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Deciding Who Decides Questions of Arbitrability: A Survey of American Law and a Comparative Perspective

Parties to commercial disputes frequently encounter and litigate the threshold issue whether their dispute is within the scope of an arbitration clause and must therefore be arbitrated rather than litigated in court. Even before this threshold issue may be decided, however, there is a more fundamental question: Who gets to decide whether a dispute is subject to arbitration—a court, or the arbitration panel itself? American courts have struggled with the question for decades—and the struggle continues. Other jurisdictions have a much more straightforward approach.

American Approach

Enactment of the FAA and Presumption of Arbitrability

In the United States, the Federal Arbitration Act requires federal district courts to stay judicial proceedings or compel arbitration as long as the parties have a valid agreement to arbitrate that encompasses their dispute. 9 U.S.C. §§ 3, 4. However, the Act does not address whether, or when, the question of arbitrability should be decided by the arbitration panel rather than the court.

Passed by Congress in 1924, the Act reversed more than a century of American common law reflecting traditional English hostility to arbitration

(continued on page 2)

INSIDE

Quinn Emanuel Named "Global Investigations Firm of the Year" by *Global Investigations Review*

On September 24, 2015, Quinn Emanuel was named "Global Investigations Firm of the Year" by *Global Investigations Review* (*GIR*), the leading publication covering global white-collar investigations. *GIR* recognized the firm for its role in several major white collar matters, including the firm's representation of FIFA in connection with the Department of Justice's wide-ranging investigation of professional soccer; success in securing a non-prosecution agreement for BSI, the first Swiss financial institution to obtain such an agreement under the DOJ's Swiss bank amnesty program; preliminary injunction victory on behalf of Tanzanian bank FBME against the U.S. Department of Treasury; and FCPA trial victory on behalf of Joseph Sigelman. Q

Kathleen M. Sullivan Named Lifetime Achievement Award Recipient by the *New York Law Journal*

New York partner Kathleen Sullivan has been honored with a Lifetime Achievement Award by the *New York Law Journal* as part of its 2015 focus on "Lawyers Who Lead by Example." These awards recognize true leaders—attorneys who have consistently risen to the top and elevated the legal profession. Ms. Sullivan was recognized for her lengthy service on the faculty of two prestigious law schools, Harvard and Stanford, as well as her groundbreaking work as Dean of Stanford Law School, and her work as a leading appellate advocate in private practice. The publication also cited her role as the first and still only female name partner among the Am Law 100 law firms and her potential candidacy for the U.S. Supreme Court. According to the *New York Law Journal*, colleagues say "[s]he is great to work with, very smart, unfailingly gracious, superb in court and an all-around outstanding member of the bar" and that "[s]he's mastered and conquered the world of academia, and she mastered and conquered the world of litigation too." Q agreements, which were considered unenforceable attempts to divest the courts of their jurisdiction. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 & n. 4 (1974). The Congressional report accompanying the Act explained that English courts, jealous of their jurisdiction, "refused to enforce specific agreements to arbitrate," and that this "jealously survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts." H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924). By reversing this historical hostility to arbitration agreements, Congress hoped to address "the costliness and delays of litigation." *Id.* at 2. This was not, however, the main purpose of the Act; instead, "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

In giving effect to the Act, the United States Courts of Appeals gradually adopted a "federal policy that, when construing arbitration agreements, every doubt is to be resolved in favor of arbitration." *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 643 (7th Cir. 1981). Indeed, so widespread was the adoption of this "policy" that by 1981 the Seventh Circuit felt comfortable declaring it "axiomatic." *Id.* On the basis of this lower court consensus, the Supreme Court itself ruled in 1983 that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)

First Options **and the "Reverse Presumption"**

The "presumption of arbitrability" seemed to suggest that the arbitration panel, rather than the court, would be empowered to determine the arbitrability of disputes unless the parties expressly agreed that arbitrability would be decided by a court. After all, if "doubts concerning the scope of arbitrable issues" were to be resolved in favor of arbitration, then any doubt regarding ***who*** was to decide arbitrability should likewise be resolved in favor of arbitration, at least absent a clear agreement to the contrary.

The Supreme Court rejected this conclusion in the 1995 case, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *First Options* involved a dispute between a stock-clearing firm and a couple who, through their wholly owned investment company, had become indebted to the stock-clearing firm in the 1987 stock market crash. *Id.* at 940. The stock-clearing firm initiated an arbitration against the couple on the basis of an agreement signed only by their investment company, which the stock-clearing firm had taken control of and subsequently liquidated. *Id.* Although the couple objected to the arbitration, the arbitration panel determined that it had the power to adjudicate the parties' dispute, which it decided in the stock-clearing firm's favor. *Id.* at 941. The federal district court confirmed the award, but the court of appeals reversed it, ruling that the courts were obligated to independently determine whether the dispute was arbitrable, and concluding that the parties' dispute was not. *Id.*

The Supreme Court affirmed. It began by noting that the question of who decides arbitrability, like any other question of arbitrability, was ultimately a question of the parties' intent: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943. If the parties have agreed to submit the question of arbitrability to the arbitrators, then the arbitrators may decide that question, and their determination will be set aside only under the narrow parameters set forth in F.A.A. Section 10. *Id.* If the parties have *not* agreed to submit the question of arbitrability to the arbitrators, however, "then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." *Id.* The Court explained that these two results "flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.*

What happens when it is unclear whether the parties have agreed to submit the question of arbitrability to the arbitrators? The presumption of arbitrability would seem to counsel that any doubt should be resolved in favor of finding an intent to arbitrate. Not so, said the Supreme Court: where there is silence or uncertainty regarding who should decide arbitrability, "the law reverses the presumption" and requires "clear and unmistakable evidence" that the parties agreed to have the arbitrators decide. *Id.* at 944-45 (internal quotation marks, alterations, and citations omitted). Recalling the primary purpose of the Federal Arbitration Act—enforcement of private agreements—the Court explained that reversing the presumption of arbitrability was necessary to ensure that parties were not forced to arbitrate matters they had not agreed to arbitrate. *Id.* at 945.

