

C/M/S/ Cameron McKenna



# Litigation

Annual review

January 2006

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## Foreword

Three cases dominated the litigation landscape in 2005, each staking a strong claim to be the *Jarndyce v. Jarndyce* of our times, and once again, lawyers are cursed as the only sure winners.

First, the Railtrack saga showed how hard it is to succeed in class actions in the UK – as 49,000 shareholders failed to persuade the court that Stephen Byers had acted maliciously or actively sought the company's collapse.

Second, the BCCI liquidators dropped their £1 billion claim against the Bank of England, but not until more than £100 million had been swallowed up in legal costs. Responsibility for banking supervision was taken away from the Bank of England in 1997, suggesting that it had sustained some reputational damage even though the claim did not ultimately succeed.

Third, Equitable Life abandoned claims against former auditors Ernst & Young and fifteen former directors in a series of humiliating climb-downs, leaving already beleaguered policyholders with even less money in their pension pots.

The judgment of hindsight tells us that all three cases may be a powerful advert for what might have been had they used alternative forms of dispute resolution. In this review, we certainly extol the virtues of ADR in its various forms. But then we have good things to say on all sorts of topics.

We spare a thought for litigation too, as the cases brought in the High Court and County Court continue to fall in number, but take longer to be heard. According to the Courts Service, the cases that are brought tend to be more complex. This suggests that the right cases are getting to court, and that our three *Jarndyces* are not a representative sample.

We've worked harder than ever to make this review an interesting read for the casual browser, not the expert: every article on a page, a ban on jargon and stuffiness and topics reflecting the enormous variety of specialisms within our disputes practice. If you enjoy what you read, please let us know.

Wishing you – and us – a successful 2006.

**Tim Hardy**

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*Tim Hardy, Partner*



Rob Hickmott

**Position**

Partner

**Specialist areas**

Banking and insolvency based litigation

**Career highlight**

Acting for Government in relation to the administration of Railtrack PLC

**Currently working on**

My next trial is a knowing receipt claim against a large spread-betting company

**Wish for 2006**

That the other side will realise that resistance is futile.



*If an employee has been siphoning-off company cash... trust law can sometimes be used to recover it.*



## Corporate Recovery

# Would you like cashback?

Bored with waiting in line for a few pence in the pound? When a customer goes bust, one way to push to the front of the queue is to prove that he doesn't just owe you money, he holds it in trust for you. Perhaps easier said than done – but still entirely possible if you know your way around basic trust law and have drafted the documents properly.

If, say, you sell insurance policies through a broker or agent, you could make sure that all premiums are held in trust for you if the broker goes bust.

First, you need some trust wording in your contract with the broker - nothing too fancy, just an acknowledgement that premiums are held in trust on your behalf and will be kept separate from other money. (You also need a broker who will comply with this wording.)

Then – the icing on the cake – make sure you tell the broker's bank that the money in the account is held in trust for you to stop them setting-off money in the account against an overdraft.

But this isn't the only way in which trust law can help when things go wrong. If an employee has been siphoning-off company cash (it's more common than you think), trust law can sometimes be used to recover it.

First, look to see where the money was paid (perhaps to a bank, a stockbroker or a spread-betting company) and then ask yourself if the recipients should have had suspicions about where the money came from. If large amounts have been transferred, should it have struck them as unusual and needing to be checked? Did they know what salary your employee (their client) was on? Were the payments excessive for someone of his means? If so, ask a judge for pre-action disclosure – it could reveal internal emails and other evidence where the transactions have been identified and commented on as unusual account activity.

If the recipient has thought it worthy of reporting to the National Criminal Intelligence Service as a suspicious transaction, that report would also be discloseable. If you can then show that he continued to accept payments after becoming suspicious, it is likely that (as we lawyers say) his "conscience will have been affected" and you will have a claim. Lawyers call it knowing receipt – you might just regard it as cashback.

**Rob Hickmott**

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## Arbitration

# Don't hesitate, arbitrate

Arbitration is a private deal to keep disputes out of court yet still resolve them in a judicial way. But why bother? The reasons may be more compelling than you think.

Globalisation has opened new markets overseas. In an ideal world, international dealings would be sealed on a virtual handshake. In the real world, you need a written contract to spell out your rights if something goes wrong.

But in whose courts, whose laws, whose language? A simple choice between home and away may build inequality into the contract – and still not solve the real problem. This is that contracts being performed throughout the world will be breached throughout the world. Court judgments may be easily obtained in one country but not so easily enforced in another. Often, the claim has to be proved again where the debtor or his assets are.

Thanks to the 1958 New York Convention, arbitral awards made in one signatory state can be enforced in 137 other signatory states more easily than court judgments. But the benefits don't end there.

For starters, arbitration can be conducted in private and confidentially. Going to court is a good way to wash dirty linen in public.

Arbitration lets you choose your own judges – each party usually nominating one arbitrator who between them choose a third. Because the majority rules, decisions can't be skewed by a rogue appointee. If you like, you can choose a neutral venue for the hearing and a neutral language too.

Arbitration is reassuring because it follows internationally agreed rules. There are many versions, each approved by a different but unimpeachably neutral body, such as the ICC, LCIA or American Arbitration Association. This is particularly helpful when one party is used to an adversarial court system, as in Australia or USA, and the other is used to an inquisitorial system, as in many European countries.

Arbitration can save time – and time means money – because the arbitrators can tailor the procedure to the dispute and rights of appeal are more limited. And if both sides agree, they can forego appeals completely.

Best of all, the power and possibility of arbitration can be secured by slipping one innocent-looking clause into your contract's boilerplate – completely standard, utterly unobjectionable and almost invisibly levelling the playing field. Let arbitration prove its worth to you in 2006 – it could be the best thing you do all year.

**Neil Aitken**

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Neil Aitken

#### Position

Partner, Head of  
Commercial Litigation

#### Specialist areas

International arbitration

#### Career highlight

Publication of the CMS Guide to Arbitration (2nd edition now available)

#### Currently working on

A variety of developing disputes

#### Wish for 2006

Resolution!



*Arbitration can be conducted in private... Going to court is a good way to wash dirty linen in public.*





Jessica Burt

**Position**

Solicitor

**Specialist areas**

Product liability & regulatory (particularly food) and health and safety

**Career highlight**

Success in striking out a group action at the Court of Appeal

**Currently working on**

Preventing the next group action!

**Wish for 2006**

A tasteful bridesmaids dress for my sister's wedding

## Healthcare

# Nanny says eat... but at your own risk

It's a wonder we are brave enough to leave our beds in the morning. Life seems to be becoming more and more of a risky business, perhaps due in part to media hype but also in some measure to warnings on every product about the risks we accept by using them. It takes a 'risk of fall' label on every ladder to keep our feet on the ground, it seems.

And what about food? Should we be warned that chocolate is fattening? Each of us has different nutritional needs which are themselves constantly changing. We only have to look on the back of most packaged food to see how much fat, salt and other ingredients they contain.

But apparently, this is not enough. The Food Standards Agency wants to introduce a traffic light system so we can tell at a glance whether to stop, go or hesitate about levels of total fat, saturated fat, sugar and salt in our shopping trolley. Far from easing our progress down the supermarket aisles, this may only produce mental gridlock.

With the rise of obesity, it is hard to decry the merit of advocating healthier diets. But we can enjoy the occasional treat and still have a healthy diet. However, the Food Standard Agency prefers not to let us take responsibility for our diet within a guideline daily allowance but to seek to judge each individual food item. It's probably easier for a government to vilify the humble chocolate bar than to improve school sports facilities.

