International Institute for Conflict Prevention & Resolution

Bartlit Beck Herman Palenchar & Scott LLP,	)	
	)	
Claimant,	)	Case No. G-19-07-G-AA
v.	)	
	)	FINAL AWARD
Kazuo Okada,	)	
	)	
	)	
Respondent	)	
	)	

WE, THE UNDERSIGNED ARBITRATORS, having been duly sworn and having heard the proofs and allegations of the parties, AWARD as follows:

I. INTRODUCTION

This dispute arises out of the failure of Respondent Kazuo Okada ("Respondent" or "Okada") to pay the contingent fee that Claimant Bartlit Beck Herman Palenchar & Scott LLP ("Claimant" or "Bartlit Beck") contends Okada owes it pursuant to an Engagement Agreement the parties entered into, dated December 9, 2017 (the "Agreement").

Less than 72 hours before the evidentiary hearing was scheduled to commence on October 28, 2019, Okada informed his counsel that he would not attend the hearing. His counsel, in turn, informed the Panel. Okada then instructed his counsel not to appear.[1]

[1] These events are explained in more detail at pp. 29-33 *infra*.

The Panel then informed the parties that pursuant to CPR Rule 16[2] of the Administered Arbitration Rules, effective July 1, 2013 (hereinafter "CPR Rule or Rules"), Okada had defaulted and had forfeited his right to present any affirmative defenses to the claim. In compliance with CPR Rule 16, the Panel stated that it would require Claimant to meet its burden of proof through the introduction of evidence before entering an Award. Bartlit Beck then requested that the evidence be submitted on the papers. The Panel agreed to consider the matter based on the submission of evidence and argument, rather than live testimony.

The Panel has reviewed the submitted evidence and legal argument consisting of:

i) Declarations of Chris Lind, Hamilton Hill, Jeffrey Huff and Joshua Ackerman

ii) Excerpts from the depositions of Kazuo Okada and Robert Ziems

iii) 517 Exhibits (referred hereinafter to as "BB Exh. or BB Supp. Exh.")

iv) Expert Report of Professor Lynn A. Baker

v) Bartlit Beck's Prehearing Brief

vi) Bartlit Beck's Final Brief in Support of Award.

Based on our review of the evidence and legal briefing, we find that Bartlit Beck has met its burden of proving, by a preponderance of the evidence, that Okada breached the Agreement by

[2] **Rule 16. Failure to Comply with Rules.** Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules, in a manner deemed material by the Tribunal, the Tribunal shall, if appropriate, fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce such evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.

failing to pay the contingent fee he promised to pay. Accordingly, we find that Bartlit Beck has prevailed in its claim for breach of contract. Okada owes the full amount of the contingent fee, and pre- and post-judgment interest in the amount fully explained at pp. 54-55, *infra*. We also find that pursuant to CPR Rule 19.2[3], Okada must reimburse Bartlit Beck for its costs and fees, as explained at pp. 56-58, *infra*.

II. THE PARTIES

Bartlit Back is a nationally recognized law firm based in Chicago that specializes in high stakes litigation.[4] The *American Lawyer* has named Bartlit Beck as a 2019 finalist for the National Specialty/Boutique Litigation firm of the year[5], an award it previously won in 2009.[6] Bartlit Beck goes to trial at three times the rate of other firms, and reportedly has prevailed in 85% of its cases that go to trial.[7]

Kazuo Okada is a Japanese businessman who owns 67% of Universal Entertainment Corp. ("UEC")[8], which he founded[9], and its wholly owned subsidiary Aruze USA. UEC is a multi-billion-dollar Japanese gaming company and one of the world's largest manufacturer of gaming products.[10]

[3] **Rule 19.2.** Subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties and their counsel during the proceeding, and the result of the arbitration.
[4] Baker report at 19-20.
[5] BB Exh. 452.
[6] BB Exh. 3.
[7] BB Exh. 424.
[8] BB Exh. 442: Okada Depo at 71:1-5.
[9] BB Exh. 5.
[10] *Id.*

III. JURSIDICTION

Jurisdiction arises from the arbitration clause in the Agreement, which provides, in pertinent part:

> Any dispute arising out of or relating to this Engagement Agreement (including the breach, termination or validity thereof) and/or the relationship between you (including your companies, employees, agents, officers directors [sic] affiliates and any of their successors) and Bartlit Beck (including its partners, employees, affiliated partnerships and any of their successors), shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("CPR") Rules for Administrated Arbitration (the "Administered Rules" or "Rules") by three arbitrators, of whom each party shall designate one in accordance with the CPR screening procedure set forth in Rule 5.4 (the identity of the designating party will not be revealed), with the third arbitrator to be appointed by the two party-appointed arbitrators. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The place of the arbitration shall be Chicago, Illinois.[11]

IV. STATEMENT OF FACTS

A. Background.

1. *Events Leading Up to the Wynn Resorts Litigation.*

Okada originally invested in Wynn Resorts Ltd. in 2000 through UEC and Aruze USA (collectively, "UEC").[12] Wynn Resorts is a worldwide developer and operator of high-end casinos.[13] By the end of 2011, Okada was the largest outside investor in Wynn Resorts, holding approximately 20% of its outstanding shares, and served as a member of its Board of Directors.[14]

[11] BB Exh. 1.
[12] BB Exh. 5.
[13] *Id.*
[14] *Id.*; BB Exh. 479.

On February 18, 2012, the Wynn Resorts Board of Directors, having determined that Okada was "unsuitable" pursuant to its Articles of Incorporation, forcibly redeemed all of his company's (UEC's) shares in Wynn Resorts and removed him as a Director.[15] The Board's action followed a year-long investigation of Okada, headed by former FBI Director Louis Freeh, who found that Okada likely violated the Foreign Corrupt Practices Act ("FCPA") and committed other illegal acts to advance his business interests in Asia.[16]

When it ousted Okada and forcibly redeemed his shares (held by UEC), Wynn Resorts gave UEC a ten-year nontransferable note (the "Note").[17] Although UEC's Wynn Resorts shares at the time of the redemption were worth approximately $2.7 billion on the open market, the face value of the Note was $1.94 billion and, moreover, could not be redeemed until its maturity date of 2022.[18]

On the day after the ouster and redemption, February 19, 2012, Wynn Resorts sued Okada and UEC in Nevada state court, alleging breach of fiduciary duty and aiding and abetting that breach.[19] Wynn Resorts sought compensatory and punitive damages against Okada and UEC, as well as a declaration that its redemption of UEC's shares and removal of Okada from the Board of Directors were proper.[20] UEC filed a counterclaim seeking to recover the full value of its redeemed shares.[21]

[15] BB Exh. 479.
[16] *Id.*; BB Exh. 4.
[17] *Id.*; BB Exh. 5.
[18] BB Exh. 479.
[19] BB Exh. 4.
[20] *Id.*
[21] BB Exh. 5.

2. *The Wynn Resorts Litigation.*

Okada had a significant stake in the *Wynn Resorts* Nevada state court litigation. He testified at his deposition in this matter that the litigation was "very important to him personally", and that the breach of fiduciary duty claim, with its underlying allegations of bribery and other misconduct, placed him at serious risk.[22] Additionally, UEC's counterclaim was extremely important to Okada. Because his family (including Okada) owned about two-thirds of UEC, the more UEC recovered through its counterclaim, the better it would be for Okada.[23]

However, by October 2017, the *Wynn Resorts* litigation was not going well for Okada. He was in serious jeopardy of losing to Wynn Resorts in its claim against him and of having UEC's counterclaim dismissed.

Okada's situation was dire on many fronts. He not only faced likely defeat in the *Wynn Resorts* litigation, but also the loss of his counsel in the litigation. In early summer 2017, UEC had ousted Okada as its chairman based on allegations that he had misappropriated company funds.[24] This action resulted in UEC's counsel, Buckley Sandler, withdrawing from its representation of Okada in the *Wynn Resorts* litigation, based on a conflict of interest.[25]

[22] BB Exh. 442: Okada Dep. at 60:11-14, 61:22-62:16.
[23] *Id.*
[24] *Id.*; *also see Reuters,* "Japan's Universal says former Chairman Okada arrested in Hong Kong", (8/6/18) (noting that Universal ousted Okada "after it accused him of misappropriating $20 million").
[25] BB Exh. 442: Okada Dep. at 93:22-94:2.

At about the same time, in July 2017, the Nevada Supreme Court had issued an opinion that jeopardized UEC's entire counterclaim against Wynn Resorts.[26] In its opinion, the Court stated that the business judgment rule insulated from judicial review Wynn Resorts' actions of redeeming Okada's shares and ousting him as director: "[s]pecifically, [the business judgment rule] prevents a court from 'replac[ing] a well-meaning decision by a corporate board' with its own decision. (citations omitted)."[27] Following that ruling, in November 2017, the trial court granted Wynn Resorts' motion for summary judgment on the counterclaim as to most of the individual directors, but not as to Wynn Resorts itself.[28]

The trial court's opinion caused concern among UEC's lawyers that the counterclaim against Wynn Resorts would not survive additional Nevada Supreme Court review. As a UEC lawyer observed:

> The Court entered almost verbatim WRL's [Wynn Resorts] proposed findings of fact/conclusions of law....This just about guarantees WRL will get this reversed at the Supreme Court....Yes, we were already in a bad spot given her [the trial judge] decision, but with these findings in here, it seems clearly wrong as a matter of law that she didn't also dismiss the claims against the company.[29]

Sure enough, within a week after the trial court's decision, Wynn Resorts filed a petition for a writ of mandamus with the Nevada Supreme Court, seeking to overturn that portion of the trial court's decision that denied summary judgment against Wynn Resorts.[30] If this petition succeeded,

[26] BB Exh. 7; Lind Dec. ¶ 33.
[27] BB Exh. 7.
[28] BB Exh. 109.
[29] BB Exh. 107.
[30] BB Exh. 123.

UEC's case against Wynn Resorts would be dismissed in its entirety, leaving Okada without any affirmative claims, while Wynn Resorts' claims against Okada would proceed to trial in April 2018.

What's more, the trial judge who would be presiding at any trial of the Wynn Resorts-Okada dispute heard Okada testify at an evidentiary hearing related to Okada's Motion for Sanctions against Wynn Resorts. In her resulting Findings of Fact and Conclusions of Law dated October 31, 2017, Judge Elizabeth Gonzalez wrote, "Okada is not a credible witness."[31] In any trial, credibility is critical; but here, credibility was central to the dispute. The litigation pitted Okada's conduct against the conduct of Wynn Resorts' directors, which included the former Governor of Nevada, Robert Miller. Louis Freeh, the former FBI director, who wrote the report that resulted in Okada's ouster, would also be a witness for Wynn Resorts.[32]

Thus, with respect to the status of the *Wynn Resorts* litigation, Okada found himself in a bleak situation when his representatives contacted Bartlit Beck.

