas LJ. 4th March 2008

MEDIATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

AB v British Coal Corporation [2008] EWHC 69 (Comm): Bailli

Time Bar : Time bar for submitting dispute to mediation upheld - even where there was no other mechanism for resolving the dispute. Mr Justice Mitting. Commercial Court. 15th January 2008.

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

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

Nigel Witham Ltd v Smith (No. 2) [2008] EWHC 12 (TCC) : Bailli

Failure to mediate : Costs : No penalty for failure to mediate where it was clear that early mediation could not have produced a settlement. Mr Justice Coulson : TCC. 4th January 2008.

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UPDATE NOTICE FROM THE NATIONAL MEDIATION HELPLINE

What's New 12th March 2008

"The moratorium on provider applications has now been lifted. If you wish to apply, go to the 'Downloads' section of this site (National Mediation Helpline - **www.hmcourts-service.gov.uk/cms/7770.htm**) *you will find a document entitled 'Application for Membership Form'. This application form explains what we require from our mediation providers and to whom the completed form should be sent."*

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IMMUNITY FROM SUIT – SUPRA-NATIONAL BODIES

It is hardly surprising that in the field of public international law, states and similar specified supra-national bodies enjoy immunity from suit before domestic courts, with regard to disputes between such bodies. The problem that courts have had to grapple with over the years concerns where a private individual or organisation finds itself in dispute with such a body, be it founded in contract or in tort. In the light of the State Immunities Act 1978, state immunity no longer extends to state bodies engaging in commercial activities.

The immunity of international organisations in English law is governed by the provisions of the International Organisations Act 1968, section 6 of which provides immunity to the UN. There is no provision in the Act to deal with situations where the UN engages in commercial activities, which it is bound to do when engaging in procurement from private commercial bodies. Whilst there is little doubt that the UN is likely to be perceived by contractors as a financially sound organisation, good for the money when the time arises, this does not mean that contractors would vest total faith in the organisation to honour its obligation, particularly in the event of a dispute as to entitlement. To address issues as to trust in this regard and to plug the vacuum, the UN from time to time contracts on terms which include arbitration. The question that then arises is whether or not a domestic court has the jurisdiction to enforce the resultant arbitral award. This matter was addressed head on recently by the commercial court in the case of ***Entico Corp Ltd v United Nations Educational Scientific & Cultural Assoc. [2008] EWHC 531 (Comm).***

Entico contracted with UNESCO to provide a calendar. However, issues arose with respect to sponsorship and UNESCO purported to withdraw from the project. Entico sought to recover costs incurred in preparation for production of the calendar from UNESCO via arbitration. UNESCO countered that the contract had not been finalised and hence the arbitration provision fell by the wayside. Entico asserted before the court that UNESCO had by this action repudiated the arbitration agreement. Accordingly they commenced action for summary judgement in the English court, on the grounds that contrary to Article 6(1) of the European Convention on Human Rights, they were being denied access to a fair and public judicial processes by the asserted immunity.

The court noted that the putative contract documents were subject to the UNCITRAL arbitration rules, Article 21 of which provides that the tribunal is competent to rule upon its own jurisdiction. The contract documents had included a requirement that the contract be signed off, but UNESCO authorised Entico to commence work and draft work was exchanged between the parties prior to the cancellation of the project. By virtue of Article 21 the tribunal would therefore have jurisdiction to determine whether or not there was a concluded contract – and thus whether or not it had jurisdiction over the "dispute".

The court concluded that UNESCO enjoyed immunity from suit in the UK – which immunity could not be taken away by subsequent legislation – viz the ECHR. However, whilst the court was far from certain that an resultant arbitral award would be enforceable before the UK courts, it noted that UNESCO had written to the court stating that Entico was welcome to commence a unilateral arbitration process and assured the court that should the tribunal find that there was a contract and made an award in favour of Entico, UNESCO would honour that award. Whilst this pragmatic approach offers Entico a viable way forward, regrettably the law is still uncertain and reliant on UNESCO's cooperation.

THE INSOLVENCY THREAT IN RESPONSE TO A CLAIM

The issue here concerns what a purported creditor (i.e. someone with an undetermined claim) should do when faced with a threat of voluntary liquidation by a debtor, with the implication that to pursue the debt would be a waste of time and expense since, at the end of the day, at worst there would be no assets to draw upon and at best the creditor would be an unsecured creditor able to recoup a miniscule percentage of the debt, which would hardly justify the effort involved. This issue came up for consideration by the Sheriff's Court in Edinburg in ***Hadden Construction Ltd v. Midway Services Limited [2007] ScotSC 58 per*** Sheriff Principal Edward F Bowen QC.

In 2001 the parties entered into a contract for the construction of a housing development at Callendar in the SBCC Scottish Building Contract with quantities (January 2000) form. Whist for a sum to be due it requires certification. Hadden asserted that no final account has been agreed in respect of the building contract and no final certificate has been issued by the architect. Hadden further maintained that they were due certain additional sums in relation to the works carried out under the contract, notwithstanding that these have not been the subject of certification. In September 2005 Hadden served a Notice of Adjudication, seeking that the Adjudicator make an order for payment to them of the sum of £111,006.56. This notice was met by a letter from the appellants' solicitor stating that in the light of the latest accounts the directors of Midway were in a position where they could place the company in liquidation, and further asserted that the company denied the debt, advised that any claim would be defended, but further advised that should the claim succeed the company would not be in a position to meet the claim and would then be forced into liquidation.

Hadden responded in 2007 by petitioning for an order to wind up Midway as a any contingent or prospective creditor, founding in particular on section 122(1)(f) & s124(1) Insolvency Act 1986. By interlocutor the Sheriff dismissed the petition because subsequent accounts disclosed that Midway was in fact solvent. Nonetheless the court found Midway liable to Hadden in expenses. Midway here appealed against the award of expenses.

