PARTY AGREEMENT AND CIVIL JUSTICE
ACUERDO PROCESAL Y JUSTICIA CIVIL

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Abstract: The scope of parties to reach agreement concerning selection of the process by which their dispute (or generic future disputes) might be resolved (court proceedings) or at least discussed (negotiation agreements and mediation agreements). The parties' capacity to agree on how the formal process (court proceedings or arbitration) will be conducted. This is a topic where many points are `moot', that is, not covered by clear authority. But even on those points, the general drift of public policy can often be predicted. This mode of resolution brings happiness, or at least relief, to most citizens and organisations. It can bring great joy to the parties who have been spared the horrors and heart-ache of formal proceedings, or of their continuation.
Keywords: Parties agreements, court proceeding, disputes resolution

Resumen: El alcance de las partes para llegar a un acuerdo sobre la selección del proceso es amplio, mediante el cual su disputa (o disputas futuras genéricas) podría resolverse (procedimientos judiciales) o al menos discutirse (acuerdos de negociación y acuerdos de mediación). Así las partes pueden acordar cómo se llevará a cabo el proceso formal (procedimientos judiciales o arbitraje). Este es un tema en el que muchos puntos son "discutibles", es decir, no están claros para la doctrina e incluso en esos puntos, a menudo se puede predecir la deriva general de las políticas públicas. Este modo de resolución trae satisfacción, o al menos alivio, a la mayoría de ciudadanos y organizaciones. Puede brindar una gran ventaja a las partes que se han librado de los horrores y la penuria de los procedimientos formales o de su continuación.
Palabras clave: acuerdos de partes, procedimiento judicial, resolución de disputas

Recibido 4 de mayo 2021
Aceptado 10 de junio 2021

I. Introduction

The topic to be explored in this short paper is the connection between Party Agreement[2] and Civil Justice[3] (that is civil court proceedings, arbitration, mediation, and settlement).

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[2]Party agreement is chosen to denote consensus. In English legal usage, `contract' concerns any type of agreement which is legally binding; 'contract' includes `agreement' in general and matters of `consensus'. Neither `agreement' nor `consensus' is confined to legally binding contracts; eg, some types of trust or proprietary estoppel arise by virtue of agreement or consensus.

[3] `Civil justice' is a convenient umbrella phrase; it is used here to cover court litigation, arbitration, mediation, and issues of

First, we will examine the external procedural dimension of agreement (in sections I and II of this paper). The external perspective concerns the following manifestations of agreement within the field of Procedure:

(i) *extra-curial procedure:* the parties to a main contract by agreement elect not to proceed by the default mechanism of court proceedings, and instead they agree to proceed by arbitration (arbitration clauses); and/or the parties agree to adopt mediation (mediation agreements); or

(ii) *curial proceedings modified:* the possibility of certain procedural modalities, whether within court proceedings or arbitration, being added, removed, or modified by party agreement.

Secondly, in section III, we will consider settlement, which is an independent species of contract, but also a mode of terminating or at least narrowing disputes.

II. Consensus and the choice of procedure

The so-called multi-tier (Kaikowska, 2017) dispute-resolution clause normally contains a wedding-cake sequence of negotiation, mediation, and arbitration or court proceedings (more commonly, arbitration is the final tier). Here the permutations are: (i) a jurisdiction agreement; (ii) a meditation agreement; (iii) an arbitration clause. Sometimes the agreement will combine (ii) and (iii). Sometimes the relevant dispute-resolution clause will require (iv) a fixed-term `friendly' negotiation as the precursor to (ii) or (iii) (or even to (i), but in that context the status of the negotiation clause has yet to be clarified).

A (written)[4] arbitration clause, if England and Wales is `the seat' of the arbitration, will be subject to the Arbitration Act 1996 (England, Wales, and Northern Ireland).[5] Of course, such an agreement presupposes consent on the part of each party.

However, the Contracts (Rights of Third Parties) Act 1999[6] enables third parties in various circumstances to acquire the capacity to engage in arbitration even though they are not parties to the main transaction.

evidence. In England, `evidence' is part of adjectival law; eg, there are courses on `criminal evidence and procedure'.

[4] Writing is required, for the purpose of the Act, by s 5, Arbitration Act 1996; Andrews on Civil Processes (2019), 32.24 to 32.38, also noting the position under the UNCITRAL Model Law and the New York Convention (1958).

[5] The Scottish statute is the Arbitration (Scotland) Act 2010.