3. *Okada Searches for New Representation.*

Holland & Hart continued to represent Okada personally after his ouster from UEC. However, a former Sands executive advised Okada that he needed stronger representation to deal with all of the challenges he faced.[33] Okada's advisors started to search for the "best litigation firm [they] can find."[34] Okada himself stated that he was looking for a well-respected, nationally recognized trial

[31] BB Exh. 49.
[32] Lind Decl. ¶ 32.
[33] BB Exh. 446: Ziems Dep. at 40:21-43:22.
[34] *Id.*

firm to "help maximize any recovery in that litigation for UEC", since he owned a majority stake in UEC.[35]

Robert Ziems, the Global Chief Legal Officer of Okada's wholly owned private company, Aruze Gaming America ("AGA") led the search for a leading trial firm.[36] Ziems, a lawyer, had over twenty years' experience advising companies. He also has an MBA.[37] He had worked for AGA for over six years and had negotiated or signed dozens of engagement letters with outside counsel.[38] Ziems put together a list of about five top tier trial firms. The list included both firms that billed on an hourly basis, and firms with alternative fee structures. Bartlit Beck was on that list, as was Theodore Wells, a prominent trial lawyer at the Paul Weiss law firm.[39]

4. *Initial Contacts with Bartlit Beck.*

On October 17 or 18, 2017, Ziems reached out to Bartlit Beck, leaving a voicemail message on its telephone system, inquiring whether Bartlit Beck would be interested in providing representation to Okada.[40] Chris Lind, a Bartlit Beck partner, picked up the message and responded to Ziems.[41] After speaking to Okada, Ziems helped arrange a meeting in Las Vegas just a few days later, on October 23, 2017.[42]

[35] Lind Decl. ¶ 12.
[36] BB Exh. 446: Ziems Dep. at 7:12-8.3. AGA is an entirely separate entity from Aruze.
[37] *Id.* at 30:20-31:15.
[38] *Id.* at 7:12-16; 8:25-9:9.
[39] *Id.* at 43:23-44:1; 44:6-22.
[40] BB Exh. 19; BB Exh. 446: Ziems Depo at 51:17-19.
[41] Lind Decl. ¶ 9.
[42] Lind Decl. ¶¶ 10-11.

Present at the meeting were, for Bartlit Beck: Chris Lind, Phillip Beck, Brian Swanson and Adam Mortara; for Okada: Okada, Ziems, Eric Persson (President of AGA and also a lawyer), Richard Pennington (Director, AGA), Mr. Kawagie, Mr. Nakayama, and several of Okada's personal attendants. Nakayama was Okada's personal attorney. Kawagie translated for Okada during the meeting.[43]

The discussion at the meeting centered on the *Wynn Resorts* litigation, Bartlit Beck's experience in high-stakes litigation, and the firm's billing model.[44] Okada emphasized the importance of the *Wynn Resorts* litigation to him personally and his desire to hire a firm that could maximize UEC's potential recovery.[45] For their part, Lind and Beck discussed their firm's experience in high-stakes litigation, the roles various Bartlit Beck lawyers would take in the litigation, and how the firm billed clients. Specifically, they explained that Bartlit Beck did not bill by the hour, but instead tied a substantial portion of its fees to its client's outcome in the case. Thus, Bartlit Beck's potential fees were at risk if it was unable to achieve a good outcome for its clients.[46]

The parties concluded the meeting with Okada and his representatives stating that he was looking for a well-respected national trial firm to represent him, that he was interested in retaining Bartlit Beck, and that Bartlit Beck should work out the details of its engagement with Okada's representatives, including Ziems and Persson, both lawyers.[47]

[43] Lind Decl. ¶ 11; Attachment A thereto.
[44] Lind Decl. ¶ 12.
[45] *Id.*
[46] *Id.*
[47] *Id.*

5. *The Negotiation of the Agreement.*

In the days following the October 23 meeting, Lind, the Bartlit Beck lead attorney, began to draw up a fee proposal for the engagement.[48] On October 25, 2017, he sent Ziems Bartlit Beck's fee proposal, offering a hybrid fee structure that included a $700,000 per month fixed fee, $75,000 per day for trial, and the potential "for a success bonus of between $15 million and $50 million, with the exact amount to be determined by Mr. Okada in his discretion based on the results obtained."[49] Lind also stated that whether Bartlit Beck would be eligible for the bonus depended on the outcome of the case.[50]

Further, Lind informed Ziems that "[t]he fee reflects the substantial resources that will be required given the complexity, significance, and stakes of the case."[51] He further stated the fee reflected the opportunity cost for Bartlit Beck – that it would have to "clear some other matters off our plates."[52] Lind reiterated what he had said at the October 23 meeting, namely that the proposal included a much lower up-front fee than Bartlit Beck normally charged, putting "the vast majority of our fee on the line, linked to results."[53] Bartlit Beck's proposal required Okada to pay for the costs of a Japanese-speaking lawyer to assist him.

The parties continued to negotiate the terms of an Agreement until December 9, 2017, when the Agreement was executed.[54] Okada's initial counterproposal included a reduced monthly fee of

[48] Lind Decl. ¶ 13; BB Exh. 22.
[49] Lind Decl. ¶ 13; BB Exh. 24.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Lind Dec. ¶14.

$500,000 and a contingency success bonus, capped at $50 million. His team suggested a contingency fee that consisted of 33% of the difference between the net present value ("NPV") of the promissory note UEC received for the redemption of its stock, and the value of any recovery in the *Wynn Resorts* litigation, whether upon judgment or settlement.[55] Okada's counterproposal also required Bartlit Beck to pay for the services of a Japanese-speaking lawyer (projected to cost up to $100,000 per month) to assist Okada.[56] Although the parties continued to negotiate the final terms of the Agreement in the succeeding weeks, the Agreement largely reflects Okada's counterproposal.[57]

On October 27, 2017, Lind sent Okada's team a revised term sheet, which included the lower monthly fixed fee requested by Okada.[58] Lind proposed that the NPV of the promissory note, which would serve as the baseline for the calculation of the contingent fee, be fixed at $1.6 billion.[59] The term sheet specifically stated, "[t]he contingent portion of Bartlit Beck's fee will be based on the Total Value Recovered, *not the value Mr. Okada will personally receive"* (emphasis added).[60] The parties exchanged a number of redlined drafts that incorporated a number of changes the Okada team requested, including the staffing of the litigation, which specified that Lind, Beck and Swanson, three first chair trial lawyers, would represent Okada at trial.[61]

Bartlit Beck drafted an engagement agreement based on the term sheet and sent it to Okada's team on October 31, 2017.[62] This draft contained the methodology for the contingency fee

[55] Lind Dec. ¶ 15; BB Exh. 30.
[56] Lind Dec. ¶ 15; BB Exh. 38.
[57] Lind Dec. ¶ 16; BB Exh. 1.
[58] Lind Dec. ¶ 17; BB Exh. 35.
[59] *Id.*
[60] *Id.*
[61] Lind Dec. ¶ 18; Exh. C attached thereto.
[62] BB Exh. 48.

calculation ultimately incorporated into the final Agreement.[63] It stated "Bartlit Beck shall receive a contingency fee equal to one third (33.33%) of any Additional Value Recovered – whether obtained through a judgment or settlement. The total contingency portion of Bartlit Beck's fee shall not exceed $50 million. The Additional Value Recovered shall be calculated as the difference between the Total Value Recovered and the Promissory Note Value."[64]

Negotiations subsequently focused on the Promissory Note Value.[65] Bartlit Beck rejected as a "nonstarter" Ziems' proposal to add a new term to the Agreement that would make the success bonus contingent on Okada's regaining control of UEC, which was the subject of separate litigation in Asia between Okada and his son.[66] Ziems had predicted that Bartlit Beck would reject his proposal; he communicated to Persson and Pennington that Okada's proposal would be a "nonstarter" given that Bartlit Beck's monthly fee of $600,000 was lower than the $1.5 million per month being charged by UEC's counsel, and that Bartlit Beck was already "taking a hit" by agreeing to a lower monthly fee."[67] Ziems' prediction proved correct; Bartlit Beck rejected that condition on its success fee.[68]

By early November, the parties had accepted most of the Agreement's terms, but still had not agreed on the Promissory Note Value.[69] On November 6, 2017, Persson emailed Lind, "[t]he principle of contingent fee is agreed on. It is merely what is the baseline." In the same email, Persson noted, "[n]o one is trying to get one over on the other" and that Okada's team "hope you

[63] *Id.*; BB Exh. 48.
[64] Lind Dec. ¶ 19; BB Exh. 48.
[65] Lind Dec. ¶ 20.
[66] Lind Dec. ¶ 20; BB Exh. 77.
[67] BB Exh. 85.
[68] Lind Dec. ¶ 20.
[69] Lind Dec. ¶ 22.

can earn the 50 [million]."[70]

Documents produced in this proceeding reveal that Okada's representatives recognized that they would have to explain to Okada how the contingent fee arrangement worked, including that he would be personally liable for its payment, even if he did not regain control over UEC. Pennington emailed Ziems on November 9, 2017: "I can imagine based on past experience that if [Mr. Okada] has to make a large payment that he does not agree with or that he feels should not have been his personal liability, your relationship will be damaged."[71] Pennington continued:

> [M]y advice to you is to be very clear with him about the possibility that a large payment will be due even in a case where he may not be happy with the result, even in the case where UEC remains in control, and that he may be personally responsible for the payment. I'd use the following as an example, if UEC were to settle for $2.2 billion in 8 months the contingency payment would be $X and it may be his personal responsibility even if he disagrees with the settlement. While that may poison the deal, he's entitled to know.[72]

After Lind rejected the proposal to tie the contingency fee to Okada's regaining control of UEC, Ziems emailed Pennington and Persson: "[w]e definitely have to get with Mr. Okada to make sure he understands the fact that he is personally in the hook [sic] as it's a non-starter for Beck (as we knew it would be)."[73]

To complete the negotiations on the one remaining issue, that of the valuation of the underlying promissory note, Okada's team turned to Pennington, Okada's "strongest finance guy."[74]

[70] Lind Dec. ¶ 22; BB Exh. 53.
[71] BB Exh. 85.
[72] *Id.*
[73] BB Exh. 79.
[74] Lind Dec. ¶ 23; BB Exh. 63.

