

THREE CROWNS

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The David D. Caron Praelium

Thursday, November 17, 2022

THREE CROWNS

Founded in 2014, Three Crowns is an elite specialist firm dedicated to providing excellence in counselling and advocacy in international arbitration and international law. We have an established reputation of being the “go-to” firm for the resolution of complex and groundbreaking international disputes.

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 and public international law.

With offices in key arbitration centers, 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 2022

An Annual Celebration of Advocacy

November 17 | New York City, New York

The Harmonie Club | 5:30 PM

The Distinguished Tribunal:

Chiann Bao

The Honorable Charles N. Brower

Professor George A. Bermann

The Advocates:

R. Doak Bishop

Angeline Welsh

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. The Roy family are the majority shareholders in Waystar RoyCo, a global media and entertainment conglomerate. The CEO of Waystar RoyCo and patriarch of the Roy family, Logan Roy, wishes to acquire a rival media company, Pierce Global Media (“**PGM**”), owned by the Pierce family. Following a successful meeting between the Roy and Pierce families at the Pierce family estate in Tuscany, the families agree to proceed with the acquisition, but only on the basis that the Pierce family retain a minority stake in PGM and key positions on the board of PGM.
2. It is planned that the acquisition will take place by way of a share sale, with Waystar RoyCo making scheduled payments for the shares. A Share Purchase Agreement (“**SPA**”) is entered into between Waystar RoyCo and the Pierce family members who own 100% of the shares in PGM (the “**PGM Shareholders**”) for the sale and purchase of 75% of the shares in PGM.
3. The first upfront payment of US\$250,000,000 is transferred by Waystar RoyCo to the PGM Shareholders. However, just as the shares are about to be transferred, the New York Magazine prints a piece suggesting that there has been a massive cover-up of crimes (including alleged sexual assault) in Waystar RoyCo. It is unclear whether Logan Roy and the Board of Waystar RoyCo are aware of, or possibly participated in, this alleged “cover-up”.
4. It also comes to light that the PGM Shareholders are planning to sell shares in PGM to Waystar RoyCo, resulting in a deluge of criticism against the Pierce family across the news media. The PGM Shareholders decide to pull out of the acquisition relying on alleged breaches by Waystar RoyCo of the following warranty in the SPA:

Clause 7.1: The Purchaser warrants to the Seller that, subject to the provisions of this Agreement, as at the date of this Agreement each of the statements set out in Schedule 4 is true and accurate and as at the Completion Date each of the Fundamental Warranties is true and accurate.

Schedule 4, Clause 8.6: So far as the Purchaser is aware, no member of the Acquiring Group is the subject of any material investigation, inquiry or enforcement proceedings or process by any governmental, administrative or regulatory body which would have a material adverse effect on the overall business of any member of the Acquiring

Group, as at the date of this Agreement.

5. Following the PGM Shareholders' termination of the transaction, it comes to light that the Pierce family have also been in discussions to sell PGM to a Saudi-based millionaire, Aaron Malik. Logan Roy flies into a rage and demands that the Waystar RoyCo legal team force through – “at all [expletive] costs” – the PGM acquisition and stop the shares from being sold to Malik.
6. Unbeknownst to Waystar RoyCo at this time, the PGM Shareholders had entered into an alternative share purchase agreement with Malik to sell their shares for twice the price agreed with Waystar RoyCo (the “**Malik SPA**”).
7. The SPA is governed by New York law and includes an arbitration agreement in the following terms:

38. ARBITRATION: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in New York in accordance with the ICC Rules of Arbitration. None of the parties hereto, nor any persons claiming under any of them, shall bring any action or other legal proceedings against any other of them in respect of any such dispute until such dispute shall first have been resolved and determined by the arbitral tribunal.

8. PGM is an English company with substantial assets in the UK. The PGM Shareholders' place of residence is Bermuda. Waystar RoyCo is a Delaware corporation with its principal offices in New York City and London. Its business dealings with PGM have primarily been managed out of its London office.
9. Waystar RoyCo successfully applies to the English High Court for: (i) a worldwide freezing order in relation to the assets of the PGM Shareholders up to the value of US\$250,000,000; and (ii) an interim injunction restraining the PGM Shareholders from selling, transferring or otherwise disposing of the PGM shares to third parties (the “**English Injunction**”). As a result of the English Injunction, the proposed deal with Malik falls through.
10. Waystar RoyCo immediately commences arbitration proceedings against the PGM Shareholders for breach of the SPA, seeking an order for the transfer of the 75% shareholding in PGM by the PGM Shareholders to Waystar RoyCo. An Arbitral Tribunal comprised of Ms Chiann Bao (Presiding), The Honourable Charles N. Brower and Professor George A. Bermann was constituted.
11. The PGM Shareholders' defence in the arbitration is that they did not commit a breach of the SPA, as the crime “cover-up” amounts to a breach of the warranty in

Clause 7.1 read with Schedule 4, Clause 8.6, which entitled them to terminate the SPA. They counterclaim against Waystar RoyCo for damages on the basis that the English Injunction interfered with their contractual rights under the Malik SPA.

