



## LEGAL BRIEFING

*Walter Llewellyn & Sons Ltd (1) Rok Building Ltd (2)  
v Excel Brickwork Ltd*  
[2010] EWHC 3415 (TCC), Mr Justice Akenhead

In this case, the Court considered whether a stay should be granted under section 9 of the Arbitration Act 1996. This was essentially a matter of examining the dispute resolution provisions within the subcontract to ascertain whether the parties had, or had not, chosen arbitration.

### *The Facts*

Walter Llewellyn was a main contractor employed to design and build 121 timber framed buildings in South London. By a subcontract made in May 2003, they employed Excel to carry out certain works on the site. These works were carried out between mid-2002 and December 2003. In December 2003, Walter Llewellyn's business and assets were sold to Rok. The assets included the benefit of the subcontract with Excel. Damage was discovered in a number of the properties in August 2004. Walter Llewellyn and Rok claimed that this was the contractual and/or tortious responsibility of Excel.

The subcontract consisted of a number of documents. The first of these was a Subcontract Order which was a pro forma document with elements filled in for the purpose of the order. This incorporated the second edition of the NEC Subcontract ("NEC2") including Option A as well as numerous amendments contained primarily in an Additions Document. The Additions Document was said to override NEC2. Its purpose was to make the subcontract compliant with the Housing Grants Act. The Subcontract Data which forms part of NEC2 had not been filled in.

Walter Llewellyn and Rok argued that the subcontract did not provide for arbitration. The NEC2 provided for arbitration only if the parties had specifically and expressly selected that form of dispute resolution. On this basis they argued that section 9 of the Arbitration Act 1996 did not apply and no stay should be granted.

### *The Issue*

Did the subcontract provide for arbitration?

### *The Decision*

The Court held that, as a matter of construction, the parties had not agreed that arbitration should be the dispute resolution method for any disputes arising under the subcontract. There was nothing in any of the subcontract documents which demonstrated an express or conscious agreement that arbitration should be used. In particular:

- (i) the Additions Document was predicated upon a conditional hypothesis ("if the standard subcontract form makes a provision for settlement of disputes by arbitration");
- (ii) the NEC2 provided for a tribunal but did not define it; and
- (iii) the Subcontract Data itself was predicated upon the condition that if the tribunal was an arbitral tribunal then it should be identified.

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The Judge also noted that, if the draftsman of the Additions Document was familiar with the NEC2 conditions, they would have been aware that the unamended NEC2 conditions only provided for arbitration if the parties had expressly agreed to it.

***Comment***

This case demonstrates the need for parties to make express and clearly drafted choices for their dispute resolution processes. In cases where the NEC2 Subcontract or its more recent forms are used it is essential to fill in the Subcontract Data. Failure to do this can result in expensive and unnecessary arguments that can be easily avoided if care is taken at the drafting stage.

Claire King  
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