Pennington proposed that the NPV of the Promissory Note should be determined as of each date in time that a recovery might occur, rather than the fixed value Bartlit Beck proposed.[75] Pennington proposed calculating the NPV of the Note on a monthly basis, from the Note's expiration date of 2022, back to the present, which was the earliest possible date of recovery.[76] He prepared a table reflecting these calculations.[77] As an example of how the calculation would work, Pennington wrote: "So for example if there was an award of $2.3 billion dollars due in December of 2019, then you would go to the table – look up the amount corresponding to Dec-19 and that corresponding amount becomes the baseline value of the Wynn note for purposes of calculating the bonus payment."[78]

Lind initially stated that Bartlit Beck would prefer a fixed NPV, a proposal that Okada's representatives rejected.[79] On November 19, 2017, Lind sent Okada's team a revised version of the Agreement that adopted Pennington's proposal of calculating the contingent fee using the note value as of the date of the event triggering the success bonus.[80]

Ten days later, on November 29, 2017, Lind sent Okada's representatives an English version and a Japanese translation of the Agreement.[81] This is substantially the version of the Agreement the parties signed about a week later. The only difference between this draft and the Agreement is

[75] Lind Dec. ¶ 23.
[76] *Id.*
[77] Lind Dec. ¶ 23; BB Exh. 91.
[78] *Id.*
[79] Lind Dec. ¶ 24.
[80] Lind Dec. ¶ 24; BB Exh. 95.
[81] Lind Dec. ¶ 25; BB Exh. 105.

the removal of a notary block and a paragraph recognizing that Bartlit Beck's lawyers were not admitted to practice law in Nevada.[82]

On December 9, 2017, Lind and two other Bartlit Beck lawyers met with Okada at his home in Tokyo.[83] Okada's representatives were present: Ziems, Persson, Takahiro Usui (Okada's senior advisor), Yugo Kinoshita (CFO of AGA), Tatsu Kamiyama (a lawyer from Clifford Chance, whom Okada had engaged), and two assistants. Usui, Kinoshita, Kamiyama and one of Okada's assistants, all spoke English.[84]

During the meeting, Okada asked a number of questions about the Agreement, inquiring about the monthly fee, the contingency fee and how it would be calculated, the damages claim in the *Wynn Resorts* litigation, the $50 million cap, and what dollar amounts might trigger the contingent fee.[85] Usui conferred with Okada during the meeting, paging through the Agreement, and translated his questions for the group.[86]

At the close of the meeting, Okada and Lind each signed both the English and Japanese versions of the Agreement. They shook hands, saying that they looked forward to continuing to work together.[87] Okada asked Lind to accompany him to Hong Kong, where they met with his Hong Kong counsel, Clifford Chance.[88]

[82] Lind Dec. ¶ 25; BB Exhs. 105, 1.
[83] Lind Dec. ¶ 27.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

6. *The Agreement.*

Terms of the Agreement that are significant to this dispute, in addition to the dispute resolution clause cited *supra* at p. 4, follow.[89]

> Fee Structure
>
> Having considered that a number of different forms of fee arrangements are available in the United States, including hourly fees, fixed fees, flat fees, contingent fees and various combinations thereof, you agree that Bartlit Beck will be compensated for its work in this matter on the basis of a hybrid fee/contingent success bonus.
>
> Flat Monthly Fee
>
> For the period starting November 1, 2017 and continuing until the Trial Period (described below), Bartlit Beck shall receive a flat monthly fee in the amount of $600,000 per month.
>
> Success Bonus
>
> In addition to the monthly fees and the trial fees set forth above, Bartlit Beck shall receive a contingency fee equal to one third (33.33%) of any **Additional Value Recovered** – whether obtained through a judgment or a settlement. The total contingency portion of Bartlit Beck's fee shall not exceed $50 million.
>
> The **Additional Value Recovered** shall be calculated as the difference between the **Total Value Recovered** and the **Promissory Note Value**.
>
> The **Promissory Note Value as used in this Agreement is** defined as the value shown in the schedule below as of the date of execution of any pre-verdict settlement... [table omitted].
>
> The contingent portion of Bartlit Beck's fee will be calculated based on the Total Value Recovered, not the value you will personally receive....
>
> Choice of Law
>
> This Engagement Agreement, and any and all claims relating to or arising out of it, shall be governed and construed in accordance with the law of the State of Illinois, excluding Illinois' choice of law principles.

[89] BB Exh. 1.

Other Important Terms

- If a result entitles Bartlit Beck a success bonus, such bonus shall be paid within sixty (60) days of the event entitling Bartlit Beck to a bonus....

- This Engagement Agreement is not time based. Bartlit Beck shall have no responsibility to record or to supply time records to you, your agents, your insurance carriers, or others.

- You recognize and agree that under certain circumstances, the fees provided for under this Engagement Agreement may result in compensation for Bartlit Beck in excess of the fees that would be owing under an arrangement based exclusively on hourly, fixed or flat fee arrangements, and you represent that you have carefully considered the fairness and appropriateness of the terms of this Engagement Agreement including full consideration of such other available options.

- For purposes of negotiating and finalizing the fee arrangements, the parties agree that Bartlit Beck is acting on its own behalf in arms-length discussions, and for purposes of this Engagement Agreement, Bartlit Beck is not acting as your lawyer or fiduciary representative. You have been represented by counsel of your choosing in connection with the negotiation and execution of this Engagement Agreement and you have the right to consult with any additional counsel of your choosing before executing this Engagement Agreement.

7. *Bartlit Beck's Work on the Wynn Resorts Litigation.*

In November 2017, before the Agreement was signed, Bartlit Beck lawyers began working on behalf of Okada in the *Wynn Resorts* litigation. Given the enormity of the litigation and the disadvantaged position Okada found himself in, Bartlit Beck staffed the matter with four first-chair trial lawyers as well as with four other partners and associates, most of whom worked nearly full-time on the matter.[90] Bartlit Beck had to get quickly up to speed at the same time it had to deal with currently pressing matters. The litigation had been pending for over five years and the parties had

[90] Lind Dec. ¶¶ 6-7.

produced nearly one million pages of documents, had taken over 150 days of depositions, and had made thousands of court filings.[91]

Bartlit Beck's work consisted of the following during the period from November 2017 to March 2018:

- **The Trial Court and the Business Judgment Rule.** As described *supra* at p.7, the Nevada Supreme Court's decision to uphold the business judgment of the Wynn Resorts' Board of Directors with respect to its ouster of Okada and redemption of UEC's shares essentially preordained that the trial court would dismiss Okada's counterclaims against Wynn Resorts. This would leave Okada naked of any affirmative claim and rob him of any potential recovery. Bartlit Beck convinced UEC's lawyers to shift their focus from the *substance* of the directors' decision to its decision-making *process*, i.e., that the Board did not follow a reasoned decision-making process, and had hired Louis Freeh to retroactively paper over its decision.[92]

Lind took Freeh's deposition; Bartlit Beck contributed to the briefing of a motion for reconsideration of the trial's court's summary judgment in favor of the Wynn Resorts' directors.[93] The strategy proved successful. Judge Gonzales granted the motion for reconsideration. Because the underlying trial court decision had been vacated, the Nevada Supreme Court denied *Wynn Resorts'* mandamus petition the following day.[94] The result: Okada had affirmative claims to pursue,

[91] Lind Dec. ¶ 30.
[92] Lind Dec. ¶¶ 41-42; BB Exh. 183.
[93] Lind Dec. ¶¶ 42-43; BB Exhs. 217, 218, 231, 237.
[94] Lind Dec. ¶ 44; BB Exhs. 304, 305.

and with them, the chance for recovery. This significant victory positioned Okada for the favorable settlement that occurred several months later.[95]

- **Wynn Resorts' Motion for Summary Judgment on its Fiduciary Duty Claim**. Relying on Freeh's report, Wynn Resorts had filed a Motion for Summary Judgment in the trial court on its affirmative fiduciary duty claim.[96] If Wynn Resorts succeeded, Okada would be liable for the claims against him. Moreover, UEC's affirmative claims depended on the jury rejecting the same core allegations of Okada's misconduct contained in the Freeh report.[97] Summary judgment In Wynn Resorts' favor would have meant a finding against Okada that could have been used against him in UEC's trial against Wynn Resorts.[98] Bartlit Beck drafted, argued, and succeeded in defeating this Motion. If the litigation had gone to trial, this would have been an extremely significant win, but it also markedly improved Okada's position for settlement .

- **Opposing Steve Wynn's Sale of Shares.** A sexual misconduct scandal erupted during this time period involving Steve Wynn, the CEO of Wynn Resorts (hereinafter "Wynn"), which resulted in Wynn Resorts' attempt to distance itself from Wynn lest it lose its gaming license.[99] Wynn Resorts announced in February 2018 that Wynn no longer would seek to enforce the 2010 Shareholders Agreement. Throughout the litigation Wynn had maintained that the Shareholders Agreement barred his ex-wife from selling her Wynn Resorts shares, on the basis that the sale would require the consent of all parties to the Shareholders Agreement prior to any signatory's sale.[100] Wynn filed a motion to

[95] Lind Dec. ¶¶ 35, 44.
[96] Lind Dec. ¶ 45.
[97] *Id.*
[98] *Id.*
[99] Lind Dec. ¶ 46.
[100] *Id.*; BB Exh. 327.

moot his ex-wife's claims regarding the Shareholder Agreement restrictions, as he no longer sought to enforce them.[101] If Wynn succeeded in this motion, he would have been able to sell his own shares as well.

Bartlit Beck successfully opposed Wynn's motion on the basis that Okada and his companies were also signatories to the Shareholders Agreement, and thus Wynn could not unilaterally declare it invalid without Okada's consent.[102] Because Wynn Resorts wanted to distance itself from Steve Wynn, and could not do so unless he sold his shares, it faced increased pressure to reach a resolution with Okada and UEC.[103]

Wynn Resorts settled with UEC a few days after this ruling. The settlement agreement the parties entered into specifically addressed this issue, precluding UEC from claiming that it was still a party to the Shareholders Agreement so that it could no longer block Wynn's sale of his shares.[104]

- **Trial Preparation and Motions *in Limine*.** With the trial imminent (scheduled for April 2018), Bartlit Beck engaged in extensive trial preparation as lead counsel among all the firms representing the Okada entities.[105] It assumed the lead position for preparing for the examination of the central witnesses, including Wynn, Freeh, former Nevada governor Robert Miller, and experts.[106] In addition, Bartlit Beck coordinated and prepared numerous pretrial motions, including motions *in limine*.[107] Some of the motions *in limine* sought to exclude evidence potentially extremely damaging

[101] Lind Dec. ¶ 46.
[102] Lind Dec. ¶ 46; BB Exhs. 477, 352, 476, 420, 364.
[103] Lind Dec. ¶ 47.
[104] Lind Dec. ¶ 47; BB Exh. 379.
[105] Lind Dec. ¶ 54.
[106] *Id.*; BB Exh. 296.
[107] Lind Dec. ¶ 54; Hill Dec. ¶¶ 18-20; BB Exhs. 324, 342.

to Okada, such as evidence about his ouster from UEC, which included allegations of embezzlement, bribery, and other assaults on his character.[108] Bartlit Beck also took the lead role in crucial trial preparation tasks, including drafting jury instructions, exhibit lists, deposition designations, and the preparation of demonstrative evidence.[109]

During his deposition in this arbitration, Ziems was asked about Bartlit Beck's work representing Okada in the *Wynn Resorts* litigation. Ziems responded that it was "excellent."[110]

8. *The Wynn Resorts Litigation Settles; Okada Fails to Pay the Contingency Fee.*

Four days after Wynn lost his motion seeking permission to sell his shares, Wynn Resorts entered into a settlement agreement with UEC, agreeing to pay $2.632 billion.[111] But the claims asserted by Wynn Resorts against Okada personally were still pending. Bartlit Beck and a lawyer from Holland & Hart engaged in a number of lengthy conversations with Okada to convince him that he should announce his intention to temporarily enjoin the settlement so as to gain leverage to get Wynn Resorts to dismiss all claims against him.[112] Okada decided to pursue this strategy, resulting in the dismissal with prejudice of all of Wynn Resorts' claims against him.[113] On March 12, 2018, the *Wall Street Journal* quoted Okada: "now the world knows what I have known all along – I am innocent."[114]

[108] Hill Dec. ¶ 18; BB Exh. 311.
[109] Lind Dec. ¶ 54; Hill Decl. ¶¶ 15-17.
[110] BB Exh. 446: Ziems Dep. at 194:15-18.
[111] Lind Dec. ¶ 55.
[112] Lind Dec. ¶¶ 56, 57; BB Exh. 442: Okada Dep. at 75:12-76:3; BB. Exh. 338; BB Exh. 446: Ziems Dep. at 195:21-24, 210:18-19.
[113] Lind Dec. ¶¶ 56-59
[114] BB Exh. 404.