[6] ss 8(1) and 8(2), Arbitration Act 1996; on which, citing extensive literature, Andrews on Civil Processes (2019), 34-08 to 34-16.

Proof of the existence of an arbitration clause will enable a party to obtain a stay of English civil proceedings (Andrews, 2019, pp. 32-86 – 32-90), or of foreign proceedings (Born, 2021).

An anti-suit injunction can be granted to prevent a party acting inconsistently with an arbitration clause which, unless otherwise provided, creates a mutual exclusive commitment to arbitration and thus precludes proceedings inconsistent with that exclusive commitment. The Supreme Court of the United Kingdom in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant* (2013) (Andrews, 2019, pp. 34-17 – 34-45)[7] noted that the injunction gives effect to an implicit negative undertaking in any arbitration agreement that both parties will exclusively pursue arbitration, forsaking all other modes, and that the injunction operates to uphold that commitment.[8] The Supreme Court explained that the limitations upon judicial injunctions for support of pending and imminent arbitration contained in section 44 of the Arbitration Act 1996 Act are irrelevant to an application of an anti-suit injunction, Lord Mance commenting on this last point:[9]

> `Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement...the source of the power...is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed. (Emphasis added).'

In the *Fiona Trust* case (2007)[10] the House of Lords held that, in the absence of forgery[11] or total lack of authority,[12] the presence of an arbitration clause in the main transaction enables the arbitral tribunal to pronounce on the status of the allegedly binding main transaction: this is the doctrine or principle of `separability', which is internationally recognised (Andrews, 2019, pp. 30-37 – 30-40; Born 2021; UNCITRAL, 1985; Schwebel, 1987, pp. 1-60). The doctrine of competence-competence (Andrews, 2019, pp. 30-41 – 30-42; Born, 2021) enables the arbitral tribunal to make a provisional decision regarding its own competence to hear the relevant dispute.

[7] [2013] UKSC 35; [2013] 1 WLR 1889;

[8] Arbitration clauses or exclusive jurisdiction clauses create a reciprocal duty to use only the nominated seat/forum and a reciprocal duty not to arbitrate/litigate elsewhere: *AMT Futures Ltd v Marzillier* [2014] EWHC 1085 (Comm), at [36] (Popplewell J) (reversed on a different point; [2017] UKSC 13; [2018] AC 439).

[9] *AES* case [2013] UKSC 35; [2013] 1 WLR 1889, at [48].

[10] *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951.

[11] ibid, at [17]; eg, *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124; [2008] 1 All ER (Comm) 351 (High Court justified in determining issue of forged signature; rather than permitting arbitrators to decide this issue).

[12] *Fiona Trust* case [2007] UKHL 40; [2007] 4 All ER 951, at [18]; see also *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm); [2009] 2 Lloyd's Rep 495; [2009] 2 CLC 386, at [33] to [40] (Gross J).

An arbitration agreement might incorporate an institutional set of rules. Or it can be *ad hoc*, that is, a self-contained arbitration agreement which is not dependent on an outside set of institutional rules. Where the seat of the arbitration is England and Wales, the law governing the conduct of the arbitration and challenges to the award is provided by the Arbitration Act 1996.[13]

In the *Emirates* case (2014) Teare J held[14] that a negotiation clause which is prescribed as a mandatory aspect of a wider arbitration agreement will be legally enforceable. In the case itself there had been no breach of the negotiation clause, which required the parties to engage in `friendly' negotiations before commencing arbitration. The clause stipulated a four-week pause following such negotiations before arbitration could be commenced. But the decision has received powerful criticism (Joseph, 2015). Teare J purported to distinguish[15] *Walford v Miles* (1992)[16] in which the House of Lords held that an agreement to negotiate in good faith or reasonably is void for uncertainty. The *Walford* case concerned a negotiation commitment within the principal agreement which was `subject to contract' and not yet established. By contrast, Teare J in the *Emirates* case noted that the negotiation agreement was contained within a dispute-resolution clause ancillary to a valid primary agreement (and the point can be extended: the negotiation clause was supportive of the arbitration agreement, in that negotiation was a mandatory prelude to arbitration).

