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FORUM 173

ARTICLES

Arbitrating financial "star wars" – *Bryan Pape*

This article considers the use of arbitration as a way of resolving financial disputes involving "over-the-counter" (OTC) derivatives. Understanding these derivatives is vital to avoiding systemic risk in the global financial economy. OTC derivative disputes involve important challenges, not only because of their complexity, especially in the case of non-centrally cleared derivatives, but also because of their unfamiliarity among commercial arbitrators who are likely to be pressed by the parties for a speedy delivery of an award. 174

Improving the ability of guarantors to make a real choice: Lenders' practices in taking third party guarantees – *Denise McGill* and *Nicola Howell*

This article considers recent cases on guarantees of business loans to identify the lending practices that led the court to set aside the guarantee as against the creditor on the basis that the creditor had engaged in unconscionable conduct. It also explores the role of industry codes of practice in preventing unconscionable conduct, including whether there is a correlation between commitment to an industry code and higher standards of lending practices, whether compliance with an industry code would have produced different outcomes in the cases considered, and whether lenders need to do more than comply with an industry code to ensure their practices are fair and reasonable. 182

Dealings in collateral under the Personal Property Securities Act 2009 (Cth) – in search of a "harmonious whole" – *Bruce Whittaker*

Australian courts have just recently had their first opportunity to consider the substantive operation of the Personal Property Securities Act 2009 (Cth) (PPSA), in a decision of the New South Wales Supreme Court handed down in June 2013. This has thereby given a first indication of how courts will go about the task of breathing life into the PPSA. Will they embrace the "vibe" and interpret the legislation in a broad and flexible manner, consistent with approaches overseas, or will they approach the task in a stricter, more traditional fashion? Will they draw extensively on the wealth of case law and academic commentary that is available in relation to similar legislation in Canada and New Zealand, or will they limit themselves for guidance to more usual extrinsic materials? This article starts by considering what approach Australian courts should take to the task of interpreting the PPSA, and tests that against the approach taken by the New South Wales Supreme Court in that decision. The article then tests the capacity of the PPSA to produce meaningful outcomes if it is interpreted using traditional Australian principles of statutory interpretation by considering what happens to a perfected security interest in collateral when the collateral is dealt with without the secured party's consent. In doing so, it identifies areas of particular uncertainty, and makes suggestions for reform. 203

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