Pursuant to the contingency fee formula agreed to by the parties in the Agreement, Okada owed Bartlit Beck $50 million, due within 60 days after the March 8, 2018 settlement.[115] The settlement amount of $2.632 billion amounted to approximately $875 million in Additional Value Recovered, as defined in the Agreement, over the Promissory Note Value as of March 8, 2018 (the triggering event date), which, as stated in the Agreement, was $1,757,265,751.[116] If Bartlit Beck's contingent fee of 33.33% were uncapped, the fee would have totaled approximately $292 million.[117] But because the contingent fee was capped at $50 million, Bartlit Beck invoiced Okada for that amount on March 23, 2018.[118]

Okada did not pay the contingent fee by its due date – May 7, 2018. To this date he has not paid the contingent fee owed pursuant to the Agreement.[119]

B. Procedural History of the Arbitration.

1. *The Filing of the Arbitration Claim; Okada Files in Nevada State Court.*

When Okada failed to pay the contingency fee, pursuant to the Agreement's dispute resolution clause, Bartlit Beck filed its claim with CPR on July 27, 2018, asserting Breach of Contract.[120]

[115] BB Exh 1.
[116] *Id.*
[117] Lind Dec. ¶ 60.
[118] Lind Dec. ¶ 61; BB Exh. 412.
[119] Lind Dec. ¶ 62.
[120] BB Supp. Exh 1.

On August 24, 2018, Okada filed an action in Nevada state court styled as "Arbitration Exemption Claimed", seeking to declare the Agreement and its arbitration clause unconscionable and void and to enjoin the arbitration action that Bartlit Beck filed.[121] Bartlit Beck removed Okada's state court action to federal court on September 20, 2018, simultaneously filing a motion to stay the action pending arbitration.[122]

Okada never responded to the Motion to Stay; instead, on October 1, 2018, he voluntarily dismissed the federal action.[123] Okada then fully participated in the arbitration until his refusal to appear at the hearing. Sean Berkowitz, Esq. of Latham & Watkins and Chris Lind, Esq. and Adam Hoeflich, Esq. of Bartlit Beck represented Bartlit Beck in this matter. Ray Ryan, Esq. and Dan Stanford, Esq. of Stanford, Ryan & Associates, APC represented Okada.

Pursuant to the parties' arbitration agreement and CPR Rule 5.4, each party selected one arbitrator, and the two party-selected arbitrators selected a Chair. The panel consisted of Dana Welch, Esq., Chair, Nancy K. Lesser, Esq., and the Honorable Ronald S. Prager (Ret.). The Panel held a preliminary conference on February 25, 2019, at which time the parties agreed to hold the hearing in Chicago, Illinois from October 28 to November 5, 2019, excluding the weekend days. At that conference, Okada's counsel objected to CPR's jurisdiction over the matter. A briefing schedule pursuant to CPR Rule 8 ("Challenges to the Jurisdiction of the Panel") was set for that motion.

[121] BB Supp. Exh 2.
[122] BB Supp. Exhs. 3, 4.
[123] BB Supp. Exh 5.

2. *The Jurisdiction Motion.*

After thorough briefing and argument on the issues of i) whether the arbitral Panel had jurisdiction to decide arbitrability and ii) even if the Panel had such jurisdiction, whether it should find that the arbitration agreement was procedurally and substantively unconscionable, the Panel ruled against Okada's challenge to the Panel's jurisdiction. In its sixteen-page March 25, 2019 Order re Rule 8 Challenge[124], which is incorporated in its entirety into this Award, the Panel found, analyzing the facts and the law, that it had jurisdiction to decide arbitrability, and moreover, that the arbitration agreement was not procedurally or substantively unconscionable.

The Panel's finding that it had jurisdiction to decide arbitrability rested on the parties' incorporation of CPR's rules into the arbitration agreement. CPR Rule 8 provides, in pertinent part, that:

> 8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> 8.2 The Tribunal shall have the power to determine the existence, scope or validity of the contract of which an arbitration clause forms a part. For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

Where an arbitration agreement incorporates an arbitral provider's rules, and where those provider's rules include a provision vesting the arbitral tribunal with authority to determine its own jurisdiction, courts have routinely found a valid agreement to delegate arbitrability decisions to the

[124] BB Supp. Exh. 9.

arbitrator. *See, e.g., Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 552-53 (5th Cir. 2018).

The Panel also rejected Okada's argument that he had been fraudulently induced to enter into the arbitration agreement, finding that i) he was a sophisticated businessman; ii) he was well-represented in the negotiation of the Agreement by his own lawyers in an arms-length negotiation with Bartlit Beck; and iii) Bartlit Beck had not made any misrepresentations or omissions of fact with respect to the arbitration agreement.

Once the Panel determined that the dispute was properly before it, Okada filed a Notice of Defense on March 29, 2019. The parties prepared vigorously for the evidentiary hearing, although Okada engaged in various dilatory tactics during the discovery process that caused significant expense, delay, and at times violated the Panel's orders, as described *infra*.

3. *Discovery.*

The parties collectively produced more than 300,000 pages of documents[125] and took numerous percipient witness depositions. Okada filed several Motions to Compel, as did Bartlit Beck. Both parties made expert disclosures and took expert depositions.

In May 2019, the parties met and conferred on a deposition schedule. Bartlit Beck listed Takahiro Usui as a deponent. As described *supra* at p. 16, Usui was present at events central to this

[125] Ackerman Dec. ¶ 3.

dispute – for example, at the signing of the Agreement. He was the conduit for most of Bartlit Beck's (and others') communication with Okada during the *Wynn Resorts* litigation.[126]

In a May 24, 2019 email, Ray Ryan, Okada's counsel, did not raise any objection to the request for Usui's deposition.[127] But just five days later, Ryan reported on behalf of Okada that Usui could not be produced because, Ryan stated, Usui had resigned from AGA, even though his resignation was not effective until June 30, 2019.[128] Bartlit Beck later learned in Okada's deposition that, in fact, Okada had fired Usui.[129] Okada testified in his deposition that Usui had never explained the Agreement to him.[130] By refusing to produce Usui voluntarily, Okada effectively prevented Bartlit Beck from deposing him. Okada's counsel represented that Usui would not appear in the United States, and enforcement of any subpoena against him would be lengthy and expensive.[131] Okada's strategy obstructed the testimony of a critical witness who likely would have contradicted him on this important issue.

Okada's repeated attempts to reschedule his own deposition also contributed to delay and expense. The parties agreed on June 4, 2019 to a deposition schedule they had been negotiating for several weeks.[132] Okada's deposition was set for June 10 and 11, 2019.[133] After Okada refused to commit to those dates, Bartlit Beck brought a Motion to Compel.[134] The Panel then ordered Okada

[126] BB Supp. Exh. 13; BB Exh. 447: Pennington Dep. at 30:5-18.
[127] BB Supp. Exh. 15.
[128] BB Supp. Exhs. 16, 17.
[129] BB Exh. 442: Okada Dep. at 15:19-16:17, 21:6-22:10.
[130] BB Exh. 442: Okada Dep. at 49:17-50:5.
[131] *See* BBHPS v. Okada Order re Motion to Compel Usui's Testimony, June 14, 2019.
[132] BB Supp. Exhs. 18, 19.
[133] *Id.*
[134] BB Supp. Exh. 19.

to appear for his deposition on or before June 18, 2019 in Chicago.[135] Okada ignored the Panel's Order and instead offered to show up later - in Las Vegas on June 27 and 28, 2019 - dates that were unworkable for Bartlit Beck.[136] Okada eventually agreed to appear in Las Vegas on July 8-9, 2019.[137] By this time, Okada had fired his counsel, Stanford, Ryan & Associates, only to re-retain it ten days after his deposition.[138]

Okada's deposition testimony elucidated numerous ways that he had failed to comply with his discovery obligations and the Panel's Orders. The Panel had ordered Okada, prior to his deposition, to search his own email and files for responsive documents, and specifically to search for documents using Japanese search terms, as Japanese is the only language he speaks.[139] Okada failed to do so, only searching for emails on his iPhone on the two mornings of his deposition, claiming that no responsive documents existed.[140] The Panel in its June 27, 2019 Order had required Okada to submit an affidavit attesting that he had no responsive documents since he had produced none; Okada failed to provide this affidavit.[141] Instead, he testified that no one had ever asked him to collect or preserve documents.[142] Additionally, Okada disclaimed his written verifications of his interrogatory responses and admissions, rendering that aspect of Bartlit Beck's discovery time, expense and effort useless.[143]

[135] BB Supp. Exh. 20.
[136] BB Supp. Exh. 21.
[137] BB Supp. Exh. 22.
[138] BB Supp. Exhs. 23, 24.
[139] Bartlit Beck's Motion for Sanctions (8/16/19).
[140] *Id.*; BB Exh. 442: Okada Dep. at 81:9-23, 245:1-246:11.
[141] *Id.*
[142] BB Exh. 442: Okada Dep. at 110:16-20, 113:17-19.
[143] BB Exh. 442: Okada Dep. at 38:1-39:7, 107:5-108:21.

4. *Pre-hearing Preparation.*

At the preliminary hearing on February 25, 2019, the Panel and the parties scheduled the hearing for seven days, to commence on October 28, 2019 in Chicago.[144] The Panel previously had cleared their calendars for the seven-day hearing and made travel arrangements. Two arbitrators are located in California, one in Washington, D.C. The parties reaffirmed this schedule at the final pre-hearing conference, held on October 22, 2019.

The parties engaged in extensive pre-hearing preparation for the hearing. They negotiated over the appropriate facility for the hearing, and even the room set-up, which became the subject of a motion.[145] The parties, including Okada, submitted pre-hearing briefs and final witness and exhibit lists.

At the October 22, 2019 pre-hearing conference, Okada's counsel Ray Ryan stated that Okada intended to attend the hearing, but just for the first two days of the scheduled seven-day hearing and would otherwise be unavailable. Bartlit Beck objected on the basis that its witnesses would have to be taken out of order; thus, it would not be able to present the case as planned. However, the Panel accommodated Okada's request and ordered that his hearing testimony would occur on October 28 and 29, 2019 in Chicago.