And what of the millions of pounds in wasted food containing Para Red and Sudan 1 in quantities so minute they were often undetectable? Apparently, where there is scientific uncertainty, food risk assessments must err on the side of caution. But uncertainty is in the nature of science and scientists – it is a brave company that takes a robust line on this.

By some standards, the UK is a bastion of common sense. For example, our courts have ruled that we should expect hot drinks to be hot and not blame the maker if we scald ourselves. Despite this, most hot drink containers now include a warning.

Where there is risk, there should be choice. Earlier this year, Hampstead Heath swimming club forced the local council to treat them as adults not potential litigants by letting them swim at their own risk without supervision.

Now how about the rest of us?

**Jessica Burt**

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## Employment

# Challenging retirement

No employee likes to be told they're no good. No employer relishes the prospect of telling them. For the ones with years of good service under their belt, it might seem easier to hang on a while, call it retirement, and let them depart gracefully.

From October 2006, it won't be quite so easy. Compulsory retirement at 65 or above can still be enforced, but employees will be able to claim unfair dismissal. Where you are imposing a compulsory retirement age below 65, you must be able to justify your choice of age. In either case, you must give employees a chance to talk you out of it.

It works like this: between twelve and six months before it would happen, employees must be told of the retirement date planned for them and that, if they want, they can ask to carry on working. If they don't want to retire, you must meet them to discuss the situation. You must consider the request but don't have to give reasons if you reject it. Be ready, though, to change your mind if the employee makes out a good case for staying on.

If you don't follow the procedure, you could be liable for unfair dismissal with an extra eight week's pay on top of the usual compensation.

If your reasons for wanting to retire employees are complicated – perhaps prompted by nagging concerns about their lack of productivity or ambition, failure to adapt to new technology or working practices, or difficulty adjusting to a youthful boss or working culture – beware. You may call it sparing their feelings but a tribunal may call it unfair dismissal and, possibly, indirect age discrimination.

If you let some people stay on and make some leave, your decisions must be consistent and untainted by their performance or personality. If you go ahead and impose retirement on everyone, then your employees will claim that you are only going through the motions of following this procedure, and that their retirement is unfair.

The regulations are still in draft and may change before they become law. Even so, the time to prepare is now. Is your contractual retirement age below 65? Has it been applied uniformly? Which employees are due to retire from October 2006 onwards? Do your managers need training to deal with requests to continue working? Put aside any thoughts of retirement – you have work to do.

### Philip Cameron

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Philip Cameron

#### Position

Solicitor

#### Specialist areas

Employment and litigation

#### Career highlight

Victory (including winning a counterclaim) in a long-running piece of litigation

#### Currently working on

Various claims including race discrimination, disability discrimination, whistleblowing, unfair dismissal and breach of contract.

#### Wish for 2006

Poverty made history



*You may call it sparing their feelings but a tribunal may call it unfair dismissal...*





Tony Marks

**Position**

Partner

**Specialist areas**

Litigation in financial services, energy and other regulated markets

**Career highlight**

Obtaining a judgment against the Russian Government for a Russian oligarch in the European Court of Human Rights in Strasbourg

**Currently working on**

Litigation from the split capital trust crisis.

**Wish for 2006**

Government go-ahead for a new Commercial Court building

## Fraud

# Floating standards

The rapid demise of Refco, a US futures broker, has been well publicised. On 11 August 2005, the company floated on the US stock market with a market capitalisation of \$2.8 billion. On 25 October, it filed for bankruptcy protection in the US courts. What went wrong and why?

It has been reported that approximately \$430 million worth of Refco debt was hidden by the use of a private company under control of the chief executive. It is claimed that the debt was concealed using a series of multi-million dollar loans in conjunction with at least one of Refco's main clients. The concealment appears to have gone on for a considerable period and pre-dated the float.

In September 2005, questions about the debt were raised by an internal accountant at Refco and by its external auditors. It is not clear why the debt had not been disclosed as a related party transaction in Refco's financial statements. In a post-Enron world, it is surprising that Refco floated without confirming that it was compliant with Sarbanes-Oxley.

It has been reported that there was a specific note in the prospectus that Refco would be exposed to risks relating to the evaluation of internal controls and that it intended to achieve compliance by February 2007. It is probably too early to understand why the nature of the loan got past the auditors and other advisers at the time of flotation. However, some general conclusions can be drawn.

First, it is clear that the futures broking industry is a highly fragile one which relies heavily on customer confidence. Refco's initial statement assured customers that the debt had been repaid. This nevertheless led to a flight of confidence by its customers.

Second, it is clear that no amount of checks and controls by advisers can fully counter the effect of a dominant boss. This feature was also present in the collapse of many leading UK companies in the 1980s and 1990s.

Third, the need to comply with numerous detailed rules as to systems and controls will not deter somebody who is determined to find a way to window-dress or manipulate company accounts. Broad principles of corporate governance are needed to deter fraud and raise ethical standards within companies rather than a system which relies solely on detailed rules.

**Tony Marks**

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## Pensions

# Pensions schemers

Pension schemes have had a rough ride: stock market reverses, low interest rates and members inconveniently living longer than expected. Where there is financial disappointment, there is usually a search for someone to blame.

It's no surprise, then, that litigation involving pension schemes has risen markedly. There are technical issues behind this – but are there also lessons of general application?

First, remember that the money doesn't belong to the trustees. Knowing that costs will be met from scheme assets, trustees can sometimes be tempted into overly-speculative claims or overly-uncompromising defences. But, as the claim proceeds, the pressure will mount. This is particularly so where the scheme is winding up and there is no employer to pick up the tab.

Consider the parables of the failed Equitable Life and BCCI litigation. The intended beneficiaries of those claims have been unstinting in their criticism of those responsible for adding substantial legal costs to their existing miseries. Remind them what losing trustees can expect.

Second, remember that most trustees are not professionals. This makes them vulnerable to over-optimistic assessments from their advisors, leading to rash litigation. However, their advisors rarely possess pensions and litigation expertise in equal measure: if the claim is litigation led, undermine their pensions expertise; if it is pensions led, attack the commerciality of their litigation advice.

Third, look for conflicts of interest. It is surprising how often the trustees involved in bringing a claim are also implicated as contributors to the loss. Their minds will be wonderfully concentrated when you point out to them that, by choosing to fight on, they would have to stand down as trustees. Few trustees agree that their removal would be in the scheme's best interests.

And the advisors may be in a similar position. Their relationships with individual trustees can be close and longstanding. More often than you might think, there are tactical opportunities arising from conflicts which advisors have not dealt with.

Fourth, talk to the company. If there is a live sponsoring employer attached to the scheme, they are the ones with the primary commercial interest and, thus, the best reason to pursue compromise.

As in so many areas, success in pensions litigation comes from identifying and using your opponent's sensitivities. The sensitivities may be peculiar to pension schemes but the methods for exploiting them are surprisingly familiar.

## Mark Atkinson

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Mark Atkinson

### Position

Partner

### Specialist areas

Pensions – professional negligence and directions applications for trustees

### Career highlight

Explaining the technicalities of contracting-out of SERPS through an interpreter – it almost made sense in Russian

### Currently working on

Lots of defence work resulting from the funding problems of pension schemes

### Wish for 2006

UEFA Cup glory for Middlesbrough FC



Rebekah Mantle

**Position**  
Solicitor

**Specialist areas**  
Media litigation

**Career highlight**  
Making the first successful privacy and fairness complaint to OFCOM

**Currently working on**  
Winning cases!

**Wish for 2006**  
A long-running case in the Bahamas...

## Media

# Unwanted exposure

Companies beware: undercover reporting is on the increase. Programme makers will either arrive unannounced at your premises and openly film your workers, or plant an undercover reporter in your workforce and secretly film goings-on. What can be done?