***Howsam* and "Questions of Arbitrability"**

Although *First Options* purported to answer the "fairly simple" question of who decides questions of arbitrability, *id.* at 943, it raised another question that has proven equally problematic: what constitutes a "question of arbitrability"? The Supreme Court took up that question in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). The plaintiff in *Howsam* initiated arbitration before National Association of Securities Dealers (NASD). *Id.* at 81-82. The NASD submission agreement, which plaintiff executed, contained a blanket six-year limitations period on all arbitration claims. *Id.* The defendant filed suit in federal court seeking to enjoin the arbitration on the ground that the dispute was more than six years old and was therefore ineligible for arbitration under the NASD rules. *Id.* The district court dismissed the complaint, ruling that the applicability of the six-year limitations period was a matter for the arbitration panel rather than the court. *Id.* The Court of Appeals reversed, ruling that the applicability of the limitations period raised a question regarding the arbitrability of the dispute and noting—citing *First Options*—that questions of arbitrability are presumptively for the court. *Id.*

The Supreme Court reversed. Recognizing the holding of *First Options*, the Court noted that "one might call any potentially dispositive gateway question a 'question of arbitrability,'" since its resolution would determine "whether the underlying controversy will proceed to arbitration." *Id.* at 83. The Court explained that in the context of determining who decides arbitrability, "the phrase 'questions of arbitrability' has a far more limited scope." *Id.* Questions of arbitrability are raised—and must be resolved by the court, rather than the arbitrator—"in the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. As examples of such questions of arbitrability, the Court identified "dispute[s] about whether the parties are bound by a given arbitration clause" and "disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 84.

By contrast, the Supreme Court held that questions of arbitrability are ***not*** raised in "circumstances where parties would likely expect that an arbitrator would decide the gateway matter." *Id.* As examples of such "procedural" questions, the Court identified disputes regarding whether prerequisites or conditions precedent to arbitration had been satisfied, as well as "allegations of waiver, delay, or a like defense to arbitrability." *Id.* at 84-85 (internal quotation marks and citations omitted). Because the NASD six-year limitation at issue in *Howsam* was effectively a defense to arbitrability, it constituted a "procedural" issue that was "presumptively for the arbitrator, not for the judge." *Id.* at 85.

Howsam's framework has proven difficult to apply in practice. In *Rent-A-Center West, Inc. v. Jackson*, for example, the plaintiff sued his former employer for employment discrimination, and the defendant responded by seeking to compel arbitration pursuant to a written arbitration agreement that expressly delegated to the arbitrator the "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of" the arbitration agreement itself. 561 U.S. 63, 65-66 (2010). The plaintiff opposed arbitration on the ground that the arbitration agreement was unconscionable under controlling state law. *Id.* at 66. A split court ruled that the plaintiff's unconscionability argument was for the arbitrator, not the courts, since it was directed at the arbitration agreement as a whole and not at the specific provision—which the court characterized as an antecedent, severable agreement—vesting the arbitrator with authority to adjudicate challenges to enforceability of the agreement as a whole. *Id.* at 70-73. Characterizing the entire arbitration agreement as a single facet of a broader employment agreement, the dissent argued that under *First Options* the plaintiff's unconscionability argument was a question of arbitrability requiring judicial resolution. *Id.* at 80-81 (Stevens, J., dissenting).

Rent-A-Center demonstrates continued uncertainty regarding how courts are to identify questions of arbitrability. The same uncertainty was raised in the Second Circuit's 2014 decision in *NASDAQ Group, Inc. v. UBS Securities, LLC*, 770 F.3d 1010 (2d Cir. 2014). There, a broker-dealer sought to arbitrate claims against the NASDAQ exchange related to the exchange's alleged mis-handling of the Facebook IPO. *Id.* at 1016-17. Although the parties had an agreement containing a broad arbitration clause that would otherwise have constituted "clear and unmistakable" evidence of an intent to vest the arbitration panel with authority to determine arbitrability, the clause was expressly made subject to a set of NASDAQ rules that arguably immunized the exchange from liability for the sorts of claims asserted by the broker-dealer. *Id.*

(continued on page 5)

Discovery Challenges in International Criminal Investigations

The U.S. Department of Justice ("DOJ") regularly builds cases by working with counterparts worldwide to conduct joint investigations. In the press releases for the blockbuster *FIFA* and *Alstom* actions, for example, DOJ acknowledged cooperation with investigative partners from Switzerland, Indonesia, the United Kingdom, Germany, Italy, Singapore, Saudi Arabia, Cyprus and Taiwan. (*See* Press Release, U.S. Dep't of Justice, Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015); *see also* Press Release, U.S. Dep't of Justice, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014).) Consequently, targets of DOJ's transnational investigations must confront the question of how to access material evidence against them that is held in the custody of DOJ's foreign partners.

