



# DECISIONS, DECISIONS

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## CODES, STANDARDS AND REGULATIONS – BORING, RIGHT?

by Melanie Willems



Many contracts contain “boiler plate” clauses that make one party responsible for complying with all applicable codes and standards, regulations, statutory requirements and the like.

These clauses may not usually give the party to whom they apply pause for thought before the contract is entered into. But it is worthwhile considering what the impact of these obligations might be before signing up to them. Particularly in the field of construction and engineering, we have come across cases where one regulatory document or potentially applicable standard might have changed the entire project, with a very serious effect for the contractor (who is generally the party who takes on the relevant obligation).

The following two examples are real life issues<sup>1</sup>.

### Bombs and Bridges

Some years ago a metropolis commissioned a new bridge. The bridge was to cross a river, below which there were tunnels for a mass transit system and, possibly, unexploded bombs. The contractor set out to construct submerged foundations when a public authority put a stop to the works. There was a fear that the works might disturb unexploded ordnance, and the public authority required an extensive survey to locate possible trouble areas. The contract contained a clause that made the contractor responsible for compliance with a large number of regulatory measures, and it applied to this scenario.

<sup>1</sup> Names and places have been omitted to preserve client confidentiality.

Some of the bombs were considered to be too fragile for removal due to close proximity to the tunnels. As a result, the bridge had to be re-designed, with the foundations and pillars being relocated. The contractor was now no longer enjoying a profitable project, but was facing insolvency if he had to bear all the additional costs. The employer asserted that there could be no variation or additional work entitling the contractor to further payment in respect of something that was the contractor's risk under the contract<sup>2</sup>. Fortunately, a settlement was reached and the pain was "shared".

### **Petrochemical Plants – Blast Proofing**

Protection from explosions was also central in our second example. This concerned the control facilities for a petrochemical plant which, due to the presence of high-pressure vessels, had to be blast-proofed. In the relevant jurisdiction, codes had undergone a change. Originally, an accident had led the relevant engineering association to publish a guidance document which prescribed a specific blast load which a control room had to be capable of withstanding. This was high – too high, some thought, for a run-of-the-mill plant. The document was identified by a three letter acronym, plus a number. Some years went by, and the accident was slowly forgotten. The engineers sat down again and published a new guidance document. This no longer specified the strength of the building. Instead, the designer was told the level of safety he had to work towards, on the basis of keeping a risk of fatalities below a certain probability (once every x thousand years). There was room for interpretation, and the results varied from plant to plant. The new document contained a section that was identified by the same three letter acronym plus the same number. Nobody said anything as to whether the first guidance document was now superseded.

You can probably guess what happened: a contract was entered into, the design

standard was identified simply by reference to the acronym, and eventually a dispute arose as to what exactly had to be built. There was much debate as to whether there was a presumption that the most recent standard should apply, and whether the employer had really specified the much more onerous standard. These difficulties caused delays to the project, and led to claims.

### **Legal Issues**

A party who suddenly faces a large increase in costs because of a regulatory requirement may be able to derive some assistance by considering the following areas of law:

- (a) Has the contract been frustrated? The doctrine of frustration will apply if there has been a radical or fundamental change in circumstances which means that performance of the contract has become something altogether different from what the parties agreed to do. But frustration requires some event or change to take place *after* the contract, for which neither party could be blamed – so while frustration was certainly considered in the first example, it could not help the contractor in our second example. Frustration does not apply easily: it has been said that performance of the contract must become either physically or commercially impossible<sup>3</sup>.
- (b) Is there a force majeure clause in the contract that could apply? Sometimes, the matter in issue is not so much a regulatory requirement but rather interference by a government authority (there may be an overlap here with the principles of frustration – some contracts have been held to be frustrated by government actions such as export prohibitions). The precise events that have been listed

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<sup>2</sup> Although much will depend on the particular contract, in principle such an argument is persuasive.

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<sup>3</sup> See *Chitty on Contracts*, 29<sup>th</sup> Edition, 23-001.

in the force majeure clause should be checked, to ensure that none of them apply. Generally, one would not expect a force majeure provision to be of help if a regulatory requirement only makes performance more expensive or more difficult.

- (c) Is the regulatory requirement new – was it in force at the time of contracting? Many contracts contain provisions which state that the financial consequences of new legislation or regulations that were not in force when the contract was agreed have to be borne by a particular party. In those circumstances, the contract may well provide for the machinery to re-

assess the price, or for some other financial compensation.

**Practical Solution?**

The case law is full of comments stating that the question of whether a contract has been frustrated is one of degree. Realistically, arguing about which side of the line a particular case falls is not attractive. A practical solution might be to include a financial limit in connection with any requirement to comply with regulations or statutes. Whether this is acceptable will depend on the economics of a particular transaction, but if the limit is set reasonably high, that may well be less contentious and could provide some protection against any “doomsday” scenario where a regulatory requirement increases the cost of the project very significantly.

**“STUCK IN THE MIDDLE”**

by Markus Esly



Some may remember the oft-quoted statements of principle as to the purpose of awarding damages from law school days. Lord Blackburn famously said in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas 25 that damages would be awarded in:

*“... that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation...”*

This general principle is accepted to be the “starting point” when looking at damages, both for contract and tort<sup>4</sup>.

