

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**AFILIAS DOMAINS NO. 3 LIMITED,**

*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**

*Respondent*

**ICDR Case No. 01-18-0004-2702**

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**CLAIMANT'S EXHIBITS**

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12 October 2020

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## LIST OF EXHIBITS

Exhibit No.	Description
<b>Exhibits submitted with Afiliias' Application for Leave to Add Exhibits C-125 through C-181 to the Record of this IRP (19 July 2020)</b>	
C-125	Letter from Deborah A. Garza (US Department of Justice, Antitrust Division) to Meredith A. Baker (US Department of Commerce) (3 Dec. 2008)
C-126	Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009)
C-127	New gTLD Application submitted to ICANN by Ruby Glen, LLC, Application ID 1-1527-54849 (13 June 2012)
C-128	New gTLD Application submitted to ICANN by Schlund Technologies GmbH, Application ID 1-1013-77165 (13 June 2012)
C-129	ICANN, Assignment: Change of Control of Registry Operator (29 Jan. 2016), available at <a href="https://www.icann.org/resources/change-of-control">https://www.icann.org/resources/change-of-control</a> (last accessed 13 July 2020)
C-130	Derek Vaughn, "Inside the High Stakes Auction for .WEB," <i>InetServies</i> (25 July 2016), available at <a href="https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/">https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/</a> (last accessed 19 July 2020)
C-131	Email from Christine Willett (ICANN) to Patrick Kane (16 Sep. 2016) [ICANN-WEB_000930 - ICANN-WEB_000932]
C-132	Email from Brian Leventhal to Eric Enson (7 Oct. 2016) [ICANN-WEB_000972]
C-133	ICANN, Board of Governance Committee, Agenda (2 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-bgc-2016-11-02-en">https://www.icann.org/resources/board-material/agenda-bgc-2016-11-02-en</a> (last accessed 17 July 2020)
C-134	ICANN, Board of Governance Committee, Meeting Minutes (2 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-bgc-2016-11-02-en">https://www.icann.org/resources/board-material/minutes-bgc-2016-11-02-en</a> (last accessed 17 July 2020)
C-135	ICANN, Board Audit Committee, Meeting Minutes (2 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-audit-2016-11-02-en">https://www.icann.org/resources/board-material/minutes-audit-2016-11-02-en</a> (last accessed 17 July 2020)
C-136	ICANN, Board Finance Committee, Meeting Minutes (2 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-bfc-2016-11-02-en">https://www.icann.org/resources/board-material/minutes-bfc-2016-11-02-en</a> (last accessed 17 July 2020)
C-137	ICANN, Organizational Effectiveness Committee, Meeting Minutes (3 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-oec-2016-11-03-en">https://www.icann.org/resources/board-material/minutes-oec-2016-11-03-en</a> (last accessed 17 July 2020)
C-138	ICANN, Board Risk Committee, Meeting Minutes (4 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-brc-2016-11-04-en">https://www.icann.org/resources/board-material/minutes-brc-2016-11-04-en</a> (last accessed 17 July 2020)

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C-139	Regular Meeting of the ICANN Board, Papers: Posting for Public Comment – Draft ICANN Community-Anti-Harassment Policy (Submission No. 2016.11.05.1a) (5 Nov. 2016)
C-140	Regular Meeting of the ICANN Board, Reference Materials: Posting for Public Comment – Draft ICANN Community-Anti-Harassment Policy (Draft: 31 October 2016) (Submission No. 2016.11.05.1a) (5 Nov. 2016)
C-141	ICANN, Regular Meeting of the ICANN Board, Agenda (5 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2016-11-05-en">https://www.icann.org/resources/board-material/agenda-2016-11-05-en</a> (last accessed 17 July 2020)
C-142	ICANN, Regular Meeting of the ICANN Board, Minutes (5 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2016-11-05-en">https://www.icann.org/resources/board-material/agenda-2016-11-05-en</a> (last accessed 17 July 2020)
C-143	ICANN, Regular Meeting of the ICANN Board, Approved Board Resolutions (5 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/resolutions-2016-11-05-en">https://www.icann.org/resources/board-material/resolutions-2016-11-05-en</a> (last accessed 17 July 2020)
C-144	Organizational Meeting of the ICANN Board, Papers: AGENDA – 8 NOVEMBER 2016 ORGANIZATIONAL BOARD MEETING (8 Nov. 2016)
C-145	Organizational Meeting of the ICANN Board, Agenda (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2-2016-11-08-en">https://www.icann.org/resources/board-material/agenda-2-2016-11-08-en</a> (last accessed 17 July 2020)
C-146	Organizational Meeting of the ICANN Board, Meeting Minutes (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-2-2016-11-08-en">https://www.icann.org/resources/board-material/minutes-2-2016-11-08-en</a> (last accessed 17 July 2020)
C-147	Organizational Meeting of the ICANN Board, Adopted Board Resolutions (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/resolutions-2-2016-11-08-en">https://www.icann.org/resources/board-material/resolutions-2-2016-11-08-en</a> (last accessed 17 July 2020)
C-148	Regular Meeting of the ICANN Board, Papers: Consideration of the <i>Corn Lake, LLC v. ICANN</i> IRP Final Declaration (8 Nov. 2016)
C-149	Regular Meeting of the ICANN Board, Papers: Appointment of Jacques Latour and Tara Whalen to the Security and Stability Advisory Committee (8 Nov. 2016)
C-150	Regular Meeting of the ICANN Board, Reference Materials: Letter dated 18 Oct. 2016 from SSAC to ICANN Board (8 Nov. 2016)
C-151	Regular Meeting of the ICANN Board, Agenda (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2016-11-08-en">https://www.icann.org/resources/board-material/agenda-2016-11-08-en</a> (last accessed 17 July 2020)
C-152	Regular Meeting of the ICANN Board, Meeting Minutes (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2016-11-08-en">https://www.icann.org/resources/board-material/agenda-2016-11-08-en</a> (last accessed 17 July 2020)

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C-153	Regular Meeting of the ICANN Board, Adopted Board Resolutions (8 Nov. 2016), available at <a href="https://www.icann.org/resources/board-material/resolutions-2016-11-08-en">https://www.icann.org/resources/board-material/resolutions-2016-11-08-en</a> (last accessed 17 July 2020)
C-154	ICANN, Board of Governance Committee, Agenda (5 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-bgc-2016-12-05-en">https://www.icann.org/resources/board-material/agenda-bgc-2016-12-05-en</a> (last accessed 17 July 2020)
C-155	ICANN, Board of Governance Committee, Meeting Minutes (5 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-bgc-2016-12-05-en">https://www.icann.org/resources/board-material/minutes-bgc-2016-12-05-en</a> (last accessed 17 July 2020)
C-156	Special Meeting of the ICANN Board, Papers: RSSAC Co-Chair Appointment (Submission No. 2016.12.13.1b) (13 Dec. 2016)
C-157	Special Meeting of the ICANN Board, Reference Materials: GAC Helsinki Communiqué Table of Advice (13 Dec. 2016)
C-158	Special Meeting of the ICANN Board, Agenda (13 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-2016-12-13-en">https://www.icann.org/resources/board-material/agenda-2016-12-13-en</a> (last accessed 17 July 2020)
C-159	Special Meeting of the ICANN Board, Minutes (13 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-2016-12-13-en">https://www.icann.org/resources/board-material/minutes-2016-12-13-en</a> (last accessed 17 July 2020)
C-160	Special Meeting of the ICANN Board, Adopted Board Resolutions (13 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/resolutions-2016-12-13-en">https://www.icann.org/resources/board-material/resolutions-2016-12-13-en</a> (last accessed 17 July 2020)
C-161	ICANN, Board of Governance Committee, Agenda (16 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/agenda-bgc-2016-12-16-en">https://www.icann.org/resources/board-material/agenda-bgc-2016-12-16-en</a> (last accessed 17 July 2020)
C-162	ICANN, Board of Governance Committee, Meeting Minutes (16 Dec. 2016), available at <a href="https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en">https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en</a> (last accessed 17 July 2020)
C-163	Contact Information for Assignment - "Change of Control" (Oct. 2017)
C-164	ICANN, Change of Control Guide: How to Submit a Request for a Change of Control Assignment (13 Dec. 2017)
C-165	Letter from Steven Marenberg (Counsel for NDC) to John Jeffrey & Akram Atallah (ICANN) (28 Feb. 2018) [ICANN-WEB_000236 - ICANN-WEB_000237]
C-166	Email from Russ Weinstein (ICANN) to Lisa Carter et al. (6 June 2018) [ICANN-WEB_000458]
C-167	Email from Jared Erwin (ICANN) to Christopher Bare and Christine Willett (ICANN) (6 June 2018) [ICANN-WEB_000457]

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C-168	Email from Erika Randall (ICANN) to Russ Weinstein et al. (ICANN) (13 June 2018) [ICANN-WEB_000453]
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C-170	Email from Grant Nakata to Christine Willett et al. (14 June 2018) [ICANN-WEB_000452 - ICANN-WEB_000453]
C-171	Email from Christine Willett (ICANN) to Correspondence (10 July 2018) [ICANN-WEB_000485]
C-172	Kevin Murphy, "Donuts Loses to ICANN in \$135 million .web auction appeal," <i>DomainIncite</i> (16 Oct. 2018), available at <a href="http://domainincite.com/23581-donuts-loses-to-icann-in-135-million-web-auction-appeal">http://domainincite.com/23581-donuts-loses-to-icann-in-135-million-web-auction-appeal</a> (last accessed 7 Oct. 2019)
C-173	David Goldstein, "Donuts Loses Another Court Appeal Against ICANN Decision on .WEB," <i>DomainPulse</i> (17 Oct. 2018), available at <a href="https://www.domainpulse.com/2018/10/17/donuts-loses-another-court-appeal-against-icann-decision-on-web/">https://www.domainpulse.com/2018/10/17/donuts-loses-another-court-appeal-against-icann-decision-on-web/</a> (last accessed on 7 Oct. 2019)
C-174	David Goldstein, "Neustar's Nicolai Bezsonoff Discusses the 'Vote of Confidence' In Being Awarded 10 More Years of .US," <i>DomainPulse</i> (21 July 2019), available at <a href="https://www.domainpulse.com/2019/07/21/neustars-nicolai-bezsonoff-awarded-us/">https://www.domainpulse.com/2019/07/21/neustars-nicolai-bezsonoff-awarded-us/</a> (last accessed 13 July 2020)
C-175	Dilantha De Silva, "VeriSign: An Overvalued Company With A Strong Moat," <i>Seeking Alpha</i> (23 Sep. 2019), available at <a href="https://seekingalpha.com/article/4293005-verisign-overvalued-company-strong-moat">https://seekingalpha.com/article/4293005-verisign-overvalued-company-strong-moat</a> (last accessed 19 July 2020)
C-176	Ash Anderson, "VeriSign Is Immune From Coronavirus," <i>Seeking Alpha</i> (16 Mar. 2020), available at <a href="https://seekingalpha.com/article/4332180-verisign-is-immune-from-coronavirus">https://seekingalpha.com/article/4332180-verisign-is-immune-from-coronavirus</a> (last accessed 19 July 2020)
C-177	Written Testimony of John W. Elias before the U.S. House Committee on the Judiciary (24 June 2020), available at <a href="https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519">https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519</a> (last accessed 19 July 2020)
C-178	Delaware Department of State, Division of Corporations - Filings: Nu Dotco LLC (13 July 2020)
C-179	Comprehensive Business Report: Nu Dotco LLC (13 July 2020)
C-180	ICANN, Assignments: Change of Control of Registry Operator or Material Subcontracting Arrangement, available at <a href="https://www.icann.org/resources/assignments">https://www.icann.org/resources/assignments</a> (last accessed 13 July 2020)
C-181	ICANN, New Generic Top-Level Domains: Frequently Asked Questions, available at <a href="https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en">https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en</a> (last accessed 13 July 2020)

Exhibit No.	Description
<b>Exhibit submitted with Afiliias' Application for Leave to Add Exhibit C-182 to the Record of this IRP (21 July 2020)</b>	
C-182	Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018) [ICANN-WEB_001061]
C-183	GAC Early Warning – Submittal Blog-AU-47770 (.BLOG) (20 Nov. 2012)
<b>Exhibit added to the record during the 3-11 August 2020 Hearing (6 Aug. 2020)</b>	
C-184	ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), available at <a href="https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.c">https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.c</a> (last accessed 4 Aug. 2020)
C-185	<i>Intentionally Left Blank</i>
C-186	<i>Intentionally Left Blank</i>
<b>Exhibit added to the record pursuant to Parties' agreement (1 Oct. 2020)</b>	
C-187	<i>Ruby Glen, LLC v. ICANN et al.</i> , Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017)
<b>Authorities submitted with Afiliias' Response to the Amicus Curiae Briefs (24 July 2020)</b>	
CA-44	<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988)
CA-45	<i>In re Cho</i> , 581 B.R. 452 (Bankr. D. Md. 2018)
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CA-47	<i>In re Aslan</i> , 65 B.R. 826 (Bankr. C.D. Cal. 1986), <i>rev'd in part on other grounds</i> , 909 F.2d 367 (9th Cir. 1990)
CA-48	<i>Vir2us, Inc. v. Sophos Inc.</i> , No. 2:19CV18, 2019 WL 8886440 (E.D. Va. Aug. 14, 2019)
CA-49	<i>In re Hat</i> , 310 B.R. 752 (Bankr. E.D. Cal. 2004)
CA-50	<i>U.S. v. Smithfield Foods, Inc.</i> , Case 1:10-cv-00120 (D.D.C.), Complaint (21 Jan. 2010)
CA-51	U.S. Department of Justice, <i>Smithfield Foods and Premium Standards Farms Charged with Illegal Premerger Coordination: Company Required to Pay \$900,000 Civil Penalty</i> (21 Jan. 2010), available at <a href="https://www.justice.gov/opa/pr/smithfield-foods-and-premium-standard-farms-charged-illegal-premerger-coordination">https://www.justice.gov/opa/pr/smithfield-foods-and-premium-standard-farms-charged-illegal-premerger-coordination</a> (last accessed 23 July 2020)
CA-52	<i>Principal Mut. Life Ins. Co. v. Vars, Pave, McCord &amp; Freedman</i> , 65 Cal. App. 4th 1469 (1998)
CA-53	<i>Mountain of Fire &amp; Miracles Ministries v. Oyeyemi</i> , No. B218591, 2012 WL 2373003 (Cal. Ct. App. June 25, 2012)
CA-54	<i>In re O'Neill Enterprises, Inc.</i> , 547 F.2d 812 (4th Cir. 1977)
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CA-56	<i>Merriam-Webster Dictionary</i> (on-line version): untrue, available at <a href="https://www.merriam-webster.com/dictionary/untrue">https://www.merriam-webster.com/dictionary/untrue</a> (last accessed 21 July 2020)
CA-57	<i>Merriam-Webster Dictionary</i> (on-line version): subjugate, available at <a href="https://www.merriam-webster.com/dictionary/subjugation">https://www.merriam-webster.com/dictionary/subjugation</a> (last accessed 21 July 2020)
CA-58	<i>Boeing Co. v. March</i> , 656 F. Supp. 2d 837 (N.D. Ill. 2009)
CA-59	<i>U.S v. Cianci</i> , 378 F.3d 71 (1st Cir. 2004)
CA-60	<i>ICM Registry, LLC v. ICANN</i> , ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009)
CA-61	<i>ICM Registry, LLC v. ICANN</i> , ICDR Case No. 50-117-T-00224-08, ICANN's Response to ICM's Memorial on the Merits (8 May 2009)
CA-62	Georg Schwarzenberger and Edward Brown, <i>A Manual of International Law</i> (6th ed. 1976)
CA-63	<i>Nuclear Tests (Australia v. France)</i> , Judgment (20 Dec.), 1974 I.C.J. 253
CA-64	<i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)</i> , Judgment (11 June), 1998 I.C.J. 275
CA-65	Anthony D'Amato, "Good Faith" in <i>Encyclopedia of Public International Law</i> Vol. 2 (1995)
CA-66	<i>The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)</i> , CAS Case No. 2002/O/410, Award (7 Oct. 2003)
CA-67	<i>A. v. Fédération Internationale de Lutttes Associées (FILA)</i> , CAS Case No. 2001/A/317, Award (9 July 2001)
CA-68	<i>G. v. Fédération Equestre Internationale (FEI)</i> , CAS Case No. 1991/A/53, Award (15 Jan. 1992) in 1 <i>Digest of CAS Awards Series Set 79</i> (1998)
CA-69	<i>AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)</i> , CAS Case No. 98/200, Award (20 Aug. 1999)
CA-70	<i>Plama Consortium Ltd. v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award (27 Aug. 2008)
CA-71	<i>AES Summit Generation Ltd. and AES-Tisza Erömu Kft. v. Republic of Hungary</i> , ICSID Case No. ARB/07/22, Award (23 Sep. 2010)
CA-72	<i>Ronald S. Lauder v. Czech Republic</i> , UNCITRAL Arbitration, Final Award (3 Sep. 2001)
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CA-75	<i>Peter Überschär v. Bundesversicherungsanstalt für Angestellte</i> , Case 810/79, Judgment (8 Oct.), 1980 E.C.R. 2747



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CA-76	<i>Bilka-Kaufhaus GmbH v. Karin Weber von Hartz</i> , Case 170/84, Judgment (13 May), 1986 E.C.R. 1620
CA-77	<i>Nykomb Synergetics Technology Holding AB v. Republic of Latvia</i> , SCC Arbitration, Award (16 Dec. 2003)
CA-78	<i>Saluka Inves. BV v. Czech Republic</i> , UNCITRAL Arbitration, Partial Award (17 Mar. 2006)
CA-79	<i>Kelly and Others v. United Kingdom</i> , ECHR, Case No. 30054/96, Final Judgment (4 Aug. 2001)
CA-80	Advisory Opinion OC-18/03 of September 17, 2003, Inter-Am. Ct. H.R., <i>Juridical Condition and Rights of the Undocumented Migrants</i>
CA-81	<i>S.D. Myers, Inc. v. Gov't of Canada</i> , UNCITRAL Arbitration, Partial Award (13 Nov. 2000)
CA-82	<i>El Paso Energy Int'l Co. v. Argentine Republic</i> , ICSID Case No. ARB/03/15, Award (31 Oct. 2011)
CA-83	<i>LG&amp;E Energy Corp. et al. v. Argentine Republic</i> , ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006)
CA-84	<i>Joseph Charles Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010)
CA-85	United Nations Procurement Manual (30 June 2020)
CA-86	UNCITRAL Model Law on Public Procurement (2011)
CA-87	World Trade Organization, <i>Revised Agreement on Government Procurement and WTO related Legal Instruments</i> (in force 6 Apr. 2014)
CA-88	World Bank, <i>Bank Policy: Procurement in IPF and Other Operational Procurement Matters</i> (Nov. 2017)
CA-89	OECD, <i>Methodology for Assessing Procurement Systems (MAPS)</i> (2018)
CA-90	<i>Siemens A.G. v. Argentine Republic</i> , ICSID Case No. ARB/02/8, Award (17 Jan. 2007)
CA-91	<i>Parkerings-Compagniet AS v. Republic of Lithuania</i> , ICSID Case No. ARB/05/8, Award (11 Sep. 2007)
CA-92	Akira Kotera, "Regulatory Transparency" in <i>The Oxford Handbook of International Investment Law</i> 617 (Peter Muchlinski et al. eds., 2008)
CA-93	Case C-532/06, <i>Emm G. Lianakis AE et al. v. Dimos Alexandroupolis et al.</i> , Judgment (24 Jan. 2008)
CA-94	Sacha Prechal and Madeleine de Leeuw, "Dimensions of Transparency: The Building Blocks for a New Legal Principle?," <i>Rev. Eur. Admin. L.</i> Vol. O, No. 1 (2007)
CA-95	<i>Bosh Int'l, Inc. and B &amp; P Ltd. Foreign Inves. Enter. v. Ukraine</i> , ICSID Case No. ARB/08/11, Award (25 Oct. 2012)
CA-96	<i>Spyridon Roussalis v. Romania</i> , ICSID Case No. ARB/06/1, Award (7 Dec. 2011)



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CA-97	<i>Ioan Micula et al. v. Romania</i> , ICSID Case No. ARB/05/20, Award (11 Dec. 2013)
CA-98	<i>United States Olympic Committee (USOC) v. International Olympic Committee (IOC) and International Association of Athletics Federations (IAAF)</i> , CAS Case No. 2004/A/725, Award (20 July 2005)
CA-99	<i>Técnicas Medioambientales TECMED S.A. v. United Mexican States</i> , ICSID Case No. ARB(AF)/00/2, Award (29 May 2003)
CA-100	<i>United States - Sections 301-310 of the Trade Act of 1974</i> , WTO Case No. WT/DS152/R, Report of the Panel (22 Dec. 1999)
CA-101	World Bank Administrative Tribunal, <i>Walter Prescott v. International Bank for Reconstruction and Development</i> , Decision No. 253 (4 Dec. 2001)
CA-102	<i>Sullivan v. The Judo Federation of Australia Inc.</i> , CAS Case No. 2000/A/284, Award (14 Aug. 2000)
CA-103	<i>CME Czech Republic B.V. v. Czech Republic</i> , UNCITRAL Arbitration, Partial Award (13 Sep. 2001)
CA-104	<i>AlterG, Inc. v. Boost Treadmills LLC</i> , 388 F.Supp.3d 1133 (N.D. Cal. 2019)
CA-105	<i>Coley v. Eskaton</i> , 2020 WL 3833018 (Cal. Ct. App. 2020)
CA-106	<i>Palm Springs Villas II Homeowners Assn., Inc. v. Parth</i> , 248 Cal.App.4th 268 (Cal. Ct. App. 2016)
CA-107	<i>Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.</i> , 168 Cal.App.4th 1111 (Cal. Ct. App. 2008)
CA-108	Stuart Chemtob, U.S. Department of Justice, <i>The Role of Competition Agencies in Regulated Sectors</i> (5th International Symposium on Competition Policy and Law, Institute of Law, Chinese Academy of Social Science, Beijing, China, 11 May 2007), available at <a href="https://www.justice.gov/atr/speech/role-competition-agencies-regulated-sectors">https://www.justice.gov/atr/speech/role-competition-agencies-regulated-sectors</a> (last accessed 23 July 2020)
CA-109	<i>In the Matter of Policies Regarding Mobile Spectrum Holdings</i> , FCC, WT Docket No. 12-269, Ex Parte Submission of the United States Department of Justice (11 Apr. 2013)
CA-110	U.S. Department of Justice and the Federal Trade Commission, <i>Horizontal Merger Guidelines</i> (19 Aug. 2010)
CA-111	Clayton Act, 15 U.S.C. § 18 (1996)
CA-112	<i>Steves and Sons, Inc. v. JELD-WEN, Inc.</i> , 345 F.Supp.3d 614 (E.D. Va. 2018)
CA-113	<i>Singh v. Singh</i> , 114 Cal. App. 4th 1264 (2004)
CA-114	18A Am. Jur. 2d <i>Corporations</i> § 262 (2020)
CA-115	<i>Merriam-Webster Dictionary</i> (on-line version): accountability, available at <a href="https://www.merriam-webster.com/dictionary/accountability">https://www.merriam-webster.com/dictionary/accountability</a> (last accessed 23 July 2020)

Exhibit No.	Description
CA-116	<i>Oxford English Dictionary</i> (on-line version): accountability, available at <a href="https://www-oed-com.nyli.idm.oclc.org/view/Entry/1197?redirectedFrom=accountability&amp;&amp;print">https://www-oed-com.nyli.idm.oclc.org/view/Entry/1197?redirectedFrom=accountability&amp;&amp;print</a> (last accessed 24 July 2020)
CA-117	Dictionary.com: redress, available at <a href="http://dictionary.reference.com/browse/redress">http://dictionary.reference.com/browse/redress</a> (last accessed 23 July 2020)
CA-118	<i>Black's Law Dictionary</i> (11th ed. 2019): redress
CA-119	<i>Factory at Chorzów (Claim for Indemnity) (Merits)</i> , Judgment (Sep. 13), 1928 P.C.I.J. (Ser. A) No. 17
CA-120	Lexico.com: resolve, available at <a href="https://www.lexico.com/en/definition/resolve">https://www.lexico.com/en/definition/resolve</a> (last accessed 23 July 2020)
CA-121	<i>Oxford English Dictionary</i> (on-line version): resolve, available at <a href="https://www-oed-com.nyli.idm.oclc.org/view/Entry/163733?rskey=u3QyP2&amp;result=2&amp;isAdvanced=false&amp;p rint">https://www-oed-com.nyli.idm.oclc.org/view/Entry/163733?rskey=u3QyP2&amp;result=2&amp;isAdvanced=false&amp;p rint</a> (last accessed 24 July 2020)
CA-122	<i>Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)</i> , Judgment (Dec. 16), 1927 P.C.I.J. (Ser. A) No. 13
CA-123	Gary Born, <i>International Commercial Arbitration</i> (2d ed. 2014)
CA-124	Arbitration Act 1996 (Eng.)
<b>Exhibits submitted with Afiliás' Post-Hearing Brief (12 Oct. 2020)</b>	
CA-125	<i>Hearn Pacific Corp. v. Second Generation Roofing, Inc.</i> , 247 Cal. App. 4th 117 (2016)
CA-126	<i>Timed Out, LLC v. Youabian, Inc.</i> , 229 Cal. App. 4th 1001 (2014)
CA-127	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic</i> , ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002)



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247 Cal.App.4th 117

Court of Appeal, First District, Division 2, California.

HEARN PACIFIC CORPORATION,  
Cross-Complainant and Respondent,

v.

SECOND GENERATION ROOFING  
INC., Cross-Defendant and Appellant.

A142203

|

Filed May 2, 2016

**Synopsis**

**Background:** After successfully defeating indemnity and related cross-claims asserted against it by general contractor in multi-party construction defect litigation and securing award of prevailing party attorney fees and costs against general contractor, embodied in two separate orders pursuant to fee clause in subcontract, roofing subcontractor filed motion to amend orders to add one of general contractor's liability insurers as a judgment debtor. The Superior Court, Sonoma County, No. SCV-240665, [Elliot Lee Daum](#), J., denied motion. Subcontractor appealed.

**Holdings:** The Court of Appeal, [Stewart](#), J., held that:

[1] declaration filed in support of prior summary adjudication motions to which copy of assignment agreement was attached was admissible;

[2] allegations in cross-complaint concerning assignment of contractor's rights and interests under subcontracts were properly considered on appeal;

[3] trial court improperly declined to amend orders to add insurer as judgment debtor;

[4] statute permitting judgment creditor to bring direct action against debtor's insurer to satisfy judgment out of policy proceeds did not provide remedy to subcontractor;

[5] statute did not bar motion to amend orders;

[6] existence of potential remedy under subrogation principles was irrelevant;

[7] trial court had authority to amend orders to add insurer as judgment debtor; and

[8] assignment was valid.

Reversed and remanded with directions.

**Procedural Posture(s):** On Appeal; Motion to Alter or Amend Judgment; Motion to Exclude Evidence or Testimony.

West Headnotes (39)

[1] **Assignments** **Admissibility in general**

Declaration from general contractor's board member, which had been previously filed in support of summary adjudication motions in multi-party construction defect litigation, that attached a copy of agreement assigning contractor's rights and interests under subcontracts to liability insurer and authenticated it as an agreement that board member had entered into on contractor's behalf, was admissible in proceedings on subcontractor's motion to amend orders awarding subcontractor attorney fees and costs as prevailing party on contractor's cross-claims for indemnity and related issues in order to add insurer as judgment debtor; declaration was proffered to prove fact of the assignment and its terms, and no unfairness to contractor would have resulted had declaration been admitted. [Cal. Evid. Code §§ 351](#), 2011; [Cal. Civ. Proc. Code § 368.5](#).

[2] **Appeal and Error** **Evidence and Witnesses in General**

**Appeal and Error** **Admission or exclusion of evidence in general**

Evidentiary rulings ordinarily are reviewed for abuse of discretion, but when trial court bases its ruling on conclusion of law, review is de novo.

