Alterations and altercations

Ian Pease rounds up the most significant changes of the past year

Ian Pease is a practising solicitor

As we slip gently into the new year, it's time to assess the past 12 months. All legal years resemble a Christmas tree, tapering to a few select cases that have gone all the way to the high courts, or nearly so. Those cases towards the top are fewer in number, of greater importance, and are likely to influence future practice either for good or ill. So is there a star case at the top of our tree?

A star turn

Arbitration is central to the settlement of disputes in both the standard forms of construction contract and in many property relationships. Anything that affects its effectiveness should be top of the list.

We should not need any reminder that, being part of the European Union (EU), the top legal slot should always go to a relevant judgment from the European Court of Justice (ECJ). *Allianz SpA v West Tankers Inc* [2007] is that case, mainly because of its general potential for harming arbitration. I say this because there is a strong climate of opinion, certainly on this side of the Channel, that the court decided the case incorrectly.

The bottom line is that anti-suit injunctions to prevent court actions where there is an arbitration clause cannot now be issued by English courts. However, this applies only if those proceedings are issued in another EU or European Free Trade Association court: proceedings outside these areas can still be injuncted.

The case facts are quite simple: West Tankers' ship damaged a jetty owned by Erg. Erg commenced arbitration in London against West Tankers while also claiming under its insurance. The insurers, under their rights of subrogation, commenced a court action against West Tankers in Italy (where the collision took place). West Tankers, in turn, complained to the English High Court, seeking an anti-suit injunction and a declaration that the disputes were to be settled under the charterparty by English arbitration, and not in court. The High Court granted the injunction, which was upheld by the Court of Appeal. The House of Lords referred the matter to the ECJ.

The case is about jurisdiction and the independence of arbitration as a process, and is unusual in that the referral to the ECJ by the Lords was accompanied by their arguments in favour of retaining the use of anti-suit injunctions. The background is that Council Regulation 44/2001 (the Brussels Regulation) determines jurisdiction between courts within the EU, when the defendant is domiciled in an EU member state. The Brussels Regulation sets out several jurisdictional rules, including Article 27, which states that the court 'first seised' with a dispute has exclusive jurisdiction over it.

However, the Brussels Regulation is not concerned with 'arbitration' (see Article 1(2)(d)), so the question arises whether it is consistent with the Brussels Regulation for an English court to make an order to restrain a person from commencing or continuing proceedings in another member state, on the ground that such proceedings are in breach of an arbitration agreement.

The case therefore revolves around the meaning and extent of the arbitration exception to the Brussels Regulation. It is fair to say that the common law takes an expansive view, so the exception covers not only proceedings

concerning the actual subject matter of the dispute, but also any ancillary proceedings about the existence of the arbitration provision itself, and hence the jurisdiction of the arbitrators. The Continental approach is narrower. On this reasoning, if the 'seised' court, could in principle, deal with the dispute (such as a claim for damages) then it also has jurisdiction over any 'preliminary issue' concerning the applicability of an arbitration agreement. And so it was held by the ECJ.

So why does this matter so much? The common law view places the arbitration centre-stage. The existence and scope of an arbitration clause, and its enforcement, are in the hands of the arbitrators, assisted by courts of the seat of the arbitration. The arbitrators determine their own jurisdiction (the principle of *kompetenz-kompetenz*). Under the reasoning of *West Tankers*, that right passes to the seised court because there is an imperative to reinforce mutual trust between the courts within the EU. However, the House of Lords viewed that effect as detrimental to the independence and 'user-friendliness' of arbitration, and apparently feared that London would lose out to more supportive arbitral jurisdictions.

It certainly appears that the decision about whether arbitration is to be effective has been taken away from the arbitrators, and this cannot but weaken this whole system of dispute resolution. Arbitral independence, it seems, has been sacrificed at the altar of EU solidarity. Common law practitioners are already seeking to find ways around what they feel is a bad judgment.

In fact the ink was not yet dry on the ECJ's decision before it faced its first challenge, *National Navigation Co v Endesa Generacion SA* [2009]. The reasoning of the court was complex (some would say anomalous). It found that while it could not now grant the injunction it could still make a declaration on the existence of the arbitration agreement. The decision was subsequently appealed, and the Court of Appeal followed the *West Tankers* reasoning, taking the view that the first instance judge was not right to have granted a declaration. While the Court of Appeal played back these new arguments with a straight bat, one senses that this is not the end of the story and that the common lawyers will be back.

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A change of course

And so to the number two slot. Cases that are of general applicability must rank highly, the more so when they intimate that the courts may be changing direction. My second place goes to a House of Lords decision, *Chartbrook Ltd v Persimmon Homes* [2009]. At first sight this case may seem just another of those following *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] (which concerned the rules of contractual interpretation) but it does, I think, mark a significant change.