As the Court of Appeal confirmed in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* (2012),[17] a mediation clause (Allen, 2019; Andrews, 2019, pp. 28-19 – 28.26; Andrews, 2013; Joseph, 2015; Kajkowska, 2017; Spencer, Brogan, 2006) is valid if (1) it discloses a commitment to creating legal obligations, and (2) both the identity of the mediator and (3) of the applicable mediation procedure are explicitly clarified or a mediation provider's machinery for appointment and procedure have been incorporated by reference. The court will grant, in its discretion, a stay of civil proceedings commenced before the mediation procedure has been exhausted.[18] The `agreement' in the *Sulamerica* case itself was triply deficient, because each of the three elements listed as (1) to (3) was missing. The relevant clause stated: `the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation'.

Sometimes statute invalidates clauses which purport to exclude formal recourse to state-administered courts or tribunals. Thus in *Clyde & Co v Bates van Winkelhof* (2011)[19] the

[13] ss 2, 3, Arbitration Act 1996; for an overview of the English statute, Andrews on Civil Processes (2019), chapter 31.
[14] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); [2015] 1 WLR 1145 (Teare J); although not criticised in *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm); [2016] 1 All ER (Comm) 517 at [59] to [63] (Popplewell J), Teare J's decision was received more agnostically in *DS Rendite Fonds Nr v Titan Maritime SA Panama* [2015] EWHC 2488 (Comm), at [15] (Males J).
[15] [2014] EWHC 2104 (Comm); [2015] 1 WLR 1145, at [29] and [59].
[16] [1992] 2 AC 128 (HL); on which Andrews: Contract Law in Practice (OUP, 2021), 4-31 to 4-54; Andrews, *Contract Law* (2nd edn, Cambridge University Press, 2015), 2.07 ff; Andrews, *Contract Rules* (Intersentia Publishing, Cambridge, 2016), Article 6.
[17] [2012] EWCA Civ 638; [2013] 1 WLR 102.
[18] *Cable & Wireless* v *IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041 (Colman J).
[19] [2011] EWHC 668 (QB) (Slade J).

(English) High Court refused to uphold a clause requiring a solicitor in a law firm to refer employment disputes to mediation and then to arbitration rather than to the public system of Employment Tribunals. Despite this clause, the relevant lawyer had brought a legal complaint to an Employment Tribunal. She alleged various statutory breaches by her law firm of equality law. The High Court held that her Employment Tribunal complaint was properly lodged. In short, in this context, statute[20] precludes an employee from 'contracting out' from this open and public system of adjudication.

III. Consensus and the conduct of formal proceedings

The parties have no general consensual control of the conduct of court proceedings. Such a general power would be inconsistent with the mandatory nature of much of the judicial process.

But parties can modify or control that process to the following limited extent:

(1) *arbitration:* they can exclude the civil court process by an arbitration clause; indeed, so significant is this capacity to opt, by agreement, for arbitration, that the arbitration `exception' has caused the Common Law proposition that the court's jurisdiction cannot be ousted by agreement to become rather marginalised; even so, it remains the starting point that an agreement to oust the court's jurisdiction is *prima facie* contrary to public policy and hence not legally binding (Chitty, 2018, pp. 16-72 – 16-75); or

(2) *mediation:* the parties can postpone resort to court proceedings by a valid mediation agreement (as discussed at section I of this paper);

(3) *prescription rules (1): extension:* the statute of limitations (the Limitation Act 1980), applicable both to court proceedings and arbitration references, can be waived;[21] but, it appears, the same statutory regime can also be modified by *ex ante* agreement so as to give `more time' within which the relevant claim can be formally commenced;

(4) *prescription rules (2): shortening:* conversely, the parties can, and often do, make express provision that claims will be subject to a shorter limitation period;[22] in the

[20] s 120, Equality Act 2010; s 203, Equality Rights Act 1996.

[21] The defence mostly provided by the Limitation Act 1980 operates under English law not to extinguish the underlying right (except in very rare situations) but rather to place a procedural bar on the claim, that bar being exercisable by the defendant, if it decides to raise this defence; on this jungle of rules and judicial glosses: Andrews on Civil Processes (2019), chapter 8; F Burton and A Roy, *Personal Injury Limitation Law* (3rd edn, Bloomsbury Publishing, London, 2013); M Canny, *Limitation of Actions in England and Wales* (Bloomsbury Publishing, London, 2013); Chitty (2018), chapter 28 (AS Burrows); A McGee, *Limitation Periods* (8th edn, Sweet & Maxwell, London, 2018); on abortive recommendations for change: 'Limitation of Actions' (L Com No 270, 2001), on which N Andrews [1998] CLJ 588; R James (2003) 22 CJQ 41; comparative discussion: UNIDROIT's *Principles of International Commercial Contracts* (3rd edn, Rome, 2010), chapter 10; R Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription* (Cambridge University Press, 2002).