**[3] Appeal and Error** 🔑 Construction, interpretation, and application in general

When there is no conflict in relevant extrinsic evidence, interpretation of a contract presents a pure question of law for appellate court. *Cal. Evid. Code* § 351.

[2 Cases that cite this headnote](#)

**[4] Appeal and Error** 🔑 Necessity of timely objection**Appeal and Error** 🔑 Objections to evidence in general

Questions relating to admissibility of evidence will not be reviewed on appeal in absence of specific and timely objection in trial court on ground sought to be urged on appeal.

[1 Cases that cite this headnote](#)

**[5] Appeal and Error** 🔑 On Review of Costs, Fees, or Sanctions

Allegations in general contractor's first amended cross-complaint against subcontractor, in which contractor sought indemnity from any damages or judgment entered against it in underlying construction defect litigation, concerning assignment of contractor's rights and interests under subcontracts to its liability insurer were properly considered on appeal from denial of subcontractor's motion to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor; although complaint was unverified, allegations constituted a binding judicial admission, and it was not unfair or inappropriate to hold contractor to the truth of its allegations in the absence of some showing of mistake or inadvertence by contractor and where contractor was not contesting allegations. *Cal. Civ. Proc. Code* § 368.5.

[1 Cases that cite this headnote](#)

**[6] Evidence** 🔑 Pleadings not verified or signed

It is presumed that even an unverified pleading is filed with the consent of client and statements therein should be regarded as an admission.

[1 Cases that cite this headnote](#)

**[7] Parties** 🔑 Assignees, purchasers, and other successors in interest

When party's interest in the subject of an action is transferred, trial courts have discretion to allow litigation to continue in the name of original plaintiff rather than substitute transferee. *Cal. Civ. Proc. Code* § 368.5.

[2 Cases that cite this headnote](#)

**[8] Assignments** 🔑 Control of proceedings

Transfer of party's interest in the subject of an action transfers right to control action. *Cal. Civ. Proc. Code* § 368.5.

[1 Cases that cite this headnote](#)

**[9] Assignments** 🔑 By Assignee

When party's interest in subject of an action is transferred, if action continues in original party's name, original party remains as only a nominal party whereas real party in interest is the transferee. *Cal. Civ. Proc. Code* § 368.5.

[3 Cases that cite this headnote](#)

**[10] Assignments** 🔑 By Assignee**Assignments** 🔑 Costs**Insurance** 🔑 Costs and Attorney Fees

Trial court improperly declined to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor, where contractor had assigned its rights and interests under subcontracts to insurer in underlying construction defect litigation; following assignment, contractor was out of the case and insurer was real party in interest, and cross-claims were litigated solely for insurer's

benefit. [Cal. Civ. Proc. Code § 368.5](#); [Cal. Civ. Code §§ 1589, 3521](#).

**[11] Appeal and Error**  [Parties](#)

Court of Appeals reviews trial court's ruling under statute governing effect of transfer of interest on an action and giving trial court discretion to allow litigation to continue in the name of original plaintiff rather than substitute transferee for abuse of discretion. [Cal. Civ. Proc. Code § 368.5](#).

[1 Cases that cite this headnote](#)

**[12] Assignments**  [Costs](#)

Assignee's acceptance of benefits of a contract containing attorney fee clause, by bringing suit, constitutes implied assumption of the attorney fee obligations, unless there is evidence that parties did not intend to transfer those fee obligations; this is true even if there is only a partial assignment of contractual rights. [Cal. Civ. Proc. Code § 368.5](#); [Cal. Civ. Code §§ 1589, 3521](#).

[2 Cases that cite this headnote](#)

**[13] Assignments**  [On contract assigned](#)

Even outside attorney fee context, assignee's voluntary acceptance of benefits of a contract may obligate assignee to assume its obligations as a matter of law, even if assignment agreement expressly excludes the obligations. [Cal. Civ. Proc. Code § 368.5](#); [Cal. Civ. Code §§ 1589, 3521](#).

[2 Cases that cite this headnote](#)

**[14] Indemnity**  [Attorney fees](#)

Party whose litigation expenses are paid entirely by its insurer has no standing to recover its legal fees against contractual indemnitor, because party has suffered no contractual damage.

**[15] Insurance**  [Contribution Among Insurers](#)

Claim for equitable contribution may be asserted by multiple insurers of the same insured and the same risk, each of which has an independent standing to assert right for equitable contribution when it has undertaken the defense or indemnification of their common insured; this right is not the equivalent of standing in the shoes of the insured.

**[16] Parties**  [Assignees or purchasers pendente lite](#)

Trial court had personal jurisdiction over general contractor's liability insurer in proceedings on motion to amend orders awarding subcontractor attorney fees and costs, as prevailing party on contractor's cross-claims for indemnity and related issues, to add insurer as judgment debtor on ground that insurer was the real party in interest by virtue of having taken assignment of rights and interests under subcontracts in underlying construction defect litigation; insurer had accepted and prosecuted rights assigned to it, and no formal substitution was required for jurisdiction to attach. [Cal. Civ. Proc. Code § 368.5](#); [Cal. Civ. Code §§ 1589, 3521](#).

**[17] Attorneys and Legal Services**  [Commencement and Conduct of Litigation](#)

In the event of a transfer of interest in a pending action, attorney for assignor does not automatically cease to be attorney of record. [Cal. Civ. Proc. Code § 368.5](#).

[1 Cases that cite this headnote](#)

**[18] Attorneys and Legal Services**  [Presumptions, inferences, and burden of proof](#)

It is always presumed, until the contrary appears, that attorney is duly authorized to appear for and represent any parties for whom he assumes to act.

[1 Cases that cite this headnote](#)

**[19] Insurance** ➡ Direct action by injured person, in general

**Insurance** ➡ Judgment or Settlement Agreement

Key requirement for judgment creditor to bring direct action against judgment debtor's insurer to satisfy judgment out of policy proceeds is that insurance policy covers relief awarded in the judgment. *Cal. Ins. Code § 11580*.

**[20] Insurance** ➡ Direct action by injured person, in general

**Insurance** ➡ Costs and Attorney Fees

Statute permitting judgment creditor to bring direct action against judgment debtor's insurer to satisfy judgment out of policy proceeds did not provide remedy for subcontractor to recover award of attorney fees and costs, as prevailing party on general contractor's cross-claims, against contractor's liability insurer on ground that insurer was the real party in interest by virtue of it having taken assignment of the rights and interests under subcontracts in underlying construction defect litigation; there was no showing that insurance policy would have covered award of prevailing party attorney fees and costs, and award of costs or fees was typically not recoverable by third-party judgment creditor in direct action against insurer. *Cal. Civ. Proc. Code § 368.5; Cal. Ins. Code § 11580*.

[1 Cases that cite this headnote](#)

**[21] Insurance** ➡ Direct action by injured person, in general

**Insurance** ➡ Costs and Attorney Fees

Statute permitting judgment creditor to bring direct action against judgment debtor's insurer to satisfy judgment out of policy proceeds did not bar subcontractor's motion to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor on ground that insurer was the real party in

interest by virtue of having taken assignment of rights and interests under subcontracts in underlying construction defect litigation; subcontractor was not seeking to recover on a judgment out of insurance proceeds or to recover on the policy, relief sought was not premised on insurer's status as contractor's insurer, and nothing in statute declared that direct action against insurer on the policy was judgment creditor's sole remedy. *Cal. Civ. Proc. Code § 368.5; Cal. Ins. Code § 11580(b)(2)*.

**[22] Assignments** ➡ Rights of assignee as against debtor

Claims by judgment creditor against insurer under assignment of rights from insured may not be predicated upon a stipulated judgment nor an award of punitive damages. *Cal. Civ. Proc. Code § 368.5; Cal. Ins. Code § 11580*.

[1 Cases that cite this headnote](#)

**[23] Assignments** ➡ Rights of Action

Judgment creditor may take an assignment of the insured's claim that insurer wrongfully refused to defend it. *Cal. Civ. Proc. Code § 368.5; Cal. Ins. Code § 11580*.

**[24] Insurance** ➡ Judgment or Settlement Agreement

Direct claim on the judgment under statute permitting judgment creditor to bring direct action against judgment debtor's insurer to satisfy judgment out of policy proceeds will not be viable if policy limits have been exhausted. *Cal. Ins. Code § 11580*.

[1 Cases that cite this headnote](#)

**[25] Insurance** ➡ Persons entitled to recover; companies and persons liable

Policy limitations that would otherwise apply in a direct action brought under statute permitting judgment creditor to bring direct action against judgment debtor's insurer to satisfy judgment out



of policy proceeds do not apply to assigned bad faith claim. [Cal. Ins. Code § 11580](#).

**[26] Insurance**  [Settlement by Liability Insurer](#)

Insurer cannot be held liable in damages to judgment creditor for allegedly pursuing meritless appeal of a judgment against its insured because appropriate remedy in that instance lies in the pursuit of appellate sanctions.

**[27] Insurance**  [Insurer's settlement duties in general](#)

Insurer that appeals adverse judgment rendered against it, and posts a bond to stay its execution, cannot be held liable in tort to judgment creditor for refusing to pay the judgment.

**[28] Insurance**  [Costs and Attorney Fees](#)

Existence of potential remedy under subrogation principles was irrelevant to issue of whether to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor on ground that insurer was the real party in interest by virtue of having taken assignment of rights and interests under subcontracts in underlying construction defect litigation; regardless of what insurer could have done, it actually took assignment of rights from contractor to prosecute rights assigned to it against subcontractor in contractor's name. [Cal. Civ. Proc. Code § 368.5](#).

**[29] Judgment**  [Authority of Court, Judge, or Judicial Officer](#)

**Judgment**  [Parties](#)

Trial court had authority to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor on ground that insurer was the real party in


interest by virtue of having taken assignment of the rights and interests under subcontracts in underlying construction defect litigation; awards were not appealed, and contractor's appeal from judgment in favor of subcontractor on cross-claims was invalid and did not affect court's authority to proceed on motion. [Cal. Civ. Proc. Code § 368.5](#).

[1 Cases that cite this headnote](#)


**[30] Appeal and Error**  [Proceeding in Cause in General](#)

Automatic stay, when it applies, arises upon a duly perfected appeal.

[2 Cases that cite this headnote](#)

**[31] Action**  [Moot, hypothetical or abstract questions](#)

Ripeness requirement prevents judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes.

**[32] Action**  [Moot, hypothetical or abstract questions](#)


Ripeness requirement is rooted in the fundamental concept that proper role of judiciary does not extend to resolution of abstract differences of legal opinion.

**[33] Appeal and Error**  [Costs and fees](#)

Issue of amending orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor on ground that insurer was the real party in interest by virtue of having taken assignment of rights and interests under subcontracts in underlying construction defect litigation was ripe for appeal; there was a present and existing concrete dispute as to whether insurer should be added to orders, and there was no potential for



appeal to become moot. [Cal. Civ. Proc. Code § 368.5](#).

**[34] Parties**  [Time for bringing in new parties and laches](#)

Subcontractor's delay was not unreasonable in filing motion to amend orders awarding subcontractor attorney fees and costs, as prevailing party on general contractor's cross-claims for indemnity and related issues, to add contractor's liability insurer as judgment debtor on ground that insurer was the real party in interest by virtue of having taken assignment of rights and interests under subcontracts in underlying construction defect litigation; motion for substitution was permitted after judgment had been entered and even after appeal had been taken, and subcontractor filed motion only seven months after entry of first order and just five months after entry of second order, which was the ruling that determined amount of fees. [Cal. Civ. Proc. Code § 368.5](#).

**[35] Assignments**  [Costs](#)

**Insurance**  [Costs and Attorney Fees](#)

**Pleading**  [Conclusiveness of Allegations or Admissions on Party Pleading](#)

General contractor's assignment of its rights and interests under subcontracts to its liability insurer, as ground for amending orders awarding subcontractor attorney fees and costs, as prevailing party on contractor's cross-claims for indemnity and related issues pertaining to underlying construction defect litigation, to add insurer as judgment debtor, was valid; contractor made binding judicial admissions in its first amended cross-complaint that it had assigned its rights under subcontracts to insurer, contractor filed memorandum in underlying litigation containing factual statements acknowledging that contractor assigned its rights under subcontracts, and attorney who signed contractor's appellate brief declared in underlying proceeding that insurer was suing in contractor's name as transferee. [Cal. Civ. Proc. Code § 368.5](#).

**[36] Assignments**  [Consent of debtor](#)

Statute providing that burden of an obligation may be transferred with consent of party entitled to its benefit is only intended to protect party to be benefited from effects of assignment of an obligation. [Cal. Civ. Code § 1457](#).

**[37] Assignments**  [Consent of debtor](#)

**Assignments**  [On contract assigned](#)

Statute providing that burden of an obligation may be transferred with consent of party entitled to its benefit does not mean that without the other party's consent, assignee cannot assume contractual obligations, but simply that assignor is not at same time relieved of them. [Cal. Civ. Code § 1457](#).

[3 Cases that cite this headnote](#)

**[38] Assignments**  [Consent of debtor](#)

**Assignments**  [On contract assigned](#)

Assignor remains bound under contract absent counter-party's consent to assignment, but stands in the nature of a surety for assignee for the performance of the obligation. [Cal. Civ. Code § 1457](#).

[1 Cases that cite this headnote](#)

**[39] Assignments**  [Nature and essentials in general](#)

In absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment; it is sufficient if assignor has, in some fashion, manifested intention to make a present transfer of his rights to assignee.

*See* [4 Witkin, Cal. Procedure \(5th ed. 2008\) Pleading, § 262 et seq.](#)

[2 Cases that cite this headnote](#)

**\*\*811** Trial Court: Sonoma County Superior Court, Trial Judge: Hon. Elliot Lee Daum. (Sonoma County Super. Ct. No. SCV-240665)

#### Attorneys and Law Firms

**\*\*812** Wild Carey & Fife, [Donald R. Wild](#), [Terence Kenney](#); Archer Norris, [William Staples](#), for Defendant and Appellant.

Boornazian, Jensen & Garthe, [Robert B. Lueck](#), [Jeffery A. Chadic](#), and [Anthony F. Manzo](#), for Plaintiff and Respondent.

[STEWART, J.](#)

### \*123 INTRODUCTION

At issue in this appeal is a trial court's authority to amend a judgment to add the name of an additional judgment debtor. It involves a civil procedure game of cat-and-mouse like none we have before encountered.

Cross-defendant Second Generation Roofing, Inc., a roofing subcontractor involved in multiparty construction defect litigation, successfully defeated indemnity and related cross-claims asserted against it by the project's general contractor, Hearn Pacific Corporation (Hearn). It then secured a roughly \$210,000 award of prevailing party attorney fees and costs against the general contractor, embodied in two separate orders, pursuant to a fee clause contained in the subcontract. It now appeals from an order denying its motion to amend the two attorney fees orders to add one of the general contractor's insurers as a judgment debtor. The insurer, it maintained, had taken an assignment of the general contractor's contractual indemnity rights during the litigation, had in fact been the entity that prosecuted the cross-claims to final **\*124** judgment (in the general contractor's name), and as such was the real party in interest liable on the resulting fee award.

Its motion was brought under several provisions of the Code of Civil Procedure, including section 368.5.<sup>1</sup> That provision states: "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, *or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.*" (§ 368.5, italics added.)

<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

For reasons not apparent in the record (but ultimately disclosed at oral argument), the nominal judgment debtor, Hearn, opposed the subcontractor's effort to add its insurer as a named judgment debtor. It now continues to press that position on appeal, and even goes so far as to deny the validity of the assignment it executed, disavow sworn statements that its counsel filed below, and contradict allegations in its pleadings that are directly dispositive of the issues on appeal. We find its arguments troubling, to say the least, and its position puzzling. That an insured, faced with a liability imposed nominally upon *it* in excess of \$210,000 (and increasing annually by 10 percent (see § 685.010)), would go to such lengths to protect *its insurer* from being named liable on that judgment debt suggests to us only one thing, which is exactly what this record shows too *and* its counsel revealed at oral argument: the insurer, not its insured, is indeed conducting this litigation.

By virtue of the assignment taken in this case, Hearn's insurer is the real party in interest here. The trial court declined to amend the judgment to name the general contractor's insurer as an additional judgment debtor. We hold that it abused its discretion under section 368.5, and reverse.

### \*\*813 BACKGROUND

Hearn acted as the general contractor on a project in Sonoma County for the construction of a mixed-use building. In 2007, the project's owner brought suit for design and construction defects against multiple parties, including Hearn and Second Generation Roofing. Hearn cross-complained against Second Generation Roofing and other subcontractors, alleging causes of action for breach of contract, professional negligence, express indemnity, implied indemnity, equitable indemnity, breach of warranties, comparative negligence and contribution.<sup>2</sup>

<sup>2</sup> The subcontracts are not in the record.

**\*125** Two years later, in August 2009, Hearn executed an agreement assigning its rights and interests under its subcontracts to two insurers, North American Specialty Insurance Company (North American) and RSUI Group, Inc. The assignment agreement states:

HEARN hereby assigns to its defending insurers, North American Specialty Insurance Company and RSUI Group, Inc. (the 'INSURERS'), all rights and interests under its subcontracts for the project located at 235 Healdsburg Avenue, Healdsburg, Sonoma County, California, including but not limited to, any obligation of any subcontractor or supplier to defend, indemnify or hold harmless, or to pay attorneys' fees in equity or by operation of law, to the extent of the defense costs or other expenses incurred by the INSURERS arising from and relating to *Deas Family Limited Partnership v. Hearn Pacific Corporation, et al.*, Sonoma County Superior Court Case No. SCV-240665 ("subject action"). HEARN agrees to this assignment provided, however, that HEARN retains its rights and interest to the extent it has incurred defense costs or other expenses defending against the subject action, prosecuting its cross-complaint or satisfying or paying insurance policy deductibles or self-insured retentions.

The INSURERS may pursue their recovery along with HEARN and/or in HEARN's name in the subject action or any subsequent action. The effect of this Agreement is cumulative along with any assignments to the INSURERS by operation of law or in equity.

This assignment should not be construed to limit the rights of either HEARN or any of the INSURERS to be fully compensated for costs, expenses, attorneys' fees, expert fees or any other expenses incurred because of or in connection with the subject action.

Thereafter, in December 2009, Hearn settled with plaintiff and all but two subcontractors, one of which was Second Generation Roofing.

Subsequently, in April 2012, Hearn filed a first amended cross-complaint against Second Generation Roofing and the other remaining subcontractor. The amended pleading alleged causes of action for breach of a contractual duty to defend it in the underlying litigation, equitable contribution premised on a duty to defend Hearn, express indemnity, breach of a contractual obligation to obtain insurance, equitable contribution for Hearn's defense costs premised on a breach of their duty to obtain insurance coverage, implied indemnity, and contribution/apportionment of fault. It sought indemnity from any damages or judgment entered in the plaintiff's favor in the underlying case, reimbursement of its defense costs in the underlying case, and an award of prevailing party costs and attorney fees incurred in pursuit of the cross-claims.

**\*\*814 \*126** The amended cross-complaint, which was unverified, included allegations concerning the assignment. It alleged that "HEARN assigned its rights under the subcontracts with the cross-defendants, including ... [Second Generation Roofing], to its insurers on August 20, 2009," and that "Pursuant to C.C.P. § 368.5 and *Greco v. Oregon Mutual Insurance Co. (1961) 191 Cal.App.2d 674*[12 Cal.Rptr. 802], HEARN's insurers are asserting claims in this action in the name of the [*sic*] HEARN assigned to them by HEARN through operation of law." The cited authority, *Greco v. Oregon Mutual Insurance Co. (1961) 191 Cal.App.2d 674*, 12 Cal.Rptr. 802, addresses the impact of an assignment on the proper parties to litigation (*id.* at pp. 686–688, 12 Cal.Rptr. 802). It states, among other things, that "if the assignment occurs after suit has been filed, the action may be continued in the name of the assignor, or the court may permit the assignee to be substituted therein (*Code Civ. Proc.*, § 385), and a judgment in favor of the assignor under these circumstances, when no change of party plaintiff has occurred, will be sustained." (*Id.* at p. 687, 12 Cal.Rptr. 802.)

The amended cross-complaint also alleged, "Pursuant to the Court of Appeal's holding in *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Company, 191 Cal.App.4th 1394*[120 Cal.Rptr.3d 487] (2011) [*Searles* ], the fact that HEARN did not literally pay its defense costs, after ... [Second Generation Roofing] refused to, does not absolve ... [Second Generation Roofing] from [its] obligation to pay HEARN's defense costs." The cited authority, *Searles*, authorizes the assignee of contractual indemnity rights to recover the defense costs it paid on the assignor's behalf by enforcing the assigned indemnity rights. (*Searles*, at pp. 1396–1397, 120 Cal.Rptr.3d 487.)

Later in the case, one of Hearn's attorneys filed a declaration in support of a motion for summary adjudication stating that, "Hearn's defending insurers are suing in Hearn's name as transferees of Hearn's contractual indemnity rights, including the right to obtain equitable contribution for defense costs incurred herein from co-indemnitors such as Second Generation Roofing, Inc."

Eventually, on April 4, 2013, the litigation terminated successfully in Second Generation Roofing's favor, with dismissal of the cross-complaint against it on procedural grounds. In the same order, the trial court awarded it \$30,256.79 in costs and granted a motion for attorney fees pursuant to a prevailing party attorney fee clause contained in

the subcontract.<sup>3</sup> The court entered a later order, on June 12, 2013, awarding attorney fees in the amount of \$179,119 and Hearn noticed an appeal from that ruling.

<sup>3</sup> The motion for attorney fees is not in the record. However, all of the parties' arguments on appeal are premised on the assumption the fee award was based on the attorney fee clause of the subcontract, and counsel confirmed this at oral argument.

\*127 Second Generation Roofing then moved under both *Code of Civil Procedure sections 187* and *368.5*, and pursuant to the court's inherent powers, to amend both orders to name one of Hearn's two insurers, North American, as a judgment debtor owing the amounts awarded against Hearn. Second Generation Roofing argued that the cross-complaint had been prosecuted by North American as Hearn's assignee, in Hearn's purported name, and North American was in fact the true cross-complainant. In a footnote, it argued that “[a]t this time, for its own reasons, [Second Generation Roofing] does not seek an order providing it the same relief as against RSUI Group, Inc., the other insurer to \*\*815 whom Hearn assigned its rights, according to the assignment agreement.” Its papers argued, too, that the award against Hearn could not be readily collected, because Hearn was merely doing business as another entity that by then was apparently a dissolved corporation.<sup>4</sup>

<sup>4</sup> Second Generation Roofing introduced no evidence of the dissolution. Counsel for Hearn maintained at oral argument, however, that this is true.

The evidentiary basis for the motion consisted of the allegations of the first amended cross-complaint; the assignment agreement, as authenticated in a declaration by the Hearn board member who had entered into it, which had been filed in support of an earlier motion by Hearn for summary adjudication; and the sworn declaration of Hearn's counsel we have described, also submitted in support of an earlier summary adjudication motion.

Hearn submitted no evidence in opposition other than a declaration by its counsel stating, in pertinent part, that “Hearn's insurer [North American] agreed to defend Hearn in this matter under a Reservation of Rights, which limits the terms of its participation in the litigation to the defense of Hearn from the plaintiff's claims. The scope of [North American]'s defense of Hearn is closely circumscribed by the

terms of [North American]'s insuring agreement and does not extend to a duty to indemnify Hearn.”

Hearn also objected to the declaration by Hearn's board member that Hearn itself had submitted in support of its motion for summary adjudication and to the assignment agreement that declaration authenticated and attached as an exhibit. It argued those materials were inadmissible and should be disregarded because they had been filed in support of a different motion.

Hearn did not dispute the existence of the assignment. In its opposition memorandum of points and authorities, Hearn stated that “[a]fter Hearn sought reimbursement from the subcontractors for its defense costs, under the provisions of the subcontract agreements, some of the subcontractors, including Second Generation, refused to reimburse Hearn. Accordingly, Hearn assigned some of its contractual rights to its insurers so they might pursue the subcontractors separately to recover their defense costs.”

\*128 The trial court denied the motion in an eight-page ruling. It sustained Hearn's objection to the board member's summary adjudication declaration, ruling it inadmissible on the ground that “it would be unfair to bind Hearn by allegations, statements or concessions made in the context of a motion for summary adjudication for a wholly separate motion by Second Generation Roofing to amend a judgment.” It also ruled the motion was “procedurally defective, since the trial court lost jurisdiction of the matter on Hearn's appeal of the judgment.”

The court also denied Second Generation Roofing's motion on the merits. The fairest interpretation of its comments is that it understood a court's power under *section 187* to amend a judgment to add additional judgment debtors to be limited to alter ego cases, and concluded Second Generation Roofing had not proved Hearn and its insurer were alter egos.

The court's ruling under *section 368.5* is reflected in comments directed to the admissibility of Second Generation Roofing's evidence. The court stated: “Even if the Court were to accept the admissibility of Hearn's Motion for Summary Adjudication Declaration and accompanying assignment, the assignment does not extend any rights to Hearn's insurers which they did not \*\*816 already possess under the operation of law. *CCP § 368.5* permits a case to proceed unabated upon a party's assignment (or partial assignment) of rights to another party, with the case proceeding in the



original party's name. As such, Hearn remains the only proper party in this matter. Hearn's partial assignment of rights (that the subcontractors owe it under their subcontracts) to its insurers does not alter the fact that the litigation may continue in Hearn's name. After Hearn sought reimbursement from the subcontractors for its defense costs, under the provisions of the subcontract agreements, some of the subcontractors, including Second Generation Roofing, refused to reimburse Hearn. Accordingly, Hearn assigned some of its contractual rights to its insurers so they might pursue the subcontractors separately to recover their defense costs. [¶] Accordingly, Plaintiff's purported evidence is inadmissible."

The trial court also ruled that Second Generation Roofing's motion was improper, reasoning the subcontractor's exclusive remedy was to pursue a separate action against Hearn's insurers under *Insurance Code section 11580* to recover against Hearn's insurance policy proceeds, subject to the terms of the policies.

This timely appeal followed.

## \*129 DISCUSSION

### I.

#### *Evidentiary Issues*

Before turning to the merits, we first clarify that our review is based on all the evidence Second Generation Roofing submitted in the trial court. On appeal, Second Generation Roofing challenges the court's exclusion of some of its evidence, and we agree the trial court erred. Conversely, Hearn contends the allegations of its first amended complaint must be disregarded on appeal, and we reject that contention.

#### **A. The Trial Court Erroneously Excluded the Stankowski Declaration.**

[1] To recap, in support of its motion, Second Generation Roofing submitted two declarations that had been filed previously in support of summary adjudication motions. One was the "Declaration of Gordon Stankowski in Support of Defendant Hearn Pacific Corporation's Motion for Summary Adjudication Against Cross-Defendant Second Generation Roofing, Inc.," dated August 20, 2009, which attached a copy of the assignment agreement and authenticated it as

an agreement Stankowski, a Hearn board member, had entered into on Hearn's behalf. The other was the declaration by one of Hearn's attorneys, which averred among other things that "Hearn's defending insurers are suing in Hearn's name as transferees of Hearn's contractual indemnity rights, including the right to obtain equitable contribution for defense costs incurred herein from co-indemnitors such as Second Generation Roofing, Inc."

Second Generation Roofing contends the trial court erroneously excluded both declarations, and while we agree the trial court erred, the record shows Hearn objected to, and the trial court excluded, only the Stankowski declaration, including the attached assignment agreement.<sup>5</sup> The trial \*\*817 court ruled this declaration was inadmissible because it was filed in support of a motion for summary adjudication. Citing \*130 *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 100 Cal.Rptr.3d 658 (*Myers*), it reasoned that "[a] motion for summary adjudication, and its accompanying papers, are not pleadings within the definition of CCP § 422.10," and under *Myers* "it would be unfair to bind Hearn by allegations, statements or concessions made in the context of a motion for summary adjudication for a wholly separate motion by Second Generation Roofing to amend a judgment."

