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### Terminating contracts - damages and exclusion clauses

#### Exclusion clauses – this time it's personal

A contracting party cannot rely on a clause excluding its liability, where it has committed a personal, deliberate and repudiatory breach, unless the contract uses very strong language, the High Court has ruled. (Internet Broadcasting Corporation Ltd (t/a NETTV) and another v MAR LLC (t/a MARHedge) [2009] EWHC 844). Further details of the decision are at the end of this article.

While this is a first instance decision, it represents a significant development in the court's interpretation of exclusion clauses: unusually the court considered the nature of the breach itself when assessing the intentions of the parties in agreeing the contract.

Unless and until any appeal is allowed, parties seeking to exclude or limit their liability should bear this decision in mind when drafting exclusion clauses. On the other hand, for parties claiming damages for fundamental breach, this decision may support an additional damages claim, if the breach can be argued to be personal and deliberate.

#### Recovering damages for loss of bargain when contracts are terminated

The Court of Appeal's recent ruling in *Stocznia Gdynia v Gearbulk* assists parties seeking to terminate contracts for repudiation, by clarifying (i) that the common law right to terminate for repudiatory breach can only be excluded where very clear language is used, and (ii) that where there is repudiation, the termination notice need not be specific as to the exact legal basis for termination. Internet Broadcasting may also help those parties, as the party terminating may now assert that any exclusions in the contract do not apply (as long as the breach can be said to be personal and deliberate). Thus, further losses may be recoverable, subject of course to the remoteness limitations outlined by the court in last year's *Transfield Shipping* case.

#### Exclusion clauses – the future

We can expect further developments in the area of exclusion clauses in the near future, when the High Court gives judgment in *BSkyB v EDS*. In that case *BSkyB* is claiming damages in excess of £700m and has argued that a liability cap should not apply due to alleged fraudulent misrepresentation on the part of *EDS*.

#### NETTV v MAR – facts and findings

NETTV and MAR entered into an agreement whereby NETTV would operate an internet TV channel on behalf of MAR. NETTV would sell opportunities to third parties to appear on that channel. MAR would receive a 10% royalty on sales. MAR's "controlling mind" was its President, Gary Lynch.

The contract could not be terminated for three years other than for material breach and contained the following exclusion clause: "...neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage".

MAR gave notice to terminate after a year (despite impressive sales by NETTV). MAR accepted that it had wrongfully terminated, amounting to a repudiatory breach, but sought to rely on the above exclusion clause to protect it from substantial liability for lost profits.

The judge acknowledged there is no current rule of law that exclusion clauses do not apply to fundamental breach, but found support in authority for the notion that there is a presumption against an exemption clause being construed so as to cover a deliberate repudiatory breach. Furthermore, a stricter approach must be taken where "the wrongdoing is personal to the wrongdoer". (In other words a deliberate personal repudiation (in this case by the "controlling mind", Lynch) as opposed to vicarious liability.)

The judge rejected the literal interpretation of the clause, stating that "even as a matter of construction... an exemption clause will never normally be interpreted as extending to a situation which would defeat the main object of the contract or create commercial absurdity, despite the literal meaning of the words used". The rejection of literalism when it conflicts with commercial common sense was, he found, a regular feature of the House of Lords approach in construing commercial agreements.

Relevant to the judge's decision was the fact that insurance for deliberate wrongful conduct was, in his view, likely to be rare or non-existent. The normal function of exemption clauses (according to many cases on the subject) was to

allocate risk between the parties, so they know who needs to insure. Indeed the availability of insurance is one of the indicators of reasonableness under UCTA.

If the parties intended an exemption clause to cover a personal, deliberate, repudiatory act by one or either of them, one would expect to see "clear" strong language, e.g. "including deliberate repudiatory acts by [the parties] themselves". Words generally covering the situation, but also a range of lesser situations, would not be enough.

In this case a "reasonable businessman" would not, according to the judge, understand the words of the clause as covering uninsurable risks (or those likely to be uninsurable), such as those flowing from a deliberate, personal, repudiatory breach. Indeed he noted that it would be unlikely for a reasonable businessman to agree to a clause which said: "neither party will be liable to the other for any indirect or consequential loss or damage even if caused deliberately by the personal act of the controlling mind of that party in a way which deliberately repudiates the contract between them" (emboldened for emphasis).

In other words, had "clear" language been used in this case to exclude liability for the breach in question, the parties would not have agreed the clause.

