Dispute Resolution

December 2012

DISPUTE RESOLUTION BULLETIN

Are ADR clauses enforceable?

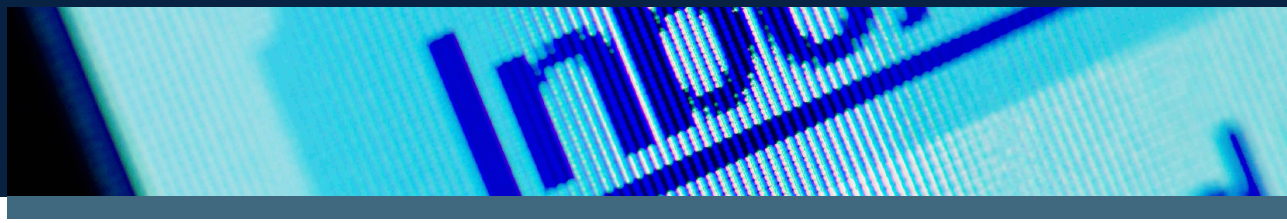
Alternative Dispute Resolution (ADR) seems likely to continue to grow in popularity as a quicker, more cost effective alternative to litigation for parties seeking to resolve disputes. A recent judgment, *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors (14 November 2012)*, serves as a reminder of the need for clarity and certainty when drafting ADR clauses if they are to be enforceable.

The claimants challenged the jurisdiction of an arbitration award against them on the basis that the underlying agreement stipulated that in the event of a dispute, there had to be a defined process of conciliation before any party could resort to arbitration. The claimants argued that the conciliation process was therefore a condition precedent to commencing arbitration. If the necessary steps had not been followed, the reference to arbitration was invalid.

The ADR clause in question provided for attempts to resolve disputes through *"amicable conciliation"*; first by the Chief Executive then, if that failed, by a panel of Board members. The defendants argued that these steps were not sufficiently precise or certain to constitute contractually binding obligations and so could not be a condition precedent to starting arbitration proceedings.

The Court commented on the tension in this area between trying to give effect to what parties are seeking to achieve by including ADR clauses in their contracts and the difficulty in giving what they have agreed any objective and legally binding substance. If a substantive ADR clause is part of an otherwise sound and enforceable agreement, the Court will generally try to find a way of interpreting it that gives it effect.

Referring to the Court of Appeal's decision earlier this year in *Sulamérica CIA National de Seguros v Enesa Engenharia* [2012] EWCA Civ 638, the Court held that the general test was whether each part of an ADR clause provides for identifiable legal obligations.



For ADR clauses that impose *positive* obligations, for example to attempt reconciliation before commencing arbitration or issuing a claim, this means:

- A sufficiently certain and unequivocal commitment to commence the ADR process.
- Discernible steps that each party is required to take to put the process in place.
- The process itself being sufficiently defined to enable the Court to determine (a) whether the parties have participated in it and (b) when or how it becomes exhausted or properly concluded without a breach.

Where the clause is a *negative* stipulation, preventing proceedings until a given event has occurred, the question is whether the event is sufficiently defined and its occurrence "objectively ascertainable" to enable the court to decide whether or not that point had been reached.

In this case, the Court found that the ADR clause was too equivocal in terms of the process, and too nebulous in terms of the parties' respective obligations to be given legal effect as an enforceable condition precedent. Although the clause set out a process, the Court held that the omission of any guidance as to the quality or nature of the attempts to be made to resolve disputes meant that it was impossible to determine whether the process had been complied with.

For parties contemplating ADR provisions in their contracts there are some key points to note: in order to be enforceable, the provisions must clearly and unequivocally set out (i) the intended ADR process; (ii) what obligations the parties are under during the process; and (iii) when/how the process can properly be considered exhausted. ADR clauses must be set out in sufficient detail to enable a Court to decide whether they have been complied with or not.

For more information, please contact Luke Zadkovich, Associate, on +44 (0)20 7264 8157, or luke.zadkovich@hfw.com, or Ian Mathew, Associate, on +44 (0)20 7264 8157, or ian.mathew@hfw.com, or your usual contact at HFW.

