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Disputes Digest

Introduction

Welcome to Disputes Digest. Over the summer, the debate over the legal issues arising from BREXIT has sharpened. With autumn upon us, the mood appears to be 'business as usual', while the political debate goes on. We have, therefore, resisted the temptation to publish a 'BREXIT Special Disputes Digest'.

Instead, this edition includes updates and commentary on current contentious issues of relevance and interest to corporate counsel. At a time when the world of sport is under increasing scrutiny (most recently, with the departure of Sam Allardyce from his role as England manager) we consider some recent disputes in elite level sport, including the role of CAS in hearing those disputes. We look at progress in the High Court's 'Financial List', provide an overview of the Insurance Act 2015 (which came into force in August 2016), and include a review of the proposed changes to routes of appeal through the English Courts. As English law continues to develop through case law, we consider recent cases on aggregation of claims and exclusion of liability in commercial contracts.

Many readers will have heard (or read) Lord Thomas' BAILII lecture in which he considered the impact of arbitration on the development of the common law. We consider his comments in detail and explore whether a case can be made out to encourage more cases to be referred to the courts. We also take a look at the future of Intra-EU bilateral investment treaties and the Transatlantic Trade and Investment Partnership.

Finally, if you have not yet read enough on BREXIT, our microsite cms-lawnow.com/brexit will tell you almost everything you need to know.

If you have any comments or questions about the issues raised in Disputes Digest, please do get in touch with me, the author, or your usual contact at CMS. I hope you find Disputes Digest an interesting and informative read.

Guy Pendell
Partner, Solicitor Advocate, Disputes
Head of Commercial, Regulatory and Disputes
T +44 (0)20 7367 2404
E guy.pendell@cms-cmck.com

The Financial List: an effective regime

We last wrote about the High Court's newly established Financial List (for complex financial disputes) in November 2015. What developments have there been since then?

There has been a small change of personnel, and the new List has started to establish its personality.

As to the List team, Hamblen and Richards have been replaced by Leggatt and Hildyard.

Several judges have had the chance to pull on a Financial List shirt over the last few months, in various cases that have been transferred or which have made it onto the List.

In January this year, the Chancellor, Sir Terence Etherton, pronounced on an application by Royal Bank of Scotland to transfer a case to the Financial List (*Property Alliance Group Limited v RBS*).[1] The claim against the bank was worth very much less than the GBP50 million benchmark in the original guidelines for claims for the new List, but it fell squarely within the definition of '*Financial List Claim*' in the Court's rules (CPR 63A).

Transferring this case to the Financial List meant moving it from its pre-assigned judge, because that judge was not on the Financial List. The Court was careful to make clear it made no criticism of that assigned judge. It also took the opportunity to stress that all Commercial Court and Chancery judges were capable of handling general financial and business disputes of all kinds. But we note two points:

First, the word 'general'; the Financial List judges are looking to do spicier stuff than that. Second, it's worth paying attention to the rest of Sir Terence's explanation for approving the transfer. Other cases such as these are likely to emerge in the future; it is prudent that the experience of dealing with such a case be gained by a Financial List judge.

Also in January, Knowles J heard a case (*GSO v Barclays Bank PLC*)[2] that had been transferred to the List at the request of the parties. At the request of the Court, the parties had notified the Loan Market Association ("**LMA**") of the fact that the dispute involved the meaning of standard terms in its documentation and of the transfer to the Financial List. This case demonstrates a good example of the communication between the Court and the parties, just as the architects of the List intended.

Blair J gave judgement in March in a case (*Banco Santander Totta S.A. v Transport Companies*[3]) that involved a much longer hearing, which lasted from 12 October through to 10 December 2015. This involved a Portuguese bank claimant and Portuguese transport companies (which run the metro, bus and tram services of Lisbon and Porto). The focus was on long term interest rate swaps entered into under ISDA Master Agreements, subject to English law and jurisdiction. This 163 page judgment was a clear stake in the ground for the Financial List; a specialist London judge tackling a highly complex finance dispute for the benefit of foreign consumers of English justice.

In April, Mr Justice Newey produced a ruling on a summary judgment application in *BNY Mellon Corporate Trustee Services Limited v Taberna*.[4] The questions before him were complex, and centred on whether certain swap agreements were 'impermissible' under the terms of a contract. The judge granted judgment on part of the claim only.

Most recently, Snowden J heard the expedited trial of seven issues in a Part 8 claim issued in the Financial List (*Hayfin Opal Luxco v Windermere*).[5] The dispute

[1] *Property Alliance Group Ltd v Royal Bank of Scotland* [2016] EWHC 207 (Ch)
[2] *GSO Credit v Barclays Bank Plc* [2016] EWHC 146 (Comm)
[3] *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWHC 465 (Comm)
[4] *BNY Mellon Corporate Trustee Services Ltd v Taberna Europe CDO I Plc and Ors.* [2016] EWHC 781 (Ch)
[5] *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc [2016] EWHC 782 (Ch)*

concerned rights in a Commercial Mortgage Backed Securitisation ("**CMBS**") structure, issues of potentially wider market significance and called for the interpretation of the complex CMBS documentation. There were no material disputes of fact, and the parties cooperated in bringing the case on urgently, in exactly the way the Financial List was intended to work!

We are aware that the Court has not said yes to all applications to transfer cases to the Financial List. This approach to selection is shaping the emerging personality of the List just as much as the judges' treatment of the cases that have passed the test.

Duncan Aldred
Partner, Banking
T +44 20 7367 2709
E duncan.aldred@cms-cmck.com

Nicholas Ross-McCall
Partner, Banking
T +44 20 7367 2703
E nicholas.ross-mccall@cms-cmck.com

Key points arising from Financial List cases

GSO v Barclays Bank PLC

— This dispute concerned secondary trading of a surety bond facility. The trades in question used LMA standard form documentation and therefore had great relevance to the wider market.
— Key conclusions of the Court, applicable to trades on 2012 LMA terms:
  - the trade will generally include the economic burden of the seller's obligations under issued surety bonds;
  - the purchased assets are, generally, funded to the extent money has been paid by the seller under the issued surety bonds, rather than to the extent by which the facility has been drawn by the mere issue of the surety bonds.

Banco Santander Totta S.A. v Transport Companies

— The High Court ruled that Article 3(3) of the Rome Convention ("**RC**") was not engaged and that English law, as chosen by the parties, did apply.
— Article 3(3) RC states that if parties have chosen foreign law, where all other elements relevant to a situation are connected with only one country, the choice of foreign law cannot prejudice the application of the mandatory rules of that country.
— Various factors pointed towards international elements, including: (1) the right to assign the impugned swaps to a bank outside Portugal; (2) the use of standard international documentation; (3) the international nature of the swaps market.

BNY Mellon Corporate Trustee Services Limited v Taberna

— The High Court granted Barclays Bank plc summary judgment following the breach of obligations by an issuer of notes. The issuer failed to obtain rating agency confirmation prior to entering into a swap arrangement subsequent to the issue of the notes.
— Rating agency confirmation was agreed between the parties to be a prerequisite to swaps above a certain threshold. The threshold was reached, confirmation was not obtained and the issuer had no real prospect of defending the claim.

Hayfin Opal Luxco v Windermere

— Snowden J took the opportunity to restate the law as to implied terms.[6] In his judgment Snowden J stated "*that there may be cases in which an analysis of the express terms of a contract leads to a clear conclusion that something is missing, and in such a case the court may be able to supply the missing words or terms…The court will only add words to the express terms of an agreement if it is necessary to do so because the agreement is incomplete or commercially incoherent without them. Even then, the court must be certain both that the absence of the missing words was inadvertent, and that if the omission had been drawn to the attention of the parties at the time of contracting they would have agreed what additional provision should be made*".
— The judgment also provided obiter views, on the recent detailed examination of the common law penalty doctrine and the Supreme Court's affirmation that the doctrine applied only to provisions of contracts that impose secondary obligations upon a party in the event of breach of its primary obligations under a contract.[7]

[6] *Marks and Spencer v BNP* [2015] UKSC 72
[7] *Cavendish Square Holdings v Makdessi* [2015] UKSC 67

Insurance Act 2015

The Insurance Act 2015 came into force on 12 August 2016, introducing major changes to the law governing disputes between insureds and insurers in the UK. The majority of the Act's provisions apply to insurance contracts entered into on or after 12 August 2016, with a new duty that insurers must pay claims within a reasonable time applying to policies taken out from 4 May 2017.

The Act has also paved the way for the coming into force of the Third Parties (Rights against Insurers) Act 2010, which will impact on insurers and brokers.

Scope of pre-contractual disclosure

The Act retains the requirement that a non-consumer insured must give disclosure of material circumstances before the contract is entered into. However, that duty is restated such that the requirement will be fulfilled if an insured either:

1. discloses all material circumstances of which it is, or ought to be, aware; or
2. gives the insurer sufficient information to put a prudent insurer on notice that it should make further enquiries.

It remains to be seen how this will be interpreted by the Courts but, in our view, the second limb should be treated as a 'catch all' rather than a viable alternative. That said, insurers and coverholders will be reviewing underwriting practices and guidelines in light of the new onus on them to make enquiries where insured's presentations raise questions or flag areas where further information is required.

For brokers and insureds, the new law on what must be disclosed to the insurer (what the insured 'knows or ought to know') is one of the more complex parts of the Act. For corporate insureds, what is 'known' means what is known to senior management and/or those responsible for the insurance arrangements. This is broader than simply the insured's board of directors and may include, for example, a general counsel who is not a board member or, in the case of a D&O policy, the individuals covered by that policy.

What an insured 'ought to know' includes what would be revealed by a reasonable search of information available to the insured. The Act makes clear that this includes information held within the insured's organisation or 'by any other person', e.g. a broker or external risk manager. It is likely that the Courts will apply a broader test for the requirement to conduct a 'reasonable search' than under the previous regime (where an insured was required to disclose matters that it ought 'in the ordinary course of business' to have known, a requirement that the Courts tended to interpret restrictively). What is 'reasonable' under the Insurance Act is likely to depend, inter alia, on the type and size of the risk and geography and company structure of the insured.

What should you be doing now to respond to the changes?

Insureds and their brokers should:

— Consider the scope of the pre-placement searches that will be necessary – such as who are the relevant persons for the purposes of knowledge? Where are the relevant documents held? Do you want to seek to agree this with your insurer?
— Reconsider renewal timescales and plan for renewal to take longer.
— Consider the format of the presentation of the risk to the insurer – in particular, the Act makes it clear that 'data dumping' is not allowed.

Insurers should:

— Update proposal forms and policy wordings to reflect changes under the Act.
— Consider who holds what information about particular risks and which personnel need to be familiar with any information held by the insurer concerning the risk. Particularly key is the interaction of the claims and underwriting arms.
— Review and revise your underwriting guidelines and how you assess risk.

Remedies for breach of the duty of fair presentation

The most wide-ranging reform introduced by the Act is to the remedies available for breach by an insured of the duty to make a fair presentation. The new remedy depends on the nature of the insured's breach. If the insurer can prove that the breach was deliberate or reckless, it can avoid the contract and retain the premium. If not, the remedy will depend on what the insurer would have done had it been fully apprised of the facts.

- If the insurer can prove to the Court's satisfaction that it would not have written the contract on any terms, it can avoid the contract but must return the premium;
- If the insurer would have written the risk but on different terms, it can treat those different terms as applying ab initio; and/or
- If the insurer would have charged additional premium, it can reduce any claims payments accordingly.

Much will depend on what the insurer is able to prove and marks a dramatic shift from the current legal position and one that insurers and brokers need to plan for carefully.

What should you be doing now to respond to the changes?

Insurers should review underwriting tables and guidelines to enable you to evidence what you would have done had you been fully apprised of the facts – i.e. would the risk simply not have met your risk profile or would you have inserted different terms and/or charged additional premium?

Warranties

Despite much controversy, the Insurance Act retains warranties in English insurance law but with three important revisions:

1. the abolition of basis of contract clauses, whereby pre-contractual statements are turned into a warranty by a provision in the policy wording;
2. any breach of warranty suspends an insurer's liability until the breach is remedied; and
3. where the warranty (or other term) relates to a loss of a particular kind or at a particular location or time, there must, in addition, be a causal link between the loss and the breach of warranty. For example, if the policy contains a warranty that a warehouse will have a fire alarm but no such alarm is installed, the insurer will be able to rely on breach of warranty in respect of a fire loss but not in respect of a flood.

What should you be doing now to respond to the changes?

- Insurers should update proposal forms to remove basis of contract clauses.
- Insureds should consider how they are going to evidence and record when a warranty has been breached and when it has been remedied. For example, if a policy contains a warranty that a warehouse will have a working fire alarm and the alarm was out of order for a two-month period, the insured should record the date on which the alarm stopped working and the date it was repaired.

Duty to pay claims within a reasonable time

The Act will imply a term into every contract of insurance entered into on or after 4 May 2017 that the insurer must pay all sums due in respect of a claim within a reasonable time. If an insurer is in breach of the

duty, the insured will be able to claim damages. This right will be in addition to the right to be indemnified under the policy and interest.