He also noted that the literal meaning would defeat the main object of the contract. Loss of profit was likely to be the only serious consequence for either party of repudiation: yet on literal reading the clause would enable either party to deliberately and personally repudiate at any time with no consequence as to lost profit. Liability for the other party's set up costs was unlikely to be a serious deterrent to a breach of this nature.

Finally, the judge dismissed an argument by MAR that if an exclusion clause is not repugnant to (i.e. wholly inconsistent with) the contract, then it must be given effect in its literal terms.

[Stephen Stewart](#)

### More protection for directors' home addresses

Companies are currently required to file with Companies House their directors' residential addresses, which are open to public inspection. Company directors are therefore exposed to risk of harassment by the media, identity theft or indeed violence (for example, by protest groups) if these details are obtained.

From 1 October 2009, directors will benefit from a change in the law. For new directors, a company will only have to include a service address in its register of directors, rather than a residential address. The residential address still has to be provided to Companies House, but will not be made public (although it can be provided to public authorities and, in some circumstances, to credit reference agencies).

Existing directors who wish to remove their residential address from the public register will still have to apply for a Confidentiality Order. Such orders are only granted if it can be shown that the director or anyone living with them is at serious risk of intimidation or violence if these details remain on the public register.

After 1 October though, existing directors can also register a new 'service address', which will provide some added protection. Historic records of residential addresses will remain publicly available, however, unless a Confidentiality Order has been made.

Further information can be found on the Companies House website [here](#).

[Korieh Duodu](#)

### How much warning should defendants be given where they may have to pay an additional liability to a winning claimant?

There seems to be an inconsistency in principle between permitting a retrospective CFA and therefore allowing the possibility of recovery of its success fee (*Birmingham City Council v Forde* [2009] EWHC 12 (QB)) (*Birmingham*), and the CPR requirement to serve a Notice of Funding within 7 days of entering into a CFA or ATE policy, confirmed in *Kutsi v North Middlesex University Hospital NHS Trust* [2008] EWHC 90119 (Costs) (*Kutsi*).

### Retrospective success fee allowed in principle

*Birmingham* was an appeal by the local authority against a decision on preliminary issues about costs in a claim brought by one of its tenants. The appeal included a question about the recoverability of a retrospective success fee under a CFA made between the claimant and her solicitors. Base costs under such a CFA were held recoverable in *King v Telegraph Group Limited* [2005] EWHC 90015. But *King* also held that a retrospective success fee was wrong and against public policy on the grounds that the solicitors did not assume any risk, or have to comply with any of the requirements relating to CFAs until the CFA was signed, including the requirement to notify their opponent of the success fee.

In *Birmingham* however, Christopher Clarke J (assisted by the Costs Judge, Master Hurst, who had decided *King*) held

that a retrospective success fee was not contrary to public policy, rejecting the argument that it was invalid because a Notice of Funding would have been served on the defendant had the agreement existed during the retrospective period. He considered the extent to which the CPR provides for a litigant to be informed that his opponent has agreed to a success fee and noted that in some circumstances the protection for the paying party may be limited.

### Notice of Funding requirement satisfied

CPR 44.15 requires Notice of a funding arrangement to be given to the other side within 7 days of entering into a CFA or ATE policy; while CPR 44.3B prohibits a party from recovering any additional liability for any period in the proceedings during which he failed to provide information regarding the funding arrangement in accordance with CPR 44.15. In *Birmingham* there had been no technical breach of the requirement to give Notice as the CFA containing the success fee had only been entered into 7 days before the date of settlement.

Christopher Clarke J acknowledged that the success fee or its amount might be unreasonable, but concluded that, as the court will, when it assesses the costs themselves, look at the reasonableness of a success fee having regard to the circumstances at the time when it was agreed, and will disallow or reduce retrospective fees that are unreasonable, that was sufficient protection for the paying party. In this case, the claimant's solicitors abandoned their claim to the success fee.

### Failure to send Notice of Funding fatal

In *Birmingham*, the court's potential extension of the protection for the receiving party under the CPR gave rise to a surprising bit of new law. But *Kutsi*, decided just a month earlier, is a reminder that where the rules do protect the paying party, they must be followed if the claimant wants to recover an additional liability arising out of a funding arrangement.