[144] BB Supp. Exh. 20.
[145] BB Supp. Exh. 29.

5. *Okada refuses to appear at the hearing.*

On October 25, 2019 at 9:11 CDT, the Friday just before the Monday of the long-scheduled start of the hearing in Chicago, the Panel received the following email[146] from Ray Ryan, Okada's counsel. The subject line read: **Bartlit Beck v. Okada Emergency Update**:

> *Dear Panel and Counsel,*
>
> *I was packed, prepared and ready to get on a plane tomorrow morning at 10:40 a.m. along with my trial partner.*
>
> *However, Mr. Okada recently informed me that he is not attending the scheduled arbitration.*
>
> *I sincerely apologize for this situation to all of you on behalf of my firm and Mr. Okada.*
>
> *Please let us know how the Panel wishes to proceed before our flight to Chicago if possible.*
>
> *Regards,*
> *Ray*

The Panel Chair responded at 10:29 pm CDT by email:

> *Mr. Ryan,*
>
> *Please inform Mr. Okada of this CPR Rule:*
>
> ***Rule 16. Failure to Comply with Rules.*** *Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules, in a manner deemed material by the Tribunal, the Tribunal shall, if appropriate, fix a reasonable period of time for compliance and, if the party does not comply within said period, the Tribunal may impose a remedy it deems just, including an award on default. Prior to entering an award on default, the Tribunal shall require the non-defaulting party to produce such evidence and legal argument in support of its contentions as the Tribunal may deem appropriate. The Tribunal may receive such evidence and argument without the defaulting party's presence or participation.*
>
> *His failure to show up for a duly and long noticed hearing is material, and may result in the Panel finding him in default, after the Claimant has satisfied the Panel that it has produced enough evidence and legal argument in support of its contentions as we deem appropriate.*

[146] BB Supp. Exh. 31.

In any event, we will commence Monday with Claimant's case. [147]

A few hours later, at 12:03 am CDT on Saturday, October 26, 2019, Ryan sent the following email to the Panel and counsel:

In addition to my previous inquiry as to whether or not we will be entitled to present a defense if authorized to do so, Mr. Okada has instructed me to provide you with his translated response:

"I believe that the alleged agreement that Bartlit Beck is trying to enforce against me is invalid and therefore unenforceable. I have explained many times the number of reasons that this alleged agreement is invalid. If Bartlit Beck does not agree that the alleged agreement is invalid, there is no reason for me to attend the proposed arbitration. Further, I have become ill and am unable to make the long journey to the USA. Even if I were to agree to participate in the proposed arbitration, I am unable to do so due to my health.

Kazuo Okada[148]

The Chair responded at 7:32 am on Saturday, October 26, 2019: *"We will hear arguments first thing Monday morning as to the appropriate remedy, so both parties should be prepared to address this issue. The Panel will then make its decision on the record. Thank you, and safe travels."*[149]

In less than an hour, Ryan responded. *"Unfortunately, Mr. Okada informed us that we are not authorized to attend the arbitration because he rejects the validity of the engagement agreement and objects to the proceeding. We are cancelling all reservations, witnesses and ordered services."*[150]

Later that morning, the Chair informed the parties that *"[p]ursuant to CPR Rule 16, we will proceed with Claimant's evidence as scheduled at 9:30 a.m."* and requested that Bartlit Beck submit a revised hearing schedule.[151] Shortly thereafter, Sean Berkowitz, counsel for Bartlit Beck, responded

[147] BB Supp. Exh. 32.
[148] BB Supp. Exh. 33.
[149] BB Supp. Exh. 34.
[150] BB Supp. Exh. 35.
[151] BB Supp. Exh. 36.

to the Panel and Okada's counsel, advising that Claimant understood that it needed to meet its Rule 16 evidentiary burden but believed it would be more efficient to go forward based on written submissions and evidence instead of a live hearing, but would proceed as the Panel wished.[152]

The Chair responded to Mr. Berkowitz, copying Okada's counsel:

> *The Panel has conferred and will accept Claimant's proposal. Respondent has forfeited the right to present any defense so the Panel will not accept or consider any papers that he may now seek to submit. We will base our Award on whether Claimant has met its burden of proof.*[153]

The Panel cancelled its travel plans, incurring significant cost. Bartlit Beck also incurred significant cost.

On November 4, 2019, the Panel received the following email from Ryan:

> *I understand how frustrating the situation must have been for everyone and I apologize on behalf of Mr. Okada again but I must ask: If I could convince Mr. Okada to commit to a date certain to attend the hearing would you all consider granting us relief to reschedule the hearing?*[154]

The Chair responded on November 5, 2019:

> *The Panel has given due consideration to your request that we reschedule the arbitration hearing if you could convince Mr. Okada to commit to a date certain.*
>
> *We see no good cause to do so. Mr. Okada did not request a postponement. Instead, he represented to the Panel on October 25, 2019 that "if Bartlit Beck does not agree that the alleged agreement is invalid, there is no need for me to attend the proposed arbitration." Further, he instructed his attorneys not to attend, even though the Panel had not yet determined whether it would be appropriate to present a defense in his absence.*

[152] BB Supp. Exh. 37.
[153] BB Supp. Exh. 38.
[154] Email dated 11/4/19 from Ray Ryan to the Panel and Claimant's counsel.

Accordingly, we will be proceeding on the basis of the papers submitted to us by Bartlit Beck.[155]

V. ANALYSIS

Both CPR Rules and established law entitle the Panel to find that Bartlit Beck has met its burden of proof, even without Okada presenting the defense that he forfeited by abandoning the hearing at literally the eleventh hour. *See CPR Rule 16; Also see Three S Delaware, Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 525, 530-531 (4th Cir. 2007) (affirming arbitration award issued on the basis of one party's submissions after opposing party "and his counsel. . .left the arbitration hearing" and abandoned the proceedings).

Having evaluating the evidence and legal arguments it submitted, this Panel finds that Bartlit Beck has proven by a preponderance of the evidence[156] that i) the parties formed a valid contract when they entered into the Agreement, and Okada signed it without duress or coercion after consulting with his attorneys, ii) Bartlit Beck fully performed its obligations under the Agreement, iii) the terms of the Agreement unambiguously entitle Bartlit Beck to the $50 million contingency fee, iv) the contingency fee is reasonable, and iii) Okada breached the Agreement by failing to pay the contingency fee as promised.

[155] Email dated 11/5/19 from Dana Welch to Ray Ryan and Claimant's counsel.

[156] *See Deheer-Liss v. Friedman*, 227 Ill. App. 3d 422, 427 (1st Div. 1991) (plaintiff in a breach of contract case must prove by a preponderance of the evidence all of the material terms of the contract.).

A. Okada Breached the Contract with Bartlit Beck.

The elements of breach of contract are: i) the existence of a contract, ii) the plaintiff's performance of all contractual conditions required of it, iii) the defendant's breach of that contract, and iv) damages resulting from that breach. *Finch v. Ill. Comty. Coll. Bd.*, 734 N.E.2d 106, 110 (Ill. App. Ct. 2000). A contingency fee contract is subject to the same four-part test, and will be enforced unless its fee terms are unreasonable. *See, e.g., Storino, Ramello & Durkin v. Rackow*, 45 N.E.3d 307, 312 (Ill. App. Ct. 2015); *Corcoran v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 803 N.E.2d 87, 90 (Ill. App. Ct. 2003) ("Usually a contract between an attorney and his client will control compensation for the attorney. Courts will enforce contingent fee contracts unless they are unreasonable.").

1. *The Parties Formed a Valid Contract.*

Bartlit Beck has proven by a preponderance of the evidence that the parties entered into a valid and binding contract when they signed the Agreement on December 7, 2017.[157] There is no dispute that Okada signed it; he testified at his deposition with respect to the Agreement: "[i]t is my signature."[158] As discussed *supra* at pp. 9-16, the Agreement had been extensively negotiated for months by teams of lawyers from both sides. Okada discussed a Japanese translation of the Agreement with his lawyers and advisors and took the opportunity to ask Bartlit Beck questions about the Agreement, including the contingent fee terms, before signing it.[159]

[157] BB Exh. 1; Lind Dec. ¶ 27.
[158] BB Exh. 442: Okada Dep. 17:22-18:13.
[159] Lind Dec. ¶¶ 26-27; BB Exh. 446: Ziems Dep. 154:23-156:19, 166:2-169:7.

Both Okada and Ziems, his principal advisor in the negotiation of the Agreement, have acknowledged that Okada was mentally competent and signed the Agreement of his own free will. Okada testified that "[t]here was no threat" and "I signed it of my own free will."[160] Ziems testified that Okada was of sound mind and that nobody "forced Mr. Okada to sign the agreement" and that Okada was not "pressured in any way to sign the engagement agreement."[161]

2. *Bartlit Beck Fully Performed its Obligations under the Agreement.*

Bartlit Beck has proven by a preponderance of the evidence that it fully performed its obligations under the Agreement. The Agreement required Bartlit Beck to "represent Okada ('you') in litigation relating to Wynn Resorts currently pending in Clark County, Nevada ('the Litigation').[162]

Because of the exigencies Okada faced in the fall of 2017, Bartlit Beck commenced its work on his behalf even before the Agreement was executed on December 7, 2017. The extensive work Bartlit Beck performed – and the successful result it obtained on Okada's behalf – is set forth in detail *supra* at pp. 18-22. Even after this dispute arose over Bartlit Beck's entitlement to the contingency fee, Ziems testified that Bartlit Beck's work on the Wynn Resorts litigation was "excellent."[163]

[160] BB Exh. 442: Okada Dep. 45:19-21, 46:1-6.
[161] BB Exh. 446: Ziems Dep. 134:11-12, 170:14-21.
[162] BB Exh. 1.
[163] BB Exh. 446: Ziems Dep. 194:15-18.

3. *Okada Breached the Contract by Refusing to Pay the Contingency Fee.*

The Agreement unambiguously required Okada to pay the $50 million contingency fee within sixty days after a triggering event.[164] The triggering event was the settlement of the Wynn Resorts litigation on March 8, 2018.[165] Okada failed to pay the amount within sixty days, i.e., by May 7, 2018, and to this date has not paid the amount due.[166]

The formula for arriving at the contingency fee amount resulted from extensive negotiation between the parties and *originated from the Okada team's own proposal.*[167] That formula, as memorialized in the Agreement, required Okada to pay 33.33% (capped at $50 million) of the "Additional Value Recovered," which is defined as "the difference between the Total Value Recovered and the Promissory Note Value."[168] The Total Value Recovered is the settlement amount of $2.63 billion.[169] As set forth in the Agreement, the Promissory Note Value as of the March 8, 2018 settlement date was $1.75 billion.[170] Thus, the "Additional Value Recovered" is the difference between $2.63 billion and $1.75 billion, or approximately $875 million. Applying 33.33% to the Additional Value Recovered would result in a contingency fee of $292 million. Applying the cap, the contingency fee Okada owes is $50 million.[171]

[164] BB Exh. 1.
[165] Lind Decl. ¶ 55; BB Exh. 379.
[166] Lind Dec. ¶ 62.
[167] Lind Dec. ¶ 15; BB Exh. 30.
[168] BB Exh. 1.
[169] *Id.*; Lind Dec. ¶ 55; BB Exh. 379.
[170] BB Exh. 1; Lind Dec. ¶ 55.
[171] BB Exh. 1.