To protect your company's reputation, you first have to know your rights. Dust off your copies of the Ofcom Code and the BBC Editorial Guidelines. Separate rules apply to open and secret filming.

Programme makers generally need permission to film your company or employees openly if (as is likely) it infringes their privacy. However, they won't need your consent – which means they won't seek it – when they can show that the public interest outweighs the right to privacy.

However, it is only acceptable for them to 'doorstep' you – filming an interview without prior warning or consent – where you have refused their request for an interview.

Sometimes, they will seek consent from an employee or someone else without proper authority. In this situation, you should tell the broadcaster immediately that the authority is unauthorised.

By definition, you only find out about secret filming after it has happened. The codes only allow it if it is in the public interest, necessary to the credibility and authenticity of the programme, and shows material that could only have been obtained through secret filming. It can't be used simply to add gloss and colour to a story.

Once you know that filming has taken place and is likely to be broadcast, ask the broadcaster how you and your company are going to be portrayed. If criticisms are going to be made, you are entitled to be given a 'timely and appropriate' opportunity to respond before the programme is aired.

You may want the broadcaster to include a carefully crafted statement putting your side of the story or to conduct an interview with your company spokesperson. You may also wish to explain your concerns about accuracy, fairness or privacy and to question whether the codes allow him to film as he did.

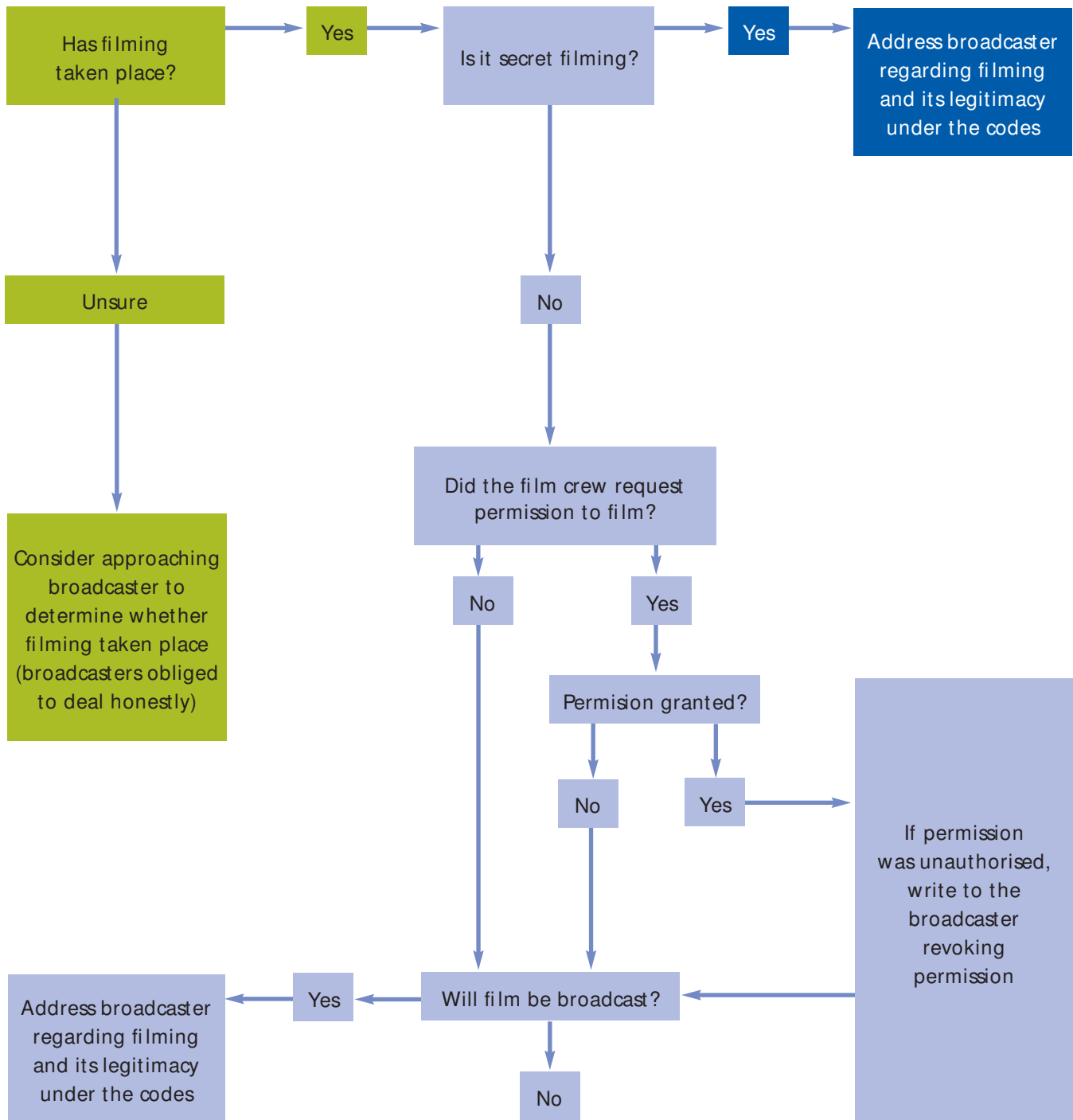
Damage limitation is still possible: the codes require the broadcaster to deal with you honestly and fairly. He may accept your concerns or he may not but, if he does, you may be able to ensure that some parts of the film are not broadcast and that your side of the story is more accurately and fully told in the final edit.

**Rebekah Mantle**  
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*...the codes require the broadcaster to deal with you honestly and fairly.*







Tim Hardy

**Position**

Partner

**Specialist areas**Litigation, arbitration  
and mediation**Career highlight**Acting as mediator and resolving  
the dispute two minutes after  
both parties donned their coats  
to leave**Currently working on**Commercial court action  
between shareholders arising  
out of a contested takeover bid**Wish for 2006**Time to play with my  
Merlin Rocket

## Mediation

# A win-win solution

Businesses spend well over a third of their legal budget on litigation – and every major dispute costs an average of 477 working days in management time. These are some of the findings from our survey of business disputes, conducted jointly with CEDR, the Centre for Effective Dispute Resolution.

Disputes are an ever-present feature of modern corporate life and they are rarely a welcome one. Apart from being a distraction, they can cause those involved worry, uncertainty and great expense. Fear and suspicion can quickly set in where reason and calm would be more useful. Worst of all, the dispute can get personal.

Four out of every five respondents told our survey that, compared with litigation, mediation is a much more effective way to resolve disputes and reduces legal costs. Three in every four say it reduces delay too. Yet four in five say they have never or only occasionally used it. In summary, everyone agrees that mediation is a great idea – but only for others.

Why is this? When disputes affect individuals, whether corporately or personally, they find more reassurance in resolution processes offering formality, structure and finality. They assume they will win, so why should they settle for anything less than the absolute victory a court judgment will give them? Unfortunately, certainty in law is a rare commodity.

At the outset, litigants want to know how long it will take and how much it will cost. Since, they don't teach psychic powers at law school, the answers can only be predictions; and the assumption that parties will co-operate is seldom correct. While mediation can produce favourable outcomes in terms of both cost and delay, it is not favoured for one simple reason.