[22] Eg a 12-month period, on the facts of *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (`The Eurymedon')* [1975] AC 154 (PC).

case of arbitration, the court can offer relief in respect of an unreasonably short agreed period of limitation;[23]

(5) *issues narrowed by agreement:* by the process of settlement, or by waiver,[24] the parties can agree to restrict their potential dispute to specified matters; and so, potential elements of claim might be excluded so that the issues are confined to `outstanding' matters of dispute; similarly, issues of fact might be agreed, or become the subject of a `concession'; the result is that the relevant matter is removed from potential adjudication; in this way the court is fed agreed factual matters;

(6) *choice of law:* by a choice of law clause, the substantive law applicable to the dispute can be agreed (for example, a foreign system of substantive law might be agreed to apply to the dispute);[25] similarly, it can be conceded that a point of law applies in a particular manner; if so, the court adopts this agreed version of the substantive law;

(7) *service of process:* the parties can agree on where the claim form will be served in order for the proceedings to be properly constituted;[26]

(8) *disclosure (discovery) rules:* the parties, by an *ex ante* written agreement, can exclude or limit `standard disclosure', that is, a party's capacity to invoke the disclosure (`discovery') powers of the court;[27] disclosure is the pre-trial process of revealing for inspection documentation; the parties have a provisional joint power to exclude 'Initial Disclosure' under the (current) `Disclosure Pilot for the Business and Property Courts';[28]

(9) *waiver of privilege:* an evidential privilege can be waived; but it is established[29] that an agreement to waive legal advice privilege is revocable until it is too late, because the information has been disclosed and waiver has occurred;

(10) *interim result:* nor is it clear that the parties can validly agree *ex ante* to be bound by the outcome of an application for an interim injunction, so that no further proceedings will take place;

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[23] s 12, Arbitration Act 1996.

[24] S Wilken and K Ghalys, *The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press, 2012).

[25] *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell, London), Rule 222.

[26] CPR 6.11.

[27] CPR 31.5(1)(c); P Matthews and H Malek, *Disclosure* (5th edn, Sweet and Maxwell, London, 2017), 8.08, note that this rule is a derogation from a general principle that the discovery rules cannot be excluded, on the principle that the court's jurisdiction cannot be ousted.

[28] PD 51U, paras 5.3(1), 5.8; in the latter it is stated: `*The court may set aside such an agreement if it considers that Initial Disclosure is likely to provide significant benefits and the costs of providing Initial Disclosure are unlikely to be disproportionate to such benefits*.' This system of disclosure rules took effect on 1 January 2019; and it is likely to be continued.

[29] *Goldman v Hesper* [1988] 1 WLR 1238, 1240 (CA) (Taylor LJ): `*[it was unsuccessfully submitted that] once a [promised] waiver of privilege had been made by the defendant she could not go back on it. [Counsel] did not advance any authority for that proposition and did not develop it more than simply to state it. He was wise in my judgment to make no more of it than that because it has little merit. In my judgment it cannot succeed. In this instance no action had been taken on the letter of [proposed] waiver, and the situation is not the same as might have been if there had been some documents already dispatched to be inspected by the plaintiff. Here nothing had been done and nothing was spoiled. The pass had not been sold, and in my judgment the defendant was perfectly entitled, on taking advice, to withdraw the waiver and her withdrawal was effective*.' The proposition is accepted by B Thanki (ed), *The Law of Privilege* (3rd edn, Oxford University Press, 2018), 5.33.

(11) *exclusion of specified remedies:* (subject to statutory and Common Law rules concerning the operation of exclusion clauses) (Andrews, 2021), the parties can agree that potentially applicable remedies will not be available if the claim succeeds;[30]

(12) *interest of outstanding sums:* the House of Lords in *Director General of Fair Trading v First National Bank plc* (2001)[31] made clear that a contractual rate of interest, expressed to continue even after judgment has been awarded, can continue to apply post-judgment until the loan is repaid even though the contractual rate exceeds the statutory judgment rate (such a term is not unfair under the unfair consumer terms legislation); the contractual stipulation had validly excluded the statutory level, even where judgment had been granted; this meant that the doctrine of merger had been expressly disapplied (Andrews, 2012, p. 27-27).[32]

(13) *post-judgment agreed exclusion of appeal:* there is no longer a right to a civil appeal; instead the prospective appellant must obtain permission from the court for appeal (Andrews, 2019, pp. 15-14 – 15-24);[33] it is submitted that once a judgment has been given, whether before or after an application for permission to appeal is made to the court, the parties can agree that no appeal will take place, or that the appeal will be restricted to specified matters; this is no more than a waiver, or partial waiver of appeal by a prospective appellant; but it is not clear that the parties can validly agree *ex ante* to exclude appeal. The rules[34] makes clear that the parties cannot agree to extend the period within which a notice of appeal must be filed.