Applying the usual rules of contract, where an award of damages places the injured party in the position they would have been in had the contract been performed, the damages awarded could be substantial (for example where a delay in payment has caused loss to an insured business).

What is a reasonable time for payment of a claim is not defined. The Act simply provides that it will depend on the "relevant circumstances", giving some examples of matters that may be taken into account:

— the type of insurance;
— the size and complexity of the claim;
— compliance with any relevant statutory or regulatory rules or guidance; and
— factors outside the insurer's control.

Inevitably, the question of what is a reasonable time will be an area of dispute. While the (non-exhaustive) list of factors to be taken into account gives some guidance, we can expect the Courts to expand on these factors. What is reasonable may vary markedly depending on the type, size and complexity of cover in any particular case.

Importantly, the legislation recognises that insurers need to be able to investigate claims properly and expressly provides that reasonable time includes a reasonable time to investigate and assess the claim. Insurers will have a defence to a claim if they can show that they had reasonable grounds for disputing a claim. Demonstrating that the insurer had reasonable grounds to delay payment may not, however, be straightforward, particularly where advice received by the insurer on the merits of a claim is subject to privilege. In deciding whether the insurer breached the implied term, its conduct will also be taken into account. So, for example, an insurer might act reasonably in delaying payment while investigating a claim but be in breach if it was slow to take into account further information confirming the validity of the claim.

What should you be doing now to prepare for the changes?

Insurers should:

— Consider how they would prove that they had reasonable grounds for delaying payment.
— Consider how to set reserves for potential exposure to claims.

Contracting out

The Insurance Act provides a 'default regime' for non-consumer insurance contracts. With the exception of the prohibition of basis of contract clauses, parties to non-consumer contracts can contract out of provisions in the Act. Where insurers intend to opt out and include a 'disadvantageous term', i.e. one that would put the insured in a worse position than they would be in under the Act, the term will have to be clear and unambiguous as to its effect and drawn to the insured's attention before the contract is entered into.

A general opting-out clause is unlikely to be sufficient and insurers will need to draw each disadvantageous term to the insured's attention. Although we doubt that general opting out will be prevalent in the market, opting out of parts of the Act may be of interest to both insurers and insureds.

Where opting out (whether generally or of parts of the Act), insurers and brokers will need to consider what alternative legal position should apply in default of the Act and careful drafting will be needed to achieve the parties' intentions.

What should you be doing now to respond to the changes?

Consider whether you want to opt out of any part(s) or all of the Act and, if so, what regime you wish to apply.

Simon Garrett
Partner, IRG
T +44 20 7367 2786
E simon.garrett@cms-cmck.com

Alaina Wadsworth
Senior Associate, IRG
T +44 20 7367 2722
E alaina.wadsworth@cms-cmck.com

Stephen Netherway
Partner, IRG
T +44 20 7367 3015
E stephen.netherway@cms-cmck.com

All for one and one for all – has aggregation interpretation become possible?

A look at aggregation case law and whether the latest Court of Appeal decision on aggregation wording has provided clarity or confusion.

Aggregation clauses enable parties to potentially combine any number of claims together, being treated as one claim for the purpose of an indemnity limit. In *AIG Europe Ltd v OC320301 LLP and others*,[1] a decision of Tear J was reviewed by the Court of Appeal. The crucial question was whether a number of different claims against a firm of solicitors could be characterised as arising from "*similar acts or omissions in a series of related matters or transactions*" in order to fall within limb (iv) of the aggregation provision within the prevailing Solicitors' Minimum Terms and Conditions ("**MTC**").

Case summary

Midas was a UK property company involved in two schemes to develop holiday homes in Turkey and Morocco. The first defendant (previously called The International Law Partnership "**TILP**") was engaged to advise Midas on all international property law aspects of the transactions.

Investors would finance the land acquisition and construction costs for each scheme. The financing of each scheme was independent of the others. Each investor made payments to TILP in accordance with an escrow agreement, with TILP acting as escrow agents. The investor was deemed to be a beneficiary under a deed of trust for the particular scheme. Each trust was to hold security over the land to be purchased for the particular scheme. Importantly, the monies held in escrow were not to be released by TILP until a certain level of security was in place.

A tranche of money in relation to the Turkish development was paid out of escrow in April 2007. Additional funds, contributed by purchases of holiday homes (not investors) in the Turkish development, were paid out in October 2008.

A tranche of money in relation to the Moroccan development was paid out of escrow in November 2007, with later payments being made between November 2007 and February 2008.

Both developments failed: the Turkish due to a right for the vendors to use and enjoy the fruits of the land being in place, the Moroccan because of a failure to obtain adequate shares.

The trustees of the two trusts (the "**Trustees**") brought proceedings against TILP (now OC320301 LLP) on behalf of 214 investors, claiming a total of more than GBP 10,000,000. The main allegation was that TILP had failed to achieve the security threshold prior to releasing funds.

Aggregation clause

TILP was insured by AIG Europe. The limit of indemnity under their policy was GBP3,000,000 any one claim. The key policy provision was contained at Clause 2.5 of the Solicitors' MTC:

"……

[1] *AIG Europe Ltd v OC320301 LLP and others* [2016] EWCA Civ 367

a. *All Claims against any one or more Insured arising from:*

   i. *One act or omission;*
   ii. *One series of related acts or omissions;*
   iii. *The same act or omission in a series of related matters or transactions;*
   iv. *Similar acts or omissions in a series of related matters or transactions and*

b. *All Claims against one or more Insured arising from one matter or transaction*

Will be regarded as One Claim."

AIG brought proceedings against TILP, seeking a declaration that the Trustees' claims should be treated as a single claim for policy purposes (arguing that sub-clause (iv) applied).

AIG argued that the Trustees' claims arose from similar acts or omissions (being the failure properly to obtain adequate security) and a series of related matters or transactions because they all arose out of Midas' property business which operated in a way common to all investors and to which funds had been enticed by the promise that they would be protected by the escrow agreement and trusts deeds.

The Trustees argued that the claims in relation to the Turkish investment differed to the Moroccan investment and that the claims were not related since each individual transaction regarding each investor were not dependent upon one another. In the alternative, both AIG and the Trustees submitted that there were two different series of related transactions (Turkish and Moroccan). If this argument were successful, then two GBP3,000,000 limits of indemnity could be accessed to meet all of the claims.

Key terms were considered:

1. *Similar Acts or Omissions*

Tear J considered the level of similarity required: "*…the requisite degree of similarity must be a real or substantial degree of similarity as opposed to a fanciful or insubstantial degree of similarity.*" This does not appear to be determinative of the issue, leaving such a phrase open for further debate on interpretation. Issues such as the true meaning of the words and the extent of similarity required will need to be explored.

2. *Series of Related Matters or Transactions*

This concept was considered for the first time in the AIG case. Tear J found that transactions are related if they are dependent upon one another. Dependence must be mutual, it is therefore not sufficient if one transaction is dependent upon another, both must be "*conditional or dependent upon each other.*"

In the first instance, Tear J found in favour for the Trustees, concluding that the individual transactions concerning each investor were not dependent upon each other. AIG was left potentially liable to pay the entire GBP10,000,000 sought by the claimants. AIG was granted permission to appeal.

The Court of Appeal

AIG argued that there was no justification for Tear J concluding that transactions needed to be interdependent in order to be deemed "a series of related matters or transactions." The Law Society (as the Solicitors' Regulatory Authority) intervened and argued that the clause required a degree of relationship between the matters or transactions, not being one of interdependence, but based on a fundamental connection rather than some common extrinsic factor (e.g. geography or the identity of the solicitor).

In handing down his opinion, Longmore LJ concluded that there should be some sort of connection between the transactions for them to be a series of related matters or transactions. Such a connection had to be intrinsic rather than remote e.g. transactions which took place in contemplation of each other might be connected. *Any* degree of relatedness would not suffice, in order to avoid a wide aggregation provision being created.

The Court of Appeal considered its judgment was in keeping with the House of Lords' decision in *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Ins Co.*[2] In that case, the policy wording stated "*where a series of third party claims shall result from any single act or omission (or related series of acts or omissions) then all such third party claims shall be considered to be a single third party claim*". The case concerned pensions mis-selling and whether the alleged failure of Lloyds properly to train its employees who were selling pensions could be considered a related series of acts or omissions.

[2] *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Ins Co* [2003] UKHL 48

The House of Lords held that the failure of Lloyds to train and monitor its employees properly was not "an act or omission" or "related series of acts of omissions" within the scope of the aggregation clause as Lloyd's failure to train and monitor was not directly causative of the customers' loss. "*Result from*" meant proximate cause, which needed to be identified. The House of Lords held that the loss was caused by the employees' failure to give best advice and this could have occurred even if there had been appropriate training and monitoring in place.

Clarity or confusion?

Having determined the issues, the Court of Appeal considered it was in no position to make the necessary findings of fact as to how such principles should be applied in the current case. Instead, the Court of Appeal determined the case should be remitted to the Commercial Court to consider the findings of fact and that they should not be inhibited by the previous findings.

Numerous professions have opined that the Court of Appeal's decision has done little to clarify the scope and application of aggregation wordings introduced in the wake of the Lloyds TSB case above.

Clause 2.5 (a) (iii) and (iv) of the MTCs have always been perplexing and the use of the words "intrinsic" not "extrinsic" has provided little clarity.

However, when approaching an aggregation clause the following could be considered:

— "*same occurrence or series of occurrences*" is wide wording, not requiring proximate cause. This entitles insurers and insureds to look further into the causes underlying the proximate cause and identify "*some connecting factor*"[3] or "*a number of events of a sufficiently similar kind following one another in temporal succession*"[4];
— An intrinsic connection would need to de demonstrated, which is unlikely to just be that the counterparty to the transactions is the same but could, for example, be a single fraud;
— It is unlikely that transactions that relate to the same subject-matter will be sufficiently related; and
— Transactions that cross-refer to one another might be sufficiently related.

It is hoped that the outcome of the further trial (and potential appeals) will provide true clarity on aggregation wording but in the meantime uncertainty remains in this area.

Stephen Netherway
Partner, IRG
T +44 20 7367 3015
E stephen.netherway@cms-cmck.com

Georgina Baxter
Lawyer, IRG
T +44 20 7367 2154
E georgie.baxter@cms-cmck.com

[3] *Countrywide Assured Group v DJ Marshall & ors* [2003] Lloyd's Rep. I.R. 195
[4] *Distiller Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* [1974] 130 CLR 1

A contentious summer of sport

With the Summer Olympic Games and the UEFA European Championships, which took place this summer alongside the usual annual sporting competitions, 2016 is turning out to be an interesting year for the world of sport. As elite level sport becomes ever more commercialised (not to mention politicised) and the potential financial stakes become ever greater, the number of disputes in sport continues to rise and increase in complexity. At the time of going to print, the risks involved in the highly regulated world of sport are no better illustrated by the untimely departure of Sam Allardyce, just 67 days into his tenure as England manager. Allardyce agreed to leave "by mutual consent" with the English FA, having been caught on film, among others, offering advice on how to "get around" the FA's regulations on third-party ownership.

Background

Disputes in sport are often resolved by bringing a case in front of the internal judicial bodies set up by the relevant national or international sports federation. For example, the international federation for association football ("**FIFA**") has two such internal bodies (the Ethics Committee and Disciplinary Committee). Outside the internal sporting structure, parties involved in a sports dispute prefer to use the Court of Arbitration for Sport ("**CAS**") rather than engaging in conventional litigation via the ordinary domestic courts.

Role of CAS

CAS is an independent forum which is tailored to hearing international sports disputes. As well as ruling on athlete eligibility, disciplinary and doping matters, CAS can also hear commercial disputes (such as disputes relating to sponsorship agreements or player contracts), provided that there is a CAS arbitration clause in the contract at the heart of the dispute.

There are two procedures through which a dispute can be heard by CAS. The Ordinary Division hears disputes of first instance, where the parties to a dispute go directly to CAS for resolution. These cases are often commercial in nature. The vast majority of cases however go to the Appeals Division. This occurs when CAS is asked to rule on disputes arising from a decision given by the internal disciplinary or judiciary body of a specific sports federation.

A CAS arbitration panel consists of either one or three arbitrators. They have the power to review both the facts and the law in relation to a case and, with respect to cases heard in the Appeals Division, can hear cases *de novo*, thereby completely replacing the first instance decision. Whilst not obliged to do so, the arbitrators tend to follow earlier decisions so as to create legal certainty. This has allowed for useful body of sports law (*lex sportiva*) to develop.

CAS decisions are legally binding and can be enforced internationally pursuant to the New York Convention on the Recognition and Enforcement of Arbitral Awards. The proceedings themselves are governed by Swiss law and CAS awards can be legally challenged in the Swiss Federal Supreme Court. However, under Swiss law, the grounds for setting aside an award are limited and procedural in nature, for example improper appointment of an arbitrator, wrongful acceptance of jurisdiction or breach of public policy.[1]

[1] Article 190(2) of the Swiss Private International Law Act 1987

CAS and the Olympic Games

CAS plays an important judiciary role for Olympic sport. Under rule 61 of the Olympic Charter, disputes relating to the Olympic Games can only be submitted to CAS. In light of this, CAS sets up an Ad-Hoc Division during the Olympic Games to ensure that any disputes which could affect an athlete's participation in competition are dealt with swiftly.

