BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
ANYTHING YOU DO OR SAY MAY BE USED AGAINST YOU IN A COURT OF LAW

A Melomed Finance (Pty) Ltd (In Liquidation) v Harris Jeffrey
(SGHC Case no: 2016/A5028) (Judgment handed down 23 June 2017)

INTERNATIONAL ARBITRATION:
WHAT INTERNATIONAL ARBITRATION IS NOT

There is no doubt that the imminent promulgation of the International Arbitration Act has created equal levels of excitement and confusion in the South African legal fraternity. South Africa does not have a particularly long history in resolving disputes by means of international arbitration. While the courts are undoubtedly “arbitration friendly”, South Africa was never really regarded as a choice seat for international arbitrations, mainly due to outdated legislation. This is expected to change with the promulgation of new Act.

INTERNATIONAL ARBITRATION:
PERMANENT COURT OF ARBITRATION (PCA) SETS UP OFFICE IN SINGAPORE.
The South Gauteng High Court, sitting as a court of appeal, recently handed down a judgment to the effect that a verbal acknowledgement of debt when made at an enquiry held into the affairs of a company, in terms of s417 and s418 of the Companies Act, No 61 of 1973 (s417 enquiry), can be used as evidence in subsequent civil litigation to recover the amount so acknowledged.

It is trite law that a witness subpoenaed to a s417 enquiry to testify before a commissioner, is obligated to take an oath and then answer any question that is put to him or her, even in the event that the answer may incriminate him or herself. The Act does, however, prevent such incriminating evidence, so obtained, from being used in criminal proceedings against that witness.

In this case, the liquidators of the company, sought to recover a sum in excess of R8 million. The only evidence which the Appellant put before the court with regards to the proof thereof was the Respondent’s admissions, made under oath, at a s417 insolvency enquiry.

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The Appeal court said that there is “no sound reason” not to rely on [an] oral acknowledgment of debt and that absence of corroborating documentation does not detract from the effect of the acknowledgment. The court concluded that no facts were adduced by the Respondent which contradicted his admissions made in the s417 enquiry and therefore the appeal must succeed and the Respondent was liable to pay.

The precedent set by the court is that a s417 enquiry transcript constitutes prima facie evidence in respect of admissions made at such enquiry. In this instance it constituted prima facie evidence of an acknowledgement of debt. A litigant faced with such evidence is therefore burdened with the onus to contradict the contents of the transcript of the s417 enquiry. This is a particularly onerous burden as any admissions made at a s417 enquiry are made under oath.

This precedent is welcome as it is logical that evidence given under oath should be admissible in court as evidence which was not necessarily the case previously when such evidence had to be led afresh.

Andrew MacPherson and Grant Ford
This note seeks to clarify a few misconceptions about this area of law.

1. **International arbitration is no different to a domestic arbitration** – International arbitration Law is a set of international laws, treaties, customs and norms, grounded by local statutes operating as a transnational framework for the resolution of cross border disputes. It is entirely different to a domestic arbitration which essentially remains under the influence of local courts.

2. **International arbitration is a "European thing"** – International arbitration is not linked with any country, region or legal system. It is a mechanism which evolved as a result of the difference in legal systems and cultures and whilst certain regions have a longer history in facilitating the resolution of such disputes, there is no one location which will be appropriate in all circumstances.

3. **A good template international arbitration clause is all one needs** – It is often insufficient to simply insert a “template” international arbitration clause in all contracts. Important factors to bear in mind when concluding an international arbitration clause include the nationality of the parties, language, the place of performance, the place of potential enforcement, the nature of the contract itself and the currency of the agreement. These are often different for each contract.

4. **It is always better to refer a dispute to one of the established seats in accordance with their rules** – For a number of years, this was indeed the default position. The biggest justification for not doing so today is cost. The majority of the established seats for example in London, Paris, Singapore and Hong Kong, are very expensive, especially for parties based in developing regions like Africa. There is a growing trend to choose a seat which will not push the resolution of a dispute beyond the means of the financially weaker party.

5. **Arbitral awards are not as enforceable as court orders** – Whilst technically correct, this statement is misleading. It is correct that an arbitral award is only enforceable once recognised by a national court at the place of enforcement. However, signatories to the New York Convention (on the enforcement and recognition of foreign arbitral awards) are obliged to enforce foreign arbitral awards and may only refuse such enforcement under certain exceptional circumstances. Currently there are over 150 signatories to the New York convention. In contrast, the
Hague convention on the Recognition and Enforcement of foreign Judgments in Civil and Commercial matters, for example, only has 5 signatories.

6. One cannot arbitrate a dispute in South Africa if the governing law of the contract is a foreign law – This is entirely false. The content of the foreign law will be determined by expert testimony, if necessary, but there is no reason why the seat cannot be in South Africa.

7. I will be forced to fly-in legal representation from England if the governing law of the contract is English Law – This too is false. There is no requirement to be proficient or qualified in any particular law in order to represent a party in an international arbitration. What is more, there is no need to brief advocates to argue the matter. The manner in which the case is advanced is entirely up to the parties.

8. International arbitration enables forum shopping, something South African law does not permit – South African law does not permit forum shopping in court litigation. Arbitration, on the other hand is not restricted by such principles. In fact, parties are encouraged to shop for the most appropriate forum for each dispute in an effort to facilitate access to justice.

The above are but a few misconceptions about international arbitration and its relevance for South Africa. International arbitration is certainly a “thing” and it is alive and kicking on the African continent.

Jonathan Ripley-Evans
On 25 July 2017, the Singapore Ministry of Law announced that the PCA will set up a staffed office in Singapore, being its first office in Asia. The decision to open up this office is testament to the number of disputes involving states, heard in the region in recent years.

The PCA is an inter-governmental organisation providing dispute resolution services for disputes involving states, state entities, international organisations and private parties, normally where one of the parties is a state (or an organ of state).

The PCA opened its first overseas office in Mauritius in 2010 mainly in an effort to assist with the promotion of Mauritius as a suitable seat for international arbitrations with the focus mainly on African disputes involving states.
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