Arbitration: When is ‘final and binding’ actually final and binding?

Even where parties have agreed that “the decision of the majority of the arbitrators... shall be final, conclusive and binding on the parties”, that of itself is not sufficient to amount to an agreement to exclude the statutory right of appeal under section 69 of the Act.

Section 69(1) of the Arbitration Act 1996 provides that “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.”

Enforcement: Adjudication and the ongoing battles on enforcement

The issue of enforcement continues to occupy the court’s time. Cases decided in the last quarter covered a range of arguments, from compliance with contractual requirements, to compliance with statutory requirements, to the old chestnut of whether the contract was in writing.

How long do I have to challenge an award?

The court considered for the first time the issue of when the cause of action accrues for a losing party to issue proceedings to challenge the outcome of an adjudication. The court found that a party could bring a claim at any time up to six years after it paid money to the winning party in accordance with the adjudicator’s award.

When does the right to set-off exist?

Whilst the usual rule is that a defendant cannot endeavour to raise a counterclaim as a means of defeating a claim to enforce an adverse arbitral award, the court has recently decided that an adjudicator’s decision is not to be treated as a counterclaim but more as a binding decision that a debt is due from the losing party to the winning party. On that analysis, the defendant was entitled to set off the adjudicator’s decision against the arbitral award.

Contract: Would I lie to you?

The court held that, where a contractor had misled the client in order to secure the contract, that amounted to fraudulent misrepresentation, rendering the contract voidable.

Procedure: The importance of full compliance with Pre-Action Protocols

The TCC has made it clear that any parties failing to comply with the spirit as well as the letter of the Pre-Action Protocols will face serious costs consequences when and if the dispute reaches court.

As part of our commitment to corporate social responsibility we are proud to support The Anthony Nolan Trust as our current Charity of the Year (www.anthonynolan.org.uk)
Arbitration: When is ‘final and binding’ actually final and binding?

Even where parties have agreed that “the decision of the majority of the arbitrators...shall be final, conclusive and binding on the parties”, that of itself is not sufficient to amount to an agreement to exclude the statutory right of appeal under section 69 of the Act.

Section 69(1) of the Arbitration Act 1996 provides that “Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.” In Shell Egypt West Manzala GMBH & Others v Dana Gas Egypt Ltd [2009] EWHC 2097 (Comm) the court concluded that the parties’ agreement that “the decision of the majority of the arbitrators...shall be final, conclusive and binding on the parties” was not of itself, and absent any other contextual indicators, sufficient to amount to an agreement to exclude the statutory right of appeal under section 69 of the Act. Such an agreement would require express wording that was sufficiently clear in order to be effective.

In Gloster J's view, the words “final and binding” did no more than restate what has long been the rule, namely that an award is “final and binding” subject to the provisions of the Act. In other words, an award is “final” in the sense that the successful claimant is precluded by the award from bringing the same claim again in a fresh arbitration or action. An award can be said to be “binding” in that each party promises to abide by the award and to perform it – it is not a mere expression by the arbitrator of his view as to the referred dispute which a party is at liberty to disregard. The addition of the word “conclusive” was insufficient by itself to show that the parties intended to forego their statutory right of appeal. An award can be said to be “conclusive” of issues of fact and law, in that an award prevents a party in a subsequent arbitration or claim from disputing for a second time an issue of fact or law on which he has failed previously. Moreover, an award can also be said to be “conclusive” in that it precludes a party from reopening in a later dispute individual issues of law or fact that have been necessarily decided by the award.

To read the judgment go to:
Enforcement: Adjudication and the ongoing battles on enforcement

The issue of enforcement continues to occupy the court’s time. Cases decided in the last quarter covered a range of arguments, from compliance with contractual requirements, to compliance with statutory requirements, to the old chestnut of whether the contract was in writing.

Compliance with contractual requirements for service
In *Primus Build Ltd v Pompey Centre Ltd & Anor* [2009] EWHC 1487 (TCC), the court concluded that the claimant had complied with a contractual requirement that a Notice of Adjudication was “delivered personally” or sent by fax to the address stated in the contract when it served its Notice of Adjudication by recorded post, which was received by Pompey’s solicitor the following day. The court held that “delivered personally” meant something different than personal service. It simply meant actual delivery to the named address in the contract and the method of delivery did not matter. Since delivery to the named address had been accomplished, service of the notice had been valid.

The decision nevertheless sends out a warning to parties to check the particular wording of any service provision in their contract before attempting to effect service, to ensure compliance. If service is invalid, any decision made by the adjudicator will be made without jurisdiction and will be unenforceable.