Okada's own witnesses have admitted that the settlement of the *Wynn Resorts* litigation triggered the $50 million contingency fee. Ziems testified that "the settlement amount of $2.632 billion would entitle Bartlit Beck to a contingent fee of $50 million", thus "it is pretty clear that under the terms of the agreement, Bartlit Beck would be owed the $50 million."[172]

It matters not at all that UEC received the payment from the *Wynn Resorts* settlement. The Agreement provides that the contingency fee is based upon "the total value of any judgments or settlements obtained by you [Okada], *UEC*, and/or Aruze combined" and does not depend on "the value you will *personally* receive." (emphasis added).[173] This concept - that Okada would pay the contingency fee even if he did not personally receive a penny - was heavily negotiated between the parties.[174] And, even though it is not relevant to this analysis, we note here that Okada *did* personally receive a benefit from the UEC-Wynn Resorts settlement, since he owns nearly 50% of Okada Holdings, his family holding company, which in turn owns two-thirds of UEC.[175]

4. *Okada's Breach Caused Bartlit Beck to Suffer Damages.*

Bartlit Beck has suffered the loss of the $50 million contingency fee that Okada promised to pay. Moreover, it has suffered further damages in the form of pre-award and post-award interest, and the costs and fees it incurred to prosecute this arbitration.

[172] BB Exh. 446: Ziems Dep. 214:1-5, 221:4-7.
[173] BB Exh. 1
[174] BB Exhs. 70, 72.
[175] BB Exh. 446: Ziems Dep. 37:11-22.

B. The Contingency Fee is Reasonable.

In support of its contention that the $50 million contingency fee is reasonable, Bartlit Beck has submitted the expert report[176] of Professor Lynn Baker, a law professor at the University of Texas and an expert on legal ethics as they pertain to attorney's fees. In this Section, we discuss her report and the case law addressing the validity of attorney contingency fee agreements. We conclude, applying the law, that Bartlit Beck has proven by a preponderance of the evidence that the contingency fee that the parties negotiated and incorporated into the Agreement is reasonable.

1. Okada Knew and Agreed that Bartlit Beck Would Charge a Contingent Success Fee.

From the very outset of the parties' negotiations over the Agreement, Bartlit Beck communicated, and Okada understood, that it did not bill by the hour and would charge a contingent success fee if certain conditions were met. Ziems wrote an email to Bartlit Beck lawyers the day after their very first meeting with Okada stating that you "did a good job while you were out here explaining how the proposal would likely work."[177] The formula for the contingent success fee was the most heavily negotiated term in the Agreement – *and it was a formula that Okada's own representatives proposed.*[178]

The Agreement itself states that Bartlit Beck's fees would not be based on the hours it expended: "This Engagement Agreement is not time based."[179] It states further that Okada chose

[176] Baker Expert Report.
[177] BB Exh. 28.
[178] Lind Dec. ¶¶ 15, 22; BB Exhs. 30, 53.
[179] BB Exh. 1.

the hybrid fee structure of a fixed monthly fee and a contingency success bonus after "[h]aving considered that a number of different forms of fee arrangements are available in the United States, including hourly fees, fixed fees, flat fees, contingent fees and various combinations thereof."[180] Further, that if there was a successful outcome:

> the fees provided for under this Engagement agreement may result in compensation for Bartlit Beck in excess of the fees that would be owing under an arrangement based exclusively on hourly, fixed, or flat fee arrangements.[181]

Okada asked questions about the contingency fee at the December 7, 2017 meeting at his home in Tokyo.[182] He signed the Agreement knowing full well that he would owe Bartlit Beck a contingency fee, capped at $50 million, if he achieved a settlement or judgment that exceeded the NPV of the Promissory Note.

2. *Courts Routinely Uphold Contingent Fee Agreements.*

The agreement between a client and his lawyer is the best evidence that a contingent fee agreement is reasonable. *See, e.g., In re Estate of Weeks*, 627 N.E.2d 736, 736-737 (Ill. App. Ct. 1994) (holding that the trial court's decision to "set aside the contingent fee contract" and award quantum meruit fees was clearly erroneous because courts must "focus[] on the terms of the agreement"); *Storino, supra,* 45 N.E.3d at 315-316 (affirming grant of summary judgment to enforce contingent fee agreement because "[g]iven the language of the parties' fee agreement," the claim "was not for the collection of fees on an hourly basis, but for a contingent fee").

[180] *Id.*
[181] *Id.*
[182] Lind Decl. ¶ 27.

There can be no credible argument that Bartlit Beck duped an unsophisticated or unwitting client. Okada is a billionaire who was represented by independent counsel and advised by experienced executives in the negotiation of the Agreement. In the course of his many years in business, he no doubt has employed numerous law firms and entered into numerous agreements. *Cf. Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 875 (9th Cir. 1979) (per curiam) (affirming trial court's enforcement of contingent fee agreement negotiated by sophisticated parties).

Throughout the course of the arbitration, Okada's counsel argued that Bartlit Beck did not *earn* the fee because the *Wynn Resorts* litigation settled a few months after Bartlit Beck's engagement. As a factual matter, Bartlit Beck actually started working on Okada matters in early November, not December. And the parties actually contemplated in the Agreement that the contingent fee might be earned as early as December 31, 2017, stating the NPV of the Promissory Note beginning as of that date.[183]

But more importantly, hindsight - that the settlement was achieved in a short timeframe - does not mean that the negotiated fee was unreasonable. The appropriate inquiry "is not whether hindsight has revealed that the fee agreements between [lawyer] and [client] represented a good bargain for the [client] based on actual work done, but rather whether those agreements were reasonable in light of the potential liabilities confronting the [client] at the time of execution of the fee agreement." *Metro E. Sanitary Dist. v. Village of Sauget*, 475 N.E.2d 1327, 1331-1333 (Ill. App. Ct.

[183] BB Exh. 1.

1985). Therefore, "[t]he best time to determine [the reasonable fee] is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low)." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001).[184]

Courts have confronted, and rejected, *post hoc* challenges to contingency fee contracts in similar circumstances. Such agreements have been upheld despite the fact that the amount of the fee appears disproportionate to the hours the lawyers actually spent on the engagement, particularly when the fee agreement was with a sophisticated party.

For example, in *Brobeck*, the Ninth Circuit upheld a contingency fee agreement based on a hybrid fee structure where the law firm had only written *one brief*. In the underlying case, the client, Telex, had sought out "the most experienced and capable lawyer it could possibly find" to petition the United States Supreme Court to review a Tenth Circuit decision that reversed a judgment of $259.5 million plus costs and attorney's fees in favor of Telex, but left intact a judgment of $21.9 million against it. Id., 602 F.2d at 867-868, 875. As in this case, the *Brobeck* hybrid fee agreement,

[184] *See also In re Estate of Harnetiaux*, 234 N.E.2d 81, 83-84 (Ill. App. Ct. 1968) (holding that a "contingent fee contract was binding and not unreasonable or unfair" even where "the number of hours spent by [lawyer] in his representation was not shown"); *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 568, 570 (7th Cir. 1992) (awarding full amount of fees agreed to by the parties *ex ante*, and holding that "[m]arkets know market values better than judges do"); *In re Estate of Weeks*, 627 N.E.2d at 737 ("The trial judge in this case, rather than focusing on the terms of the agreement ... employed a hindsight analysis and determined that the fees should be reduced to what the attorneys would have recovered on a quantum meruit basis. Such a consideration is clearly erroneous. If the attorneys had expended the same amount of time on the case, but recovered nothing for their client, the court surely would not have awarded them fees on a quantum meruit basis.").

which consisted of a fixed fee of $25,000 and a contingency fee of $1 million, was the product of substantial negotiation between sophisticated parties. *Id.*

After Brobeck filed the petition for *certiorari*, Telex and the underlying defendant agreed to a walk-away settlement in which neither party received any recovery. This result entitled Brobeck to a contingency fee of $1,000,000 (more than $4,000,000 in today's dollars), even though it only wrote a single brief - a brief on which the Supreme Court never ruled. *Id.* at 868. Telex refused to pay the contingency fee, arguing that the fee "was so excessive as to render it unconscionable." *Id.* at 870.

The Ninth Circuit affirmed the trial court's award of the full contingency fee. *Id.* at 875. In doing so, the Court noted: "whether a contract is fair or works an unconscionable hardship *is determined with reference to the time when the contract was made and cannot be resolved by hindsight* (emphasis added)." *Id.* at 875. In language especially pertinent to this dispute, the Court opined: "[t]his is not a case where one party took advantage of another's ignorance, exerted superior bargaining power, or disguised unfair terms in small print. Rather, Telex, a multi-million [sic] corporation, represented by able counsel, sought to secure the best attorney it could find to prepare its petition for certiorari, insisting on a contingent fee contract." *Id.*

Other courts have upheld contingency fee agreements in similar circumstances. See, e.g., *Cotchett, Pitre & McCarthy v. Universal Paragon Corp.*, 187 Cal.App.4th 1405, 1423 (Cal. Ct. App. 2010) (enforcing hybrid contingent fee agreement because there was "no authority" for the assertion "that a contingency fee payable by a client under a retainer agreement is unconscionable when it significantly exceeds the amount the attorneys would have billed had they taken the case on

an hourly basis—a proposition that would render unenforceable almost any contingency fee agreement in which the attorney procures an early settlement of a substantial claim"); *Grynberg Prod. Corp. v. Susman Godfrey, L.L.P.*, No. 10-1248, 2012 U.S. App. Lexis 3316 (10th Cir. Feb. 16, 2012) (affirming arbitration panel's award of $50 million fee, based on a 30% contingency fee agreement for engagement that lasted less than one year); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 895, 898 (1st Cir. 1985) (reversing as an "abuse of discretion" the district court's refusal to enforce a contingent fee agreement as written).

3. *The Contingent Fee was a Reasonable Bargain.*

As described in detail *supra* at pp. 6-8, at the time Okada's representatives contacted Bartlit Beck, Okada's prospects in the *Wynn Resorts* litigation seemed dim. It appeared that his counterclaim against Wynn Resorts would be entirely dismissed in a summary judgment motion following the Nevada Supreme Court decision upholding the Wynn Resorts directors' business judgment in ousting Okada and redeeming his shares. While the trial court summary judgment decision left standing Okada's claims against Wynn Resorts itself, the language in that ruling "just about guaranteed" that the claims against Wynn Resorts would also be dismissed.[185] If that occurred, Okada would be left with no avenue for recovery, facing only Wynn Resorts' claims against him.[186]

Judge Gonzales, whom Okada would be facing shortly at trial, had deemed him not a credible witness in an earlier ruling. Because the allegations in both Wynn Resorts' claims against Okada and

[185] BB Exh. 107.
[186] Lind Dec. ¶ 36.

his counterclaim against Wynn Resorts depended on his credibility, Okada faced serious jeopardy in the trial scheduled to start in April 2018.

