FEDERAL COURT OF AUSTRALIA

ESCO Corporation v Bradken Resources Pty Ltd [2011] FCA 905

Citation:	ESCO Corporation v Bradken Resources Pty Ltd [2011] FCA 905
Parties:	**ESCO CORPORATION v BRADKEN RESOURCES PTY LTD**
File number:	NSD 876 of 2011
Judge:	**FOSTER J**
Date of judgment:	9 August 2011
Catchwords:	**ARBITRATION** – international arbitration – whether proceedings brought by a US corporation in Australia to enforce against an Australian corporation an arbitral award made in the USA should be adjourned pending the outcome of proceedings brought in the USA by the corporation against which the award was sought to be enforced for a stay and ultimately an order setting aside the award in part – interpretation and application of s 8(8) of the *International Arbitration Act 1974* (Cth) discussed
Legislation:	*Federal Court of Australia Act 1976* (Cth), ss 50, 51A and 52 *Federal Arbitration Act,* 9 U.S.C. ¶201 *et seq* *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 U.S.T. 2517, T.I.A.S. No 997, 300 UN 38 *International Arbitration Act 1974* (Cth), ss 2D, 8 and 39, Art V and Art VI of Sch 1
Cases cited:	*Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 cited *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 726 cited *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 cited
Date of hearing:	19 July 2011
Date of last submissions:	20 July 2011
Place:	Sydney

Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	95
Counsel for the Applicant:	Mr P Brereton SC, Mr JA Watson
Solicitor for the Applicant:	Jones Day
Counsel for the Respondent:	Mr MF Holmes QC, Mr MB Holmes
Solicitor for the Respondent:	Corrs Chambers Westgarth

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 876 of 2011**

BETWEEN:	**ESCO CORPORATION** **Applicant**
AND:	**BRADKEN RESOURCES PTY LTD** **Respondent**

JUDGE: **FOSTER J**
DATE OF ORDER: **9 AUGUST 2011**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

By 20 August 2011 the parties lodge with the Associate to Foster J agreed Short Minutes of Order giving effect to Reasons for Judgment of Foster J published this day.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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JUDGE:	**FOSTER J**
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REASONS FOR JUDGMENT

1 On 11 June 2010, Gerald W Ghikas QC, a Canadian barrister (**the arbitrator**) published a Final Arbitral Award (**the Award**) which determined a number of disputes that had arisen between the applicant (**ESCO**) and the respondent (**Bradken**) concerning a contract dated 1 July 1999 (**the Licence Agreement**) entered between ESCO and Smorgon Steel Group Limited (**Smorgon**), a corporation incorporated in Victoria, pursuant to which Smorgon was licensed to manufacture certain ESCO products in Australia, New Zealand and Papua New Guinea. Through a series of subsequent transactions, Bradken assumed the rights and liabilities of Smorgon under the Licence Agreement.

2 The disputes which were determined by the Award had been referred to arbitration pursuant to an arbitration clause in the Licence Agreement.

3 The arbitration hearing took place in Portland, Oregon, USA, as required by the arbitration clause. The procedural rules governing the arbitration were the Rules of Arbitration of the International Chamber of Commerce in force as and from 1 January 1998 (**the ICC Rules**). By the agreement of the parties and pursuant to an order of the arbitrator, supplementary rules of procedure were established.

4 In the Award, the arbitrator made several declarations by which he purported to declare the parties' respective rights in respect of the subject matter of the disputes which had arisen between them. The arbitrator made only two orders requiring the payment of money.

The first was an order that Bradken pay to ESCO the sum of US$210,000 as reimbursement of ESCO's share of the Procedural Costs fixed by the ICC Court (Administrative Expenses and Arbitrator's remuneration). The second was an order that Bradken pay to ESCO the sum of US$7,747,087.88, as reimbursement for ESCO's legal costs incurred in connection with the arbitration. In late June or early July 2011, Bradken paid to ESCO US$210,000 on account of procedural costs, as it had been ordered to do. It has not paid anything on account of ESCO's legal costs.

5 The arbitrator rejected all other claims for money. The arbitrator did not award or make any provision for the payment of interest on the costs orders referred to at [4] above.

6 Soon after the Award was published, ESCO took steps to have the Award confirmed in the United States District Court, District of Oregon, Portland Division (**the US District Court**). In that proceeding, Bradken resisted confirmation of the Award insofar as the order for legal costs in favour of ESCO was concerned. Bradken argued that it should not be compelled to pay that portion of the amount awarded on account of legal costs which was incurred in respect of its antitrust claims against ESCO (**the antitrust legal costs**). The amount of costs attributable to the antitrust claims has not been agreed between the parties. Bradken contends that it could be of the order of US$6 million whereas ESCO says that it is significantly less than that amount.

7 In a final judgment published and entered on 11 May 2011, the US District Court confirmed the Award and ordered that Bradken pay to ESCO the amount of US$7,957,087.88 (being the total of the amounts specified in the two orders for payment made by the arbitrator) together with post-judgment interest accruing from the date of the judgment (viz 11 May 2011) until payment in full of the monetary sums awarded by the arbitrator … *"at the legal rate pursuant to 28U.S.C.¶1961…"* (**the US Federal interest rate**).

8 On 9 June 2011, ESCO commenced the present proceeding in this Court. In this proceeding, ESCO seeks enforcement of the Award pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth) (**the IAA**). In particular, it seeks declarations which it contends reflect the terms of the declarations made by the arbitrator in the Award and also seeks monetary orders in the following terms, namely, orders that:

i. Bradken pay to Esco the sum of US$210,000 as reimbursement of Esco Corporation's share of the Procedural Costs fixed by the ICC Court (Administrative Expenses and Arbitrator's remuneration). (Award ¶ 368).

ii. Bradken Pay Esco the sum of US$7,747,087.88 as reimbursement for Esco's legal costs in connection with the arbitral proceedings. (Award ¶ 369).

iii. Pursuant to Section 51A(1) of the Federal Court Act, interest on the sums in paragraph b(i) and (ii) herein at the rate prescribed by Order 35 rule 8 of the Federal Court Rules for the period 11 June 2010 until entry of judgment in these proceedings;

iv. Pursuant to Section 52(1) of the Federal Court Act, interest on the judgment entered by this honourable Court from the date as of which the judgment is entered at the rate prescribed by Order 35 rule 8 of the Federal Court Rules;

v. Bradken pay Esco's costs of these proceedings.