This is that mediation usually lets the other side win too. Anything that admits another party might be right, or have a relevant point, is seen as weak. On the contrary, it requires unusual strength of purpose and pragmatism.

All too often, disputes are complicated by so much heat and fog that just solutions lying somewhere between the absolutes of victory and defeat are not considered until shortly before trial. But early mediation is most effective, allowing the parties to explore every shade of grey before positions are entrenched. In this way, commercial disputes can find commercial solutions. For that reason alone, boardrooms everywhere should be prepared to use it from the outset of every dispute.

**Tim Hardy**
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## Intellectual Property

# Patently obvious

Expert witnesses play an important role in many kinds of dispute but in patent litigation more than most. Often, they are the difference between winning and losing.

Patents are 20-year monopoly rights. To qualify for patents, inventions must be new and inventive, which largely depend on factual evidence. In particular, an invention is not patentable if it is merely an obvious development of earlier practice.

But obviousness can be a rather subjective judgement: very little is obvious to the ordinary man on the street; and rather too much to the world-leading expert. To set the right benchmark, the court has to use its own invention: a hypothetical skilled reader who is aware of everything invented when the patent application was filed.

The kind of expertise your witness must possess is that of knowing what would be obvious to him. So how do you find such an expert?

**First**, cast your net wide as well as deep: search other jurisdictions as well as your own. Meet candidates face to face. Take up references.

**Second**, make your choice early – before the start of proceedings if you can. Their views should help you judge the strength of your case and decide how to present it.

**Third**, make sure they are good witnesses as well as experts. Don't just rely on academic credentials; rate them for bedside manner, mental agility and powers of expression too.

**Fourth**, make sure they know what to expect. If they haven't given evidence before, take them on a court visit. If they lack court skills, you cannot coach them on specifics but you can give them general guidance, such as how to spot the assumption buried in the question, how to address their answers to the judge – and so on.

**Fifth**, check their availability. Working experts are better than retired ones, but have more crowded diaries. Video conferencing can lose much of the impact their evidence would have in person, so make sure they are free when you need them.

**Sixth**, keep them informed but not involved. Experts who get sucked into the winning and losing may forget their overriding duty to the court, modify their evidence to please their clients and lose all credibility in the process. If you need someone to help you prepare, hire a second expert.

Follow these six rules and you won't go far wrong. They may seem patently obvious – but they work.

**Nick Beckett**

[nick.beckett@cms-cmck.com](mailto:nick.beckett@cms-cmck.com)



*Nick Beckett*

**Position**

Partner

**Specialist areas**

Patents, IP

**Career highlight**

Successful settlement of complex high-value arbitration for Japanese pharmaceutical company

**Currently working on**

First ever UK streamlined patent litigation dealing with issues of infringement and validity separately

**Wish for 2006**

A healthy and happy new addition to the family



Susan Barty

**Position**

Partner

**Specialist areas**

Technology, media and advertising

**Career highlight**

I have always used Clairol's "Born Blonde" for my highlights...

**Currently working on**

Advising on issues surrounding the inclusion by Sony of Digital Rights Management software on its music CDs

**Wish for 2006**

To be drinking champagne with Freddie Flintoff after the last day of the Melbourne Test with England 4-0 up in the series



*Parties should be clear about their priorities, needs and expectations.*



## Outsourcing

# Out-sorcery: wizard wording

Disputes can cripple both parties to outsourcing contracts. Here are five ways to keep the relationship going:

### **Agree clear, comprehensive terms**

The contract should be a road map for both sides to understand how the project will be delivered on time and on budget. Parties should be clear about their priorities, needs and expectations. Members of the project team at all levels should be involved to make sure the contract properly reflects their requirements.

### **Identify and understand the legal and technical risks**

Specify, clearly and in detail, how things will work and who has responsibility for what. Address potential problem areas such as scope, delay, cost overruns and other pricing pressures. Ensure the supplier knows what the customer expects and the customer understands the intricacies of what the supplier is taking over. There may be philosophical and cultural differences to consider too. Make sure the board is kept informed of all risks inherent in the project.

### **Document all changes and issues arising**

Before the contract is signed, check all contractual assumptions, requirements, clarifications or dependencies and their impact on the price or service. Uncertainty can lead to disputes and give under-performing suppliers an easy way out. Don't give an inadvertent waiver by not addressing a default or not sticking to what the contract specifies. Follow the contractual mechanisms for making changes and reflect any compromises reached in documented variations.

### **Manage the contract actively and effectively – don't let it gather dust on a shelf**

Good communication can help solve many unforeseen problems. Involve someone who can apply some objectivity – perhaps even identify a trouble-shooter to help manage the contract. Conduct a full analysis of the background to a dispute as well as your rights under the contract before setting out your position to the other side. The evidence you find may not bear out some of the "folk memories" you have been told.

### **Anticipate and address disputes early before they get out of hand**

Reserve your strict legal rights, whether for negotiation or litigation. Where differences arise, parties often get fixed in their position and leave it too late to open negotiations. This may make it more difficult to make concessions once negotiations begin. Identify your objectives and consider any escalation or dispute management provisions. Once a dispute has arisen, consider formal procedures for resolving it such as structured negotiation, mediation and ultimately arbitration or litigation.

### **Susan Barty**

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## Litigation Procedure

# Good behaviour, litigation style



Amanda Wadey

**Position**

Professional Support Lawyer

**Specialist areas**

Commercial Litigation

**Career highlight**

Arriving at the headquarters of my client (a large publishing company) to interview a witness and finding the foyer awash with male models...

**Currently working on**

Litigation Annual Review 2006!

**Wish for 2006**

A high speed rail-link between Farnham (my home town) and Waterloo

Once upon a time, the first you would know about a claim against you was in a letter before action... if you were lucky. What a difference seven years makes.

Since 1999, the Civil Procedure Rules have required disputing parties to exchange information before starting a claim in the courts. There are protocols to encourage compliance. Those who do not play nicely face costs sanctions.

The theory is that familiarity breeds settlement: the more you understand about a dispute, the easier it is to settle. Critics say it just front-loads and increases costs.

Here's our guide to good behaviour:

**Try to settle your differences** – enter into genuine and reasonable negotiations to settle the claim; court proceedings should be a last resort.

**Protect your costs** – make a 'Part 36' offer before proceedings begin. The other side has 21 days to accept the offer or risk having to pay all your subsequent costs if the offer proves to be better than what the court awards.

**Follow protocol** – there are currently pre-action protocols setting out the information to be exchanged before proceedings in eight types of dispute: construction and engineering, defamation, personal injury, clinical disputes, professional negligence, disease and illness claims, housing repair and judicial review.

**Be reasonable** – even if there is no protocol for your dispute, you still have to act reasonably when deciding what relevant information to exchange.

**Being reasonable doesn't mean being weak** – don't automatically give the other side everything they ask for – they have to prove they are entitled to it first. They can't go on a fishing expedition to find out what you've got that can help their case.

**You get what you pay for** – or, rather, you must pay for what you get so there's no point asking for several warehouses of documents you don't need just to mess the other side around.

**You may not get costs for everything you disclose** – if you address issues raised by the claimant that do not ultimately find their way into the Claim Form, you will not get the costs of providing that information.

**Winner takes (nearly) all** – as long as you behave yourself, you can recover your pre-action costs.

**Bad behaviour will be punished** – when the case is over, the court will take your pre-action behaviour into account when deciding who pays costs and how much.