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No property in an email

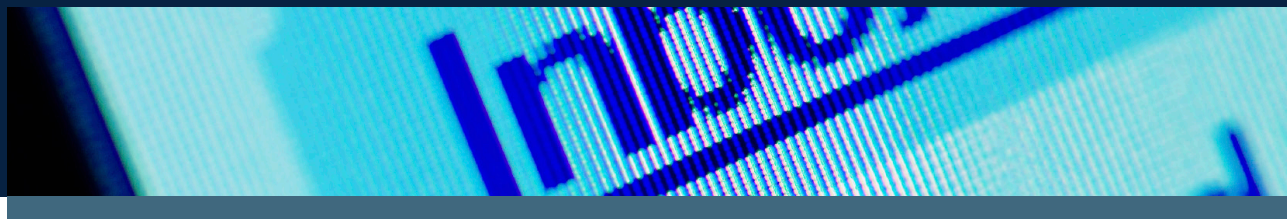
In *Fairstar Heavy Transport NV v Adkins (1 November 2012)*, the High Court decided that the content of an email is not a form of property.

Fairstar Heavy Transport ("Fairstar"), the applicant, sought to obtain an injunction restraining Mr Adkins, the respondent and former CEO, from deleting or otherwise interfering with emails he had sent or received while acting on behalf of Fairstar.

The circumstances of the application were unusual both legally and factually. Legally, adequate protection would usually be available by means of a claim in copyright or based on a duty of confidentiality. Neither of these options was available to Fairstar because of proceedings underway in the Netherlands. Factually, the case was unusual because all of Mr Adkins' incoming emails addressed to him at his Fairstar email address were automatically forwarded by Fairstar's server to his private email address and, Fairstar claimed, automatically deleted from Fairstar's server. All of his outgoing emails were sent directly from his own computer. In short, Fairstar had no record of Mr Adkins' emails.

The judgment provides a useful analysis of the problems associated with relying on rights of ownership as a means to obtain and control information. It will be of little comfort to companies seeking to assert control over the individuals that execute and represent their business in an era where communication - and its consequences - have become instantaneous.

The Court rejected Fairstar's application, although the Judge



conceded that this was *"not a result I view with any enthusiasm in the circumstances of the particular case."*

In the judgment, the Court focused on the impracticalities of there being a proprietary right to the content of emails. It ruled out content remaining with its creator or title passing to the recipient when an email is sent, due to the difficulties of asserting rights over emails which had been forwarded on to other parties and of competing proprietary rights to the information. It was illogical that title could remain with either the sender or recipient, with the other party receiving a licence to the information, as this would negate the benefit of ownership of the information. For similar reasons, it was not feasible that ownership of the information could be shared.

It is important to note that where the information is confidential, communicated in circumstances importing an obligation of confidence and is used to the detriment of the party communicating it, the communicating party is protected by an action for breach of confidence (*Force India Formula One Team v 1 Malaysian Racing Team* [2012] EWHC 616 (Ch)).

The decisions in *Fairstar* and *Force India* underline the fact that possession of information is absolutely critical. If a proprietary right cannot be asserted over information, the only solution for a company is to have access to it at all times.

In light of this decision, companies should consider the following steps to manage potential risks:

- Ensuring that communications and data facilities are under the control of the organisation, through the use of business email addresses and secure data storage facilities.
- Including provisions relating to business information in contracts with staff and other parties. Terms might include:
  - A requirement to use business email addresses and communications systems for business-related communications.
  - A right of the organisation to access relevant communications and other information.
  - Confidentiality of business communications.
  - A requirement to deliver to the organisation all copies of relevant communications and information upon request and upon termination of the relationship.

It is important to remember that Fairstar does no more than reaffirm the status quo and that it involved unusual circumstances: ordinarily, there are protections available to companies under English law. However, it serves as a timely reminder that companies must ensure effective risk management procedures are in place regarding the control of information.

For more information, please contact Andrew Williams, Associate, on +44 (0)20 7264 8364, or andrew.williams@hfw.com, or your usual contact at HFW.

