COMMERCIAL DISPUTES WEEKLY – 50TH EDITION SPECIAL

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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

To mark this special 50th edition of the Commercial Disputes Weekly, we have brought together some of the most significant decisions of the English courts from the past 12 months. WFW acted for the successful party on three of them These decisions demonstrate that, even as the restrictions imposed around the world as a result of the Covid-19 pandemic continue, the English courts continue to dispense justice for commercial parties effectively, efficiently and fairly.

We trust that you find these weekly bitesize updates useful. To help us keep the Commercial Disputes Weekly relevant to you, we would also be grateful if you could complete a short survey, available **here**.

> "As a matter of principle and authority there are ... strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract."
>
> Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb

Arbitration

In an important judgment on the law applicable to an arbitration agreement, the Supreme Court has overturned the Court of Appeal's decision that, where no choice of law is specified, an arbitration agreement should be governed by the law of the chosen seat, instead holding that the governing law of the underlying contract will generally apply to an arbitration agreement which forms part of that contract.
Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb

Arbitration

In a significant decision concerning measures in support of arbitration, the Court of Appeal has confirmed that the English court has power to order a non-party to give evidence by deposition in relation to a foreign arbitration, but the question of whether the court has power to make other orders against non-parties pursuant to the Arbitration Act 1996 has been left for another day. Read our article on the decision here.
A & Anr v C & Ors

Construction

In an important case for the construction industry the UK Supreme Court has held that the insolvency regime and the statutory adjudication regime are not incompatible, and so a company in liquidation could refer a dispute to adjudication, notwithstanding the existence of cross-claims and the rules regarding set-off in an insolvency. The Supreme Court also rejected the Court of Appeal's arguments that such an adjudication would be an exercise in futility. Read our full article here.

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd

Construction

In a significant case for parties to construction contracts, in which WFW acted for the successful party, the Court of Appeal has confirmed that if an adjudicator's decision is arguably procured by fraud, or the evidence on which the adjudicator relied is both material and arguably fraudulent, and if the allegations of fraud could not have been raised in the adjudication itself, those allegations can be a proper ground for resisting enforcement of the decision. Read our article here.

PBS Energo AS v Bester Generacion UK Limited

Contract

In a leading shipbuilding case, where WFW acted for the successful buyer, the English court has considered key questions concerning SAJ form shipbuilding contracts, including points on the prevention principle, notices, modifications and non-payment of installments. Our full article is available here.

Jiangsu Guoxin Corporation Ltd (formerly known as Sainty Marine Corporation Ltd) v Precious Shipping Public Co. Ltd

"In the context of construction disputes adjudication has, as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication."

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd

Equity

In a significant case, in which WFW acted for the successful claimant lenders, the Commercial Court has provided helpful clarification on the law of undue influence, holding that two sons of a shipping magnate had not been "unduly influenced" to enter into personal guarantees of shipping loans. Read our full article on the decision here.

YS GM Marfin II LLC & Ors v Lakhani & Ors

Experts

The Technology and Construction Court has confirmed that experts can owe fiduciary obligations of loyalty to their client, and accordingly continued an injunction to restrain a firm from providing expert witness services in respect of an arbitration where they had been instructed by the opponent in separate but related proceedings.

A v X & Ors

Insurance

In an expedited hearing under the Financial Markets Test Case scheme, the Commercial Court has provided important guidance on the correct construction of various business interruption insurance policies, and whether they provide cover for losses arising out of the Covid-19 pandemic and resulting government restrictions. An appeal from the decision is to be heard by the Supreme Court, but in the meantime read more about the decision in our full article here.

The Financial Conduct Authority v Arch Insurance (UK) Limited & Ors

Privilege

The Court of Appeal has handed down a significant judgment on privilege, confirming that a dominant purpose test applies to legal advice privilege as well as litigation privilege, and so when assessing whether emails sent to both lawyers and non-lawyers are covered by privilege, it is necessary to identify the purpose of the communication. Read our article here.

The Civil Aviation Authority v R (on the application of Jet2.com Limited) & Anr

Privilege

In a noteworthy decision which will be of particular interest to in-house counsel, the Commercial Court has confirmed that legal advice privilege applies to communications with foreign lawyers, including in-house lawyers, and the court will not enquire into how the foreign lawyer is regulated or the standards applicable to the lawyer under their local law. Read our full article here.

PJSC Tatneft v Bogolyubov & Ors

Reflective loss

In an important decision, the Supreme Court has clarified the law on the "reflective loss" principle, the majority holding that it is a rule of company law which provides that a shareholder cannot bring a claim in respect of a diminution in the value of their shareholding or a reduction in their distributions which is merely the result of a loss suffered by the company in consequence of a wrong done by the defendant, even if no proceedings are brought by the company. The principle did not, therefore, apply to a case in tort brought by the creditor of two companies alleging the defendant had stripped the companies of their assets, rendering them insolvent. Read more about the decision in our article here.

Sevilleja v Marex Financial Ltd

> "The problems and uncertainties which have emerged in the law have arisen because the "principle" of reflective loss has broken from its moorings in company law."
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> Sevilleja v Marex Financial Ltd

Third party funding

In a significant judgment for third party funders, the Court of Appeal has found that the so-called Arkin cap, which limits a funder's cost liability to the amount funding provided, is not an automatic rule and it may not be just to apply it in cases where the funder stands to gain a significant amount from the claim.

Chapelgate Credit Opportunity Master Fund Limited v Money & Ors

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

- Andrew Ward

- Rebecca Williams
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