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ENFORCEMENT

Getting a real result on decisions and awards

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Overview

- Domestic decisions and awards
 - Procedure
 - Adjudication and Arbitration – How and where can you enforce?
 - Recent developments
 - Severability
 - Important changes to the Construction Act
 - Key enforcement tools
 - Charging and 3rd Party Debt Orders
 - Freezing injunctions



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Overview

- International awards
 - New York Convention
 - Reservations
 - Defences – Public Policy
 - Key enforcement tools
 - Worldwide Freezing Orders
 - Widening scope – assets of foreign companies and client/solicitor privilege



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Procedure

- Adjudication Awards
 - 1996 Act recently amended
 - Now past 500 judgments dealing with Adjudication
 - *“Rough justice: pay now, argue later”*
 - *Macob v Morrison [1999] EWHC TCC 254 – “intervening provisional stage in the dispute resolution process” – is this the commercial reality?*



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Procedure

- Adjudication Awards
 - TCC
 - Guide Section 9
 - CPR 7 – monetary
 - CPR 8 – declaratory
 - CPR 24 – summary judgment
 - Hearing within 28 days of directions
 - Defences – jurisdiction, natural justice



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Developments

- Severability – a growing trend?
 - Breach of natural justice - *Amec Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419
 - Aspects decided separately - *Cleveland Bridge v Whessoe-Volker* [2010] EWHC 1076
 - *Carillion Utility Services Ltd v SP Power Systems Ltd* [2011] CSOH 139 –
 - “the fact that the parties have contracted for a decision by an adjudicator does not prevent the Court severing parts of his decision if he had determined **separate disputes** in the one decision”



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Developments

- Construction Act changes
 - For all construction contracts from:
 - 1 October 2011 in England and Wales
 - 1 November 2011 in Scotland
 - Adjudication provisions now apply to written, oral and partly oral construction contracts
 - Cannot allocate liability for parties' costs of an adjudication



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Procedure

- Arbitration Awards
 - TCC and Arbitration Act 1996
 - Part III of CPR 62 – same as a Judgment or Order of Court
 - Summary procedure (s.66)
 - Challenges on jurisdiction (s.67), serious irregularity (s.68) or point of law (s.69)
 - Partial or Interim Awards (s.47)
 - ICC Final Partial Award enforcing a DAB decision
 - *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33



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New York Convention

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards
 - Requires member states to give effect to arbitration agreements and awards
 - 146 member states, Liechtenstein latest to join in October 2011
 - Egypt and Syria members since 1959, Tunisia since 1967
 - Yemen and Libya are yet to join



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New York Convention

- Reservations
 - Reciprocity – only enforce in other member states
 - Commercial – only enforce on commercial matters
 - Some examples:
 - UK – reciprocity yes, commercial no
 - US - reciprocity yes, commercial yes
 - UAE - reciprocity no, commercial no, but local limitations
 - India - reciprocity yes, commercial yes, but be aware of Arbitration and Conciliation Act – *VGE v Satyam*
 - Russia – reciprocity no, commercial no, but be aware of public policy defence – *United World*



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New York Convention

- Defences
 - S.103 of Arbitration Act enshrines Article V of New York Convention:
 - Jurisdiction – mandatory s.66
 - Public policy
 - Invalidity – *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 45
 - Others:
 - Incapacity
 - Notice
 - Composition
 - Not binding
 - Not capable of settlement



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New York Convention

- Public Policy
 - Vague concept, varying from state to state
 - *United World* – Russian Federal Arbitration Court protected debtor from bankruptcy
 - UK public policy
 - Should only exclude serious criminal acts – *Lemenda Trading Co Ltd v African Middle East Petroleum Co* [1988] 1 QB 448
 - Breach of EU laws? – *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB)



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Key Enforcement Tools

- Domestically
 - Charging Orders (CPR 73)
 - attachment to property including securities
 - Third Party Debt Orders (CPR 72)
 - attachment to a debt that is **due and owing**
 - Freezing Injunctions (CPR 25)
 - freezes and preserves assets including land, bank accounts, shares and motor vehicles



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Key Enforcement Tools

- Internationally
 - Worldwide Freezing Orders
 - High Court has jurisdiction
 - Scope over assets of foreign company - *Mediterranean Shipping Company v OMG International Ltd and ors* [2008] EWHC 2150 (Comm)
 - Client/solicitor privilege may not protect a defaulter – *JSC BTA Bank v Solodchenko & Ors* [2011] EWHC 2163 (Ch)



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Summary

- Domestic Adjudication and Arbitration
 - TCC streamlined procedure for both monetary and declaratory relief
 - Growing trend towards severability?
 - Changes to Construction Act – oral contracts
- New York Convention
 - Overarching structure
 - Reservations
 - Public Policy defence



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Summary

- Domestic tools
 - Charging Order – against real property
 - 3rd Party Debt Orders – against debts including cash
 - Freezing Injunctions – preserve available assets
- International tools
 - Worldwide Freezing Orders
 - Issued by a High Court judge
 - Widening scope to foreign companies with assets in the UK