In *Kutsi* the claimant applied for relief from sanctions in order to attempt to recover the cost of an ATE premium from the defendant on detailed assessment. The claimant's solicitors had failed to notify the defendant of the existence of the ATE policy until well after the claim had settled, in breach of CPR 44.15. It was a simple oversight, and the claimant successfully argued some of the factors relevant to the exercise of the court's discretion in the claimant's favour under CPR 3.9. However, as there was no good explanation for the failure to notify, the application was dismissed (in contrast to *Supperstone v Hurst* [2008] EWHC 735 (Ch) in which the claimant was allowed to recover an ATE premium following a mistake of a technical nature).

Master Campbell noted in *Kutsi* that the CPR do take into account the effect of a breach of the rules on the interests of the administration of justice: if relief were granted in circumstances where no Notice had been given until well after the case had settled, the effect would be to drive a coach and horses through the Rules.

Rather than being driven straight through the Rules, the coach and horses could in theory now take the *Birmingham* back route of retrospectivity to reach their destination. But costs assessment would, of course, still represent a final hurdle to recovery.

[Helen Murray](#)

### Apportioning damages between a fraudster and the 'merely negligent' professional

In the current financial climate, fraud-related claims are expected to increase as 'boom-time' valuations come under scrutiny. Negligence claims against professionals who advised on transactions where one party claims to be the victim of fraud may also filter through.

So it is helpful that the Commercial Court recently considered how the Civil Liability (Contribution) Act 1978 is applied in situations where one adviser was found to be guilty of fraud and the other was 'merely negligent', and where the negligent party sought a contribution to its liability to the claimant from the fraudulent party.

The decision in *Nationwide Building Society v Dunlop Haywards (DH) and Cobbetts* on 18 February 2009 will be a relief to professionals/their insurers where the professional has become caught up in a fraud perpetrated by a fellow adviser. Mr Justice Clarke's judgment shows that there is some protection for advisers who are "merely negligent". It shows that the court can apportion liabilities fairly.

### The background

In 2005, Cheshire Building Society – now part of Nationwide – was the victim of a significant mortgage fraud. It lost around £11m on two advances to borrower Goldgrade Properties, as well as other significant consequential losses.

DH was found liable to Cheshire in fraud and negligence at a summary judgment hearing.

The court held that the former head of City valuation at DH, had acted with Goldgrade in overvaluing a run-down commercial property in Aston, Birmingham. Cheshire lent Goldgrade £11.5m to buy it. It was in fact worth only a fraction of that.

Cheshire also alleged that its legal adviser, Cobbetts, had been negligent for failing to advise it of the indicators of mortgage fraud while advising on the transaction.

DH went into liquidation in May 2008, so Cheshire pursued its negligence claim against Cobbetts. That claim was settled in October 2008. Cobbetts then sought a contribution from DH to the sum it paid out to Cheshire to crystallise its position in the liquidation.

On 18 February, the judge made a ruling on the amount for which DH is liable to Cheshire, and the contribution it must pay to Cobbetts in respect of the settlement with Cheshire.

### The issues

The court found Cobbetts 20% liable for Cheshire's loss and DH 80%. Cobbetts sought to recover from DH 80% of the £5.6m settlement it paid out to Cheshire – around £4.5m. They argued that the court should look at its actual settlement payment and assess what proportion it should recover.

However, Cobbetts was concerned that the case law suggested that 'the damage in question' in the 1978 Act, which allowed it to recover a contribution, might refer to the 'total damage' suffered by Cheshire rather than the smaller settlement sum. Cheshire's total claim exceeded £21m. If the court found that Cheshire was 20% responsible for that, it would have been hypothetically liable at a trial for £4.2m (a lower figure than its actual settlement payment), so it might only recover £1.4m (20% of £4.2m) of its £5.6m settlement payment. Cobbetts argued that, under the 'total loss' scenario, a defendant may find itself in a worse position if a co-defendant is liable for deceit. Where a co-defendant is negligent, some 'contributory negligence' may be apportioned to the claimant, reducing the overall liability of the defendant. However, where a co-defendant is liable for deceit, the claimant cannot be found contributorily negligent, leaving the defendant with the whole loss.

In the end, the court chose neither option.

### The decision

Mr Justice Clarke held that the court should identify a 'just and equitable' sum in respect of the contributing party's responsibility for 'the damage in question'. The 'damage in question' was 'the same damage' for which there was a right to a contribution under the Act.

The judge followed Lords Bingham and Steyn in the House of Lords case of Royal Brompton NHS Trust v Hammond. In his view the court 'should examine the nature and extent of the defendants' common liability when determining whether two defendants are liable for the same damage'.