<sup>4</sup> As noted in *McGregor on Damages*, 17<sup>th</sup> Edition (“McGregor”), at paragraph 1-022. Of course, the specific question to be asked as a result of this principle differs for tort and contract. In tort, the principle refers to putting the injured party in the position he would have been in had the tort never happened. In contract, the injured party is to be put into the position he would have been in had the contract

Hearing some of the arguments advanced by wrongdoers in the commercial courts and before arbitrators, apparently with great conviction, may have led some to wonder whether the entitlement to damages is not, in practice, less than Lord Blackburn would have it. In this article, we look at a common consequence of a breach of contract – the innocent party incurs a liability towards a third party. How does the law go about compensating the innocent party in this situation? And how should the innocent party act to ensure that he protects his position?

The innocent party may be caught between the contract breaker and third parties with whom he may want to do business, or to whom he may already owe a legal duty. This situation often arises in the context of a sale of goods. If the original seller delivers defective goods to a buyer who is in the business of selling them on or using them, then it is easy to see how any losses which the buyer might incur in his own (ordinary) subcontracts would be recoverable. In the

been performed – not in the position that he might have been in if the contract had never been made.

well-known *Victoria Laundry* case<sup>5</sup>, the claimants had ordered a boiler for use in their laundry business. It was not delivered on time, and the claimants sued for loss of profit. Damages were awarded for the buyer's loss of profits which would have been generated by its ordinary business (but not for an especially profitable government contract which the buyer lost, since that would not have been in the reasonable contemplation of the parties, and the seller, in fact, knew nothing about it).

So damages for breach of contract may be awarded for the loss of a (future) bargain – prospectively – provided it is not too remote. The position should not be any different, and prospective claims should be allowed, where the innocent party is not complaining of lost business but has already taken on a legal obligation to third parties exposing him to damages because of the breach of contract. Why then is it sometimes said that a claimant's loss (if it relates to expenses, or liabilities) must "crystallise" (in the sense of a certain amount having been paid out) before it can be claimed?

### **No Need for Loss to Have Been Paid Out Provided There is A Liability**

In fact, there is no legal requirement that a liability to a third party, incurred as a consequence of the breach of contract (and which passes the test of remoteness), can only support a claim for damages once the innocent party has "paid off" the third party.

This is well illustrated by the decision in *Total Liban SA v Vitol Energy SA* [2001] QB 643. The facts of that case were unusual. Vitol sold gasoline to Mackay. Mackay sold it to Total. The gasoline proved defective. Total then sued Mackay. Mackay in turn sued Vitol for its liability to Total. The same arbitrator was appointed in both references. It then transpired that Mackay were in poor

financial condition. They could neither afford to pay Total, nor could they afford to sue Vitol to get the money to pay Total. Mackay therefore assigned its right to claim against Vitol to Total. This left Total in the position of pursuing Mackay's claim against Vitol (a claim for Mackay's liability to Total) as Mackay's assignee, in Total's own right.

So in the *Mackay v Vitol* arbitration, the claimant had become Total suing in the name of somebody else (Mackay) who was liable to it (Total), and only on the basis of that liability existing as a matter of principle, since: (i) no money had changed hands and (ii) it had not been established by what amount (or if at all) Mackay were liable to Total. The arbitrator had a difficulty with this, as it seemed too hypothetical a situation for him to make any substantive award of damages in Total's favour. But the commercial court was more robust in its judgment and said that substantial damages could be awarded here:

*"(1) In English law, the cause of action for breach of contract is complete on breach; in contract, unlike tort, loss or damage is not an ingredient of the cause of action.*

*(2) The question in contract of whether loss has been suffered arises in the context of determining whether substantial damages may be claimed.*

*(3) A legal liability owed by B to C, consequent upon and not too remote from A's breach of its contract with B, is capable of constituting recoverable loss entitling B to substantial damages from A. There is no rule of law, requiring B first to have paid C."*

So a claim for substantial (and not merely nominal) damages is possible as soon as the breach has led to the innocent party itself being in breach to the third party. As the court pointed out, any concerns as to a "windfall", in the form of the innocent party / claimant recovering more from the defendant than would perhaps be due to the third party had the third party pursued a claim against the innocent party / claimant

<sup>5</sup> *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. This case is a good example of the operation of the rule as to remoteness of damages (set out in *Hadley v Baxendale*) – damages are recoverable if the kind of loss is a natural consequence of the breach and would therefore have been in the reasonable contemplation of the parties at the time of contracting.

to judgment or award first, could be addressed by the court assessing damages with care.

