

# DISPUTE RESOLUTION ALERT

## IN THIS ISSUE

### **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friendly", South Africa was never really regarded as a choice seat for international arbitrations, mainly due to outdated legislation.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.**

# BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

## ANYTHING YOU DO OR SAY MAY BE USED AGAINST YOU IN A COURT OF LAW

*The precedent set by the court is that a s417 enquiry transcript constitutes prima facie evidence in respect of admissions made at such enquiry.*

*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.*



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

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.

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***



**CLICK HERE** to find out more about our Business Rescue, Restructuring and Insolvency team.

# INTERNATIONAL ARBITRATION: WHAT INTERNATIONAL ARBITRATION IS NOT

*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.*

*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 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.

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

# INTERNATIONAL ARBITRATION: WHAT INTERNATIONAL ARBITRATION IS NOT

CONTINUED

*International arbitration is certainly a “thing” and it is alive and kicking on the African continent.*



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.

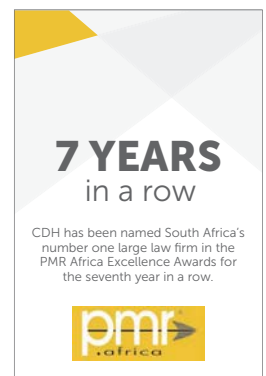
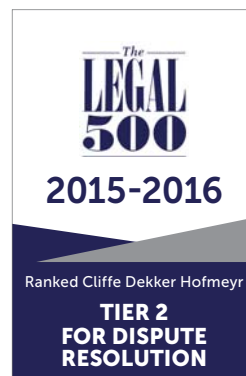
8. **International arbitration enables forum shopping, something South African law does not permit** – South African law does not permit forum shopping in court litigation. Arbitration, on the other hand is not restricted by such principles. In fact, parties are encouraged to shop for the most appropriate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



**CLICK HERE** to find out more about our International Arbitration team.



# INTERNATIONAL ARBITRATION: PERMANENT COURT OF ARBITRATION (PCA) SETS UP OFFICE IN SINGAPORE.

## International Arbitration **NEWS BULLETIN**

### PERMANENT COURT OF ARBITRATION (PCA) SETS UP OFFICE IN SINGAPORE.

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.



**CLICK HERE** to find out more about our International Arbitration team.

CHAMBERS GLOBAL 2017 ranked us in Band 1 for dispute resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2017 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2017 in Band 2 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



## OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



**Tim Fletcher**  
National Practice Head  
Director  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com



**Grant Ford**  
Regional Practice Head  
Director  
T +27 (0)21 405 6111  
E grant.ford@cdhlegal.com

**Timothy Baker**  
Director  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

**Roy Barendse**  
Director  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**Eugene Bester**  
Director  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

**Tracy Cohen**  
Director  
T +27 (0)11 562 1617  
E tracy.cohen@cdhlegal.com

**Lionel Egypt**  
Director  
T +27 (0)21 481 6400  
E lionel.egypt@cdhlegal.com

**Jackwell Feris**  
Director  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

**Thabile Fuhrmann**  
Director  
T +27 (0)11 562 1331  
E thabile.fuhrmann@cdhlegal.com

**Anja Hofmeyr**  
Director  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

**Willem Janse van Rensburg**  
Director  
T +27 (0)11 562 1110  
E willem.jansevanrensburg@cdhlegal.com

**Julian Jones**  
Director  
T +27 (0)11 562 1189  
E julian.jones@cdhlegal.com

**Tobie Jordaan**  
Director  
T +27 (0)11 562 1356  
E tobie.jordaan@cdhlegal.com

**Corné Lewis**  
Director  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

**Janet MacKenzie**  
Director  
T +27 (0)11 562 1614  
E janet.mackenzie@cdhlegal.com

**Richard Marcus**  
Director  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

**Burton Meyer**  
Director  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

**Zaakir Mohamed**  
Director  
T +27 (0)11 562 1094  
E zaakir.mohamed@cdhlegal.com

**Rishaban Moodley**  
Director  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com

**Byron O'Connor**  
Director  
T +27 (0)11 562 1140  
E byron.oconnor@cdhlegal.com

**Lucinde Rhoodie**  
Director  
T +27 (0)21 405 6080  
E lucinde.rhoodie@cdhlegal.com

**Jonathan Ripley-Evans**  
Director  
T +27 (0)11 562 1051  
E jonathan.ripleyevans@cdhlegal.com

**Belinda Scriba**  
Director  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

**Willie van Wyk**  
Director  
T +27 (0)11 562 1057  
E willie.vanwyk@cdhlegal.com

**Joe Whittle**  
Director  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

**Jonathan Witts-Hewinson**  
Director  
T +27 (0)11 562 1146  
E witts@cdhlegal.com

**Pieter Conradie**  
Executive Consultant  
T +27 (0)11 562 1071  
E pieter.conradie@cdhlegal.com

**Nick Muller**  
Executive Consultant  
T +27 (0)21 481 6385  
E nick.muller@cdhlegal.com

**Marius Potgieter**  
Executive Consultant  
T +27 (0)11 562 1142  
E marius.potgieter@cdhlegal.com

**Nicole Amoretti**  
Professional Support Lawyer  
T +27 (0)11 562 1420  
E nicole.amoretti@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1802/AUG