Obstacles to Collection of Foreign Evidence

Unfortunately for defendants facing U.S. trials that are built on evidence from transnational investigations, mainstay tools for domestic discovery lose much of their power at the U.S. national border. Cases built through transnational law enforcement cooperation bring into particularly sharp relief the limitations on defendants' access to evidence under Federal Rule of Criminal Procedure 16 and the *Brady*/*Giglio* line of authority.

Disclosure obligations under Rule 16, for example, do not extend to evidence outside the U.S. Government's "possession, custody, or control." *See* Fed. R. Crim. P. 16(E). Similarly, *Brady* and *Giglio* only entitle defendants to production of evidence "actually or constructively in [the Government's] possession or accessible to it." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 2013). This amounts to a high bar, and defendants rarely succeed when arguing that DOJ constructively possesses evidence held in the files of foreign authorities. *See, e.g.*, *United States v. Reyeros*, 537 F.3d 270, 279-80, 283 (3d Cir. 2008) (holding that the U.S. Government did not have constructive possession of Colombian interview records relating to a prosecution witness extradited by Colombian authorities where extradition proceedings did not involve a joint investigation).

In practice, defendants seeking disclosure of evidence gathered by other nations' law enforcement agencies during cooperative investigations may find that DOJ has avoided taking actual possession of such material and disclaimed constructive possession. In the recent *Sigelman* case, for example, the Government maintained it did not have custody of, and thus was not responsible for producing, certain materials Colombian prosecutors had openly referenced in related Colombian criminal cases. Yet a senior Colombian official publicly touted the "very fluid communication and judicial cooperation" between the U.S. and Colombian investigations and stated, "we are going to give our information, our investigative results to the prosecutors of the U.S. so that they can take it to the U.S. and so that they can use it. . . ." (Radio interview of Mario Montes, RCN Radio (March 13, 2015) (translated from Spanish language audio).)

Holding Prosecutors to a Good Faith Duty to Seek and Disclose Evidence

Of course, defendants must be vigilant for any sign that a prosecution built upon a transnational investigation has turned into "an opportunity for evading constitutional requirements applicable to United States officials." *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984).

Defendants should therefore take note of a small body of federal appellate authority signaling U.S. prosecutors' duty to seek in good faith and disclose evidence held by joint investigation partners. *See, e.g.*, *Reyeros*, 537 F.3d at 285 n.20 (3d Cir. 2008) (noting *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984) as authority for the proposition that DOJ may be obligated "to attempt to obtain and produce" otherwise-discoverable material "in the actual possession of another sovereign when the two governments have engaged in a joint investigation"); *see also Paternina-Vergara*, 749 F.2d at 998 (2d Cir. 1984) (stating that prosecutors must make good faith effort "to obtain the statements of prosecution witnesses held by foreign governments").

Paternina-Vergara provides insight into the scope of prosecutors' duty of good faith. There, when Canadian authorities refused to send evidence generated in a joint U.S.-Canadian investigation outside of Canada, an Assistant U.S. Attorney ("AUSA") fulfilled the duty of good faith by traveling to Canada to prepare copies or summaries of the documents for the defense. *Id.* at 996, 998. Where prosecutors in future cases fail to display a similar level of diligence in seeking and disclosing evidence after joint investigations, *Paternina-Vergara* may prove a useful guidepost for defendants asserting discovery violations.

Multinational/International Legal Tools

U.S. defendants seeking evidence overseas will note two core mechanisms for foreign discovery: Mutual Legal Assistance Treaties ("MLATs") and letters rogatory. While a defendant cannot force the Government to initiate the MLAT process on his behalf, defendants should keep in mind the Government's power to use MLAT requests if and when the parties agree on the necessity of specific discovery.

Defendants can also petition the Court for the issuance of letters rogatory. Letters rogatory represent formal requests for judicial assistance made by a court in one country to a court in another nation. The power to issue letters rogatory for overseas discovery falls within a U.S. district court's authority in both civil and criminal cases, but the decision of whether to issue letters rogatory is left to "a district court's sound discretion." *United States v. Jefferson*, 594 F. Supp. 2d 655, 675 (E.D.V.A. 2009).

Because the specific requests made through letters rogatory will be carried out, if at all, under the judicial procedures of the requested nation (*i.e.*, not under U.S. judicial procedures), defendants should expect lengthy waits. The Federal Judicial Center's guidebook on the subject cautions judges "[t]he letter rogatory process may take as long as a year . . . [and] even in urgent cases . . . often take[s] at least a month to execute." (T. Markus Funk, *Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* 20 (2014).)

Conclusion

The evidentiary playing field doubtless tilts against defendants in cases where critical evidence is abroad, particularly given the slow and uncertain nature of MLAT requests or letters rogatory. In future cases proceeding to trial after joint investigations, however, defendants' creative and persistent monitoring of prosecutors' duty to seek and produce foreign evidence in good faith may push DOJ towards greater transparency. Q

(lead article continued from page 3)

at 1031-32. Rather than construing the NASDAQ rules as raising the sort of defense to liability that *Howsam* suggested would be subject to resolution by the arbitrator, the Second Circuit ruled that reference to the rules in the arbitration clause itself raised an ambiguity regarding whether the parties had in fact intended to vest the arbitrator with authority to determine the arbitrability of the specific claims asserted. *Id.*

In short, while *First Options* purported to answer the question of who decides arbitrability, it appears that the focus has simply shifted from the question "who decides" to the question "what is being decided." Despite the Supreme Court's efforts to resolve that issue in *Howsam*, it is clear that confusion and uncertainty remains.