<sup>5</sup> Hearn's objection did not specify that declaration by name but unmistakably referred only to it, in the singular. Hearn objected to "evidence of a declaration and accompanying partial assignment of certain rights which was originally filed with this Court in support of a motion for summary adjudication." And it argued, "the Declaration and accompanying evidence (including the partial assignment agreement) relied upon by Second Generation in its motion must be disregarded...." The trial court's ruling likewise was framed in the singular, repeating the above-quoted portion of Hearn's objection *verbatim*. On appeal, Hearn does not argue the trial court excluded both declarations; it argues only that both are inadmissible.

The trial court erred in excluding this declaration. *Myers* offers no support for the court's ruling; the case deals with judicial admissions, not the rules of evidence. It holds that a factual concession in a separate statement of undisputed fact filed for purposes of a summary judgment motion does not constitute a binding judicial admission that estops a party

from later contesting the fact at trial. (*Myers, supra*, 178 Cal.App.4th at pp. 746–749, 100 Cal.Rptr.3d 658.)

Hearn nonetheless argues the case is analogous, because “the reasoning applied to any evidence not considered a pleading” filed in support of a summary judgment motion, and urges us to extend *Myers* to declarations. We disagree. *Myers* distinguished a separate statement of undisputed fact from evidentiary materials such as declarations. (See *Myers, supra*, 178 Cal.App.4th at p. 747, 100 Cal.Rptr.3d 658 [“ ‘It is not evidence (because not under oath or verified); nor is it a judicial admission’ ”].) Furthermore, Second Generation Roofing did not proffer the Stankowski declaration in order to *estop* Hearn from contesting any facts concerning the assignment; it did so in order to *prove* the fact of the assignment and its terms. Nothing in *Myers*’ reasoning precludes a party from reintroducing into evidence a declaration previously admitted into evidence on summary judgment, and we decline to extend *Myers* to this wholly different situation.

Nor was there any “unfair[ness] to Hearn.” Hearn was certainly free to respond with additional declarations or other evidence to try to rebut, or qualify, its board member’s earlier sworn statements, but it didn’t do that. The only unfairness we perceive would be to allow *it* to proffer this sworn declaration as evidence but then later prevent *its opponent* from doing exactly the same thing.

[2] Hearn did not below, and does not now, contend the Stankowski declaration is made inadmissible by any provision of the Evidence Code, and we agree with Second Generation Roofing it should have been admitted.<sup>6</sup> (See *Evid.Code*, § 351 [“Except as otherwise provided by statute, all relevant \*131 evidence is admissible”]; see also §§ 2011 [affidavit “is prima facie evidence of the facts stated therein”], 2015.5 [declarations under penalty of perjury]; \*\*818 *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 610, 15 Cal.Rptr.3d 793, 93 P.3d 386 [“A valid declaration has the same ‘force and effect’ as an affidavit administered under oath”]; *Bank of America Nat’l Trust & Savings Ass’n v. Taliaferro* (1956) 144 Cal.App.2d 578, 581–583[301 P.2d 393] (per curiam) [contract of assignment held properly admitted].)

<sup>6</sup> Evidentiary rulings ordinarily are reviewed for abuse of discretion, but because the trial court based its ruling here on a conclusion of law, our review is de novo. (See *Sargon Enterprises,*

*Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773[149 Cal.Rptr.3d 614, 288 P.3d 1237].) Furthermore, a court abuses its discretion by “ ‘ ‘transgress[ing] the confines of the applicable principles of law’ ” ’ ” (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 833[112 Cal.Rptr.2d 284]), so the distinction between standards of review is immaterial here since the trial court misapplied the law.

[3] Ordinarily, an appellate court may not rely upon evidence excluded by the trial court in reviewing the sufficiency of the evidence (see *Shepherd v. Turner* (1900) 129 Cal. 530, 532, 62 P. 106; *Arditto v. Putnam* (1963) 214 Cal.App.2d 633, 640, 29 Cal.Rptr. 700; 4 Cal.Jur.3d (2016) Appellate Review, § 335), but here there is no point in a remand for the trial court to reconsider its ruling in light of this improperly excluded evidence. When there is no conflict in the relevant extrinsic evidence, as here, the interpretation of a contract presents a pure question of law for the appellate court. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865–866, 44 Cal.Rptr. 767, 402 P.2d 839.) Therefore, we will proceed to an analysis of the merits based upon our independent determination of the assignment agreement’s meaning.

#### **B. The Allegations of the First Amended Complaint Are Properly Considered on Appeal.**

[4] Mounting yet another attack on the assignment, Hearn argues for the first time on appeal that the allegations of its first amended complaint concerning the assignment “have no evidentiary value,” because the complaint was unverified. But because Hearn did not object below to Second Generation Roofing’s reliance on those allegations, the contention is forfeited. “ ‘ “[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.” ’ ” (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

[5] [6] Furthermore, we agree with Second Generation Roofing that these allegations constitute a binding judicial admission, and Hearn’s evidentiary objection misses the point. Hearn cites authority standing only for the proposition that the allegations of an unverified complaint may not be used by the pleading party *offensively*, as evidence against another party in the context of a contested motion, because “the complaint was unverified and therefore could not serve as an affidavit.” (*Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, 212[114 Cal.Rptr. 743].) But a pleading

party may be \*132 bound by the factual allegations it makes in a complaint, even if the complaint is not verified.<sup>7</sup> “It is presumed that even an unverified pleading is filed with the consent of the client and should be regarded as an admission.” (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1412[235 Cal.Rptr. 165]; see, e.g., *Reichert v. Gen. Ins. Co.* (1968) 68 Cal.2d 822, 835-837[69 Cal.Rptr. 321, 442 P.2d 377] [allegation of unverified complaint held binding]; *Womack v. Lovell* (2015) 237 Cal.App.4th 772, 786-787[188 Cal.Rptr.3d 471] [same].) This is consistent with the nature and purpose of a pleading, whether verified or not: “ ‘An admission in the pleadings is not treated procedurally as evidence,’ ” because “ ‘it is fundamentally different from evidence: It is a waiver of proof of a fact by conceding its truth, and \*\*819 it has the effect of removing the matter from the issues.’ ” (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271[127 Cal.Rptr.2d 436], quoting 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510–511.) At least in the absence of some showing of mistake or inadvertence by the pleading party (*Reichherdt*, at pp. 836-837), and as long as the opposing party is not contesting the factual allegation (see *Barsegian v. Kessler & Kessler*, 215 Cal.App.4th 446, 451–453, 155 Cal.Rptr.3d 567), there is nothing unfair or inappropriate about holding a party to the truth of its unverified factual allegations. Therefore, we will not ignore Hearn's allegations in considering whether the trial court erred in denying Second Generation Roofing's motion.

<sup>7</sup> Exceptions have been recognized when an unverified complaint has been superseded by an amended pleading (see, e.g., *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456[154 Cal.Rptr.3d 87]) or is ambiguous (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1066–1067[14 Cal.Rptr.2d 604]), but neither is true here.

We now turn to the merits.

## II.

### *The Trial Court Abused Its Discretion in Declining to Amend the Judgment Under Code of Civil Procedure Section 368.5.*

The focus of much of the parties' lengthy briefing, and the trial court's ruling, is on *Code of Civil Procedure section 187*, a provision that empowers trial courts to amend a judgment to

add additional judgment debtors in appropriate circumstances and most frequently has been invoked in the context of alter egos (see, e.g., *Danko v. O'Reilly* (2014) 232 Cal.App.4th 732, 735–736[181 Cal.Rptr.3d 304]; *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1072–1073[130 Cal.Rptr.3d 123]; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 508–510[121 Cal.Rptr.3d 118]) or similar theories by which the corporate \*133 form of the original judgment debtor may be disregarded.<sup>8</sup> (See, e.g., *Carolina Casualty Ins. Co. v. L.M. Ross Law Group, LLP* (2012) 212 Cal.App.4th 1181, 1188–1194[151 Cal.Rptr.3d 628] [sole equity partner of dissolved limited liability partnership]; *McClellan v. Northridge Park Townhome Owners Ass'n* (2001) 89 Cal.App.4th 746, 752–755[107 Cal.Rptr.2d 702] [successor corporation].) But it is unnecessary here to decide whether, and to what extent, the court's equitable power to add an additional judgment debtor under *section 187* is limited to alter egos or similar veil-piercing scenarios. That question is somewhat complex, and the law unsettled. (Compare, e.g., *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 116[89 Cal.Rptr.2d 1] (*Tokio Marine*); *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1420[29 Cal.Rptr.2d 741] with *Carolina Casualty Ins. Co.*, at pp. 1188-1189[151 Cal.Rptr.3d 628]; *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 21–23[28 Cal.Rptr.2d 127]; *In re Levander* (9th Cir.1999) 180 F.3d 1114, 1122.)<sup>9</sup>

<sup>8</sup> *Code of Civil Procedure section 187* states: “When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”

<sup>9</sup> Hearn discusses at some length *Tokio Marine*, *supra*, 75 Cal.App.4th 110, 89 Cal.Rptr.2d 1 in an argument captioned under the heading, “The Assignment Does Not Create An Alter Ego.” *Tokio Marine* held that summarily adding a defendant's insurers to a judgment rendered against the insured not only was unauthorized by various provisions of the Code of Civil Procedure, including *section 187* (*Tokio Marine*, at pp. 116-117, 89 Cal.Rptr.2d 1), but also violated due process. (*Id.* at pp. 119-124, 89 Cal.Rptr.2d 1.) Hearn does not invoke the latter



holding nor contend that amending the judgment to add North American would offend due process, and so we have no occasion to address that issue. We note, however, that amending a judgment to insert the true name of the real party in interest who pursued claims to final judgment in the original plaintiff's name, as here, presents a considerably different due process calculus than amending a judgment to add the name of a nonparty who never participated, or asserted any claims, in the lawsuit. (Cf., e.g., *Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460, 120 S.Ct. 1579, 146 L.Ed.2d 530; *Higgins v. Kay* (1914) 168 Cal. 468, 471–473, 143 P. 710.)

**\*\*820** This case can be decided on a more straightforward ground. On its face, [section 187](#) applies only “if the course of proceeding be not specifically pointed out by this Code or the statute.” Here, the course of proceedings is specifically addressed by another provision of the [Code of Civil Procedure: section 368.5](#), quoted *ante*, which was the alternate basis for Second Generation Roofing's motion.

[7] [8] [9] [Section 368.5](#) is derived without substantive change from former [section 385](#). (22 Cal. Law Revision Com. Rep. (1992) p. 922.) Under the case law construing that statute, trial courts have discretion to allow litigation to continue in the name of the original plaintiff rather than substitute the transferee. ( **\*134** *Alameda County Home Inv. Co. v. Whitaker* (1933) 217 Cal. 231, 234[18 P.2d 662].) But the transfer of a party's interest in the subject of an action transfers the right to control the action. (*Walker v. Felt* (1880) 54 Cal. 386, 387; see also *Crescent Canal Co. v. Montgomery* (1899) 124 Cal. 134, 56 P. 797.) And if the action does continue in the original party's name, the original party remains as only a nominal party whereas the real party in interest is the transferee. (See *Crescent Canal Co.*, 124 Cal. at pp. 143, 144, 56 P. 797; *Tuffree v. Stearns Ranchos Co.* (1899) 124 Cal. 306, 308, 57 P. 69 (*Tuffree*)). “Possibly the opposing party, for reasons readily perceptible, might be desirous of having the real party in interest substituted as a party to the record; but if such party is willing to have matters stand *statu quo*, and the real party in interest is content to have matters proceed upon the old lines, ... [t]he real plaintiff or defendant simply uses the name of another in the further prosecution or defense of the action.” (*Tuffree*, at p. 309, 57 P. 69.) As Witkin describes it, “The transferee's election to allow the proceeding to continue in the name of the original party is at most a matter of procedural convenience.” (4 Witkin, [Cal. Procedure](#) (5th ed. 2008) [Pleading](#), § 263, p. 340.) It appears that in this case,

up until entry of the orders awarding fees and costs, the parties were content to allow matters to proceed in this fashion.

The statute was not meant to be used as a shield, however. For example, in *Keeling Collection Agency v. McKeever* (1930) 209 Cal. 625[289 P. 617], the Supreme Court observed in dictum that the buyer of property at issue in a foreclosure suit “could not avoid the requirement of [an appeal] bond through the device of continuing the appeal in the name of the nominal appellants (sec[ti]on 385, [Code Civ. Proc.](#)) rather than securing a substitution of parties.” (*Id.* at p. 628[289 P. 617].) And the Supreme Court in dictum has recognized an opposing party's right to ask that a transferee be substituted in under the statute. (See *Higgins v. Kay*, *supra*, 168 Cal. at p. 472, 143 P. 710; *Tuffree*, *supra*, 124 Cal. at p. 309, 57 P. 69; *Campbell v. West* (1892) 93 Cal. 653, 656[29 P. 219].) In particular, authority not cited by the parties recognizes a trial court's power to order that a judgment debtor's transferee be substituted in as a party, and ordered bound by the judgment, so that a judgment creditor does not get left holding **\*\*821** a judgment that proves difficult or impossible to collect. (See *Erickson v. Boothe* (1949) 90 Cal.App.2d 457, 459–460[203 P.2d 122].)

[10] [11] The trial court should have done so here. It gave no reason to continue the action solely in Hearn's name when Second Generation Roofing sought to add North American to the two orders, and none appears. By contrast, Second Generation Roofing had a liquidated right—adjudicated by court order—to collect its attorney fees and costs as a prevailing party. We **\*135** hold in these circumstances it was an abuse of discretion<sup>10</sup> to refuse its request to add the name of the real party in interest, Hearn's assignee, who pressed claims in the name of the party nominally adjudged liable by these orders. The trial court's denial of this relief appears to be arbitrary.<sup>11</sup>

<sup>10</sup> We review the court's ruling under [section 368.5](#) for abuse of discretion. (See *Erickson v. Boothe*, *supra*, 90 Cal.App.2d at p. 460, 203 P.2d 122 [applying former [section 385](#)].)

<sup>11</sup> Second Generation Roofing relies extensively on this court's decision in *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042[59 Cal.Rptr.2d 382], which involved somewhat similar facts but is inapposite. Like here, a general contractor assigned its indemnity rights to a party that then went on to lose

at trial on the assigned claims. (*Id.* at p. 1046, 59 Cal.Rptr.2d 382.) The trial court initially entered a judgment of nonsuit against the general contractor, the assignor. But it then granted a motion to correct the judgment to reflect entry of judgment against the assignee instead. (*Ibid.*) We agree with Hearn the case has no bearing because the trial court's modification of the judgment was not at issue on appeal. We held only that the modification was a substantial change resulting in a new final judgment that restarted the appeal period. (*Id.* at pp. 1047-1049, 59 Cal.Rptr.2d 382.)

[12] [13] Furthermore, as Second Generation Roofing argues, that relief is consistent with the law governing contractual attorney fees. Had Hearn's insurer exercised its right to formally substitute in as the real party in interest, rather than remain on the sidelines and sue in Hearn's name, it could have been held directly liable for Second Generation Roofing's prevailing party attorney fees under the subcontract, as an assignee. (See *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1086-1087[25 Cal.Rptr.3d 39] (*Erickson*) [deciding the issue as a matter of law]; *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1288-1292[87 Cal.Rptr.2d 497] (*Heppler*) [deciding the issue on the basis of conflicting extrinsic evidence, under substantial evidence standard]; *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 605-610[117 Cal.Rptr.2d 390] [deciding the issue as a matter of law].) That is because an assignee's acceptance of the benefits of a contract containing a fee clause, by bringing suit, constitutes an implied assumption of the attorney fee obligations, unless there is evidence the parties did not intend to transfer those fee obligations.<sup>12</sup> ( \*\*822 *Erickson*, at p. 1087, 25 Cal.Rptr.3d 39; see also *Heppler*, at pp. 1289-1292, 87 Cal.Rptr.2d 497; Civ.Code, §§ 1589, 3521.) And that is true even if, like here, there is only a partial assignment of contractual rights. (See *Erickson*, at pp. 1086-1087, 25 Cal.Rptr.3d 39.) \*136 Indeed, even outside the attorney fee context, an assignee's voluntary acceptance of the benefits of a contract may obligate the assignee to assume its obligations as a matter of law, even if the assignment agreement expressly *excludes* the obligations, as in the authority Hearn cites. (See *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 790, 131 Cal.Rptr.2d 347.)<sup>13</sup> Hearn's insurer cannot evade responsibility for paying Second Generation Roofing's costs and legal fees solely because of its tactical choice to keep Hearn's name, not its own, on the case caption. We do not

think the discretion afforded a trial court to continue an action in the transferor's name under section 368.5 was meant as a get-out-of-jail-free card, to insulate the real party in interest from exposure to liability for costs and fees when the litigation they pursue concludes unfavorably.

12 There is no such evidence here. On the contrary, the first amended complaint contains a prayer for attorney fees, which shows Hearn's insurer was indeed “ ‘primed to take the benefits of an award of attorney fees’ ” if it won. (See *Erickson, supra*, 126 Cal.App.4th at p. 1087, 25 Cal.Rptr.3d 39, citing *Heppler, supra*, 73 Cal.App.4th at p. 1291, 87 Cal.Rptr.2d 497; see also *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc., supra*, 96 Cal.App.4th at p. 608 & fn. 6, 117 Cal.Rptr.2d 390.) We express no opinion concerning litigation undertaken pursuant to an assignment for the benefit of creditors, however, which presents considerations unique to that role. (See *Sherwood Partners, Inc. v. EOP-Marina Business Center, L.L.C.* (2007) 153 Cal.App.4th 977, 981-983[62 Cal.Rptr.3d 896] [assignee for benefit of creditors not liable for contractual attorney fees under assigned lease].)

13 Other authority Hearn cites involves quite different facts, and is inapposite. (See *Griffin v. Williamson* (1955) 137 Cal.App.2d 308, 315[290 P.2d 361] [assignment of business assets to newly formed partnership did not render partners liable for pre-existing debt].)

On appeal, Hearn does not seriously address section 368.5. It contends the assignment is invalid, which we address below. It asserts North American “was completely unaware” of the subcontract's terms and so could not assume its obligations; but it cites nothing in the record to support that factual assertion, which is raised improperly for the first time on appeal and also is defied by the prayer for attorney fees in its complaint (see fn 12, *ante* ). Moreover, the authorities it cites do not involve parties who press suit to enforce assigned contractual rights but then, later, try to escape contractual burdens relating to the conduct of litigation. (See *Recorded Picture Company [Productions] Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 363-368[61 Cal.Rptr.2d 742]; *Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 421[75 Cal.Rptr.3d 368]; but see, e.g., *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 83-84[100 Cal.Rptr.2d 683] [distinguishing

*Recorded Picture Co.*.) Apart from that, it asserts—without citing any legal authority (or, again, any portion of the record)—that “even if the assignment was valid, it only assigned a portion of the contract provisions” and so “the application of CCP § 368.5 is not applicable,” and “Hearn remained the only party asserting its claims against Second Generation.”

We disagree. It was Hearn that first invoked this statute below, in paragraph 18 of its first amended complaint. It alleged “HEARN’s insurers are asserting claims in this action in the name of the [*sic*] HEARN assigned to them by HEARN through operation of law.” And it alleged they were doing so “[p]ursuant to C.C.P. § 368.5.” For Hearn to turn around now and argue the opposite—that “Hearn remained the only party asserting its claims” and that section 368.5 does not apply—without so much as even a nod to what it said in its pleadings, is baffling. There are limits to appellate \*137 advocacy, chief among them a duty of candor to the court. (*Rules Prof. Conduct, rule 5–200.*) It may be Hearn has some explanation for its change of tune, but the explanation is not to be found in the 32 pages of briefing Hearn has filed on appeal, nor did it surface in any way at oral argument. Responsible (not to mention, effective) appellate advocacy requires confronting serious potential \*\*823 obstacles, not burying one’s head in the sand to them, be they potentially controlling adverse authorities or problematic portions of the record. As has been said by the federal circuit that is home to Chicago’s Lincoln Park Zoo: “The ostrich is a noble animal, but not a proper model for an appellate advocate.” (*Gonzalez-Servin v. Ford Motor Co. (7th Cir.2011) 662 F.3d 931, 934* [Posner, J.]).

Furthermore, Hearn’s current position is not the law. It is well-settled that former applies to partial assignments too. This principle dates back more than a century. (*section 385 Cerf v. Ashley (1886) 68 Cal. 420, 420[9 P. 658]* [“It would be too narrow a construction of this section to hold that it applies only where the transfer is of the entire interest”]; accord, *Crescent Canal Co. v. Montgomery, supra*, 124 Cal. at p. 145, 56 P. 797.) This court addressed partial assignments in a decision of more modern vintage involving similar facts, in *Bank of Orient v. Superior Court (1977) 67 Cal.App.3d 588[136 Cal.Rptr. 741]*. There, we held that an insurer to whom a cause of action had been partially assigned is an indispensable party who *must* be joined as a party plaintiff. (*Id.* at pp. 595–596, 136 Cal.Rptr. 741.) In that context, we observed that former section 385 “has no application to instances where partial assignees or partial subrogees are required to be joined” as indispensable parties (*Bank of Orient, at p. 596[136 Cal.Rptr. 741]*, italics omitted), which

we understand to mean the court has no discretion in that situation to *permit* continued suit solely in the original party’s name.

On this record, it also appears the partial nature of this assignment is a red herring. It is true the language of the assignment agreement reserves for Hearn some residual interest in claims for defense cost reimbursement against Second Generation Roofing. Specifically, Hearn retained the right to seek reimbursement under the subcontracts “to the extent *it* has incurred defense costs or other expenses defending against the subject action, prosecuting its cross-complaint or satisfying or paying insurance policy deductibles or self-insured retentions,” while assigning to its insurers its right to seek reimbursement under the subcontracts “to the extent of the defense costs or other expenses *incurred by the INSURERS*” in the case. (Italics added.) But it appears from the face of the amended complaint that Hearn *qua* Hearn did not assert any claim based on its retained, unassigned interest. That is, there is nothing on the face of the first amended complaint indicating that Hearn itself sought reimbursement for litigation expenses it incurred out of its own pocket, as contrasted with the litigation expenses paid by its insurers. On the contrary, the first amended complaint alleges a complete assignment of rights, \*138 which suggests any unassigned rights were not in play (“HEARN assigned its rights under the subcontracts with the cross-defendants ... to its insurers on August 20, 2009”); it alleged that “HEARN’S insurers are asserting claims in this action in the name of the [*sic*] HEARN” (italics added); and it alleged that “HEARN did not literally pay its defense costs.” That pleading also alleged that Hearn’s “co-obligors” (presumably, its insurers) “are providing HEARN with a defense from Plaintiff’s claims in this action and are incurring costs for attorneys’ fees, experts, and other costs and expenses related to the subject litigation.” So, any distinction between partial and complete assignments is immaterial.

[14] These allegations, moreover, substantiate that the real party in interest was Hearn’s insurer. A party whose litigation expenses are paid entirely by its insurer has no standing to recover its legal \*\*824 fees against a contractual indemnitor, because the party has suffered no contractual damage. (See *Bramalea California, Inc. v. Reliable Interiors, Inc. (2004) 119 Cal.App.4th 468, 472–473[14 Cal.Rptr.3d 302] (Bramalea)*.) However, a party *can* pursue an indemnification action in its own name in that circumstance if, as was done here, it assigns its claim to its insurer. In that case, the insurer is the real party in interest but continued suit in the original

party's name is authorized by section 368.5. (See *Bramalea*, at pp. 473–474, 14 Cal.Rptr.3d 302, citing *Greco v. Oregon Mut. Fire Ins. Co.*, supra, 191 Cal.App.2d 674, 687, 12 Cal.Rptr. 802, citing, *inter alia*, former *Code Civ. Proc.*, § 385.) Some of these authorities are in fact the very ones Hearn cited in the first amended complaint.

[15] That Hearn's insurers were actually in the driver's seat, pursuing this lawsuit, is also evidenced by the claims themselves, some of which were self-evidently pursued by Hearn's insurers in their own right, not derivatively as assignees of Hearn. Specifically, the two causes of action for equitable contribution belonged to Hearn's insurers. Such a claim may be asserted by multiple insurers of the same insured and the same risk, each of which “has an independent standing to assert a right for equitable contribution when it has undertaken the defense and/or indemnification of their common insured.” (*Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 350[70 Cal.Rptr.2d 255].) And, “[t]his right is not the equivalent of ‘standing in the shoes’ of the insured.” (*Ibid.*)

At oral argument, Respondent's counsel effectively conceded that the cross-claims were litigated solely for the benefit of Hearn's insurer after the settlement. Specifically, counsel: (i) confirmed that the settlement resolved all claims against Hearn, and that after the settlement there remained only the issue of the defense costs Hearn's insurer had paid on Hearn's behalf, (ii) acknowledged that Hearn's indemnity claims were assigned, (iii) disclosed that the assignment's only purpose was to facilitate North American's \*139 recovery of those insurer-paid defense costs, by avoiding the holding of *Bramalea*, supra, 119 Cal.App.4th 468, 14 Cal.Rptr.3d 302,<sup>14</sup> (iv) maintained he represents both Hearn and its insurer which retained him, under the tripartite relationship that arises between an attorney, insurer and insured when the carrier retains counsel for its insured (see generally *Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089–1096, 151 Cal.Rptr.3d 526),<sup>15</sup> and (vi) represented that pursuit of the cross-complaint after the assignment was for North American's sole benefit, and that for all practical purposes Hearn was indifferent as to the outcome of Second Generation's motion because it has dissolved \*\*825 and “effectively” has no assets.<sup>16</sup> As to the latter point, too, it seems obvious to us that the undisputed circumstance that Hearn might now be judgment-proof is all the more reason it was inappropriate to deny Second Generation Roofing's motion, leaving it without recourse to

the assets of the real party in interest who owned these claims, and controlled this case, after the assignment.

14 Under *Bramalea*, a contractual indemnitee whose defense was entirely funded by insurance and paid nothing itself out-of-pocket may not recover its defense costs as contractual indemnity damages. (*Bramalea*, supra, 119 Cal.App.4th at pp. 472–473, 14 Cal.Rptr.3d 302.)

15 According to one leading commentator, “[T]he attorney's duty to the insurance company is subordinate to that owed to the insured” in this situation, which “often puts defense counsel in a difficult situation. As one court has noted, ‘... in reality, the insurer's attorneys may have closer ties with the insurer and more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured.’” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2016) ¶¶ 7:846–7:847, pp. 7B–138–7B–139, citing *Purdy v. Pac. Auto. Ins. Co.* (1984) 157 Cal.App.3d 59, 76[203 Cal.Rptr. 524].)

16 Hearn's counsel also contends this circumstance avoids a conflict of interest in the representation, and although we have concerns, that is an issue we do not decide.

[16] [17] [18] For all of these reasons, then, we reject Hearn's argument that “Hearn remained the only party asserting its claims against Second Generation.” By all accounts, and as ultimately conceded by counsel, Hearn *qua* Hearn was out of this case following the assignment. The court abused its discretion in declining to amend the orders awarding attorney fees and costs to add North American's name as a judgment debtor.<sup>17</sup>

17 The question of personal jurisdiction was not raised below nor addressed by the trial court. However, on appeal Second Generation Roofing contends the trial court has personal jurisdiction over North American, by virtue of its acceptance and prosecution of the rights assigned to it. We agree. A plaintiff consents to the court's exercise of jurisdiction by the very act of asserting its claims. (See 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 161, p. 764 [“the plaintiff, by



bringing the action, submits himself or herself to the jurisdiction of the court with respect to the cause of action”].) Here, the first amended complaint alleges, and a sworn declaration of counsel states, that Hearn's insurers were suing (under Hearn's name). No formal substitution was necessary for jurisdiction to attach against them. (See *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 Cal.App.3d 260, 267-268[261 Cal.Rptr. 484].) Furthermore, there is no evidence Hearn's counsel lacked authority to appear on North American's behalf in pursuit of the assigned claims (see *Milrot v. Stamper Medical Corp.* (1996) 44 Cal.App.4th 182, 186[51 Cal.Rptr.2d 424] (*Milrot*)), and even had Hearn's counsel not indicated during oral argument that he also represents Hearn's insurer, we could presume Hearn's counsel did have authority. “In the event of a transfer of interest in a pending action, the attorney for the nominal party/assignor does not automatically cease to be the attorney of record.” (*Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 121[87 Cal.Rptr.2d 603], disapproved on another ground in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 484[127 Cal.Rptr.2d 614, 58 P.3d 450]; see, e.g., *Tuffree, supra*, 124 Cal. at pp. 309–310[57 P. 69].) And “ ‘it is always presumed, until the contrary appears, that an attorney is duly authorized to appear for and represent any parties for whom he assumes to act.’ ” (*Pacific Paving Co. v. Vizelech* (1903) 141 Cal. 4, 8–9[74 P. 352]; see also *Turner v. Caruthers* (1861) 17 Cal. 431, 433.)