**Amanda Wadey**

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*Even if there is no protocol for your dispute, you still have to act reasonably...*





Joanne Marshall

**Position**

Senior Solicitor in the Insurance and Reinsurance Department

**Specialist areas**

Providing policy advice and dealing with claims relating to public authority insurance, directors and officers liability cover and other areas of professional indemnity insurance.

**Career highlight**

Being quoted in the FT following Birmingham judgment

**Currently working on**

Instructions with a financial services element

**Wish for 2006**

Mulberry Pasadena handbag

## Electoral Fraud

# Bent bananas and rotten apples

The day before the May general election was announced, a Commissioner giving judgment on two election petitions from the 2004 local elections in Birmingham spoke of "...electoral fraud that would disgrace a banana republic".

The fraud in question concerned postal votes cast in favour of Labour candidates in the Aston and Bordesley Green wards. Two petitions were brought to challenge the election result, along strict party lines: by the Liberal Democrats in Aston and the People's Justice Party in Bordesley Green.

Birmingham City Council's Returning Officer was named as a party to both Petitions. It was alleged that she had breached various rules and regulations in her conduct of the elections. We acted on her behalf in a successful defence of these serious allegations.

By contrast, all six Labour candidates were found to have committed corrupt and illegal practices. They were disenfranchised and not allowed to stand for office for 5 years. All six appealed. To date, the appeal of one of the Aston Labour candidates has been successful.

The Commissioner was scathing in his criticism of the postal voting system and ordered new elections to be held in both wards. Although the potential for abuse within the postal voting system was widely reported in the run-up to the general election, more voters chose to vote by post than in previous general elections.

The Government promised action. A Bill was introduced into the House of Commons on 11 October 2005. The Department of Constitutional Affairs advises that the Bill will be passed by 16 June 2006... at the earliest. It may not be in force in time for the local elections next year.

Even if it is, it remains to be seen whether the measures in the Bill will be effective. It is clear from the Birmingham cases that tensions can run high at local elections and the results in a particular ward can be critical. Winning margins may be small and therefore more open to abuse than at parliamentary elections.

Returning Officers should have insurance cover for the costs of defending election petitions as well as for the costs of re-running elections. From an insurer's point of view, the new Bill must be effective in preventing electoral fraud now that the Birmingham cases have shown the rest of the country what is possible.

**Joanne Marshall**

[joanne.marshall@cms-cmck.com](mailto:joanne.marshall@cms-cmck.com)



Sophie White

**Position**

Solicitor

**Specialist areas**

Employment

**Career highlight**

Winning *Edmund Nuttall v Butterfield* in the EAT and winning *WeComm v Guy Rosenhoiz* in the high court the year before (both cases were reported)

**Currently working on**

Several tribunal cases (unfair dismissal, whistleblowing, redundancy, TUPE), advising clients on the impact of the age discrimination and providing corporate support.

**Wish for 2006**

To keep any new years resolution I make!



*Without medical training, employers are bound to find it hard to tell whether depression is the cause of poor performance or the other way round.*



## Employment

# Impaired judgments

It is ten years since laws were passed protecting the disabled from discrimination in the workplace. Are they working?

As we lawyers say: yes and no. For starters, the final part of the 1995 Act only came into force in October 2004. And, hot on its heels, the new 2005 Act has made further adjustments to the statutory regime. So protection for the disabled is very much a work in progress.

We all know that employers must make reasonable adjustments for disabled employees and must not dismiss them or subject them to a detriment due to their disability. But what constitutes disability?

Disability can be any impairment - either mental or physical - that is likely to last at least a year and significantly affects day-to-day activities. It covers: long-term conditions such as diabetes; progressive conditions such as multiple sclerosis; impairments to sight, speech, hearing or mobility; learning difficulties; and mental health problems.

Some disabilities are expressly excluded from protection, including hay fever, tendencies to physical or sexual abuse, kleptomania, pyromania, exhibitionism, voyeurism, tattoos, piercings and certain addictions.

In December 2005, the definition was expanded so that HIV, MS and cancer are treated as disabilities from the moment of diagnosis. Mental impairments were also included even when not a clinically well-recognised illness. This ostensibly includes stress – a massive extension of its reach given that 5 million people in the UK feel very or extremely stressed by their work, according to the latest HSE study.

No-one disputes that the genuinely mentally ill should be protected. However, terms such as stress and depression do not calibrate the seriousness of the illness, making it hard for employers to know what, if any, adjustment is required. Without medical training, employers are bound to find it hard to tell whether depression is the cause of poor performance or the other way round.

In a case we fought on behalf of Edmund Nuttall, an employee was dismissed for exposing himself to minors and then lying about it. Exhibitionism and tendencies to sexual abuse are not protected by the Act but he claimed his behaviour was caused by long-term depression, which is.

Happily, the EAT accepted that dismissal was due to the behaviour and not the disability, which may give employers some breathing space in future. Otherwise, working out the right thing to do might give us all rather more than just a headache.

**Sophie White**

[sophie.white@cms-cmck.com](mailto:sophie.white@cms-cmck.com)



Guy Pendell

**Position**

Partner

**Specialist areas**

Commercial litigation and arbitration

**Career highlight**

Advising the Finance Minister of a former soviet block state on his country's prospects in an international arbitration

**Currently working on**

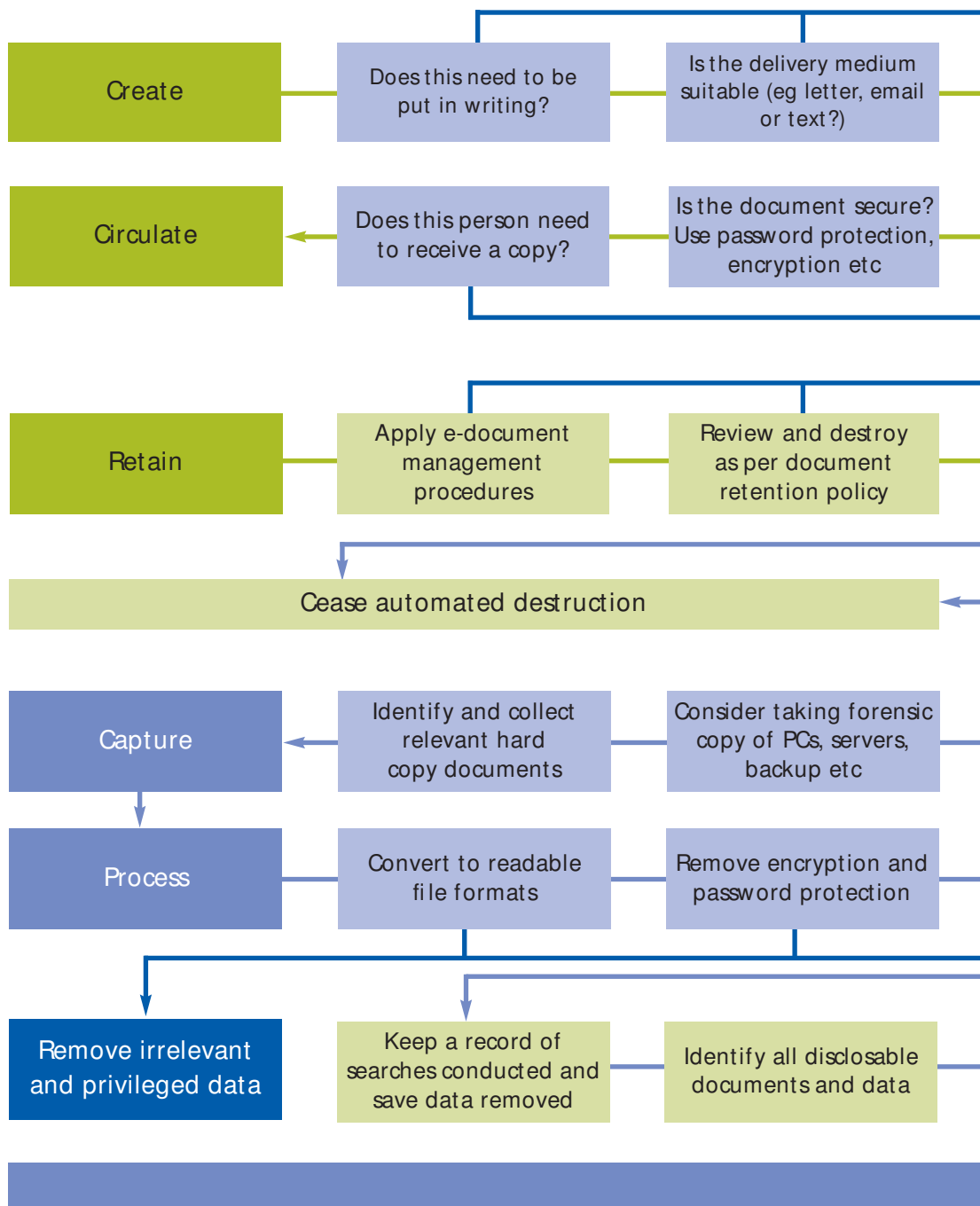
Various disputes including a professional negligence claim, a challenge to an arbitral award and an international arbitration of a substantial outsourcing dispute