Conversely, the following restrictions constrain the principle of freedom of contract in this procedural context:

(i) the parties cannot nominate a particular judge; nor, it seems, can the parties agree, or collusively arrange, that a particular court will hear the case (for example, the County Court, as distinct from the High Court, or vice versa, or the Commercial Court rather than the ordinary Queen's Bench Division court);

(ii) the court cannot be bound to accept issues if that will entail countenancing a claim based on illegality or which is contrary to public policy; the court is entitled to act *proprio motu* in identifying a matter as one which is founded in illegality or as contrary to public policy; in *Re Mahmoud and Ispahani* (1921) Scrutton LJ said:[35] ` the court is

[30] The present author does not support Rowan's converse suggestion, that party consent can tie the hands of the courts in general, S Rowan, `For the Recognition of Remedial Terms Agreed *Inter Partes' (*2010) 126 LQR 448.

[31] [2001] UKHL 52, [2002] 1 AC 481.

[32] *ibid*, at [3].

[33] CPR 52.3 to 53.7;

[34] CPR 52.15.

[35] [1921] 2 KB 716, 729 (CA); approved in *Birkett v Acorn Business Machines Ltd* [1999] 2 All ER 429, 433 (CA: Colman J, sitting with Sedley LJ); latter case applied in *Pickering v Deacon* [2003] EWCA Civ 554; *The Times*, 19 April 2003. Similarly, in *Skilton v Sullivan, The Times*, 25 March 1994, the Court of Appeal said that, if the VAT authorities had not already been informed, the court would have been obliged to report to those authorities the fact that one of the parties had dishonestly violated the VAT rules (see the end of Beldam LJ's judgment)

bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources';

(iii) the parties cannot agree that specific performance or an injunction will not be granted; nor, it appears, can the parties validly agree *ex ante* to exclude a party's capacity to invoke the court's jurisdiction for the purpose of obtaining protective relief, notably a freezing injunction or a search order;

(iv) however, the parties cannot tie the court's hands to grant specific performance or an injunction if the relevant claim is substantiated;[36]

(v) an agreed damages clause (a liquidated damages clause) will be void if it is a penalty (Andrews, 2021, p. 27-69);[37]

(vi) the parties cannot agree that evidence can be adduced which is inadmissible;

(vii) an agreement to procure false testimony,[38] suppress evidence,[39] or to drop a charge,[40] influence a juror or adjudicator[41] will offend the public policy against agreements tending to pervert the course of justice, and this objection might overlap in some contexts with the statute against bribery (Andrews, 2021, p. 16-18; Andrews, 2015, p. 20-17);[42] and so the parties cannot connive at the presentation of false evidence so as to concoct a judgment which is inconsistent with the true merits of the dispute; the parties cannot validly agree on a consent judgment which is contrary to the known facts or which involves concealment of a known illegality or which violates public policy (Chitty, 2018, pp. 16-63 – 16-71); it also appears that the parties cannot validly agree *ex ante* that a person or the representatives of a company will not be called to give evidence; nor, it seems, can such a `scope of evidence' agreement exclude categories of potential evidence such information held on computer discs or other data banks, or evidence located in particular locations, or evidence controlled by specified persons;

(viii) an *ex ante* agreement that certain modes of enforcement will be excluded would appear to offend the doctrine that the court's jurisdiction cannot be ousted (Chitty, 2018, pp. 16-72 – 16-75); for example, a loan agreement which stipulated that no enforcement proceedings could be brought would appear to be self-contradictory and contrary to public policy (Jacob, 1987, p. 170);[43]

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[36] This is clear law: Neil Andrews, *Contract Law* (2nd edn, Cambridge University Press, 2015), 18.33 at fn 319, citing *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, 451 (CA) (cf *Warner Bros v Nelson* [1937] I KB 209, 220-1, Branson J); for a contrary suggestion, which is not English law, S Rowan, `For the Recognition of Remedial Terms Agreed *Inter Partes'* (2010) 126 LQR 448, 449-55, 470-5.