### **What is the Relevance of the “No loss” Cases?**

Pausing at this point, some may wonder – what about the so-called “no loss” cases, decisions such as *Alfred McAlpine Construction Ltd v Panatown*<sup>6</sup>? These cases are sometimes referred to in support of contentions that one cannot claim unless there has been a “personal” loss<sup>7</sup>. The relevant decisions arose in the field of construction, out of facts that can be summarised as follows. A developer engages a contractor to build premises, which it is known are owned by or will be sold to a third party. The sale may be made before the premises are actually built. The premises are duly completed by the contractor, but there are defects which need to be remedied. The third party has no direct right against the developer (who never accepted liability for defects caused by the contractor in the first place). The third party may, or may not, have a remedy against the contractor (by way of a collateral warranty). The result depends on whether he has such a remedy, as is clear from *Panatown*:

- (a) If the third party cannot recover from the contractor, there is a legal “black hole”. The contractor has broken his contract, but the developer cannot claim substantial damages under the building contract because he no longer owns the property – he has sold it to the purchaser and can say “*caveat emptor*” (buyer beware). He has managed to divest himself of the building without remaining on the hook for defects. So here the law steps in and creates an exception to the

normal rule that substantial damages must relate to either a loss or a legal liability. Putting it simply, the developer can claim substantial damages on behalf of the third party.

- (b) But if the third party can pursue the contractor, then there is no need for the law to step in with an exception to the ordinary rule. The third party can go directly against the contractor, and the wrongdoer can be held to account.

Is *Panatown* really consistent with *Total* and the position that the existence of a legal liability alone is enough to allow a claim for substantial damages? Yes: the Court of Appeal made that quite clear when the *Panatown* case was sent back following the House of Lords decision<sup>8</sup>. Waller LJ at paragraph 20 said:

*“It is self-evidently true that if there were in existence, prior to the entry into the building contract, a chain of contracts back-to-back imposing obligations [between the developer and the third party], equivalent to the obligations owed by [the contractor to the developer] under the building contract, then, despite the existence of [a direct warranty claim by the third party against the contractor], [the developer] under the building contract could recover those damages which it was obliged to pay up the chain.”*

### **Take Care – Damages Must Be Assessed “Once and For All”**

So the party “stuck in the middle”, if he is pro-active and wants to sort out his books, may start an action against the wrong-doer to get damages to discharge his liability to the third party rather than wait for the third party to sue him. This seems a good idea because the innocent party can avoid paying out of his own pocket first, and then chasing the wrongdoer to get the money back. But it is here that he will run into the

<sup>6</sup> [2001] 1 AC 51. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85 and *Darlington BC v Wiltshire Northern Ltd* [1995] 1 WLR 68.

<sup>7</sup> It is important to remember that a claim for breach of contract is possible upon any breach, but if the claimant cannot prove substantial loss or a liability then he will only get nominal damages – see McGregor, 10-002 and *The Mediana* [1900] AC 113 at 116.

<sup>8</sup> [2001] EWCA Civ 485 – this was for determination by the Court of Appeal of further issues on the basis of the ruling in the House of Lords.

rule in *Rowntree v Allen*<sup>9</sup>. We have just seen that a claimant can recover for future expenses that he has not yet incurred: the flip-side of this is that the law requires him to claim all of his damages (prospective or otherwise) in one action or reference<sup>10</sup>. So if the claimant does not get sufficient damages to discharge the liability to the third party (because when the third party makes its claim, it is found that they are entitled to more), he has to bear the shortfall. As the law currently stands, the innocent party cannot go back and ask the court or arbitrator to order the wrongdoer to pay the balance. This hardly seems fair.

There is a further issue to be considered: the court or arbitrator may not feel able to assess prospective damages once and for all, because of particular uncertainties arising in a given case. These considerations influenced the Court of Appeal in *Trans Trust S.P.R.L. v Danubian Trading Co.*<sup>11</sup> Even Denning LJ (not normally known to take the side of wrongdoers) noted that if a liability to a third party had not been assessed, the innocent party might not (in all cases) be entitled to damages until all issues relating to the third party's claim had been determined.

What then are the other options for the innocent party? One is to claim an indemnity, rather than damages, from the wrongdoer. But an indemnity covering anything that the innocent party might have to pay to the third party might sound good in theory, whilst (in practice) still exposing the innocent party to the risk of the wrongdoer's future insolvency and potential trouble of enforcing the indemnity and dealing with the claim from the third party when it comes. Much may also depend on the terms of the indemnity – for example, are all the legal costs that might be incurred covered?

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<sup>9</sup> (1936) 41 Com.Cas. 90

<sup>10</sup> Provided there is a single cause of action only. If there are separate breaches (for example, in an instalment contract), then he may be able to commence a second action for the further breach and claim further damages – see generally Chapter 9 of McGregor on this issue.

<sup>11</sup> [1952] 2 QB 297. See also *Deeny v Gooda Walker* [1995] 1 WLR 1206.

### **Paying Off First Before Claiming – What Are The Dangers?**

If an indemnity is not attractive, the innocent party could also take the plunge and reach a settlement with the third party. On the basis of that compromise, which does “crystallise” his loss, he can then bring an action against the wrongdoer. If that is the chosen course of action, several issues arise.

The innocent party must, of course, still take reasonable steps to mitigate his loss. It is not the purpose of this article to discuss the duty to mitigate, but one aspect of it merits highlighting. It is not always safe to “burn one's bridges” with the contract breaker – because he may well be able to offer something that would actually reduce the loss. If it is reasonable to deal further with the contract breaker, then the innocent party may be required to do so. This is illustrated by *Payzu v Saunders*<sup>12</sup>. The seller had refused to deliver goods on the agreed credit terms. The buyer found that replacement goods could only be obtained at a higher price – in the first instance, the buyer's damages would be the additional amount he would have to pay to get the replacement goods. But in this case, the seller then offered to deliver the goods against cash rather than on credit. In the circumstances, it was found that the buyer's refusal to accept that offer was unreasonable. Of course, an offer by the contract breaker to perform the contract after all provided that any claim for damages is dropped<sup>13</sup> cannot be reasonable.

