

Court Backs English Liability Ruling Sought By Notre Dame

By **Christine Powell**

Law360, New York (April 7, 2016, 8:07 PM ET) -- A Massachusetts federal judge on Thursday confirmed an expert's liability determination under an international arbitration convention against two companies accused by the University of Notre Dame (USA) in England of botching the renovation of student housing in London, and awarded the college a \$7.2 million attachment.

The companies being sued by UND, real estate developer TJAC Waterloo LLC and ZVI Construction Co. LLC, had argued that the school's suit should be dismissed because the liability determination, which was issued by an expert in July 2015, is not final. That expert is still obligated to determine the damages owed for their breach of the contract, and the liability determination is therefore unenforceable, they claimed.

But UND, which asked the court to confirm and enforce the liability award and prevent the companies from dissipating their assets, countered that the parties agreed the liability determination would be "final and binding."

On Thursday, U.S. District Judge Allison D. Burroughs sided with the school with respect to the finality aspect and confirmed the liability decision pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act.

"Where there is a formal, agreed upon bifurcation of an arbitration, between liability and damages, a district court can confirm the final liability award even while the damages portion of the arbitration is pending," the judge said.

However, the judge did not grant UND the \$8.5 million it sought in prejudgment security to ensure the defendants have the funds to pay the anticipated final judgment, saying the court cannot order security pursuant to Article VI of the convention given the procedural posture of the English case. Nor did Judge Burroughs grant UND's request for a preliminary injunction, saying it had not established that it would suffer irreparable harm without one.

Rather, the court granted UND's request for a smaller attachment, for \$7.2 million, that she said gives UND some security without hindering the defendants' business activities.

This attachment "is equal to the amount of liability insurance that TJAC and ZVI were required to carry under the P&S agreement, but admittedly do not have," the judge said. "This amount places Notre Dame in the position it would have been in had the defendants upheld their obligation to carry

insurance in that same amount.”

The court’s attachment as to TJAC and ZVI’s physical property is the “only recourse available,” the judge said, and given the likelihood of a significant damages award, the absence of insurance and the defendants’ unwillingness to voluntarily set aside assets, the court “has a responsibility to what is possible” to make sure there are assets available to satisfy the anticipated damages award.

The judge noted that the terms of the attachment were somewhat vague because the court was not sure exactly what physical assets existed — or even what exactly the relationship is between the two Massachusetts-based companies, which share an office address.

Additionally, Judge Burroughs denied TJAC and ZVI’s motion to dismiss with respect to the confirmation and attachment claims but granted it with respect to the preliminary injunction claim, in accordance with the other aspects of the decision.

And the judge nixed UND’s claim for recognition of a foreign judgment under a Massachusetts law governing the recognition of foreign country judgments, and its claim for declaratory judgment the judge said was an amalgamation of the other claims and served no additional purpose.

UND obtained an "expert determination" against TJAC and ZVI in England in July 2015 in which the companies were found to have breached a contract relating to the purchase and renovation of a former hospital in London into student housing. UND said in its original complaint, filed in Massachusetts state court, that the liability determination is similar to a binding arbitration.

The contract between the university and the companies provided for the refurbishment the hospital before it was sold to UND, but UND — which identifies itself as a company and charity in the U.K. — said that certain serious and critical safety defects came to light soon afterward. Thereafter, the university enlisted an expert the determine the companies' liability in the matter, as outlined in their contract.

Robert B. Lovett of Cooley LLP, who represents the college, told Law360 Thursday that "although we are in the process of studying the order, we appreciate the court’s time and attention in considering Notre Dame’s concerns, and are pleased to have been granted an attachment against both TJAC and ZVI in the amount of \$7.2 million.”

Representatives for the defendants did not respond immediately to requests for comment.

The university is represented by Robert B. Lovett, Michael J. McMahon and Elizabeth Trafton of Cooley LLP.

ZVI Construction is represented by Richard Briansky and Amy B. Hackett of McCarter & English LLP. TJAC Waterloo is represented by John W. DiNicola II of DiNicola Seligson & Upton LLP.

The case is The University of Notre Dame (USA) in England v. TJAC Waterloo LLC et al., case number 1:16-cv-10150, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Caroline Simson. Editing by Brian Baresch.
