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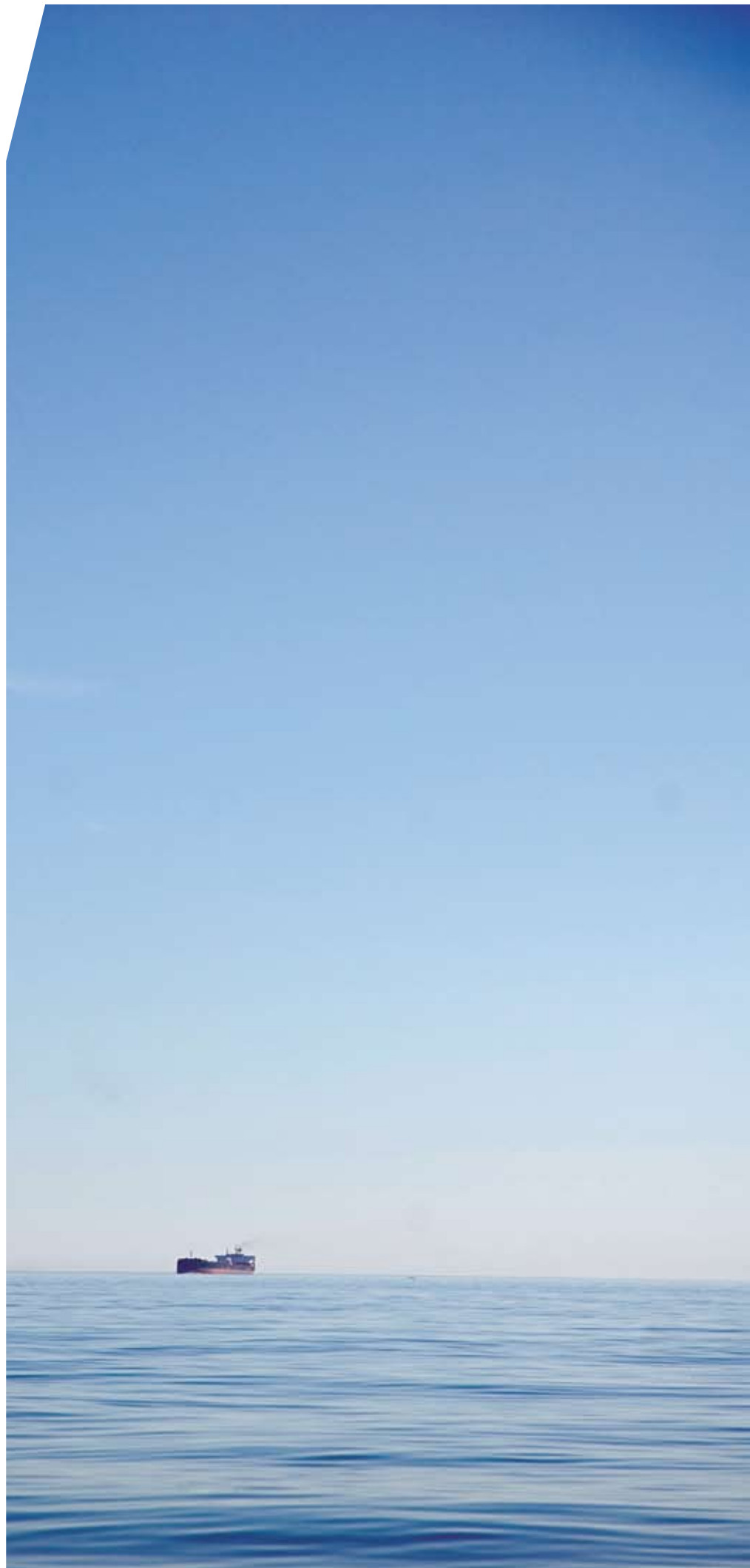
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Welcome to the second edition of the CMS Dispute Resolution newsletter. With this publication we aim to provide you with an overview on key developments and hot topics on dispute resolution in Europe. We hope that you find the topics covered in this publication support you in assessing potential litigation risks across Europe. If you would like to learn more about a particular topic, please do not hesitate to get in touch with the authors of the relevant article or your usual CMS contact. We are also grateful for any feedback you would like to share with us. Thank you.

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THE END OF ANTI-SUIT INJUNCTIONS?

Allianz SpA and Generali Assicurazioni Generali SpA vs. West Tankers Inc.

On 10 February 2009 the European Court of Justice (“ECJ”) delivered a long-anticipated decision in the *West Tankers* case¹, concerning the admissibility of so-called anti-suit injunctions under the Brussels I Regulation². Anti-suit injunctions in Europe are used primarily by English courts as a means to protect arbitration proceedings in England from parallel State court proceedings in other jurisdictions. English courts order parties (and not the court concerned) to refrain from commencing or continuing proceedings before foreign courts, in order to give effect to an arbitration agreement. Violation of an anti-suit injunction is considered to constitute contempt of court and can lead to substantial fines against the party concerned. However, in the *West Tankers* case, the ECJ ruled that such injunctions are not consistent with the Brussels I Regulation.

