

THREE CROWNS

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Law School

THE DAVID D. CARON PRAELIUM 2024

Thursday, June 6, 2024

THE LAW SOCIETY

113 Restaurant & Bar

THREE CROWNS

Founded in 2014, Three Crowns is a specialist firm dedicated to providing excellence in counselling and advocacy in international arbitration and international law. We are recognised by our clients and leading legal directories as “one of the premier arbitration practices in the world” and “the go-to firm for high-value and complex matters”.

Members of our firm have acted on some of the largest and most significant international disputes in recent years. Our clients—leading corporates and sovereign States—entrust us with their largest and most important disputes. On their behalf, we have an outstanding track record of securing positive awards and settlements, including obtaining many of the precedent setting awards in the history of international arbitration.

With offices in key arbitration centres, our “one firm, one team” approach ensures that our clients receive a seamless service and dedicated lawyers on every mandate. Successful representation in international dispute resolution calls upon a unique blend of experience, creativity, forensic skill, and advocacy. Our way of working drives efficiency.

THE DAVID D. CARON PRAELIUM 2024

An Annual Celebration of Advocacy

London International Disputes Week | London

The Law Society | 4:30 PM

The Distinguished Tribunal:

Hilary Heilbron KC - *Presiding Arbitrator*

Sam Wordsworth KC

Audley Sheppard KC

The Advocates:

Kate Davies KC

Tariq Baloch

The Praelium is an annual celebration of advocacy, with two leading international advocates deploying their oratorical and advocacy skills in the service of important current legal issues before a distinguished three-member tribunal. The event has been renamed to honor the life and legacy of Praelium co-founder Professor David D. Caron, an individual of great humility and kindness whose distinguished career in international law will long serve as a source of guidance and inspiration.

*The opinions expressed are in the spirit of academic debate and do not necessarily reflect the advocates' or arbitrators' views.

CASE STUDY: FACTUAL BACKGROUND

1. Vito Organics (“**Vito**”) is a company incorporated in the Republic of Corleone. Vito produces and exports various processed edible items, including cold pressed olive oil. In 2015, Vito entered into an agreement (the “**Agreement**”) to sell cold pressed olive oil extracted from Italian green olives to Fredo Foods (“**Fredo**”), a partially state-owned retail company incorporated in the Republic of Brasi.
2. Olive oil is a regulated commodity in Brasi. The Brasi Ministry of Commerce sets the maximum price at which it can be sold to consumers, which is linked to the global price of raw olives.
3. The Agreement provides that the price at which Vito sells olive oil to Fredo will be the cost of raw olives plus a 15% processing charge, as set out in a spreadsheet to be agreed between the parties on an annual basis at the start of each year. Accordingly, under the Agreement and every year, Vito notifies the price in the form of an Excel sheet, which Fredo then confirms. Vito and Fredo agreed that any dispute arising from the Agreement would be resolved by arbitration (the “**Arbitration Agreement**”). The Arbitration Agreement provides as follows:

- (a) *This Agreement shall be governed by the laws of England and Wales without regard to its conflicts of laws.*
- (b) *Any dispute arising out of, relating to or in connection with this Agreement shall be referred to and finally resolved by arbitration under the UNCITRAL Rules by a panel of three arbitrators.*
- (c) *The seat of arbitration shall be London, United Kingdom.*
- (d) *When a party to this Agreement submits a request for arbitration in connection with a legal relationship in respect of which arbitration proceedings between the parties are already pending under the UNCITRAL Rules (the “Already Pending Proceeding”), any party to the Agreement may request that the claims contained in the request for arbitration be included in the Already Pending Proceeding provided that the proceedings raise common questions of law or fact.*