9 Confronted with these claims, Bradken applied in this Court by way of Notice of Motion for an order that:

> The application brought by ESCO Corporation to enforce the award be adjourned until the final determination of the proceedings CV-10-788-AC brought by ESCO in the US District Court (Portland, Oregon) including any appeals arising out of those proceedings.

10 Bradken also seeks the costs of its motion and such other orders or relief as the Court might consider appropriate.

11 ESCO opposes any adjournment of this proceeding. As a fallback position, ESCO contends that any adjournment of this proceeding should be on terms as to the provision of security which fully protect it against the consequences of delay in the enforcement of the Award in Australia.

12 These Reasons for Judgment determine Bradken's application that the current proceeding be adjourned pending the final determination of the US proceedings.

THE PARTIES

13 ESCO is a corporation incorporated in Oregon, USA, with its principal place of business in Portland, Oregon. ESCO is a manufacturer of both proprietary and non-patented engineered metal parts and components for industrial applications worldwide, including wear parts for use in the mining, construction and other industries. ESCO's products are manufactured by ESCO in North America, Europe and Asia and by ESCO licensees in various parts of the world.

14 Bradken is a corporation incorporated in Australia. Bradken provides consumable parts, capital equipment and associated maintenance and refurbishment services to the natural resources, freight, rail and other industries. Bradken has manufacturing facilities in Australia, New Zealand and elsewhere. Its corporate headquarters are in Newcastle, New South Wales.

15 Bradken is a wholly owned subsidiary, and the primary operating entity, of Bradken Limited, which is listed on the Australian Securities Exchange. Bradken Limited was listed on that Exchange in 2004. Bradken Limited has operations throughout Australia, Europe, the United Kingdom, North America and China.

16 Bradken's main business is the manufacture and sale of consumable and capital products for the mining and resources industry. Bradken's operations are divided into three internal business divisions, one of which is the Mining Products Division. The Mining Products Division designs, manufactures and sells specialised wear parts for both mobile and fixed plant used in mining activities and also provides maintenance and refurbishment services to the resources industry.

17 A significant part of the business of the Mining Products Division of Bradken is the manufacture and sale of Ground Engaging Tools (**GET**) to mining companies. The GET made and sold by Bradken are largely bucket teeth and associated wear parts, drag line rigging components and a range of buckets for drag line, front-end loader and hydraulic excavator equipment.

18 The evidence before me disclosed that Bradken Limited had earned gross revenue of more than $1 billion for the financial year ended 30 June 2010 to which the sale of mining products contributed approximately $342 million. In that year, the sales revenue of Bradken was approximately three-quarters of the total revenue earned by the parent company, Bradken Limited. As at 30 June 2010, the Bradken group had net assets on a consolidated basis of $471.7 million including approximately $63.5 million in cash or cash equivalents.

THE LICENCE AGREEMENT

19 As mentioned at [1] above, the parties to the Licence Agreement were originally ESCO and Smorgon. The Licence Agreement has been amended from time to time. Under the Licence Agreement, ESCO granted to Smorgon (*inter alia*) the exclusive right and licence

to use certain ESCO patents, trade marks and know-how in the manufacture and sale of ESCO products in Australia, New Zealand and Papua New Guinea. The Licence Agreement included additional grants, restrictions and other important provisions which it is not necessary to describe in detail in these Reasons for Judgment. As mentioned at [1] above, Bradken ultimately assumed the liabilities and obligations of Smorgon under the Licence Agreement and became the beneficiary of all of the benefits afforded to Smorgon under that Agreement.

20 Clause 24 of the Licence Agreement is in the following terms:

> 24. DISPUTE RESOLUTION
>
> (a) All disputes arising in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the rules. The place of arbitration shall be Portland, Oregon, USA.
>
> (b) Judgment upon award rendered may be entered in an Australian, New Zealand or Papua New Guinea court having jurisdiction, or in any other court having jurisdiction, or application may be made to such courts for judicial acceptance of the award and an order of enforcement, as the case may be.
>
> (c) This Agreement shall be construed and interpreted in accordance with the laws of the State of Oregon, United States of America.

21 Clearly, cl 24 constituted an agreement to refer all disputes under or in connection with the Licence Agreement to arbitration in accordance with the ICC Rules. The seat of any arbitration undertaken pursuant to cl 24 was agreed to be Portland, Oregon. Clause 24 also expressly provided that any award made as a result of an arbitration contemplated by cl 24 might be enforced in any court properly seised of jurisdiction and might be enforced in more than one such court.

22 Under one of the subsequent agreements entered into between the parties (a Licence Novation Agreement between ESCO, Bradken Mining SPV Pty Limited and Bradken dated 8 August 2004), Bradken unconditionally and irrevocably submitted to the non-exclusive jurisdiction of the courts of Oregon. That description may not encompass the US District Court which, of course, is a US Federal court. Whether or not that description covers the US District Court, by its conduct in appearing in that Court and in actively participating in the Award confirmation proceedings instituted in that Court by ESCO, Bradken has submitted to the jurisdiction of that Court.

THE ARBITRATED DISPUTES

23 The Award is confidential to the parties. In order to preserve that confidentiality, on 19 July 2011, I made an order pursuant to s 50 of the *Federal Court of Australia Act 1976* (Cth) (**the Federal Court Act**) prohibiting disclosure of the contents of the Award other than to the parties and their representatives.

24 For present purposes it is not necessary to describe in great detail the disputes which arose between ESCO and Bradken and which were determined by the Award. A brief description will suffice.