The anti-suit injunction in question was issued by the High Court in London in order to prevent two Italian insurance companies from continuing court proceedings before an Italian State court in Syracuse. The companies were insurers to a ship charterer and had raised a claim against a ship owner with respect to damage caused to a jetty in Italy. The dispute allegedly fell under the arbitration agreement in question and this view was confirmed by the English High Court. The insurance companies appealed to the English House of Lords against the decision to grant the anti-suit injunction claiming that such an injunction was not consistent with the Brussels I Regulation

(“Regulation”). The House of Lords referred this question to the ECJ for a preliminary ruling.

In its ruling, the ECJ found that even though arbitration is expressly excluded from the scope of the Regulation, it would nevertheless apply in the case of an anti-suit injunction directed against proceedings before other European courts. The ECJ argued that, although anti-suit proceedings as such do not fall under the Regulation, the impact of anti-suit injunctions on the courts of other EU Members States render them incompatible with the Regulation. The anti-suit injunction in question undermined the effectiveness of the Regulation by preventing the Italian court from exercising its right to rule on its jurisdiction with regard to the dispute brought before it.

The ECJ held that anti-suit injunctions are contrary to two principles of European law, namely:

- the principle that every court seized itself determines whether it has jurisdiction to resolve the dispute before it; and
- the principle of mutual trust that the Member States have in one another’s legal systems and judicial institutions.

Although the ECJ handed down the expected outcome, the decision received harsh criticism. Most critics fear that the ruling of the ECJ will lead to a situation where the Regulation may have an impact

on arbitral proceedings, even though arbitration is expressly excluded from the scope of its application. In this context it is argued that:

1. the decision will negatively affect London’s attractiveness as a seat of arbitration because anti-suit injunctions are no longer available as a means to protect arbitration proceedings;
2. the reasoning of the court implies that any proceedings that are excluded from the scope of the Regulation must be examined in order to find out whether they could affect proceedings falling within the scope of the Regulation; this may even be the case with respect to arbitral proceedings expressly excluded from the Regulation; and
3. a respondent in potential arbitration proceedings may find it irresistible to use parallel court proceedings in European Union countries in order to “torpedo” arbitration proceedings in Europe.

The first argument is less compelling in view of the fact that while courts such as those in Paris, Stockholm and Zurich do not grant anti-suit injunctions in practice, these cities are popular and frequently used as seats of arbitration.

With respect to the second argument, there are doubts as to whether the ECJ really intends to interpret the Regulation in such an extensive manner. While it is true that the legal reasoning of the ECJ

in this case has considerable weaknesses, it seems that it is focused on the issue of anti-suit injunctions, and is not intended to create a new legal doctrine of extensive interpretation of the Regulation; if the latter were the case, this would indeed be problematic.

Neither does the third argument seem convincing. First, the initiation of proceedings before State courts does not preclude the commencement and continuation of arbitral proceedings. A party can thus obtain an arbitral award despite the fact that the other party has initiated parallel proceedings before the State courts of another State. However, arbitrators will have to have regard to such proceedings, particularly where this may raise questions as to the enforceability of their awards.

Furthermore, a party that is forced into court proceedings despite the existence of an arbitration agreement is not left entirely defenceless. It still has the possibility of applying for a stay of the court proceedings pursuant to *Article II* of the New York Convention³. Under this provision, the court must refer the parties to arbitration, unless it holds that the arbitration agreement is null and void, inoperative or incapable of being performed. Article VI (3) of the European Convention on International Commercial Arbitration⁴ imposes an obligation on the courts of a Member State to stay proceedings in the case of parallel arbitration proceedings.

The core problem – to which anti-suit injunctions do not, however, provide a solution – is that there is no European regulation or international convention establishing the jurisdiction of Member State courts to determine the validity of an arbitration agreement.

This would be the most efficient way to avoid the risk of courts in different jurisdictions taking opposing views on the validity of an arbitration agreement. To this end, it would seem sensible to provide, on a European (or even international) level, that:

- in the first instance, the arbitral tribunal is entitled to determine whether or not it has jurisdiction;
- this decision can be reviewed by the courts of one State, preferably at the place of arbitration, with binding effect on all other States; and
- all other courts must suspend proceedings concerning the same subject-matter until such decision has been rendered.

A lesson to be learned from the *West Tankers* decision is that it is important to enter into a valid, clear and unambiguous arbitration agreement, which does not run the risk of being found void, invalid or incapable of being performed. If the arbitration agreement leaves no room for doubt, the courts of EU Member States are more than likely to stay court proceedings

and refer the parties to arbitration. The decision also raises a question as to whether the courts of a Member State should stay any proceedings that impact on arbitration proceedings in order to consider the arbitration agreement in situations where an arbitration has commenced and the arbitration agreement is not deemed null, invalid or inoperable. If this question is likely to lead to difficulties, it may be desirable to seek an amendment to the Brussels I Regulation.

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1) *Allianz SpA and Generali Assicurazioni Generali SpA vs. West Tankers Inc.*, ECJ C-185/07.

2) *Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, ABIG Nr. L 12, 16 January 2001.

3) *Convention on the Recognition and Enforcement of Foreign Arbitral Award of 10 June 1958*, available here: www.uncitral.org

4) *European Convention of International Arbitration of 1961*, United Nations, Treaty Series, vol. 484, p. 369 no. 7041 (1963–1964).