Comparative Perspectives

The struggle to determine who decides questions of arbitrability is largely an American phenomenon, the result of the Federal Arbitration Act's silence on the issue and the American courts' subsequent need to develop rules of decision in light of perceived Congressional intent and fundamental principles of contract law. Other jurisdictions have managed to avoid the lasting uncertainty catalogued above by codifying the rules of decision.

In France, the Code of Civil Procedure expressly vests arbitration tribunals with "exclusive jurisdiction" to determine their jurisdiction. Code of Civil Procedure, Art. 1465. The Code also provides that the existence of an arbitration agreement divests the courts of jurisdiction entirely, except where the arbitration panel "has not yet been seized of the dispute" and the arbitration agreement is "manifestly void or manifestly not applicable"—an exception that is strictly interpreted. *Id.* Art. 1448, para. 1; *see also, e.g.*, Fouchard, "La coopération du président du tribunal de grande instance à l'arbitrage," Rev. Arb. 1985, at 27. Application of this principle of "compétence-compétence"—jurisdiction to determine jurisdiction—means that even where the arbitration tribunal's jurisdiction is in question, the arbitration tribunal itself enjoys "chronological priority" to decide the issue and the courts remain divested of jurisdiction unless the parties mutually consent to judicial intervention. *See* Code of Civil Procedure, Art. 1448, para. 2 (court "may not decline jurisdiction on its own motion," giving parties the ability to jointly consent to judicial intervention); *see generally* E. Gaillard, "L'effet négatif de la compétence-compétence," in *Mélanges J.-F. Poudret*, 1999, at 387.

Whereas the American approach to the question of who determines arbitrability is directed primarily at vindicating the parties' contract, the French approach places a greater premium on preventing dilatory tactics and encouraging the centralized and efficient resolution of all disputes surrounding the subject of the arbitration. *See* C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international*, 2013, Lextenso

(continued on page 9)

Insurance Litigation Update

Recent Cases Highlight Need for, and Potential Limitations of, Cyber Insurance Policies. Although the July 2015 hack of the Ashley Madison adultery-oriented online dating service has brought issues regarding the protection of customer data to the popular forefront, insurance coverage law as it relates to cybersecurity and privacy is still in its nascent stage. Litigation surrounding third-party data breaches is often extremely fact-specific, with outcomes varying wildly depending on the nature of the cyberattack and the harm suffered. This raises interesting issues with respect to the scope of insurance coverage, especially given that coverage in this area is not generally issued on standard forms. Three recent cases may prove to be important for both insurers issuing such coverage and for businesses seeking to insure themselves and their customers against privacy incursions.

First, as exemplified by *Travelers Indem. Co. of Conn. V. P.F. Chang's China Bistro, Inc.*, No. 3:14-cv-01458 (D. Conn., filed Oct. 2, 2014), a general commercial liability policy may not provide coverage when hackers have breached customer data in the possession of the insured business. In that action, Travelers sought a declaratory judgment that three class action lawsuits brought by P.F. Chang's customers following the theft of their credit and debit card information fell outside the scope of its coverage. Travelers argued that the explicit terms of the general liability policy maintained by P.F. Chang's covered only "bodily injury" or damage to "tangible property." Because the stolen electronic data did not involve physical or tangible injury, Travelers claimed it had no duty to defend. While the case was stayed by order, on April 28, 2015, until resolution of all appeals regarding the underlying class action lawsuits (which were dismissed on standing grounds), it illustrates that policyholders' likely need to purchase a separate cyber insurance policy that expressly covers technology-related risks.

Even if cyber insurance is purchased, businesses need to be mindful of the terms and conditions of such policies, which are not uniform throughout the insurance industry. In *Columbia Cas. Co. v. Cottage Health Sys.*, No. 2:15-cv-03432 (C.D. Cal., filed May 7, 2015), Columbia Casualty ("CNA") argued that it had no obligation to defend or indemnify Cottage Health against a class action and regulatory investigation tied to a data breach that exposed patients' medical records—despite the presence of a cyber insurance policy. As alleged by CNA, the policy maintained by Cottage Health required that it follow certain "Minimum Required Practices" and "maintain all risk controls" identified in connection with its insurance application. Because Cottage Health purportedly stored medical records on a system that was fully accessible to the internet but failed to utilize encryption software or regularly maintain security patches on its systems, CNA claimed that coverage was properly denied under policy's exclusions.

Before these arguments could be resolved, Cottage Health successfully moved to dismiss the action without prejudice due to CNA's failure to participate in a mandatory alternative dispute resolution process prior to the filing of its lawsuit. *See* 2015 WL 4497730 (C.D. Cal. July 17, 2015). Because virtually every cybersecurity incident results from a failure to maintain sufficient security, the substance of CNA's argument will likely reappear in future litigation even if the case is not revived following the mediation.

Moreover, cyber insurance coverage could be negated in the event that the losses result from the type of intentional conduct that was at issue in *Travelers Prop. & Cas. Co. of Am. v. Fed. Recovery Servs., Inc.*, No. 2:14-cv-170 (D. Utah, filed March 7, 2014). The cyber insurance policy in that action provided coverage against only "error, omission or negligent act." Because the insured had intentionally withheld customer data that it was required to produce as part of an asset transfer agreement, leading to the underlying lawsuit, the district court ruled that its conduct did not "sound in negligence" and thus fell outside of the cyber insurance policy it had purchased. *See* --- F. Supp. 3d ----, 2015 WL 2201797, at *4 (D. Utah May 11, 2015). This result further illustrates the need for a careful eye when evaluating potential cyber insurance policies and the need for measured conduct when addressing cybersecurity and data privacy issues.