Provided that there has been no failure to mitigate, a claim against the wrongdoer can be based on a settlement reached with the third party. In *Biggin v Permanite*<sup>14</sup>, the Court explained that a reasonable settlement would be the basis of the damages to be paid to the innocent party, and that it would be for the contract breaker

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<sup>12</sup> [1919] 2 KB 581.

<sup>13</sup> *Schindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038.

<sup>14</sup> [1951] 1 KB 422.

to attack it and show that it was unreasonable:

*“If, upon the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs have settled, he would be justified in awarding the settlement figure. I do not consider that it is part of his duty to examine every item in these circumstances. The plaintiffs put forward their claim and call evidence to establish it. The defendants have an opportunity of cross-examining the plaintiffs’ witnesses and of calling evidence themselves. The plaintiffs must establish a prima facie case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages. The position is much the same, though, perhaps, not quite as strong, as in a case in which damages have been assessed in a suit between other parties involving the same facts. The judgment is not binding, but the court will not lightly disregard it in the absence of fresh evidence or new factors”*

That leaves the question: what exactly is a reasonable settlement? Can the innocent party reach a “quick and dirty” commercial deal? Is legal advice recommending a settlement required? A review of the cases shows that the following considerations are relevant when a court or arbitrator seeks to determine whether a settlement was reasonable:

- (a) The issue of whether a settlement was reasonable is not the same as what the outcome of any claim by the third party against the innocent party would have been<sup>15</sup>. The claimant should be liable to the third party (and it is certainly not recommended to settle hastily if liability is in doubt), although there is a statement made by the Court of Appeal (in *Comyn Ching v*

<sup>15</sup> *Royal Brompton Hospital v NHS Service Trust* [1999] BLR 4 (paragraph 34).

*Oriental Tube*)<sup>16</sup> – albeit in connection with an indemnity against “claims” – that:

*“A loss will be sustained in consequence of a claim if it arises from a reasonable settlement of a claim which had some prospect or a significant chance of success.”*

- (b) This may beg the question: which is it, ‘some prospect’ or a ‘significant chance’ of success? These two thresholds appear different.
- (c) The courts seem to acknowledge the fact that an assessment of a claim can only be made on the basis of the information available at the time, and that such an assessment may be far from exhaustive<sup>17</sup>.
- (d) The claim by the third party does not have to be proved strictly with all of its particulars<sup>18</sup>.
- (e) It seems relevant that a settlement was reached following legal advice, although there are conflicting decisions as to whether the content of the legal advice is relevant and should (or can) be put into evidence<sup>19</sup>.
- (f) The claimant appears to be entitled to take a view of the merits of the claim made by the third party, rather than assess it strictly on the basis that it is presented at time<sup>20</sup>.
- (g) In exceptional cases, a wrongdoer may be liable for an unreasonable

<sup>16</sup> *Comyn Ching v Oriental Tube Co Ltd* [1979] 17 BLR 47 – per Brandon LJ at page 92.

<sup>17</sup> *Royal Brompton Hospital NHS Trust v Hammond and Others* [1999] BLR 162, at paragraphs 41 to 43 (in particular, the last sentences of 43).

<sup>18</sup> *Oxford University Press v John Stedman Group* (1990) 34 Con L.R. 1

<sup>19</sup> These conflicting decisions are discussed in *Keating on Construction Contracts*, 8<sup>th</sup> Edition, 8-031, footnote 54.

<sup>20</sup> See the short judgment of Brandon LJ in *Comyn Ching Ltd v Oriental Tube Ltd* [1979] 17 BLR 47 – he referred to a point that was not taken in a claim but which he felt might have been raised subsequently had the action continued.

settlement<sup>21</sup> - but this must have been in the reasonable contemplation of the parties when the contract was made.

There is a further point to note. The Court of Appeal has said (in *Comyn Ching*) that there are two (separate) questions<sup>22</sup> to consider: (i) was it reasonable to settle, and (ii) was the amount of the settlement reasonable. For the first question, considerations such as the uncertainty of the outcome of “*long and complex litigation*” were noted as relevant. Legal advice as to settlement was also referred to in connection with the first question. The second question, if it is truly separate as the court seemed to suggest, would then need to be answered without reference to those factors. Would it therefore be unreasonable to make a commercial settlement that was higher than the third party’s strict entitlement, but which ended potentially long and complex litigation there and then? The reality of commercial disputes is that the party making a (somewhat overstated) claim in proceedings can sometimes benefit from putting the defendant to a large amount of effort and expenditure to reduce the claim to the strict entitlement. Can the paying party put a price on that, settle quickly, and recover everything from the wrongdoer who caused all of this in the first place? If Lord Blackburn’s statement is applied strictly, it would seem that this should be the case.