Pechstein

The ability of sporting bodies to impose CAS as the arbiter for hearing disputes with athletes was thrown into doubt in a long-running dispute concerning German speed skater Claudia Pechstein. Pechstein was given a two-year ban from the International Skating Union ("**ISU**") in 2009 for blood doping.[2] She never failed a doping test but the ISU had built a biological profile of Pechstein's blood through previous test records and found some of her samples to be abnormal. Pechstein protested her innocence but she lost an appeal at CAS and the Swiss Federal Supreme Court.[3] As well as adversely affecting her professional reputation, this meant that Pechstein was unable to compete and lost sponsorship and other commercial opportunities during the ban.

Following the ban, Pechstein decided to take her case to the German Courts, claiming GBP 3 million in damages for the loss of earnings during the period of her ban. This was theoretically not possible as, when an athlete signs up to participate in elite sport, they enter into an agreement with the relevant sports governing body, which normally includes an arbitration clause under which the athlete agrees to submit to the jurisdiction of CAS if a dispute arises. However, the Munich Courts ruled that the arbitration clause was contrary to German antitrust law and therefore invalid.[4] This was on the basis that:

- Each sports governing body has a monopoly over the sport that it governs and, as such, finds itself in a dominant position. If a dominant undertaking imposes a contractual condition it may, in certain circumstances, be considered an abuse of the dominant position.
- Notwithstanding this, the Munich Court did recognise that imposing such an arbitration clause was important to ensure the uniform application of sports-related laws such as anti-doping legislation.
- They were nevertheless concerned by CAS's institutional set-up. The courts noted that CAS arbitrators were appointed upon proposals made by sports governing bodies which risked putting the bodies in a favourable position regarding the composition of the CAS arbitral panel.
- As the forced arbitration clause was combined with the lack of independence of the arbitral panel, it was ultimately found to be anti-competitive.

This threatened to undermine the authority of CAS. The ruling would have resulted in CAS awards being unenforceable in Germany and potentially other jurisdictions. It would also have allowed athletes to bring parallel claims against sports governing bodies in front of national Courts.

In June 2016, the German Federal Court overturned the decision of the Munich Court and found that CAS was not biased against individual athletes.[5] Although it acknowledged that sports governing bodies enjoyed a monopoly, the Court ruled that athletes signed the arbitration clause of their own free will. It also considered that athletes received a fair hearing in the CAS set-up, especially as (i) they are able to appeal to the Swiss Federal Court and (ii) arbitrators can be challenged and removed from the arbitral panel if they are not independent from the parties. The Court also recognised the importance of CAS as a "genuine arbitration tribunal" which ensures the uniform application of sport-specific regulations.

Recent CAS decisions

A substantial number of cases before CAS concern doping. Against the backdrop of investigations by the World Anti-Doping Agency ("**WADA**") on alleged systemic state-sponsored doping in Russia, this year has seen an unusually high number of such cases.

CAS's dismissal of Russia's appeal against the IAAF's suspension of Russian track and field athletes at the Olympic Games received widespread coverage earlier this month. However, perhaps two of the biggest cases on doping in the past year concerned Essendon Football Club (an Aussie rules football club which participates in the Australian Football League ("**AFL**")), and tennis star Maria Sharapova.

Essendon

In February 2013, the Australian Sports Anti-Doping Authority ("**ASADA**") and WADA began investigating the legality of a supplements regime run by Essendon for their players, following which 34 players were implicated for taking banned substance Thymosin beta-4. Prior to the investigation, the players had signed

[2] Decision of the International Skating Union Disciplinary Commission dated 1 July 2009
[3] CAS 2009/A/1912-1913 *Claudia Pechstein and Deutsche Eisschnelllauf Gemeinschaft v International Skating Union*, 25 November 2009 and Swiss Federal Tribunal appeal cases 4A_612/2009, 10 February 2010 and 4A_144/2010, 28 September 2010
[4] Oberlandesgericht Munchen U 1110/14 Kart, *Claudia Pechstein v Deutsche Eisschnelllauf-Gemeinschaft e.V. and International Skating Union*, 15 January 2015.
[5] Bundesgerichthof KZR 6/15, *Deutsche Eisschnelllauf-Gemeinschaft e.V. and International Skating Union v Claudia Pechstein*, 7 June 2016

consent forms to participate in the supplements programme and were allegedly assured that all substances used were WADA compliant.

ASADA alleged that the players had been administered with the banned substance, although they did not accuse the players of using the Thymosin beta-4 intentionally. Rather, ASADA alleged that Essendon football club had knowingly injected the players with the substance and the players were unaware that it was illegal.

This ultimately led to an AFL Tribunal Hearing in 2015, where the 34 players were found not guilty. The standard of proof applied to doping cases is comfortable satisfaction bearing in mind the seriousness of the allegation which is made. This is a greater standard of proof than the balance of probabilities but it is still less than beyond reasonable doubt. The AFL Tribunal ruled that it was not comfortably satisfied that the players had been administered with Thymosin beta-4.

The Tribunal took a "links in the chain" approach (which dismisses evidence if a link within it cannot be proved) and found that, although it was clear that the players had been administered with Thymosin, there was insufficient evidence to suggest that it was Thymosin beta-4 rather than a legal variety of Thymosin. Indeed, the players were told that they were being injected with Thymosin but not necessarily Thymosin b-4.

WADA appealed the decision to CAS and on 12 January 2016, CAS upheld the appeal and returned a guilty verdict.[6] In its ruling, CAS took a "strands in a cable" approach where individual evidence chains with missing links may still result in a comfortable satisfaction of guilt if the combination of all such evidence is sufficiently strong. Key evidence in favour of a guilty verdict was that:

— Stephen Dank, the sports scientist who had primary responsibility for the supplements programme at Essendon, had discussed using Thymosin to aid recovery of soft tissue. It is generally accepted that Thymosin b-4 was the only form of Thymosin which would have had this effect;
— those who worked closely with Mr Dank were careful to ensure Essendon's doctor was not made aware of the substance's use and the players were asked to keep the use secret; and
— two urine samples from players during the period in which the substance had allegedly been administered contained elevated levels of Thymosin b-4.

More importantly, contrary to the findings of the AFL Tribunal, CAS also ruled that the players were significantly at fault. This was considered surprising as it was assumed that the players were administered with the substance under the direction of Essendon. However, CAS took into account that none of the players had disclosed the substance on their doping control forms and that some had withheld information on the use of the substance from the club doctor under Mr Dank's instructions. As such the players were all given full two-year (rather than reduced one-year) suspensions.

The players have since appealed the decision to the Swiss Federal Supreme Court.

Maria Sharapova v International Tennis Federation

In March 2016, Ms Sharapova announced that she had failed a drugs test at this year's Australian Open. The prohibited substance used was "Mildronate" (Meldonium) which Ms Sharapova had been taking for some years for illnesses caused by a metabolism disorder but which was only added to WADA's Prohibited Substance list at the end of 2015.

Under the Tennis Anti-Doping Programme a ban for doping can be reduced from four to two years if the athletes can show that the doping was not intentional. In addition, if the athlete can demonstrate that they bore no significant fault or negligence, the ban can be reduced further.

The International Tennis Federation ("**ITF**") Tribunal banned Ms Sharapova for two years.[7] The Tribunal considered that Ms Sharapova did not intentionally dope, as it was clear that, having not realised that the Prohibited Substance list had been updated, she did not know she was committing an anti-doping violation. However, it found that she was at very significant fault in failing to take any steps to check whether the continued use of her medicine was allowed. Key to the finding against her was that:

— she had concealed her use of Mildronate from anti-doping officials (failing to disclose the substance on doping control forms) and members of her own medical team;
— although it was clear that there was no system in place by her team to check for Prohibited Substances, the player and her management team were well aware of the ways in which they could enquire about Prohibited Substances and had made enquiries about other substances used by Ms Sharapova in the past;

[6] CAS 2015/A/4059, *World Anti-Doping Agency v Essendon Players, Australian Football League and Australian Sports Anti-Doping Authority*, 11 January 2016
[7] Independent Tribunal appointed by the International Tennis Federation, *Decision in the case of Maria Sharapova*, 6 June 2016

— Ms Sharapova continued to use Mildronate many years after it was prescribed to her and she had not sought advice as to whether there was a continued medical need to do so; and
— Ms Sharapova tended to use the substance on mornings of match days and when undertaking intensive training which the Tribunal found to be consistent with an intention to boost energy levels rather than for any long-term health benefits.

Ms Sharapova has since appealed the length of the ban to CAS.

Michel Platini v FIFA

CAS is also a forum for deciding on the many disputes in the world of football. In particular, CAS is used as an appeals court against decisions of the various FIFA judicial committees.

As was well-publicised this year, Michel Platini was suspended from all football-related activity by the FIFA Ethics Committee and FIFA Appeals Committee after it was discovered that Mr Platini accepted a payment of CHF2,000,000 in 2011, four months prior to the FIFA presidential elections.

Mr Platini claimed that the payment was for back-pay agreed orally in 1998 with then FIFA president Sepp Blatter in relation to his employment with FIFA between 1999 and 2002. In the absence of any clear evidence supporting this, the FIFA Ethics Committee ruled that Mr Platini obtained an undue advantage and was guilty of a conflict of interest breaching, amongst others, Articles 19 and 20 of the FIFA Code of Ethics. FIFA subsequently imposed a six-year suspension and fined Mr Platini CHF80,000.

Mr Platini filed an appeal with CAS asking that the decision be overturned. However, in line with the FIFA ruling, CAS was not convinced of the legitimacy of the payment and ruled that Mr Platini did breach Articles 19 and 20.[8] Key to this finding was that the payment in question:

— was only recognised by Mr Platini and Mr Blatter;
— occurred eight years after Mr Platini's employment with FIFA ended; and
— did not correlate with the alleged unpaid part of his salary.

CAS opined that a severe sanction was necessary due to the seniority of Mr Platini (then FIFA Vice-President and UEFA President), the impact on FIFA's reputation and the lack of repentance from Mr Platini. Nevertheless, CAS found that the suspension imposed by FIFA was too severe and reduced it to four years, the equivalent to the length of a FIFA presidential term, with a reduced CHF 60,000 fine. In giving the reduction, CAS also noted that FIFA had been aware of the payment in 2011 but did not commence an investigation until September 2015.

The case demonstrates the important role CAS has played in attempting to clear up the FIFA corruption scandal. In the past year, CAS had also been asked to rule on Sepp Blatter's suspension from football-related activities and requests for the use of transparent voting booths in the FIFA presidential elections.

Dutee Chand v Athletics Federation of India and the International Association of Athletics Federations

CAS plays a pivotal role in eligibility disputes. In a landmark case from July 2015, CAS ruled that the International Association of Athletics Federations (the "**IAAF**") must suspend its Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "*Regulations*") until the IAAF could prove with scientific evidence that there was a link between enhanced testosterone levels and improved athletic performance in hyperandrogenic athletes.[9] The Regulations were established to deal with women who had excessive levels of androgenic hormones (such as testosterone).

The dispute itself concerned Indian female sprinter Dutee Chand. Ms Chand was asked to take a number of tests by the Athletics Federation of India ("**AFI**") to verify her gender. The results indicated that the natural levels of testosterone found in Ms Chand's body were abnormally high and at levels usually only found in men. Ms Chand was therefore prohibited from participating in the forthcoming World Junior Championships and Commonwealth Games.

Under the Regulations, women with such high levels of testosterone are required to undergo surgery to reduce the naturally-produced hormone to permissible levels if they want to continue competing. Ms Chand brought an appeal to CAS against her ban on the basis of there being a lack of scientific evidence of a relationship between high levels of testosterone and enhanced performance. Ms Chand's lawyers also argued that, by forcing female athletes to undergo surgery, the Regulations were disproportionate to any legitimate objective of preventing female athletes with high testosterone levels from having an unfair advantage.