EU Litigation Update

Damages Based Agreements—Latest Developments. The United Kingdom has historically been averse to straight contingency based fee arrangements between clients and their lawyers, believing these led inevitably to conflicts of interest. It took until 1990 for statutory provision to be made for conditional fee arrangements (**CFA**), whereby a discount on standard rates may be given in exchange for an uplift on those rates in the event of a defined "success." However, all other forms of contingency fee agreements continued to amount to unlawful maintenance and champerty in contentious matters.

It took a further decade for that position to change. On January 14, 2010, Lord Justice Jackson's final report, following his review of civil litigation costs, was published. He recommended that lawyers should be permitted to enter into contingency fee agreements in civil litigation generally *(See* Jackson LJ, *Review of Civil Litigation Costs: Final Report,* 21 December 2009, p. 133, *available at* https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf). With effect from April 1 2013, contingency fee agreements, referred to as Damages Based Agreements or "DBAs" for short, became legal in all contentious business, other than criminal and family proceedings (Section 45, Legal Aid, Sentencing and Punishment of Offenders Act 2012).

The DBA is meant to be a "no win, no fee" arrangement between lawyer and client, requiring the client to make a payment to the representative if the client obtains "a specified financial benefit," ordinarily damages in the case (DBA Regulations 2013: Explanatory Memorandum, paragraph 2.1). The amount of the payment will be determined as a percentage of the compensation received by the client (Section 58AA, Courts and Legal Services Act 1990). If the client is unsuccessful, no payment is due. If the DBA does not comply with the relevant legislation the client will not have to pay the lawyer, even upon success. The level of risk for the lawyer is thus very high. Finally, a no hybrid-DBA arrangement – namely one where the lawyer receives both some level of fee income and also a share of damages – is permissible. This was perhaps the last nail in the coffin for DBAs, at least in terms of their use in substantial commercial litigations – as one commentator noted: *"DBAs appear to be like the Yeti: they are believed to exist in practice but hardly any sightings have been made."* (*See* John Peysner, *Impact of the Jackson reforms: Some Emerging Themes Report,* presented at the Civil Justice Council Cost Forum, March 21, 2014, *available at* https://www.judiciary.gov.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf).

The prohibition against hybrid arrangements stemmed from Regulation 4 of the DBA Regulation, 2013, which provides that, in any claim or proceedings, a DBA must not require the client to pay an amount other than the contingency fee and any non-counsel expenses. Initially, it was unclear whether this exclusion of hybrids was a policy decision or an accident of drafting. Many commentators believed that it was the latter, and that it would be only a matter of time before the Government would clear things up. But in November 2014, the Government announced that it had ruled out extending the regulations to permit hybrid DBAs, as it is considered such arrangements could *"encourage litigation behaviour based on a low risk/high returns approach" (See* Civil Justice Council, *News Release,* November 10,2014, *available at* https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/civil-justice-council-cjc-to-look-at-damages-based-agreements-revisions/). At the same time though, the Government asked the Civil Justice Council (**CJC**) to take a detailed look at some technical revisions to the DBA Regulation, so as to seek to increase their popularity and use within the profession.

These recommendations were published in the first week of September 2015 (**Report)** *(See* Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues,* 2 September 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf). The Report clarifies in its terms of reference that the Government's policy objection to hybrid arrangements applies only where the two forms of fee arrangements – i.e. fee income based and share of damages – exist at the same time, referred to as *"concurrent hybrids."* The Government does not object to arrangements where there are different types of retainer for different stages of a case, termed *"sequential hybrids."*

But this clarification does not get us very far. Significant issues of how a 'sequential hybrid' DBA would work in practical terms remain: can a firm take a DBA for fees up to trial and then hourly rates for the trial, or is it based on the type of work undertaken, or by splitting fees incurred on claims and counterclaims. The draft regulations suggested by the Report refer to *"part"* of the proceedings, but what precisely constitutes a "part" is unclear.

Perhaps in light of these remaining inherent uncertainties, the Report itself finally recommends that certain aspects of how such an arrangement would work should be clarified. It also recommends that the Government should be encouraged to evaluate the arguments in favour of 'concurrent hybrid' DBAs. This is a necessary and logical development in this area of the law if DBAs are ever to work in the United Kingdom, at least for the purposes of large scale commercial disputes. From a policy perspective, it is difficult to see how the scenarios of 'sequential hybrids' described above are any better than allowing combinations of, say, a reduced hourly rate throughout the case with a contingency fee entitlement on success.

In the meantime, third party funders have stepped into the mix taking advantage of the legal lacuna. The trend is for the law firm which has entered into a DBA with its client to conclude a separate agreement with a funder to cover the lawyers' work in progress, in return for a share of the contingency fee. The Report acknowledges this trend, but concludes that it does not infringe the Government's current policy on DBAs. It does seem, though, that a yet further opportunity has been missed to bring not only greater clarity and certainty but also greater flexibility to this area of legal practice in England, where both practitioners and clients with material commercial disputes have been calling out for just that.