So while there is guidance to be found in the cases as to what a reasonable settlement is, and it is the contract breaker who has the burden of showing that a settlement was unreasonable, nevertheless there remains a risk that the innocent party pays out too much and cannot recover everything from the wrongdoer. What precisely will be a reasonable settlement will depend on all the circumstances of the case

– but that is also the reason for the uncertainty.

### Conclusion

In our suggestion, the law is not entirely satisfactory when dealing with a party who incurs a liability towards others due to a breach of contract. It is possible to claim damages from the wrongdoer first in order to settle the liability, but that has the risk of underestimating the extent of the liability. Once damages have been assessed for a particular breach, that is the end of the matter as the law stands.

If the third party is paid off first, the contract breaker can make an argument as to the settlement being unreasonable. The ingenuity of lawyers in coming up with arguments that they will say should have been taken by the innocent party against the third party should not be underestimated – and an element of risk for the innocent party remains that he may not recover everything he paid out.

What then is the solution? In our view, it should be possible for the innocent party to claim damages from the wrongdoer but with permission to revisit the matter if it turns out the third party is entitled more. This does not solve everything (for example, the question as to whether the third party is reasonably entitled to more than was awarded in the first place remains), but it would at least allow the innocent party to get a substantial amount of money out of the wrongdoer, which it could then use to try to settle the dispute. In the real world, “money talks” and a good deal of disputes might be settled in this way.

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<sup>21</sup> *P&O Developments Ltd v The Guy’s and St Thomas’ NHS Trust* [1999] BLR 3, at pages 13-14 (per HHJ Bowsher QC). These passages are a useful reminder that the court is not doing anything more than applying the rule of remoteness of damages when considering whether damages should be awarded on the basis of a settlement.

<sup>22</sup> Page 89

## INJUNCTING ARBITRATION PROCEEDINGS: OH NO YOU DON'T

by Robert Blackett



Intervention in arbitration by the courts should be kept to a minimum. Do we all generally agree on that? As arbitration purists, we do! The parties have, after all, sought to agree that their dispute will be settled by an arbitrator, choosing that over the court which would otherwise decide. The Arbitration Act 1996 reflects such an approach, with Section 1 providing:

*“General Principles:*

*The provisions of this Part are founded on the following principles and shall be construed accordingly:*

...

*(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*

*(c) in matters governed by this part the court shall not intervene except as provided by this part”*

In a much-quoted speech in the House of Lords, Lord Wilberforce commented as follows on the Bill which was to become the Arbitration Act 1996:

*“I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible and subject to statutory guidelines no doubt, regarded as a free-standing system, free to settle its own procedure ... I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction ... other countries adopt a different attitude ... the difference between our system and that of others has been and is, I believe, quite a*

*substantial deterrent to people sending arbitrations here ...”*

*“How then does this Bill stand in that respect? ... I find that, on the whole and although not going quite so far as I should personally like, it has moved very substantially in this direction. It has given the court only those essential powers which I believe the court should have, that is rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors”*

The Act operates to reduce the opportunities for parties who have agreed that their disputes will be settled by arbitration to seek to have those disputes resolved by the courts instead. To give two examples:

- (1) Section 9 of the Arbitration Act 1996 provides for legal proceedings brought in breach of an arbitration agreement to be stayed unless the court is satisfied that the arbitration agreement is ‘null and void, inoperative, or incapable of being performed’. This is by contrast with Section 4(1) of the Arbitration Act 1950, which gave the court discretion whether to stay proceedings brought in breach of an arbitration agreement.
- (2) Section 69 permits parties to agree that there shall be no right to appeal an arbitration award on a point of law. Under the Arbitration Act 1979, this right to exclude appeals by agreement did not apply to particular types of arbitration. Even where the right to appeal is not excluded, section 69(3) sets out particular requirements which must be met before leave to appeal will be granted<sup>23</sup>. The 1996 Act provides for a right to appeal an award for ‘serious irregularity’, which cannot be excluded. There is, however, a rather short, closed, list of what can constitute serious irregularity and the

<sup>23</sup> Largely drawn from the decision of the House of Lords in *The ‘Nema’* [1982] AC 724

courts have been generally restrictive in their interpretation<sup>24</sup>.

If, as Lord Wilberforce said, the 1996 Act is sufficient to confer “*only those essential powers which a court should have*”, it might be thought surprising to find parties seeking to disrupt ongoing arbitrations by applying for injunctions under an obscure, supervisory power which predates the Act and was not included in it.

Nonetheless, in three recent cases (*Intermet*, *Elektrim* and *Blue Circle*, all considered below), parties to ongoing arbitrations have sought to do just that. The jurisdiction in question applies, it seems, where an issue arises both in court proceedings and in properly constituted arbitral proceedings. Lord Wilberforce referred to a tendency to see arbitration as “the poor relation”, and it seems this power has its origins in just such a view, with proceedings before arbitrators seen as automatically inferior to those before courts. To quote Farwell LJ in the 1912 case of *Doleman & Sons v Ossett Corporation*:

“*The King’s Courts do not compete with arbitrators...*”<sup>25</sup>

#### **Background: *The ‘Oranie’ and The ‘Tunisie’***

The court’s jurisdiction is first clearly described in *The ‘Oranie’ and The ‘Tunisie’*<sup>26</sup> a 1966 decision of the Court of Appeal. A dispute between shipowners was the subject of arbitration in London. Twenty four days before the final hearing in that arbitration, one party applied to the court seeking an injunction to prevent the arbitration continuing. This was on the ground that there were concurrent proceedings before the French courts in which the same parties were involved, and a risk of inconsistency between the court’s decisions and the arbitrator’s decisions. The injunction was refused at first instance, largely because of the applicant’s delay. By the time the case came before the Court of

Appeal, the arbitration had been heard and an award prepared, but not issued.