CAS agreed with Ms Chand. Key to the finding was that there was a lack of evidence that hyperandrogenic

[8] *Michel Platini v FIFA*, 9 May 2016
[9] CAS 2014/A/3759, *Dutee Chand v Athletics Federation of India and The International Association of Athletics Federations*, 24 July 2015

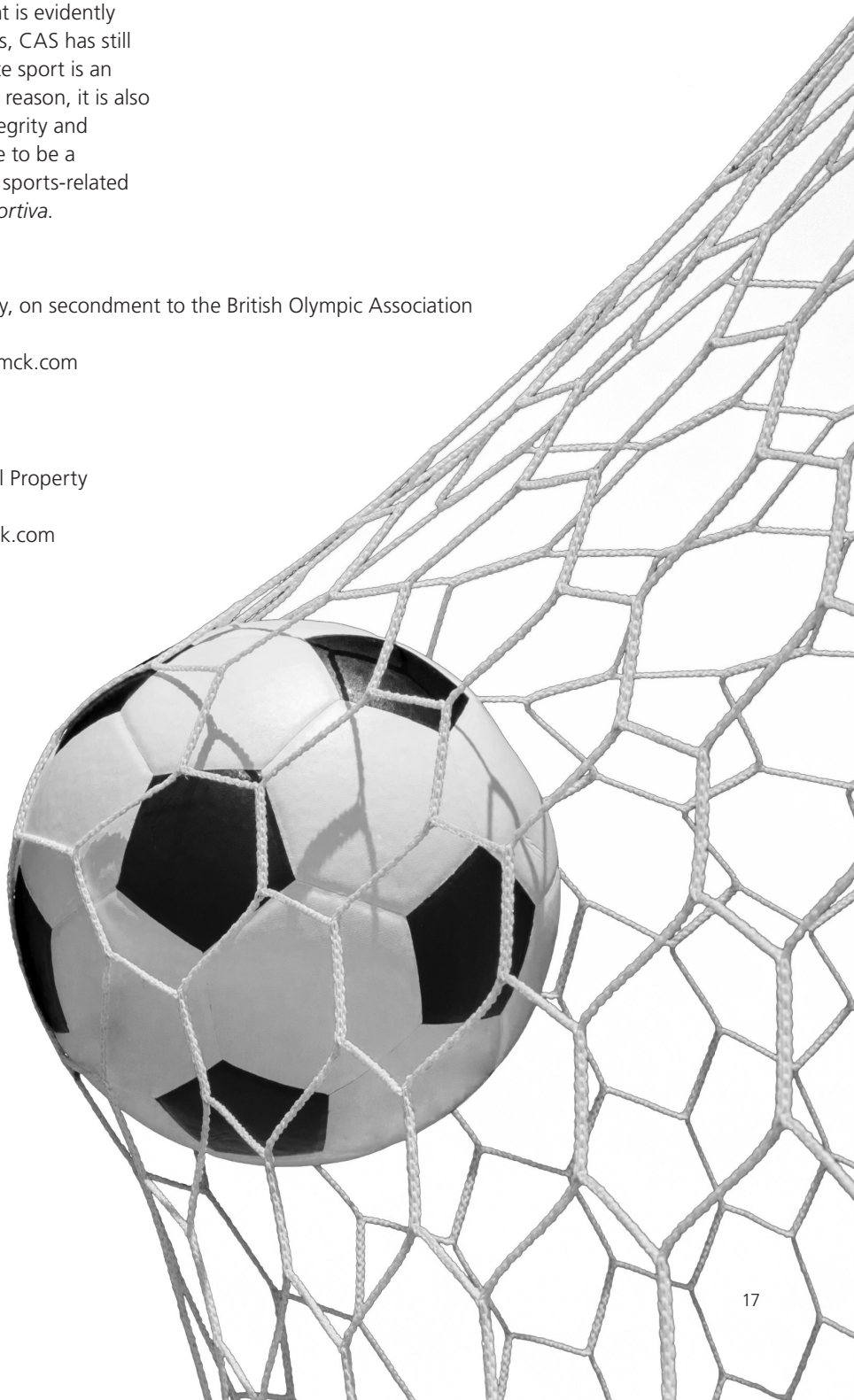
females benefited from a substantial performance advantage sufficient to warrant excluding them from competing in female competitions. Although CAS recognised that increased testosterone may increase athletic performance, it was not satisfied that the benefit was so significant as the advantage derived from numerous other variables such as nutrition, access to good training facilities or good coaching. As such, Ms Chand's suspension was lifted and she has since been permitted to compete in competitions.

Final comment

Despite the recent challenge to its authority, it is evident that CAS has and will continue to play a key role in resolving sports-related disputes. In what is evidently becoming a busy year for sports disputes, CAS has still to rule on a number of topical cases. Elite sport is an extremely lucrative business but, for this reason, it is also at times susceptible to issues around integrity and ethics. It makes sense therefore for there to be a specialist forum capable of dealing with sports-related disputes and develop the body of *lex sportiva*.

Poonam Majithia
Lawyer, Intellectual Property, on secondment to the British Olympic Association
T +44 20 7367 2248
E poonam.majithia@cms-cmck.com

Tom Scourfield
Partner, Head of Intellectual Property
T +44 20 7367 2707
E tom.scourfield@cms-cmck.com



Gain without pain – one step closer?

The Court of Appeal has recently upheld an award of Wrotham Park damages in a claim for breach of confidentiality, non-compete and non-solicitation covenants in a business sale context. In doing so it has brought a measure of clarity and flexibility to an area of the law of damages that, until now, had often been regarded as an exceptional remedy.

Wrotham Park damages

Damages for breach of contract are usually measured by reference to the innocent party's financial loss, so as to put that party in the position it would have been in, had the contract been properly performed. When damages are calculated on that basis, a claimant who has not suffered a loss will usually only be entitled to nominal damages.

There are, however, certain circumstances in which a court may be willing to assess damages by reference to the price of a release from the obligation which the defendant has breached, following a hypothetical reasonable negotiation between a willing buyer and a willing seller. This is often referred to as Wrotham Park damages after the case of *Wrotham Park Estate Company Limited v Parkside Homes Limited*.[1]

Because Wrotham Park damages do not focus on how much the aggrieved party has lost, or how much the wrongdoer has gained, they are sometimes described as 'negotiating' damages or a 'hypothetical bargain'. In *Wrotham Park*, the court awarded damages to a claimant estate owner where the first defendant (a developer) had breached a restrictive covenant which benefitted the estate. Although the development had not reduced the value of the estate 'by one farthing', the Court considered it would be unjust for the claimant not to be compensated and for the defendants to benefit from the fruits of their wrongdoing. Accordingly, the Court awarded an amount of damages that the claimant might reasonably have demanded as the price for relaxing the covenant in question.

Claims for Wrotham Park damages are not just confined to property cases and are available, in principle, for breach of contract claims generally. They often arise in cases involving breach of restrictive covenants, particularly in contracts of employment, breach of confidence cases and in proceedings for breach of intellectual property rights.

One Step - background

The recent case of *Morris-Garner and another v One Step (Support) Limited*,[2] concerned claims for breaches of restrictive covenants in relation to material competition, solicitation and the use of confidential information. The claimant, One-Step (Support) Limited, provided supported living services to vulnerable people. The first defendant was a former director and shareholder of the claimant. The second defendant was a former employee of the claimant and the first defendant's civil partner.

In 2006, following a shareholder dispute, a deed of compromise was entered into between the shareholders of the claimant and the first defendant. A separate deed of compromise was entered into between the claimant and the second defendant. Both contained identical confidentiality, non-compete and non-solicitation covenants in favour of the claimant. However, unbeknown to the claimant, the defendants had already secretly set up a new and competing business which they began marketing in 2007 and accepted supported living placements. In 2012, the claimant brought proceedings against the defendants for alleged breaches of the restrictive covenants contained in the deeds of

[1] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798
[2] *Morris-Garner and another v One Step (Support) Limited* [2016] EWCA Civ 180

compromise. On quantum, the claimant adduced an accountant's report calculating a shortfall in its profits from the time that the defendants' new company started trading, until 2010 when the defendants sold that company for a significant profit. However, the accountant's report did not cover ongoing loss or quantify the loss or market share or general reputational damage. Accordingly, the claimant sought either an account of profits or Wrotham Park damages.

At first instance, the court held that the defendant's company was competing with the claimant and that the defendants had breached their non-compete and non-solicitation covenants and had wrongfully used the claimant's confidential information in order to do so. The court did not regard the circumstances as sufficiently exceptional to order an account of profits but did find that it would be just for the claimant to have the option of recovering Wrotham Park damages because of the difficulty in identifying the financial loss suffered, which had been exacerbated by the defendants' secrecy in setting up a rival business.

The defendants appealed on a number of grounds, including whether the judge was right to give the claimant the option to elect (as it did) for Wrotham Park damages and in respect of the test to applied in those circumstances.

Court of Appeal

The appeal was dismissed in its entirety. The Court of Appeal upheld the award of Wrotham Park damages. In doing so, the Court held that Wrotham Park damages are not restricted to cases where the claimant has suffered no identifiable loss and nor must the case be exceptional. Instead, Longmore LJ approved the three important features which justified a Wrotham Park award set out by Peter Gibson LJ in *Experience Hendrix LLC v PPX Enterprises Inc*,[3] namely:

i. there was a deliberate breach by the defendant of its contractual obligations for its own reward;
ii. the claimant would have difficulty in establishing financial loss therefrom; and
iii. the claimant has a legitimate interest in preventing the defendant's profit-making activity in breach of contract.

Longmore LJ also proposed a fourth factor in cases of sales of a business:

iv. the result of the defendant's breach of contract has been that it is doubtful that interim relief could be obtained.

In addition to the principles referred to above, the Court added the following guidance on the approach to be taken into account in awarding Wrotham Park damages:

— it is not necessary to find that it is 'impossible' for the claimant to identify any financial loss, and a flexible approach may justify the award of Wrotham Park damages where it would be 'very difficult' for the claimant to establish ordinary compensatory damages;

[3] *Experience Henderix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323

— in an appropriate case justice may call for the claimant to be awarded Wrotham Park damages – what is the just response is a matter for the judge to decide (in the present case, the Court was persuaded that it was just to make the award given the deliberate and secretive breaches of covenant, the very real problems in proving loss and, in particular, the challenge in assessing the loss of goodwill to the claimant's business);
— the case need not be exceptional - the relevant test is what does justice require.

Comment

This decision has brought welcome clarity to the principles governing the award of Wrotham Park damages. However, the Court did recognise that there was 'some force' in the submission that an award of Wrotham Park damages in the present case would make the exception the norm. Indeed, in many cases it will be difficult to say what business the contract breaker has obtained which the innocent party would otherwise have obtained, and what the effect on the goodwill and reputation of the innocent party has been. Given that the Court has taken a relatively liberal approach, claimants will be expected to seek Wrotham Park damages in an attempt to avoid the cost of quantifying difficult claims and with a potential windfall in the event that the damages awarded exceed the actual losses incurred.

A further potential consequence arises in the approach defendants may take to applications for injunctive relief. Often, an innocent party may seek an injunction to restrain a counterparty from breaching their restrictive covenants and/or using the innocent party's confidential information as a 'springboard' to build a competing business. In the present case, no application for injunctive relief was made but this was principally because the breaches had already occurred over a significant period of time and prior to the claimant discovering them.

However, defendants to applications for injunctive relief may now try to argue that since Wrotham Park damages are more widely available, damages would be an adequate remedy instead of injunctive relief. Longmore LJ's fourth factor referred to above sought to address this issue and the Court held that it did not regard the present case as meaning that injunctions, which would otherwise be granted, are likely to be refused. Nevertheless, future defendants to applications for injunctive relief may well seek to defeat those applications on the basis that Wrotham Park damages would be an adequate remedy.

Incidentally, Wrotham Park is a Palladian country house in Hertfordshire available for wedding hire and the like.

Anthony Fincham
Partner, Employment
T +44 20 7367 2783
E anthony.fincham@cms-cmck.com

David Bridge
Senior Associate, Solicitor Advocate, Disputes
T +44 20 7367 3021
E david.bridge@cms-cmck.com

Feeding the Minotaurs

A consideration of Lord Thomas' speech on rebalancing the relationship between the courts and arbitration.

Outline of Lord Thomas' position

Earlier this year, Lord Chief Justice Thomas delivered a Bailii lecture titled '*Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*' in which he asserted that, as a result of changes implemented in respect of arbitration in England and Wales in 1979 (by statute) and 1981 (by Lords Denning and Diplock through an interpretation of that statute) which had the effect of limiting avenues of appeal to the courts, there has been "*a serious impediment to the development of the common law by the courts in the UK*". Lord Thomas is not the first to raise these concerns (nor is he likely to be the last) however, owing to his position as Head of Judiciary of England and Wales, his comments have garnered much attention amongst the arbitration community.

Solutions considered

In response to this issue, Lord Thomas considers the following questions in his lecture:

a. Should we revise the criteria for appeals?
b. Should we encourage greater use of the power under section 45 of the Arbitration Act 1996 to enable the court to give decisions on points of law which arise after the commencement of arbitration but before the decision?
c. Should greater use be made of the courts?

The Stated Case procedure[1]

The reform of arbitration law to permit greater court interference is a sensitive issue, not least because before the introduction of the Arbitration Act 1979 ("**AA 1979**"), judicial review of arbitral awards in England, by way of the 'Stated Case' procedure, had reached a critical point and arbitration in England had fallen out of favour. In order to assess the risks of reform, it is helpful to revisit the development of this procedure.

In the 18th century, decisions of arbitrators (and inferior courts) could be quashed for an error of fact or law on its face. However, this was unsatisfactory because (a) it led to arbitrators giving awards without reasons (to avoid the award being reviewed); and (b) the procedure did not permit the court to amend the award or remit it back to the arbitrator. The court could only set the award aside, a process that would almost certainly have given rise to arbitration-fatigue amongst parties seeking to resolve their disputes.