12. The English Injunction is in place until a return date hearing before the English High Court, which is scheduled for a month's time. Waystar RoyCo now applies to the Arbitral Tribunal for permission to apply to the English High Court for a continuation of the English Injunction.
13. The PGM Shareholders resist the application. Their position is that:
 - (i) The parties have, by the terms of their arbitration clause, expressly excluded s. 44 of the English Arbitration Act which provides that:

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings (emphasis added).

In particular, the PGM Shareholders contend that, by agreeing to arbitration in New York, the parties intended the interim powers of the Arbitral Tribunal under Article 28 of the ICC Rules to be the extent of interim measures available, and the Arbitral Tribunal can act effectively under those powers.

- (ii) Even if s. 44 of the English Arbitration Act has not been excluded by the parties, the Tribunal should not grant permission to Waystar RoyCo to apply to the English High Court because: (a) Waystar RoyCo will not succeed in its claim under the SPA as the PGM Shareholders were entitled to terminate the SPA upon Waystar RoyCo's breach of the warranty in Clause 7.1 read with Schedule 4, Clause 8.6 of the SPA; and (b) there is a small window of opportunity for the PGM Shareholders to complete their deal with Malik, if the English Injunction is lifted.

ISSUES FOR DETERMINATION

Should the Tribunal grant permission to Waystar RoyCo to apply make its application to the English High Court for a continuation of the English Injunction? In particular:

- (1) Has S. 44 of the English Arbitration Act 1996 been excluded by party agreement?
- (2) Even if S. 44 not been excluded, should the Tribunal exercise its discretion to give permission for the S. 44 application to be made?

44 Court powers exercisable in support of arbitral proceedings

- (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are—
 - (a) the taking of the evidence of witnesses;
 - (b) the preservation of evidence;
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
 - (d) the sale of any goods the subject of the proceedings;
 - (e) the granting of an interim injunction or the appointment of a receiver.
- (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
- (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
- (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

THE DISTINGUISHED TRIBUNAL



Chiann Bao

Arbitration Chambers

Chiann Bao is an independent arbitrator with Arbitration Chambers (with offices in New York, Hong Kong and London). She has been appointed as chair, co-arbitrator, emergency arbitrator, and sole arbitrator in arbitrations under most of the major institutional rules totalling several billion USD in dispute. Chiann currently serves as a Vice Chair of the IBA Arbitration Committee. She is also a Vice President of the ICC Court of Arbitration and a co-chair of the ICC Commission's Task Force on ADR and Arbitration. From 2010 to 2018, she served as the Secretary General of the HKIAC and was subsequently appointed as a Council Member of the HKIAC. She regularly lectures on international arbitration at universities worldwide including at Sciences Po Law School and University of Hong Kong and is a member of the Board of Trustees and an honorary senior fellow of the British Institute of International and Comparative Law. Chiann serves as a member of the advisory board for the Journal of International Arbitration. She is a member of the global advisory board for the New York International Arbitration Center. Chiann is a Chartered Arbitrator and CEDR-accredited mediator.



The Honorable Charles N. Brower

Twenty Essex Chambers

Judge Brower has recently served as Judge ad hoc of the International Court of Justice in three active contentious cases, has been a Judge of the Iran-United States Claims Tribunal since 1983, and in the past served as Judge ad hoc of the Inter-American Court of Human Rights. He is a member of Twenty Essex Chambers in London and has served as Distinguished Visiting Research Professor of Law at George Washington University Law School. Previously, Judge Brower served as Acting Legal Adviser of the United States Department of State, as Deputy Special Counsellor to the President of the United States, and as a partner at White & Case LLP, where he co-founded the firm's Washington, D.C. office. Among other honors, Judge Brower has been awarded the ASIL Manley O. Hudson Medal, U.C. Berkeley Law School's Stefan A. Riesenfeld Memorial Award, the ABA Section of International Law's Lifetime Achievement Award, the ITA-CAIL's Pat Murphy Award, GAR's Lifetime Achievement Award, and the inaugural Lifetime Achievement Award of the Center for American and International Law.