The Court of Appeal held that there was a power to injunct an arbitration. Sellers LJ described the principles governing such an application as follows:

*“I have already said that delay is a powerful factor against granting an injunction. The guiding principles are:*

- (1) that the stay must not cause injustice to the claimant in the arbitration, and*
- (2) that the applicant for a stay must satisfy the court that the continuance of the arbitration would be oppressive or vexatious to him or an abuse of the process of the court: in short that it would be unjust.”*

The Court of Appeal refused the injunction, with Sellers LJ saying:

*“...delay is most prejudicial to the granting of an injunction. That ground alone, I think, would be sufficient to justify the refusal of the learned Judge to make the order asked for.”*<sup>27</sup>

#### *University of Reading v Miller Construction*

Thereafter, the only time the power has been used to injunct arbitration proceedings is in the case of *The University of Reading v Miller Construction*<sup>28</sup> (decided in 1994, two years before the 1996 Act). The University retained Miller to carry out construction work under two contracts. The second of those contracts contained an arbitration clause, but the first did not. Miller brought arbitration proceedings against the University under the second contract, claiming £1.8m. The University then brought claims in court against Miller, its engineer and its architect in respect of building works which had been the subject of both contracts.

Miller applied for a stay of the court proceedings, at least insofar as they related to the second contract. As noted above, however, s4(1) of the Arbitration Act 1950

<sup>24</sup> See, for example, the decision of the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA and Others* [2001] 1 AC 221

<sup>25</sup> [1912] 3 KB 257 at 273

<sup>26</sup> *The ‘Oranie’ and The ‘Tunisie’* [1966] 1 Lloyd’s List LR 477

<sup>27</sup> At pages 484 to 485

<sup>28</sup> [1994] 75 BLR 91

gave the courts a discretion whether to stay court proceedings brought in breach of an arbitration clause. Judge Bowsher QC refused to stay the proceedings.

The University then applied to the court for an injunction to restrain the arbitration. HHJ Humphrey LLOYD QC granted the injunction. HHJ LLOYD applied the principles stated by Sellers LJ in *The 'Oranie' and The 'Tunisie'*. He found that the injunction would cause no injustice to Miller (the University having offered to consent to Miller's claim being advanced before the court, with the court to have the same powers as the arbitrator) and that it would be vexatious and oppressive for the university to be involved in concurrent proceedings before both court and arbitrator.

### The three recent cases: *Intermet*, *Elektrim* and *Blue Circle*

#### *Intermet FZCO v Ansol*

These things remained for 12 or so years, until the closing days of 2006, when Mrs Justice Gloster, in the Commercial Court, heard an application for an injunction in the case of *Intermet FZCO v Ansol*<sup>29</sup>. In that case, claimants brought a claim in England alleging a conspiracy to defraud by a number of defendants. The claimants had brought separate arbitration proceedings in Switzerland, claiming for a breach of contract by one of the same defendants. The defendant sought an injunction restraining the Swiss arbitration, alleging that Swiss proceedings were oppressive and unconscionable because they would allow the claimants 'two bites at the cherry'.

It was assumed in that case that, despite the passage of the 1996 Act, the court retained a power to grant an 'anti arbitration' injunction, by virtue of section 37 of the Supreme Court Act (SCA), which provides:

*"The High Court may by order ... grant an injunction ... in all cases in which it appears to the court to be just and convenient to do so"*

Gloster J considered that the principles which apply to the grant of anti-arbitration

injunctions are the same as those which apply to anti-suit injunctions. Briefly, these allow an English court to restrain a party from pursuing proceedings before certain foreign courts where the foreign proceedings are brought in breach of contract or are "vexatious, unconscionable or oppressive".

Gloster J declined to grant an injunction. Once again, delay was a factor<sup>30</sup>, but Gloster J also considered that the arbitration proceedings could not be considered 'oppressive or unconscionable'. There was no risk of inconsistent findings because the arbitration proceedings were anticipated to result in a decision before the English court proceedings, and:

*"...insofar as there are any adverse findings against the claimants, issue estoppel will arise to prevent them from re-arguing or re-litigating such issues in the Commercial Court proceedings."*

The English Court was content to let arbitrators decide issues which might otherwise have been considered in the English proceedings, suggesting a move away from the pre-1996 Act view of arbitration as the poor relation.

