

The construction & energy law specialists

# ENFORCEMENT

Getting a real result on decisions and awards

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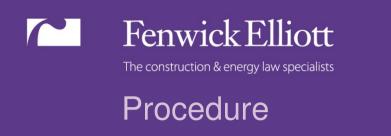
Hill International and CIOB London Masterclass 10 November 2011



- 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 3<sup>rd</sup> Party Debt Orders
    - Freezing injunctions



- 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



- 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?



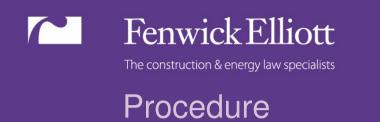
- Adjudication Awards
  - TCC
    - Guide Section 9
    - CPR 7 monetary
    - CPR 8 declaratory
    - CPR 24 summary judgment
    - Hearing within 28 days of directions
    - Defences jurisdiction, natural justice



- 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"



- 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



- 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



- 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



#### 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*



## 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



- 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)



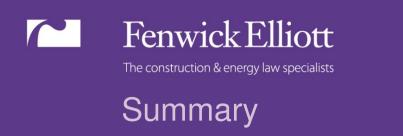
## Key Enforcement Tools

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

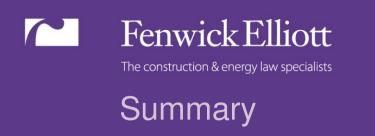


## Key Enforcement Tools

- 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)



- 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



- Domestic tools
  - Charging Order against real property
  - 3<sup>rd</sup> 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