

English Liability Determination Can Be Enforced, Court Told

By **Caroline Simson**

Law360, New York (March 8, 2016, 9:39 PM ET) -- The University of Notre Dame (USA) in England argued in Massachusetts federal court on Tuesday that a "conclusive" liability determination against two Massachusetts companies accused of botching the renovation of student housing in London can be enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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

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

"UND's receipt of a final and conclusive expert determination of defendants' liability on nearly 70 issues — as to which defendants have no right of appeal — entitles UND to recognition and enforcement of that expert determination," UND said. "The proceedings were before an impartial and agreed fact finder, and each of the parties had a chance to present their cases to that fact finder in a contested proceeding."

The school is also asking the court to declare that the award is final, and that TJAC and ZVI have failed to provide sufficient assurances that they will be able to pay the forthcoming damages determination, which it expects will be around \$8.5 million.

UND obtained an "expert determination" against TJAC and ZVI in England in July 2015 in which the Massachusetts-based companies were found to have breached a contract relating to the purchase and renovation of a former hospital in London, which was to be converted 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 university wants the court to prevent the construction companies from dissipating their assets and to confirm the determination under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention.

The construction companies, meanwhile, argue that the liability determination doesn't qualify for

enforcement because it deals only with the issue of liability and not damages. The damages phase is slated to be held in May and a damages judgment issued thereafter, so the liability determination isn't a final enforceable judgment, according to the companies' March 1 motion to dismiss.

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.

An attorney for UND declined to comment on Tuesday. Attorneys for ZVI and TJAC weren't immediately available to comment.

The University of Notre Dame (USA) in England 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.

--Editing by Brian Baresch.