### \*140 III.

#### *The Trial Court's Grounds for Denying the Motion*

##### A. Insurance Code Section 11580

As noted, the trial court articulated several reasons for denying Second Generation Roofing's motion, one of which was that Second Generation Roofing's sole remedy was to bring an action under *Insurance Code section 11580*. However, that statute does not provide any remedy on this record, much less an exclusive one.

[19] [20] In appropriate cases, *Insurance Code section 11580* enables a judgment creditor to bring a direct action against the judgment debtor's insurer to satisfy the judgment

out of policy proceeds.<sup>18</sup> One key requirement, however, is \*\*826 that the insurance policy covers the relief awarded in the judgment. (*Miller v. Am. Home Assurance Co.* (1996) 47 Cal.App.4th 844, 847–848[54 Cal.Rptr.2d 765].) In this case, Hearn did not introduce any evidence its insurance policy would cover the award of prevailing party attorney fees and costs made to Second Generation Roofing. The policy itself is not in the record, and the only evidence Hearn did introduce *disclaimed* coverage.<sup>19</sup> On appeal, Hearn adverts to that evidence in its brief and expressly disavows coverage again. It tells this court, North American “has no obligation to satisfy judgments imposed upon its insured Hearn.” Furthermore, as Second Generation Roofing points out, an award of costs or attorney fees is typically not recoverable by a third-party judgment creditor in a direct action against the insurer. (See *San Diego Housing Com. v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669, 691–693[116 Cal.Rptr.2d 103]; accord, \*141 *Clark v. California Ins. Guarantee Assn.* (2011) 200 Cal.App.4th 391[133 Cal.Rptr.3d 1].) So, for these reasons, the trial court had no basis to conclude there was a potential remedy under *Insurance Code section 11580*.

18 The statute reads into every policy of liability insurance issued in California a direct action provision, stating that “whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.” (*Ins.Code, § 11580, subd. (b)(2)*.)

19 That was the declaration of Hearn's counsel, which described North American's agreement to defend Hearn under a reservation of rights as being “closely circumscribed by the terms of [its] insuring agreement” and “not extend[ing] to a duty to indemnify Hearn.”

[21] But even if there were a remedy, we also agree with Second Generation Roofing the statute is irrelevant, and in no way displaces a litigant's right to amend a post-judgment order to add the name of a judgment debtor who was the true party to the action, even when that party is an insurer. *Insurance Code section 11580* authorizes a direct action “against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.” (*Ins.Code, § 11580, subd. (b)(2)*.) Second

Generation Roofing was not seeking to “recover on” a judgment (out of insurance proceeds, or any other specific fund) but to *amend* a judgment, to reflect the true name of a judgment debtor directly liable in its own name for the amounts awarded by that judgment. Nor was it trying to recover “on the policy.” The relief it sought was premised on North American's assignment and exercise of rights from Hearn, not North American's status as Hearn's insurer. We agree that if Second Generation Roofing wished to proceed against policy benefits to satisfy these post-judgment orders, it must assert a claim against Hearn's insurers under [Insurance Code section 11580](#), but that is not what it was trying to do.

The trial court's conclusion that Second Generation Roofing's “only avenue for relief” was to pursue a direct action under [Insurance Code section 11580](#) has no support in either the text of the statute itself, or principles of statutory interpretation. As noted, that provision states that “an action may be brought against the insurer on the policy” by a judgment creditor in specified circumstances. ([Ins.Code, § 11580, subd. \(b\)\(2\)](#).) The trial court apparently construed this language to mean that recovery by an insured's judgment creditor may be had against an insurer “only” by means of a direct action on the policy. But we cannot insert that limitation under the guise of interpreting [section 11580](#). (See [County of Santa Clara v. Escobar](#) (2016) 244 Cal.App.4th 555, 570–571, 198 Cal.Rptr.3d 646.) “It is of course a ‘cardinal rule’ of statutory construction that a law ‘is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its **\*\*827** express provisions.’ ” (*Id.* at p. 571, 198 Cal.Rptr.3d 646; see also [Code Civ. Proc., § 1858](#) [in construing statutes, court may not “insert what has been omitted”].) The text of this statute contains no ambiguity, and so “we presume the Legislature meant what it said, and the plain meaning of the statute governs.” ([People v. Allegheny Cas. Co.](#) (2007) 41 Cal.4th 704, 709, 61 Cal.Rptr.3d 689, 161 P.3d 198.) Nothing in the text of [section 11580](#) “declare[s] in definite language” that a direct action against an insurer on the policy is a judgment creditor's sole remedy (see [County of Santa Clara](#), at p. 571, 198 Cal.Rptr.3d 646), and we decline to adopt that construction.

**\*142** Furthermore, nothing on the face of [Insurance Code section 11580](#) exempts insurers from the operation of [section 368.5 of the Code of Civil Procedure](#). There is simply no conflict between the text of these two statutes. The authorities Hearn cites do not address this question. (See [Webster v.](#)

[Superior Court](#) (1988) 46 Cal.3d 338, 346–348, 250 Cal.Rptr. 268, 758 P.2d 596 [construing statutory stay governing insurance liquidation proceedings]; [Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.](#) (9th Cir.1986) 784 F.2d 1392, 1403–1406 [section 11580 held applicable to policy indemnifying loss from liability for personal injury, and constitutional as applied to out-of-state contract].)

At oral argument, Hearn acknowledged there is nothing in the statute's text that explicitly provides it is an exclusive remedy, but nonetheless argued for that construction because, in its view, [subdivision \(b\) of section 11580](#) otherwise would be rendered “completely unnecessary.” We disagree. The argument is circular. Subdivision (b) is the direct action remedy. (See [Ins.Code, § 11580, subd. \(b\)\(2\)](#).) All policies of insurance covered by the statute, whether they contain the direct action language required by subdivision (b)(2), “shall be construed as if such provisions were embodied therein.” (See *id.* § 11580, first paragraph.) Hearn's argument boils down to the illogical contention that the mere existence of the remedy makes it an exclusive one.

[22] [23] Hearn cites no authority holding that [Insurance Code section 11580](#) is a judgment creditor's sole remedy against an adversary's insurer, and we are aware of none. On the contrary, judgment creditors may sometimes pursue *damages claims* against the judgment debtor's insurer. One California court has held they may do so in their own right, and seek tort damages as a third-party beneficiary of the policy, if there is a final judgment rendered against the insured that is covered by the policy and the insurer refuses in bad faith to pay it. ([Hand v. Farmers Ins. Exchange](#) (1994) 23 Cal.App.4th 1847[29 Cal.Rptr.2d 258] (*Hand*); accord, [Low v. Golden Eagle Ins. Co.](#) (2002) 101 Cal.App.4th 1354, 1368[125 Cal.Rptr.2d 155]; [Gulf Ins. Co. v. TIG Ins. Co.](#) (2001) 86 Cal.App.4th 422, 433[103 Cal.Rptr.2d 305]; [Harper v. Wausau Ins. Co.](#) (1997) 56 Cal.App.4th 1079, 1086[66 Cal.Rptr.2d 64].)<sup>20</sup> And it is well-settled judgment creditors may bring suit under an assignment of rights from the insured in some instances **\*\*828** too. For example, subject to some **\*143** limitations, a judgment creditor may bring suit on an assigned claim the insurer wrongfully failed to settle within policy limits, in which case the measure of damages is the entire amount of the judgment even if it exceeds policy limits.<sup>21</sup> (See [Comunale v. Traders & General Ins. Co.](#) (1958) 50 Cal.2d 654, 661–662, 328 P.2d 198; [Samson v. Transamerica Ins. Co.](#) (1981) 30 Cal.3d 220, 236–243, 178 Cal.Rptr. 343, 636 P.2d 32.) A judgment creditor also may take an assignment of the insured's claim

that the insurer wrongfully refused to defend it. (See *Risely v. Interinsurance Exchange of Automobile Club* (2010) 183 Cal.App.4th 196, 208, 213–214, 107 Cal.Rptr.3d 343 (*Risely* ).) And sometimes attorney fees on assigned claims are recoverable too, if sought by judgment creditors as tort damages under *Brandt v. Superior Court* (1985) 37 Cal.3d 813[210 Cal.Rptr. 211, 693 P.2d 796]. (*Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, 1255[45 Cal.Rptr.3d 362, 137 P.3d 192].)

20 Some authorities have questioned this in dictum. (See *San Diego Housing Com. v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669, 687–688, 116 Cal.Rptr.2d 103; *Hughes v. Mid-Century Ins. Co.* (1995) 38 Cal.App.4th 1176, 1184, 45 Cal.Rptr.2d 302; cf. *CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 276–277, 31 Cal.Rptr.3d 619 [assuming but not deciding *Hand* was correctly decided]; see also *Maxwell v. Fire Ins. Exchange* (1998) 60 Cal.App.4th 1446, 1452, 70 Cal.Rptr.2d 866 [declining without analysis to follow *Hand* to the extent it would permit recovery of emotional distress damages for 81–day delay in paying judgment creditor in full].)

21 Such a claim may not be predicated upon a stipulated judgment (see *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 117 Cal.Rptr.2d 318, 41 P.3d 128; *21st Century Ins. Co. v. Superior Court* (2015) 240 Cal.App.4th 322, 327, 192 Cal.Rptr.3d 530), nor an award of punitive damages. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 313, 84 Cal.Rptr.2d 455, 975 P.2d 652.)

[24] [25] [26] [27] These cases also reflect that it is not uncommon for judgment creditors to assert, in a single lawsuit against an insurer, both damages claims assigned to them by the insured as well as a direct claim on the judgment under Insurance Code section 11580. (See, e.g., *Risely, supra*, 183 Cal.App.4th at pp. 201–203, 107 Cal.Rptr.3d 343; *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 458, fn. 7, 467–468, 64 Cal.Rptr.3d 632.) The latter claim will not be viable if policy limits have been exhausted. (*Archdale*, at pp. 458, fn. 7, 480, fn. 28, 64 Cal.Rptr.3d 632.) But policy limitations that would otherwise apply in a direct action brought under Insurance Code section 11580 do not apply to an assigned bad faith claim. (See *Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 43 & fn.4, 32 Cal.Rptr.2d

354.) In most of these situations, what is really going on is the judgment creditor is attempting to satisfy all or part of its judgment through a claim for contract and/or tort damages against the insurer, rather than through (or, in addition to) a direct action on the judgment. Yet this entire body of law would be meaningless if the direct action provision of Insurance Code section 11580 constituted a judgment creditor's sole avenue for relief against an insurer.<sup>22</sup>

22 We offer these examples merely for illustration, and by no means suggest an insurer's liability to a judgment creditor is open-ended. An insurer cannot be held liable in damages to a judgment creditor for allegedly pursuing a meritless appeal of a judgment against its insured, for example, because the appropriate remedy in that instance lies in the pursuit of appellate sanctions. (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 226 Cal.Rptr. 90, 718 P.2d 77.) Similarly, an insurer that appeals an adverse judgment rendered against *it*, and posts a bond to stay its execution, cannot be held liable in tort to the judgment creditor for refusing to pay the judgment. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1766, 31 Cal.Rptr.2d 224.)

\*144 Two published California opinions have rejected arguments the statute displaces other rights or remedies against insurers, and their reasoning applies equally here. In *Turner v. Evers* (1973) 31 Cal.App.3d Supp. 11, 107 Cal.Rptr. 390, disapproved on other grounds in *Javorek v. Superior Court* (1976) 17 Cal.3d 629, 641, 131 Cal.Rptr. 768, 552 P.2d 728, the appellate department of superior court held \*\*829 Insurance Code section 11580 does not override the remedy of garnishment, embodied by former section 544 of the Code of Civil Procedure. (See *Turner*, at pp. 22–24, 107 Cal.Rptr. 390.) Among other reasons, “[t]here is nothing in section 11580, subdivision (b) to indicate that it was intended to exempt insurers from garnishment and thus given them a benefit that other obligors of the insured do not enjoy.” (*Id.* at p. 23, 107 Cal.Rptr. 390; see also *id.* at p. 24, 107 Cal.Rptr. 390 [“Since section 11580, subdivision (b) does not refer to garnishments, we should not expand it to nullify the application of section 544 to insurers”].) And in *Roberts v. Home Insurance Indemnity Co.* (1975) 48 Cal.App.3d 313, 121 Cal.Rptr. 862 (*Roberts* ), our colleagues in Division Four held the statute was no bar to a personal injury plaintiff's action against an insurer under Louisiana's direct action statute, which permits an injured plaintiff to sue the tortfeasor's insurer directly on the policy without awaiting



a final judgment against the insured. (*Id.* at pp. 317–318, 121 Cal.Rptr. 862.) Citing *Turner*, the court reasoned in part, “The statute is silent as to a direct action against the insurer before judgment is obtained against the insured. [Citation.] That silence does not imply a legislative policy against allowing a claimant to pursue any rights which may have been created by contract or by another state’s direct action statute.” (*Ibid.*) We have described *Roberts* as “an exception to the rule [that] ... ‘generally speaking the injured party may not directly sue an insurer of the alleged tortfeasor.’ ” (*Hoteles Camino Real, S.A. v. Superior Court* (1977) 70 Cal.App.3d 367, 373, 138 Cal.Rptr. 807.)

The Ninth Circuit parted ways with *Turner* and *Roberts* in *Fireman’s Fund Ins. Co. v. City of Lodi, California* (9th Cir.2002) 302 F.3d 928, which held section 11580 conflicts with, and therefore preempted, a local law that would permit a direct action on an insurance policy before entry of a final judgment. (See *Fireman’s Fund Ins.*, 302 F.3d at pp. 955–956.) The Ninth Circuit acknowledged both decisions “support the conclusion that § 11580 does not set forth the exclusive set of circumstances under which one may initiate a direct action against an insurer.” (*Id.* at p. 955.) But it reasoned, “there is greater authority to suggest that § 11580 sets forth the exclusive set of circumstances under which a third-party claimant may directly sue another policyholder’s liability insurer.” (*Ibid.*) That observation, however, is not supported by the cited authorities, none of which addresses \*145 whether Insurance Code section 11580 displaces other rights or remedies.<sup>23</sup> We therefore part \*\*830 ways with *Fireman’s Fund* to the extent its broad language is inconsistent with our decision. We find the reasoning of *Turner* and *Roberts* persuasive, insofar as their textual analysis of the statute is concerned, and equally pertinent to the application of section 368.5. Indeed, this case presents even less reason to infer a potential conflict with Insurance Code section 11580, because Second Generation Roofing is not seeking to secure any policy benefits.

<sup>23</sup> *McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282, 19 Cal.Rptr.2d 286 holds that a “judgment” made enforceable by Insurance Code section 11580 must be final, in the sense that any appeal from it has been exhausted or the appeal deadline has passed. (*McKee*, at pp. 285–287, 19 Cal.Rptr.2d 286). *Nationwide Ins. Co. v. Superior Court* (1982) 128 Cal.App.3d 711, 180 Cal.Rptr. 464 addressed the elements of a (now-abrogated) third party cause of

action against an insurer for bad faith settlement practices under *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 153 Cal.Rptr. 842, 592 P.2d 329, overruled in *Moradi–Shalal v. Fireman’s Fund Ins. Companies* (1988) 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58, similarly holding the claim does not exist until a final judgment against the insured is entered, from which appeals have been exhausted. (*Nationwide Ins. Co.*, at pp. 713–715, 180 Cal.Rptr. 464.)

*Zahn v. Canadian Indem. Co.* (1976) 57 Cal.App.3d 509, 129 Cal.Rptr. 286, a pre-*Royal Globe* decision, declined to recognize a cause of action by injured third parties for an insurer’s bad faith refusal to settle a case before any judgment against the insured had been entered. It reasoned not that such a claim is barred by section 11580 but, on the contrary, that the injured party was not a third-party beneficiary of the insurance policy unless and until there was a judgment against the insured, as reflected by the direct action statute itself. (See *Zahn*, at p. 513, 129 Cal.Rptr. 286.)

*Tashire v. State Farm Fire & Casualty Co.* (9th Cir.1966) 363 F.2d 7, revd. (1967) 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270, involved a question of federal subject matter jurisdiction in an insurer’s interpleader action against several California tort plaintiffs and others that turned on an interpretation of the federal interpleader statute (28 U.S.C. § 1335). Neither the Ninth Circuit’s opinion nor the Supreme Court’s addresses whether section 11580 would provide the injured parties who were named in the federal case an exclusive remedy against the insurer.

And, *Laguna Pub. Co. v. Employers Reinsurance Corp.* (C.D.Cal.1985) 617 F.Supp. 271 held that a judgment creditor lacks standing to sue under section 11580 where the judgment had been set aside, and also cannot sue the insurer under *Royal Globe* in that circumstance because there is not yet a final judgment. (*Id.* at pp. 272–273.)

Accordingly, we hold that Insurance Code section 11580 does not bar a judgment creditor’s motion under section 368.5 to amend a judgment to add an insurer as a judgment debtor on the ground that the insurer is the real party in interest by virtue of its having taken an assignment of the rights and claims at issue in the case and litigated the case to final judgment.

### \*146 B. Subrogation

[28] In denying the motion, the trial court also commented that “the assignment does not extend any rights to Hearn’s insurers which they did not already possess under the operation of law.”

Second Generation Roofing suggests the court possibly had in mind here principles of insurance subrogation, and argues at some length that, if so, the point is irrelevant. It contends that “regardless of what [North American] supposedly could have done, what it actually did was to take an assignment of rights from Hearn and prosecute the rights assigned to it against [Second Generation Roofing] in ‘Hearn’s’ name.”

We agree. As previously explained, the transfer of Hearn’s interests in the subcontracts made North American the real party in interest in this suit, and the existence of another potential remedy under subrogation principles is irrelevant to the application of [section 368.5](#). Second Generation Roofing also points out, correctly, that an insurer who pursues a subrogation claim steps into the shoes of its insured and, if unsuccessful, assumes the insured’s liability for contractual attorney fees to the prevailing party. (See *Employers Mutual Liability Ins. Co v. Tutor–Saliba Corp.* (1998) 17 Cal.4th 632, 639–642, 71 Cal.Rptr.2d 851, 951 P.2d 420; *Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1799–1801, 54 Cal.Rptr.2d 541.) So it would make little sense to refrain from making North American expressly liable for the attorney fees and costs awarded here based on the possibility North American might have pursued recovery against Second Generation Roofing on a subrogation theory.

### C. The Trial Court Did Not Lack Jurisdiction to Amend the Order.

[29] The trial court also denied the motion on the ground that Hearn’s notice of appeal from the June 12, 2013 attorney fees order divested the court of jurisdiction to amend the order to add North **\*\*831** American as a judgment debtor. However, the earlier, April 4, 2013 award of costs was not appealed and so, at a minimum, the court could not have been divested of jurisdiction over it.

[30] Nor was the court divested of jurisdiction to amend the June 12, 2013 order. Hearn’s appeal from that order was untimely and we have dismissed it. The automatic stay, when it applies, arises upon a “duly perfected” appeal. (See *Sacks v. Superior Court* (1948) 31 Cal.2d 537, 540, 190 P.2d 602; see also § 916.) Since Hearn’s appeal was invalid, it did not

affect the trial court’s jurisdiction to proceed. (See *Central Sav. Bank v. Lake* (1927) 201 Cal. 438, 442, 257 P. 521 [appeal from non-appealable order]; *Ex parte Kandarian* (1921) 187 Cal. 479, 480, 202 P. 647 [untimely appeal] \*147 *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666, 73 Cal.Rptr.2d 242; *Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 124, 32 Cal.Rptr. 208.)

## IV.

### *Hearn’s New Contentions on Appeal*

Finally, we come to a number of new arguments Hearn has made on appeal in defense of the trial court’s ruling.

#### A. Ripeness

[31] [32] [33] First, Hearn argues the issue of amending these orders is not ripe because it has appealed the order awarding fees and costs. But the error of Hearn’s contention is evident from the very authority it cites, *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 188 Cal.Rptr. 104, 655 P.2d 306. As the Supreme Court explained in that case, the ripeness requirement “prevent[s] judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes.” (*Id.* at p. 170, 188 Cal.Rptr. 104, 655 P.2d 306.) It “is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion.” (*Ibid.*) While we agree with Hearn that “It would be a waste of judicial resources to consider altering a judgment to add a debtor if the Court may dispose of the judgment entirely through Hearn’s appeal” seeking to reverse the judgment, that potential for mootness in no way renders these issues unripe. There is a present and existing, concrete dispute as to whether Hearn’s insurer should be added to these postjudgment orders. Furthermore, as noted, we have now dismissed the other appeal as untimely, and so there is no longer even any potential that this appeal could become moot.

#### B. Unreasonable Delay

[34] Reversing course from its position that it is premature for this court to address these issues, Hearn also argues Second Generation Roofing has waited too long to raise them. Hearn contends Second Generation Roofing unreasonably delayed more than four years after it knew of the assignment,

and so the judgment should be affirmed under this court's decision in *Alexander v. Abbey of Chimes* (1980) 104 Cal.App.3d 39, 163 Cal.Rptr. 377 (*Alexander*). We held in *Alexander* that a motion to amend a judgment to add a new judgment debtor under section 187 must be timely made, and that waiting seven years to do so after the judgment became final, without explanation, was unreasonable. (*Alexander*, at pp. 47–49, 163 Cal.Rptr. 377.)

\*148 *Alexander* does not compel reversal. Because Hearn did not raise its delay theory below, it has been forfeited. (See *LaChance v. Valverde* (2012) 207 Cal.App.4th 779, 789, 143 Cal.Rptr.3d 703.) \*\*832 We also would reject the argument had it been preserved, because *Alexander* does not apply and it also is distinguishable.<sup>24</sup> It arose under section 187, not section 368.5. A motion for substitution under former section 385 may be granted after judgment has been entered, and even after an appeal has been taken. (*Erickson v. Boothe*, *supra*, 90 Cal.App.2d 457, 459, 203 P.2d 122.) Furthermore, the moving party in *Alexander* waited seven years to file its motion under section 187 after the judgment became final (*Alexander*, *supra*, 104 Cal.App.3d at p. 48, 163 Cal.Rptr. 377); Second Generation Roofing moved far more quickly. It filed its motion to amend the two orders awarding attorney fees and costs only seven months after entry of the first order, and just five months after entry of the second order which is the ruling that determined the amount of attorney fees. This was reasonable. (See *In re Levander* (9th Cir.1999) 180 F.3d 1114, 1121, fn.10.)

<sup>24</sup> We have no occasion to decide whether to revisit *Alexander* in light of recent criticism that it dispensed with a required element of prejudice. (See *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 285–286, 199 Cal.Rptr.3d 226.)

### C. Hearn's Belated Attacks on the Validity of the Assignment

For the first time on appeal, Hearn also contends in scattershot fashion the “purported” assignment was invalid on a number of grounds. The position borders on frivolous, and also rests in large part on repeated violations of the rules of appellate briefing.

Hearn never challenged the validity of the assignment below; it merely urged the trial court to turn a blind eye to evidence of the assignment agreement when confronted with the Stankowski declaration. So this theory has been waived.

(*LaChance v. Valverde*, *supra*, 207 Cal.App.4th at p. 789, 143 Cal.Rptr.3d 703.)

[35] It also is untenable. Hearn's position on appeal contradicts: (1) binding judicial admissions in the first amended complaint that “HEARN assigned its rights under the subcontracts with the cross-defendants, including ... [Second Generation Roofing], to its insurers on August 20, 2009” and, moreover, that “HEARN's insurers are asserting claims in this action in the name of the [*sic*] HEARN assigned to them by HEARN through operation of law”; (2) the declaration of its board member, Gordon Stankowski, who swore under oath that “[i]n my capacity as Board Member of HEARN, I have personal knowledge of the Assignment Agreement dated August 18, 2009, which I entered into on behalf of HEARN,” and who also authenticated the assignment agreement as an agreement “I entered into on behalf of HEARN to assign the rights and interests of the subcontracts ... to North American \*149 Specialty Insurance Company and RSUI Group, Inc.”; (3) factual statements contained in the memorandum of points and authorities Hearn filed below, which we have already described, acknowledging that “Hearn assigned some of its contractual rights to its insurers so they might pursue the subcontractors separately to recover their defense costs”; (4) the trial court's *verbatim* factual finding; and, perhaps most egregiously, (5) the sworn declaration by the very lawyer who signed Hearn's appellate brief, who declared under oath below that “Hearn's defending insurers are suing in Hearn's name as transferees of Hearn's contractual indemnity rights....” Hearn's contention that the assignment is invalid, on any ground at all, is disingenuous.

\*\*833 Again, if there was anything inaccurate about these positions Hearn took in both its pleadings and in sworn statements of counsel, it perhaps might have proffered evidence in opposition to Second Generation Roofing's motion below to try to explain. But its attacks on the assignment's validity at this late stage are based on nothing. No evidence whatsoever.

[36] [37] [38] [39] Hearn also is wrong on the law. It argues that, at a minimum, the prevailing party attorney fee provision of the subcontract could not be validly assigned, because Second Generation Roofing did not execute the assignment agreement. In support, it cites *Civil Code section 1457*, which states in relevant part: “The burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise....” Hearn misconstrues *Section 1457*. The provision “is only intended

to protect *the party to be benefited* from the effects of the assignment of an obligation.” (*Cutting Packing Co. v. Packers' Exchange of California* (1890) 86 Cal. 574, 576, 25 P. 52, italics added.) It does not mean that without the other party's consent an assignee cannot assume contractual obligations, but simply that the assignor is not at the same time relieved of them. (*Wiseman v. Sklar* (1930) 104 Cal.App. 369, 374, 285 P. 1081.) An assignor remains bound under the contract absent the counter-party's consent to the assignment, but stands “in the nature of a surety for the [assignee] for the performance of the obligation.” (*Cutting Packing Co.*, at p. 577, 25 P. 52.) Hearn cites no authority holding the lack of a counter-party's signature is fatal to an assignment. “ [I]n the absence of [a] statute or a contract provision to the contrary, *there are no prescribed formalities that must be observed to make an effective assignment.* It is sufficient if the assignor has, in some fashion, manifested an intention to make a present transfer of his rights to the assignee.” (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1002, 95 Cal.Rptr.3d 605, 209 P.3d 937, italics added; see, e.g., *Walmsley v. Holcomb* (1943) 61 Cal.App.2d 578, 583–584, 143 P.2d 398 [upholding assignment executed only by assignors].) Even oral assignments may be valid. (See *Civ.Code*, § 1052.) Here, as previously explained, Hearn's insurers are bound by their voluntary acceptance of the subcontract's benefits. (*Id.* § 1589.)

\*150 Hearn raises several other objections to the assignment, but none presented as any cognizable legal argument. It asserts, with no discussion, “there is no evidence that Mr. Stankowski was authorized to bind Hearn to contracts.” It also contends, with no citation to legal authority or to the record, that “neither of the purported assignees ever received a copy of the assignment, nor did they ever assent to the assignment by executing or even orally agreeing to the assignment. As such, the purported assignment is invalid....” We disregard these points. They were not raised below (see *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13–14, fn. 6, 14 Cal.Rptr.3d 89); they are not supported by any citation to the record (see *Dominguez v. Financial Indem. Co.* (2010) 183 Cal.App.4th 388, 392, fn. 2, 107 Cal.Rptr.3d 739; *Cal. Rules of Court*, rule 8.204(a)(1)(C)); they appear to be based upon matters outside the record (see *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366, fn. 8, 174 Cal.Rptr.3d 683); and with minor exception, they are not supported by any cogent argument or legal \*\*834 authority<sup>25</sup> (see, e.g., *Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 817, 174 Cal.Rptr.3d

131; *Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956, 124 Cal.Rptr.3d 78).