Readers will remember that the driving force behind this line of cases is Lord Hoffmann, who set down the oft-quoted five rules of interpretation:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background... subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy... The boundaries of this exception are in some respects unclear...
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> (4) The meaning which a document... would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may... enable the reasonable man... to conclude that the parties must, for whatever reason, have used the wrong words or syntax...
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

The most interesting part of *Chartbrook* relates to the prohibition on using pre-contract negotiations (rule 3 above). The actual decision in the case was consistent with previous cases in the line of authority (ie, that pre-contract negotiations were not admissible) but the judges, including Lord Hoffmann, went on to intimate that change may be in the offing. The House of Lords appeared to appeal to 'higher authority' – in this case the Law Commission – to get them off the hook of their own precedent. Lord Hoffmann put it thus:

> It is possible that empirical study (for example, by the Law Commission) may show that the alleged disadvantages of admissibility are not in practice very significant or that they

> are outweighed by the advantages of doing more precise justice in exceptional cases or falling into line with international conventions.

Furthermore, Baroness Hale found that the background correspondence to the agreement facilitated her decision-making process, and therefore the courts might have come to the conclusion that a fixed rule on this is more of a hindrance than a help.

Judgment days

Of course it's difficult to speak for long about construction law without mentioning adjudication. There have been two significant changes in 2009.

Acting up

The first was the passing of the new Construction Act (or more accurately the Local Democracy, Economic Development and Construction Act). This became law on 12 November, but its actual commencement is predicated on a date being set by the Secretary of State (or the appropriate Scottish or Welsh minister). As with the original Construction Act (passed in 1996 but only coming into force in 1998), this will have to await the drafting of the appropriate secondary legislation in the form of a revised Scheme for Construction Contracts. It will be interesting to see how long that takes, or whether it will be abandoned if there is a change of government.

The legal changes themselves, as can be judged from the fact that there are but eight sections in the Act devoted to construction, are not groundbreaking. They are described as improving the operation of construction contracts, particularly regarding cash-flow and adjudication.

In *RJT Consulting Engineers v DM Engineering* [2002] the Court of Appeal set the cat among the pigeons by holding that, under s107 of the Act, all terms of the construction contract had to be in writing. This threatened to oust many such contracts from the operation of the 1996 Act, as oral terms are quite common in the construction industry. The 2009 Act tries to correct this by repealing s107 of the 1996 Act. However, many commentators think that in doing so it threatens the whole scheme of adjudication which was originally set up to mete out quick, cheap justice, to establish who should be holding the cash. In short, adjudicators will be hard-pressed to deal with oral evidence within the restricted timescales imposed on them, and this will probably lead to an elongation of the process and the loss of the original goals of adjudication.

Parties on the receiving end of adjudication notices had, over the years, sought to put contractual disincentives in the way of adjudication. One of these was contractual clauses placing all the costs of such adjudications on the initiator (called '*Tolent* clauses' after *Bridgeway Construction Ltd v Tolent Construction Ltd* [2000]). This is now dealt with by a new s108A. While it was expected that the new Act would make such contractual agreements on adjudication costs unenforceable, the actual wording appears to be deficient. Such clauses are still allowed if made after the start of the adjudication, or:

> ... if made in writing, is contained in the construction contract and confers power on the adjudicator to allocate his fees and expenses as between the parties.

Therefore it still seems possible for a *Tolent* clause to specify that the contractor is to bear the employer's costs, win or lose, as this clause gives adjudicators the power to deal with only their own fees and expenses.

Although there are other significant changes involving the right of suspension of work for non-payment (s145), the biggest changes lie in the payment provisions, with the institution of new 'payer' and 'payee' notices, and a new regime for a notice to 'pay less than the notified sum', the replacement for the current 'withholding notice'. There are also further tweaks to the pay-when-paid prohibition to now encompass 'pay-when-certified' clauses. These changes in regime will have to be digested by the industry and will lead to a flurry of case law as their ambit is worked out.

Stepping in

The second major change to adjudication relates to a little-used procedure that has been around for some time but has been given new life by *The Dorchester Hotel v Vivid Interiors* [2009]. The court can, and should, in appropriate cases, step in during the adjudication to determine questions of jurisdiction and natural justice. Of course, adjudicators can make such decisions but, assuming that they decide to carry on, such matters will inevitably be resurrected during the enforcement process. If the judge takes a different view then all the costs of the adjudication and the enforcement (which can be substantial) may be thrown away.

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In *Dorchester Hotel* Judge Coulson was faced with the problem of acknowledging that the court did have the jurisdiction to decide such matters, without unleashing a torrent of satellite litigation. He was keen to emphasise the unusual nature of the application, saying that ability to interfere would be used only very rarely, and in the clearest of cases. However, look out in 2010: now the courts have shown that they have the jurisdiction it will, I think, be difficult to hold the line on using the procedure sparingly. After all, it could lead to great cost savings. ■

Allianz SpA v West Tankers Inc
[2007] EUECJ C-185/07

Bridgeway Construction Ltd v Tolent Construction Ltd
[2000] CILL 1662-1664

Chartbrook Ltd v Persimmon Homes
[2009] UKHL 38

Investors Compensation Scheme Ltd v West Bromwich Building Society
[1997] UKHL 28

National Navigation Co v Endesa Generacion SA
[2009] EWCA Civ 1397;
[2009] EWHC 196 (Comm)

The Dorchester Hotel v Vivid Interiors
[2009] EWHC 70 (TCC)