25 In very general terms, by March 2008, a dispute had arisen between ESCO and Bradken concerning whether Bradken was obliged to mark products manufactured by it under the auspices of the Licence Agreement with ESCO trade marks as directed by ESCO. Bradken asserted that it was not obliged to mark those products in that fashion but had an option, at its sole election, whether to do so. ESCO contended to the contrary and asserted that Bradken was obliged under the Licence Agreement to mark those products with ESCO trade marks. In addition, a dispute had arisen as to whether Bradken was entitled to promote in the territory covered by the Licence Agreement products sourced from other manufacturers or manufactured by it which were similar to, or competitive with, ESCO products, without breaching s 7 of the Licence Agreement. Section 7 of that Agreement provided that Bradken must use its best endeavours to promote the sale of ESCO products in the territory covered by the Licence Agreement. Another dispute concerned the manufacture by Bradken of a drag line bucket designed by it which, according to ESCO, competed directly with a similar product offered by ESCO. A further dispute concerned the question of whether Bradken was entitled to have the Licence Agreement varied. Other disputes concerning the true interpretation of the Licence Agreement had also arisen by the time the arbitration commenced and these too were determined by the Award. One question which had arisen was whether or not ESCO had validly terminated the Licence Agreement.

26 By way of counterclaim in the arbitration, Bradken contended that ESCO had contravened US antitrust laws. These allegations appear to have occupied a good deal of time and effort in the arbitration.

27 As I have mentioned at [1]–[5] above, the arbitrator resolved all of these disputes by making a number of declarations and by refusing to award any monetary compensation or damages to either party. The only monetary orders made by the arbitrator were the costs orders referred to at [4] above.

THE LITIGATION IN THE UNITED STATES DISTRICT COURT

28 By Petition dated 8 July 2010, ESCO sought to confirm the Award in the US District Court pursuant to the US *Federal Arbitration Act,* 9 U.S.C. ¶201 *et seq* and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 21 U.S.T. 2517, T.I.A.S. No 6997, 300 UN 38 (**the Convention)**. In its Petition, ESCO sought interest on the monetary components of the Award (viz US$7,957,087.88) *"... at the Oregon legal rate of nine (9) per cent from 17 June 2010 until the monetary portion of the judgment is satisfied"*. The Oregon legal rate of 9% per annum was a rate prescribed under State legislation for the State of Oregon and not under any US Federal legislation. Interest was sought for a period commencing a few days after the Award was published (viz 17 June 2010) until payment.

29 In the US District Court, Bradken opposed ESCO's confirmation Petition. By Motion dated 10 September 2010, Bradken sought to overturn part of the Award. It contended that ESCO should not recover the antitrust legal costs because recovery of such costs would be contrary to US public policy. It also asserted that the award to ESCO of costs in respect of those matters showed a manifest disregard of the law.

30 On 31 January 2011, a magistrate of the US District Court delivered findings and recommendations in respect of ESCO's application to confirm the Award and in respect of Bradken's motion to vacate part of the Award. The magistrate rejected Bradken's arguments. The magistrate recommended that the US District Court:

(a) Confirm the Award in its entirety;

(b) Enter judgment in favour of ESCO against Bradken for all of the declarations made by the arbitrator and for the full amount awarded by him for procedural costs and legal costs;

(c) Decline ESCO's application for post-Award pre-judgment interest at the rate of 9% pa (whether such interest is claimed under Oregon State law or under US Federal law);

(d) Decline to award ESCO its costs of its motion for post-Award pre-judgment interest; and

(e) Award ESCO post-judgment interest at the US Federal interest rate (rather than at the rate of 9% pa under Oregon State law) from the date of judgment until payment in full.

31 The magistrate reasoned that both ESCO's claims in its Petition and Bradken's claims in its Motion filed in opposition to that Petition mainly concerned US Federal law. In those circumstances, the magistrate decided that the US Federal interest rate should apply to any interest award that the US District Court might ultimately decide to make.

32 The magistrate went on to decide that the equities did not weigh in favour of awarding any sum by way of post-Award pre-judgment interest. He held that Bradken's opposition to ESCO's Petition for confirmation of the Award had not been unreasonable and that the arguments which it had advanced were not baseless or frivolous. He also weighed in the balance the fact that ESCO had obtained the benefit of a more speedy resolution of its disputes with Bradken by having them determined through arbitration rather than litigation. In the end, the magistrate refused to award any post-Award pre-judgment interest.

33 The magistrate also held that post-judgment interest on the US District Court judgment should be awarded at the US Federal interest rate rather than at the rate specified under Oregon State law.

34 All of the findings and recommendations made by the magistrate were adopted by a judge of the US District Court on 27 April 2011.

35 The adoption of the magistrate's decision led to the entry of final judgment in the US District Court on 11 May 2011 (as to which see [7] above).

36 By Notice of Appeal lodged on 24 May 2011, Bradken appealed from the orders made by the US District Court on 11 May 2011. In its Notice of Appeal, Bradken seeks to set aside that part of the Award and that part of the US District Court judgment by which it was ordered to pay the antitrust legal costs. Bradken's appeal will be heard by the United States Court of Appeals for the Ninth Circuit (**the US Appeals Court**). The evidence before

me suggested that the appeal and cross-appeal are not likely to be determined before mid 2013 (two years hence).

37 By Notice of Cross-Appeal filed in the US Appeals Court on 7 June 2011, ESCO seeks to re-agitate its claims for post-Award pre-judgment interest and post-judgment interest. It seeks both categories of interest at the rate prescribed under Oregon State law (viz 9% per annum). This rate is far higher than the US Federal interest rate which, I am told, is currently set at 0.19% per annum.

38 The Appeal and Cross-Appeal referred to at [36]–[37] above have not yet been heard.

39 By Notice of Motion filed on 21 June 2011 in the US District Court proceedings, Bradken sought a stay of execution of the first instance judgment of the US District Court entered on 11 May 2011. Bradken's motion for a stay has not yet been heard and could take up to two months from now to be dealt with.

