

Crime and Punishment ? an Examination of a Punitive Outcome

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PRACTICES Litigation, International Arbitration

HPOR Servicios De Consultoria Ltda v Dryships Inc & Anor [2018] EWHC 3451 (Comm) was handed down on 13 December 2018, too late for discussion in the last edition of *The Arbitrator*. The case is an example of an appeal on a point of law from the decision of an arbitral tribunal – relatively rare, since so many arbitration agreements exclude such appeals (pursuant to section 69(1) of the Arbitration Act 1996). The arbitrators were two former high court judges and one deputy high court judge who were split 2-1 on the point of law in question. The judge then agreed with the majority in the result, but disagreed with their reasoning – ample indicators that the legal issue was not straightforward.

Compensation, restitution and punishment

Perhaps the most striking thing about the case is that it provides an example of a situation where:

- a party breached a purely private law duty (i.e. a duty owed to another person, not a duty owed to the state, as in a criminal law);
- the private law duty comes from common law / equity (i.e. this is judge-made law, not a legal duty imposed in a statute by parliament);
- the duty arose in the context of a commercial transaction; and yet,
- the remedy for that breach of duty is not to compensate the innocent party for a loss it suffers, nor even to reverse an enrichment obtained by the breach. Rather, the remedy is expressly imposed for the purpose of *punishing* the duty breaker.

Briefly, an agent did valuable work for a principal over a period of years, securing contracts for the principal which appear to have been worth more than \$1.3 billion. The principal later discovered that, when the principal retained the agent, the agent had failed to disclose a conflict of interest. The majority of the tribunal, and the court, held that the agent had to repay all the fees which the principal had ever paid the agent. The arbitrators characterised this as an ‘account of profits’, the court as ‘forfeiture’.

To read the full article, see the PDF linked below.

[Crime-and-Punishment-an-Examination-of-a-Punitive-Outcome.PDF](#)