25 Hearn cites, but does not discuss, *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 267 P.2d 16 which held there was a failure to prove the existence of a valid assignment in the absence of evidence the alleged agent who executed the assignment was authorized to do so. (*Id.* at pp. 292–293, 267 P.2d 16.) Unlike here, however, the assignment's validity was not questioned for the first time on appeal, nor was it judicially admitted by the very party seeking to defeat it.

In sum, we reject Hearn's belated attempts to challenge the assignment.

## V.

### Remedy

Having determined that North American cannot evade responsibility for being named as a judgment debtor, liable under the orders awarding fees and costs to Second Generation Roofing, there remains the question of the appropriate remedy.

Second Generation Roofing argues that “[t]he real ‘Hearn’” also should remain liable for the attorney fees and costs awarded, “because it made only a partial assignment of its contract to its insurers.” Second Generation Roofing also invokes the principle that, “[e]ven if the assignee *assumes* the obligation, i.e., agrees to perform it, the assignor still remains secondarily liable as a surety or guarantor, unless the promisee releases him or her or the parties execute a complete novation.” (1 *Witkin, Summary of Cal. Law* (10th ed. 2005) *Contracts*, § 730, p. 815.)

\*151 This issue does not appear to be in dispute. Hearn's appellate brief does not address, and thus takes no issue with, Second Generation Roofing's position. On the contrary, Hearn contends “there is no basis to impose the liabilities of Hearn's subcontract upon [North American].” Since neither party has suggested substitution, and the parties evidently agree Hearn should remain liable on the awards of litigation expenses, we will reverse with appropriate directions to join North American as an additional judgment debtor rather than substitute North American in lieu of Hearn.

**DISPOSITION**

The February 27, 2014 order denying Second Generation Roofing's motion to amend the April 14, 2013 order and June 12, 2013 order is reversed. On remand, the trial court is directed to amend both orders to add the name of North American Specialty Insurance Company as owing the amounts awarded against "Hearn."

[Kline, P.J.](#), and

[Miller, J.](#), concurred.

**All Citations**

247 Cal.App.4th 117, 201 Cal.Rptr.3d 806, 16 Cal. Daily Op. Serv. 4637, 2016 Daily Journal D.A.R. 4244

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229 Cal.App.4th 1001

Court of Appeal, Second

District, Division 3, California.

TIMED OUT, LLC, Plaintiff and Appellant,

v.

YOUABIAN, INC. et al.,

Defendants and Respondents.

B242820

|

Filed September 12, 2014

**Synopsis**

**Background:** Assignee for two [professional models brought action against medical defendants for common law and statutory misappropriation of likeness based on the defendants' alleged unauthorized display of the models' images in connection with advertising defendants' cosmetic medical services. The Superior Court, Los Angeles County, No. SC114914, [Norman P. Tarle, J.](#), granted defendants' motion for judgment on the pleadings, and assignee appealed.

**Holdings:** The Court of Appeal, [Kitching, J.](#), held that:

[1] models' right to publicity was assignable;

[2] right of publicity claims involved purely pecuniary interests such that claims were assignable;

[3] allegations of complaint were sufficient to establish that models had assigned the underlying pecuniary interest in exploiting the models' likeness, such that assignee had standing; and

[4] federal copyright law did not preempt assignee's state law misappropriation of likeness claims.

Reversed.

**Procedural Posture(s):** On Appeal; Motion for Judgment on the Pleadings.

West Headnotes (14)

**[1] Torts** Nature and extent of right

The right of publicity is both a statutory and a common law right. [Cal. Civ. Code § 3344.](#)

[1 Cases that cite this headnote](#)

**[2] Torts** Nature and extent of right

What the right of publicity holder possesses is a right to prevent others from misappropriating the economic value generated through the merchandising of the name, voice, signature, photograph, or likeness of the holder.

[1 Cases that cite this headnote](#)

**[3] Torts** Types of invasions or wrongs recognized

The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs, (2) public disclosure of embarrassing private facts about the plaintiff, (3) publicity which places the plaintiff in a false light in the public eye, and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

**[4] Assignments** Estates or interests in property in general

Professional models' right to publicity was assignable to assignee, which brought action for misappropriation of likeness against defendants based on their use of models in advertising. [Cal. Civ. Code § 3344.1\(b\).](#)

[3 Cases that cite this headnote](#)

**[5] Assignments** Estates or interests in property in general

Under California law, the personal nature of the right of publicity restricts who can assign it, not

whether the right can be assigned. [Cal. Civ. Code § 3344.1\(b\)](#).

[1 Cases that cite this headnote](#)

**[6] Assignments**  [For Tort](#)

Professional models' right of publicity claims against medical defendants for misappropriation of likeness involved purely pecuniary interests such that claims were assignable; assignee did not sue for injury to the feelings, emotional distress or personal injuries, but rather sought damages such as the "profits or gross revenues" the defendants received as a result of the unauthorized use of the models' images, the usurpation of the models' rights to commercially exploit their images, and the dilution of the commercial value of the models' likenesses, and assignee did not allege emotional distress or disturbance to the models' peace of mind, nor did assignee seek damages for hurt feelings or injury to the models' reputation. [Cal. Civ. Code §§ 953, 954, 3344.1\(b\)](#).

[1 Cases that cite this headnote](#)

**[7] Assignments**  [Rights of Action](#)

The basic public policy that assignability of things in action is now the rule; nonassignability the exception. [Cal. Civ. Code §§ 953, 954](#).

[1 Cases that cite this headnote](#)

**[8] Assignments**  [Rights of Action](#)

**Assignments**  [Injuries to person](#)

Nonassignability is confined to wrongs done to the person, the reputation, of the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage. [Cal. Civ. Code §§ 953, 954](#).

[1 Cases that cite this headnote](#)

**[9] Assignments**  [On contract](#)

**Assignments**  [For Tort](#)

**Assignments**  [Injuries to person](#)

Causes of action for personal injuries arising out of a tort are not assignable, nor are those founded upon wrongs of a purely personal nature such as to the reputation or the feelings of the one injured; assignable are choses in action arising out of an obligation or breach of contract, as are those arising out of the violation of a right of property, or a wrong involving injury to personal or real property. [Cal. Civ. Code §§ 953, 954](#).

[5 Cases that cite this headnote](#)

**[10] Assignments**  [Estates or interests in property in general](#)

Although the right of publicity is described as "personal" in nature, this simply means that the owner of the right has exclusive authority to assign it during his or her lifetime. [Cal. Civ. Code § 3344](#).

**[11] Assignments**  [For Tort](#)

**Assignments**  [By Assignee](#)

Allegations of complaint were sufficient to establish that professional models had assigned not only the right to sue defendants for violation of the right of publicity based on misappropriation of likeness, but also the underlying pecuniary interest in exploiting the models' likeness, such that assignee had standing to bring claims against defendants; complaint alleged that assignee, through the assignment, had been damaged "with respect to [the Models'] right to control the commercial exploitation of their image and likeness" and that "the value of [the Models'] image and likeness has been diluted" due to unauthorized use to advertise defendants' medical services, resulting in injury to assignee through the assignment. [Cal. Civ. Code §§ 954, 3344, 3344.1\(b\)](#).

[1 Cases that cite this headnote](#)

**[12] Assignments**  [For Tort](#)

**Assignments**  [By Assignee](#)

The fact that an assignment of a cause of action for violation of the right to publicity based on misappropriation of likeness is limited to a



particular display does not mean it is ineffective to impart standing to sue for misappropriation within the limited scope of the assignment. [Cal. Civ. Code §§ 954, 3344.1\(b\)](#).

[1 Cases that cite this headnote](#)

**[13] States** [↔](#) Particular cases, preemption or supersession

**Torts** [↔](#) Preemption

Federal copyright law did not preempt assignee's state law misappropriation of likeness claims against defendants who used assignor professional models' likeness in their advertising, although pictures displayed on defendants' internet website were protected by the Copyright Act, as the models' likenesses themselves, which were the subject of the claims, were not copyrightable, even though embodied in a copyrightable work such as a photograph, and the asserted state law right of publicity did not fall within the subject matter of copyright. [17 U.S.C.A. § 301](#); [Cal. Civ. Code § 3344.1\(b\)](#).

[4 Cases that cite this headnote](#)

**[14] Copyrights and Intellectual Property** [↔](#) Remedies

**States** [↔](#) Copyrights and patents

To establish preemption under the Copyright Act, two conditions must be met: first, the subject of the claim must be a work fixed in a tangible medium of expression and come within the subject matter or scope of copyright protection, and second, the right asserted under state law must be equivalent to the exclusive rights contained in the Act. [17 U.S.C.A. § 301](#).

See [5 Witkin, Summary of Cal. Law \(10th ed. 2005\) Torts, § 676 et seq.](#)

[1 Cases that cite this headnote](#)

**\*\*775** APPEAL from judgment of the Superior Court of Los Angeles County, [Norman P. Tarle](#), Judge. Reversed. (Los Angeles County Super. Ct. No. SC114914)

**Attorneys and Law Firms**

Law Offices of Hall & Lim, [Timothy A. Hall](#), [Ani Aghajani](#), Beverly Hills; Conkle Kremer & Engel and [Eric S. Engel](#), Santa Monica, for Plaintiff and Appellant.

Bonne, Bridge, Mueller, O'Keefe & Nichols, [Raymond J. McMahon](#) and [Kevin J. Grochow](#), Santa Ana, for Defendants and Respondents.

[KITCHING, J.](#)

**\*1004 INTRODUCTION**

Plaintiff Timed Out, LLC (Plaintiff), as the assignee of two models who are not parties to this action (the Models), sued defendants Youabian, Inc., and Kambiz Youabian (Defendants) for common law and statutory misappropriation of likeness based on Defendants' alleged unauthorized display of the Models' images in connection with advertising Defendants' cosmetic medical services. The trial court ruled a cause of action for misappropriation of likeness is not assignable and granted Defendants' motion for judgment on the pleadings on that basis. We conclude a misappropriation of likeness claim, which concerns only the pecuniary benefits to be derived from the commercial exploitation of a person's likeness, is assignable. Accordingly, we reverse.

**FACTS<sup>1</sup> AND PROCEDURAL BACKGROUND**

<sup>1</sup> Because this matter comes to us after a judgment on the pleadings, we take the facts from Plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether Plaintiff has stated a viable cause of action. (See [Stevenson v. Superior Court \(1977\) 16 Cal.4th 880, 885, \[66 Cal.Rptr.2d 888, 941 P.2d 1157\]](#); [Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc. \(2007\) 148 Cal.App.4th 1130, 1133, fn. 1, \[56 Cal.Rptr.3d 351\]](#).)

According to the complaint's allegations, Plaintiff is a company that “specialize[s] in **\*\*776** the protection of personal image rights.” The Models are professional models who earn a living modeling and selling their images to companies for advertising products and services. In or about July 2011, the Models discovered Defendants had been

using their images on Defendants' Web site, without the Models' consent, to advertise Defendants' cosmetic medical services. Following the discovery, the Models "assigned their rights to bring suit for misappropriation of their images to PLAINTIFF."

Based on the foregoing allegations, Plaintiff sued Defendants for statutory and common law misappropriation of likeness. The complaint alleges that, as a direct and proximate result of the misappropriation, Plaintiff, through its assignment from the Models, suffered damages "with respect to [the Models'] right to control the commercial exploitation of their image and likeness [*sic*]" and through the dilution of the value of the Models' images for advertising medical services.

Defendants moved for judgment on the pleadings. In their motion, Defendants principally asserted that Plaintiff lacked standing to sue on behalf of the Models because the right of publicity, which creates liability for misappropriation of a person's name or likeness, is personal in nature and cannot be \*1005 assigned. Defendants also argued Plaintiff's claims were preempted by the federal Copyright Act of 1976 (Pub.L. No. 94-553 (Oct. 19, 1976) 90 Stat. 2541).

After hearing argument and taking the matter under submission, the trial court granted Defendant's motion. In its written ruling, the court observed the parties' primary dispute centered on whether a claim for misappropriation of likeness can be assigned. The court framed the issue as follows: "The parties agree that, under California law, assignment of a 'personal' tort is not valid.... The issue, therefore, is whether a cause of action for misappropriation of publicity is personal in nature." Citing *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, [160 Cal.Rptr. 323, 603 P.2d 425] (*Lugosi*), the trial court concluded "the right to publicity [is] personal in nature and therefore non-assignable." On this basis, the court granted the motion and entered judgment for Defendants.

### STANDARD OF REVIEW

"Review of a judgment on the pleadings requires the appellate court to determine, de novo and as a matter of law, whether the complaint states a cause of action.'" (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1317, [26 Cal.Rptr.3d 452].) "We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be

taken. [Citation.] We construe the pleading in a reasonable manner and read the allegations in context." (*Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1006, [55 Cal.Rptr.3d 911].) The complaint "must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

### DISCUSSION

#### 1. *The Pecuniary Interest Protected by the Right of Privacy Is Assignable*

[1] [2] [3] "In this state the right of publicity is both a statutory and a common law right." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 391, [106 Cal.Rptr.2d 126, 21 P.3d 797] (*Comedy III*)). Although its origin can be traced to "the fourth type of privacy invasion identified by Dean Prosser in his seminal \*\*777 article on the subject"<sup>2</sup> ( \*1006 *id.* at p. 391, 106 Cal.Rptr.2d 126, 21 P.3d 797, fn. 2, citing Prosser, *Privacy* (1960) 48 Cal. L.Rev. 383, 389), "[t]he right of publicity has come to be recognized as distinct from the right of privacy." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366, [92 Cal.Rptr.2d 713] (*KNB*)). "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness." (*Ibid.*) "What the right of publicity holder possesses is ... a right to prevent others from misappropriating the economic value generated ... through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder]." (*Comedy III, supra*, 25 Cal.4th at p. 403, 106 Cal.Rptr.2d 126, 21 P.3d 797; Civ.Code § 3344, subd. (a).)

2 "The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff ... "to be let alone." Without any attempt to exact definition, these four torts may be described as follows: [¶] 1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs. [¶] 2. Public disclosure of embarrassing private facts about the plaintiff. [¶] 3. Publicity which places the plaintiff in a false light in the public eye. [¶] 4. Appropriation, for the defendant's advantage, of the plaintiff's name

or likeness.’ ” (*Lugosi, supra*, 25 Cal.3d at p. 819, 160 Cal.Rptr. 323, 603 P.2d 425, quoting Prosser Privacy, (1960) 48 Cal. L.Rev. 383, 389.) The common law right of publicity derives from “the fourth type of privacy invasion.” (*Comedy III, supra*, 25 Cal.4th at p. 391, fn. 2, 106 Cal.Rptr.2d 126, 21 P.3d 797, citing Prosser, Privacy, at p. 389.)

In 1971, California enacted Civil Code section 3344,<sup>3</sup> a commercial statute that complements the common law tort of misappropriation of likeness. (*Lugosi, supra*, 25 Cal.3d at p. 819, fn. 6, 160 Cal.Rptr. 323, 603 P.2d 425; *KNB, supra*, 78 Cal.App.4th at pp. 366–367, 92 Cal.Rptr.2d 713.) Section 3344, subdivision (a) provides in relevant part: “Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof.” Nothing in section 3344 expressly prohibits assignment of the rights and remedies established by the statute.

3 Statutory references are to the Civil Code unless otherwise stated.

[4] In the instant case, the trial court granted Defendants’ motion on the ground that the right of publicity is “personal in nature and therefore non-assignable.” In reaching this conclusion, the trial court derived a rule from our Supreme Court’s opinion in *Lugosi v. Universal Pictures, supra*, 25 Cal.3d 813, 160 Cal.Rptr. 323, 603 P.2d 425 that cannot properly be attributed to the holding in that case.

In *Lugosi*, the heirs of the actor Bela Lugosi sued Universal Pictures, the motion picture company that produced the film *Dracula* (Universal Pictures 1931), for common law misappropriation of Lugosi’s likeness. In contracting to star in the film’s title role, Lugosi assigned Universal the right to use his \*1007 name and likeness to advertise the movie.<sup>4</sup>

\*\*778 After his death, Lugosi’s heirs sued Universal for the profits it made licensing “ ‘the use of the Count Dracula character to commercial firms’ ” for merchandising products other than the film. (*Lugosi, supra*, 25 Cal.3d at pp. 816–817, 160 Cal.Rptr. 323, 603 P.2d 425.) The trial court ruled in favor of the heirs, finding “Lugosi during his lifetime had a protectable property or proprietary right in his facial characteristics and the individual manner of his likeness and appearance as Count Dracula...,” and this right did

not terminate with Lugosi’s death but “descended to his heirs.” (*Id.* at p. 817, 160 Cal.Rptr. 323, 603 P.2d 425.)

4 The assignment clause in Lugosi’s contract provided: “ ‘The producer shall have the right to photograph and/or otherwise produce, reproduce, transmit, exhibit, distribute, and exploit in connection with the said photoplay any and all of the artist’s acts, poses, plays and appearances of any and all kinds hereunder, and shall further have the right to record, reproduce, transmit, exhibit, distribute, and exploit in connection with said photoplay the artist’s voice, and all instrumental, musical, and other sound effects produced by the artist in connection with such acts, poses, plays and appearances. The producer shall likewise have the right to use and give publicity to the artist’s name and likeness, photographic or otherwise, and to recordings and reproductions of the artist’s voice and all instrumental, musical and other sound effects produced by the artist hereunder, in connection with the advertising and exploitation of said photoplay.’ ” (*Lugosi, supra*, 25 Cal.3d at p. 816, fn. 2, 160 Cal.Rptr. 323, 603 P.2d 425.)

As framed by the trial court’s ruling, the issue on appeal in *Lugosi* was whether the right of publicity survives a celebrity’s death, as a descendible property interest, if never exercised or exploited by the celebrity during his or her lifetime. (See *Lugosi, supra*, 25 Cal.3d at pp. 817–819, 160 Cal.Rptr. 323, 603 P.2d 425.) While answering this question in the negative, our Supreme Court recognized—contrary to the trial court’s ruling in the instant case—that the right of publicity *can be assigned by the celebrity* during his or her lifetime. (See *id.* at p. 823, 160 Cal.Rptr. 323, 603 P.2d 425.)

In addressing a collection of federal cases that concluded the right of publicity passes to one’s heirs, the *Lugosi* court affirmed the premise of those cases—that “the right to exploit name and likeness *can be assigned* ”—but explained why assignability alone does not automatically translate into inheritability of the right. (*Lugosi, supra*, 25 Cal.3d at p. 823, 160 Cal.Rptr. 323, 603 P.2d 425, italics added.) The court explained, “Assignment of the right to exploit name and likeness by the ‘owner’ thereof is synonymous with its exercise. In all of the [federal] cases the owner of the right did assign it in his lifetime and, too, *Lugosi did precisely this in his lifetime when he assigned his name and likeness to Universal* for exploitation in connection with the picture *Dracula*. [Citation.] Assertion by the heirs of the right to

exploit their predecessor's name and likeness to commercial situations he left unexploited simply is *not* the exercise of that right by *the person* entitled to it.” (*Ibid.*, some italics added.) Because “the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime,” the Supreme Court concluded Lugosi's heirs lacked standing to assert their claim. (*Id.* at p. 824, 160 Cal.Rptr. 323, 603 P.2d 425.)

**\*1008** Though the Supreme Court expressly acknowledged that the right of publicity can be assigned by the owner during his or her lifetime, the trial court in the instant case appears to have been confused by the references to a “personal” right in the *Lugosi* opinion. Starting from the premise that “assignment of a ‘personal’ tort is not valid,” the trial court reasoned that because *Lugosi* “found the right was purely personal in nature” it could not be assigned. The trial court's conclusion reads too much into the “personal” right label in *Lugosi*. When the *Lugosi* court identified the right of publicity as personal in nature, it did so to explain why only *the \*\*779* owner of the right had the authority to assign or otherwise exercise it. (See *Lugosi, supra*, 25 Cal.3d at p. 823, 160 Cal.Rptr. 323, 603 P.2d 425 [“Assignment of the right to exploit name and likeness by the ‘owner’ thereof is synonymous with its exercise” (italics added) ].) In other words, the personal nature of the right restricts *who* can assign it—not whether the right of publicity can be assigned. Acknowledging that the right is personal to its owner led the *Lugosi* court to logically conclude that, if Lugosi did not assign or exercise the right during his life, then his heirs had no standing to exercise it after his death. (*Id.* at p. 824, 160 Cal.Rptr. 323, 603 P.2d 425.)

[5] Ultimately the Legislature changed the law by enacting section 3344.1. The statute provides that the rights to control “a deceased personality's name, voice, signature, photograph, or likeness” (§ 3344.1, subd. (a)(1)), are “property rights” that are “deemed to have existed at the time of death ... [which] vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death.” (§ 3344.1, subd. (b).) While this change has no bearing on the instant case—as the Models allegedly made an inter vivos assignment to Plaintiff—section 3344.1 is nevertheless notable because it acknowledges, as the Supreme Court did in *Lugosi*, that the right of publicity can be assigned by the owner during his or her lifetime. Section 3344.1, subdivision (b) states in relevant part: “Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by

a deceased personality *during his or her lifetime* by which the deceased personality *assigned the rights*, in whole or in part, to use his or her name, voice, signature, photograph, or likeness....”<sup>5</sup> (Italics added.) That is precisely what Plaintiff alleges happened here. The trial court erred in holding the right of publicity cannot be assigned.<sup>6</sup>

<sup>5</sup> Because sections 3344 and 3344.1 are not ambiguous with respect to the assignability of the right of publicity during one's lifetime, we do not consider the legislative history cited by Defendants. (See *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000, [90 Cal.Rptr.2d 236, 987 P.2d 705] [In determining legislative intent, “we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs.”].)

<sup>6</sup> The federal district court in *Upper Deck Authenticated LTD. v. CPG Direct* (S.D.Cal.1997) 971 F.Supp. 1337 (*Upper Deck*) made a similar error, albeit without even citing our Supreme Court's controlling opinion in *Lugosi*. Without analyzing California law, and relying on a Florida district court case, the district court in *Upper Deck* dismissed a misappropriation of likeness claim, based on an inter vivos assignment, on the stated ground that “the right of publicity appears to attach only to actual persons.” (*Upper Deck*, at pp. 1348–1349, citing *National Football League v. Alley, Inc.* (S.D.Fla.1983) 624 F.Supp. 6, 10.) As we have explained, under California law, the personal nature of the right of publicity restricts *who* can assign it—not whether the right can be assigned. (See *Lugosi, supra*, 25 Cal.3d at p. 824, 160 Cal.Rptr. 323, 603 P.2d 425.)

**\*1009** 2. *A Cause of Action for Misappropriation of Likeness Is Assignable*

[6] Having concluded the right of publicity is assignable, we now turn to Defendants' contention that the trial court's ruling should nevertheless be affirmed, because Plaintiff was assigned only “the naked right to bring suit for misappropriation of the [M]odels' images, and received no other rights or duties along with the assignment.” Defendants argue “the right to sue alone, without anything more, is not assignable” and “an **\*\*780** assignment of the naked right



to sue generally does not give a plaintiff standing to bring claims.” The applicable law does not support Defendants’ contention.

[7] [8] [9] Section 954 provides: “A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner.” A “thing in action” is defined as “a right to recover money or other personal property by a judicial proceeding.” (§ 953.) Sections 953 and 954 state a “broad rule of assignability ... underlying which is the basic public policy that ‘ [a]ssignability of things in action is now the rule; nonassignability the exception’ ” [citations]. ‘ “[A]nd this exception is confined to wrongs done to the person, the reputation, of the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage.” ’ [Citation.] Thus, causes of action for personal injuries arising out of a tort are not assignable nor are those founded upon wrongs of a purely personal nature such as to the reputation or the feelings of the one injured. Assignable are choses in action arising out of an obligation or breach of contract as are those arising out of the violation of a right of property [citation] or a wrong involving injury to personal or real property.” (*Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, 393–394, 133 Cal.Rptr. 83 (*Goodley* ), fns. omitted; see also *White Mountains Reinsurance Co. of America v. Borton Petrini, LLP* (2013) 221 Cal.App.4th 890, 895–896, [164 Cal.Rptr.3d 912].)

Defendants rely on *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, [132 Cal.Rptr. 424, 553 P.2d 584] (*Murphy* ) and *Essex Ins. Co. v. Five Star Dye House, Inc.* (2006) 38 Cal.4th 1252, [45 Cal.Rptr.3d 362, 137 P.3d 192] (*Essex* ) to argue a cause of action for misappropriation of likeness comes within the exception for wrongs done to the person. Based on these authorities, Defendants contend a misappropriation of likeness cause of action is not assignable, absent some “indication that other rights or duties have been assigned.” We disagree. Though *Murphy* and *Essex* may state the \*1010 general rule that “a purely personal tort cause of action is not assignable in California...” (*Murphy*, at p. 942, 132 Cal.Rptr. 424, 553 P.2d 584; *Essex*, at p. 1263, 45 Cal.Rptr.3d 362, 137 P.3d 192), those cases actually support the conclusion in this case that Plaintiff’s purely *pecuniary* misappropriation claims are assignable.

*Murphy* addressed the assignability of an insurance bad faith cause of action, arising from the insurer’s failure to settle a personal injury claim. (*Murphy*, *supra*, 17 Cal.3d at pp.

939–942, 132 Cal.Rptr. 424, 553 P.2d 584.) Our Supreme Court concluded the bad faith cause of action was assignable, although the personal tort aspects—emotional distress and punitive damages—were not. (*Id.* at p. 942, 132 Cal.Rptr. 424, 553 P.2d 584.) When the Supreme Court revisited the issue in *Essex*, it reaffirmed the bad faith action in *Murphy* was a “ ‘hybrid cause of action,’ one comprised of both assignable and nonassignable components.” (*Essex*, *supra*, 38 Cal.4th at p. 1261, 45 Cal.Rptr.3d 362, 137 P.3d 192.) The court explained, “We start from the proposition that assignability is the rule. (§ 954.) From that general rule we except those tort causes of actions ‘ “ ‘founded upon wrongs of a purely personal nature.’ ” ’ [Citation.] Actions for bad faith against an insurer have generally been held to be assignable [citation], including claims for breach of the duty to defend [citation]. Although some damages potentially recoverable in a bad faith action, including damages for emotional distress and punitive damages, are not assignable ( \*781 *Murphy*, *supra*, 17 Cal.3d at p. 942 [132 Cal.Rptr. 424, 553 P.2d 584]), the cause of action itself remains freely assignable as to all other damages (*id.* at p. 946 [132 Cal.Rptr. 424, 553 P.2d 584]).” (*Essex*, at p. 1263, 45 Cal.Rptr.3d 362, 137 P.3d 192.)

[10] As we explained above, though the right of publicity is described as “personal” in nature, this simply means that the owner of the right has exclusive authority to assign it during his or her lifetime. (See *Lugosi*, *supra*, 25 Cal.3d at p. 824, 160 Cal.Rptr. 323, 603 P.2d 425.) More to the point, unlike the other interests grouped under the privacy rubric (see fn. 2, *ante* ), the right of publicity distinctly protects an “economic interest.” (*Comedy III*, *supra*, 25 Cal.4th at p. 405, 106 Cal.Rptr.2d 126, 21 P.3d 797; see *Crosby v. HLC Properties, Ltd.* (2014) 223 Cal.App.4th 597, 604, [167 Cal.Rptr.3d 354] [“the right of publicity involves the right of a person to profit derived from the use of his ‘name, voice, signature, photograph, or likeness...’ ”]; *Aroa Marketing, Inc. v. Hartford Ins. Co. of Midwest* (2011) 198 Cal.App.4th 781, 789, [130 Cal.Rptr.3d 466].)