EUROPEAN ORDER FOR PAYMENT

Regulation (EC) No. 1896/2006 of the European Parliament and Council dated 12 December 2006 (the "Regulation") created a European order for payment ("EOP") procedure for the collection of money due under uncontested debt claims.

The procedure offers creditors the opportunity to obtain an enforceable right to recover an outstanding debt swiftly and efficiently if the debtor is unlikely to contest the claim. It can be applied to cross-border cases where the parties live in different Member States (with the exception of Denmark). The specific feature of the EOP is that the enforcing State abstains from examining whether the requirements for the claim are fulfilled. The procedure is additional to the other remedies available to the creditor. The creditor remains free to resort to a procedure provided for under national law.

In general the EOP only applies to claims arising from contractual obligations. Claims arising from non-contractual obligations cannot be enforced in this way. Also it is not available in matters relating to matrimonial relationships, wills and succession, tax and customs, administrative law, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial settlements and analogous proceedings. The claimant applies for the EOP using an official form issued by the relevant court, which according to Paragraph 6 of the Regulation is usually the court of the Member State in which the *defendant is resident*. However, other courts may

also have jurisdiction, for example due to jurisdiction agreements between the parties.

The court seized of an application for an EOP will examine, as soon as possible and on the basis of the application form, whether the requirements are met and whether the claim appears to be founded. The Regulation provides that the application will only be rejected if the claim is clearly unfounded. The EOP states that it is exclusively based on information provided by the claimant which the court has not verified.

If the requirements are met and the claim appears plausible, the court generally issues the EOP within 30 days of the application and serves it to the defendant. If the defendant wishes to dispute the EOP he must lodge a 'statement of opposition' with the court that issued the order within 30 days of receipt of the order.

If a statement of opposition is lodged, this immediately leads to adversarial proceedings before the issuing court, unless this was excluded in the application form. If no statement of opposition is lodged the court immediately declares the EOP enforceable and sends it to the claimant. EOPs that are declared enforceable in the claimant's Member State are *immediately approved and enforceable* in all other Member States, without the need for any further declaration of enforceability.

The core advantage of the EOP is that it provides a fast track resolution to enforcing a debt. If the defendant does not object, the claimant will in principle be able to enforce his claim within 60 days from lodging his application in court. Of course, this is in ideal circumstances. Postal delivery may result in delays. But Paragraph 13d of the EOP also allows electronic delivery via fax and email. As in so many cases, time will tell whether the general advantages of the EOP will pay off in every day practice.

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ENFORCEMENT OF ARBITRATION AWARDS IN ARGENTINA

With the exception of cases to which the Argentinean State is a party, commercial arbitration has been encouraged by Argentinean courts as a means of resolving disputes.

Several recent decisions confirm the narrow criteria according to which courts may set aside awards and reject dilatory measures, providing comfort with regard to the enforcement of awards.

In *Cacchiane vs. Urbaser Argentina S.A.*¹, the Argentinean Supreme Court rejected an appeal against an award granted pursuant to an arbitration agreement, in which the parties had waived their right to appeal. The decision confirms the limited criteria according to which an award can be set aside; an application to set aside should rely on the fact that the award

- (i) evidences an essential failure in the legal process;
- (ii) has been granted after a deadline; or
- (iii) contains decisions on matters that are beyond the scope of the arbitration agreement, or that should not be subject to arbitration.

This criterion is affirmed by the adoption of the French principle of “*pas de nullité sans grief*” by the Argentinean Courts. This principle is applied in Section 172 of

the Argentinean Procedure Code, which is mentioned in the leading case *Holiday Inns Inc. vs. EBASA Exportadora Buenos Aires S.A.*² In that decision, the Supreme Court affirmed that a party applying for a decision to be set aside must identify a failure in the legal process, but should also specify the damage or loss arising from the failure, detailing where applicable the legal remedy of which it has been deprived of as a consequence.

In *Financompra S.A. v. Paz, Liliana Mabel*³, Panel D of the Commercial Court of Appeal confirmed that the rules on summary judgments (i.e. “*Juicio Ejecutivo*”) apply to procedures enforcing foreign arbitration awards in Argentina. Pursuant to the last paragraph of Section 14 of the Argentinean Procedure Code, the Court of Appeal rejected an application to challenge the judge in charge of the file without including mention of the grounds (i.e. “*sin expression de causa*”), as permitted in ordinary civil judgments in Argentina.

Notwithstanding these encouraging decisions, certain issues remain to be resolved and specialist local professional advice should be sought in relation to the enforceability of contracts and/or arbitration awards.

In *Armada Holland Bv Schiedam Denmark v. Interfruit S.A.*⁴, Panel II of the Civil and

Commercial Court of Appeal rejected the enforcement of an English arbitration award due to the arbitration clause being invalid. In this case, the parties had signed a charterparty which had not been performed, since the charterer provided a different vessel after the charterparty had been signed, without any addendum to the charterparty. The Argentinean Court held that, pursuant to Section IV of the New York Convention and in order to grant the *exequatur* (or permission to execute the judgment) in Argentina, the local judge was competent to analyse the validity of the written arbitration agreement and not only the form of the award. The only written agreement between the parties specified a ship that was different from the one actually used; the Appeals Court concluded that the agreement could not be recognised and accordingly, the award was not enforced in Argentina.