He said there was no reason why the court could not distinguish between one category of economic loss for which only one defendant was responsible – for example, a loss that was not reasonably foreseeable and recoverable only because one defendant was fraudulent – and a foreseeable loss for which both were liable.

Importantly the court had to avoid 'the odd result' whereby 'an innocent defendant who had the misfortune to have a fraudulent co-defendant would recover less by way of contribution from that fraudulent defendant than he would have done if his co-defendant was merely as incompetent as him'.

In deciding the level of contribution, the judge took four key steps:

He identified 'the same damage' as those elements of the overall claims for which both defendants had shared responsibility by reference to Cheshire's respective claims against them. Cobbetts would not be liable to Cheshire for certain 'fraud only' consequential losses, such as the costs of internal fraud investigations. He disregarded those and produced a net figure of £13.2m for which DH and Cobbetts would have been found jointly liable in negligence.

He reduced the £13.2m by half, to £6.6m. This was based on evidence from Cobbetts on the rationale for its settlement with Cheshire, which assumed 50% contributory negligence on the part of Cheshire.

He apportioned blame between the defendants, finding DH 80% responsible and Cobbetts 20% responsible.

This means that Cobbetts was liable for £1.3m – or 20% – of that £6.6m and that DH was liable for £5.3m.

This decision allowed Cobbetts to recover £4.3m back from DH - representing the £5.6m settlement between Cheshire and Cobbetts, minus Cobbetts' £1.3m or 20% liability.

This was not the approach Cobbetts had wanted, but the result was similar, and preferable to the 'total loss' outcome it feared. The judge's approach was logical and fair and the outcome was close to what Cobbetts sought.

The decision suggests that a contributory negligence defence may still be available to reduce the liability of a negligent professional adviser, even if the fraudulent co-defendant cannot rely on it.

The court's finding that there is no reason why it could not distinguish between a category of economic loss for which only one defendant was responsible and a foreseeable loss for which both are liable, may also prove useful.

This decision will be of interest to professionals who have advised on transactions where one party becomes the victim of fraud, and where the professional may be at risk of exposure for failing to spot and advise on potential warning signs, but were not involved in the underlying fraud.

Practitioners advising on commercial property transactions should be alive to the increased risk of fraudulent transactions in the current climate and be alert to the warning signs. Then they can avoid the situation that Cobbetts found itself in.

[Paul Rowley](#) is part of the Contentious team headed by [John Gosling](#) which acted for the Cheshire Building Society and Nationwide in the litigation.

### Limitation - how the rules work in practice

The Limitation Act 1980 limits the time during which a claimant may recover damages in civil proceedings. For most claims the limitation period is currently 6 years, but for some types of claim the period is different. There may be a good reason for not issuing a claim quickly, such as settlement negotiations or a hitherto impecunious defendant who wins the lottery and becomes worth suing. But some claims just get overlooked. Where that happens the claimant must assess the risk and if appropriate ensure that swift action is taken so that the right to a remedy is not lost.

In every case the claimant will need to find out:

when the limitation period starts to run; and  
how long it lasts

so that the deadline for starting the claim can be worked out.

The limitation period starts to run from the day after the claimant's cause of action accrues. When a particular cause of action accrues depends on its nature. For example if a customer breaches a contract then the cause of action accrues on the day of the breach and so time starts to run the following day.

How long the period lasts depends on the cause of action in question. The end of the period is a final deadline for starting the claim. After the limitation period a defendant has a complete defence to the claim.

It is enough to deliver the claim form to court for issue on or before the deadline. The court may not be able to issue the claim immediately. It is therefore good practice to ask the court to produce a receipt as evidence that a limitation defence should not succeed.

If you do not start proceedings in time, the claim will be statute-barred for limitation and the defendant, who might not otherwise have had a substantive defence, will defeat the claim.

### Six Typical Cases

Here are some examples of how limitation works in the context of a typical asset finance claim. Many of the issues will arise in relation to other claims for breach of contract.

#### 1. Shortfall claim against customer (C)

Following termination of a hire purchase agreement, the lender recovers and sells the goods leaving a shortfall.

The type of agreement and its terms and conditions will determine when termination takes effect.<sup>1</sup> C is obliged to pay a lump sum on termination, so that is the date on which the cause of action accrues. Where the termination date is **31 December 2002** and the limitation period is six years, as it would be in this example, the 6 years starts to run on 1 January 2003 and the last day of the six year period is 31 December 2008, so proceedings must be started against C on or before **31 December 2008**.