**Wish for 2006**

Not to embarrass myself on the golf course.

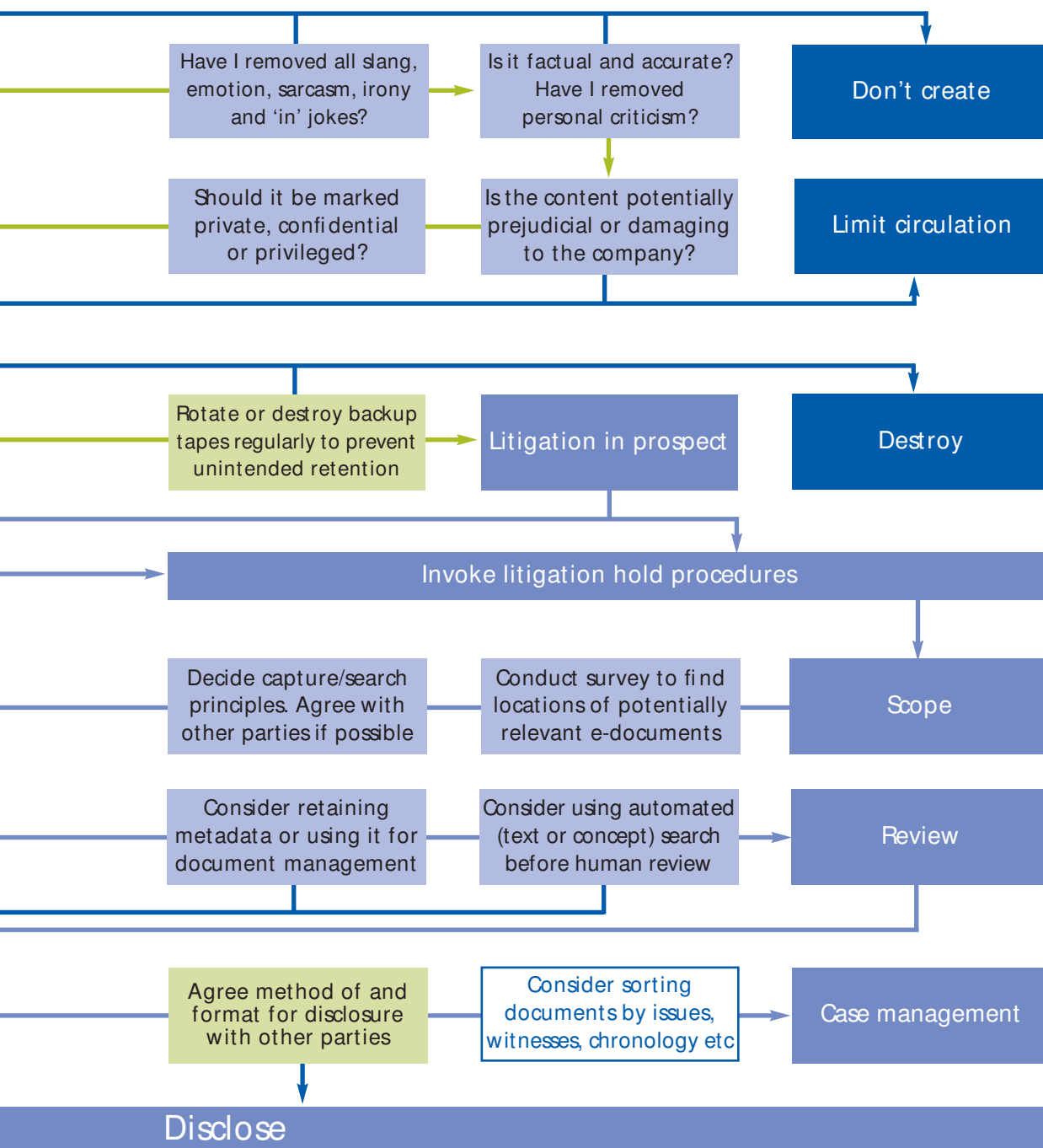
## Litigation Procedure

# A page in the life of a document



Electronic documents are easy to create but almost impossible to eradicate from an organisation's IT system. E-documents can tell stories that hard copies cannot and are perceived by some to be the best chance of providing the 'smoking gun' in a dispute.

Here's our guide to best practice in electronic disclosure, starting when the document is no more than a thought in the would-be author's mind.





John Uwins

**Position**

Partner

**Specialist areas**Construction and projects  
disputes resolution**Career highlight**Scoring a century for the  
firm's cricket team**Currently working on**

My golf swing

**Wish for 2006**Europe wins the  
Ryder Cup, again

## Construction

# Football followers

If a football team plays badly, it's rarely the players who shoulder the blame. If the team gets relegated, some players are even rewarded with a lucrative transfer. The manager's prospects, by contrast, are rarely so rosy. When England loses, we blame Sven.

It now looks like the construction industry has decided to follow suit. In the *Great Eastern Hotel* case, the famous railway hotel next to Liverpool Street Station opened almost a year late following an expensive refurbishment.

The hotel had a sizeable professional design team: architects, cost consultants, structural engineers, planning supervisors, mechanical and electrical engineers, interior designers, kitchen consultants and project managers. It also engaged umpteen trade contractors to carry out the demolition, temporary works, permanent construction, fit-out and services work. Despite this, the judge decided that 44 weeks of critical delay were the construction manager's fault. Why?

According to his terms of appointment, his role was to exercise the skill and care reasonably to be expected of a competent manager. He was not under any absolute obligation to deliver the refurbishment on time or to budget: the hotel owners, not him, took the risk of time and cost.

However, his performance was not up to scratch: works were wrongly sequenced, an important trade contract package proceeded without there being a trade contract in place, trade contractor work went unchecked and, generally, design and construction of certain trade packages was allowed to proceed too slowly. In addition, he failed to tell the hotel the full extent of the delays.