In 1854, the Common Law Procedure Act was enacted, and for the first time, arbitrators were able to state a special case in order to obtain the opinion of the court. The power was exercised at the arbitrator's discretion, and parties were at liberty to eliminate this discretion in the arbitration agreement. Importantly, the courts did not have the power to compel an arbitrator to state a special case.

However, by 1922 the position had changed and parties were prevented from opting out of the special case procedure. In the seminal case of *Czarnikow & Co. Ltd v. Roth Schmidt & Co.*[2], in response to a clause purported to exclude cases from being referred to the courts by way of special case procedure, the Court of Appeal stated:

"Arbitrators, unless expressly otherwise authorised, have to apply the laws of England. When there are persons untrained in law, and especially when as in this case they allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Court thinks it proper. This is done in order that the Courts may ensure the proper administration of the law by inferior tribunals. In my view, to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no ***Alsatia in England where the King's Writ does not run****."* [emphasis added]

[1] Variously referred to as the "Stated Case" procedure, the "Special Case" procedure and the "Case Stated" procedure, the Common Law Procedure Act 1854 provided, at section (IV) that "*… it shall be lawful for such Court to direct a Case to be stated, or an Issue or Issues to be tried …*" and at section (V) that "*It shall be lawful for the Arbitrator … to state his Award, as to the whole or any Part thereof in the Form of a Special Case for the Opinion of the Court …*".
[2] *Czarnikow & Co. Ltd v. Roth Schmidt & Co* [1922] 2 K.B. 478.

Although the Stated Case procedure had (apparently) worked well for a period, it was increasingly utilised by parties as a litigation strategy to delay resolution of a dispute. This became particularly egregious in the decade preceding the AA 1979 and was acknowledged by members of the judiciary at the time. In his judgment in *Granvias Oceanicas Armadora S.A. v. Tibsen Trading Co. (The Kavo Peiratis)*[3], Justice Kerr stated:

"There are nowadays many complaints that our special case procedure in commercial arbitrations is being abused. Special cases used to be the exception, but they are becoming the rule and ***increasingly frequent as a means of delaying the speedy resolution of commercial disputes*** *… Again and again they [arbitrators] find and this Court finds, that in these times of economic difficulty respondents with weak cases use the decision of the Court of Appeal in [The Lysand] merely as a means of gaining time in order to postpone a final award against them."* [emphasis added]

The lack of finality and potential for serious delay was undoubtedly impacting upon the success of arbitration in the UK. In recalling how the AA 1979 came about,[4] Lord Hacking (who was instrumental in getting the act onto the Statute Book) refers to two incidents which illustrate how poorly English arbitration was regarded at the time. He recalls a conversation that he had with a distinguished Wall Street lawyer, who "*stated informally that in his firm it was an act of professional negligence to allow an English arbitration clause in any of their clients' contracts!*"[5] He also refers to a letter he received from the General Counsel of Raytheon (a major US arms manufacturer) which detailed the difficulties Raytheon had experienced in English arbitration and ended with the words: "*I have issued instructions in my department that counsel are never to agree to the United Kingdom as a site for an arbitration.*"

In April 1978, Lord Hacking tabled a motion in the House of Lords, highlighting the issues with arbitration law in England and Wales. The Arbitration Bill began its journey in the House of Lords in late 1978 and by mid-1979 it had made its way onto the Statute Book. The passage of this Act is relevant because the same concerns now voiced by Lord Thomas were raised in opposition to the Act in 1978/9. In particular, Lord Hacking recounts the concerns of Lord Diplock, who stated that:

"the taking away from the Commercial Court of arbitration cases - particularly relating to admiralty, insurance and commodity disputes - which provided "the water in the fountain of the development of English commercial law", ***would be most damaging****.."*[emphasis added][6]

Lord Hacking went on to say that *"[s]ome of us didn't quite see why foreign parties were being compelled to make this expensive (in time and money) contribution to the development of English law. I remember being reminded of the comment of that great English jurist and judge Lord Devlin*:

"So there must be an annual tribute of disputants to feed the Minotaurs. The next step, I suppose, would be a prohibition placed on the settlement of cases containing interesting points of law."[7]

Lord Devlin's comments were most recently echoed by Lord Saville of Newdigate, a former law lord and Supreme Court justice, who now sits as a commercial arbitrator, who added that:

"People use arbitration to resolve their disputes, not to add to the body of English commercial law. Why should international parties be put to the expense and delay occasioned by appeals to the court, often followed by further appeals to the Court of Appeal and the Supreme Court? Why, in other words, should they be obliged to finance the development of English commercial law?"

He has predicted that any move to expand the right of appeal from arbitration awards …*"would be calculated to drive international commercial arbitration away from London, to the great loss of the country."*

The solutions considered

Before considering the potential effect of Lord Thomas' proposed solutions on arbitrations in England and Wales, it may be helpful to set out the current position with respect to judicial review and court intervention.

The avenues for appeal from an arbitral award are now set out in the Arbitration Act 1996 ("**AA 96**"). Section 69 enables parties to appeal to the courts on points of law. This avenue of appeal can be excluded by agreement between the parties (either in the arbitration agreement or subsequently). Of note, under many institutional

[3] *Granvias Oceanicas Armadora S.A. v. Tibsen Trading Co. (The Kavo Peiratis)* [1977] 2 Lloyd's Rep. 344.
[4] In 2009, at a garden party at his home in London, Lord Hacking told the "rather extraordinary story" of how the Arbitration Act 1979 came into being. The story was published in 2010 in *Arbitration* and is a brief and entertaining read. "*The Story of the Arbitration Act 1979*" (2010) 76 *Arbitration* 125-129.
[5] "*The Story of the Arbitration Act 1979*" (2010) 76 *Arbitration* 125-129, .
[6] ibid., p126.
[7] ibid., p126.
[8] Lord Saville of Newdigate, The Times, "*Reforms will threaten London's place as a world arbitration centre*", 28 April 2016.

arbitration rules, parties automatically waive the right to appeal by agreeing to arbitrate under the respective institution's arbitration rules (see text boxes for examples).

Proposed solution 1 – should we revise the criteria for appeals?

Turning now to the solutions proposed by Lord Thomas, he first considers whether one answer might be to "*go back to a more flexible test for permission to appeal … that would enable the courts more readily to develop the law whilst leaving arbitration as an important means of dispute resolution.*" Lord Thomas does not provide further detail of how this might be achieved.

It is worthwhile considering whether or not this proposed solution has the potential to discourage parties from resolving their disputes in England and Wales.

Parties who resolve their international commercial disputes in England and Wales may be broadly categorised as follows:

a. parties who have submitted to the jurisdiction of the courts in advance of any dispute arising (e.g. through an exclusive jurisdiction clause);
b. parties who submit to the jurisdiction of the courts once a dispute arises (e.g. this might occur where the claim is in tort and the damage was sustained in England);
c. parties who have agreed to arbitrate any dispute which may arise, and select to have the seat of the arbitration in England – this would bring parties within the jurisdiction of the courts of England and Wales, albeit with the protection afforded by the AA 96.

Of these categories, generally speaking, only parties in category (b) are a 'captive audience'. That is, parties in categories (a) and (c) will in most instances be at liberty to take their disputes elsewhere. In his lecture, Lord Thomas highlights the creation, over the past decade, of multiple commercial courts for resolution of international disputes, referring in particular to commercial courts in Dubai, Abu Dhabi, Qatar, Singapore, India, Hong Kong, South Africa, Nigeria, Delaware, New York, and the Cayman Islands, and a Netherlands Commercial Court is due to be fully operational by January 2017. With some 27% of the world's 320 legal jurisdictions using English common law, it is anticipated that the proliferation of such courts will only continue (although it is highly questionable whether some of these courts provide a real alternative to international arbitration, Nigeria's commercial court being the most obvious example). In addition, parties frequently agree to arbitrate disputes which have English Law as the law governing the substance of the dispute in seats outside of England. Paris, Hong Kong, Singapore, Geneva, New York and Stockholm are some of the most popular choices, and many other jurisdictions are investing significant time and money to attract parties to their jurisdiction. In short, parties who are not 'captive' have many options available to them.

Turning now to the factors which may determine forum, the Queen Mary 2015 International Arbitration Survey (the "**Queen Mary Survey**") highlighted some factors that are relevant to party preference. Those factors are important because they indicate what will attract a party to a particular jurisdiction or forum and what will drive a party away:

a. 90% of survey respondents identified international arbitration as their preferred method for resolution of cross-border disputes;
b. 77% of survey respondents did not favour the inclusion of an appeal mechanism on the merits for arbitral awards in international arbitration;
c. 25% of survey respondents named national court intervention as one of the worst characteristics of international arbitration;
d. 18% of survey respondents named finality as one of the best characteristics of international arbitration.

The aversion which many parties had to international disputes being arbitrated in England pre-1979 may be contrasted with the reputation that London holds today as a leading centre for international dispute resolution (this was confirmed in the Queen Mary Survey in which London was named as the preferred seat, by some margin, and the seat most used by respondents over the last five years).

If avenues of appeal from arbitral awards are widened, it is not fantastical to predict that parties currently selecting London as the seat of arbitration for resolution of their cross-border commercial disputes will simply 'take their business elsewhere' and the river of cases currently resolved by arbitration in London will reduce to a stream and then a trickle, thereby removing such cases from the potential pool of cases that might be appealed to the courts, and might thereby contribute to the development of English commercial law.

Proposed solution 2 - section 45

By contrast with his first proposed solution, Lord Thomas' suggestion that section 45 of the AA 96 be used more frequently is less likely to cause alarm (or harm), since it would not require any amendments to existing legislation.

Section 45 permits parties to arbitral proceedings to refer "*any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.*" Importantly, such application may only be made with the agreement of all parties to the arbitral proceedings, or with the permission of the Tribunal (in which case the

court must be satisfied that the determination is likely to produce substantial costs savings and the application is made without delay).

In the recent case of *Secretary of State of Defence v Turner Estate Solutions Ltd*[9] the High Court had reason to consider the application of this section. A section 45 application was made by the Claimant on 4 February 2015 in respect of arbitral proceedings that were on foot. The hearing of the substantive dispute was scheduled for June 2015 and the parties had deferred the exchange of witness statements pending the court's decision. The application was heard on 30 March 2015 and judgment was issued on 30 April 2015. The speed with which the application progressed is noted because parties interested in making use of this procedure may have doubts about its procedural feasibility when arbitration is underway. In his judgment, Justice Coulson observed that there were "*surprisingly few authorities relating to s.45*" confirming that it is seldom used by parties to arbitration.

There are nevertheless some potential difficulties with this proposal. First and foremost, as Lord Thomas acknowledges, it is questionable whether greater use of s. 45 could be achieved without "*raising the spectre … of reintroducing what was perceived to damage London's attractiveness as a centre for arbitration*". Second, as this solution already exists and is little utilised, it is not clear what efforts might be made to "*encourage greater use of the power*" (aside from revising the guidelines) or whether such efforts would have any material effect on party uptake. Parties would ordinarily lose confidentiality of proceedings, a valued characteristic of international arbitration.[10] Further, if one party were to oppose the application, but the Tribunal permitted the application, the opposing party may well lose confidence in arbitrating disputes in England. On a larger scale, this could have the same deleterious effect as amendments to section 69. Lastly, if both parties resist the application, it is highly questionable whether any Tribunal would permit a section 45 application; the number of disputes which might find their way before the commercial court through this avenue is therefore likely to continue to be *de minimis*.

Proposed solution 3 - greater use of the courts

Lord Thomas' third proposed solution is the greater use of the commercial courts. It is in this context that Lord Thomas considers select characteristics of arbitration that are commonly cited as reasons for making arbitration a more attractive dispute resolution mechanism than litigation. These are (in Lord Thomas' view) (i) party autonomy and confidentiality, (ii) enforcement, (iii) speed; and (iv) low cost. This list may be contrasted with the characteristics most valued by survey respondents to the Queen Mary survey, which are, in order of priority:

— enforcement;
— avoiding specific legal systems / national courts;
— flexibility;
— selection of arbitrators;
— confidentiality and privacy;
— neutrality;
— finality;
— speed;
— cost;
— other.

Lord Thomas goes on to critique party autonomy, confidentiality, enforcement, speed and low cost, concluding that arbitration does not truly offer any advantage over litigation with regard to these characteristics.

Confidentiality

Lord Thomas queries whether arbitrations are truly confidential, referring to information leaks, private markets in the trade of arbitral decisions, and the potential for loss of confidentiality if enforcement requires entry into the public arena. These are risks which will always arise in relation to confidential information and although the approach taken from one country to the next will differ, case law supports privacy and confidentiality of arbitral proceedings: subject to parties agreeing otherwise, arbitrations in England and Wales are held in private, and subject to certain exceptions, there is an implied obligation of confidentiality on parties to the arbitration and the Tribunal.

Whilst statistics on the true number of arbitrations in England and Wales are hard to come by, of the hundreds of arbitrations conducted in England annually, very few of them ever become public, suggesting that confidentiality is, in fact, alive and well as a benefit of arbitration. The occasional publication of decisions on enforcement is nothing more than the tip of the iceberg.