Don’t let the adjudicator stray too far
Although the claimant succeeded on the issue of service, the court in *Primus* nevertheless held that the adjudicator’s decision was unenforceable because the adjudicator had breached natural justice in a material way, in that he had based his decision on his own, alternative, way of calculating loss of profit – which both parties had agreed was an irrelevant method of calculation – and without giving the parties an opportunity to make submissions on the alternative approach he proposed. This part of the decision acts as a reminder that decisions must be based on the evidence relied on by either party and cannot go beyond that evidence unless, at the very least, the parties are given an opportunity to make submissions on any alternative approach the adjudicator seeks to take.

To read the judgment, go to:  http://www.bailii.org/ew/cases/EWHC/TCC/2009/1487.html

Getting the notice right first time
The issue of the validity of service arose again in *Vision Homes Limited v Lancsville Construction Limited* [2009] EWHC 2042 (TCC), although here in a slightly different context. The referring party served an amended Notice of Adjudication after it had made a request to the Royal Institution of Chartered Surveyors to appoint an adjudicator. Paragraph 2 of the Scheme for Construction Contracts requires that Notice of Adjudication be served before the referring party approaches the nominating body to appoint an adjudicator. As a result, the court held that the adjudicator had made his decision without jurisdiction.
This case provides a warning to referring parties of the need to ensure that the Notice of Adjudication is drafted carefully, because it will determine the scope of the matters dealt with in the adjudication. Here, the amendment simply dealt with a request for a declaration that the responding party should be liable for the adjudicator’s fees. Since paragraph 25 of the Scheme, which applied to this adjudication, already confirms that the adjudicator is entitled to a reasonable amount for his fees and can determine how those fees are apportioned, this was arguably an unnecessary amendment to make and one that proved very costly.

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/2042.html

Does the contract exist?
Section 107 of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) provides that the right to refer disputes to adjudication only applies where the “construction contract” (as defined by the HGCRA) is in writing. Although the first part of the Draft Construction Contracts Bill repeals section 107, so that adjudication will apply to all construction contracts, whether agreed in writing or orally, the court in Adonis Construction v O’Keefe Soil Remediation [2009] EWHC 2047 (TCC) sent out a reminder that until section 107 is repealed, parties must ensure that their contracts comply with the requirements of that section if they wish the adjudication provisions to apply. The letter of intent used in this case did not constitute a “construction contract in writing”. As a result, the adjudicator’s decision was unenforceable.

To read the judgment, go to http://www.bailii.org/ew/cases/EWHC/TCC/2009/2047.html

In Aceramais Holdings Limited v Hadleigh Partnerships Limited [2009] EWHC 1664 (TCC) the argument was different. There, the employer attempted to argue that there was no “construction contract in writing” because the terms of the JCT standard form contract chosen by the contractor had never been agreed formally by the employer. The court held that, where an employer chooses not to inform himself as to what a JCT form of contract is, or to concern himself with the detail of matters such as which form of contract was to be used, and left such details to the contractor, the employer could not then say that he did not agree to the form of contract chosen by the contractor. The fact that the employer never signed that contract would not, in such circumstances, lead to the conclusion that the terms had not been agreed so that there was no “construction contract in writing” for the purposes of adjudication.

The court accepted that a director of Aceramais (the employer) had told the contractor that its funder would require a JCT contract to be executed but had left the details of the contract documentation to the contractor. Those acting on behalf of the funder had also made it clear that the contract should be on a proper footing and that they wanted a JCT contract in place. They had chased throughout the material period for contract documentation to be completed.

A JCT 2005 Design and Build standard form of contract was eventually executed by the contractor and sent to the employer for signature, but the employer never signed it. In those circumstances, the court held that the March 2008 JCT form set out the terms to which the parties had agreed and, although not signed by Aceramais, the document clearly fell within the provisions of section
107(2)(a) and (c) of the HGCRA – it was a contract in writing within the meaning of section 107 and within the guidance given in RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) [2002] BLR 217. The judgment in Redworth Construction Ltd v Brookdale Healthcare Ltd [2006] BLR 366 – that an agreement “in principle” to agree to a JCT form was insufficient to satisfy the HGCRA – did not apply in these circumstances: “This was not an agreement in principle; the parties here agreed, in the way I have described, to contract on the JCT form.”

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/1664.html

Is the withholding notice valid?
In Windglass Windows Limited v Skyline Construction Limited [2009] EWHC 2022 (TCC), Coulson J rejected the suggestion that section 111 of the HGCRA and the relevant part of the scheme does not require a withholding notice that sets out “valid” grounds for withholding money otherwise due. Neither did he agree with the suggestion that “as long as there is something which purports to be a withholding notice, then that is sufficient to justify withholding, regardless of the contents of the notice itself.” The judge concluded that there was no meaningful distinction between a “valid” and an “effective” notice in section 111. The adjudicator had provided reasons as to why the withholding notices were ineffective – neither the amount proposed to be withheld nor the grounds for doing so had been set out. The adjudicator’s decision was therefore enforceable.