THE PRE-HEARING EXCHANGE OF OFFERS

40 On 13 July 2011, Jones Day, the solicitors for ESCO, sent a letter dated that day to Corrs Chambers Westgarth (**Corrs**) in the following terms (omitting formal parts):

> **ESCO Corporation v Bradken Resources**
>
> We refer to your client's notice of motion to be heard on 19 July 2011. This is an open letter which we intend to tender to the court on 19 July 2011.
>
> ESCO is entitled to all of the relief set out in its Application filed on 8 June 2011, save for the Order in A(b)(i) which will no longer be pressed in light of the fact that your client has now paid ESCO's Procedural Costs fixed by the ICC. In relation to the liquidated component of the Application, your client is required to pay to our client:
>
> (a) US$7,747,087.88.
>
> (b) Interest from 11 June 2010 calculated in accordance with FCR Order 35, Rule 8, which as at 19 July 2011 will be in the amount of US$907,788.90, and continuing to accrue at the rate of US$2,281.68 per day.
>
> In these proceedings, your client does not deny that our client will be entitled to interest from the time of judgment in Australia, but it seeks a stay of the entry of judgment. Paragraph 4 (c) of Steven Fleming's second affidavit sworn 8 July 2011, deposes to the fact that the US Appeal Proceedings may take two years or more to take its course. The prejudice suffered by our client if your client obtains a stay of the Australian proceedings is, therefore, readily apparent: on the one hand, it will be denied the use of $US7,747,087.88 plus the interest to which it is entitled; and, on the other hand in the event (which is not accepted by our client) that your client's position in relation to post Award pre-judgment interest is correct, our client will be

prevented from entering judgment which is necessary to start the "clock ticking" for payment of interest on the Award amount.

Our client would be prepared to consent to a stay of the Australian proceedings until such time as the US Appeal Proceedings are finally determined or otherwise disposed of if the prejudice it will suffer as a result of doing so is able to be addressed by agreement between the parties. To this end, our client proposes that:

1. Your client provide to our client security in the form of an irrevocable bank guarantee in our client's favour for the amounts of:
   (a) US$7,747,087.88 (the ***Award Amount***);
   (b) US$907,788.90 (the ***Award Interest Amount***); and
   (c) US$1,665,626.40 (the ***Judgment Interest Amount***), being interest at the rate of US$2,261.68 per day for two years from 19 July 2011.
2. Under the security, our client will be entitled to:
   (a) payment under the security for the Award Amount upon the registration of the Award in the Australian Proceedings;
   (b) payment under the security for the Award Interest Amount in the event that it obtains a Judgment or order in accordance with paragraph A(b)(iii) of our client's Application; and
   (c) payment under the security for the Judgment Interest Amount in the event that it obtains a Judgment or order in accordance with paragraph A(b)(iv) for as much of the Judgment Interest Amount that may be owing to our client as at the time of the Court Order.
3. In the event that the US Appeal Proceedings take in excess of two years to reach a final determination, your client agrees to "top up" the security for the Judgment Interest Amount in increments of 6 months. That is, for example, as at 19 July 2013, your client will provide security for an additional 6 month's interest on the Award Amount.

Please let us know prior to 16 July 2011 whether your client will agree to this proposal and, if so, let us have a copy of the proposed security for our consideration.

41 On 18 July 2011, Corrs replied in the following terms (omitting formal parts):

Bradken Resources Pty Ltd ats ESCO Corporation
Federal Court of Australia NSW District Registry – General Division No NSD 876 of 2011

We refer to:

1 your client's application filed 8 June 2011 (**ESCO's Application**) in the above proceedings;

2 our client's motion filed 23 June 2011 (**Bradken's Motion**) in the above proceedings; and

3 your letter of 13 July 2011.

Our client denies that ESCO is entitled to all the relief set out in ESCO's Application.

In so far as the liquidated component (only) of the relief sought is concerned, it is our client's position that:

(a) ESCO is not entitled to any post-award pre-judgment interest, in circumstances where the court in the seat of the arbitration has determined that ESCO has no such entitlement; and

(b) ESCO is not entitled to post-judgment interest at Australian rates in the circumstances where ESCO, in full knowledge that our client has irrevocably submitted to the courts of Portland Oregon, chose to enter judgment there and (contrary to ESCO's contentions made there) was confined by that Court to post-judgment interest at the US federal rate.

Given the appeal proceedings in the US, ESCO's cross-appeal regarding the interest awarded by the US District Court (Portland Oregon), and the matters raised in your letter, ESCO's Application appears to be directed to obtaining a higher post-judgment rate of interest in an alternative forum.

Our client denies that ESCO will suffer any prejudice if it is unable to obtain post judgment interest at Australian Federal Court rates. ESCO is already entitled to post-award interest at US rates accruing from 12 May 2011, and our client will abide by the final determination of the US courts with respect to the appeal processes arising from the proceedings in the US District Court.

The proposal in your letter of 13 July is therefore neither appropriate, nor acceptable to our client.

However, consistently with its contractual submission to the jurisdiction of the courts of Portland, Oregon, as a condition of obtaining the adjournment sought in Bradken's motion our client is willing to provide security in ESCO's favour, in the form of a letter of credit to be issued by a major Australian trading bank, on the following basis:

1 The letter of credit is to be security in respect of any judgment in the US, Australia or any other jurisdiction in which ESCO moves to enforce the arbitrator's award of 11 June 2010 (**Award**).

2 The letter of credit will be in the amount of US$7,747,087.88 (**Outstanding Award**) plus interest calculated at US federal rates (in accordance with the orders of the US District Court) for 2 years from 12 May 2011 (being the date that judgment was entered in the US District Court).