Enforceability

Turning now to enforceability, Lord Thomas does not consider that this perceived advantage of arbitration is as 'clear cut' as might seem, observing that (a) national courts may accede to challenges to recognition and

[9] *State of Defence v Turner Estate Solutions Ltd* [2015] EWHC 1150 (TCC).
[10] 33% of respondents in the 2015 Queen Mary International Arbitration survey identified this as one of the most valuable characteristics of international arbitration.

enforcement of judgments under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and (b) challenges provide parties with another opportunity to delay proceedings, akin to the "Italian Torpedo" issue which became popular (or unpopular, as the case may be) under the Brussels Regulation I (but which is no longer possible under the Recast Brussels Regulation).

Arbitral awards and court judgments alike may be subject to challenge at enforcement stage. However, the most significant regime on recognition and enforcement of court judgments, commonly referred to as Recast Brussels Regulation, has only 28 Member States.[11] By comparison, the New York Convention, with 157 Contracting States, boasts a geographic spread which is unparalleled by any other multi-national or international regime on recognition and enforcement of judgments. Despite difficulties that parties will sometimes experience with recognition and enforcement of arbitral awards in particular jurisdictions, the New York Convention still provides parties to cross-border disputes with the best chance of enforcement.

Speed and low cost

Speed and low cost may be dealt with swiftly, since these characteristics are no longer seriously cited as advantages of arbitration. This is supported by the Queen Mary Survey in which only 10% of survey respondents cited speed as a valuable characteristic of arbitration; for cost, it was only 2%.

Attractiveness of the Courts

Lord Thomas refers to the steps being taken by the courts to increase their attractiveness to potential litigants. Whilst examples such as the Financial List and the Market Test Case Scheme are commendable, arbitration and litigation possess characteristics which in some instances are quite different, and it is unfortunately the case that in respect of some of the characteristics which attract parties to arbitration, the courts simply cannot compete. Enforceability and confidentiality have already been addressed. In addition, with reference to the list above, parties to litigation cannot select the judge who will preside over their dispute, nor control the procedure in quite the same way that parties to arbitration are able to do so (although we acknowledge that institutional arbitrations are not always as flexible as some parties might wish). Although a modern, efficient, innovative and agile court system is something we ought to strive for, it is unlikely to attract any significant proportion of users of arbitration.

Court sanctioned mediation – also encouraging resolution of disputes behind closed doors?

Lord Thomas argues that as a result of resolution of disputes *behind closed doors* (specifically, by arbitration) the potential for the courts to develop and explain the law is reduced. He also disagrees with the point taken by Lord Hacking (amongst others) that, as parties have freely chosen arbitration, the courts should not interfere. This philosophic point, taken to its logical conclusion, would exclude settlement of any case which might deprive the courts of the opportunity to develop or explain the law. Interestingly, this contradicts the courts' stance on mediation, which is strongly in favour of parties seeking to resolve their disputes by alternative methods of dispute resolution, and that "*litigation should be a last resort*".[12] Although a distinction may be drawn between disputes which settle pre-litigation and disputes which settle pre-arbitration (simply on the numbers, a percentage of pre-litigation disputes will not settle and the hearing of those disputes provides an opportunity for the courts to develop and explain the law; the same cannot be said of arbitration), it is nevertheless the case that the courts' active encouragement of ADR is as capable of retarding the development of the common law as arbitration.

Quantifying the impact of arbitration on development of the common law

What is perhaps most dissatisfying about this issue is the difficulty of assessing, accurately, the impact of international arbitration on the development of the common law in England and Wales. On the one hand, we have figures from Lord Thomas' lecture, in which he compares the 300 special cases "*in the years before 1979*" with a per annum average of 50 for the period between 2005 and 2006. Whilst it is widely acknowledged (both now, and pre-1979) that parties were referring cases to the courts by way of Special Case procedure when it was not appropriate to do so (such that comparative figures are of limited value), it is not disputed that whilst the number of disputes arbitrated in England and Wales has increased considerably, the number of appeals heard by the Courts on points of law has not increased (proportionately or otherwise).

On the other hand, we know that the Commercial Court is not suffering from an absence of disputes - in 2015, nearly 1,100 claims were issued by the Commercial Court and more than two thirds of these involved a party whose address was outside England and Wales.[13]

[11] It is also worth noting that the UK is unlikely to have the protection of this enforcement regime once the UK exits the EU. If something similar is not agreed with the remaining EU Member States, the ease of enforcement of an arbitral award under the New York Convention may become even more attractive for parties resolving their disputes in England and Wales (where enforcement may be required in an EU Member State).

[12] CPR, Practice Direction – Pre-Action Conduct and Protocols, paragraph 8.

[13] UK Legal Services 2016 Report, TheCityUK, Page 6, available at https://www.thecityuk.com/research/uk-legal-services-2016-report/

Without quantifying with a degree of accuracy the true impact of arbitration on the development of the common law, it will likely be difficult to make a case for change, particularly when the proposed changes are anticipated to have a markedly adverse effect on London's attractiveness as a centre for international arbitration.

Section 69 AA 96 in action

As a final point, it is helpful to consider a practical example of how parties may benefit from referring their case to the courts by virtue of section 69 AA 96 (in its current form). In late 2014, arbitral proceedings were commenced in relation to a dispute arising from the insolvency of the OW Bunker Group. The applicable rules of arbitration, the London Maritime Arbitrators Association Terms (2012), do not contain a waiver of the right to appeal in the way that many institutional rules do, and the parties agreed that the Award on preliminary issues was capable of appeal. The case was ultimately appealed all the way to the Supreme Court *PST Energy 7 Shipping LLC & Anor v O.W. Bunker Malta Ltd & Anor* [2016] UKSC 23 and the fact that the proceedings were expedited at every stage is evidence of the case's importance: in the application to appeal to the Supreme Court, the appellant referred to the many parties that would be affected by the Supreme Court's decision, including the '*hundreds of parties affected by the OW Group insolvency, for the bunker trade generally, which uses standard terms containing the three critical terms in this case, and more widely for almost anyone selling or buying goods under English law on terms which involve a RoT clause*', and parties to '*hundreds of LMAA arbitrations and numerous interpleader Court actions which were stayed, formally or informally, pending the final determination of the question to be determined*'.

This case neatly illustrates how section 69 AA 96 may be used to good effect.

Where to next?

Lord Thomas' lecture was clearly intended to generate debate, however owing to the damage that some of the proposed solutions may cause to London's attractiveness as a centre for arbitration, his cause has not been taken up with any enthusiasm.

As the position now stands, parties have the means to appeal to the courts from an arbitration award on a point of law (by virtue of section 69) or to refer to the courts a preliminary question of law (by virtue of section 45). It could be argued that the automatic waiver in many institutional rules may pose a problem, since most parties will not be alive to this issue when they agree to arbitrate under the rules of one of these institutions. However, if that were the case, one would expect the popularity of those institutions to wane over time, which does not appear to be the case.

For the reasons set out above, rather than expanding the avenues for appeal, a more palatable approach would be to focus on improving awareness of the scope of the AA 96 (particularly before parties enter into an arbitration agreement). For sectors where the development of the common law is considered to be particularly problematic, this process could be spearheaded by relevant industry groups. Where parties to arbitrations are capable of 'taking their business elsewhere', this 'middle ground' is more likely to assist with the development of English commercial law than increasing the scope for judicial intervention.

The full lecture is available at https://www.judiciary.gov.uk/announcements/speech-by-the-lord-chief-justice-the-bailii-lecture-2016/

ICC Rules Article 34.6

Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

LCIA Rules Article 26.8

All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

Sarah Grenfell
Partner, Disputes
T +44 20 7367 3549
E sarah.grenfell@cms-cmck.com

Exclusion of liability: not a taboo – a commercial reality

One common aspect of commercial contracts is the allocation of risk between the parties. This is achieved, in part, by clauses in contracts that exclude a party's liability for certain risks or limit the manner in which claims can be brought by a party. This article considers two recent Court of Appeal decisions on that subject.

The first decision, widely reported in oil and gas circles, related to a contract that excluded liability for consequential losses and, specifically whether that included wasted costs of third party suppliers which would not have been incurred but for the breach of contract.

The second decision related to a contractual provision in a SPA that required notice of warranty claims to be given as soon as reasonably practicable and in any event within 20 business days after the buyer became aware of the matter: a standard provision in SPAs.

Principles of construction of exclusion clauses

As a starting point, general rules of construction of contracts apply to exclusion clauses as well. As such the starting point is the language used by the parties. If the language is unambiguous then the court will not resort to its tools of construction and will give the language used its ordinary meaning. In doing so the English court will take into account other provisions of the contract and consider an exclusion clause in the wider context of the contract.

However, because the effect of exclusion clauses is to limit a party's liability, the English Courts tend to interpret such clauses strictly and require a party to have used clear and unambiguous words to exclude the type of loss being claimed against it. The Court is likely to prefer an interpretation that is consistent with the main purpose of the contract rather than one that defeats that purpose.

The party seeking to rely on the exclusion clause has the burden of proving that it applies to the loss being claimed against it. English Courts have tended to interpret exclusion clauses *contra proferentem*, i.e. against the party that seeks to rely on the exclusion. As such, where there is ambiguity in an exclusion clause, the benefit of doubt is given to the party who is claiming the loss.

Finally, legislative controls like the Unfair Contract Terms Act 1977 or Consumer Rights Act 2015 may also be applicable to certain exclusion clauses. This is not within the scope of this article and is not considered further.

We consider below two recent Court of Appeal decisions on construction of exclusion clauses.

1. Transocean Drilling U.K. Ltd v Providence Resources PLC[1]

Providence Resources PLC ("**Providence**") contracted with rig owner Transocean Drilling U.K. Ltd ("**Transocean**") to drill a well off the southern coast of the Republic of Ireland. Drilling operations were suspended due to problems with the rig. The delay gave rise to various disputes between the parties, in particular the right of Providence to recover from Transocean the 'spread costs' on the basis the delay was caused as a

[1] *Transocean Drilling U.K. Ltd v Providence Resources PLC* [2016] EWCA Civ 128

result of Transocean's breach of its obligations. The spread costs were described as the costs of personnel, equipment and services contracted from third parties that were wasted as a result of the delay.

Transocean argued that the liability for spread costs was excluded in the contact. This was because the contract contained a clause which provided that each party would hold harmless the other party in relation to consequential loss. Consequential loss was defined to include:

"loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption…".

Providence argued that the above exclusion was not engaged in relation to spread costs because those costs represented the costs of goods and services that were obtained and paid for but were wasted as a result of the delay caused by Transocean's breach of contract. As such, there was no "loss of use".

The first instance judge held that the consequential loss hold harmless provision was an exclusion clause. As such it should be interpreted narrowly and against the party seeking to rely on it. In applying this approach to interpretation the first instance judge held that Transocean was liable for the spread costs because the clause did not clearly exclude liability for such costs.

Court of Appeal decision

On appeal, the Court of Appeal overturned the first instance decision. The Court of Appeal held that:

1. the starting point for interpreting the clause was the natural and ordinary meaning of the words used by the parties. In this regard, the Court of Appeal took note of the Supreme Court decision in *Arnold v Britton*[2] where Lord Neuberger emphasised the importance that must be given to the language used by the parties in priority to commercial common sense;
2. applying the above approach the Court held that the words "loss of use" naturally refers to the loss of the ability to make use of some of kind property or equipment. The Court also held that the words in brackets in the clause after "loss of use" explain and expand the phrase "loss of use" by giving wide examples of the types of loss that fall within that phrase;
3. the mutual nature of the clause and its role as part of provisions allocating loss was indicative of an intention by the parties to give the words a broad meaning;
4. the *contra proferentum* rule could be applied when the language used by the parties is one-sided and genuinely ambiguous, i.e. equally capable of two distinct meanings. However, it has no part to play when the clause favours both parties equally, in particular, when both parties are of equal bargaining power; and
5. if the meaning of words used by the parties is clear that should not be overridden by the argument that the meaning denudes the contract of any meaningful obligations. The principle of freedom of contract is fundamental and requires the court to respect and give effect to the parties' agreement. If, as a result of incorporating several different provisions, the parties have effectively agreed to exclude liability for damages for any breaches, it is difficult to see why the court should not give effect to their agreement.