In William Hare Limited v Shepherd Construction [2009] EWHC 1603 (TCC), Coulson J held that the insolvency of an employer did not fall within the ‘pay-when-paid’ clause in a sub-contract that referred to so-called upstream insolvency. As a result, the contractor’s withholding notices were invalid and the sub-contractor was entitled to payment of approximately £997k plus VAT and interest. The judgment reminds parties of the need to examine closely the wording of any pay-when-paid clause that deals with upstream insolvenccy.

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/1603.html

How long do I have to challenge an award?
The court considered for the first time the issue of when the cause of action accrues for a losing party to issue proceedings to challenge the outcome of an adjudication. The court found that a party could bring a claim at any time up to six years after it paid money to the winning party in accordance with the adjudicator’s award.

In Jim Ennis Construction Limited v Premier Asphalt Limited [2009] EWHC 1906 (TCC), the TCC had to decide, for the first time, the issue of the nature and date of accrual of the cause of action where a losing party to an adjudication brought under Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) subsequently commences court proceedings to seek a final determination of the matters decided by the adjudicator, with a view to recovering monies paid to the winning party in compliance with the adjudicator’s decision.
The defendant contended that the cause of action was no different from the dispute referred to adjudication and thus arises at the same time as that underlying cause of action. The court disagreed, noting that where the adjudication provisions of the HGCRA Scheme apply to a contract, the cause of action for the repayment of monies paid lies in breach of an implied term that, where one party has paid monies to the other party in compliance with an adjudicator’s decision, then that party is entitled to have that dispute finally determined by legal proceedings and if, or to the extent that, the dispute is finally determined in his favour, to have those monies repaid to him. Such a cause of action only arises when the losing party pays monies to the winning party in compliance with the adjudicator’s decision. Section 5 of the Limitation Act applies to such a claim because it is a claim founded on a simple contract, so that the losing party has six years from the date of payment in which to bring legal proceedings to recover that payment.

Such an implied term was seen by the court as “reasonable and equitable” in that:

• it applied equally to both parties to the contract
• it was essential to give effect to the reasonable expectation of the parties, that a losing party to an adjudication who has to ‘pay now, challenge later’ will have the right to recover such payment by legal proceedings that finally determine the dispute
• it was obvious that such a term was required to give effect to the reasonable expectations of the parties
• it could clearly be expressed
• it supported rather than contradicted the terms of the scheme that formed part of the contract between the parties

His Honour Judge Stephen Davies said: “It seems to me that the implied term is necessary to make fully workable the concept of the temporary finality of the adjudicator’s decision which lies at the heart of the policy behind the adjudication provisions of the HGCRA. It is in substance no different to the state of affairs which exists in many construction contracts, where there is provision for interim payments under interim certificates based on interim valuations, with the final valuation, certificate and payment to be made at the end of the contract. If it transpires at that stage that the contractor has been overpaid under the interim certificates, then it cannot be doubted that the employer has a cause of action to recover the overpayment. Although standard form contracts will typically make express provision for that eventuality, in my judgment if they did not, such a right would undoubtedly be implied.”

The court noted that this could result in unacceptable delay, where for example a party launches an adjudication shortly before the expiry of the six-year limitation period for his claim, succeeds and receives money, only to be met by a claim for repayment just before the expiry of the six-year limitation period for that claim to be made. This would result in the court having to rule on a claim that was 12 years old. However, the first counter-argument is that the initial delay cannot be the fault of the losing party, and the second is that this still produces a fairer result than the one for which the defendant was contending. In any event, given that adjudication is employed in the vast majority of cases precisely because it is a quick remedy, it seems unlikely that any case would take 12 years to reach the court.
The court added, albeit obiter, that, in addition to the cause of action founded on the implied term, the claimant also had a cause of action to recover the monies paid over in restitution. Whether the claim in restitution is subject to any limitation period at all was held to be “far better left for a case in which the point does directly arise for decision.”

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/1906.html

**When does the right to set-off exist?**

Whilst the usual rule is that a defendant cannot endeavour to raise a counterclaim as a means of defeating a claim to enforce an adverse arbitral award, the court has recently decided that an adjudicator’s decision is not to be treated as a counterclaim but more as a binding decision that a debt is due from the losing party to the winning party. On that analysis, the defendant was entitled to set off the adjudicator’s decision against the arbitral award.