In *Ogden Entertainment Services Inc v. Eijo Néstor E.*⁵, Panel E of the Commercial Court of Appeals rejected the enforcement of an ICC award in which the successful party was ordered to pay to the other party an amount of fees exceeding the indemnification obtained in the same award.

The Court of Appeals stated that such an order was contrary to Argentinean public order, since it damaged the right

of access to justice. Therefore, it could not be recognised in Argentina.

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5) *Panel E of the Commercial Court of Appeals "Ogden Entertainment Services Inc v. Eijo Néstor E."* 20/09/2004.

1) *National Supreme Court "Cacchione, Ricardo Constantino c/Urbaser"*
11/03/2008

2) *National Supreme Court "Holiday Inns Inc. vs. EBASA Exportadora Buenos Aires S.A"* 05/04/2005.

3) *Panel D of the Commercial Court of Appeals Finacompra S.A. v. Paz, Liliana Mabel,* 17/09/2002

4) *Panel II of the National Civil and Commercial Court of Appeal "Armada Holland Bv Schiedam Denmark v. Interfruit S.A."* 8/5/2007



CIVIL LITIGATION: COSTS UNDER THE SPOTLIGHT

The cost of bringing civil actions in the courts of England and Wales has long been the subject of considerable debate. Several high profile cases have demonstrated that the legal costs of taking a case to trial can often exceed the value of the claim or the damages recoverable. As an example, a recent dispute between *Multiplex* and *Cleveland Bridge* over the construction of Wembley Stadium resulted in combined legal fees of GBP 22 million; the final High Court award in the dispute was for just over GBP 6 million for overpayments, breach of contract and interest.

The problem of how to make legal costs proportionate to justice has been a particularly troubling issue since the introduction of the Civil Procedure Rules (CPR) after the Woolf reforms in 1999. The CPR introduced a higher level of pre-trial activity and court control and, as a consequence, the front-end costs of litigation have generally increased significantly. The counterweight to this was intended by Lord Woolf to be better case management by the courts to ensure that disputes, if they cannot be settled, are dealt with quickly, without gamesmanship by the parties' lawyers. Unfortunately, judges have not taken on this responsibility and not a little of the blame for the escalating costs in English court proceedings must lie at their door. As such, this gives credence to the complaint that claimants without deep pockets or external funding can be denied access to justice. Further, a report in *The Times* in October 2008 speculated that the high costs of civil litigation could drive high-value litigation

away from London. It referred to a case in which the total legal fees were projected to be in the region of GBP 90 million, as a result of which the parties were said to be reviewing the possibility of finding a less expensive jurisdiction in which to contest their dispute.

Civil Litigation Costs Review

During 2009, the costs of civil litigation in England and Wales will be under particular scrutiny. The Master of the Rolls, Sir Anthony Clarke, has instructed Lord Justice Rupert Jackson (Jackson LJ) to conduct a comprehensive year-long review into the subject. Its principal objectives, as reported by the Judicial Communications Office, are to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at a proportionate cost.

In conducting the review, Jackson LJ will:

- establish how present costs rules operate and how they impact on the behaviour of parties to litigation and their lawyers;
- establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs;
- have regard to previous and current research into costs and funding issues;

- seek the views of judges, practitioners, government, court users and other interested parties, through both informal consultation and a series of public seminars;
- compare the costs regime for England and Wales with those operating in other jurisdictions; and
- prepare a report setting out recommendations with supporting evidence by 31 December 2009.

On 8 May 2009, Jackson LJ published his preliminary report. Jackson LJ's final report is intended to be very broad and cover a large number of areas. His analysis is likely to look particularly closely at the provision and availability of contingency fees, conditional fee agreements (CFAs), third party funding and After The Event (ATE) insurance policies.

Contingency Fees/CFAs

Jackson LJ will be looking closely at the United States' contingency fee system where the winning party does not generally have his legal fees paid by the losing party. Instead, a winning party's lawyers take a percentage of the damages won. Contingency fees in litigation are illegal in England and Wales. This is a principle dating back to the Statute of Westminster in 1275, the traditional view being that it is improper for lawyers to have a pecuniary interest in the outcome of the case. However, there have been suggestions recently that the introduction of a

contingency fee model in England and Wales could have some merit. At present, instead of using contingency fees, lawyers in England and Wales may provide contentious legal services under CFAs, where they may be paid nothing if their client loses the case but are entitled to an uplift of up to 100% of their standard fees if they win. Whereas these “no win, no fee” arrangements may appear to benefit claimants lacking the necessary funds, the practice has been criticised for allowing lawyers to charge up to double their normal fees if successful and for requiring the losing party to bear the full burden of this. As a consequence, “no win, no fee” arrangements are said to be unfair to defendants who have to pay large sums in claimants’ costs, even if a dispute settles at an early stage. A suggested solution has been to cap the level of fees that lawyers can recover to a percentage of the recovered value.