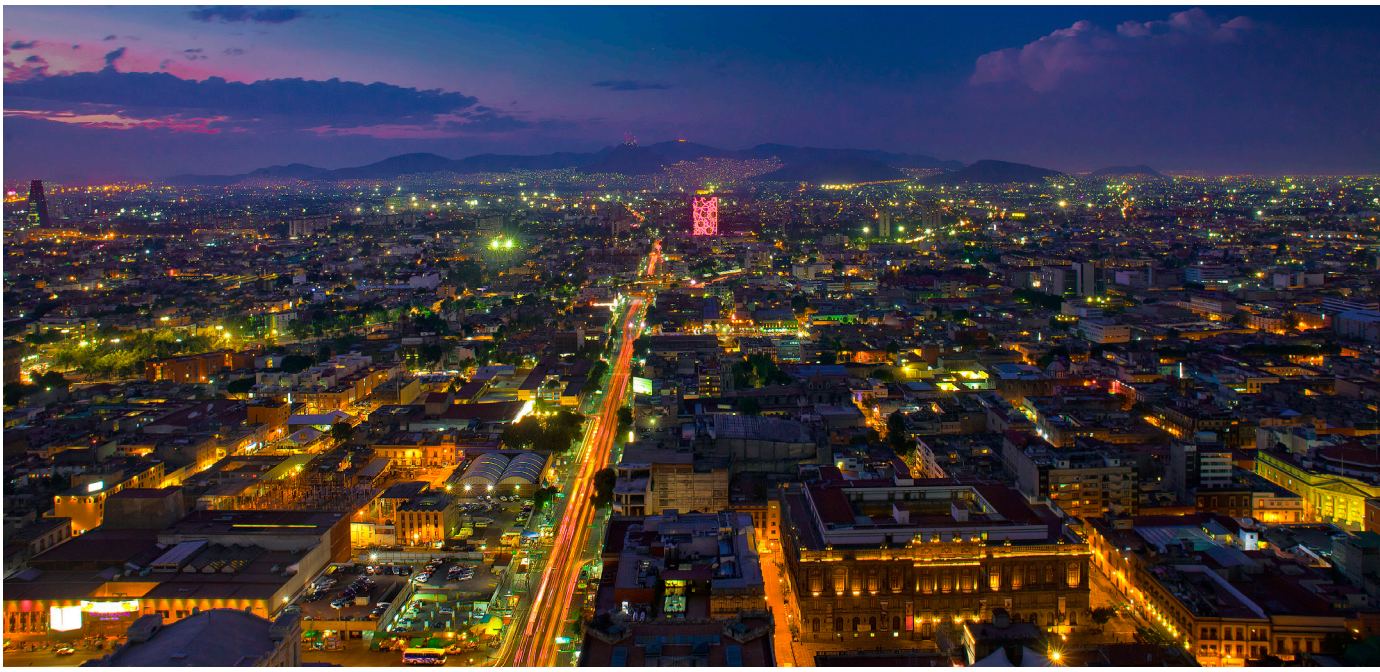
2. Nobahar-Cookson & Ors v The Hut Group[3]

Mr Nobahar Cookson and Barclays Private Bank & Trust Limited sold a company to The Hut Group. The SPA contained various warranties from the sellers. The SPA also contained contractual limitations on the seller's liability under the warranties. One such limitation was that the seller would not be liable for a warranty claim unless the buyer "*serves notice of the Claim on the Sellers…as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter*".

The buyer made a claim that the sellers were in breach of warranties. The sellers disputed the claim and stated that the buyer was time barred because the buyer had not provided the required notice within 20 business days of becoming aware of the facts giving rise to the warranty claim.

The buyer had served notice of its warranty claim on 6 February 2012. It was common ground between the parties that if it was held that the buyer had become "aware of the matter" by 9 January 2012 (being 20 business days prior to 6 February 2012), then its warranty claim would be contractually time barred. The first instance judge held that the buyer had become aware of the facts in relation to its warranty claim before 9 January 2012, and it was at this time that the buyer might have a claim under the warranties in the SPA. However, the judge held that this was not

[2] *Arnold v Britton* [2015] UKSC 36
[3] *Nobahar-Cookson & Ors v The Hut Group* [2016] EWCA Civ 128



sufficient to limit the buyer's claim because there was distinction between awareness of the facts giving rise to a claim and awareness of a proper basis for the claim. The judge held that the time limit in the SPA started from when the buyer became aware of the proper basis for its claim because the clause (quoted above) referred to being aware of the 'Claim', a defined term. The first instance judge held that the buyer only became aware of the proper basis for its claim upon receiving advice from its forensic accountants, which was after 9 January 2012. Therefore, the claim was not time barred.

Court of Appeal decision

The sellers appealed and the following three interpretations of the time at which notice of the claim should have been given were put before the Court of Appeal:

1. awareness of the facts giving rise to the claim (even if unaware that those facts did give rise to a claim);
2. awareness that there might be a claim under the warranties; or
3. awareness that there was proper basis for the claim.

The appeal was unanimously dismissed on the basis that the Court of Appeal held that the correct interpretation was awareness that there was proper basis for the claim. In giving the leading judgment Briggs LJ held that the ambiguity in the clause should be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analyses do not disclose an answer to the question with sufficient clarity. Briggs LJ was persuaded by the fact that the purpose behind the notice requirement was to prevent the buyer from pursuing claims previously kept up its sleeve, rather than to goad him towards analysis and obtaining advice about known facts sufficient to enable him to notify the claim within the stipulated 20 business days.

Briggs LJ also concluded that if the sellers were correct that the buyer was required to give notice of its claim upon awareness of the facts giving rise to the claim or that there might be a claim, this would severely limit the buyer's right to compensation for breach of warranty, without a sensible purpose. In order to achieve this, clearer words would be required.

Conclusion

The English Court is no longer prepared to accept that all exclusion clauses should be construed narrowly and against the party seeking to rely on it. These decisions are consistent with Lord Neuberger's approach in the Supreme Court in *Arnold v Brittan* and re-emphasise the importance of the freedom of contract and the need to preserve the sanctity of the meaning of the words used by the parties. Only if there is ambiguity in the words used by the parties, should the court consider the commercial purpose of the contract and the provision and adopt a narrow interpretation against the party seeking to rely on it.

Guy Pendell
Partner, Solicitor Advocate, Disputes
T +44 20 7367 2404
E guy.pendell@cms-cmck.com

Kushal Gandhi
Senior Associate, Solicitor Advocate, Disputes
T +44 20 7367 2664
E kushal.gandhi@cms-cmck.com

Expert evidence: the devil's in the detail

Expert evidence can be a crucial element of a dispute. It can make or break a case. It is important to ensure that an expert's report is well thought through and that the contents are relevant to the points in dispute. The recent case of *Flanders Community Centre Ltd v Newham London Borough Council*[1] is an important lesson to anyone reliant on expert evidence to succeed in their case.

Facts

Flanders rented a community centre in east London from Newham Council. The passing rent under Flanders' lease was one pound per annum (which reflected the poor condition of the property).

When the lease came up for renewal Flanders and Newham Council failed to agree terms for a new lease as Newham Council argued the rent should increase to GBP 23,000 per annum whereas Flanders wanted it to remain at one pound per annum. Since the parties could not agree, the level of rent payable fell to be determined by the Court under section 34 of the Landlord and Tenant Act 1954 (a statutory mechanism that allows tenants occupying property for the purposes of their business to ultimately ask the Court to determine the terms of the lease). The statutory provision requires the Court to have regard to a number of specified factors, the most important of which is the rent at which the property might reasonably be expected to be let in the open market by a willing landlord.

As is usual, both the landlord and tenant relied on expert valuation evidence to support their arguments as to how much rent should be paid under the new lease.

The judge found the expert evidence was unreliable because:

— The terms of the allegedly comparable leases which the landlord put forward were not available. Consequently it was not known whether they contained onerous and uncommercial requirements and so were truly comparable;
— the property type was not easy to value and a wide range of values per square foot was put forward;
— evidence as to what rent the tenant could afford was irrelevant;
— there was no evidence as to the discount to be applied for an onerous lease term, so the proposed rent was not evidence of current market value and the judge could not guess as to the discount.

As the expert evidence as to market rent was inadequate, the judge decided that the passing rent of one pound should be preserved compared to the rent of GBP 23,000 sought by the landlord.

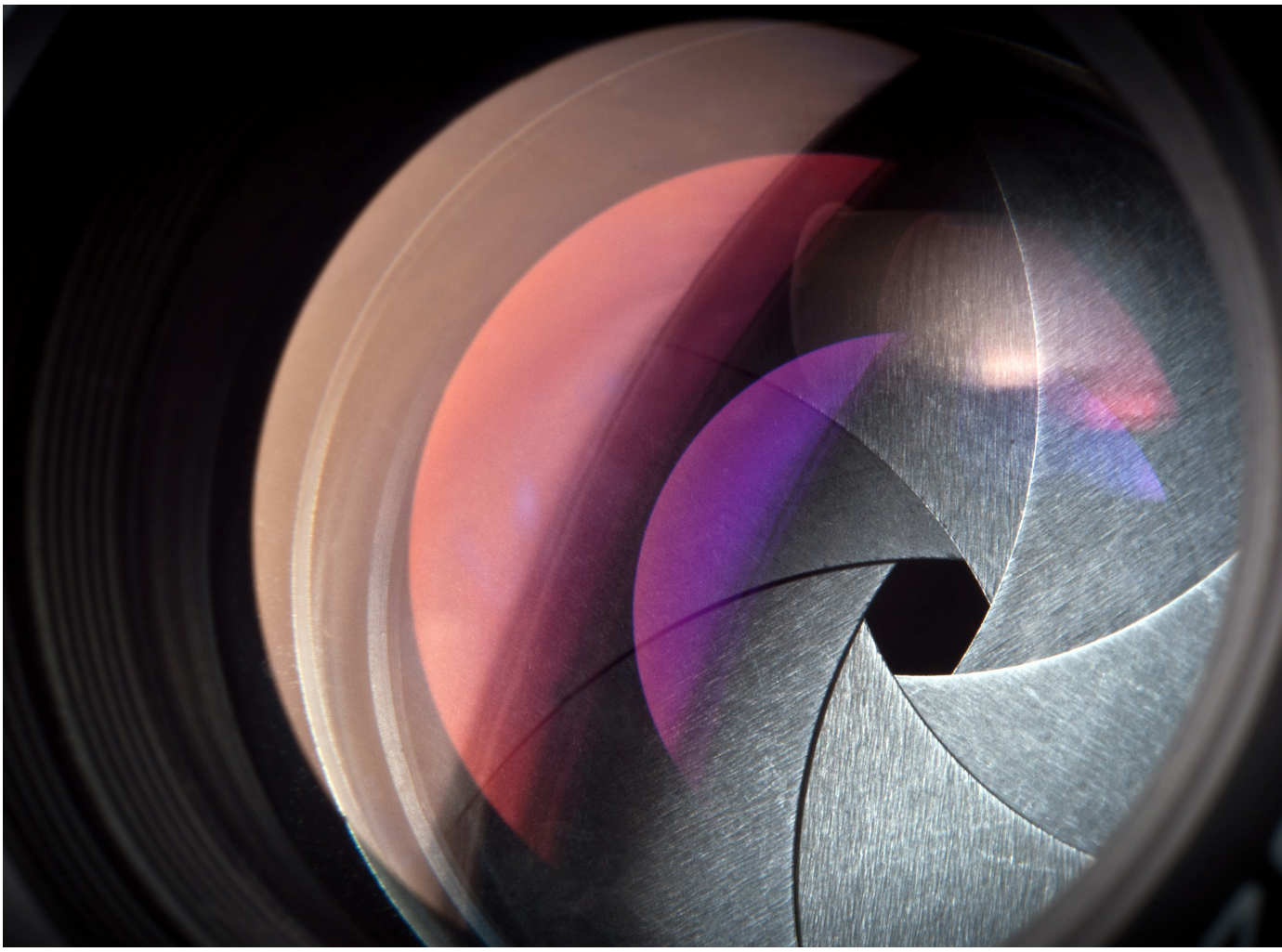
The council appealed. In endorsing the decision of the lower Court, the Appeal Court commented that:

"The judge was only obliged to address the arguments deployed by each side. It was not her task to think up different arguments that might have been advanced by one side or the other."

"there were no reliable comparables…the points of difference were not pleaded, and the significance of the points of difference were not valued…[the court] cannot guess as to how much of a discount there should be… the point is that no one had given her any help on that issue. She took what she thought was the most reliable evidence."

Since there was no reliable evidence of the market rent, the judge could have conducted her own analysis but was not obliged to in the absence of help from the parties. She was entitled to rely on the passing rent

[1] *Flanders Community Centre Limited v Newham London Borough Council* [2016] EWHC 1089 (Ch)



(accepted by the parties as a relevant factor) and the weight attributed to that was a matter for the trial judge.

Comment

It is the parties' responsibility to prepare their cases thoroughly. Care should be taken to instruct experts with appropriate expertise and knowledge to provide good quality and robust evidence both in writing and in the witness box, and instructions given to experts should be detailed and clear. Expert evidence can be expensive to prepare. However the risks of not getting it right can be even more expensive.

Where expert evidence concerns matters of value, it must be detailed enough, and supported by calculations and analysis of comparables where appropriate, to enable a Court to draw the conclusions you want. A Court has to understand the expert evidence and be persuaded that the evidence is robust. If there is insufficient evidence and what evidence there is appears unreliable, parties run a real risk of an adverse decision.