4. Between 2020 and 2022, Fredo stopped paying for Vito’s olive oil. Vito sought to negotiate with Fredo, but Fredo insisted that it was not able to afford the olive oil because it was paying Vito more than it was able to sell the olive oil for to consumers in Brasi.
5. On 25 December 2022, Vito commenced arbitration against Fredo before a three-member tribunal (the “**Tribunal**”) seeking recovery of the sums owed for the olive oil sold to Fredo between 2020 and 2023. Initially, Fredo defended the claim. During the course of the arbitration, Fredo’s defence changed several times until eventually, and a few weeks prior to

the hearing, Fredo changed counsel and applied (successfully) (a) to amend its pleadings to counterclaim for damages arising out of a breach of a duty of good faith under the Agreement on the basis that the price of Vito's olive oil had not changed even though the price of raw olives had declined consistently and steadily since 2015, and (b) for disclosure of documents from Vito in support of its new counterclaim (the "**Initial Disclosure**"). Fredo claimed that it had entered into the Agreement on the understanding that the price of the olive oil would track the price of raw olives.

6. At the same time, Fredo also applied to postpone the hearing – due to have commenced on 1 January 2024 – until 30 June 2025. The Tribunal dismissed the application for a postponement of the hearing.
7. At the hearing, during cross-examination of one of Vito's witnesses, Mr Clamenza, it became apparent that the historic Excels, on the basis of which Vito had notified the price of the olive oil each year, and which Fredo had confirmed, contained two sheets. The first based the price of olive oil on a fixed cost of raw olives and the second varied the price in line with the prevailing market. Fredo alleged that Vito had never mentioned the first sheet, and that it had never opened it although the evidence showed that both sheets had been provided each year.
8. In certain of the responses given by Mr Clamenza during cross examination, however, he suggested that the first sheet (showing the fixed price) was not visible at the time they were emailed to Fredo. Vito pointed to documents showing that both sheets were clearly visible, but Fredo applied for disclosure of Mr Clamenza's emails, claiming these were "*critical*" to its case to prove that the first spreadsheet was not visible (the "**Additional Disclosure Request**"). The Tribunal dismissed the Additional Disclosure Request, but it granted Fredo permission to draw any reasonable inference from the absence of such documents from Vito's Initial Disclosure. In response to the Tribunal's denial of its Additional Disclosure Request, Fredo trailed that it would seek to argue that Vito had deliberately concealed evidence in the form of the emails. In an attempt to pre-empt Fredo's potential allegation, Vito filed new evidence overnight in the form of a three-page witness statement by Ms Connie, Vito's CFO. Fredo sought permission to cross-examine Ms Connie (the "**Cross-Examination Request**"). The Tribunal denied the Cross-Examination Request on the basis that it did not consider the matters addressed in the evidence ultimately to be relevant.
9. Fredo presented its case at the hearing on the basis of a lack of good faith, as pleaded in its written submissions. However, in closing arguments, Fredo's counsel, Mr Hagen remarked "*Vito may even have concealed the first sheet. We are still looking into it. It may come to pass in the course of this arbitration that there was in fact wilful concealment*". When asked by the Tribunal whether Mr Hagen was advancing a claim in fraud, Mr Hagen replied "*Not at this time, but we are considering it and I will confirm imminently*". The hearing concluded that evening and the Tribunal adjourned.