[37] *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67; [2016] AC 1172;.

[38] *R v Andrews* [1973] QB 422 (CA).

[39] *R v Ali* [1993] CLR 396 (CA) (offence extends to an agreement that a potential witness should not give evidence); and see next fn.

[40] *R v Panayiotou* [1973] 3 All ER 112 (CA) (attempt to procure dropping of charges).

[41] This covers any agreement intended to, or tending to, expose to unacceptable influence, in particular, a juror, court, tribunal, judge, court official, enforcement officer, arbitrator, public decision-maker, or (arguably) mediator.

[42] Bribery Act 2010.

[43] Cf the general remark of Jacob: `*A right or claim without a remedy is empty of legal content; it may have some other social basis but is void of any legal basis*'. A *tertium quid* would be a loan agreement which stipulated that legal proceedings were confined to declaratory relief; such relief might establish a set-off right in favour of the lender; but otherwise the effect of such an agreed exclusion would be to render the loan `uncollectable' by the lender and hence commercially nugatory, subject to

(ix) within the law of assignment (Andrews, 2021; Chitty, 2018; Guest, Liew, 2018; Smith, Leslie, 2018; Fox, 2019; Tolhurst, 2016) it is established that the transfer of certain causes of action is contrary to public policy (Andrews, 2019, p. 10-19); in particular, the right to sue for personal injury or a fatal accident cannot be validly assigned; thus in *Simpson* v. *Norfolk and Norwich University Hospital NHS Trust* (2011)[44] the Court of Appeal held that a personal injury claim exercisable by the true victim X cannot be validly assigned to Y so as to enable Y to sue the defendant for damages in the tort of negligence; the doctrine of champerty (see text immediately below) invalidates such attempted assignments; accordingly, the defendant was entitled to obtain a striking out of the assignee's claim;

(x) the doctrines of maintenance and champerty (Andrews, 2019, pp. 16-56 – 16-59; Chitty, 2018, pp. 16-76 – 16-97)[45] provide a background general bar on agreements which objectionably involve the promotion of civil claims by non-parties or entitlement to the successful proceedings of a civil suit; but conditional fee agreements (for civil proceedings or arbitration) and damages-based agreements are statutory exceptions to these Common Law doctrines; in *Sibthorpe v Southwark LBC* (2011)[46] the Court of Appeal held that the doctrine of champerty does not invalidate an agreement that the claimant's solicitor will bear its client's costs liability towards the opponent if the case is lost; this case reflects the modern tendency not to expand that doctrine, and this decision attractively promotes access to justice;[47] the result was that the conditional fee agreement between that client and his lawyer was also valid; Lord Neuberger MR noted that champerty concerns arrangements where the non-litigant funder (here, the client's lawyer) agrees to gain positively from the relevant litigation; but this was not so on the present facts; instead the lawyer would suffer a loss if the case were lost, because he would have to indemnify his client; on the other hand (the following point was not considered in this case) the lawyer stands to make an overall gain in the sense that the case would not have been attracted if the lawyer had not been able to offer the present contingent costs indemnity;

(xi) settlement of pending civil proceedings must be ratified by the court if the settlement concerns a minor or a person who has a mental disability (Andrews, 2019, pp. 14-93 – 14-98);[48]

(xii) the Arbitration Act 1996 acknowledges[49] the parties' joint capacity to agree

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extra-legal `naming and shaming', `black-listing', and to other informal sanctions which might prove to be highly unsavoury. Another permutation is a legally binding loan, but without interest: *Al Jaber v Al Ibrahim* [2019] EWCA Civ 230; [2019] 1 WLR 3433 (appeal pending), where the court refused to insert an implied term to make interest payable.

[44] [2011] EWCA Civ 1149; [2012] 1 All ER 1423; Treitel (2020), 15-062, discerns here a more discriminating approach, noting Moore-Bick LJ at [7].

[45] On this topic, including the statutory exceptions introduced to make available certain `no-win-no-fee' agreements.

[46] [2011] EWCA Civ 25; [2011] 1 WLR 2111 (also known as *Morris v Southwark LBC*); notably at [42] to [44], [47] to [49], [51] to [53], [55]; noted, A Sedgwick (2011) 30 CJQ 261.

[47] *ibid*, at [49].

[48] CPR 21.10.