In the lease renewal proceedings at the centre of this case, it did not appear that the parties entertained alternative disputes resolution options. There is a structured alternative to court proceedings in lease renewals – Professional Arbitration on Court Terms. Had this been pursued a specialist surveyor would have been appointed to determine the rent and would have been able to use his own expertise to bridge the gaps in the evidence. If there are difficulties with expert evidence, then the well-advised ought to consider alternative means of disputes resolution, in order to mitigate the risk of an unfavourable decision.

Danielle Drummond-Brassington
Partner, Real Estate Disputes
T +44 20 7367 2768
E danielle.drummond-brassington@cms-cmck.com

Sarah Ellison
Associate, Real Estate Disputes
T +44 20 7367 3298
E sarah.ellison@cms-cmck.com

Intra-EU BITs and TTIP: *Quo Vadis?*

Investment arbitrations initiated by investors from one EU Member State against the government of another Member State have become commonplace in recent years. According to a recently published UNCTAD report,[1] by the end of 2015, 130 of the 698 known investor-State arbitrations were initiated under intra-EU bilateral investment agreements ("**intra-EU BITs**") or the Energy Charter Treaty ("**ECT**"), which is applicable in all EU Member States. There are nearly 200 intra-EU BITs in force among the EU Member States.[2] Following the proliferation of intra-EU investment disputes and in the context of negotiating investment protection provisions as part of wider external trade and investment deals, such as the Transatlantic Trade and Investment Partnership ("**TTIP**"), the EU and a number of its Member States are looking to create new ways of protecting investments. Investors relying on the existing treaty framework will need to keep this development in mind in their risk management strategies.

New approach to protecting intra-EU investments

The European Commission ("**EC**") has long questioned the permissibility of the continued existence of intra-EU BITs on the basis that they amount to an "*anomaly within the EU internal market*"[3] due to their partial overlap with the internal market provisions of the EU. Arbitral tribunals have rejected the notion that EU law has automatically superseded existing intra-EU BITs as a result of a host State's accession to the EU.[4] They have held that the protections offered to investors under EU law are not identical to those offered under intra-EU BITs, which typically provide eligible investors with direct access to an international arbitral tribunal independent from the host State.[5]

Ireland and Italy terminated their intra-EU BITs in 2012 and 2013, respectively.[6] On 18 June 2015, the EC initiated infringement proceedings against Austria, The Netherlands, Romania, Slovakia and Sweden with a view to compelling these five Member States to terminate their intra-EU BITs.[7] The EC has indicated that it is requesting information from, and is initiating an administrative dialogue with, the remaining 21 Member States that still have intra-EU BITs in place.[8] On 2 May 2016, Denmark reportedly initiated the process of terminating its nine intra-EU BITs.[9]

In principle, the termination of intra-EU BITs does not affect existing investments, which based on the so-called 'sunset clause' typically found in BITs remain protected for five or 10 years after termination. In 2009 Denmark and the Czech Republic removed the sunset clause before terminating their BIT. The effectiveness of such a move has not been tested in arbitral practice.

[1] United Nations Conference on Trade and Development (UNCTAD), IIA Issues Note, N0. 2 June 2016, Investor-State Dispute Settlement: Review of Developments in 2015, retrieved from http://investmentpolicyhub.unctad.org/Publications/Details/144.
[2] European Commission, Press release: "Commission asks Member States to terminate their intra-EU bilateral investment treaties", retrieved from http://europa.eu/rapid/press-release_IP-15-5198_en.htm.
[3] See for example, the European Commission Observations quoted in *Eureko B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 177.
[4] *Eastern Sugar B.V (Netherlands) v The Czech Republic*, UNCITRAL, SCC Arbitration No. 088/2004, Partial Award, 27 March 2007, para. 128.
[5] *Idem*., para. 165.
[6] Italy also withdrew from the ECT with effect from 1 January 2016.
[7] *Supra* footnote 2.
[8] *Id.*
[9] "*The end of intra-EU BITs is nearing*", retrieved from http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/

On 3 March 2016, Germany's Federal Court made a preliminary reference to the Court of Justice of the European Union ("**ECJ**") regarding the legality of intra-EU BITs, as part of an appeal against the enforcement of an investment arbitration award rendered against Slovakia.[10] The Federal Court requested a ruling from the ECJ that the BITs discriminate, in contravention of EU law, between EU investors of different national origins and that all EU investors should be able to access the protections of an intra-EU BIT.

While the ECJ proceeding remains pending, in April 2016, five EU Member States proposed to the EC a coordinated termination of intra-EU BITs along with a non-discriminatory regulation of cross-border investments in the EU. In a recently leaked non-paper presented to the EU Council's Trade Policy Committee, Austria, Finland, France, Germany and The Netherlands[11] proposed the replacement of the current pool of intra-EU BITs with a multilateral agreement among all EU Member States that would guarantee "*an appropriate level of substantive and procedural protection of EU-Investors so that the phasing-out of intra-EU BITs do not result in any gaps in the protection of cross-border investment within the internal market.*"[12] According to the proponents, the envisaged multilateral agreement would terminate all existing intra-EU BITs, including their so-called 'sunset clauses', with immediate effect and, by providing a continuing substantive and procedural protection to European investors, it "*would aim to avoid any potential financial liability of the Member States vis-à-vis their own investors*" in relation to the immediate termination of the intra-EU BITs.

In the proponents' view, EU investors would be able to continue to pursue and enforce their rights to protection through a three-tier dispute resolution structure, starting with litigation in the Member States' domestic courts, followed by an *ad hoc* mediation scheme and, as a last resort, a binding and enforceable investor-State dispute settlement mechanism. The delegations of the five Member States put forward three alternatives for binding investor-State dispute settlement: (1) the settlement of investor-state disputes by the ECJ; (2) the creation of a "*permanent investment court*" modeled on the EU Unified Patent Court; and (3) reliance on the Permanent Court of Arbitration ("**PCA**") in The Hague. The proponents have stated their preference for the PCA alternative as the quickest and most cost-effective solution while suggesting that the proposed multilateral agreement contain dispute settlement provisions "*modeled on the recent EU proposal for an Investment Court System in the TTIP and other EU trade agreements (permanent arbitrators, strict ethic rules, appeal facility, etc.)*". The difference with the dispute resolution mechanism proposed by the EU for the TTIP would consist of the use of the PCA's existing list of State-nominated arbitrators.

However, the five EU countries recognise that in the long term a "*permanent court system*" would be more in line with the EU's new policy on investor-State dispute settlement and they put forward the PCA alternative only as a provisional solution, to be replaced by a permanent solution for investment disputes within the internal market. They have offered to participate in the drafting of the legal text in furtherance of their "*compromise solution*" for intra-EU BITs.

It remains to be seen if the proposal by the five Member States will be implemented. In the context of the current uncertainties surrounding intra-EU BITs, EU investors would be wise to consider (re-)routing their investments in an EU Member State through a vehicle incorporated in a non-EU member State that has a favorable BIT with the host EU Member State in advance of any claims becoming ripe.

New approach to protecting investments under the TTIP

Under the Lisbon Treaty, in force as of 1 December 2009, a transfer of competence from the Member States to the EU has taken place regarding foreign direct investments and the protection of investments. The EU exercises its exclusive competence in respect of foreign direct investment by negotiating trade and investment agreements with countries outside the EU. One such agreement is the TTIP, the largest bilateral trade and investment pact ever negotiated.

In September 2015, the EC released the EU's proposal to the US for the TTIP to provide for the creation of permanent first-instance and appeal tribunals comprising publicly-appointed judges. Under the proposal, in contrast to arbitrations conducted under the traditional investor-State dispute settlement mechanisms, the investor-claimants would have no role in the formation of the arbitral tribunal in a given case. Any claims would still be heard under the auspices of the World Bank's International Centre for Settlement of Investment Disputes (ICSID), the UN Commission on International Trade Law (UNCITRAL) or other arbitration

[10] "*Bundesgerichtshof legt Europäischem Gerichtshof Fragen zur Wirksamkeit von Schiedsvereinbarungen in Investitionsschutzabkommen vor*", press release of Germany's Federal Court no. 81/16, published on 10 May 2016 on http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=1&anz=82

[11] "*Intra-EU Investment Treaties Non-Paper from Austria, Finland, France, Germany and The Netherlands*", 7 April 2016, retrieved from https://www.tni.org/files/article-downloads/intra-eu-bits2-18-05_0.pdf

[12] *Id.*

rules agreed by the disputing parties. As in the current ICSID system, TTIP awards would not be subject to any review by national courts. The draft text responds to growing ethical and transparency concerns that have dominated public debate in recent years. For example, a disputing party is required to disclose to the other party and the tribunal if its claim is third-party funded. The recently adopted UNCITRAL Transparency Rules would apply to investment disputes and add certain transparency obligations.

If adopted, the proposed investment court system would herald a new era in investor-State dispute settlement. The EC has announced that, in parallel with the TTIP negotiations, it will start work, together with other interested countries, on the establishment of a permanent International Investment Court. At the time of writing, there were no reports that the US would be prepared to accept the EU's TTIP proposal concerning a jointly established permanent investment court.

On 29 February 2016, the EC announced that, in the context of the legal review of the negotiated Comprehensive Economic and Trade Agreement ('**CETA**'), it has reached an agreement with Canada concerning the replacement of the investor-State arbitration mechanism traditionally encountered in BITs with a system establishing a permanent multilateral investment court of fifteen members.[13] The EC emphasised that the revised CETA text "*is also a clear signal of the EU's intent to include this new proposal on investment in its negotiations with all partners.*"[14]

It remains to be seen if the EU will be successful in implementing its recalibrated investment policy in the internal market and in the new trade and investment deals negotiated with its partners. Savvy investors and their advisors will be keeping a close eye on these developments.

Following the UK's withdrawal from the EU, it is reasonable to expect that any existing trade and investment agreements entered into by the EU with non-EU states will cease to apply with respect to the UK, given that those treaties applied to the UK in its capacity as an EU Member State. However, it is unclear how the process of unravelling would unfold and whether any "sunset clauses," which guarantee post-termination remedies for covered investors during a certain period (typically 10 years), might still apply in this situation. Also, it is highly likely that the UK will have to negotiate its own trade and investment agreements with its trading partners, including the US and Canada. The nearly 100 UK BITs, including 11 BITs with EU Member States, will not be affected by the UK's exit from the EU.

Pieter Bekker
Partner, Disputes
T +44 20 7367 3537
E pieter.bekker@cms-cmck.com

Csaba Kovacs
Senior Associate, Disputes
T +44 20 7367 3485
E csaba.kovacs@cms-cmck.com

[13] "*CETA: EU and Canada agree on new approach on investment in trade agreement*", press release of the European Commission, 29 February 2016, retrieved from http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468
[14] *Id.*

Access to Justice Act 1999: Proposed changes to routes of appeal

The recently published draft *Access to Justice Act 1999 (Destination of Appeals) Order 2016* (the "**Order**") makes provisions determining the court to which an appeal should be made. The Order is intended to simplify the process and ensure that, as far as possible, an appeal should be heard by the next level of judge rather than only in the Court of Appeal.

Key changes

- The proposal in the Order is that appeals from the County Court should now be heard in the High Court instead of the Court of Appeal.
- Further, in an attempt to speed up the process, appeals routed to the High Court by the Order will be heard by a single judge with the relevant expertise for the matter in hand.
- As the current process requires a hearing before a court of up to three Lord Justices of Appeal in the Court of Appeal there is a simple benefit in avoiding the need to manage multiple diaries.
- The Order will empower the Lord Chancellor to provide, by order, which of the County Court; High Court; or the Court of Appeal is the most appropriate to hear the appeal.
- It will also considerably widen the definition of "judge of the county court" – this will ensure that appeals from decisions of a District Judge (or a judge of the County Court of similar level) sitting in the County Court continue to be heard by a Circuit Judge (or another judge of the County Court of similar level) rather than the High Court so as not to be overly burdensome on the High Court judges.
- Appeals from the High Court will be to the Court of Appeal, with exceptional cases leapfrogging to the Supreme Court, as is currently the case.

Aims of the Order

The aim of the Order is to streamline the process of an appeal. It is clearly felt that the High Court has the capacity to absorb the extra work. Fundamentally, allowing for appeals re-routed from the Court of Appeal to the High Court to be heard by only one judge should lead to a reduction in wait times for those appeals and benefit the flow of cases in that court.

With fewer appeals being heard in the Court of Appeal, there should be a reduction in waiting times there too thereby allowing for more effective and expeditious determinations of other appeals.

The Order hopes to provide for better use of judicial resources and court staff time, as well as better justice for litigants by making it much easier for litigants to understand the correct route of appeal. This is however subject to the right of the judge to order otherwise.

Conclusion

Any attempt to reform the Court process, especially that involving the complexities of Appeal, is to be welcomed. However the reality is that the Court system in England and Wales is already stretched at all levels and so the impact remains to be seen.

Emma Pinkerton
Partner, Real Estate Disputes
T +44 20 7367 2065
E emma.pinkerton@cms-cmck.com

Emily Gardner
Trainee, Real Estate Disputes
T +44 20 7367 3764
E emily.gardner@cms-cmck.com

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CMS Cameron McKenna LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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