In short, given the state of the *Wynn Resorts* litigation, Bartlit Beck took an enormous risk when it staked so much of its fee on a successful outcome, an arrangement Okada's representatives considered indispensable. Bartlit Beck's first proposal included a fixed monthly fee of $700,000, required Okada to cover the $100,000 a month cost of a Japanese-speaking lawyer, and called for a minimum success bonus of $15 million.[187] Okada's representatives rejected the minimum success fee, proposed a contingent fee directly tied to the amount of the recovery and capped at $50 million, required a reduction in the monthly fixed fee, and called for Bartlit Beck to reimburse Okada for the $100,000 monthly cost of a Japanese-speaking lawyer.[188]

All of the material terms Okada proposed ended up in the Agreement: the reduced monthly fee, the reimbursement to Okada for the Japanese-speaking lawyer, the methodology for determining the amount of the contingency fee, the valuation of the Promissory Note on a rolling rather than fixed basis, and the absence of a minimum success fee.[189]

Accepting Okada's proposals meant that Bartlit Beck had less of an assured fee (in the form of monthly fixed payments) and more at risk in a contingent fee, especially because there was no minimum fee. Okada assumed the opposite risk: in exchange for a lower monthly fixed fee, he took

[187] Lind Dec. ¶ 13; BB Exh. 24.
[188] Lind Dec. ¶ 15.
[189] BB Exh. 1.

the risk that the total fee would be higher if there was a significant recovery. To not enforce the Agreement would place *all* the risk on Bartlit Beck, which is not what the parties bargained for, nor a result that courts tolerate in instances like this, where sophisticated parties fully negotiate and agree on fee terms. *See, e.g., In re Synthroid Mktg. Litig., supra,* 264 F.3d at 718 [the appropriate fee is the fee the parties negotiate "at the outset of the case (that is, when the risk of loss still existed.")]

4. *Rule 1.5(a) Factors Support the Reasonableness of the Contingent Fee.*

During the course of this arbitration, Okada's lawyers represented that Illinois Rule of Professional Conduct ("IRPC") 1.5 (a) mandates that the contingent fee be set aside as unreasonable.[190] Even though Okada's default precludes him from presenting a defense, in this Section we address that argument. We come to the opposite conclusion: applying the factors enumerated in IRPC 1.5(a) to the evidence, we find that Bartlit Beck's contingent fee is reasonable.

IRPC 1.5(a) provides that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee" and sets out eight factors that may be considered in "determining the reasonableness of a fee." Comment 1 to the Rule explicitly states that the eight factors "are not exclusive. Nor will each factor be relevant in each instance."

Professor Baker opined in her Report that the contingency fee "is plainly 'reasonable' when examined under each of the non-exclusive factors set out in [IRPC] 1.5(a)," and is also "not only

[190] *See, e.g.,* Okada Notice of Defense at 21.

reasonable but clearly low as a percentage of the recovery when compared to other contingent fees negotiated ex ante in the marketplace and/or awarded by courts and arbitration panels, even in the context of similarly large settlements involving sophisticated clients."[191]

The IRPC 1.5(a) factors relevant to this dispute are applied below to the evidentiary record.

a. *Nearly the entire fee was contingent on the result*.

IRPC 1.5(a)(8) provides that "[t]he factors to be considered in determining the reasonableness of the fee include . . . whether the fee is fixed or contingent." It is undisputed that ninety-five percent of Bartlit Beck's fees were contingent, and that the $50 million cap resulted in a contingency fee below 33.33% of the Additional Value Recovered, as defined in the Agreement.

b. *The underlying litigation involved extraordinary damages claims and resulted in an extraordinary recovery*.

The amount at stake in the underlying litigation and "the results obtained" is the factor to be considered pursuant to IRPC 1.5(a)(4). This factor supports the reasonableness of the $50 million contingent fee. The stakes and the results in the *Wynn Resorts* litigation were unusually high.[192]

Literally billions of dollars were at stake in the *Wynn Resorts* litigation. UEC's counterclaim against Wynn Resorts included over a billion dollars in damages related to the valuation of the

[191] Baker Report at 1-2.
[192] Baker Report at 17.

allegedly improperly redeemed stock.[193] Wynn Resorts' claims against Okada for breach of fiduciary duty amounted to tens of millions of dollars.[194]

The "results obtained" were also extraordinary. When Bartlit Beck entered the fray, Okada's claims against Wynn Resorts were facing almost certain obliteration. Wynn Resorts ended up paying $2.632 billion to settle those claims, an amount that represented approximately $875 million in value under the terms of the Agreement. Indeed, the $875 million in value was nearly six times the amount required to trigger the $50 million cap, and almost three times the amount Okada's team presented as an example of what would be a successful result.[195]

The extraordinary monetary recovery was not the only benefit to Okada. All claims against Okada were dismissed with prejudice, including claims that he had violated the Foreign Corrupt Practice Act and engaged in other unethical and potentially criminal activity, allowing him to state in the *Wall Street Journal*, "now the world knows what I have known all along – I am innocent."[196]

Okada's lawyers asserted during the pendency of this arbitration that this result had little to do with Bartlit Beck's work.[197] That is not what the evidentiary record reflects. To the contrary, the record reflects that the very substantial work and strategic guidance Bartlit Beck provided contributed significantly to Okada's successful recovery. *See supra,* pp. 18-21.

[193] BB Exh. 5.
[194] BB Exh. 52.
[195] BB Exh. 91.
[196] BB. Exh. 404.
[197] *See, e.g.,* Okada's Notice of Defense at 7-8.

c. *Bartlit Beck's experience, reputation, and ability.*

IRPC 1.5(a)(7) requires the Panel to consider Bartlit Beck's "experience, reputation and ability" in its assessment of the reasonableness of the contingent fee. These are the very attributes that Okada considered when he selected Bartlit Beck to represent him in his 'bet the company' litigation. As Ziems told Lind after their initial October 25, 2017 meeting: "the reason we reached out [to you] is because of your reputation."[198]

The Bartlit Beck attorneys who worked on this matter also demonstrate extraordinary experience, reputation and ability. Phillip Beck and Chris Lind have over 40- and 25-years' experience, respectively, of handling high-stakes litigation.[199] They are both members of the American College of Trial Lawyers.[200] They were both appointed by the United States Justice Department as Special Counsel for the Microsoft antitrust proceedings.[201] They both regularly represent clients in billion-dollar litigation.[202]

The other Bartlit Beck lawyers who worked on the Okada matter have equally impressive credentials. Hamilton Hill recently successfully took the lead in litigating two trials in Colorado with $800 million at stake.[203] Brian Swanson recently served as the co-lead trial lawyer for Walgreens in the bellwether opioid trial case that was pending in the district court in Cleveland, Ohio.

[198] BB Exh. 43.
[199] Lind Dec. ¶ 2; BB Ex. 469.
[200] *Id.*
[201] *Id.*
[202] Lind Dec. ¶ 3; BB Ex. 469.
[203] Hill Dec. ¶ 3.

Professor Baker opined that "simply being able to announce that one is represented by Bartlit Beck affords a client significant *in terrorem* leverage against its adversary, which can lead to more generous and quicker settlements."[204] In fact, the best result for Okada in the *Wynn Resorts* litigation was the quickest result. Based on this evidentiary record, Bartlit Beck achieved both a generous and a quick settlement for Okada.

d. *The difficulty of the question involved, and the skill level required*.

The "novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly" is a factor to be considered in determining the reasonableness of an attorney's fee. IRPC 1.5(a)(1). There is little doubt that Okada faced a web of complex legal challenges when he retained Bartlit Beck precisely because the firm possessed the skill to handle them. Application of this factor supports the reasonableness of Bartlit Beck's fee.

The *Wynn Resorts* litigation had been pending for five years when Okada retained Bartlit Beck. The firm had to quickly absorb a complex factual record that included 150 days of depositions, nearly one million pages of documents and thousands of court filings.[205] Even though the dispute settled within six months after Bartlit Beck's retention, during those six months, there were almost one thousand court filings, twenty expert witness reports and depositions, over 50 motions *in limine*, and over 280 witnesses identified.[206] With the trial just months away, the jury selection process had commenced, with a pool of ten thousand potential jurors. The Bartlit Beck team had started planning for what was expected to be a six-month trial, including preparation for *voir dire* and cross-

[204] Baker Report at 20.
[205] Lind Dec. ¶ 30.
[206] *Id.*

examination of the most important and challenging witnesses, including Steve Wynn, former Nevada governor Robert Miller, and Louis Freeh.[207]

The legal questions presented were hardly garden variety, with the odds stacked heavily against Okada. The Nevada Supreme Court's decision to uphold the Wynn Resorts' Directors' ouster of Okada and redemption of UEC's shares imperiled UEC's entire counterclaim, and therefore Okada's chance for recovery. Bartlit Beck's creative approach of shifting the focus from the substance of the Directors' decision to its procedural deficiencies salvaged the counterclaim, ensuring that UEC and Okada retained leverage to negotiate the settlement.

Moreover, the motion to block the sale of Steve Wynn's shares forced Wynn Resorts to settle with Okada, enabling Okada to claim complete exoneration in the pages of the *Wall Street Journal*, personally critical to him and his reputation.

[207] Lind Dec. ¶¶ 30, 54.

e. *The opportunity cost to Bartlit Beck*.

Accepting the Okada engagement precluded Bartlit Beck from accepting other matters, one of the Rule 1.5 factors examined in the determination of the reasonableness of a fee. *See* IRPC 1.5(a)(2) (reasonableness of fee supported by the likelihood "that the acceptance of the particular employment will preclude other employment by the lawyer").

Bartlit Beck is a relatively small firm, with less than 100 lawyers.[208] The Agreement specifically required that three first chair partners – Beck, Lind and Swanson – be available for what was expected to be a lengthy *voir dire* process and six-month trial.[209] Lind made clear to Okada that the agreed-upon fees reflected in part the opportunity cost to Bartlit Beck of keeping four of its leading attorneys off the market during the *Wynn Resorts* litigation. That time frame included not only the anticipated trial, but also the pre-trial period, which proved so central to positioning Okada for a successful settlement.[210]

f. *The time limitations imposed*.

Okada argued throughout this proceeding that because Bartlit Beck worked on the *Wynn Resorts* litigation for a relatively short period, it did not deserve the $50 million contingent fee.[211] Rule 1.5 suggests entirely the opposite conclusion. The "time limitations imposed by the client or by the

[208] *See* www.Bartlit-beck.com.
[209] Lind Dec. ¶ 30.
[210] Lind Dec. ¶¶ 13, 52; Hill Dec. ¶ 8; Baker Report at 21-22.
[211] *See, e.g.*, Okada's Notice of Defense at 7.

circumstances" is a factor to consider in evaluating the reasonableness of an attorney's fee. IRPC 1.5(a)(5).