[49] s 1, Arbitration Act 1996: `the parties should be free to agree how their disputes are resolved, subject only tosuch safeguards as are necessary in the public interest'. This is principle (b), one of three articulated at section 1.

upon how the reference is to be conducted; but the statute identifies[50] a large raft of matters which are *ius cogens* and hence incapable of being excluded by party agreement, examples are the right to challenge an award on the basis that the tribunal lacked jurisdiction (or exceeded the scope of that jurisdiction),[51] or that there has been a serious procedural irregularity[52] in the conduct of the arbitration.

IV. Settlement

A settlement is a species of contract (the leading work has as its title *Compromise* (Foskett, 2019), but that term is a synonym for `settlement'). A settlement can be challenged on the basis of general contractual doctrine: misrepresentation, duress, undue influence. Some leading contract cases are in fact attempts to invalidate settlement agreements.[53] As for the doctrine of consideration, it is established that a compromise or settlement of a dispute is supported by consideration unless the claimant knew that the claim was bad in law or factually wholly unarguable, or there was objectively no reasonable basis for believing that the claim was arguable in law.[54] Wider attempts to impugn settlements on the basis of failure to disclose a material fact have been unsuccessful. For example, in *Thames Trains Ltd v Adams* (2006) Nelson J held[55] that it was not unacceptable for an offeree (Y) to accept a settlement figure even though the offeror (X) had clearly not read a much lower settlement figure which had been proposed the same day by the offeree. The judge rejected[56] the contention that this involved a unilateral error unconscionably acquiesced in by the other side: `a reasonable man would expect [Y's solicitor to be] entitled to stay silent, act in her client's best interests and accept the increased offer.'

The courts lean in favour of upholding apparent settlements, notwithstanding some obscurities in the terms of the agreement or minor loose-ends.[57]

[50] s 4, and sch 1, Arbitration Act 1996.

[51] S 67, Arbitration Act 1996.

[52] S 68, Arbitration Act 1996.

[53] Eg, *Bell v Lever Bros* [1932] AC 161 (HL) (leading decision on the doctrine of shared mistake in contract law); *Zurich Insurance Co Ltd v Hayward Zurich Insurance* [2016] UKSC 48; [2017] AC 142 (insurer settling exaggerated claim; claimant's fraud later uncovered; settlement set aside for fraud).

[54] There is no consideration supporting a compromise of a fraudulent claim: *Callisher v Bischoffsheim* (1870) LR 5 QB 449, 452, citing *Cook v Wright* (1861) 1 B & S 559, 570; *Miles v NZ Alford Estate* (1886) 32 Ch D 266 (CA); Neil Andrews, *Contract Law* (2nd edn, Cambridge University Press, 2015) 5.12; the *Callisher* case and later authorities were noted in *LCP Holding Ltd v Homburg Holdings BV* [2012] EWHC 3643 (QB), at [47] ff (Judge Mackie QC), notably *Hill v Haines* [2007] EWCA Civ 1284; [2008] Ch 412, at [79] (Rix LJ); generally, *Foskett on Compromise* (9th edn, Sweet and Maxwell, London, 2019); Chitty (2018), 4-51 to 4-57.

[55] [2006] EWHC 3291 (QB); for a similar context and the same result, *Turner v Green* [1895] 2 Ch 205 (Chitty J).

[56] [2006] EWHC 3291 (QB), at [56].

[57] *Scammell v Dicker* [2005] EWCA Civ 405; [2005] 3 All ER 838, at [39] to [43] (Rix LJ), emphasising that the courts will be especially keen to uphold apparent contracts of compromise or settlement; and for another example of a settlement being upheld *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 CLC 423; [2013] 1 Lloyd's Rep 638.

Most disputes which give rise to claims (whether or not proceedings are formally commenced) are either abandoned or are settled (Andrews, 2018; Blake, Browne, Sime, 2016; Genn, 1987; Genn, 2009; Foskett, 2020; Kajkowska, 2017; Palmer, Roberts, 2005). Only a small percentage of civil disputes involve a formal adjudicative process, whether court proceedings or arbitration. Of those cases which are commenced in the English civil courts, only a small segment reaches trial and becomes the subject of a final decision on the merits (and settlement during the course of a trial is quite common, even more so settlement at the threshold of the court before `day one' begins).

Therefore, settlement carries the greatest level of freight and traffic: it is Civil Justice's major trunk road.

Settlement can occur at various stages. It can precede commencement of proceedings, or it can occur thereafter. The various categories of consent judgment (also known as `judgment by consent') are summarised by the author elsewhere (Andrews, 2019, pp. 14-99 – 14-115).