10. Six weeks later, while the Tribunal's award was pending, Vito received two letters from Fredo. The first letter informed that, irrespective of the outcome of the arbitration, Fredo would challenge any award under the English Arbitration Act 1996 on grounds of serious irregularity affecting the proceedings said to arise out of the apparent bias of the Tribunal against Fredo. The bias was said to arise out of the Tribunal's failure to grant Fredo's (i) Additional Disclosure Request and (ii) Cross-Examination Request.
11. The second letter was a notice of arbitration ("**Notice**"), informing Vito that Fredo was commencing a new arbitration under the Agreement (the "**New Arbitration**") for a claim for rescission of the Agreement and damages based on fraudulent misrepresentation by Vito said to arise because Fredo relied on the information in the second sheet in entering into the Agreement while Vito knowingly concealed the first sheet. Fredo further alleged that Vito's olive oil was extracted from black olives instead of green ones, which Vito had allegedly concealed from Fredo, inducing Fredo to keep purchasing the oil under the impression that it was receiving oil from green olives. In the Notice, Fredo nominated a new arbitrator different from any of the arbitrators in the first arbitration.
12. That evening, Vito was served the particulars of claim in a suit filed in the Brasi High Court by Sonny Management ("**Sonny**"), a Delaware-incorporated limited liability company that is a majority shareholder in Fredo and the latter's related company. The same nine persons constitute the respective boards of Sonny and Fredo, save that Sonny has an additional independent director who is not a board member of Fredo. Sonny sought, by way of a derivative action, invalidation of the Agreement on the basis that, under Brasi law, the purchase of olive oil, a regulated commodity in Brasi, from a foreign producer required shareholder approval, which Fredo had allegedly not obtained. Both Fredo and Vito were named as defendants in Sonny's claim.
13. On 27 May 2024, Vito filed an application for urgent relief (the "**Application**") pursuant to Article 26 of the UNCITRAL Rules seeking (a) an injunction in the form of an order, restraining Fredo from taking any steps to progress the New Arbitration, including by constituting a new tribunal, (*i.e.*, an anti-arbitration injunction) on the basis that any such step would be a breach of the arbitration agreement and an abuse of process; and (b) an order restraining Sonny from pursuing the claim in the Brasi High Court and Fredo from assisting it on the basis that the claim was abusive and designed to undermine the arbitration.

ISSUES FOR DETERMINATION

The Tribunal has asked the parties to address the following issues at the upcoming procedural hearing of the Application on 6 June 2024:

1. whether the Tribunal should grant an order restraining Fredo from taking any step to progress the New Arbitration (or whether it should simply consolidate the New Arbitration into the existing arbitration); and
2. whether the Tribunal has jurisdiction to grant an order restraining Sonny from pursuing the claim in the Brasi High Court.

THE DISTINGUISHED TRIBUNAL



Hilary Heilbron KC

Brick Court Chambers

Hilary Heilbron KC is a barrister and King’s Counsel practising from Brick Court Chambers, London. She now focuses on international arbitration, sitting as an international arbitrator. She has been appointed as an arbitrator over 130 arbitrations, many as Chair, with a range of different applicable laws, seats, institutional rules and subject matters, both ad hoc and under institutional rules. She brings to this role her extensive experience as counsel in which capacity she has acted for a wide range of national and international clients, appearing as leading counsel in the Supreme Court, the House of Lords and the Privy Council. She has been a member of various recent international task forces on current topics in international arbitration and is a former member of the LCIA Court and the ICC UK Arbitration and ADR Committee. She has spoken and written extensively on international arbitration and cross-border litigation and is the author of *A Practical Guide to International Arbitration in London* (Informa Law, 2008).



Sam Wordsworth KC

Essex Court Chambers

Sam Wordsworth KC specialises in public international law and international arbitration. He is regularly instructed by Governments in international cases and has appeared before numerous international tribunals including the International Court of Justice and Tribunals constituted with respect to the Law of the Sea. He is a Visiting Professor teaching investment arbitration at Kings College, London and is regularly instructed as counsel in investment treaty disputes (he also sits as arbitrator in a limited number of disputes). Sam advises regularly on international law matters, including questions concerning treaty interpretation, international watercourses, maritime boundaries, the Law of the Sea, investment treaty disputes, State immunity, sanctions, dispute settlement procedures. He is co- author of Halsbury’s Vol. 61 “International Law and Foreign Relations” and one of the co- authors of the forthcoming Oppenheim’s *International Law* 10th ed and the forthcoming Mustill & Boyd, *International Commercial and Investment Arbitration*, 3rd ed.



Audley Sheppard KC

Twenty Essex

Audley Sheppard KC is an Arbitrator Member at Twenty Essex, which he joined in June 2024 after 38 years at Clifford Chance (28 as a partner), where he was the co-Head of International Arbitration. He has extensive experience of major disputes arising out of infrastructure and energy projects, and international trade and investment. He has been appointed as an arbitrator under the LCIA, ICC, SIAC, LMAA and UNCITRAL Rules (including an investment treaty arbitration). Audley is currently a vice president of ICCA, and chair of the board of Sport Resolutions. He is a former chair of the board and vice president of the court of the LCIA, the New Zealand member on the ICC Court and Arbitration Commission, co-chair of the IBA Arbitration Committee, and rapporteur of the ILA Arbitration Committee.