Here, Plaintiff did not sue for injury to the feelings, emotional distress or personal injuries to the Models. On the contrary, Plaintiff seeks to recover only pecuniary damages for Defendants’ alleged commercial misappropriation of the Models’ images. Those damages are described in the complaint as the “profits or gross revenues” Defendants received as a result of the unauthorized use of the Models’ images, the usurpation of the Models’ rights to commercially exploit their images, and the dilution of the commercial value of the Models’ likenesses. The complaint does not



allege emotional distress or disturbance to the Models' peace of mind, nor does Plaintiff seek \*1011 damages for hurt feelings or injury to the Models' reputations. Because the claims involve purely pecuniary interests, the broad rule of assignability of things in action applies.<sup>7</sup> (See § 954; *Goodley, supra*, 62 Cal.App.3d at p. 393, 133 Cal.Rptr. 83.)

<sup>7</sup> Defendant also advocate a more general prohibition against any “naked” assignment of a cause of action, arguing that “[i]n many other related areas of law, the right to sue alone, without anything more, is not assignable.” Such a rule would be inconsistent with section 954's broad rule of assignability of things in action. Moreover, the cases Defendants cites, most of which were decided under federal intellectual property law, are plainly inapposite. (See, e.g., *Crown Co. v. Nye Tool Works* (1923) 261 U.S. 24, 40, [43 S.Ct. 254, 67 L.Ed. 516] (*Crown Co.*) [federal patent statute restricts assignment of infringement claim]; *Silvers v. Sony Pictures Entertainment, Inc.* (9th Cir.2005) 402 F.3d 881, 885 [copyright infringement]; *National Licensing v. Inland Joseph Fruit* (E.D.Wash.2004) 361 F.Supp.2d 1244, 1256 [trademark infringement].) As the United States Supreme Court explained in *Crown Die*, the common law preference for assignment of things in action does not apply to a patent infringement action because “[p]atent property is the creature of statute law and its incidents are equally so and depend upon the construction to be given to the statutes creating it and them.... It is not safe, therefore, in dealing with a transfer of rights under the patent law, to follow implicitly the rules governing a transfer of rights in a chose in action at common law.” (*Crown Die*, at p. 40, 43 S.Ct. 254.) As for the prohibition against assigning a “naked” cause of action for fraud, our Supreme Court has held that a fraud claim is assignable where any form of property was obtained by means of fraud. (See *Jackson v. Deauville Holding Co.* (1933) 219 Cal. 498, 501–502, [27 P.2d 643].) Plaintiff's action to assert the Models' pecuniary interests in the dissemination of their likenesses comes squarely within the broad rule of assignability of things in action. (See § 954; *Goodley, supra*, 62 Cal.App.3d at p. 393, 133 Cal.Rptr. 83.)

[11] In the alternative, Defendants argue, even if a misappropriation of likeness claim can be assigned, an “exclusive license” is required to assert the claim. Because Plaintiff “only possesses a right to \*\*782 sue for particular violations”—i.e., Defendants' alleged display of the Models' images on Defendants' Web site—Defendants contend “[Plaintiff] has not received enough of the right to create standing.” We disagree.

[12] On this record, the complaint's allegations are sufficient to support a reasonable inference that Plaintiff received exclusive assignments with respect to the Models' likenesses. To begin, even if Plaintiff received only “a right to sue” to exclude Defendants from exploiting the Models' images, that right alone suggests Plaintiff obtained an exclusive right; albeit one limited perhaps to the particular display of the Models' images on Defendants' Web site. Be that as it may, the fact that an assignment is limited to a particular display does not mean it is ineffective to impart standing to sue for misappropriation within the limited scope of the assignment. For instance, the assignment to Universal in *Lugosi* was limited to exploiting Lugosi's likeness in connection with promoting the film *Dracula*. (See *Lugosi, supra*, 25 Cal.3d at p. 816, fn. 2, 160 Cal.Rptr. 323, 603 P.2d 425.) The Supreme Court nevertheless recognized the validity of that assignment, without ever implying a condition that the assignment must cover Lugosi's entire right of publicity to be enforced. The same is true of the \*1012 other cases cited by Defendants—all involved a limited license to exploit the celebrity's likeness in connection with a particular commercial opportunity, but none questioned whether a limited license was enforceable. (See, e.g., *Haelan Laboratories v. Topps Chewing Gum, Inc.* (2d Cir.1953) 202 F.2d 866, 867 [ballplayer licensed plaintiff exclusive right to use ballplayer's photograph in connection with selling plaintiff's gum for a stated term]; *Cepeda v. Swift and Company* (8th Cir.1969) 415 F.2d 1205, 1207 [ballplayer granted equipment manufacturer “ ‘exclusive world right and license to manufacture, advertise and sell baseballs, baseball shoes, baseball gloves and baseball mitts identified by his name, facsimile signature, initials, portrait, or by any nickname popularly applied to him’ ”].) So too, the Legislature has acknowledged the enforceability of a limited assignment. As noted above, section 3344.1, subdivision (b) recognizes a “contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole *or in part*, to use his or her name, voice, signature, photograph, or likeness” is enforceable. (Italics added.)

In any event, the complaint's allegations also are sufficient to reasonably infer that the assignment encompassed not just the right to sue, but also the underlying pecuniary interest in exploiting the Models' likenesses. For instance, the complaint alleges Plaintiff, "through its assignment from [the Models]," has been damaged "with respect to [the Models'] right to control the commercial exploitation of their image and likeness [*sic*]." The complaint also alleges "the value of [the Models'] image and likeness [*sic*] has been diluted due to [Defendants'] unauthorized use ... to advertise [Defendants'] medical services," resulting in injury to Plaintiff through the assignment. These allegations support a reasonable inference that the assignment encompasses the pecuniary interest in controlling the display of the Models' images in connection with advertising medical services. Liberally construing the complaint as we must, with all reasonable inference drawn in favor of the pleadings, we conclude these allegations are sufficient to establish Plaintiff's standing to assert the claims for common law and statutory misappropriation of likeness by right of assignment.

**\*\*783** 3. *Plaintiff's Claims Are Not Preempted by Federal Copyright Law*

[13] Lastly, we address Defendants' contention that Plaintiff's state law misappropriation of likeness claims are preempted by federal copyright law. Defendants argue Plaintiff's action seeks to prevent the display of copyrightable photographs and, therefore, the claims are preempted. We disagree.

[14] To establish preemption under the Copyright Act (17 U.S.C. § 301), two conditions must be met: "first, the subject of the claim must be a work fixed in a tangible medium of expression and come within the subject **\*1013** matter or scope of copyright protection as described in sections 102 and 103 of 17 United States Code, and second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106. [Citations.]" (*KNB, supra*, 78 Cal.App.4th at p. 369, 92 Cal.Rptr.2d 713; *Downing v. Abercrombie & Fitch* (9th Cir.2001) 265 F.3d 994, 1003 (*Downing*)). Plaintiff's claims in the instant case do not satisfy either condition.

To be sure, the photographs displayed on Defendants' Web site, as pictorial works of authorship, are protected by the Copyright Act of 1976. However, it is not the publication of the photographs themselves that is the basis for Plaintiff's claims. Rather, it is Defendants' use of the Models' likenesses pictured in the photographs to promote Defendants' business

that constitutes the alleged misappropriation. As the Nimmer treatise on copyright law states: "The 'work' that is the subject of the right of publicity is the *persona*, *i.e.*, the name and likeness of a celebrity or other individual. A *persona* can hardly be said to constitute a 'writing' of an 'author' within the meaning of the Copyright Clause of the Constitution. *A fortiori*, it is not a 'work of authorship' under the Act. Such name and likeness do not become a work of authorship simply because they are embodied in a copyrightable work such as a photograph." (1 Nimmer on Copyright (2013) § 1.01 [B] [1][c], *fn.* omitted; *KNB, supra*, 78 Cal.App.4th at p. 374, 92 Cal.Rptr.2d 713; *Downing, supra*, 265 F.3d at pp. 1003–1004.)

Returning to the two-part test for preemption, we conclude (1) the subjects of Plaintiff's claims—the Models' likenesses—are not copyrightable, even though embodied in a copyrightable work such as a photograph; and (2) the right asserted under state law—the right of publicity—does not fall within the subject matter of copyright.<sup>8</sup> (1 Nimmer, *supra*, § 1.01 [B][1][c]; *KNB, supra*, 78 Cal.App.4th at p. 374, 92 Cal.Rptr.2d 713.) Plaintiff's state law misappropriation of likeness **\*\*784** claims are not preempted by federal copyright law.

<sup>8</sup> The court in *KNB* rejected a substantively identical preemption argument on the same basis. In doing so, the *KNB* court distinguished *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, [58 Cal.Rptr.2d 645]—one of the principal cases Defendants rely upon. As the *KNB* court observed, the court in *Fleet* found the misappropriation claim was preempted "where the only misappropriation alleged was the film's authorized distribution by the exclusive distributor, CBS." (*KNB, supra*, 78 Cal.App.4th at p. 364, 92 Cal.Rptr.2d 713; see *Fleet*, at p. 1914, 58 Cal.Rptr.2d 645.) Thus, the *KNB* court explained, "*Fleet* stands for the solid proposition that performers in a copyrighted film may not use their statutory right of publicity to prevent the *exclusive* copyright holder from distributing the film." (*KNB*, at p. 372, 92 Cal.Rptr.2d 713.) That rule, however, did not apply in *KNB* because the plaintiff was not "asserting a right of publicity claim against the exclusive copyright holder in an effort to halt the authorized distribution of their photographs." (*Ibid.*) So too here, there is no allegation that Defendants hold the copyright to the subject photographs. We agree with the *KNB*

court that *Fleet* does not apply where, as here, “the defendant has no legal right to publish the copyrighted work.” (*KNB*, at p. 374, 92 Cal.Rptr.2d 713.)

**\*1014 DISPOSITION**

The judgment is reversed and the order granting Defendants' motion for judgment on the pleadings is vacated. Plaintiff Timed Out, LLC, is awarded costs on appeal.

We concur:

[KLEIN](#), P.J.

[ALDRICH](#), J.

**All Citations**

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*[Date of dispatch to the parties: July 3, 2002]*

International Centre for  
Settlement of Investment Disputes  
(ICSID)

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In the Matter of the Annulment Proceeding  
in the Arbitration between

COMPAÑIA DE AGUAS DEL ACONQUIJA S.A.

and

VIVENDI UNIVERSAL  
(formerly COMPAGNIE GÉNÉRALE DES EAUX)

Claimants

v.

ARGENTINE REPUBLIC

Respondent

Case No. ARB/97/3

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DECISION ON ANNULMENT

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*President:* Mr. L. Yves FORTIER, C.C., Q.C.

*Members of the  
ad hoc Committee:* Professor James R. CRAWFORD, S.C., F.B.A.  
Professor José Carlos FERNÁNDEZ ROZAS

*Secretary of the Committee:* Mr. Alejandro A. Escobar

In Case No. ARB/97/3

*BETWEEN:* Compañía de Aguas del Aconquija S.A. and  
Vivendi Universal (formerly Compagnie Générale des Eaux)  
("Claimants")

Represented by:

Judge Stephen M. Schwebel,  
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Mr. Luis A. Erize  
of the law firm *Abeledo Gottheil Abogados*, as counsel

Mr. Ignacio Colombres Garmendia  
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as counsel

*And*

Argentine Republic ("*Respondent*")

Represented by:

Dr. Rubén Miguel Citara, Dr. Ernesto Alberto Marcer,  
Mr. Hernán M. Cruchaga and Mr. Carlos Ignacio Suárez  
Anzorena  
of the *Procuración del Tesoro de la Nación*, as counsel

THE *AD HOC* COMMITTEE

After deliberation,

*Makes the following Decision:*

**A. THE ANNULMENT PROCEEDINGS**

1. On 20 March 2001, Compañía de Aguas del Aconquija S.A. (“CAA”) and Compagnie Générale des Eaux (“CGE”; CGE and CAA are referred to, collectively, as “Claimants”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing (the “Application”) requesting the partial annulment of an Award dated 21 November 2000 (the “Award”) rendered by the Tribunal in the arbitration between Claimants and Respondent.<sup>1</sup>

2. The Application was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). The Application sought partial annulment of the Award on three of the five grounds set out in Article 52(1) of the ICSID Convention, specifically: the Tribunal had manifestly exceeded its powers; there had been a serious departure from a fundamental rule of procedure; and the Award failed to state the reasons on which it was based.

3. The Application was registered by the Secretary-General of ICSID on 23 March 2001. In accordance with Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), the Secretary-General transmitted a Notice of Registration to the parties on that date and also forwarded to the Respondent copies of the Application and accompanying documentation. Thereafter, in accordance with Article 52(3) of the ICSID Convention and at the request of the Secretary-General, the Chairman of the Administrative Council proceeded to appoint an *ad hoc* Committee (the “Committee”).

4. The Committee was subsequently duly constituted—composed of Professor James R. Crawford, Professor José Carlos Fernández Rozas and Mr. L. Yves Fortier—and the parties were so notified by the Secretary-General on

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<sup>1</sup> The text of the award is published at 40 ILM 426 (2001).

18 May 2001, in accordance with Rule 52(2) of the Arbitration Rules. On 25 May 2001, the Secretary of the Committee informed the parties that Mr. L. Yves Fortier had been designated President of the Committee.

5. The first meeting of the Committee was held at the seat of ICSID, in Washington, D.C., on 21 June 2001. At that meeting, all members made declarations in terms of Rule 6 of the Arbitration Rules. Mr. Fortier qualified his declaration in one respect, and the Respondent reserved the right to challenge him. Subsequently it did so, pursuant to Articles 14 and 57 of the ICSID Convention and Arbitration Rule 53. The challenge concerned Mr. Fortier's disclosure that one of the partners in his law firm had been engaged by CGE to advise on certain specific matters relating to taxation under Quebec law. Mr. Fortier had had no personal involvement in the work, which was wholly unrelated to the present case and which did not involve a general retainer. After receiving written statements from the parties, the other two members of the Committee, by a decision of 24 September 2001, dismissed the challenge.

6. In accordance with the procedural timetable laid down by the Committee at its meeting of 21 June 2001, the parties filed their respective Memorials on 20 August 2001 and on 12 November 2001. Claimants' Memorial was accompanied by an Expert Opinion prepared by Professor Christoph H. Schreuer, and Respondent filed an Expert Opinion rendered by Professor Arthur T. von Mehren. Claimants thereafter submitted a Reply on 10 December 2001. Respondent filed a Rejoinder on 8 January 2002.

7. A two-day hearing in this annulment proceeding was held at the seat of ICSID on 31 January and 1 February 2002, at which counsel for both parties presented their arguments and submissions, and responded to questions from the members of the Committee. The parties subsequently made observations to the English and Spanish transcripts made of the hearing, which have been taken into account by the Committee.

8. In the absence of any agreed request by the parties to vary the rules of procedure laid down in the ICSID Convention and the Arbitration Rules, the annulment proceeding was at all times conducted in accordance with the applicable provisions of Section 3 of Chapter IV of the ICSID Convention and the Arbitration Rules.<sup>2</sup>

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<sup>2</sup> Article 52(4) of the ICSID Convention provides: "The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII [of the Convention, dealing with arbitration proceedings] shall apply *mutatis mutandis* to proceedings before the Committee."

## B. THE TRIBUNAL'S AWARD

9. The dispute underlying the arbitration arose out of certain alleged acts of the Argentine Republic and its constituent Province of Tucumán that, according to Claimants, caused the termination of a thirty-year concession contract (the “Concession Contract”) entered into by Tucumán and CAA on 18 May 1995. In the arbitration, Claimants asserted that all of these acts were attributable to the Argentine Republic under international law and, as such, violated Argentina’s obligations under the Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991 (the “BIT”).<sup>3</sup> Relevant provisions of the BIT are set out later in this decision.

10. The Award that is the subject of the present annulment proceeding was rendered on 21 November 2000. In the Award, the Tribunal rejected the objections to its jurisdiction raised by the Argentine Republic. Having upheld its jurisdiction, the Tribunal nonetheless dismissed the claim.

11. In order to provide relevant background and context to the present decision, and before proceeding to consider the detailed findings of the Tribunal and the grounds for annulment to which those findings are said to give rise, the Committee can do no better than recite the Tribunal’s own “Introduction and Summary”:

### *A. Introduction and Summary*

This case arises from a complex and often bitter dispute associated with a 1995 Concession Contract that a French company, Compagnie Générale des Eaux, and its Argentine affiliate, Compañía de Aguas del Aconquija, S.A. (collectively referred to as “Claimant” or “CGE”), made with Tucumán, a province of Argentina, and with the investment in Tucumán resulting from that agreement. The Republic of Argentina (“Argentine

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<sup>3</sup> Signed 3 July 1991; entered into force 3 March 1993; *United Nations Treaty Series*, vol. 1728, p. 282 (French text). The BIT provisions quoted, in English, in the present decision are drawn from the official United Nations English translation: *United Nations Treaty Series*, vol. 1728, p. 298. Appendix 1 to the Tribunal’s Award of 21 November 2001 is the source of the English translation of the provisions of the Concession Agreement referred to herein: 40 ILM 426 (2001), pp. 449-451.

Republic”) was not a party to the Concession Contract or to the negotiations that led to its conclusion....

The Concession Contract...makes no reference to either the BIT or ICSID Convention or to the remedies that are available to a French foreign investor in Argentina under these treaties. Articles 3 and 5 of the BIT provide that each of the Contracting Parties shall grant “fair and equitable treatment according to the principles of international law to investments made by investors of the other Party,” that investments shall enjoy “protection and full security in accordance with the principle of fair and equitable treatment,” and that Contracting Parties shall not adopt expropriatory or nationalizing measures except for a public purpose, without discrimination and upon payment of “prompt and adequate compensation.” Article 8 of the Argentine-French BIT provides that, if an investment dispute arises between one Contracting Party and an investor from another Contracting Party and that dispute cannot be resolved within six months through amicable consultations, then the investor may submit the dispute either to the national jurisdiction of the Contracting Party involved in the dispute or, at the investor’s option, to arbitration under the ICSID Convention or to an *ad hoc* tribunal pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.

Article 16.4 of the Concession Contract between CGE and Tucumán provided for the resolution of contract disputes, concerning both its interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán. While this case presents many preliminary and other related questions, the core issue before this Tribunal concerns the legal significance that is to be attributed to this forum-selection provision of the Concession Contract in light of the remedial provisions in the BIT and the ICSID Convention. This question bears both on the jurisdiction of the Centre and the competence of this Tribunal under the ICSID Convention and on the legal analysis of the merits of the dispute between CGE and the Argentine Republic.



When CGE invoked the jurisdiction of ICSID in reliance on the terms of the BIT and the ICSID Convention and sought damages of over U.S. \$300 million, the Argentine Republic responded that it had not consented to submission of the dispute for resolution under the ICSID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided that it would not be able to resolve the jurisdictional question without a full presentation of the factual issues relating to the merits. Accordingly, the Tribunal, after receiving memorials from the parties and hearing oral argument, joined the jurisdictional issue to the merits.

For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.

With respect to the merits, CGE has not alleged that the Republic itself affirmatively interfered with its investment in Tucumán. Rather, CGE alleges that the Argentine Republic failed to prevent the Province of Tucumán from taking certain action with respect to the Concession Contract that, Claimants allege, consequently infringed their rights under the BIT. CGE also alleges that the Argentine Republic failed to cause the Province to take certain action with respect to the Concession Contract, thereby also infringing Claimants' rights under the BIT. In addition, CGE maintains that international law attributes to the Argentine Republic actions of the Province and its officials and alleges that those actions constitute breaches of the Argentine Republic's obligations under the BIT.

While CGE challenged actions of Tucumán in administrative agencies of the Province, CGE concedes that it never sought, pursuant to Article 16.4, to challenge any of Tucumán's actions in the contentious administrative courts of Tucumán as viola-

tions of the terms of the Concession Contract. CGE maintains that any such challenge would have constituted a waiver of its rights to recourse to ICSID under the BIT and the ICSID Convention.

The Tribunal does not accept CGE's position that claims by CGE in the contentious administrative courts of Tucumán for breach of the terms of the Concession Contract, as Article 16.4 requires, would have constituted a waiver of Claimants' rights under the BIT and the ICSID Convention. Further, as the Tribunal demonstrates below, the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract.

CGE presented certain additional claims regarding allegedly sovereign actions of Tucumán that Claimants maintained were unrelated to the Concession Contract. CGE asserted that these actions of the Province gave rise to international responsibility attributable to the Argentine Republic under the BIT as interpreted by applicable international law. Furthermore, CGE alleged that the Argentine Republic was also liable for its failures to perform certain obligations under the BIT that Claimants submitted gave rise to international responsibility independent of the performance of Tucumán under the Concession Contract. The Tribunal finds that many of these other claims arose, in fact, from actions of the Province relating to the merits of disputes under the Concession Contract and, for that reason, were subject to initial resolution in the contentious administrative tribunals of Tucumán under Article

16.4. To the extent such claims are the result of actions of the Argentine Republic or of the Province that are arguably independent of the Concession Contract, the Tribunal holds that the evidence presented in these proceedings did not establish the grounds for finding violation by the Argentine Republic of its legal obligations under the BIT either through its own acts or omission or through attribution to it of acts of the Tucumán authorities.<sup>4</sup>

12. In the final section of its Award, after reviewing the procedural history of the arbitration,<sup>5</sup> summarising the facts and respective legal positions of the parties<sup>6</sup> and explaining its reasoning with respect to both its jurisdiction<sup>7</sup> and the merits,<sup>8</sup> the Tribunal disposed of Claimants' case in the following terms:

### *G. Award*

The Tribunal herewith dismisses the claims filed by the Claimants against the Republic of Argentina.<sup>9</sup>

13. Before considering the grounds for annulment presented to the Committee, it is necessary to set out in some greater detail the Tribunal's reasoning both as to its jurisdiction and regarding the merits of the claim.

#### (1) The Tribunal's Findings on Jurisdiction

14. The core of the Tribunal's reasoning in support of its jurisdictional finding is contained in paragraphs 49 to 54 of the Award. The Tribunal found as follows:

(a) Claimants' claims concerning the actions of the federal government of Argentina as well as those of the provincial authorities of Tucumán are

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<sup>4</sup> Award, Part A., pp. 1-3; 40 ILM 426 (2001), pp. 427-429 (footnotes omitted).

<sup>5</sup> Award, Part B., paras. 1-23; 40 ILM 426 (2001), pp. 429-433.

<sup>6</sup> Award, Part C., paras. 24-39; 40 ILM 426 (2001), pp. 433-435.

<sup>7</sup> Award, Part D., paras. 40-55; 40 ILM 426 (2001), pp. 435-439.

<sup>8</sup> Award, Part E., paras. 56-92; 40 ILM 426 (2001), pp. 439-446.

<sup>9</sup> Award, Part G., p. 35; 40 ILM 426 (2001), p. 447. Part F. of the Award, paras. 93-96, contains the Tribunal's assessment and determination regarding the allocation of the costs and fees associated with the arbitration: 40 ILM 426 (2001), pp. 446-447.

properly characterised as claims arising under the BIT, and not as contractual claims under the Concession Agreement.<sup>10</sup>

- (b) Under international law, the acts of organs of both the central government and provincial authorities are attributable to the state—in this case, the Argentine Republic—with the result that Argentina cannot rely on its federal structure as a means of limiting its treaty obligations.<sup>11</sup>
- (c) Article 25(3) of the ICSID Convention is intended to allow for constituent subdivisions or agencies of a state party to the ICSID Convention to be subject to ICSID jurisdiction and to be parties to ICSID cases, in their own right and in their own name, where they have so consented and the Contracting State in question has approved. Article 25(3) neither limits the scope of the state's international responsibilities in accordance with normal rules of attribution nor qualifies the jurisdiction of an ICSID tribunal over that state. In the present case, it does not restrict the Tribunal's jurisdiction over the Argentine Republic pursuant to the BIT, and there is no question of the Province of Tucumán itself being a party to the arbitration in its own name.<sup>12</sup>
- (d) Similarly, Article 16(4) of the Concession Contract—which provides that “[f]or purposes of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán”—does not, and indeed could not, exclude the jurisdiction of the Tribunal under the BIT. Claimants' claims “are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.”<sup>13</sup>

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<sup>10</sup> Award, para. 50; 40 ILM 426 (2001), p. 438.

<sup>11</sup> Award, para. 49; 40 ILM 426 (2001), p. 437.

<sup>12</sup> Award, para. 51; in para. 52, the Tribunal supports this conclusion by reference to the *travaux* of Article 25; 40 ILM 426 (2001), p. 438.

<sup>13</sup> Award, para. 53; 40 ILM 426 (2001), pp. 438-439 (footnote omitted). This conclusion is supported *inter alia* by reference to the decision of the ICSID Tribunal in *Lanco International Inc v. Argentine Republic* (Preliminary Decision on Jurisdiction of 8 December 1998), 40 ILM 457 (2001).

15. The Tribunal went on to state that “[b]y this same analysis,”<sup>14</sup> instituting proceedings against the Province of Tucumán before the contentious administrative tribunals for breach of the Concession Contract would not have been “the kind of choice by Claimants of legal action in national jurisdictions (*i.e.*, courts) against the Argentine Republic that constitutes the ‘fork in the road’ under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention.”<sup>15</sup>

## (2) The Tribunal’s Findings on the Merits

16. In considering the Tribunal’s findings on the merits, it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims “based directly on alleged actions or failures to act of the Argentine Republic”<sup>16</sup> and, on the other hand, claims relating to conduct of the Tucumán authorities which are nonetheless brought against Argentina and “rely...upon the principle of attribution.”<sup>17</sup> For the purposes of this decision, these two categories of claims will be referred to, respectively, as the “federal claims” and the “Tucumán claims.”

17. Although, as mentioned above, the Tribunal expressly “dismiss[e]d the claims filed by Claimants against the Republic of Argentina,”<sup>18</sup> what it actually did—and did not do—was much disputed between the parties. According to the Respondent, the Tribunal carefully considered and, as stated in its Award, dismissed all of Claimants’ claims on the merits. According to

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<sup>14</sup> Referring to the analysis contained in paras. 53-54 of the Award (40 ILM 426 (2001), pp. 438-439) and summarized at para. 14(d) of this decision.

<sup>15</sup> Award, para. 55; 40 ILM 426 (2001), p. 439. Strictly speaking, this passage did not constitute part of the Tribunal’s findings on jurisdiction, though it flowed from its analysis of the jurisdictional situation. We return to it later in this decision.

<sup>16</sup> Award, para. 50; 40 ILM 426 (2001), p. 438.

<sup>17</sup> *Ibid.* The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Resolution 54/83, 12 December 2001 (hereafter “ILC Articles”), Articles 2(a), 4 and the Commission’s commentary to Article 4, paras. (8)-(10). A similar remark may be made concerning the Tribunal’s later reference to “a strict liability standard of attribution” (Award, para. 63; 40 ILM 426 (2001), p. 440). Attribution has nothing to do with the standard of liability or responsibility. The question whether a state’s responsibility is “strict” or is based on due diligence or on some other standard is a separate issue from the question of attribution (*cf.* ILC Articles, Arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.

<sup>18</sup> Award, Part G., p. 35; 40 ILM 426 (2001), p. 447.



Claimants, the Tribunal never actually considered the merits of their BIT claims at all, and by purporting to dismiss those claims without effectively considering them on their merits, the Tribunal manifestly exceeded its powers. Further, Claimants submit, even if it could be said that the Tribunal did consider their claims on the merits, it nonetheless failed to give any reasons for dismissing them. There is thus a fundamental difference between the parties as to the manner in which the Tribunal's decision is to be characterised.

(a) **The Federal Claims**

18. The Tribunal dealt with the federal claims—that is, claims arising from alleged conduct on the part of the federal authorities of the Argentine Republic—in paragraphs 83-90 and 92 of the Award.