Experts from both sides analysed the causes of delay and the standards required from a competent manager. The judge agreed with the hotel's experts. Even though the manager was not under an absolute obligation to procure performance on time, he had to take responsibility for 44 weeks' critical delay to the project. This included one 3 week period in which the delays had nothing to do with him but was held to be his responsibility because it coincided with a period of poor management.

No doubt, future construction managers will demand a cap on liability in their appointments. No doubt procurers will resist this. In the meantime, while the media speculate who will be the next managerial casualty in the Premiership, contractors are speculating who will be the next construction manager on the receiving end of a delay claim. Don't blame the players: blame the manager.

**John Uwins**
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## EU Mediation

# You mediate. No, EU mediate.

When the EU Commission first suggested harmonising mediation across Europe, there was much sucking of teeth. It seemed counter-intuitive to take key parts of a voluntary process and make them compulsory.

When, after lengthy consultation, a draft directive finally emerged in 2004, the proposals were unsurprisingly modest. There were none dealing with the mediation process itself or with the appointment or accreditation of mediators. What remained to be harmonised? In truth, not much.

**First**, courts could invite parties to mediate. They could make them attend an information session on the benefits of mediation but compulsion ended there.

**Second**, voluntary codes of conduct and quality control mechanisms were generally to be encouraged as a good idea, but shouldn't interfere with the parties' right to a mediator of their choosing.

**Third**, any settlement reached through mediation must be enforceable through the courts as long as it was legal and above board.

**Fourth**, what happened within the four walls of the mediation must remain confidential and not be used in evidence.

**Finally**, limitation periods must be suspended during the mediation process.

However inoffensive it may be, the directive faces a struggle for survival. It was not well received when presented to the European Parliament: MEPS apparently prefer to slash 'red tape' which is still in draft form than the many million miles of it already in force.

Sadly, the legal basis for the directive is suspect. Article 65 of the Treaty of Amsterdam allows harmonisation of civil judicial systems. However, changes must have cross-border implications and be necessary to make the internal market function properly. The draft directive applies to mediation used to resolve national as well as cross-border disputes. The burden of reconciling the required changes with fundamentally different legal systems across the EU may be disproportionate to any benefit in making the internal market function properly.

With or without a directive, the benefits of mediation are now so well recognised that it will continue to flourish in its own particular market in each member state. Lack of harmonisation in cross border disputes can also be mitigated by choosing a governing law, such as English law, which protects the confidentiality of the mediation process.

**Jayne Singer**

[jayne.singer@cms-cmck.com](mailto:jayne.singer@cms-cmck.com)



Jayne Singer

#### Position

Solicitor

#### Specialist areas

Commercial Litigation,  
International Arbitration

#### Career highlight

Publishing the  
EU Mediation Atlas

#### Currently working on

Four High Court claims

#### Wish for 2006

A secondment in the Seychelles..



Lucy Kilshaw

**Position**

Senior Solicitor

**Specialist areas**

Intellectual property, advertising and marketing

**Career highlight**

Attending court with a professional Elvis Presley lookalike in full costume

**Currently working on**

Case referred to European Court of Justice (ECJ) in Luxembourg for an unprecedented second time on packaging materials for pharmaceuticals

**Wish for 2006**

That the ECJ gives a clear answer...



*To protect official sponsors, the government proposes to ban advertisers from associating themselves or their products in any way with the London Olympics.*



## Marketing

# Olympic marketing madness

“We can all be winners from the Games coming to Britain” announced the Government on the successful London Olympic bid.

Apart from a few multi-million dollar official corporate sponsors, the advertising industry seems to disagree. It has lobbied fiercely against measures to stop ambush marketing in the London Olympics Bill, fearing that the measures will unfairly penalise them and even lead to them being prosecuted as criminal offenders.

To protect official sponsors, the government proposes to ban advertisers from associating themselves or their products in any way with the London Olympics. This is on top of existing safeguards against use of the word ‘Olympic’ and the five ring Olympic symbol.

The draft Bill proposes to create a new ‘London Olympic association right’. A bizarre provision states that an advertiser will be assumed to infringe this right if he uses any two of the following together: ‘games’, ‘Two Thousand and Twelve’, ‘2012’ and ‘twenty-twelve’ or any one of them in combination with: ‘gold’, ‘silver’, ‘bronze’, ‘London’, ‘medals’, ‘sponsor’ or ‘summer’.

The thinking is that any such marketing is parasitic on the activities of official advertisers who have paid for the privilege of a connection with the Olympic Games. The result is draconian, since even innocent phrases such as ‘Visit London in 2012’ would be prohibited.

English law already offers considerable protection against misrepresentation and false impression of official endorsement, including copyright, registered trade marks and designs and passing off. In recent years, top UK sporting organisations have been quick to challenge anyone associating themselves with well known sporting events or bodies. Recent examples include: the Football Association’s copyright action to stop unofficial stickers with football club logos, Arsenal’s trade mark action against unofficial merchandise; and Eddie Irvine’s case against a radio station for using a doctored photograph to suggest that he endorsed it.

Critics are adamant that the current draft provisions to protect the new London Olympic association right would strangle unlicensed references to the London Olympics. The advertising industry is hoping the House of Lords will make further amendments as the Bill proceeds through Parliament. The Government is assuring them that it will be enforced in a proportionate way, but advertisers still fear they will end up as Olympic losers.

**Lucy Kilshaw**

lucy.kilshaw@cms-cmck.com

## Business Disputes Survey

In partnership with the Centre for Effective Dispute Resolution, we conducted a survey into the cost of business disputes and use of mediation. The survey was conducted anonymously and has produced some very revealing information concerning the lack of knowledge of mediation at management level and a surprising reluctance to commit to using mediation. Here are some highlights:

### Management time spent on litigation

Average person days spent managing the most serious dispute each company had been involved in the last three financial years:

81 days in-house lawyers responsible for handling the dispute

245 days managers directly involved in the dispute

151 days managers becoming involved in the dispute

### Effective of mediation in resolving disputes

Effectiveness of mediation as a means of resolving business disputes, compared to other means of dispute resolution:

78.8% more effective

8.8% no difference

7.7% less effective

4.4% don't know

### Using mediation to resolve disputes

Percentage of organisations actually using mediation to resolve a business dispute

9.9% very frequently

7.7% frequently

35.2% occasionally

Download your free copy of the business disputes survey from

[www.law-now.com/businessdisputesurvey.com](http://www.law-now.com/businessdisputesurvey.com)

For more information, contact [tim.hardy@cms-cmck.com](mailto:tim.hardy@cms-cmck.com)

## CMS Guide to Arbitration in Europe

While much has been done to unify arbitration laws across Europe and beyond, law and practice from country to country still varies.

To help you, we have produced a practical guide which takes you through the different approaches adopted across Europe.

To access the guide please visit [www.law-now.com/guidetoarbitration05](http://www.law-now.com/guidetoarbitration05) or alternatively contact [guy.pendell@cms-cmck.com](mailto:guy.pendell@cms-cmck.com) for a free CD version.

## In court 2005

If you have any questions relating to any of the articles in this guide, or would like to discuss any specific issues, please contact Tim Hardy at [tim.hardy@cms-cmck.com](mailto:tim.hardy@cms-cmck.com).

Below are examples of some of the cases we advised on and went to court in 2005, demonstrating our breadth of experience.