Hence, the issue here was "W*hat is a reasonable claimant to do faced with such a situation? Should they have proceeded with the adjudication or was it a legitimate tactic to petition for winding up in the absence of current accounts?"* The dilemma is a familiar one. The claimant will not have sight of the latest accounts. The company may well be flush with funds and simply trying to scare the claimant off. Adjudication can be very expensive, and whilst reasonably prompt, would nonetheless afford the other party the time to put any assets it might have out of the reach of the claimant. If an action were commenced it might be possible to secure a Mareva injunction to prevent dissipation of assets but again none of this would come cheap. It is a moot point as to whether a Mareva could be secured in respect of adjudication proceedings – adjudication not benefiting from the provisions of the Arbitration Act 1996 (and even less so in Scotland).

Happily for Hadden, the court rejected the appeal, confirming that Hadden's approach was in the circumstances justified. At first instance the judge had found that it was reasonable for Hadden to rely on the unambiguous assertions of insolvency of Midway and unreasonable to expect Hadden to have accurate knowledge of the state of Midway's finances. Furthermore, any liability to Hadden was contingent upon an architect's certificate which was long since due. Unlike a claim for unliquidated damages, the court concluded that at least as far as Scotland is concerned, a claim in respect of work done could be classified as a contingent. In ***Costain Building and Civil Engineering Limited v Scottish Rugby Union PLC*** *1993 SC 650* the Lord President stated that "*Where a contract provides for payment for work done on the issuing of a certificate by an engineer or architect, the issue of a certificate is a condition precedent to the contractors' right to demand payment. A claim which is of that kind is a contingent claim because the debt is not due until the certificate has been issued*". Q.E.D.

Whilst it is clear that such proceedings could not be used to determine the sum due, it would have been possible to stay the action pending resolution elsewhere. Presumably therefore it would have been possible to then pursue the adjudication, and in the event of success, to proceed thereafter to summary enforcement. Unfortunately for Hadden, once the latest accounts were adduced, winding up ceased to be an option. Nothing of course precludes Hadden from pursuing the debt by other means, whether by adjudication or litigation, so all was not lost, even though events had not gone to plan.

The court noted that "……. *it is difficult to see what action the present respondents could have taken other than to present a petition for liquidation. What they had been told was that there was no point in proceeding with any other form of process for recovery of the debt, which they maintained was due, because they would not be able to recover it. Put another way that meant that there were no funds available to meet the petitioners' debt which, on their argument, was due immediately. In that situation it could not be said to be an unreasonable exercise of the Sheriff's discretion to arrive at the conclusion that the present respondents were justified.*"

Whether or not it would be advisable to pursue such a course of action in England & Wales is another matter altogether – but one thing is for sure – we have not seen the last of the bully boy insolvency threat tactic. The claimant who has himself been put in a precarious financial position by the very non-payment complained of is particularly vulnerable to the strategy. If that precariousness has led to the incurring of any CCJ's, pursuing adjudication is likely to be difficult especially since there might be a further threat of withholding any award pending arbitration or litigation. If in addition the claimant is relying on a contingency fee arrangement for legal advice and assistance in order to pursue the debt, securing such assistance would be most problematical. At this stage the Scottish process would appear most attractive.

C.H.Spurin

The Law School University of Glamorgan

LLM/Postgraduate Diploma/Postgraduate Certificate "Dispute Resolution"

About the Course

The primary objective of the course is to provide a stimulating and challenging intellectual environment for the development of knowledge and understanding of the philosophy of disputation and the guiding principles of conflict avoidance, management and resolution in the context of the law, practice and procedure of dispute resolution beyond the confines of national courts.

The course aims to prepare students for professional alternative dispute resolution (ADR) practice, combining academic rigour with practical hands on training in case management, quasi-judicial decision making and the third party facilitated settlement process. The course provides a through grounding in the practices and procedures involved in arbitration, conciliation and mediation and the procedural law governing ADR processes, reinforced by the study of specialist areas of law.

Course content (*Credits in Brackets – to total 180*)

Core Modules:		**Optional Modules:**	
•Arbitration Law	(20)	•Public International Law	(20)
•Dispute Resolution	(20)	•Litigation Strategies	(10)
•ADR Practice and Ethics	(20)	•Carriage of Goods	(10)
•Private International Law	(20)	•Commercial Law and Practice	(10)
•Research Methods	(10)	•Construction Contract Procedure	(10) (ICE 2/3)*
•Obligations	(20) (ICE 1)*	•Construction Law	(10) (ICE 2/3)*
•Dissertation	(60)	•Trade Law	(10)

* ICE 1,2 and 3 can be studied alone or as part of the LLM

How will you study

The scheme will be taught via a combination of lectures and small group activities with the emphasis on the latter. Students will be expected to have prepared thoroughly and to participate fully in all teaching and learning activities. Much of the assessment during the scheme is continuous, practical and skills based. 60 credits are required for the certificate, 120 for the diploma, and 180 for LLM.

What will I get for completing the course : An LLM in Dispute Resolution. Note in addition that :-
The LLM is fully validated by the Chartered Institute of Arbitrators, enabling successful graduates to apply for membership status of the ClArb, to fast track to interview for fellowship and to then undertake the ClArb programs to become respectively a listed mediator, a listed adjudicator and / or a chartered arbitrator.

Whilst the course covers the Institution of Civil Engineers (ICE) syllabus and the University of Glamorgan is an examination centre for ICE, the external ICE examinations must be successfully completed in addition to the LLM in order to satisfy the requirements of the ICE.

The course may be studied full time over one year, or part time over two years.

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