Professor George A. Bermann

Columbia Law School

Professor George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. He principally teaches courses in transnational dispute resolution (international arbitration and litigation) and European Union law. George is an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; founding member of the governing body of the ICC Court of Arbitration; chair of the advisory board of the Center for International Investor-State and Commercial Arbitration (CIICA) (Lahore, Pakistan), and the Thai Arbitration Center (Bangkok, Thailand); and member of the board of the Tehran Regional Arbitration Center (Tehran, Iran).

THE ADVOCATES



R. Doak Bishop

King & Spalding

Doak Bishop is a partner in King & Spalding’s Houston Office. He has forty-six years of legal experience, with a focus on international arbitration and foreign investment disputes. Doak has acted as arbitrator in approximately 85 arbitrations, including ICSID, LCIA, ICC, AAA/ICDR, NAFTA, and UNCITRAL arbitrations. His professional affiliations include: Executive Committee, ICCA (2018-2022); Board of Advisors of SIAC (2012-2015); Board of Advisors, American Arbitration Association (AAA) (2010-2014); Executive Committee of the American Society of International Law (2017-2020); Board of Trustees of the Center for American and International Law; Chair of the Institute of Transnational Arbitration (2012-2015); Advisor to the American Law Institute’s Restatement of the Law (3rd) of International Commercial Arbitration; Adjunct Professor, SMU Law School (1999), University of Texas Law School (2014); University of Oklahoma Law School (2012, 2013, 2015); Co-Chair, International Litigation Committee of ABA’s Litigation Section (1998-2000); and Chair, Litigation Section of the State Bar of Texas (1998-1999). Doak’s thought leadership includes being the editor of *The Art of Advocacy in International Arbitration* (2nd ed. Juris Publishing 2010); co-author of *Foreign Investment Disputes: Cases, Materials and Commentaries* (Kluwers, 2nd ed. 2014); editor of *Enforcement of Arbitral Awards Against Sovereigns* (Juris 2009); and co-author of *Annulment Under the ICSID Convention*. He obtained his B.A. degree with high honors and departmental distinction from Southern Methodist University, and his J.D. degree with honors from the University of Texas Law School.