3 The letter of credit will expire on the earliest of the following dates:

   (a) our client posts a bond in the US District Court in respect of the Outstanding Award and interest to 12 May 2013 on that amount at the applicable US federal rates;

   (b) the US Court of Appeals upholds our client's appeal against the judgment of the US District Court (Portland, Orgeon) entered on 12 May 2011 in case CV 10-788-AC;

   (c) payment being made by our client in satisfaction of the Outstanding Award and any interest then accrued at the applicable US federal rates; or

   (d) ESCO and our client reaching an agreement to the effect that any outstanding monetary obligations under the Award are satisfied.

4 ESCO may call on the letter of credit after first providing 7 days' written notice to our client if, within 28 days after an order of the US Court of Appeals denying and finally disposing of our client's appeal against the judgment of the US District Court (Portland, Orgeon) entered on 12 May 2011 in case CV 10-788-AC, Bradken has not satisfied any judgment against it.

> This proposal provides ESCO with adequate assurance that our client will satisfy any final US judgment and US interest award against it and is consistent with both the contractual election of the parties to submit to the courts of Portland, Oregon and ESCO's decision to enforce the arbitral award in Portland, Oregon.
>
> Should this proposal be acceptable to your client, or the Court, we are instructed that it will take approximately 14 days to put such an arrangement in place, including allowing time for the parties to agree to the terms of the draft letter of credit prior to its issue.
>
> We intend to tender this letter at the hearing tomorrow and to advise the Court that our client is willing to provide the security offered in this letter as a condition to the adjournment sought in its notice of motion.

42 As at 13 July 2011, ESCO was prepared to consent to a stay or adjournment of the proceeding in this Court until such time as the US proceedings are finally determined provided that the "prejudice" that might be suffered by it which was identified in the letter from Jones Day to Corrs is adequately addressed.

43 At the hearing of Bradken's application for an adjournment of the present proceeding, ESCO made clear that, should the conditions set out in the letter from Jones Day to Corrs dated 13 July 2011 not be agreed to by Bradken or not be ordered by the Court, ESCO's position was to oppose the grant of any adjournment or stay.

44 The common ground and points of difference between ESCO and Bradken reflected in the correspondence referred to at [40]–[41] above may be summarised as follows:

45 By 18 July 2011, Bradken had offered to provide security for the monetary component of the Award (US$7,747,087.88) together with some interest by way of letter of credit to be provided by a major Australian trading bank. ESCO had sought an irrevocable bank guarantee for the same amount plus additional sums on account of interest.

46 As to the form of security (letter of credit v irrevocable bank guarantee), no distinction of substance exists.

47 Bradken also seeks to have the security which is to be provided expressed to cover the amount of the monetary component of the Award and any judgment based upon the Award which is obtained anywhere in the world.

48 In its 13 July 2011 proposal, ESCO seeks that the security which is to be provided should cover an additional amount of US$907,788.90 which is intended to reflect the amount of interest which it contends would inevitably be payable pursuant to s 51A of the Federal Court Act on the amount of the Award in respect of the period from the date when the Award was made (10 June 2010) up to and including the date when the US District Court entered judgment against Bradken based upon the Award (viz 11 May 2011) at the rate prescribed under the *Federal Court Rules* for the purposes of s 51A of the Federal Court Act. Bradken contends that that amount should not be secured under the proposed security. It argues that no amount comparable to this item sought by ESCO should be secured because the US District Court rejected ESCO's claim to post-Award pre-judgment interest in its judgment of 11 May 2011 and this Court should not and would not order such interest under s 51A of the Federal Court Act in those circumstances.

49 ESCO claims that the security should stand as security for a further amount of US$1,665,626.40 upon the basis that the security should secure the amount of interest that is likely to be awarded in this Court in respect of the period from 19 July 2011 until the final disposition of the US litigation. This amount is said to be an additional amount that would be awarded pursuant to s 51A of the Federal Court Act. Against this, Bradken says that the only amount that should be secured post 11 May 2011 is that amount which is payable at the US Federal interest rate for a period of two years from 11 May 2011.

50 There are also differences between the parties as to the circumstances in which the security might be called upon by ESCO. These differences are reflected in par 2 of the letter from Jones Day to Corrs dated 13 July 2011 when compared with par 3 of the response from Corrs to Jones Day dated 18 July 2011.

51 Finally, ESCO seeks an increase in the amount of security in the event that the appeal processes in the US take longer than the two years currently anticipated by the parties (see par 3 of the Jones Day letter to Corrs dated 13 July 2011).

CONSIDERATION

52 Section 8 of the IAA provides for the recognition of foreign awards. Subsections (1) and (3) of s 8 are in the following terms:

> **8 Recognition of foreign awards**
>
> (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.
>
> …
>
> (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

53 In the present case, the Award is a *foreign award* within the meaning of that expression in s 8(1) of the IAA (as to which, see s 3 and the definition of *foreign award* in that section). The Award was made in pursuance of an arbitration agreement (viz cl 24 of the Licence Agreement) in a country other than Australia (viz the United States of America) being an arbitral award in relation to which the Convention applies (as to which see Art 1 of the Convention). The USA is a Convention country. The Award is *prima facie* liable to be enforced in Australia under the IAA. Unless Bradken ultimately makes out one of the grounds in s 8(5) or s 8(7) of the IAA, the Award will be enforced here.

54 Bradken relies upon s 8(8) of the IAA as the source of power for this Court to adjourn this proceeding for the period sought by Bradken. That subsection is in the following terms:

> **8 Recognition of foreign awards**
>
> …
>
> (8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.
>
> …

55 It may be that s 8(8) of the IAA is not the only source of power which would enable this Court to adjourn this proceeding. After all, the Court has a general power to control its own processes. However, Bradken has relied only upon s 8(8) of the IAA as the relevant source of power and I will deal with the matter upon the basis that it falls to be decided under that subsection.

56 Subsections (9), (10) and (11) of s 8 of the IAA, which were introduced into the IAA by Act No 97 of 2010 and came into effect on 6 July 2010, give to the Court significant

power to monitor and supervise the enforcement proceeding during any period of adjournment granted under subs (8).