A settlement without a court order is still effective to prevent a party from re-opening the case. If one party seeks to do so, he will commit a breach of contract. Two contexts can be distinguished.

The first concerns settlements which are made before proceedings have been formally commenced. If one of the parties to such a settlement breaches that agreement by seeking to bring an action, there are two ways in which he can be prevented from obtaining judgment in those proceedings: the court can grant a stay of that action (assuming it has been brought in England); or the defendant, who is the innocent party, can plead as his main defence the fact that this action has been brought in breach of the settlement agreement.

The second context occurs when proceedings are already afoot. Settlement in this situation will also be governed by general principles of the law of contract. The action which is settled by pure agreement (without a consent order, *Tomlin* order stay, dismissal by consent, or unilateral discontinuance by a claimant) (Andrews, 2019, pp. 14-99 – 14-115) will remain pending until such time as one of the parties notifies the court that the action should be dismissed, or unless the action is struck out by the court because, as a result of their undisclosed settlement, one party, or both parties, has failed to comply with a procedural order or rule.[58]

It is possible for a settlement to occur after judgment, but this is unlikely because the judgment victor will not normally perceive it as in his or her interests to abandon that victory, or at any rate to dilute it. Uncertainties concerning a pending appeal, or the prospects of obtaining enforcement of a positive judgment, might induce settlement. The fact that judgment has already been entered did not deter a Lord Justice of Appeal in the famous *Dunnett* case[59] from issuing to appellant and respondent a mediation recommendation notice as part of the

[58] On pre-trial settlements which are expressed to be 'subject to liberty to apply for a costs order', see *Brawley v Merezynski (No 1)* [2002] EWCA Civ 756; [2003] 1 WLR 813.
[59] *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 WLR 2434; Andrews on Civil Processes (2019), 28.50 to 28.56.

process of granting permission to appeal (the twice successful respondent company was denied the costs of the appeal, because it failed to act on this mediation recommendation.

Sharp LJ in *Mionis v Democratic Press SA* (2017)[60] summarised the attraction of settlement as follows:

> 'There were obvious advantages to both sides to this litigation, in reaching a settlement, as there are for litigants more generally. As Lord Bingham (Foskett, 1996) put it: "The law loves a compromise. It has good reason to do so, since a settlement agreement freely made between both parties to a dispute ordinarily commands a degree of willing acceptance denied to an order imposed on one party by a court decision. A party who settles foregoes the chance of total victory, but avoids the anxiety, risk, uncertainty and expenditure of time which is inherent in almost any contested action, and escapes the danger of total defeat. The law reflects this philosophy, by making it hard for a party to withdraw from a settlement agreement, as from any other agreement, and by giving special standing to an agreement embodied by consent, in an order of the court."'
>
> Sharp LJ added:[61]
>
> 'I would add that settlement does not only serve the private interests of the litigants, but the administration of justice and the public interest more generally, by freeing court resources for other cases. The law therefore encourages and facilitates the mutual resolution of disputes by various means, for very sound reasons of public policy; and there is obviously an important public interest in the finality of settlement.'

Mediated settlements are the result of discussion between the parties facilitated by the mediator (the literature concerning mediation is cited elsewhere in this paper at footnote 24 above). Such a settlement will tend be become embodied in a written agreement, with both parties' leading representatives signing.

V. Concluding remarks

The first theme has been the scope of parties to reach agreement concerning selection of the process by which their dispute (or generic future disputes) might be resolved (court proceedings) or at least discussed (negotiation agreements and mediation agreements).

The second theme has been the parties' capacity to agree on how the formal process (court proceedings or arbitration) will be conducted. This is a topic where many points are `moot', that is, not covered by clear authority. But even on those points, the general drift of public policy can often be predicted.

[60] [2017] EWCA Civ 1194; [2018] 2 WLR 565, at [88] (Sharp LJ).
[61] [2017] EWCA Civ 1194; [2018] 2 WLR 565, at [89] (Sharp LJ).

Thirdly, there is settlement. This mode of resolution brings happiness, or at least relief, to most citizens and organisations. It can bring great joy to the parties who have been spared the horrors and heart-ache of formal proceedings, or of their continuation. It is a fundamental necessity that most cases should be, and happily are, either abandoned or settled, otherwise the courts would be deluged with an impossible flood of cases. But there are always some losers or malcontents. Settlement is bad news for arbitrators and litigation lawyers, unless they have already earned their fee by the time the case is settled. And even they might deserve a vacation.

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