A lengthy delay in the recovery and sale of the Goods could mean that action is deferred for several months or even years after termination. That delay is unlikely to make any difference to the limitation deadline.

#### 2. Shortfall claim against guarantor (G)

In most cases G's liability is conditional on a demand being served, so the cause of action accrues when G receives the demand for payment.

As with the first example above, the termination date is 31 December 2002. The guarantee states that G's liability depends on service of a demand.

Following termination, the agent recovers the Goods from C on 5 January 2003, but they are not sold until 8 June 2003. On the following day, **9 June 2003**, the claimant lender delivers a demand to G, but then forgets to instruct solicitors until 9 January 2009.

Again the primary limitation period against C is 6 years, so a claim issued against C after 31 December 2008 will be time-barred. However for the purposes of the claim against G, time only starts to run from the date when G received the demand. Proceedings against G must be started by **9 June 2009**.<sup>2</sup>

### 3. Claim for return of goods

Assume the same facts as in the examples above.

If C holds on to the Goods beyond termination, the lender may be able to sue him for a breach of the agreement or wrongful interference with the Goods.

The legal basis for wrongful interference with Goods is different from a claim for breach of contract, but the limitation period is still 6 years and the starting point is also the termination date, because that is when (a) the lender became entitled to the Goods' immediate possession and (b) C breached the agreement and committed the wrongful interference.

If the lender cannot recover the Goods within the limitation period, the general rule is that it will lose ownership of them (although it might still sue C or a third party for damages instead, if the Goods were stolen or taken fraudulently).

### 4. Shortfall claim against C - impact of late payments

After termination, on each occasion when C makes a payment it will have the effect of postponing the start of the limitation period (so that the period starts again on the day of each payment) provided the payment itself falls within the original or a previously-extended limitation period.

Say that you terminate a lease agreement early because C did not pay the rentals on time. The termination date is 4 November 2002 and on that day C becomes liable to pay £20,000 including £5,000 worth of arrears and £15,000 due under a minimum payment clause. The original limitation deadline would therefore be 4 November 2008.

C immediately returns the Goods and pays £5,000. However he cannot pay the remaining £15,000 as a lump sum. On 4 November 2007 he pays another £9,000. In this situation the payment will postpone the start of the limitation period, so that it ends on 4 November 2013.

If C then pays another £3,000 on 3 November 2013. Because he makes this payment within the extended limitation period, the payment will postpone the limitation period for the recovery of the outstanding sums again, so that it ends on 3 November 2019.

However if C instead makes his £3,000 payment a week later, on 10 November 2013, it will fall outside the extended limitation period. Under those circumstances any claim against C for payment of the remaining balance of £3,000 after 4 November 2013 will be time-barred.

### 5. C's acknowledgement of debt

If C acknowledges his indebtedness before the end of the original limitation period, the acknowledgement will postpone the start of the period.

However if the acknowledgement comes after the original limitation period has expired, it will be too late to have any effect. It is also important to note that debtor's acknowledgement must be in writing and signed by him. If he makes the acknowledgement in a letter written without prejudice to his legal rights (ie the purpose of the letter is to make an offer of settlement), it may not affect the limitation period.

### 6. Enforcement of judgment debt by charging order

Generally a judgment creditor must take action to enforce his judgment within 6 years.

After 6 years the judgment creditor must apply for permission to enforce by way of levying execution against the debtor's goods. However an application for a charging order may still be made after 6 years without any requirement for permission (although the court would limit the interest recoverable to 6 years up to the date of the application).

The position is different after enforcement proceedings have begun. For example, once you have a final charging order you may then wait until there is an upturn in the property market. You need not seek an order for sale.

[David Farnell](#)

<sup>1</sup> eg if the agreement is regulated, then it will terminate on the day when the Customer receives notice (subject to the proper procedure under the Consumer Credit Act 1974), but if the agreement is unregulated because the Customer is

a limited company, then it may terminate automatically on the day that the Customer appoints a receiver.

<sup>2</sup> However the court does have power to dismiss a claim where there has been excessive delay under the equitable doctrine of laches. It is always important to take action to progress a claim as promptly as possible, so as to avoid this problem.