57 These provisions recognise the need for the Court to keep a close and active eye on the progress of the foreign proceedings which will have underpinned any adjournment granted under subsection (8).

58 Section 8(8) of the IAA reflects the terms of Art VI of the Convention (which was adopted in 1958 by the UN Conference on International Commercial Arbitration). The English text of the Convention is Schedule 1 to the IAA. Article VI provides:

> ARTICLE VI
>
> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

59 Article V(1)(e) provides that recognition and enforcement of a foreign arbitral award may be refused if the party against whom enforcement is invoked proves to the satisfaction of the authority by which enforcement is sought that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

60 Article VI supports Art V(1)(e). It is designed to preserve the status quo in order to enable an application to set aside or suspend the award to be made in the country where it was made.

61 Article V(1)(e) is substantially reproduced in s 8(5)(f) of the IAA. Section 8(5) provides that the Court may refuse to enforce a foreign arbitral award if the party against whom the award is sought to be enforced proves to the satisfaction of the Court that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

62 Section 8(8) of the IAA is, therefore, intended to protect the position of a party in Australia against whom enforcement of a foreign arbitral award is invoked under s 8 of the IAA in circumstances were a *bona fide* application for the setting aside or suspension of the

award has been made to a competent authority of the country in which, or under the law of which, the award was made provided that the Court is satisfied, having taken account of all relevant facts and circumstances in the exercise of its discretion, that an adjournment of the enforcement proceedings is justified.

63 Section 2D of the IAA (which also took effect from 6 July 2010) provides:

> **2D Objects of this Act**
>
> The objects of this Act are:
>
> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> (d) to give effect to Australia's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty fourth meeting; and
>
> (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

64 These objects need to be kept in mind when the Court comes to interpret and apply provisions of the IAA. The Court is probably obliged to have regard to them in any event (see ss 39(1)(a)(i), 39(1)(b) and 39(2) of the IAA).

65 I am satisfied that Bradken has applied to the US District Court and to the US Appeals Court for an order setting aside the award in part. It has also sought a stay of the confirmation judgment of the US District Court pending the determination of its appeal to the US Appeals Court. The US District Court is the *"authority"* to which ESCO chose to go in order to enforce the Award in Oregon. It was common ground before me that that Court was *"a competent authority"* to which Bradken might apply to set aside the Award, in whole or in part. The same observations may be made in respect of the US Appeals Court which is the appropriate Court to which Bradken must appeal, given its intention to seek to overturn the first instance decision of the US District Court which confirmed the Award in its entirety.

66 I am also satisfied that the applications which Bradken has made in the United States to set aside the Award in part are *bona fide* applications. The US District Court said as much and ESCO did not contend otherwise in the application before me.

67 In the US District Court, Bradken moved to set aside (*"vacate"*) the monetary component of the Award to the extent that that component included the antitrust legal costs. Those costs were quantified by Bradken for the purposes of the US litigation at US$6 million. While I do not think that every attack on part of a foreign award will meet the threshold requirements laid down in s 8(8) (*"... an application for the setting aside or suspension of the award ..."*), I am satisfied that Bradken's application in the US District Court (and now on appeal to the US Appeals Court) is *"... an application for the setting aside of the award ..."*. The relief which Bradken seeks in the US litigation is a *pro tanto* vacation of the Award to the tune of US$6 million. This is a very substantial part of the total sum awarded for legal costs.

68 The threshold requirements of s 8(8) are, therefore, satisfied in the present case. The Court's discretion is, therefore, engaged.

Discretion

69 The whole of the proceeding in this Court relates to the Award. However, only part of the Award requires the payment of money. It is the requirement to pay ESCO's legal costs which is of immediate concern to Bradken. ESCO has informed the Court that, for the time being, it does not wish to press the balance of the relief which it claims in this proceeding in the event that the Court is minded to grant an adjournment of that part of the proceeding which concerns its monetary claims. The effect of this concession is that, if I am minded to grant any adjournment, it should be an adjournment of the whole proceeding.

70 Section 8(8) gives to the Court a wide discretion to adjourn an enforcement proceeding (*"... may, if it considers it proper to do so ..."*). The Court is also given a specific power to order *"... suitable security ..."* if the party seeking enforcement of the award requests it. Here, ESCO has applied for an order for the provision of security should I be minded to grant the adjournment sought by Bradken. Bradken has offered to provide security. However, the parties have been unable to agree upon the terms of such security.

71 What is *"suitable security"* in any given case will depend upon all of the circumstances under consideration in that case. The concept covers:

(a) The quantum of the security;

(b) The type of security;

(c) The terms and conditions upon which the security is to be provided, including the circumstances in which it might be called upon by the enforcing party.

72 Factors to be considered by the Court when ordering security would include the subject matter of the award; the history of the parties' dealings (especially with each other) since the making of the award; the enforcing party's prospects of enforcing the award; and the potential for the party against whom enforcement is sought to resist enforcement by, for example, applying to suspend or set aside the award in the jurisdiction where it was made.

73 *"Suitable"* is a word which calls into play a wide range of discretionary factors. The discretion to order security, like the discretion to adjourn enforcement proceedings, must be exercised by having regard to the objects of the IAA and the rationale underlying the Convention.