Subject	Case	Court	Issue
Data protection	Abayomi Sofola v Lloyds TSB Bank	Queen's Bench	Exceptional circumstances permitted the re-opening of an application for leave to appeal
VAT	Abbey National plc v Commissioners of Customs and Excise	Chancery	VAT treatment of "virtual assignment" of leasehold interest in property
VAT	Abbey National Plc and Inscape Investment Fund v Commissioners of Customs and Excise	ECJ	The scope of the VAT exemption for the management of investment funds.
VAT	Abbey National Plc v Commissioners of Customs and Excise	Chancery	The application of VAT bad debt relief to conditional sale agreements
Insurance	Bonner v Cox	Court of Appeal	Defence of claim for breach of duty of care
Professional negligence	Andrews v Barnett Waddingham	Queens Bench	Whether actuary negligent for advice given on annuity policies
Pensions	Armitage v Staveley Industries	Court of Appeal	Interpreting an employer's obligation to top up employee's pension benefits

IT	Alliance Française de Londres v Her Majesty's Attorney General	Chancery	Resisting an injunction to prevent the cancellation of a domain name
Commercial	Burns-Anderson Independent Network v Wheeler	Queen's Bench Mercantile Court	Claim under indemnity for breach of network agreement
Employment	Butterfield v Edmund Nuttall	Employment Appeal Tribunal	Dismissal for criminal conduct not disability discrimination
Patents	Canady v Erbe Electromedizin GmbH	Patents Court	Infringement proceedings relating to an endoscopic medical device
Insolvency	In the matter of Dap Holding NV	Chancery	Jurisdiction to sanction scheme of arrangement for Dutch companies with no UK base
Banking	Diamantides v JP Morgan Chase Bank	Court of Appeal	Whether a bank owed duties both to a company and to its sole shareholder
Insolvency	Fourie v Le Roux	Court of Appeal	Freezing order made in support of foreign proceedings
Defamation	Johnson v Perot Systems Europe	Queen's Bench	Application to strike out claimant's defamation claim
Insurance	King v Brandywine Reinsurance Company	Court of Appeal	Whether insurance policy covered by New York or English law; whether 'removal of debris' includes oil clean-up

Trade marks	Mitsubishi Corpn v PFK Trading UK Co	Chancery	Injunction to prevent trade mark infringement
Product liability	Re MMR and MR Vaccine Litigation (No 12); Sayers v Smithkline Beecham	Queen's Bench	Entitlement of claimants giving notice of discontinuance to proceed with claim
Pensions	MNOFF Trustees v T F Everard & Sons	Chancery	Meaning of participating employer in scheme rules
Town Planning	Patel v Brent London Borough Council	Court of Appeal	Whether local authority had repudiated planning agreement
Elections	R (on the application of Afzal) v Election Court	Court of Appeal	Illegal postal voting practices in local elections
Elections	R (on the application of Khan) v Election Commissioner	Queen's Bench	Liability of ward organiser for illegal postal voting in local elections
Insurance	Rendall v Combined Insurance Company of America	Commercial Court	\$90m reinsurance claim arising from loss of Aon employees in World Trade Centre disaster
Employment	Roeser v Commerzbank	Employment Appeal Tribunal	Appeal against refusal to adjourn hearing
Data protection	Smith v Lloyds Tsb Bank	Chancery	Meaning of 'data' for subject access request under data protection laws

Insurance	Taylor Aston Ltd v Aon	Commercial Court	Defence of claim for breach of contract
Pensions	Xchanging Global Insurance Systems v Clark	Chancery	Whether to rectify pension deed to change calculation of members' entitlement
Arbitration	X Ltd v Y Ltd	Technology and Construction Court	Challenge to arbitrator's award over the scope of the arbitration clause
Pensions	ZF Lemforder UK Ltd v Lemforder UK Pension Trustree Ltd and Anor	Chancery	Application to rectify pension scheme rules

## Litigation expertise

When it comes to disputes resolution, our clients look to us to bring commercial understanding, experience and pragmatism to our dealings with them.

Few businesses relish the prospect of disputes. When they do happen, most will want to ensure that they are dealt with effectively and with minimal damage to their reputation and standing. They will also look to a law firm that has extensive experience, not just of commercial disputes, but also in specialist areas.

With over 50 partners, our disputes resolution practice is a significant force to be reckoned with. Add to that extensive specialist knowledge in industries such as energy, insurance, banking, construction, financial services, health & safety, IP, IT, pensions, and real estate to name but a few.

Some of our clients include:

- ✔ Amazon
- ✔ August Storck KG
- ✔ Bouygues Batiment International SA
- ✔ Camelot
- ✔ Centrica plc
- ✔ Česká spořitelna, a.s.
- ✔ Česká televize (Czech TV)
- ✔ Coats plc
- ✔ Commerzbank
- ✔ Dixons Group Plc
- ✔ Hunting Group
- ✔ Metronet
- ✔ NIE plc
- ✔ Pfizer plc
- ✔ Proctor & Gamble International
- ✔ Royal Mail Group plc
- ✔ Wachovia plc
- ✔ Warner Bros.

# The EU Mediation Atlas: Practice and Regulation

**Editors:** Karl Mackie, Chief Executive, CEDR;  
Tim Hardy, Partner, CMS Cameron McKenna;  
and Graham Massie, Director, CEDR  
**Author:** Jayne Singer, Solicitor, CMS Cameron McKenna

C/M/S/

CEDR

Recent activity within the European Union has brought mediation and the field of alternative dispute resolution (ADR) to the forefront of the civil justice reform agenda. **The EU Mediation Atlas: Practice and Regulation** addresses these developments and provides a highly practical guide to the present status of mediation in the member states of the EU. Focusing on commercial disputes, it specifically deals with court annexed mediation. The Atlas is organised on a country-by-country basis and investigates the legal framework in each jurisdiction and the available mediation schemes and providers, tackling issues such as confidentiality and enforceability, as well as explaining the general rules governing mediation and mediators. It also outlines the approach of the EU thus far in relation to harmonising mediation across the member states.

With **The EU Mediation Atlas** you will benefit from:

- Up-to-date information on key developments in this highly topical area.
- Reliable, authoritative commentary from the Centre for Effective Dispute Resolution, the leading body in European ADR, and CMS Cameron McKenna.
- A reference source of practical information assembled in one succinct volume.
- A comprehensive summary of mediation in the EU, taking an accessible country-by-country approach and addressing the same issues in each country to allow quick and easy research and comparisons at a practical level.
- Practical information such as details of mediation providers and available mediation schemes in EU countries.

EU countries covered by specific chapters include: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. Each chapter provides detailed information on the court structure within the country, definitions, the legal framework, mediation schemes and

providers, the regulation of mediators and other developments. Additional chapters cover:

- Mediation in the New Member States
- Mediation in the European Union
- Appendices:
  - Comparative tables of development of mediation
  - CEDR questionnaire
  - Schedule of mediation providers
  - EU Code of Conduct for Mediators
  - EU Draft Mediation Directive

**The EU Mediation Atlas** is an essential reference source for all practitioners involved in mediation, alternative dispute resolution and litigation in the UK, Europe and internationally. It will also be of great interest to government agencies and academic institutions and to anyone concerned with the development of effective dispute resolution practice.

**Price:** £50.00

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**For advice on any of the topics covered in this review, please contact the individual author or Tim Hardy on 020 7367 2533 or [tim.hardy@cms-cmck.com](mailto:tim.hardy@cms-cmck.com)**

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