Third Party Funding/Insurance Policies

Other litigation funding mechanisms likely to come under scrutiny include the availability and growth of third party funding and ATE policies. The practice of third party funding has developed considerably in the past few years following the 2005 case of *Arkin*¹, which confirmed that the practice is permissible, provided that the agreement facilitates access to justice and the litigation is controlled by the claimant and not the funder. There remain concerns that third party funders may only be interested in pursuing large commercial disputes where

the potential rewards are substantial rather than dealing with lower value claims. The use of ATE policies is becoming more widespread. These policies provide cover for the costs involved in pursuing or defending litigation. In cases where the chances of success are high, this can be a useful mechanism to protect claimants or defendants from exposure to significant legal expenses. However, ATE policies generally require very high chances of success and obtaining such assessments can often be costly and time-consuming in themselves. Further, the premiums charged can be considerable, generally around 30–40% of the damages recoverable. We anticipate that the future provision of these funding mechanisms will constitute a considerable proportion of the review.

Conclusions

The costs review during 2009 has been described by the Civil Justice Council as the most significant development since the Woolf report, over ten years ago. Disputes lawyers will no doubt be awaiting the outcome with some trepidation. Recommendations that a contingency fee model be adopted, for example, would represent a significant departure from centuries of English civil litigation tradition. The determining factor is likely to be whether Jackson LJ concludes that they would represent a significant improvement to English civil proceedings. This seems improbable, but his analysis of current funding mechanisms is nevertheless likely to result in considerable reforms in civil procedure in England and Wales.

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1) [2005] EWCA Civ 655

DEAL OR NO DEAL? THE “BINDING” OFFER

In England and Wales, it is not uncommon for parties in commercial negotiations to make offers stated to be “binding” or “irrevocable” for a specified time period. Sometimes events may then occur that make the deal suddenly unattractive, leaving the offeror wanting to walk away before the deadline has expired. So, if the commercial drivers for a deal evaporate, under English law can the offeror pull out with impunity?

Take the following example:

Bank A wants to buy a business-owning company Z from Bank B. Negotiations take place and, eventually, A offers B the sum of USD 100 million for Z, on terms set out in a draft Share Purchase Agreement (SPA) prepared by A. At the same time, A states that the offer will be irrevocable for 30 days.

Three weeks later, unexpected market events occur to make the deal unattractive to A. A sends a fax to B purporting to withdraw its earlier offer. The next day, B faxes to A a signed copy of the SPA.

Has B’s apparent acceptance of A’s terms, within the 30-day “irrevocable” offer period, led to the creation of a binding contract?

If there is an international element, the first question to be considered is what law will apply. Often, this is not a straightforward question and it may become an issue between the parties (even across Europe there is no unified position on whether such

offer periods are binding). The question of what law applies will be affected by the circumstances of the discussions between the parties, including where they occurred, the terms of the alleged binding agreement, the nationalities or places of business of the parties themselves and even, possibly, any law stated in the draft contract to govern the parties’ relationship if a deal were reached.

Usually, under English law, the answer as to whether there is a binding offer period in the above scenario is “no”. In other words, A was free to withdraw or revoke its offer at any time after it was made, unless there was consideration for the promise to keep the offer open. The position would have been different if A had contracted to keep the offer open for valuable consideration (e.g. by way of option contract) or the promise is contained in the deed. “Valuable consideration” does not have to be in the form of money – it could be a promise from the offeree that is of value to the offeror. If that were the case, the offer would be irrevocable for the stated period, in the sense that revocation would be a breach of the option contract and, in appropriate circumstances, specific performance may be available.

When is revocation effective?

What if A sent its revocation by post, but before B received it, B faxed back its acceptance of the offer? In that case, a binding contract would have been formed; the revocation must actually reach B to be effective. On the other hand, it would be sufficient notice if B was, in fact, aware

from any reliable source that the offer had been withdrawn. This might be relevant, for instance, where an offeree is aware that the offeror has sold the subject of the offer to a third party.

To develop the example above: what would the position be if the revocation was sent by fax (or email), the fax (or email) reached its destination, but before it was read by the relevant person at B, B accepted the offer? Unfortunately, the position here is not very clear. The courts have found that revocation transmitted by telex in these circumstances is effective, but the issue in the case of fax or email has not come before the courts yet. Nevertheless, we would expect a similar outcome.

Who must be told?

Who is the “relevant person” at B that must have read the revocation for it to be effective? Where the offeree is a company, it is not necessary to inform the specific individual dealing with the matter of the revocation – whoever is authorised to receive notices on behalf of the company should suffice. Commentators have even suggested that revocation will be effective when the withdrawal either was, or would have been, received in the ordinary course of business. For example, if the receptionist at a company is authorised to open all correspondence received, the revocation may be effective when it is opened by that receptionist.

The safest approach when withdrawing an offer would be to do so as quickly as

possible – i.e. orally, perhaps by telephone, to the most senior person at the offeree involved. That should immediately be followed by a written notification sent by courier, fax or post, to the individual with whom the telephone conversation took place, copied to all members of the offeree team dealing with the matter, as well as a director of the company or its legal secretary. The written notification evidences that notice was given (orally and in writing) and can be relied on if there is any dispute later.