74 In the present case, Bradken relied upon the following matters as weighing in favour of an adjournment:

(a) Oregon was the jurisdiction chosen by the parties as the seat of the arbitration;

(b) The US District Court was chosen by the parties to have primary jurisdiction and supervision of the arbitration and of the Award;

(c) The parties chose the laws of the United States to determine the validity of the Award;

(d) ESCO commenced proceedings in the US District Court in order to confirm the Award and thereby raised the question of the validity of the Award before that Court;

(e) The US litigation, including Bradken's motion to vacate the Award in part, and its current appeal from the decision of the US District Court to confirm the Award, were initiated before the enforcement proceedings were commenced in Australia;

(f) Bradken's applications in the US have been brought *bona fide* and not with any intent to hinder or delay the resolution of the overall dispute between the parties;

(g) The US District Court has found that the issue raised by Bradken under US law is a *"... significant and untested legal issue ..."* and was *"... not baseless or frivolous ..."*;

(h) The US District Court and the US Appeals Court are more appropriate venues to determine Bradken's challenges to the Award as those challenges involve questions of US law;

(i) An adjournment is in the interests of comity and likely to avoid giving rise to conflicts of laws problems, since the US litigation is likely *"... to resolve the issue in the country in which or under the law of which the Award was made ..."*;

(j) ESCO is engaged in forum shopping by making a claim for post-Award pre-judgment interest in Australia in circumstances where that very claim was refused in the US District Court;

(k) Appropriate security has been offered by Bradken;

(l) Bradken and the Bradken Group of companies are substantial corporations with significant assets and income located in Australia and in the United States;

(m) The balance of convenience favours an adjournment on appropriate terms as to the provision of security since there will be no irreparable harm suffered by ESCO; and

(n) An adjournment subject to an order for security is consistent with the IAA and its objects and with equivalent provisions in other jurisdictions based upon the Convention.

75 Many of the above factors relied upon by Bradken are factors which other courts in other cases have considered significant in tipping the scales in favour of an adjournment. Senior Counsel for Bradken took me to several authorities which supported his submissions. I do not need to refer to most of those authorities. They are, for the most part, examples of the exercise of the relevant discretion by other courts in other circumstances. However, they provide a useful illustration or guide as to how the discretion under s 8(8) of the IAA ought to be exercised.

76 In the United Kingdom, the leading authority on the approach to be taken by the courts of that country when dealing with an adjournment application under a provision expressed in very similar terms to s 8(8) of the IAA is *Soleh Boneh International Ltd v*

Government of the Republic of Uganda [1993] 2 Lloyd's Rep 208. In that case, at 211, Staughton LJ held that the mere existence of proceedings to challenge an award in another jurisdiction did not, of itself, require the UK courts to refuse enforcement for the time being and to adjourn the enforcement proceedings. His Lordship also held that the enforcing court should examine for itself the strength of the arguments in the foreign jurisdiction for setting aside or suspending the award. If those arguments are strong, an adjournment will be granted, probably without security. If those arguments are weak, an adjournment may be refused or, if granted, only granted upon terms that substantial security be provided.

77 The enforcing court's assessment of the strength of the arguments in support of setting aside or suspending the award would ordinarily be undertaken on incomplete material and in circumstances where only the briefest consideration of the arguments would be appropriate. It would not be sensible or appropriate for the enforcing court to second-guess the judgment of the foreign court or authority called upon to rule on the application to set aside or suspend the award nor would it be sensible or appropriate for the enforcing court to usurp the role of that foreign court or authority.

78 In *Soleh Boneh International Ltd*, at 212, Staughton LJ said:

> The other cases show, perhaps, a more general tendency to order security, but no more than that. I certainly cannot accept the opinion of Mr. W. Michael Tupman in Arbitration International [1987] vol. 3, p. 223 that—
>
> > … it is difficult to think of any circumstances in which security would not be warranted.
>
> If, for example, the challenge to the validity of an award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign Court.
>
> In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
>
> The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.

79 Neill LJ and Roch LJ agreed with Staughton LJ.

80 The observations made by Staughton LJ in *Soleh Boneh International Ltd* at 212 which I have extracted at [75] above were approved by the UK Court of Appeal in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at 337 (per Mance LJ with whom Neuberger LJ and Thorpe LJ agreed).

81 In *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 726 at [15], Gross J said:

> In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event, embodied in the decision of the Court of Appeal in Soleh Boneh v Uganda Govt. [1993] 2 Lloyd's Rep. 208 in the context of the question of security:
>
> [extract not reproduced]
>
> *Per* Staughton LJ, at p.212. See too: *Fouchard*, at p.982; Dardana v Yukos [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep. 326 (CA).

82 The UK authorities to which I have referred provide useful guidance as to the proper exercise of the discretion reposed in the Court once the discretion to adjourn under s 8(8) is engaged. I propose to follow those authorities when considering whether to adjourn the present proceeding.

83 ESCO opposed any adjournment of the present proceeding. Alternatively, it submitted that any adjournment should be on condition that Bradken provide substantial security along the lines of the security specified in the letter from Jones Day to Corrs dated 13 July 2011.

84 ESCO submitted that:

(a) It was entitled to seek to enforce the Award in Australia. There is no element of forum shopping in its doing so. Australia is Bradken's country of origin. Australia is where Bradken holds substantial assets;

(b) The Court should not be too quick to accept the *bona fides* of Bradken's attempts in the United States to set aside the Award in part. Bradken had initially informed ESCO that it would pay all of the legal costs which the arbitrator awarded and appeared to accept liability for the whole amount of those costs in its June 2010 Financial Statements.

(c) ESCO will suffer substantial prejudice if enforcement is delayed. If an adjournment is not granted, ESCO would be able to enforce the Award in Australia immediately and would have the benefit of an award of pre-judgment and post-judgment interest under the Federal Court Act (as to which see s 51A and s 52 of that Act). An adjournment holds ESCO out of its money. Security for the whole amount of interest that would otherwise be payable should be provided.

(d) ESCO has already suffered delay at the hands of Bradken and will inevitably suffer further substantial delay (two years or more) if an adjournment is granted.

85 The discretion to adjourn an enforcement proceeding pursuant to s 8(8) of the IAA is a wide one. But it has to be exercised against the background that a foreign arbitral award is to be enforced in Australia unless one of the grounds in s 8(5) of the IAA is made out by the party against whom the award is sought to be enforced or unless the public policy of Australia requires that the award not be enforced. The pro-enforcement bias of the Convention and its domestic surrogate, the IAA, requires that this Court weigh very carefully all relevant factors when considering whether to adjourn a proceeding pursuant to s 8(8) of the IAA. The discretion must be exercised against the obligation of the Court to pay due regard to the objects of the IAA and the spirit and intendment of the Convention.