Angeline Welsh

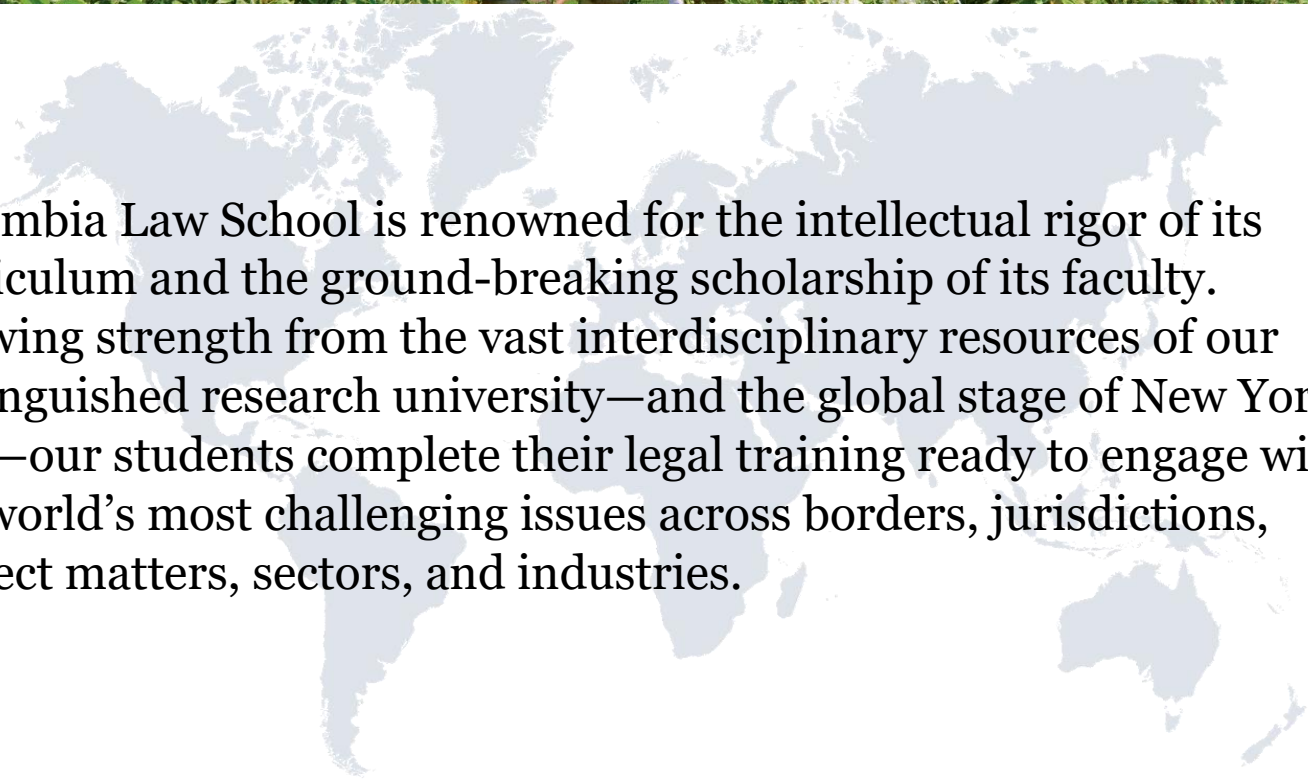
Essex Court Chambers

Angeline Welsh of Essex Court Chambers is a commercial litigator with over 15 years of experience and specific expertise in international arbitration. She has appeared (unled) before the English Commercial Court, the English Court of Appeal, and conducted substantial advocacy before both commercial and investment treaty arbitral tribunals. She has also appeared (led) before the Supreme Court and the Privy Council, as well as various courts in the Caribbean. Angeline also regularly sits as arbitrator.

Prior to being called to the English Bar in 2015, Angeline was Counsel and Solicitor Advocate with a major international law firm. She has litigated a broad range of disputes before the English courts, courts in the commonwealth, and arbitral tribunals under the LCIA, HKIAC, ICC, ICSID, UNCITRAL and BVI IAC rules. In 2021, Angeline was named International Arbitration Junior of the Year by Chambers and was recognised as a Global Leader for Arbitration by Who’s Who Legal. Angeline was previously named as a “Star at the Bar” by Legal Week.



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Columbia Law School is renowned for the intellectual rigor of its curriculum and the ground-breaking scholarship of its faculty. Drawing strength from the vast interdisciplinary resources of our distinguished research university—and the global stage of New York City—our students complete their legal training ready to engage with the world’s most challenging issues across borders, jurisdictions, subject matters, sectors, and industries.



View from Bush House terrace,
Strand Campus

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THE DICKSON POON SCHOOL OF LAW AT KING'S COLLEGE LONDON

One of the oldest law schools in England and recognised globally as one of the best law schools in the world, The Dickson Poon School of Law 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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New York Arbitration Week

November 14-18, 2022

The New York International Arbitration Center (NYIAC) and the New York Branch of the Chartered Institute of Arbitrators (CIArbNY) are pleased to continue their joint leadership of New York Arbitration Week (NYAW) for the fourth year. This year, the event will take place from November 14-18, 2022 and center on the theme of “Who’s In Charge”. The variety of programming offered throughout the week will showcase New York as a leading global seat for international arbitration and center for thought leadership, and will be presented in a format designed to take advantage of being both online and in person.

The NYAW Organizing Committee is chaired by Natalie L. Reid and Daniel Schimmel and includes members Ulyana Bardyn, Matthew E. Draper, Sandra González, Ndanga Kamau, Louis B. Kimmelman, Lea Haber Kuck, Trisha Mitra, Alexandra Mitretodis, Rebecca E. Mosquera, Rekha Rangachari, Catherine A. Rogers, Steven Skulnik, Gretta Walters, Laura R. Zimmerman, and Committee Secretaries Lisa W. Lachowicz, Elias Leon, Nour Nicolas, Christel Y. Tham, Jane Tien, and Eva P. Treves.



NYIAC is a non-profit organization formed to advance, strengthen, and promote the conduct of international arbitration in New York. NYIAC presents thought leadership programs and hosts a range of educational and networking programs and events for the international arbitration and New York ADR community.

The Chartered Institute of Arbitrators is a learned society and charity headquartered in London. It provides worldwide scholarship and professional development for all areas of alternative dispute resolution, has approximately 17,000 members worldwide and is the only body to confer arbitrator credentials recognized around the world. CIArbNY represents the Institute in the States of New York, New Jersey and Connecticut; it offers training in international arbitration and other ADR programs in its territory.



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