Okada brought Bartlit Beck into complex litigation that had been pending for five years, with a trial date merely six months away. In the five months the firm worked on the matter, a dedicated team reviewed thousands of documents, deposition transcripts and motions, all while actively engaging in motion practice, taking depositions, and preparing for trial.[212] Bartlit Beck lawyers, based in Chicago, traveled frequently to Nevada for court appearances and to take depositions, and also traveled to Japan and Hong Kong to meet with Okada and his team.[213]

The circumstances under which Okada engaged Bartlit Beck – facing the dismissal of his counterclaim and several adverse trial court rulings - militated the intense pace of work, as did the short time until trial. This factor supports the reasonableness of the contingency fee.

g. *Comparing Bartlit Beck's fees to other contingent fees.*

Comparing Bartlit Beck's contingency fee to the "fee customarily charged in the locality for similar legal services" (IRPC 1.5(a)(3)) supports the reasonableness of the contingency fee the parties agreed to.

[212] Lind Dec. ¶¶ 35-54; Hill Dec. ¶¶ 8-22.
[213] Lind Dec. ¶ 54; Hill Dec. ¶ 9.

As Professor Baker opined, in complex, high-stakes litigation involving international parties with multiple law firms with national practices from across the country, the relevant "locality" is the entire United States, and "comparable" litigation includes large, national complex litigation under similar circumstances.[214]

Even though the dollar amount of the contingency fee is large ($50 million), the actual percentage (6%) of the settlement amount ($875 million) is quite low. Professor Baker's empirical study shows that a 6% contingency fee is well below contingency fees in similarly complex litigation.[215]

A contingency fee of 33.33% is common in attorney fee agreements. *See*, e.g., *Storino, supra,* 45 N.E.3d at 315 (collecting cases finding contingent fees of 33.33% and 40% reasonable); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) ("A customary contingency fee would range from 33 1/3% to 40% of the amount recovered.").

The fact that Bartlit Beck was paid a monthly fixed fee does not change this analysis. The contingency fee represented 95% of Bartlit Beck's overall fee. Hybrid fees, consisting of a mix of fixed monthly fee and a contingent fee, have been upheld as reasonable. *See*, e.g., *Cotchett*,

[214] Baker Report at 22.
[215] *Id.* at 23-29.

supra, 187 Cal.App.4th at 1420-21 (upholding hybrid reduced- hourly fee with additional 16% contingency).

C. Bartlit Beck has Met its Burden of Proof.

For all of the reasons articulated in this Award, we find that Bartlit Beck has met its burden of proving by a preponderance of the evidence that Okada breached the Agreement by failing to pay the contingent fee that he had agreed to.

Okada's refusal to appear and participate in the evidentiary hearing resulted in his default. Under CPR Rule 16, the Panel does not have to consider his affirmative defenses because he has waived them. But we pause here to briefly do so.

We have already addressed IRPC 1.5, which Okada asserted in his Notice of Defense as an affirmative defense. *See supra* at pp. 45-53. In our Ruling on Jurisdiction, we dispensed with Okada's contention that Bartlit Beck owed him a fiduciary duty in the negotiation of the Agreement on multiple grounds: "the parties included a paragraph in the Agreement explaining that for purposes of the negotiation of the Agreement, Bartlit Beck was 'acting on its own behalf in arms' length negotiations' with Mr. Okada, that it was not acting as Mr. Okada's lawyer or fiduciary representative, and that Mr. Okada had been represented by counsel of his choice."[216] We examined and rejected that defense again in Okada's June 2019 Motion for Reconsideration.[217]

[216] Order re Rule 8 Challenge at 9.

[217] Order re Okada Motion for Reconsideration at 1 (6/26/19).

Okada's other defenses fare no better. Okada has claimed that he did not understand the Agreement. But the overwhelming evidence is that his advisors explained it to him. *See supra* at pp. 14-16. And as we previously ruled, "[a]ny complaints Mr. Okada might have about whether the [Agreement] was fully explained to him are more properly addressed to his own lawyers, not to Bartlit Beck."[218]

VI. DAMAGES

We find that Bartlit Beck is entitled to its contractual contingency fee of $50 million. In addition, we find that Bartlit Beck is entitled to pre- and post- award interest and the costs it incurred of recovering the amounts Okada owes it.

A. Pre and Post Award Interest.

CPR Rule 10.4 provides that "[t]he Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law." Illinois law provides that Bartlit Beck is entitled to 5% statutory pre-judgment interest from the date that Bartlit Beck's invoice became due. 815 Ill. Comp. Stat. Ann. 205/2. So long as the amount due "was liquidated or is easily computed" (such as the $50 million fee here), an award of pre-judgment interest is "statutorily mandated." *Chandra v. Chandra*, 53 N.E.3d 186, 206 (Ill. App. Ct. 2016).

[218] Order re Rule 8 Challenge at 10.

Okada owed the $50 million contingency fee on May 7, 2018, which was sixty days from the *Wynn Resorts* settlement.[219] Accordingly, the accrued interest from May 8, 2018 to December 20, 2019, the date of this Award, is $4,026,533.66.

Under Illinois law, Bartlit Beck is entitled to post-Award interest at the rate of 9% per annum until the judgment is satisfied. 735 Ill. Comp. Stat. Ann. 5/2-1303; *see also LRN Holding, Inc. v. Robert Bosch Tool Corp.*, 2013 IL App (3d) 120595-U ¶¶ 40–42 (Ill. App. Ct. 2013) (post-judgment interest may be applied to arbitration awards). Applying 9% per annum to the contractual damages of $49,651,513.00 (*see* fn. 229 *infra)*, Okada owes $12,242.83 each calendar day until he pays the full amount he owes to Bartlit Beck.

B. Costs and Fees.

CPR Rule 19.1 provides that "[t]he Tribunal shall fix the costs of arbitration[220] in its award." Pursuant to CPR Rule 19.2, "the Tribunal may apportion the costs of arbitration between or among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the proceeding, and the result of the arbitration."

Owing to Okada's lack of any meritorious defense, his obstructionist conduct during the course of the proceeding, and his last-minute decision to abandon the arbitration, this Panel will apportion all of Bartlit Beck's costs of the arbitration to Okada. Although the Panel was surprised to

[219] BB Exhs. 1, 412.

[220] These costs may include: the fees and expenses of the Panel; the costs of expert advice and other assistance engaged by the Tribunal; travel and other expenses of witnesses; costs of legal representation and experts; the CPR administrative fee; the costs of a transcript; and the costs of the hearing facilities.

learn at the last minute that Okada would not participate in the long-scheduled evidentiary hearing, in retrospect, we should not have been. He acted in accordance with his previous behavior.

Not until the Friday night before the Monday morning commencement of a hearing that had been scheduled for over eight months did Okada give any indication that he would refuse to appear for the hearing and would prevent his attorneys from doing so. We agree with Bartlit Beck that "Okada's decision to press a meritless defense for over a year before walking away at the last minute can only be characterized as abusive and bad faith."[221]

In his own words, Okada stated that "*[i]f Bartlit Beck does not agree that the alleged agreement is invalid, there is no reason for me to attend the proposed arbitration.*" Of course, what Bartlit Beck does or does not agree with is irrelevant. What is relevant is what the Panel determines. Okada went on to write: "*Further, I have become ill and am unable to make the long journey to the USA. Even if I were to agree to participate in the proposed arbitration, I am unable to do so due to my health.*" Okada's health is a transparently false excuse. If he truly were ill and could not travel, Okada could have presented to the Panel a declaration from his treating physician attesting to his medical condition preventing his travel. Okada could have, but did not, request a postponement or for an arrangement to take his testimony remotely, by live video feed, for example. And his decision to bar his attorneys from attending, even before the Panel had decided

[221] Bartlit Beck's Final Brief in Support of Award at 47.

whether they could present his defense in his absence, proves that he had no intention of participating.

Accordingly, this Panel will require Okada to pay all of the costs that Bartlit Beck incurred for the prosecution of this proceeding. These costs include the following:

Arbitration Facility	$ 23,975.00
CPR/Arbitrator Fees (Bartlit Beck's portion)	$68,249.36
Duplicating	$ 17,433.98
E-Discovery Fees	$ 27,936.00
Expert Witness Fees	$ 170,730.80
Graphics/Technology Consulting	$ 28,671.16
Messenger	$ 189.69
Outside Attorney's Fees	$ 555,008.72
Reporter/Transcript Fees	$ 27,821.97
Shipping	$ 1,076.07
Translation	$ 27,404.01
Travel	$14,536.06

The total of all of Bartlit Beck's incurred costs is $963,032.82

VII. AWARD

Accordingly, we the undersigned Arbitrators, AWARD as follows:

1. Bartlit Beck is the prevailing party.

2. Damages in the amount of **$54,641,079.48** which consist of the following components:

   a. Breach of contract damages in the amount of **$49,651,513.00.**[222]

   b. Pre-award interest in the amount of **$4,026,533.66**.

   c. Costs and fees in the amount of **$963,032.82** which includes Bartlit Beck's share of CPR fees in the amount of $10,000 and Bartlit Beck's share of the arbitrators' compensation in the amount of $58,249.36.[223]

3. In addition, Okada shall pay to Bartlit Beck post-award interest in the amount of **$12,242.83** for each calendar day until he pays in full the amounts specified above.

This Final Award is in full satisfaction and settlement of all claims submitted to this arbitration and disposes of each and every claim of each of the parties. Any relief not awarded above is hereby expressly denied.

IT IS SO ORDERED. December 20, 2019

Dana Welch, Panel Chair

Nancy F. Lesser

Hon. Ronald S. Prager (Ret.)

[222] This number reflects two offsets to the $50 million success fee: (1) $348,387, which represents the pro rata portion of Bartlit Beck's monthly fee for March 2018 after the case settled, and (2) a $100 cab fare related to another matter that Bartlit Beck inadvertently billed to Mr. Okada. *See* Bartlit Beck's Final Brief in Support of Award at fn. 209.

[223] Total CPR fees were $20,000 and total arbitrators' compensation was $116,498.73.

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   b. Pre-award interest in the amount of **$4,026,533.66**.

   c. Costs and fees in the amount of **$963,032.82** which includes Bartlit Beck's share of CPR fees in the amount of $10,000 and Bartlit Beck's share of the arbitrators' compensation in the amount of $58,249.36.[223]

3. In addition, Okada shall pay to Bartlit Beck post-award interest in the amount of **$12,242.83** for each calendar day until he pays in full the amounts specified above.

This Final Award is in full satisfaction and settlement of all claims submitted to this arbitration and disposes of each and every claim of each of the parties. Any relief not awarded above is hereby expressly denied.

IT IS SO ORDERED. December 20, 2019

Dana Welch, Panel Chair

Nancy F. Lesser

Hon. Ronald S. Prager (Ret.)

[222] This number reflects two offsets to the $50 million success fee: (1) $348,387, which represents the pro rata portion of Bartlit Beck's monthly fee for March 2018 after the case settled, and (2) a $100 cab fare related to another matter that Bartlit Beck inadvertently billed to Mr. Okada. *See* Bartlit Beck's Final Brief in Support of Award at fn. 209.

[223] Total CPR fees were $20,000 and total arbitrators' compensation was $116,498.73.