Effect of a counter-offer

What if B replied to A's offer, before A revoked it, and sent an amended draft of the SPA altering some of the draft terms? This will be treated as a counter-offer and has the effect of rejecting and terminating A's original offer. (Of course, there is nothing to stop the offeror later reviving or repeating the initial offer – this is simply another counter-offer.) The offeree can effectively terminate an offer by an unambiguous intimation, express or implied, that it rejects the offer. Once the offer has been rejected, the offer will be extinguished and cannot be "accepted" later. This remains the case even if the offer was stated to remain open for a specified period of time that is yet to expire.

However, there are three possible exceptions to this rule. First, where the offeror contracted for valuable consideration or by deed with the offeree to keep the contract open for the specified period, this may be effective to keep the

offer alive even if it has been rejected before the close of the specified period. Second, where the original offer expressly or impliedly stipulated that it was to continue notwithstanding rejections, some argue, based on US authority, that this effectively keeps the offer alive irrespective of a prior rejection. Third, some argue that a counter-offer will not revoke an offer where the offeree states in the counter-offer that it is not to have that effect.

Conclusion

Under English law, an offer expressed to be "binding" or "irrevocable" is nothing of the sort unless some form of consideration has been given for the promise to keep the offer open, or it is contained in a deed. If an offeror wants to withdraw its offer, the quickest and most effective method is to telephone the offeree immediately and then follow up with a written notification.

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CAN GMBH SHAREHOLDER DISPUTES BE RESOLVED BY ARBITRATION?

The general meeting of the shareholders of a GmbH is responsible for various aspects of company affairs such as the adoption of the annual financial statements, the appointment and dismissal of directors, the approval of certain actions by a director and the exclusion of shareholders. In all these cases a resolution of the shareholders is required.

Frequently disputes arise among shareholders regarding the validity of such resolutions made in a general meeting, in particular, when the minority shareholders feel that their view is not being taken into consideration adequately.

The question is then: does an arbitral tribunal have the competence to decide disputes among, or can such disputes only be decided by a State court? Almost all GmbHs have an arbitration clause in their articles of association, but, so far, the Federal Court of Justice has held that shareholder disputes may not be taken to arbitration.

The Federal Court of Justice reasoned that an arbitral award relating to the validity of a shareholder resolution would only have effect on the persons involved in the arbitration proceedings. This was considered unacceptable, as a shareholder resolution can obviously only be valid or invalid with effect for or against all shareholders. If, however, the decision were made by a State court, the prevailing opinion was that it would have effect for or against all shareholders by virtue of an analogous application of §§248, 249 Stock Corporation Act.

On 6 April 2009 (II ZR 255/08, Deutsches Steuerrecht 2009, 1043 ff., Betriebsberater 2009, 841 ff.) the Federal Court of Justice expressly ruled – in line with the prevailing opinion amongst German legal commentators – that disputes relating to the validity of GmbH shareholder resolutions may be decided by an arbitral tribunal, if the arbitration proceedings guarantee

- compliance with the minimum standard of due process; and
- legal protection for all shareholders concerned.

If this is the case, the decision of an arbitral tribunal will have effect *inter omnes*, that is, for and against all the shareholders of the GmbH.

Therefore, the arbitration clause must be worded with great care, in order to satisfy the “*minimum standards of due process*” required by the Federal Court of Justice. This means that, in particular:

- the arbitration agreement must be incorporated in the articles of association with the consent of all shareholders or in a separate agreement among all shareholders and the company itself;
- each shareholder must be informed about the commencement and course of the arbitration proceedings and thereby be in a position to be able to enter into the proceedings, at least as an intervening party;

- all shareholders must be able to influence the selection and appointment of the arbitrators unless the arbitrators are appointed by a neutral institution; and
- it must be guaranteed that all disputes regarding shareholder resolutions relating to the same subject matter are concentrated in one arbitral tribunal.

Only if these minimum requirements are reflected in the arbitration clause (or in *ad hoc* shareholders’ agreements), will the competence of an arbitral tribunal to decide disputes among shareholders be recognised by the German courts.

We would therefore recommend:

- reviewing all existing GmbH articles of association to ascertain whether the arbitration clause satisfies the requirements listed above; and
- ensuring that future arbitration provisions in articles of association or separate arbitration agreements are very carefully drafted in accordance with the guidelines from the Federal Court of Justice.

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REMEDY OF A DEFECT BY A PRINCIPAL CAN CONSTITUTE SPOILIATION OF EVIDENCE UNDER GERMAN LAW

The Federal Supreme Court (*Bundesgerichtshof*) recently decided that spoliation of evidence can arise, under certain conditions, when a principal has remedied a defect himself after the contractor was given a deadline to perform the remedy and failed to do so. The *Bundesgerichtshof* reversed the existing burden of proof under which the contractor in this case would have been obliged to prove that there had been no defect in the work. As a consequence, the principal had to prove that there had been a defect. Since this was no longer possible, the principal had to bear the costs of the remedy.

Spoliation of evidence occurs when a party hinders an opponent or makes it impossible for him to present the necessary evidence in litigation to prove his case. In the view of the *Bundesgerichtshof*, the justifiable remedy of defects carried out by a principal does not in itself constitute spoliation of evidence. This applies even where the remedying alters the work, making it more difficult for the contractor to present evidence. This is because the contractor would have been obliged to ascertain the cause of the defect and remedy the defect when it was reported to him. If the contractor does not fulfil this obligation, the principal cannot generally be accused of spoliation of evidence only because he makes use of his right to remedy the defect himself.