#### *Elektrim v Vivendi*

A few weeks after the judgment in the *Intermet* case was handed down, judgment was given in *Elektrim SA v Vivendi Universal SA*<sup>31</sup>, another Commercial Court case. Elektrim was the defendant in an LCIA arbitration in London and an ICC arbitration in Geneva, in both of which Vivendi was claimant. Elektrim applied on three occasions to the LCIA arbitrators for a stay, which was refused. Elektrim then applied to the English court for an anti-arbitration injunction, restraining the LCIA arbitration. It argued that, if Vivendi were allowed to pursue both arbitrations, its conduct would be vexatious, unconscionable or oppressive. Elektrim

<sup>29</sup> [2007] EWHC 226 (Comm)

<sup>30</sup> Gloster J referred to the decision of Millett LJ, as he then was, in *The 'Angelic Grace'* as authority for the proposition that delay was a ground for refusing an injunction restraining foreign proceedings, particularly when foreign proceedings are well advanced.

referred to the possibility of inconsistent awards, and alleged that Vivendi was pursuing two arbitrations so as to place Elektrim under financial pressure and force a settlement.

At paragraph 51 of his judgment Mr Justice Aikens states:

*"I do not intend to explore whether the court has any jurisdiction at all under s37 of the SCA to grant ... injunctions to restrain arbitrations that are the subject of the 1996 Act. I must assume that there is such a jurisdiction, given the comments of the Court of Appeal in Cetelem v Roust Holdings ... and Weissfisch v Julius. Nonetheless I must consider whether the jurisdiction is wide enough to provide a base on which an injunction might be granted on the facts of this case"*

Aikens J concluded that it was not vexatious or oppressive that Elektrim should face two arbitrations rather than one. Each concerned an issue which had arisen under a distinct contract, and with respect to each contract Elektrim had agreed that any dispute would be determined under a separate arbitration procedure.

Notwithstanding the passage quoted above, Aikens J went on<sup>32</sup> to consider the effect of the 1996 Act. His conclusion does, in truth, come very close to saying that the 1996 Act does away with the power to injunct arbitral proceedings described in *The 'Oranie'* and *University of Reading* cases. He first referred to Section 1(c), which he describes as 'an express statutory warning not to intervene except as provided in Part I of the 1996 Act'. He then points out that the whole scheme of the 1996 Act suggests the scope for a court to intervene by injunction before an award is made is limited. The Act contains only two express references to the grant of injunctions<sup>33</sup>, neither of which was of the kind sought by Elektrim.

The arbitrators could have stayed the LCIA arbitration pending an award in the ICC arbitration. Elektrim had failed to achieve this before the arbitrators, and was seeking to obtain the same result by way of an injunction. Elektrim's application was, in effect, an attempt to override the arbitrators' decision to refuse a stay. The question of a stay of arbitral proceedings is a procedural matter<sup>34</sup> and Part I of the Act generally contemplates that the arbitrators, and not the court, will deal with issues of procedure in the arbitration<sup>35</sup>. Aikens J concluded:

*"...even if Elektrim ... could establish that the continuation of the LCIA arbitration was ... vexatious, oppressive or unconscionable, in this case the court should not invoke the power to grant an injunction under section 37. This is for the following reasons:*

...

*The LCIA arbitration tribunal has decided, on three occasions not to stay the LCIA arbitration. ... the court is given no express power under the 1996 Act to review or overrule those procedural decisions in advance of an award by the LCIA arbitrators. ... to attempt to invoke section 37 as a means of reviewing or overruling the tribunals decisions would undermine the principles of the 1996 Act and would grant the court a general supervisory power which it never had."*

Similar considerations would, it seems, apply in almost every case where an injunction is sought to restrain arbitral proceedings on the grounds that it would be 'vexatious, unconscionable or oppressive' for them to continue, pending the resolution of court proceedings or another arbitration. This is because, unless it is excluded by the arbitration agreement, the tribunal will always have a procedural power to stay its

<sup>31</sup> [2007] EWHC 571 (Comm)

<sup>32</sup> Paragraphs 67–79 of the judgment.

<sup>33</sup> Sections 44(2)(e) and 72

<sup>34</sup> Section 34(2)(a) provides that procedural matters include "...when and where any part of the proceedings is to be held.."

<sup>35</sup> Section 34(1) provides that it is for the tribunal to decide "...all procedural and evidential matters. Subject to the right of the parties to agree any matter...".

proceedings pending the outcome of the other proceedings.

Aikens J, did, however go on to make one comment which suggested that the power survived. This was his comment on *University of Reading v Miller*, to which counsel for *Elektrim* had referred:

*“That case is not helpful. First, it was decided before the 1996 Act came into force... the court had previously refused to grant a discretionary stay to halt the court proceedings between the two parties to the arbitration clause. It had decided that it was better for the court to deal with all disputes in its jurisdiction and the arbitration should await its outcome before it proceeded. In those circumstances, where there was a danger of two tribunals within England and Wales deciding the same issues of fact if they both continued, it is not surprising that an injunction was granted.”*

This short obiter statement was to be the spur for the third of the three recent cases in which an injunction has been sought. Before moving on to consider that case it should, however be noted that Aikens J, considered the issue of delay by *Elektrim* in seeking an injunction. He referred to the judgment of Sellers LJ in *The ‘Oranie’*, and appears to have agreed that delay is a powerful factor against the grant of an anti-arbitration injunction.

#### *J. Jarvis & Sons v Blue Circle Dartford Estates*

The recent decision of Mr Justice Jackson in the Technology and Construction Court in *J. Jarvis & Sons Limited v Blue Circle Dartford Estates Limited*<sup>36</sup> is the latest case in which the jurisdiction has been invoked.