2013: Jackson reforms to English litigation

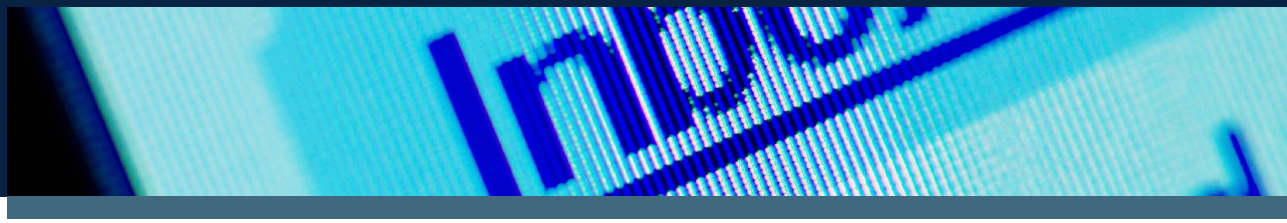
April 2013 is the expected date for the implementation of substantial civil justice reforms based on the recommendations made by Lord Justice Jackson, following his review of civil litigation costs in England and Wales.

The reforms, which are intended to promote access to justice at a proportionate cost, are wide-ranging and will have a significant impact on the way litigation is funded and conducted in all courts. The main aims of the reforms are to eliminate methods of funding which increase costs and to create a more efficient litigation procedure in order to reduce costs.

The majority of the reforms will be effected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which will come into force in April 2013, and by changes to litigation procedure through amendments to the Civil Procedure Rules.

The LASPO reforms are mainly concerned with litigation funding and costs management. The main changes are that after-the-event insurance premiums (except in some clinical negligence cases) and success fees in conditional fee agreements (also known as "no win, no fee" agreements) will no longer be recoverable from the losing party, where the policy or agreement is entered into after 1 April 2013 and a new form of litigation funding known as Damages Based Agreements ("DBAs") will be allowed.

DBAs are contingency fee agreements whereby the claimant's lawyer will be paid a success fee calculated as an agreed percentage of the damages



awarded if the claim is successful. Where a successful claimant has entered into a DBA, the defendant will only be required to pay the claimant's reasonable base costs (their lawyer's hourly rate fee and disbursements). The claimant will have to pay the difference between the amount of costs recovered from the defendant and the DBA fee. It is not clear whether defendants will also be permitted to enter into DBAs. It is expected that this will be clarified in the final version of the regulations.

The statutory instrument implementing the changes to the Civil Procedure Rules will be published in January 2013 and is expected to come into force in April 2013 at the same time as the LASPO reforms. It is anticipated that the main changes to litigation procedure will include:

- A new proportionality test for recoverable costs, which will apply to all multi-track claims, except for those in the Admiralty and Commercial Court. It is expected that this will reduce the level of recoverable costs.
- A new rule allowing a menu of disclosure options, rather than simply standard disclosure, for large commercial claims.
- New rules setting out standard case management directions.
- New rules setting out a standard costs management procedure. Parties will be required to exchange and, if possible, agree costs budgets at an early stage in the proceedings. The court will then set approved budgets (which it can revise if necessary) and the case will be managed to ensure that, as far as possible, it proceeds within the approved budgets. At the end of the case, the successful party's costs will be assessed with reference to the approved budget. It is expected that this will reduce the need for detailed assessment of costs after the main proceedings have finished.
- An amendment to the rules to ensure judges are less tolerant of delay and breaches of orders.
- An extension of the regime of fixed recoverable costs.
- An amendment to the rules requiring a party seeking permission to put forward expert evidence to provide an estimate of the costs of that evidence.
- The introduction of qualified one way costs shifting for personal injury cases. This means that an individual claimant will not be at risk of paying the defendant's costs if the claim fails (provided the claimant has not acted fraudulently, frivolously or unreasonably in pursuing the claim), but the defendant will have to pay the claimant's costs if the claim is successful.

In summary, whilst there are certain details which are still to be clarified, it is clear that the Jackson reforms will bring significant changes to the practice of civil litigation in England and Wales. Under the new regime, parties involved in litigation will experience a change in culture; in particular they should expect tighter case management and control of costs by the courts.

For more information please contact Jane Hugall, Associate, on +44 (0)20 7264 8206, or jane.hugall@hfw.com, or your usual contact at HFW.

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HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
United Kingdom
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888