However, this depends significantly on the facts of the case. In the instant case, the remedying of defects revealed further

defects not previously visible, and the principal had neither documented those further defects, nor made it possible for the contractor to gather evidence relating to them. The *Bundesgerichtshof* viewed this as a negligent breach of the principal's contractual obligation to provide information to the contractor; it decided that it must have been evident to the principal that it would not have been possible for the contractor to prove to the court that his work was free of defects without the further defects being documented. This kind of failure to provide information can be regarded as spoliation of evidence (*Bundesgerichtshof*, 23.10.2008, VII ZR 64/07).

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EXTENDED POSSIBILITIES FOR EFFECTING SERVICE BY PUBLICATION

The Act to Modernise the Law Governing Private Limited Companies and to Combat Abuses (the “MoMiG”) came into force in Germany on 1 November 2008. It included an amendment to the German Procedural Code (the “GPC”) extending the scope of application of service by public announcement.

Before the amendment, service could only be effected by publication if:

- the party’s abode was unknown and service on an authorised agent was not possible;
- service that would have to be effected abroad was not possible or had no prospect of success; or
- service could not be effected because the party’s residence was not subject to German jurisdiction (e.g. diplomatic and consular corps).

The newly included §185 No. 2 GPC provides for additional circumstances under which service by publication will be accepted as valid service, namely:

- the legal entity is required to register a domestic business address with the commercial register;
- one unsuccessful attempt to effect the service at the registered address must have been made;
- if applicable, one unsuccessful attempt to effect the service at the address

of a registered authorised agent and – if applicable – at any other known domestic address must have been made.

There is no requirement to do further research or to effect service abroad, even if a foreign address is known.

The MoMiG also introduced an obligation for certain legal entities (e.g. limited liability companies and stock corporations) to register a domestic business address. Entities that are already registered are granted a transitional period.

In addition, the respective provisions of the relevant statutes (§10 II 2 Private Limited Companies Act, §13e II 4 Commercial Code, §39 I 2 Companies Act) give companies the option to register a further agent as authorised to accept service. This can be a shareholder or a third party such as a notary or a tax advisor. The registration of an authorised agent is optional. It can serve as a protection against service by publication if service to the registered domestic business address should fail for any reason.

Please note that the service of an order for payment in summary proceedings for debt recovery cannot be effected by publication.

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RECENT CLASS ACTION DEVELOPMENTS IN THE ITALIAN LEGAL SYSTEM

Development in Parliament

On 21 December 2007, in a departure from traditional Italian Civil principles, the Italian Parliament introduced a new type of lawsuit to protect consumers. Article 140-bis was inserted into the Italian Consumer Code to regulate “*azione collettiva risarcitoria*” (collective redress). The rule provided that, where a company infringes the rights of a group of consumers, certain specific collective bodies, representative of consumers’ collective interests, may undertake legal proceedings to obtain compensation for the individuals affected.

The “*azione collettiva risarcitoria*” for consumer protection was originally intended to come into force on 1 July 2008. However, both the collective bodies entitled to bring this new type of action and several representatives of the Italian Parliament expressed concerns about the legislation and requested that significant changes be made.

The introduction of the new provision was therefore postponed to 1 January 2009, and then again to 1 July 2009.

On 13 May 2009, the upper house in Parliament voted through some amendments to the legislation, including extending the number of collective bodies entitled to bring the action and introducing the possibility of bringing action against public authorities. Reviews by the lower house have led to a further postponement of the provision.

Finally, on 23 July 2009 the Italian Parliament approved a further amendment of the provision of Article 140-bis of the Consumers’ code (published on the Official Gazette on 31 July); the new provision, regulating a class action rather than a collective redress, will enter into force as

of 1 January 2010, and will cover only the infringements and violations occurred since 15 August 2009.

I. The current provision

According to the current text of Article 140-bis, consumers’ individual rights and interests may be protected through the so called “*azione di classe*”; the member of the class, damaged as a consequence of infringement of contractual obligations, defective products or unfair commercial practices, may undertake legal proceedings aimed at the ascertainment of the liabilities, at the compensation for damages and at the reimbursements.

The action may be brought by each member of the class, even through consumer associations and committees.

The system requires affected consumers to opt in and the statute of limitation is suspended as soon as the claim is issued or the joining to the action is filed, respectively for the consumers adhering to the action or joining at a following stage of the proceedings.

The procedure is structured in two phases, the first of which is aimed at the ascertainment of the admissibility of the claim; if the claim is admitted, the court orders that the contents of the claim be divulged to allow the joining of the members. Once the term for the joining is elapsed, no further actions for the same infringements and against the same entrepreneur are allowed.

Compensation and reimbursements are awarded by means of a final judgment, which is enforceable after 180 days from its issue.

II. Other remarks

While the original text of Article 140-bis has been harshly criticised by consumers associations as an unsatisfactory tool for defending consumer interests and as incompatible with the Consumer Code and EU overtures in relation to cross-border class actions, it seems now that the new provision may fulfil the main purposes of class action (reducing or eliminating serial litigation and increasing the consistency of judgments).