THE ADVOCATES



Kate Davies KC

Skadden

Kate Davies KC is head of Skadden's Europe International Litigation and Arbitration Group. She has extensive experience advising on commercial disputes in the pharmaceutical, telecommunications, automotive, technology, energy and construction sectors, as well as those arising out of a variety of agreements, including joint venture, shareholder, post-M&A, licensing, distribution, technology transfer, patent and construction agreements. Additionally, she counsels on disputes arising from complex contracts and projects, including in the energy, mining and transport sectors. She also has handled a range of matters involving investment treaty arbitration and public international law. Kate recently served as secretary to the International Bar Association's Arbitration Committee and on the ICC Task Force considering dispute resolution in the context of climate change and the Paris Agreement, and is a recent former member of the ICC U.K. Appointments Committee. She also sits on the Executive Committee of the Foundation for International Arbitration Advocacy and was co-chair of the 2022 Institute for Transnational Arbitration Workshop. She regularly sits as arbitrator on single- and three-member tribunals.



Tariq Baloch

3 Verulam Buildings

Tariq Baloch's practice encompasses international arbitration (international investment treaty claims and international commercial arbitration), public international law and general commercial litigation. He has represented or advised private parties and states under all the major arbitral rules including the ICC, LCIA, SCC, ICSID, UNCITRAL and DIAC rules, in a range of sectors including banking, oil and gas, insurance and reinsurance and telecommunications and energy. His experience includes acting for some of the world's largest companies in high value complex arbitrations involving disputes around the world. The international dimension of Tariq's experience is further reinforced by the 4 years he spent practicing international arbitration in Freshfields' offices in the Middle East and North Africa region and Paris. He also sits as an arbitrator. In 2012 he was nominated to the ICSID Panel of Arbitrators. In 2014 he co-taught the inaugural course on the practice of international arbitration at the LSE. Prior to entering practice Tariq was an assistant professor at the LSE. He is also an expert in the English law of obligations. His book *Unjust Enrichment and Contract* (Hart, Oxford, 2009) is cited in leading English texts, including Chitty and Goff and Jones, and was described by Professor Robert Stevens (Oxford) as the "definitive" work in the area.



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View from Bush House terrace,
Strand Campus

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The Dickson Poon School of Law, King's College London is one of the oldest law schools in England and recognised globally as one of the best law schools in the world. The School was established in 1831 and has played an integral role in the life of King's since the university was formed almost 200 years ago.

King's has been in service to society since its foundation and we're proud to continue that tradition to this day. Our research and teaching address some of the most pressing questions of our time relating to equality and human rights, the legal implications of climate change, globalisation, international relations, trade, competition and global finance, to name but a few. Members of The Dickson Poon School of Law advise governments, serve on commissions and public bodies and are seconded to national and international organisations, helping to shape policy and practice nationally and internationally.

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London International Disputes **Week**

3 – 7 June 2024

London International Disputes Week (LIDW) is a forward-thinking forum which aims to:



Explore and contribute to the future of international dispute resolution



Celebrate London as a leading centre for handling the resolution of international disputes, whatever the sector or form of dispute resolution, such as arbitration, litigation and mediation



Represent London's dispute resolution community



Demonstrate legal London's genuine commitment to diversity, inclusion and the rule of law

LIDW24 marks the fifth year of London International Disputes Week. With its theme, “Uniting for global challenge and opportunity”, LIDW24 will follow up on last year’s theme “Adapting to a changing world” and look not only at what progress has been made in the dispute resolution world over the last year, but also at what we can expect over the next year and beyond. What does the next year hold for dispute resolution professionals around the world?

Find out more at: <https://lidw.co.uk/>.

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