19. It began by noting that on only one occasion—in a letter dated 5 March 1996—did Claimants ever raise the issue, as against the federal authorities directly, of a breach of the BIT.<sup>19</sup> The Tribunal noted that nowhere in the letter did Claimants “ask Argentine officials to take any particular action relating to the Concession Contract or the pending differences between Claimants and the authorities of Tucumán.”<sup>20</sup> Accordingly the Tribunal determined that “[t]he record contains no evidence that Argentine officials ever failed to take any specific action that the Claimants requested.”<sup>21</sup>

20. The Tribunal nonetheless went on to deal with the federal claims in some detail. It surveyed the range of “legal and political means” which, according to Claimants, the federal authorities should have used “to protect Claimants’ rights.”<sup>22</sup> These included: commencing legal proceedings against Tucumán in a federal court (para. 87); exercising financial (para. 88) and political (para. 89) leverage over the province; and notifying Tucumán that its conduct was in breach of the BIT (para. 90).

21. Representative of this discussion is the treatment of potential legal action by the federal government, in a federal court, designed “to compel Tucumán to comply with the BIT.”<sup>23</sup> The Tribunal acknowledged (but

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<sup>19</sup> Award, para. 83; 40 ILM 426 (2001), p. 444.

<sup>20</sup> *Ibid.*

<sup>21</sup> Award, para. 84; 40 ILM 426 (2001), p. 444.

<sup>22</sup> Award, para. 86; 40 ILM 426 (2001), p. 445.

<sup>23</sup> Award, para. 87; 40 ILM 426 (2001), p. 445.

declined to resolve) the contested issue of Argentine law as to whether a federal court action would lie against a province for breach of a treaty. It observed that recourse to the Tucumán tribunals was available to Claimants (or at least to CAA) under the terms of the Concession Contract. It concluded by holding:

On the facts presented, the Tribunal finds that there was no action of the Province of Tucumán that, absent such a local court proceeding [viz. under Article 16(4) of the Concession Agreement], so obviously violated the BIT as to require the Argentine government to seek a legal remedy against the Province in the Argentine courts nor, for that matter, did the Claimants ever specify any such action to the Argentine Republic.<sup>24</sup>

22. The Tribunal's overall conclusion regarding the federal claims was as follows:

In conclusion, the Tribunal finds that the record of these proceedings does not provide a basis for holding that the Argentine Republic failed to respond to the situation in Tucumán and the requests of the Claimants in accordance with the obligations of the Argentine government under the BIT.<sup>25</sup>

**(b) The Tucumán Claims**

23. Claimants' claims arising from the alleged conduct of Tucumán and its officials are discussed in paragraphs 57-82 and 91 of the Award.

24. After some initial discussion of the arguments of the parties regarding the so-called "strict liability standard of attribution" (paras. 57-61), the Tribunal declared that it would resolve the case not by answering any general question as to whether treaty provisions "impose a strict liability standard on a central government for actions of a political subdivision," but rather by analysing "the specific allegations on which the Claimants base their claims and their legal significance in light of the terms of the Concession Contract

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<sup>24</sup> *Ibid.*

<sup>25</sup> Award, para. 92; 40 ILM 426 (2001), p. 446.

and the BIT.”<sup>26</sup> It then proceeded to analyse what Claimants had identified as “four categories of ‘acts of the Province attributable to [Respondent] that violated Claimants’ rights under the BIT.’”<sup>27</sup>

25. The first category of alleged BIT violations by Tucumán concerned “[a]cts that resulted in a fall in the recovery rate.”<sup>28</sup> These included a decision by the Ombudsman, in December 1996, which was said to have deprived CGE of “their right to cut off service to non-paying customers,” as well as certain decisions of a local regulatory authority, ERSACT, which were said to have “forced a reduction in the tariff and thereby created uncertainty as to what invoices had to be paid.” In respect of all these decisions, the Tribunal found that “Claimants never challenged in the courts of Tucumán any of these actions of the administrative agencies of Tucumán relating to implementation of the Concession Contract.”<sup>29</sup>

26. Under this first category of impugned conduct, the Tribunal also considered Claimants’ allegations concerning public statements by provincial legislators and others purportedly urging customers not to pay their water bills. The Tribunal remarked that those allegations concerned “a highly disputed issue of fact, *i.e.*, whether Tucumán authorities organized a campaign for non-payment of invoices issued by Claimants”; but it determined that “[i]n any event, this non-payment issue relates to the grounds for non-payment under the Concession Contract,” and, as with the administrative decisions discussed above, the Tribunal found that “Claimants failed to challenge any of these acts in the Tucumán courts.”<sup>30</sup>

27. The second category of Tucumán conduct allegedly in violation of Claimants’ rights under the BIT concerned “[a]cts that unilaterally reduced the tariff rate.”<sup>31</sup> These were found to comprise essentially the same acts referred to in the first category, and the Tribunal determined that, as with the

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<sup>26</sup> Award, para. 62; 40 ILM 426 (2001), p. 440. Thus, as mentioned above (*see* note 17), the confusion inherent in the phrase “strict liability standard of attribution” seems to have no operative effect in the Award.

<sup>27</sup> Award, para. 63; 40 ILM 426 (2001), p. 440.

<sup>28</sup> Award, paras. 65-66; 40 ILM 426 (2001), pp. 440-441.

<sup>29</sup> Award, para. 65; 40 ILM 426 (2001), p. 440.

<sup>30</sup> Award, para. 66; 40 ILM 426 (2001), pp. 440-441.

<sup>31</sup> Award, para. 67; 40 ILM 426 (2001), p. 441.

impugned conduct comprising the first category, they “were never challenged in the Tucumán courts.”<sup>32</sup>

28. With respect to the third category of alleged Tucumán breaches of the BIT, which concerned certain “[a]buses of regulatory authority,”<sup>33</sup> the Tribunal again noted that “CGE never challenged in the Tucumán courts the interpretation that the Tucumán agencies gave to the provisions of the Concession Contract bearing on this issue.”<sup>34</sup>

29. The fourth category of alleged BIT violations by Tucumán concerned certain “[d]ealings in bad faith.”<sup>35</sup> A number of examples were given, including conduct by the provincial Governor designed to alter unilaterally “the terms of the second renegotiated agreement that was submitted to the Tucumán legislature” in the period March-August 1997 (paras. 70-71). After briefly reviewing the factual differences between the parties on this point (para. 72), the Tribunal observed that this aspect of the dispute related solely to the parties’ efforts to conclude a negotiated settlement. It stressed that, as Claimants themselves acknowledged, Tucumán was not “legally obligated to modify the Concession Contract” (para. 73). After noting that Argentina itself was involved in attempts to resolve the impasse, the Tribunal held that “on the evidence presented, the Tribunal does not find the basis for holding the Argentine Republic liable for actions of the Tucumán authorities.”<sup>36</sup>

30. Three additional allegations were made by Claimants in support of their claim of bad faith. One concerned certain fines imposed on Claimants for poor water quality allegedly discovered during water testing by Tucumán.

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<sup>32</sup> *Ibid.*

<sup>33</sup> Award, paras. 68-69; 40 ILM 426 (2001), p. 441.

<sup>34</sup> Award, para. 68. In para. 69, the Tribunal sidestepped a factual dispute as to whether “the ERS-ACT intervention” was a legitimate administrative intervention or was politically motivated, to the detriment of Claimants, noting again that “Claimants never brought any legal challenge in the courts of Tucumán [in respect] of the ERSACT intervention on the ground that such action violated the rights of CGE under the Concession Contract.” *See* 40 ILM 426 (2001), p. 441.

<sup>35</sup> Award, paras. 70-76; 40 ILM 426 (2001), pp. 441-442.

<sup>36</sup> Award, para. 73; 40 ILM 426 (2001), p. 442. This conclusion is repeated in para. 82 of the Award: 40 ILM 426 (2001), p. 444.

Argentina argued that the fines were authorised by the Concession Contract, and were in any event never collected; Claimants asserted that the fines were politically motivated and were intended to induce it to modify the Concession Contract, thus amounting to an abuse of power. For its part, the Tribunal concluded that “[s]ince none of the fines were ever enforced against Claimants, the Tribunal cannot base a finding of bad faith dealings on this alleged action, particularly when the dispute concerning its justification appears to depend in significant part on an interpretation of the Concession Contract that the parties thereto agreed would be decided by the Tucumán courts.”<sup>37</sup> Similarly, as regards the other acts of Tucumán allegedly committed in bad faith, the Tribunal concluded that “the parties disagree over the meaning and applicability of the pertinent provisions of the Concession Contract, as well as over the underlying facts.”<sup>38</sup>

31. The Tribunal’s conclusions, drawn from its analysis of these “four categories” of Tucumán acts, are summarised in paragraphs 77-84 of the Award.

32. The Tribunal opens this section of its Award with the statement that “it is apparent that all of the...actions of the Province of Tucumán on which the Claimants rely...are closely linked to the performance or non-performance of the parties under the Concession Contract.”<sup>39</sup> It concludes that “all of the issues relevant to the legal basis for these claims against Respondent arose from disputes between Claimants and Tucumán concerning their performance and non-performance under the Concession Contract.”<sup>40</sup> These findings lead to the Tribunal’s central conclusion:

[T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract requires, asserted their rights in proceedings before the contentious administrative

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<sup>37</sup> Award, para. 74; 40 ILM 426 (2001), p. 442.

<sup>38</sup> Award, para. 75; 40 ILM 426 (2001), p. 442. The Tribunal also referred summarily to the post-termination conduct of the parties, specifically Claimants’ allegations that they were forced to continue to provide services under the Concession Contract while the provincial authorities continued to obstruct their attempts to collect charges from their customers (para. 76). The Tribunal only summarised the arguments made by the parties in this regard.

<sup>39</sup> Award, para. 77; 40 ILM 426 (2001), p. 443.

<sup>40</sup> *Ibid.*



courts of Tucumán and have been denied their rights, either procedurally or substantively.<sup>41</sup>

33. The Tribunal went on to make a number of additional findings in support of this overarching conclusion:

[G]iven the nature of the dispute between Claimants and the Province of Tucumán, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract.... To make such determinations the Tribunal would have to undertake a detailed interpretation and application of the Concession Contract, a task left by the parties to that contract to the exclusive jurisdiction of the administrative courts of Tucumán.<sup>42</sup>

...

There is no allegation before the Tribunal that the courts of Tucumán were unavailable to hear such claims or that they lacked independence or fairness in adjudicating them.<sup>43</sup>

...

Because the Tribunal has determined that on the facts presented the Claimants should first have challenged the actions of the Tucumán authorities in its administrative courts, any claim against the Argentine Republic could arise only if Claimants were denied access to the courts of Tucumán to pursue their remedy under Article 16.4 or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice) or otherwise denied rights guaranteed to French investors under the BIT by the Argentine Republic.<sup>44</sup>

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<sup>41</sup> Award, para. 78; 40 ILM 426 (2001), p. 443.

<sup>42</sup> Award, para. 79; 40 ILM 426 (2001), p. 443.

<sup>43</sup> *Ibid.*

<sup>44</sup> Award, para. 80; 40 ILM 426 (2001), p. 443.

The Tribunal emphasizes that this decision does not impose an exhaustion of remedies requirement under the BIT because such requirement would be incompatible with Article 8 of the BIT and Article 26 of the ICSID Convention.

In this case, however, the obligation to resort to the local courts is compelled by the express terms of Article 16.4 of the [Concession Contract] and the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local courts.<sup>45</sup>

34. Two further points should be noted. The first concerns Article 10 of the BIT, on which Claimants had relied to avoid the apparently preclusive effect of Article 16(4) of the Concession Contract. Article 10 provides that:

Investments which have been the subject of a specific undertaking by one Contracting Party vis-à-vis investors of the other Contracting Party shall be governed, without prejudice to the provisions of this Agreement, by the terms of this undertaking, in so far as its provisions are more favourable than those laid down by this Agreement.

35. In a footnote, the Tribunal declared:

Article 10 protects rights granted to an investor under a special agreement if such rights are more favorable to the investor than those granted under the BIT. The question here is not whether one or the other is more favorable, but whether the Tribunal is in a position, on the facts of this case, to separate the breach of contract issues from violations of the BIT, considering that the parties to the Concession Contract have agreed to an exclusive remedy in the Tucumán courts for the determination of the disputed contractual issues which are not governed by the BIT.<sup>46</sup>

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<sup>45</sup> Award, para. 81; 40 ILM 426 (2001), p. 444.

<sup>46</sup> Award, para. 78, note 20; 40 ILM 426 (2001), p. 449.

36. The second point concerns the Tribunal's explanation of why, in its view, the so-called "fork in the road" provision of Article 8(2) of the BIT has no application to Claimants in the circumstances of this case. Article 8(2) provides in relevant part that, "[o]nce an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of those procedures is final." In the Tribunal's view, recourse by Claimants to the contentious administrative courts of Tucumán would not have precluded them from subsequently bringing claims before an ICSID tribunal in accordance with the BIT, i.e., it would not have amounted to a final "choice of one or the other of those procedures" within Article 8(2). The Tribunal addressed this question twice, in paragraphs 55 and 81 of the Award.

37. In paragraph 55, the Tribunal announced this conclusion with the prefatory words "[b]y this same analysis." The analysis in question is found in paragraphs 53 and 54, where, after analysing the decision in the *Lanco* case, the Tribunal stated:

53. ... In this case the claims filed by CGE against Respondent are based on violation by the Argentine Republic of the BIT... As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT.

54. Thus, Article 16.4 of the Concession Contract cannot be deemed to prevent the investor from proceeding under the ICSID Convention against the Argentine Republic on a claim charging the Argentine Republic with a violation of the Argentine-French BIT.

55. *By this same analysis*, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention...<sup>47</sup>

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<sup>47</sup> 40 ILM 426 (2001), pp. 438-439 (emphasis added, footnote omitted).

38. As these passages show, the Tribunal interpreted Article 8(2) as applying only to claims of a breach of the BIT, and not to purely contractual or other claims within the jurisdiction of the administrative courts of Tucumán, even if those claims overlapped with the claims for breach of the BIT. In other words, in the view of the Tribunal, the fork in the road set out in Article 8(2) is limited in its application to claims which explicitly “allege a cause of action under the BIT” or which “[charge] the Argentine Republic with a violation of the Argentine-French BIT”; it does not apply in the circumstance of claims “based on the Concession Contract” or to “a suit by Claimants...for violation of the terms of the Concession Contract.”

39. That this is the correct interpretation of the Tribunal’s ruling as to Article 8(2) is reinforced by the discussion contained in footnote 19, at paragraph 53 of the Award, where the Tribunal explicitly rejected Respondent’s contention that the Tucumán courts would have had jurisdiction over “a claim against the Argentine Republic based on the BIT.” It gave two reasons: first, “the Argentine Republic could have engaged in conduct or failed to act in violation of its obligations under the BIT even if Tucumán were not in violation of the Concession Contract”; and second, “the Tucumán courts do not have jurisdiction over such a suit [against the Argentine Republic] absent consent by Respondent.” The underlying assumption is, again, that for a claim before the Tucumán courts to be covered by Article 8(2), it would have to be “based on the BIT.”

40. The Tribunal returned to the question in paragraph 81 of its Award:

That is why the Tribunal rejects Claimants’ position that they had no obligation to pursue such local remedies against the Province or that, in the event of a denial of justice of [sic] rights under the BIT, that any such legal action in the Tucumán courts would have waived their right to resort to arbitration against the Argentine Republic before ICSID under the BIT.<sup>48</sup>

41. The Tribunal’s stated rationale for rejecting Claimants’ position is “the impossibility, on the facts of the instant case, of separating potential breaches of contract claims from BIT violations without interpreting and applying the Concession Contract, a task that the contract assigns expressly to the local

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<sup>48</sup> *Ibid.*, p. 444.

courts.” The Tribunal appears to have considered that, because Claimants’ contract and treaty claims could not be separated, a distinct claim “based on the BIT” was impossible in the circumstances of the case, at least prior to submission of the dispute to the provincial courts.

42. Thus, it seems that the Tribunal’s conclusion that the fork in the road was never reached in this case is based on an interpretation of Article 8(2) which limits its application exclusively to claims alleging a breach of the BIT, that is, to treaty claims as such.

43. The Tribunal returned to consider the Tucumán claims in paragraph 91 of the Award, which addresses Claimants’ allegations regarding hostile and concerted “action by officials, legislative and executive.” In this regard, the Tribunal said:

In addition to pointing out that the legislators on whose actions the Claimants rely were opponents of the governing party in Tucumán at the time that the disputes arose under the Concession Contract, Respondent presented a point by point refutation of the other evidence upon which Claimants rely for these allegations. After carefully reviewing the extensive memorials and testimony, the Tribunal finds that the record in these proceedings regarding these allegations does not establish a factual basis for attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucumán.<sup>49</sup>

### C. THE COMMITTEE’S ANALYSIS

44. Before proceeding to analyse the Tribunal’s reasoning in more detail, with a view specifically to assessing the validity of the grounds of annulment raised by the parties, it is necessary to say something about the France-Argentina BIT of 3 July 1991, and about the role of annulment panels and the scope of their powers.

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<sup>49</sup> *Ibid.*, p. 446.



(1) **Relevant Provisions of the France-Argentina BIT**

45. The Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments was signed by France and Argentina at Paris on 3 July 1991 and came into force on 3 March 1993.<sup>50</sup> It deals, *inter alia*, with the following matters relevant to the present proceeding.

(a) **Definition of “Investor” and “Investment”**

46. Article 1(1) contains a broad definition of the term “investment,” which includes: “Shares, issue premiums and other forms of participation, albeit minority or indirect, in companies constituted in the territory of either Contracting Party,” which are invested in accordance with the law of the Contracting Party before or after the entry into force of the BIT.<sup>51</sup>

47. The term “investor” is defined in Article 1(2). It is stated to apply to: (a) individuals; (b) bodies corporate having the nationality of one of the Contracting Parties, and also to

(c) Any body corporate effectively controlled, directly or indirectly, by nationals of one Contracting Party, or by bodies corporate having their registered office in the territory of one Contracting Party and constituted in accordance with that Party’s legislation.<sup>52</sup>

48. At the time the Concession Contract was signed and the initial investment was made, the shareholding in CAA was divided between CGE, a Spanish company, Dragados y Construcciones Argentina S.A. (Dycasa), and an Argentine company, Benito Roggio e Hijos S.A. (Roggio), none of which had a controlling shareholding in CAA. When the letter of 5 March 1996 was written, Dycasa maintained its interest in CAA, hence the letter referred not only to the Argentine-France BIT but also to a BIT between Spain and Argentina. Subsequently, in June 1996, CGE acquired Dycasa’s shareholding and thus had effective control of CAA within the meaning of Article 1(2)(c)

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<sup>50</sup> Above, note 3.

<sup>51</sup> BIT, Article 1(1)(b).

<sup>52</sup> BIT, Article 1(2)(c).

of the Argentine-French BIT at the time the arbitration proceedings were commenced.

49. Notwithstanding these facts (on which there seems to be no dispute between the parties) the Tribunal held, in a footnote, that “CAA should be considered a French investor from the effective date of the Concession Contract.”<sup>53</sup> The Respondent claims that this finding was unsupported by any reasons and was in fact contradicted by uncontested evidence before the Tribunal. According to the Respondent, CGE was not the controlling shareholder at the time when most of the alleged BIT violations occurred, and CAA was accordingly not an “investor” for the purposes of the BIT at that time.

50. In common with other BITs, Article 1 clearly distinguishes between foreign shareholders in local companies and those companies themselves. While the foreign shareholding is by definition an “investment” and its holder an “investor,” the local company only falls within the scope of Article 1 if it is “effectively controlled, directly or indirectly, by nationals of one Contracting Party” or by corporations established under its laws. In accordance with these provisions, which determine the scope of operation of the BIT, issues might well arise where there has been a transfer of control of a local company from a shareholder of one nationality to a shareholder of another. For example, if Dycasa had a Spanish treaty claim prior to March 1996, questions might arise as to how that claim could be later transferred to a French company, or as to how CGE could have acquired a French treaty claim in respect of conduct concerning an investment which it did not hold at the time the conduct occurred and which at that time did not have French nationality. At least, such questions might affect the quantum of recovery, but they might have further and even more basic legal consequences. But while it is arguable that the Tribunal failed to state any reasons for its finding that “CAA should be considered a French investor from the effective date of the Concession Contract,” that finding played no part in the subsequent reasoning of the Tribunal, or in its dismissal of the claim. Moreover it cannot be argued that CGE did not have an “investment” in CAA from the date of the conclusion of the Concession Contract, or that it was not an “investor” in respect of its own shareholding, whether or not it had overall control of CAA. Whatever the extent of its investment may have been, it was entitled to invoke the BIT in respect of conduct alleged to constitute a breach of Articles 3 or 5. It is also clear that CGE controlled CAA at the time the proceedings were commenced, so that there

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<sup>53</sup> Award, para. 24, note 6; 40 ILM 426 (2001), pp. 447-448.

was no question that the Tribunal lacked jurisdiction over CAA as one of Claimants in the arbitration. In the circumstances, and for the purposes of the present proceedings, the Committee does not need to reach any conclusion on the precise extent of CAA's and CGE's treaty rights at different times.

**(b) Local Remedies and Their Relation to Arbitration under the BIT**

51. The role and effect, if any, of local remedies available to the investor under the France-Argentina BIT are addressed in Article 8 of the BIT, which is central to this case, and in certain articles of the ICSID Convention, especially Article 26.

52. In accordance with Article 26 of the Convention, consent to ICSID arbitration involves consent "to the exclusion of any other remedy." A Contracting State may qualify its consent by requiring, as a pre-condition to arbitration, "the exhaustion of local administrative or judicial remedies." Argentina did not impose such a pre-condition when it agreed to Article 8 of the BIT. Accordingly it is common ground (and the Tribunal so held) that the exhaustion of local remedies rule does not apply to claims under the BIT.

53. Article 8 of the BIT expressly gives investors a choice of forum. Article 8 provides in full as follows:

1. Any dispute relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the two parties concerned.
2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the investor, be submitted:
  - Either to the domestic courts of the Contracting Party involved in the dispute;
  - Or to international arbitration under the conditions described in paragraph 3 below.

Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final.

3. Where recourse is had to international arbitration, the investor may choose to bring the dispute before one of the following arbitration bodies:

- The International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature in Washington on 18 March 1965, if both States Parties to this Agreement have already acceded to the Convention. Until such time as this requirement is met, the two Contracting Parties shall agree to submit the dispute to arbitration, in accordance with the rules of procedure of the Additional Facility of ICSID;
- An *ad hoc* arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

4. The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

5. Arbitral decisions shall be final and binding on the parties to the dispute. [Footnote omitted.]

54. Two initial points may be made about these provisions. First, it is evident that the term “national jurisdictions” as used in Article 8(2) (“juridictions nationales”/“jurisdicciones nacionales” in the authentic French and Spanish texts; “domestic courts” in the UNTS English translation) refers to all the courts and tribunals of the Contracting Parties, and not just to those at the federal level. In a treaty between a unitary and a federal state, such as France and Argentina respectively, one would not expect any disparity in the application of a phrase such as “national jurisdictions”: all French courts and tribunals are national, as are, for the purposes of the BIT, all courts and tribunals of

Argentina. The relevant distinction, as Article 8(2) makes clear, is between “national” and “international” tribunals, not between “national” and “provincial” courts. Thus, there is no disparity between the phrases “national jurisdictions [*i.e.*, courts]” and “jurisdictions [courts] of the Contracting Party” as used in the two paragraphs of Article 8(2). In consequence, the contentious administrative courts of Tucumán are to be considered as national courts falling within the scope of Article 8(2).<sup>54</sup>

55. Secondly, Article 8 deals generally with disputes “relating to investments made under this Agreement between one Contracting Party and an investor of the other Contracting Party.” It is those disputes which may be submitted, at the investor’s option, either to national or international adjudication. Article 8 does not use a narrower formulation, requiring that the investor’s claim allege a breach of the BIT itself. Read literally, the requirements for arbitral jurisdiction in Article 8 do not necessitate that the Claimant allege a breach of the BIT itself: it is sufficient that the dispute relate to an investment made under the BIT. This may be contrasted, for example, with Article 11 of the BIT, which refers to disputes “concerning the interpretation or application of this Agreement,” or with Article 1116 of the NAFTA, which provides that an investor may submit to arbitration under Chapter 11 “a claim that another Party has breached an obligation under” specified provisions of that Chapter. Consequently, if a claim brought before a national court concerns a “dispute relating to investments made under this Agreement” within the meaning of Article 8(1), then Article 8(2) will apply.<sup>55</sup> In the Committee’s view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán, would *prima facie* fall within Article 8(2) and constitute a “final” choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT.

### (c) Scope and Application of Substantive Provisions of the BIT

56. Claimants’ case before the Tribunal was based on Articles 3 and 5 of the BIT, which deal, respectively, with “fair and equitable treatment according

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<sup>54</sup> Although counsel for the Respondent contended otherwise before the Committee, the issue does not appear to have been the basis for the Tribunal’s ruling on Article 8(2). See above, paras. 35–41, where the Committee summarises its understanding of the Tribunal’s reasoning on this point.

<sup>55</sup> Cf. *Waste Management, Inc. v. Mexico (No. 1)*, 40 ILM 56 (2001) at p. 68 (para. 28).



to the principles of international law” and with “measures of expropriation...or any other equivalent measure.”

57. Article 3 provides that:

Each Contracting Party shall undertake to accord in its territory and maritime zone just and equitable treatment, in accordance with the principles of international law, to the investments of investors of the other Party and to ensure that the exercise of the right so granted is not impeded either *de jure* or *de facto*.

58. Article 5 provides that:

1. Investments made by investors of one Contracting Party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement.

2. The Contracting Parties shall not take, directly or indirectly, any expropriation or nationalization measures or any other equivalent measures having a similar effect of dispossession, except for reasons of public necessity and on condition that the measures are not discriminatory or contrary to a specific undertaking.

Any such dispossession measures taken shall give rise to the payment of prompt and adequate compensation the amount of which, calculated in accordance with the real value of the investments in question, shall be assessed on the basis of a normal economic situation prior to any threat of dispossession.

The amount and methods of payment of such compensation shall be determined not later than the date of dispossession. The compensation shall be readily convertible, paid without delay and freely transferable. It shall yield, up to the date of payment, interest calculated at the appropriate rate.

3. Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the

territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own investors or to investors of the most-favoured nation.

59. Both these Articles refer to an international law standard, expressly or by clear implication. The protection afforded under both Articles is extended to “investments made by investors.”

60. Again it is evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT’s standards and questions of contract. Article 8(4), by expressly empowering the Tribunal to base its ruling on the provisions of the BIT as well as on the terms of any private agreements concluded on the subject of the investment, clearly acknowledges that possibility. So too does Article 8(2), which contemplates that the very same dispute may be submitted either to the domestic courts of the Contracting Party (to be determined in accordance with the domestic law of that State), or to international arbitration (to be determined in accordance with the applicable law identified in Article 8(4)).

## (2) The Role of Annulment Under the ICSID Convention

61. It is against this background that the Committee has to consider the grounds for annulment relied on before it. Before doing so, however, some brief remarks on the role of annulment in the ICSID system are necessary.

62. Although the issue of the proper role of an annulment committee in the ICSID system must necessarily inform the analysis and the conclusions of this Committee, relatively little needs to be said about the issue for the reason that there seems to be little disagreement between the parties. Claimants and Respondent agree that an *ad hoc* Committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention. It also appears to be established that there is no presumption either in favour of or against annulment,<sup>56</sup> a point acknowledged by Claimants as well as Respondent.

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<sup>56</sup> Cf. *MINE v. Guinea*, Decision on Annulment of 22 December 1989, (1989) 4 ICSID Rep. 79 at p. 86 (paras. 4.09-4.12); and *see also* C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) (hereafter “Schreuer”), at pp. 902-3.

63. No doubt the Committee must take great care to ensure that the reasoning of an arbitral tribunal is clearly understood, and must guard against the annulment of awards for trivial cause. But where a tribunal has “manifestly exceeded its powers” or has committed “a serious departure from a fundamental rule of procedure”—both grounds for annulment under Article 52 of the ICSID Convention and both relied on by Claimants in this proceeding—the matter is by definition not trivial.