Blue Circle retained Jarvis to construct a warehouse facility. The building contract provided for CIMAR arbitration. Before the warehouse had been built, Blue Circle agreed to sell the land. Under the sale contract, it undertook to the new owner that a warehouse would be constructed in accordance with the specification in the

building contract. Jarvis also granted a collateral warranty to the same effect to the building owner.

The warehouse proved defective. In 2003, the Owner indicated that it would bring claims against Blue Circle (under the sale contract) and Jarvis (under the collateral warranty) for the cost of remedial works. It did not, however, commence proceedings.

In 2006 Blue Circle brought an arbitration claim against Jarvis under the building contract. It claimed the cost of the remedial works as damages for breach of the building contract. This, Blue Circle argued, was what Jarvis’s breach had caused it to become liable to the owner for. More than six months later, and with just two weeks to go before the arbitration hearing, Jarvis applied to the court for an injunction restraining the arbitration.

Jackson J reviewed *The ‘Oranie’*, the *University of Reading* case and referred to the two commercial court decisions. He concludes<sup>37</sup>:

*“From this review of authority I derive four propositions:*

- (i) The Court’s power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to restrain an arbitration from proceeding.*
- (ii) That power may be exercised if two conditions are satisfied, namely: (a) the injunction does not cause injustice to the claimant in the arbitration, and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.*
- (iii) The Court’s discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.*
- (iv) Delay by the party applying for an injunction is material to the Court’s*

<sup>36</sup> [2007] EWHC 1262 (TCC)

<sup>37</sup> Paragraph 40

*exercise of discretion and may in some cases be fatal to the application.”*

Jarvis claimed that the arbitration proceedings were ‘oppressive’ because they could result in Jarvis having to pay the same damages twice. The award of damages to Blue Circle would not discharge Jarvis’s liability to the owner under the collateral warranty. This meant that, if for some reason Blue Circle did not pay the money to the owner, the owner could still claim against Jarvis and so Jarvis might have to pay the same damages twice. Jackson J considered that any risk of this happening was so reduced by Blue Circle’s undertaking as to how it would deal with any damages awarded that the arbitration proceedings, that the arbitration could not be characterised as oppressive<sup>38</sup>.

Jarvis argued that the arbitration proceedings were vexatious because, if the owner launched its own proceedings then there would be concurrent proceedings concerning the same subject matter. This would “carry the risk of inconsistent findings”, along with duplicated costs and a need for the parties to fight on two fronts over the same subject matter.

Jackson J dealt with this argument as follows<sup>39</sup>:

*“All of those observations are true, but they do not mean that the arbitration is vexatious. It is an inevitable consequence of the mandatory language of section 9 of the Arbitration Act [1996] that from time to time there will be concurrent proceedings in court and before an arbitrator....*

*I therefore conclude that the prospect of concurrent proceedings in the present case, with all the usual consequences of concurrent proceedings, does not make the arbitration either vexatious or unconscionable or an abuse of process”*

The same consideration, of course, will apply whenever a party claims an injunction to restrain an arbitration on the ground that it is vexatious or unconscionable for it to continue concurrently with court, or indeed other arbitration, proceedings. Jackson J’s judgment, therefore, seems almost to remove the jurisdiction applied in *University of Reading*.

All Jarvis’s other arguments were as to the merits of Blue Circle’s substantive claim. These issues had yet to be determined by the arbitrator, and could not be grounds for staying the arbitration.

Jackson J went on to identify two further obstacles to Jarvis’s claim for an injunction. The first was that there were not actually any concurrent proceedings afoot. The second was Jarvis’s delay. In this regard the Judge referred to the reasoning of the Court of Appeal in *The ‘Oranie’* and concluded that:

*“Jarvis’s delay in proceeding is a factor which points strongly to against the grant of an injunction.”*

### Conclusion

Following the 1996 Act it was not easy to see how a party might now ever obtain an injunction restraining arbitral proceedings on the grounds that they are oppressive, vexatious or unconscionable. While the *Elektrim* and *Blue Circle* decisions preserve the possibility of an injunction they are also, in truth and on a true reading of the authorities, nails in the coffin of this particular power.

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<sup>38</sup> Paragraph 44

<sup>39</sup> Paragraphs 46-47

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## MEET THE TEAM

Each quarter we will introduce one of the members of Howrey LLP's International Dispute Resolution Group.



**JEAN DE HAUTECLOCQUE**  
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Jean de Hauteclocque is a partner in the Global Dispute Resolution Group, based in Howrey's Paris office. Mr. de Hauteclocque has more than 25 years of experience in dispute resolution, particularly international arbitration. He has been involved in a broad variety of multi-jurisdictional and domestic disputes. His practice includes, in particular, commercial contracts, investment, asset tracing and seizure, numerous corporate and regulatory disputes and some specialist fields such as product liability and environmental law.

He has acted as counsel in a large number of arbitral proceedings both ad hoc and for institutions such as ICC, CCIG and NAI. Mr. de Hauteclocque has also been appointed as arbitrator (chairman or panel member) in a number of international arbitration cases. Jean and Melanie have been partners before, and he is a great addition to a dynamic and growing team.

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