Life Sciences Litigation Update

Amarin Wins Injunction Against FDA over Off-Label Marketing. Historically, FDA-approved drug products have only been promoted for their expressly approved uses. On August 7, 2015, the Southern District of New York granted Amarin Pharma, Inc.'s application for preliminary relief to engage in truthful and non-misleading speech relating to off-label use of its Vascepa drug product, free from the threat of an FDA misbranding action. *Amarin Pharma, Inc., v. U.S. Food & Drug Admin.*, No. 15-3588 (S.D.N.Y. Aug. 7, 2015). The court held that a misbranding action could not be based on truthful promotional speech alone. The significance of this decision is that it potentially opens the door for pharmaceutical companies to start promoting their drug products for uses that have not been approved by the FDA ("off-label uses.")

Vascepa, composed of pure eicosapentaenoic acid ("EPA"), an omega-3 fatty acid, is approved by the FDA for treating adult patients with triglyceride levels above 500 mg/dL of blood. *Id.* at 20. Amarin also sought FDA approval to market Vascepa to treat patients with triglyceride levels between 200 and 499 mg/dL who are already on statin therapy, but the FDA refused to approve this indication until Amarin conducted an additional study to demonstrate that Vascepa can reduce cardiovascular risk in this patient population, in addition to lowering triglyceride levels. *Id.* at 20-21. The FDA had previously determined that Vascepa is safe, and the results of an earlier FDA-approved study (the ANCHOR study) indicate that Vascepa is also effective in reducing triglyceride levels in the new patient population. *Id.* at 20. While the results of the study regarding cardiovascular risk are pending, however, the FDA warned Amarin that including information regarding the ANCHOR study in Vascepa's labeling may be considered misbranding under the Food Drug and Cosmetic Act ("FDCA"). *Id.* at 26.

In response to this warning, Amarin brought a "First Amendment challenge to FDA regulations that prohibit Amarin 'from making completely truthful and non-misleading statements about its product to sophisticated healthcare professionals.'" *Id.* at 26. Under the FDCA, the FDA requires manufacturers to demonstrate the safety and efficacy of their pharmaceuticals before they are approved. *Id.* at 4. The promotion of an approved product for unapproved uses is not allowed by the FDA, which considers the promotion of an off-label use to be criminal "misbranding" under 21 U.S.C. § 331(a). *Id.* at 9. The FDA, however, does not regulate doctors. Once a drug has been approved by the FDA, physicians may prescribe the drug for FDA-approved uses as well as unapproved, off-label uses. *Id.* at 5. In fact, the Court cited a 2001 study that found that 21% of prescriptions in the United States were off label. *Id.*

Amarin sought an injunction prohibiting the FDA from bringing a misbranding action for promoting Vascepa for its unapproved use or, in the alternative, a declaration that its intended communications were protected against misbranding actions. *Id.* at 31. In response, the FDA agreed that the content of some of Amarin's intended statements were permissible, but objected to the content of others entirely. *Id.* at 31-35. The FDA also sought to restrict the manner in which Amarin could disseminate any of the information. *Id.*

The Southern District of New York based its decision to grant preliminary relief on the Second Circuit's 2012 decision in *U.S. v. Caronia*, 703 F.3d 149 (2d Cir. 2012). *Id.* at 43-53. In *Caronia*, a sales representative who had been caught promoting the drug Xyrem to doctors for unapproved uses was convicted of conspiracy to misbrand. *Id.* at 17-18. The Second Circuit reversed the conviction, holding that the First Amendment protects the truthful promotion of FDA-approved drugs for off-label uses. *Id.* at 18. Specifically, the Second Circuit held that "the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful, off-label use of an FDA-approved drug." *Id.* (quoting *Caronia,* 703 F.3d at 169). The *Amarin* court held that, under *Caronia*, the FDA may not bring an action for misbranding based on truthful promotional speech alone. *Id.* at 45.

On its face, the *Amarin* decision appears to open the door to the promotion of off-label uses of approved drug products, but several aspects of the decision must be considered in looking forward to determine how widespread off-label promotion may become.

Amarin only limits the FDA's ability to bring misbranding actions based on truthful promotional speech alone. Indeed, Judge Engelmeyer specifically highlighted two forms of off-label marketing that are not protected by the First Amendment. *Id.* at 52-53. *First*, the FDA may still prosecute manufacturers that engage in false or misleading speech, which the First Amendment does not protect. *Second*, the First

Amendment protects expression, but not conduct. Thus, non-communicative activities, such as payments to physicians, are not protected, and in such situations, the FDA may use truthful promotional speech to prove that non-communicative activities have been used to improperly promote off-label use. Thus, drug manufacturers must remain vigilant regarding the statements and actions of their representatives.

It also remains to be seen how broadly *Amarin*'s holding will be applied by the courts and by the FDA. While *Amarin* limits the FDA's ability to prove misbranding, the decision does not require the FDA to approve off-label promotional materials. Similar to FDA's response to Amarin's proposed promotional statements, Judge Engelmeyer only approved a specific set of promotional statements, even editing certain statements himself. It will take time for the FDA and the industry to gain clarity regarding the scope of "truthful promotional speech." This may open the door, however, for pharmaceutical companies to begin engaging in promotion of their drug products for non-FDA approved uses. Such promotion would represent a large change in the way that drugs are promoted in this country.

Finally, Judge Engelmeyer makes clear that statements that are truthful today may not be truthful in the future. Pharmaceutical manufacturers engaging in off-label promotional speech, particularly statements that have not been approved by the FDA, will need to be particularly vigilant to ensure that their promotional materials contain accurate information reflecting the most current data. Every statement not approved by the FDA increases a pharmaceutical manufacturer's exposure.