86 In the present case:

(a) Given that the US District Court has found that the arguments advanced by Bradken in support of its application to set aside the Award in part are not frivolous but are plainly arguable, I think that I should regard Bradken's applications in both the US District Court and in the US Appeals Court as having been made *bona fide*.

(b) If an adjournment is not granted, Bradken will be denied an opportunity to seek to persuade this Court that the Award should not be enforced by relying upon the ground specified in s 8(5)(f) of the IAA. It currently has on foot an application for a stay of the first instance judgment of the US District Court and an application to set aside the Award in part.

(c) In the arbitration agreement, the parties chose Oregon as the seat of the arbitration and Oregon law as the law which was to govern the interpretation of the Licence Agreement.

(d) The first forum chosen by ESCO as the jurisdiction in which it would seek to enforce the Award was the US District Court. Bradken was entitled to seek to "vacate" the Award in part in the confirmation proceedings commenced by ESCO. The US District Court and the US Appeals Court are more appropriate venues than this Court to determine all questions of the validity and enforcement of the Award. Those questions involve US law.

(e) ESCO did not seek to enforce the Award in Australia until after the US District Court entered judgment in its favour in May 2011. It came to Australia only after it failed in its bid to secure interest on the amount of the legal costs awarded to it at the higher rate provided under the State law of Oregon. It could have sought to enforce the Award in Australia in June 2010 but chose not to do so at that time.

(f) The present proceeding raises interesting and difficult questions as to the correct interpretation of s 51A of the Federal Court Act and its application in circumstances where (as here) a party seeking to enforce a foreign arbitral award under the IAA has failed to secure an award of post-award pre-judgment interest in its home jurisdiction and only secured post-judgment interest at a negligible rate.

(g) There is no question that an adjournment, even for a relatively long period of time, will detrimentally affect ESCO's prospects of recovering the amount for legal costs awarded by the arbitrator. Bradken and the group of companies of which it is a member comprise substantial corporations with income and assets that could easily support a payment of the amount awarded. There is no suggestion that Bradken will move assets in order to avoid payment or that improvident trading will erode its financial position.

(h) ESCO can be adequately protected by requiring Bradken to put up substantial security.

87 I think that the concerns of ESCO can be met by an order for substantial security and by the Court closely monitoring the progress of the US litigation.

88 The factors to which I have referred at [86] above lead me to grant the adjournment sought. I shall do so, however, only on condition that substantial security be provided.

89 In the words of s 8(8) of the IAA, the security must be *"suitable security"*. What is *"suitable security"* will be dictated by the circumstances of the individual case. A suggestion was made on behalf of ESCO at the end of the hearing that one way of protecting ESCO and meeting the exigencies of the case was to order that a substantial sum be paid into Court by way of security. I have decided not to adopt this suggestion but rather to take the more conventional course of ordering the provision of security along the lines of the security which the parties had in mind when they exchanged their pre-hearing offers.

90 In the present case, in my opinion, *"suitable security"* must have the following features:

(a) It should be in a form which can be readily accessed by ESCO should it become entitled to the benefit of the security. Either a letter of credit or an irrevocable bank guarantee provided by a major Australian trading bank or other financial institution acceptable to the parties would be appropriate.

(b) The amount to be secured should be US$7,747,087.88 (the balance of the monies due under the Award, excluding interest).

(c) ESCO should be able to access the security immediately upon the Award becoming a judgment of this Court.

(d) The security should be expressed to cover the amount of the legal costs ordered to be paid by Bradken under the Award and any judgment based upon the Award wherever obtained.

(e) The security should be expressed to expire upon the earliest of the dates specified in par 3 of the letter dated 18 July 2011 from Corrs to Jones Day.

91 ESCO contended that the amount of the security to be provided should include the interest amounts specified in the letter dated 13 July 2011 from Jones Day to Corrs and the top up amount specified in that letter. It was submitted that the inclusion of these extra amounts was only fair as ESCO would suffer significant prejudice by the further delay that an adjournment will inevitably produce. The foundation of these submissions was the proposition that enforcement in Australia was a certainty and that the *"usual"* court rates of interest levied under s 51A and s 52 of the Federal Court would definitely be applied. However, ESCO's submissions pay no regard to the possibility that Bradken might succeed in having its liability to pay money under the Award reduced from US$7,747,087.88 to approximately US$1.7 million and thus its exposure to enforcement in Australia similarly reduced, nor do those submissions accord sufficient weight to the fact that the US District Court did not award to ESCO any post-Award pre-judgment interest and only awarded post-judgment interest at the US Federal interest rate which is but a fraction of the Oregon State interest rate and a tiny fraction of the rates currently usually awarded in this Court under s 51A and s 52 of the Federal Court Act. Furthermore, the quantum of *"suitable security"* will hardly ever be that amount which represents the largest possible verdict in favour of the enforcing party based upon the most favourable view of all potential outcomes. When these factors are taken into account, the case for the amount of the security to include the additional amounts for which ESCO contended falls away.

CONCLUSIONS

92 For all of the above reasons, I propose to adjourn this proceeding until a date early in the new Law Term of 2012 upon condition that security in accordance with the requirements which I have specified at [90] above is provided by the end of August 2011.

93 I will direct the parties to bring in agreed Short Minutes of Order to give effect to these Reasons for Judgment.

94 Those Short Minutes of Order should include general liberty to apply. That liberty should be exercised by ESCO in the event that it considers that the security which I propose to order requires amendment or adjustment in light of future events.

95 Bradken has substantially succeeded in its Motion. However, the substance of its application was the grant of an indulgence by the Court. ESCO unsuccessfully opposed

Bradken's application. In those circumstances, I propose to order that the costs of Bradken's adjournment application be Bradken's costs in the proceeding.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster.

Associate:

Dated: 9 August 2011