The reduction of the multiphase proceedings, originally provided, to a two-phase structure proceedings and the provision of a sole action are steps forward to the harmonisation of tools for consumers’ protection at a European level.

Nevertheless, as the new provision introduces a further type of trial, there may be some issues of compliance with the procedural rules of the code of Civil Procedural Law.

The efficacy of the new procedural instrument shall be therefore verified only after its entry into force, but the practice will surely have the opportunity to underline limits of the new provision and to suggest how to improve it in order to better address consumer needs and improve management of the proceedings.

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RECENT CHANGES TO THE ARBITRATION LAWS OF UKRAINE

On 5 March 2009 the Parliament of Ukraine enacted ground-breaking new legislation: *“On Amending Certain Legislative Acts Regarding the Activities of Domestic Arbitration Tribunals and the Enforcement of the Awards Rendered”*. The amendments to existing legislation are mainly aimed at limiting the jurisdiction of domestic arbitration tribunals. However, the new act’s provisions may impact upon international commercial arbitration: for example, whether international commercial disputes can be determined by arbitration and whether certain foreign international commercial awards are enforceable in Ukraine. The legislative amendments are intended to protect companies from conducting illegal corporate raiding practices and initiating fabricated arbitration proceedings. Before the revised legislation was enacted, the perception was that domestic arbitration had been open to abuse: for example, enabling the illegal purchase of shares in companies or of title to land.

In a nutshell, international commercial arbitration and domestic arbitration are governed by separate laws in Ukraine. The former is governed by the Law of Ukraine *“On International Commercial Arbitration”* No. 4002-XII and the latter by the Law of Ukraine *“On Arbitration Courts”* No. 1701-IV.

One of the key objectives of the new legislation is to limit the subject matter over which domestic arbitration courts have jurisdiction. In addition to the initial list of disputes which cannot be subject to

arbitration¹, the following disputes have now been added:

- (a) disputes concerning title to real estate and land plots;
- (b) disputes concerning the establishment of legal facts;
- (c) labour disputes;
- (d) corporate disputes²; and
- (e) arbitrations, which would require actions by the government or local authorities in order to enforce arbitration awards rendered in the scope of such arbitrations.

Also, it should be noted that new legislation introduces amendments to the Code of Commercial Procedure that exclude corporate disputes from being arbitrated. Previously, arbitration could not be used to determine disputes regarding the validity of regulations made by State authorities or disputes arising from the execution, modification, termination and fulfillment of contracts connected with the State’s needs. In the long run, these changes are likely to affect the arbitrability corporate disputes subject to international commercial arbitration, notwithstanding that these changes were introduced by the legislation governing domestic arbitration. The new legislation follows the recent trend started by the controversial recommendations of the High Commercial Court of Ukraine and the Supreme Court of Ukraine, which stated that issues

of corporate governance in Ukrainian companies may not be governed by foreign law. In addition, disputes arising out of corporate or contractual agreements shall not be referred to international commercial arbitration. Consequently, corporate disputes involving Ukrainian parties are no longer capable of determination by arbitration in Ukraine.

Additionally, the legislation introduced new regulations concerning other arbitration issues. By way of example, findings of fact established by an arbitration award are not binding upon the parties or State courts. Thus, any such finding may be re-opened and the relevant facts may have to be proved before the courts again.

The new legislation stipulates that parties to an arbitration agreement are free to choose the place of arbitration only in the event that the dispute is to be resolved by an *ad hoc* arbitration tribunal. Otherwise, the place of arbitration shall be considered to be the place where the relevant arbitration institution is located.

The amendments grant the right to challenge an arbitral award to third parties whose rights were in any way affected by such an award.

Rather surprisingly, despite its declared purpose of amending the legislation pertaining to domestic arbitration, the new legislation has also changed the order of priority for the enforcement of foreign arbitral awards. Under the new system the list of instruments enforceable by Ukrainian

court bailiffs, provided for by the Law of Ukraine "On Enforcement Proceedings," allows for awards rendered by International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry and International Maritime Commission of the Ukrainian Chamber of Commerce and Industry to be enforced in a simplified procedure previously only available in domestic arbitration awards, whereas foreign arbitration awards will have to be enforced through UNCITRAL Model Law fashioned proceedings. The rationale behind this discrimination remains unclear.

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1) *Article 6 of the Law of Ukraine "On Arbitration Courts" originally stipulated the following disputes as not capable of being arbitrated:*

1. *disputes on the validity of State regulations;*
2. *disputes arising from the execution, amendment, termination and fulfillment of contracts connected with the State's needs;*
3. *disputes connected with State secrets;*
4. *disputes arising from family relations;*
5. *bankruptcy disputes;*
6. *disputes where one of the parties is a State authority, municipal body, State organisation and company or public enterprise;*
7. *other disputes falling under the jurisdiction of general courts and the Constitutional Court of Ukraine; and*
8. *disputes where one party is a non-resident of Ukraine.*

2) *Article 12 item 4 of the Code of Commercial Procedure: "... disputes between a company and its shareholders (founders, stakeholders), including a shareholder who withdrew from the company; and also between shareholders (founders, stakeholders) of the company, with respect to the establishment, activity, governance and termination of the activity of the company."*

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