(lead article continued from page 5)

eds. at 679. This does not mean, however, that the courts have no role—it simply means that whereas American courts exercise chronological precedence, acting as a gate-keeper to arbitration, the French courts act as a back-stop, exercising a limited review of the arbitration panel's decision—including its decision regarding arbitrability—once that decision has been delivered. *See* Code of Civil Procedure, Art. 1492, para. 1 (allowing a court to "set aside" domestic award where the "arbitral tribunal wrongly upheld or declined jurisdiction"); *id.* Art. 1520, para. 1 (same with respect to international awards).

English law strikes something of a balance between the American and French approaches. Like the French Code, the English Arbitration Act expressly empowers an arbitration panel to "rule on its own substantive jurisdiction," including "what matters have been submitted to arbitration in accordance with the arbitration agreement." Arbitration Act (1996), § 30(1). Unlike the French approach, however, the English courts are not divested of jurisdiction, *id.* § 9, and may be called on to make a determination as to the jurisdiction of the arbitral tribunal (and hence the arbitrability of the parties' dispute)—but only when all parties agree to seek such a ruling, or when the tribunal itself allows a party to do so, *id.* § 32. Otherwise, a party must await issuance of an award before challenging the arbitration panel's arbitrability determination. *See id.* § 67(1).

Conclusion

Given the continued uncertainty regarding how to determine who should decide "gateway" questions of arbitrability in the United States, parties wishing to ensure resolution of such questions by a specific decision-maker—whether the court or the arbitrator—should spell out their preference as clearly as possible. Conversely, parties seeking to challenge a decision-maker's authority to decide arbitrability should be attentive to circumstances that might implicate unresolved aspect of this vexing issue. Parties who seek to avoid litigation over this threshold question—and who are comfortable with having an arbitration panel determine its own jurisdiction in the first instance—may wish to consider contracting for arbitration in France or the United Kingdom, where judicial involvement is generally delayed until completion of the arbitration itself.

Preliminary Injunction Victory over U.S. Treasury

On August 27, 2015, the U.S. District Court for the District of Columbia issued an unprecedented preliminary injunction in favor of our client, FBME Bank Ltd, enjoining a United States agency from effectuating a final rule that threatens to deal a devastating blow against FBME. The U.S. agency in question is a bureau of the U.S. Department of the Treasury known as the "Financial Crimes Enforcement Network" or "FinCEN." According to FinCEN's final rule, scheduled to take effect on August 28, 2015, any U.S. bank would be prohibited from maintaining a correspondent bank account for FBME directly or indirectly through a third-party financial institution. As a result, FBME stood to be cut off from transacting in U.S. dollars, forcing FBME to fundamentally alter its business and cease functioning as an international bank—if it could survive at all. The preliminary injunction issued by Judge Cooper on August 27 enjoins the final rule from taking effect until he issues a final judgment. In his opinion, Judge Cooper explained that FinCEN may have had valid grounds to issue the rule, but the process by which it issued the rule was sufficiently flawed that FBME is likely to prevail on the merits in challenging the rule.

This is the first successful stand a bank has made against FinCEN's implementation of this deadly sanction. The authority FinCEN invoked comes from Section 311 of the USA PATRIOT Act, which permits FinCEN to impose any of five special measures against financial institutions that it determines to be "of primary money laundering concern." In July 2014, FinCEN targeted FBME with a Notice of Finding and Proposed Rulemaking that announced the agency planned to impose on FBME the "fifth special measure," which cuts an institution off from the U.S. financial system. Over the following year, FinCEN refused to disclose all of the charges against FBME or to provide FBME with the evidence underlying those charges, thereby denying FBME a meaningful opportunity to review the record and refute the allegations against it. Nevertheless, on July 29, 2015, citing classified and other undisclosed evidence to support its vague allegations, FinCEN published the final rule in the Federal Register. After FinCEN promulgated the final rule, FBME hired Quinn Emanuel to challenge the rule and stop it from taking effect, and we prepared and filed a complaint and motion for preliminary injunction less than two weeks later.

Quinn Emanuel persuaded Judge Cooper both that our client faces irreparable harm from implementation of the rule and also that is likely to prevail on the merits because FinCEN's ruling was procedurally defective, arbitrary and capricious. We succeeded despite being up against classified evidence submitted *ex parte* and *in camera* that allegedly establishes FBME's involvement in money laundering and terrorist financing, as well as the heightened deference that courts accord Executive agencies whenever concerns about national security and foreign policy are invoked, as they have been here. On August 27, the day before the final rule would take effect and effectively put FBME out of business, the court granted our motion for a preliminary injunction. The final rule is now enjoined so as to protect our client while the merits of the case are being briefed and adjudicated.

Voluntary Dismissal of $600 Million Claim

In 2014, Australia's largest bank, Commonwealth Bank of Australia, (CBA) commenced proceedings in the NSW Supreme Court over one of Australia's largest corporate collapses during the global financial crisis – ABC Learning Centres Limited. The suit was against the liquidators of the company as well as its auditors, directors and officers – four of which were Quinn Emanuel clients. The claim was commenced a week before the expiry of the statutory limitation period and at a time when most of the available insurance had been eroded by past claims and regulatory investigations. The Bank's solicitors (Jones Day) had been working up the case for some months and already had a copy of our client's insurance policy.