In *Workspace Management Ltd v YJL London Ltd* [2009] EWHC 2017 (TCC), the court had to decide whether a contractor was entitled to set off an adjudicator’s decision in its favour against sums it was obliged to pay the employer under an arbitrator’s award relating to the same contract. Generally, a defendant cannot endeavour to raise a counterclaim as a means of defeating a claim to enforce an adverse arbitral award, but the court in this instance held that an adjudicator’s decision is not to be treated as a counterclaim but more as a binding decision that a debt is due from the losing party to the winning party. On that analysis, setting off the adjudicator’s decision against the arbitrator’s award was simply a mutual set-off of debts.

In reaching this decision, the court noted that both decisions were binding on the losing party, neither decision had greater status than the other (the arbitration award was, in this case, actually stated to be “provisional” and “interim”) and both were capable of being the subject of the judgment of the court. The court concluded that it would be “artificial to allow the claimant to ring-fence the award simply because it is not subject to potential challenge (which an adjudicator’s decision might be), in circumstances where, for reasons best known to themselves, the parties are conducting simultaneous arbitration and adjudication proceedings.”

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/2017.html
Case notes

Contract: Would I lie to you?
The court held that, where a contractor had misled the client in order to secure the contract, that amounted to fraudulent misrepresentation, rendering the contract voidable.

In Fitzroy Robinson Limited v Mentmore Towers Limited [2009] EWHC 1552 (TCC), Coulson J held that a statement by a contracting party made during pre-contract negotiations to the effect that a certain employee would be involved throughout the duration of the project in the critical role of team leader was a representation designed to induce the defendants to enter into the contract. Once the representation was no longer true, the party making the statement had a duty to inform the other party of that change, before the contract was concluded. Failure to do so constituted a fraudulent misrepresentation.

Fitzroy Robinson Limited (FRL) repeatedly represented to the defendants during the pre-contract negotiations that Mr Blake would act as team leader throughout the duration of the project on both the Piccadilly and Mentmore sites. That representation was not only made orally at various meetings but was also made in writing – the bid documents were based almost exclusively on Mr Blake, his previous work and the experience, expertise and skills that he would bring to the project. The court concluded that that was not a statement of future intent but rather a representation of fact as to the services and personnel that FRL would provide to the defendants.

Mr Blake resigned from FRL before the project contracts were executed, but FRL knowingly and dishonestly failed to correct the false representation as to Mr Blake’s involvement in the project because it knew that disclosure of that information might affect whether or not it was awarded the contract. As a result, at the time that the contract was concluded, there was a false representation that was deliberate and made for a specific purpose, namely to ensure FRL got the job.

Although not making new law, the judgment sets out three key practical points:

- Consultants must always inform their clients promptly of any changes to key personnel, or risk being found guilty of professional misconduct, breach of contract, and/or negligent – or even fraudulent – misrepresentation
- Even where fraudulent misrepresentation has been proven, recovery of damages is uncertain. In this case, once the client discovered the misrepresentation, he did not seek to rescind the contract. Although quantification of loss was held over to a quantum hearing, typically damages for fraudulent misrepresentation in these circumstances would be limited to disruption and duplication of work arising out of the team leader’s resignation
- Those drafting professional appointments should always include an express term dealing with key personnel

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/1552.html
Procedure: The importance of full compliance with Pre-Action Protocols

The TCC has made it clear that any parties failing to comply with the spirit as well as the letter of the Pre-Action Protocols will face serious costs consequences when and if the dispute reaches court.

In Bovis Homes Ltd v Kendrick Construction Limited [2009] EWHC 1359 (TCC), the TCC made it clear that the Pre-Action Protocol for Construction and Engineering Disputes requires both parties to exchange fully their views not only on the substance of the underlying dispute but also on the procedure to be adopted in seeking to resolve it. The court concluded that a defendant who:

• does not request a copy of the contract documents during a Pre-Action Protocol process
• who knows that the contract incorporated a standard form that contains an arbitration agreement
• who has no reason to believe that agreement has been amended or deleted; and
• who has expressly considered the possibility of arbitration
cannot just wait to see if the claim will be continued without saying anything about the possibility that a stay of proceedings may be requested. Such conduct is not in accordance with either the spirit of co-operation required by, or the detailed provisions of, the Pre-Action Protocol. For example, paragraph 4.2.1 of the Protocol requires a statement of any jurisdiction or arbitration points to be made at an early stage and provides for costs to be awarded where compliance with the Protocol does not occur.

To read the judgment, go to: http://www.bailii.org/ew/cases/EWHC/TCC/2009/1359.html