## Summaries of recent key developments for those dealing with commercial disputes

### Civil Costs Review – Lord Justice Jackson

Jackson LJ, appointed by the Master of the Rolls to carry out a year long review of civil litigation costs, funding and whether case management is effective in achieving proportionate costs, has published a 653 page [Preliminary Report](#). This follows four months of fact finding and informal consultation with stakeholders, including reviews of civil costs regimes in other countries.

Responses to the many and detailed discussion points raised in the Preliminary Report are invited by 31 July 2009. After that, Jackson LJ will consider responses and publish a Final Report by the end of the year. While he has said that he expects the Civil Procedure Rules Committee (of which he is a member) to discuss those recommendations which they have power to deal with (and their own work plan includes reference to this), where primary legislation is needed, further action will depend on government policy/parliamentary timetabling.

There are no provisional recommendations in the Preliminary Report, and little indication of Jackson LJ's current thinking, but he is considering some very fundamental questions, including whether:

- disclosure should be limited to those documents on which each party relies, as a default;
- pre action protocols should be dispensed with in certain types of claims;
- the current costs shifting rules (the winner usually getting its costs) should be abandoned, to be replaced by either no costs shifting at all, or one way costs shifting, so that only a winning claimant can recover its costs (although the Preliminary Report acknowledges that there is little support for abandoning costs shifting);
- the fixed cost regime should be extended to all fast track cases or even to those which are valued above the fast track;
- contingency fees should be permitted, allowing solicitors to take a share of damages. The current conditional fee regime allows solicitors to take a success fee expressed as a percentage of their costs;
- conditional fee agreement success fees and After the Event Insurance premiums should no longer be recoverable from losing defendants; and
- the changes in Commercial Court practice following the Long Trials Working Party Report should be revisited and/or some of the changes extended to other courts/divisions.

Anyone interested in responding to the Preliminary Report can do so using the following email address: [costs.review@judiciary.gsi.gov.uk](mailto:costs.review@judiciary.gsi.gov.uk)

### Pre action conduct now more closely regulated

Among the six monthly amendments to the CPR on 6 April 2009, a new Practice Direction on Pre Action Conduct was introduced. The PD applies to all cases, even those in which a specific Pre Action Protocol applies (but specific PAPs take precedence over the PAC PD).

Key points in the PD are:

- that the court can take into account non compliance with the PD when managing cases and making costs orders. The power to do so is not new, but the express statement in a PD may encourage more robust judicial case management;
- minor or technical shortcomings should not concern the court;
- when deciding whether to impose sanctions, the court will look at the effect of non compliance on the other party. This is a new emphasis, although in practice prejudice to the other party is likely anyway to have been taken into account by the court when making decisions about sanctions for non compliance;
- examples of conduct are listed which will not comply with the PD, such as unreasonably refusing to take part in alternative dispute resolution; and
- the conduct expected of parties to whose cases no specific PAP applies is set out in Annex A. There is separate guidance for debt claims, which so far do not have their own PAP.

### Jurisdiction in Europe under review

The EU is reviewing the operation of the Brussels Regulation on Jurisdiction and the Enforcement of Judgments. In a Green Paper it asks for comments on areas which have led to uncertainty, (such as how the arbitration exception works) as well as new issues such as whether the scope of the Regulation should be extended to defendants resident in non EU States but who claimants want to sue in the courts of Member States. Responses to the EU direct by the

end of June. [HERE](#) is a link to the Green Paper with details of how to respond.

[HERE](#) is a link to our own response to the Green Paper.

### **Enforcing English judgments in Italy perhaps not as straightforward as it should be**

There are limited grounds under the Brussels Regulation on which the courts of an EU Member State can decline to enforce the judgments of the courts of another Member State. For example, review of the substance of a foreign judgment is not permitted.

The grounds for refusing to enforce do, however, include that the judgment is contrary to the public policy of the Member State where the judgment is to be enforced. Such public policy objections rarely succeed, but they often raise questions about the procedure used in the Member State in which the judgment was obtained. This was the case in *Marco Gambazzi v Daimler Chrysler*, ECJ (Case C 94-07). The Italian court, which had been asked to enforce an English judgment, asked the ECJ whether it could take into account the circumstances in which the English court had debarred the defendant from defending the claim for non compliance with disclosure orders. The ECJ said that it could. The matter will now be heard again by the Italian court.

The Gambazzi decision suggests that the current European enforcement regime may not be working as it should. Similar fears are expressed in the Green Paper on the Regulation (see above): "it is difficult to justify in an internal market without frontiers, that citizens and businesses have to undergo the expense in terms of costs and time to assert their rights abroad".

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