Years earlier, CBA had agreed to underwrite the offering of $600 million worth of notes; only $150 million of which were eventually purchased by investors. The claims alleged that the defendants engaged in misleading or deceptive conduct, by providing declarations as to the company's financial position and auditing compliance. However, CBA had long been a company advisor and was intimately involved in due diligence processes for the underwriting. Further, our clients had been advised by auditors in respect of those. In short, the claims were plagued with problems from the start.

The Quinn Emanuel team in Sydney – Michael Mills, Michelle Fox, Penelope Abdiel and Thomas Brebner – identified major deficiencies in the pleadings and brought a strike-out application (a very rarely-used form of motion to dismiss, because of its high burden) against the Bank. CBA was forced to amend its pleadings four subsequent times over and then defend against the application for two hearing days in Court.

The Bank survived the strike out (as procedurally it should always have done) but on such a restricted basis, that it then sued for peace; or the legal equivalent - mediation. The Bank insisted that any settlement had to be accompanied by a full statutory declaration listing our clients' (and others') personal assets and wealth. The Quinn Emanuel team refused and conveyed our position that, on that basis, there would be no mediation and we should proceed to an expedited trial. Eventually the Bank conceded on this and at the mediation the matter was fully (and confidentially) resolved on terms very favorable to our clients. Needless to say, they are thrilled, as is their insurer.

Victory for Pinterest in New York Trade Secrets Case

The firm recently obtained a unanimous victory for our client Pinterest Inc. in the New York Appellate Division, First Department, which affirmed the dismissal with prejudice of all claims that had been asserted against Pinterest in its very first lawsuit, a trade-secret case alleging that Pinterest's first investor had misappropriated the idea for Pinterest from Plaintiff Ted Schroeder and given it to Pinterest's founders in 2009. The comprehensive, 34-page decision is a veritable treatise explaining why Plaintiff—who alleged that the idea for the wildly successful Pinterest website was actually his—failed to state claims against Pinterest for aiding and abetting breach of fiduciary duty, misappropriation of trade secrets/ideas, unjust enrichment and unfair competition.

In late 2012, Schroeder filed a complaint in federal court (later refiled in state court), alleging that his former angel investor and business partner Brian Cohen sabotaged their social media startup, www.Rendezvoo.com, and then handed Schroeder's ideas over to Pinterest's founders. Schroeder alleged that Pinterest's meteoric rise transpired a few months after Pinterest's founders met and began working with Cohen, and that it was Cohen who led Pinterest's founders to change their original idea for a mobile shopping platform called "Tote" into a visual curation site called "Pinterest"—which Plaintiff claimed was similar to his now-defunct www.Rendezvoo.com site.

Pinterest, represented by Quinn Emanuel, moved to dismiss the complaint for failure to state a claim. Not long thereafter, the state court issued an order dismissing the entire case against Pinterest without leave to amend. The court adopted Quinn Emanuel's arguments on every claim, including that Plaintiff's trade secrets were not actionable because they were either public (having been disclosed to the world via the Internet on Rendezvoo.com) or impermissibly vague (such as Plaintiff's supposed "business and management information" trade secret).

Plaintiff appealed, and the Appellate Division affirmed in an unusually lengthy decision. The Appellate Division went into great detail regarding Plaintiff's allegations and reinforced that, under New York law, trade secret and idea misappropriation, unfair competition and unjust enrichment claims require a close relationship between the parties or use of improper means—neither of which the court found to have been pled here. The Appellate Division also declined to extend trade-secret protection to a website's common design choices, such as color schemes and profile pages, explaining that such information was readily ascertainable by the public. And the court explicitly rejected Plaintiff's belated request for leave to amend, meaning that Pinterest's first lawsuit is over.

Swiss Securities Law Victory

On September 1, 2015, Quinn Emanuel obtained an important victory before the Swiss Federal Administrative Court in the context of the legal battle surrounding the sale of the controlling stake in Swiss-based specialty chemicals company Sika AG by the successors of the company's founder to French conglomerate Saint-Gobain.

As strategic legal advisers, the firm, together with local counsel appearing in court, represents the majority shareholders of Sika AG who have pooled their voting rights in a company named Schenker-Winkler Holding AG. This holding company along with the controlling stake in Sika AG has been sold to French conglomerate Saint-Gobain. The deal was signed back in December 2014 but has not been closed so far. Saint-Gobain did not make a public offer to other shareholders since the articles of association of Sika AG explicitly waive such an obligation of an acquirer of shares in the company.

The majority of the management board of Sika AG and several minority shareholders are opposed to this transaction and committed to block it, or at least substantially delay, its closing date. To this end, the majority of the management board of Sika AG in several instances drastically restricted the voting rights of Schenker-Winkler Holding AG to preserve the status quo ante for the time being. In support of this move, the investment vehicles of Bill Gates (that are powerful minority shareholders of Sika) commenced legal proceedings arguing that the acquisition of Schenker-Winkler Holding AG by Saint-Gobain triggered an obligation to make a public offer on the same terms to all the other shareholders of Sika AG, irrespective of the aforementioned opting out-clause.

Now, the Swiss Federal Administrative Court has dismissed the complaint brought by Bill Gates and his investment vehicles on the merits by unappealable decision. The court, in favor of Schenker-Winkler Holding AG and co-defendant Saint-Gobain, found that Saint-Gobain is under no obligation to make a public offer to other shareholders as it can invoke the valid and enforceable opting out-clause. Q

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business litigation report

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