64. A greater source of concern is perhaps the ground of “failure to state reasons,” which is not qualified by any such phrase as “manifestly” or “serious.” However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons.<sup>57</sup> It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

65. In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.

66. Finally, it appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annulable error is found. Article 52(3) provides that a committee “shall have the authority to annul the award or any part thereof,” and this has been interpret-

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<sup>57</sup> See Schreuer, pp. 984-1008.

ed as giving committees some flexibility in determining whether annulment is appropriate in the circumstances.<sup>58</sup> Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties. This question, as it applies in the circumstances of the present case, is addressed below.

67. Another question, which was debated between the parties in this case, is whether an *ad hoc* committee is limited to the grounds for annulment relied on by a Claimant, or whether the Respondent may itself raise additional grounds for annulment. In their Application, Claimants sought only the partial annulment of the Award, on three grounds: (1) that the Tribunal manifestly exceeded its powers; (2) that there had been a serious departure from a fundamental rule of procedure; and (3) that the Award failed to state the reasons on which it is based.<sup>59</sup> The Respondent not only resisted each of these contentions, it further argued that if any of them were to be upheld, the Award *as a whole* should be annulled, on the grounds either that the Tribunal had no jurisdiction at all, or that there was a fundamental contradiction in the Tribunal's reasoning as between that part which dealt with jurisdiction and that part which dealt with the merits. By way of reply, in their written pleadings, Claimants argued that what they called Respondent's "counterclaim" for annulment of the Award as a whole was inadmissible, on the ground that it was out of time and that Article 52 made no provision for counterclaims.

68. The Committee agrees with Claimants that a counterclaim for annulment, that is, a claim which is not raised by the party concerned as a separate request in accordance with Article 52(1) of the Convention, is inadmissible. But it does not follow that a party, such as Respondent in the present case, may not present its own arguments on questions of annulment, provided that those arguments concern specific matters pleaded by the party requesting annulment, in this case the Claimants. In the opinion of the Committee, a party to annulment proceedings which successfully pleads and sustains a ground for annulment set out in Article 52(1) of the ICSID Convention cannot limit the extent to which an *ad hoc* committee may decide to annul the impugned award as a consequence. Certain grounds of annulment will affect the award as a whole—for example, where it is demonstrated that the tribunal which rendered the award was not properly constituted (Article 52(1)(a)). Others may

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<sup>58</sup> See Schreuer, pp. 1018-1023, with references to the authorities, especially *MINE* at paras. 4.09-4.10.

<sup>59</sup> Application, para. 3; *see also* para. 2 of the present decision.

only affect part of the award. An *ad hoc* committee is expressly authorised by the Convention to annul an award “in whole or in part” (Article 52(3)).

69. Thus where a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant’s characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award. This is reflected in the difference in language between Articles 52(1) and 52(3), and it is further supported by the *travaux* of the ICSID Convention. Indeed, Claimants in the present case eventually accepted this view.

70. In seeking in the alternative the annulment of the jurisdictional portion of the Award, the Respondent was not making a late annulment application by way of a counterclaim—a procedure which, as Claimants correctly asserted, is not contemplated by Article 52 of the ICSID Convention. Rather it was arguing that if Claimants’ position on the merits were to be upheld, either under Article 52(1)(b) or 52(1)(e), the effect must necessarily be to bring down the whole Award. That position was entirely open to the Respondent. It in no way entailed what would have been an inadmissible counterclaim for annulment on new grounds.

### (3) The Grounds of Annulment

71. The Committee accordingly turns to the grounds for annulment themselves. Since, as explained above, the grounds validly pleaded by the Respondent extend to the Tribunal’s holding on jurisdiction, it is appropriate to consider first the issue of the Tribunal’s jurisdiction.

#### (a) The Tribunal’s Jurisdictional Finding

72. The Committee has already summarised the grounds on which the Tribunal upheld its jurisdiction. The Tribunal gave extensive reasons for doing so, and these reasons are not in themselves contradictory.<sup>60</sup> It is true that Respondent argued, in the alternative, that there was a contradiction between those reasons and the reasons given by the Tribunal concerning the merits. But Argentina also argued that the Tribunal lacked jurisdiction in any event. If this

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<sup>60</sup> With the possible exception of the matter concerning Dycasa’s shares, referred to above, para. 48.

is right, it was a manifest excess of power for the Tribunal to proceed to consider the merits, and the whole Award must be annulled. Accordingly, the question of failure to give reasons, including possibly contradictory reasons, does not arise so far as the Tribunal's jurisdictional finding is concerned.

73. For its part, however, the Committee has no difficulty accepting each of the four propositions, summarised in paragraph 14 above, on the basis of which the Tribunal held that it had jurisdiction and that its jurisdiction extended to the Tucumán claims.

74. In particular, the Committee agrees with the Tribunal in characterising the present dispute as one "relating to investments made under this Agreement" within the meaning of Article 8 of the BIT. Even if it were necessary in order to attract the Tribunal's jurisdiction that the dispute be characterised not merely as one relating to an investment but as one concerning the treatment of an investment in accordance with the standards laid down under the BIT, it is the case (as the Tribunal noted) that Claimants invoke substantive provisions of the BIT.

75. The Committee likewise agrees that the fact that the investment concerns a Concession Contract made with Tucumán, a province of Argentina which has not been separately designated to ICSID under Article 25(1), does not mean that the dispute falls outside the scope of the BIT, or that the investment ceases to be one "between one Contracting Party and an investor of the other Contracting Party" within the meaning of Article 8(1) of the BIT.

76. This being so, the fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16(4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under Article 8(2) of the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required.

77. The *Lanco* decision, cited by the Tribunal, supports its finding of jurisdiction.<sup>61</sup> In that case the contract at issue, which involved an agency of the federal government of Argentina, contained an exclusive jurisdiction clause

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<sup>61</sup> 40 ILM 457 (2001), cited by the Tribunal in its Award, para. 53.



referring contractual disputes to a federal contentious administrative tribunal. The *Lanco* Tribunal held:

[T]he stipulation of Article 12 of the Concession Agreement, according to which the parties shall submit to the jurisdiction of the Federal Contentious-Administrative Tribunals of the City of Buenos Aires, cannot be considered a previously agreed dispute-settlement procedure. The Parties could have foreseen submission to domestic or international arbitration, but the choice of a national forum could only lead to the jurisdiction of the contentious-administrative tribunals, since administrative jurisdiction cannot be selected by mutual agreement.<sup>62</sup>

78. But in any event the *Lanco* Tribunal denied that an exclusive jurisdiction clause could exclude ICSID jurisdiction, relying in particular on Article 26 of the ICSID Convention. It said:

§39 A State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause. The ARGENTINA-U.S. Treaty does not provide at any point for the exhaustion of domestic remedies, and the Argentine Republic, for its part, has not alleged that there is any such domestic legislation. The only requirement that the ARGENTINA-U.S. Treaty does provide for is the period of six months that is required for turning to ICSID arbitration.

§40 In our case, the Parties have given their consent to ICSID arbitration, consent that is valid, there thus being a presumption in favor of ICSID arbitration, without having first to exhaust domestic remedies. In effect, once valid consent to ICSID arbitration is established, any other forum called on to decide the issue should decline jurisdiction. The investor's consent, which comes from its written consent by letter of September 17, 1997, and its request for arbitration of October 1, 1997, and the consent of the State which comes directly

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<sup>62</sup> 40 ILM 457 (2001), p. 466 (§ 26).

from the ARGENTINA-U.S. Treaty, which gives the investor the choice of forum for settling its disputes, indicate that there is no stipulation contrary to the consent of the parties... In effect, the offer made by the Argentine Republic to covered investors under the ARGENTINA-U.S. Treaty cannot be diminished by the submission to Argentina's domestic courts, to which the Concession Agreement remits.<sup>63</sup>

79. Indeed, *Lanco* was a stronger case on the facts than the present, as regards the effect of an exclusive jurisdiction clause, since the foreign claimant in *Lanco* was actually a party to the exclusive jurisdiction clause at issue, unlike CGE here.<sup>64</sup>

80. For all these reasons, the Respondent's request that the Tribunal's jurisdictional finding be annulled must be rejected.

#### (b) The Tribunal's Findings on the Merits

81. Claimants relied on three grounds set out in Article 52 of the ICSID Convention as supporting its request for partial annulment. The Committee will deal with these in turn.

##### (i) *Serious departure from a fundamental rule of procedure: Article 52(1)(d)*

82. The first of these grounds concerns the claim that "there has been a serious departure from a fundamental rule of procedure" (Article 52(1)(d)). Claimants argued that the Tribunal had departed from a fundamental rule of procedure in that its eventual decision, notably as to the dismissal of the Tucumán claims on grounds related to Article 16(4) of the Concession Contract, concerned a question not adequately canvassed in argument.

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<sup>63</sup> *Ibid.*, §§ 39-40.

<sup>64</sup> See also *Salini Costruttori SpA v. Kingdom of Morocco*, ICSID, jurisdictional decision, 23 July 2001, reported in 129 *Journal de droit international* 196 (2002), with note by Gaillard, *ibid.*, p. 209. This was a construction dispute focusing on the amount payable under a contract with a local jurisdiction clause. The Tribunal held that provisions in the BIT concerning measures of expropriation or nationalization "ne saurait être interprétée dans le sens d'une exclusion de tout grief d'origine contractuelle du champ de l'application de cet article" (p. 209, para. 59), and further that, notwithstanding the local jurisdiction clause, "le Tribunal arbitral demeure compétent pour les violations du contrat qui constituerait en même temps, à la charge de l'Etat une violation de l'Accord bilatéral" (p. 209, para. 62).

83. The Committee cannot find in the record of the arbitration, including the Award, any basis for Claimants' allegations in this regard. Under Article 52(1)(d), the emphasis is clearly on the term "rule of procedure," that is, on the manner in which the Tribunal proceeded, not on the content of its decision. In the opinion of the Committee, the Tribunal proceeded with abundant care. It considered the issue of jurisdiction first, and it decided, in the exercise of its discretion, to join that issue to the merits of the dispute. It then considered the merits at length and rendered a densely reasoned award.

84. Claimants contend the Tribunal's decision came unannounced, and that they had no opportunity to present arguments on the decision to dismiss their claim on the merits on grounds related to Article 16(4) of the Concession Contract. It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention. In fact, the Tribunal had already determined that the questions of jurisdiction and merits were closely linked, and it had joined the two. Moreover, in its questioning and especially its request for post-hearing briefs, the Tribunal clearly indicated that it had concerns as to how to reconcile Article 8 of the BIT and Clause 16(4) of the Concession Contract.

85. From the record, it is evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings. They had ample opportunity to consider and present written and oral submissions on the issues, and the oral hearing itself was meticulously conducted to enable each party to present its point of view. The Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*. For these reasons, the Committee finds no departure at all from any fundamental rule of procedure, let alone a serious departure.

*(ii) Manifest excess of powers: Article 52(1)(b)*

86. It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under

those instruments.<sup>65</sup> One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).

87. No doubt an ICSID tribunal is not required to address in its award every argument made by the parties, provided of course that the arguments which it actually does consider are themselves capable of leading to the conclusion reached by the tribunal and that all questions submitted to a tribunal are expressly or implicitly dealt with. In the present case, Claimants contend that, far from considering their claims concerning breach of the BIT prior to purportedly dismissing them, the Tribunal actually declined to decide Claimants' allegations since it considered that, in order to do so, it would have had to address issues which, according to the Concession Contract, fell within the exclusive jurisdiction of the Tucumán courts. Claimants argue that if the Tribunal was wrong as regards this approach—that is, if the Tribunal erred in finding that it could not consider the BIT claims, in the circumstances—it failed to exercise its treaty jurisdiction, a jurisdiction which it had itself upheld. On that assumption, its failure to do so could also be said to be manifest.

88. With these preliminary comments in mind, the Committee turns to the substance of Claimants' request for partial annulment of the Award on the ground of manifest excess of powers. In doing so, it is necessary to distinguish between the Tribunal's treatment of the federal claims and the Tucumán claims.

#### *The federal claims*

89. An initial point concerns Claimants' argument that there was a breach of the BIT by reason of the actions and omissions of ministers and officers of the federal government of the Argentine Republic—the so-called “federal claims.” As the review of the Tribunal's reasoning set out at paragraphs 18-22 above demonstrates, the Award clearly evidences a certain reliance on Article 16(4) of the Concession Contract even as to the federal claims; and the Tribunal's interpretation of the obligations incumbent on the federal authori-

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<sup>65</sup> Schreuer, pp. 937-938.

ties under the BIT emerges more by implication from its treatment of the facts than as a result of any detailed analysis. However, in the opinion of the Committee, it is nonetheless clear that the Tribunal carefully considered the federal claims on the facts, and that it rejected those claims. The Tribunal committed no excess of power, manifest or other, so far as the federal claims are concerned.

90. Claimants submit that, even if the Tribunal could be said to have considered the federal claims on their merits, its consideration was vitiated in that the Tribunal's handling of the federal and Tucumán claims was interdependent. Specifically, Claimants argue that if Tucumán's actions did in truth constitute a breach of the BIT, then Respondent was under a far more stringent obligation to respond and to correct the situation than the Tribunal found applied to it. Claimants contend that the Tribunal—always with its mind set on Article 16(4)—failed to consider this alternative. In the opinion of the Committee, it is true, as mentioned in the preceding paragraph, that Article 16(4) did obtrude into the Tribunal's analysis of the federal claims to some degree. However, the Tribunal did not suggest that Claimants were in any sense obliged to pursue their federal claims in any domestic court or tribunal. It held, rather, that the federal authorities could reasonably have regarded the dispute as contractual in character,<sup>66</sup> and that the extent of any federal obligation to react could reasonably have been influenced by this perception.

91. As to the Tribunal's findings of fact, there is no basis under Article 52 of the ICSID Convention for this Committee to disagree. The Tribunal found that the Argentine federal authorities responded to Claimants' initiatives, that they sought to resolve the problem and in fact took reasonable steps to do so, that they did not fail to do anything requested of them and that they were never themselves charged, directly, with any breach of the BIT. As to the Tribunal's findings of law, it may be that the Award lacks a detailed analysis of the relevant BIT provisions, as Claimants contend. Yet the gist of the Tribunal's reasoning is clear enough. On its face, Article 3 of the BIT imposes no more than an obligation on the Argentine Republic to take appropriate care. And the Tribunal's findings, taken together, are more than sufficient to provide a basis for the Tribunal's clear conclusion that the federal claims were not sustainable, and that there had been no breach of Article 3 as a result of any federal act or omission. Moreover the Committee does not consider that the Tribunal's dismissal of Claimants' federal claims was so intimately linked

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<sup>66</sup> Award, para. 87; 40 ILM 426 (2001), p. 445.

to its decision regarding the Tucumán claims, and to its alleged failure to exercise its jurisdiction with respect to the latter, that the Tribunal's determination of the federal claims must fall in the event that its decision on the Tucumán claims is annulled.

92. For these reasons, Claimants' request for partial annulment of the Award in relation to the Tribunal's determination of the federal claims is rejected.

*The Tucumán claims*

93. The second question in relation to Article 52(1)(b) is whether the Tribunal, having validly held that it had jurisdiction over the Tucumán claims, was entitled nonetheless to dismiss them as it did. Claimants, for their part, submit that the Tribunal did not so much dismiss the Tucumán claims as decline to address them. They argue that the only reason those claims were dismissed was that they were held to be substantially identical with claims against Tucumán under the Concession Contract, which the Tribunal found it could not determine, and that the Tribunal's refusal to decide the Tucumán claims on this basis was a manifest excess of powers. The Respondent argues that, assuming the Tribunal had jurisdiction over these claims, it acted correctly in dismissing them on the basis of Article 16(4) of the Concession Contract, but that in any event this was not the only reason for dismissal since the Tribunal did consider the Tucumán claims on their merits.

94. In dealing with these issues, it is necessary first to consider the relationship between the responsibility of Argentina under the BIT and the rights and obligations of the parties to the Concession Contract (especially those arising from Article 16(4), the exclusive jurisdiction clause); and secondly, to consider precisely what the Tribunal decided with respect to the Tucumán claims.

95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and *vice versa*, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled "Characterization of an act of a State as internationally wrongful":



The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities.<sup>67</sup> By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to Article 3 of the ILC Articles, which reads in relevant part as follows:

(4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... the Member cannot contend that this obligation is governed by municipal law.” In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

‘Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.’

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<sup>67</sup> See above, paras. 16, 23-33, 43.

Conversely, as the Chamber explained:

‘...the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.’

...

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.<sup>68</sup>

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<sup>68</sup> Commentary to Article 3, paras. (4), (7) (footnotes omitted). The passages from the *ELSI* case, quoted in para. (4) of the commentary, are to be found at ICJ Reports 1989 at p. 51, para. 73, and p. 74, para. 124.

98. In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.<sup>69</sup> For example in the *Woodruff* case,<sup>70</sup> a decision of an American-Venezuelan Mixed Commission in 1903, a claim was brought for breach of a contract which contained the following clause:

Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation.

99. The Commission in that case held that Woodruff was bound by this clause not to refer his contractual claim to any other tribunal. At the same time, the exclusive jurisdiction clause did not and could not preclude a claim by his government in the event that the treatment accorded him amounted to a breach of international law:

[W]hereas certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamation, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party;

But whereas this does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not

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<sup>69</sup> That is, unless the treaty in question otherwise provides. See, e.g., Article II(1) of the Claims Settlement Declaration of 19 January 1981, 1 *Iran-U.S. Claims Tribunal Reports* p. 9, which overrode exclusive jurisdiction clauses concerning United States courts but not Iranian courts: see the cases cited by C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998) pp. 60-72. The Committee does not need to consider whether the effect of Article 8 of the BIT is to override exclusive jurisdiction clauses in contracts underlying investments to which the BIT applies.

<sup>70</sup> *Reports of International Arbitral Awards*, vol. IX, p. 213.

impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges;...<sup>71</sup>

100. The Commission accordingly dismissed the claim “without prejudice on its merits, when presented to the proper judges,” on the ground that “by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction of this Commission.”<sup>72</sup>

101. On the other hand, where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.<sup>73</sup> At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.

102. In the Committee’s view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.

103. Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.

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<sup>71</sup> *Ibid.*, p. 222.

<sup>72</sup> *Ibid.*, p. 223.

<sup>73</sup> It is not necessary for the Committee to pronounce on the content of the standard laid down in the BIT, in particular Article 3. It may be that “mere” breaches of contract, unaccompanied by bad faith or other aggravating circumstances, will rarely amount to a breach of the fair and equitable treatment standard set out in Article 3. The Tribunal did not, however, offer any interpretation of Article 3, nor seek to base itself on this consideration.

104. The Respondent argues that, even if the Tribunal had jurisdiction, and even if it could not decline to exercise that jurisdiction by reference to the exclusive jurisdiction clause in the Concession Contract, this was not what the Tribunal did. According to the Respondent, it emerges clearly from the Award that the Claimants had no arguable case for a breach of Articles 3 or 5 of the BIT and that, at best, their claim was one for breach of contract: the issue of a treaty claim could only arise in the event that the contentious administrative tribunals of Tucumán denied Claimants justice, substantively or procedurally.

105. The question thus becomes how to characterize the Tribunal's decision. In considering that question, the Committee does not believe that it is material either that CGE was not a party to the Concession Contract or that the parties to the Concession Contract were CAA and the Province of Tucumán, as opposed to CAA and the federal government. If the Tribunal was right in saying that it could not consider any allegation of breach of treaty which required it to interpret or apply the Concession Contract, then it is arguable that CGE could be in no better position than CAA. It is also arguable that this conclusion should apply even though CAA's contractual commitment was to a province, since the acts of that province form the nub of the claim. But it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT.

106. Claimants made a series of allegations as to the conduct of Tucumán, much of which, they claim, involved measures taken in bad faith. Such action included alleged instances of: acts of the Ombudsman and other regulatory authorities; incitement of consumers, by legislators and others, not to pay their water bills; unauthorized tariff changes; the incorrect imposition of fines (never in fact collected) for allegedly deficient water quality; incorrect invoicing for municipal and provincial water taxes; conduct relating to the "black water" problem, which was blamed on CAA, but which CAA denied was its fault; unilateral changes by the provincial Governor to the second renegotiated agreement; and various post-termination conduct. This conduct, they contend, amounted on the whole to concerted action by the Tucumán authorities to frustrate the concession.

107. The Tribunal expressed views on some of these allegations, but by no means all. For example, in paragraph 82 of the Award, the Tribunal took the

view that the unilateral changes to the renegotiated agreement did not amount to a breach of the BIT because there was no legal duty to revise the concession contract.<sup>74</sup> In paragraph 91, under the general heading “Failure of the Argentine Republic to Respond to Actions of Tucumán Officials,” the Tribunal concluded that “the record...does not establish a factual basis for attributing liability to the Argentine Republic under the BIT for the alleged actions of officials of Tucumán.”<sup>75</sup> In its context the latter passage is not unequivocal; it suggests that the Tribunal had in mind earlier discussion of the “strict liability standard of attribution,” and the reference to “alleged action” is troublesome: it is in the end unclear whether the Tribunal rejected the Claimants’ allegations of fact or whether they held that the allegations, though potentially made out, were not sufficient to “attribute liability” to the federal government.

108. But however this may be, it is clear from the core discussion of the Tucumán claims, at paragraphs 77-81 of the Award, that the Tribunal declined to decide key aspects of the Claimants’ BIT claims on the ground that they involved issues of contractual performance or non-performance. The Tribunal itself characterised these passages, in paragraph 81, as embodying its “decision” with respect to the Tucumán claims.

109. A key passage in this regard is found in paragraph 79, where the Tribunal said:

[G]iven the nature of the dispute between Claimants and the Province of Tucumán, it is not possible for this Tribunal to determine which actions of the Province were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract considering, in particular, that much of the evidence presented in this case has involved detailed issues of performance and rates under the Concession Contract.<sup>76</sup>

110. This passage calls for two remarks. First, it is couched in terms not of decision but of the *impossibility* of decision, the impossibility being founded

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<sup>74</sup> Award, para. 82; 40 ILM 426 (2001), p. 444.

<sup>75</sup> Award, para. 91; 40 ILM 426 (2001), p. 446.

<sup>76</sup> Award, para. 79; 40 ILM 426 (2001), p. 443.



on the need to interpret and apply the Concession Contract.<sup>77</sup> Yet under Article 8(4) of the BIT the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT. Second, the passage appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights.<sup>78</sup>

111. For these reasons, and despite certain passages of the Award in which the Tribunal seems to go further into the merits, the Committee can only conclude that the Tribunal, in dismissing the Tucumán claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the BIT. In particular, the Tribunal repeatedly referred to allegations and issues which, it held, it could not decide given the terms of Article 16(4) of the Concession Contract, even though these were adduced by Claimants specifically in support of their BIT claim.<sup>79</sup> Moreover, it offered no interpretation whatsoever either of Article 3 or of Article 5 of the BIT, something which was called for if the claims were to be dismissed on their merits.

112. It is not the Committee's function to form even a provisional view as to whether or not the Tucumán conduct involved a breach of the BIT, and it is important to state clearly that the Committee has not done so. But it is

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<sup>77</sup> See also the Tribunal's summary, cited in para. 11 above, where the Tribunal said it was "impossible...to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement."

<sup>78</sup> See ILC Articles, commentary to Article 4, para. (6), commentary to Article 12, paras. (9)-(10). See also C. Amerasinghe, "State Breaches of Contracts with Aliens and International Law," *American Journal of International Law*, vol. 58 (1964), p. 881, at pp. 910-912: "The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties"; R. Jennings & A. Watts, *Oppenheim's International Law* (9th edn.) (Harlow, Longman, 1992), p. 927: "It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes *per se* a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility."

<sup>79</sup> Award, paras. 65, 66, 67, 68, 69, 74, 75, 76, 77, 78, 79, 80, 81; 40 ILM 426 (2001), pp. 440-444.

nonetheless the case that the conduct alleged by Claimants, if established, *could* have breached the BIT. The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it. Although the Tribunal expressed conclusions on certain aspects of the claim, it never expressed a conclusion as to the claim as a whole, still less did it assess Claimants' case against the requirements of Article 3 or 5 of the BIT.

113. In the light of Article 8 of the BIT, the situation carried risks for Claimants. Having declined to challenge the various factual components of its treaty cause of action before the administrative courts of Tucumán, instead choosing to commence ICSID arbitration—and having thereby, in the Committee's view, taken the “fork in the road” under Article 8(4)—CAA took the risk of a tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT. In that event, it would have lost both its treaty claim and its contract claim. But on the other hand it was entitled to take that risk, with its associated burden of proof. A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard. The availability of local courts ready and able to resolve specific issues independently may be a relevant circumstance in determining whether there has been a breach of international law (especially in relation to a standard such as that contained in Article 3). But it is not dispositive, and it does not preclude an international tribunal from considering the merits of the dispute.

114. It should be stressed that the conduct complained of here was not more or less peripheral to a continuing successful enterprise. The Tucumán conduct (in conjunction with the acts and decisions of Claimants) had the effect of putting an end to the investment. In the Committee's view, the BIT gave Claimants the right to assert that the Tucumán conduct failed to comply with the treaty standard for the protection of investments. Having availed itself of that option, Claimants should not have been deprived of a decision, one way or the other, merely on the strength of the observation that the local courts could conceivably have provided them with a remedy, in whole or in part. Under the BIT they had a choice of remedies.

115. For all of these reasons, the Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.

*(iii) Failure to state reasons: Article 52(1)(e)*

116. In view of the foregoing conclusion, it is unnecessary to consider the further ground of annulment relied on by Claimants, viz., that in dismissing the claim the Tribunal failed to state the reasons on which its decision was based. As to the federal claims, the Committee has already concluded that reasons for the dismissal of those claims were given. As to the Tucumán claims, in the Committee's view the Tribunal gave very full reasons for the step it took, viz., the dismissal of those claims without any overall consideration of their merits. The question of failure to state reasons would only arise if one took the view that the Tribunal actually did reach a conclusion adverse to Claimants under Articles 3 and 5 in respect of the Tucumán claims as a whole—a view the Committee has already rejected. Accordingly, nothing more needs to be said on this ground of annulment.

#### D. COSTS

117. The Tribunal made no order for costs, and required Claimants and Respondent to share equally the costs of ICSID. It observed that the dispute raised “a set of novel and complex issues not previously addressed in international arbitral precedent relating to the interplay of a bilateral investment treaty, a Concession Contract with a forum-selection clause and the ICSID Convention.”<sup>80</sup> It noted that both parties had prevailed to some extent. These considerations apply equally to the present phase of the proceedings. Claimants have succeeded in part, but only in part. Moreover, Argentina was entitled to take the position it took, which itself raised a difficult and novel

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<sup>80</sup> Award, para. 95; 40 ILM 426 (2001), p. 447.

question of public importance concerning ICSID and the operation of investment protection agreements on the model of the BIT.

118. In the light of the importance of the arguments advanced by the parties in connection with this case, the Committee considers it appropriate that each party bear its own expenses incurred with respect to this annulment proceeding, and that the parties bear equally all expenses incurred by the Centre in connection with this proceeding, including the fees and expenses of the members of the Committee.

#### E. DECISION

119. For the foregoing reasons, the Committee DECIDES:

- (a) The Tribunal rightly held that it had jurisdiction over the claims.
- (b) The Tribunal committed no annullable error in its rejection of the federal claims (claims concerning the conduct of federal authorities) on the merits, and that rejection is accordingly *res judicata*.
- (c) The Tribunal manifestly exceeded its powers by not examining the merits of the claims for acts of the Tucumán authorities under the BIT and its decision with regard to those claims is annulled.
- (d) Each party shall bear its own expenses, including legal fees, incurred in connection with this annulment proceeding.
- (e) Each party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding. Accordingly, the Argentine Republic shall reimburse the Claimants one half of the total costs incurred by the Centre in connection with this annulment proceeding once the amount has been determined by the Secretariat of the Centre.

Done in English and Spanish, both versions being equally authoritative.

L. YVES FORTIER, C.C., Q.C.  
*President of the Committee*

Professor JAMES R. CRAWFORD  
*Member*

Professor JOSÉ CARLOS FERNANDEZ ROZAS  
*Member*