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The 'Fraud Is Not Enough' – English Law Raises the Bar for Proving Reliance in the Tort of Misrepresentation

Introduction

What level of awareness is required to be in a person's mind when being induced by another to rely on an implied fraudulent representation? According to the English High Court, which recently had to answer this question in the context of a (successful) application brought by Barclays Bank plc ("**Barclays**") to strike out a LIBOR manipulation claim commenced against it by a group of UK local authorities (*Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm) (Cockerill J) ("***Leeds***")), an assumption in a person's mind that a representation is true is <u>not</u> sufficient to prove reliance on it. Instead, and by contrast, the misrepresentation has to be "*actively present*" in that person's mind for the reliance element of the tort to be made out (at [102]). That is notwithstanding that, on recent authority, a sub-conscious assumption by a representee <u>can</u> be sufficient for the representation to be implied in the first place.

The case raises two important issues. The first is the fundamental question of whether it is correct as a matter of legal principle to find that an actionable implied misrepresentation requires the claimant to have a level of awareness of the representation akin to actual knowledge. This is particularly so in light of the English Court of Appeal's relatively recent decision in another leading LIBOR manipulation case, *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2018] EWCA Civ 355 ("***PAG***"), where it was found (in summary) that implied representations by a bank as to the honesty and integrity of a financial benchmark which it participates in setting can be

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Veteran Trial Lawyer and Former Federal Prosecutor Tai H. Park Joins Quinn Emanuel in New York

Tai H. Park has joined the New York office as partner. Park brings to the firm a two-decade-plus career as a white collar criminal and regulatory defense lawyer. He has represented both companies and executives in high-profile criminal trials, and has conducted many sensitive internal investigations for corporate clients. He has been described in *Chambers 2021* as "a real trial lawyer who masters the facts and has the ability to suddenly effect his strategy in complex criminal cases." Q

Former White-Collar Prosecutor Robert A. Zink Joins Washington, D.C.

Robert A. Zink has joined the Washington, D.C. office as partner. Most recently Zink was Chief of the Fraud Section in the Criminal Division and Acting Deputy Assistant Attorney General responsible for supervising fraud and foreign bribery cases in the Criminal Division at Main Justice in Washington, D.C. Zink spent 11 years at Justice. His work resulted in the resolution of over 40 corporate criminal cases totaling over $17 billion in global fines, penalties, and payments. He spearheaded the Department's efforts to prosecute commodities offenses, prescription opioid distribution offenses, healthcare fraud, and pandemic-related fraud. Zink speaks regularly on white collar matters at conferences around the world and has served as a guest lecturer at several law schools, including Harvard, Georgetown, and George Washington University. Q implied from the mere incorporation by the bank of the benchmark in a loan or swap product. The reason for this is that the counterparty to the loan or swap is entitled to assume that the benchmark is honest and reliable and that the bank has not been involved in manipulating it. Second, and no less importantly for those involved in litigation before the English Courts, which have traditionally been reluctant (especially in novel or developing areas of the law) to grant strike out applications in cases where additional facts and evidence relevant to the determination may be expected to emerge by the time of any trial, there is the procedural question of whether it was appropriate for the Court to determine the awareness issue on a strike out application ahead of the main trial. It may be for these (as well as for other) reasons that we understand the English Court of Appeal may have recently granted permission to appeal from the High Court's decision.

Context – LOBOs and the LIBOR Scandal

Leeds is the latest in what is now a long line of cases which have come before the English courts as a result of the LIBOR scandal, which first broke into public consciousness as long ago as 2012.

As is well known, LIBOR is an acronym for the London Interbank Offered Rate, a set of benchmark rates whose purpose is to reflect the cost of inter-bank borrowing on the London financial market. While, as a result of the scandal, extensive efforts are now being undertaken by regulators and market participants to transition financial contracts away from LIBOR, LIBOR remains the most widely used interest rate benchmark in the world, referenced in some USD 373 trillion notional value of financial transactions of all types. In simple terms, it is supposed to reflect the rate at which a prime bank could obtain an unsecured loan from another bank in a particular currency for a particular period in the London market.

In the period from 2006 to 2008, when the loans at issue in *Leeds* were entered into, LIBOR was calculated by surveying a panel of major banks every day for their assessment of the rates at which they considered they would be offered funds for specific currencies and maturities. In 2012, the LIBOR scandal erupted. It was discovered that a number of panel banks were manipulating LIBOR for various currencies. This manipulation took a number of different forms, but for example, rather than submit their genuine assessment of the rate at which they thought they would be offered funds, it was often the case that panel banks would submit rates that assisted their trading divisions to profit from LIBOR-linked derivatives trades, or which were lower than they should have been, with a view to projecting creditworthiness. The scandal led to fines, prosecutions and extensive reforms on both sides of the Atlantic and beyond.

The LIBOR-based financial instruments at issue in *Leeds* were so-called Lender-Option Borrower-Option loans ("**LOBO loans**"). In essence, these are long-term loans that enabled the lending bank (here, Barclays) to change the interest rate in line with fluctuations in market rates. However, if the lender did so, the borrower had the option to pay out the outstanding amount in full, thereby avoiding the need to pay any higher interest rate. These loans have proved to be unsuitable for local authorities, and have given rise to very high (and above market) debt servicing costs. All of the LOBO loans had the common feature that LIBOR was used to set either the interest rate or certain breakage costs.

The Alleged Representations

In essence, the claimants argued that by offering the LOBO loans to the councils, Barclays had impliedly represented that the LIBOR rates were being set honestly and reliably, and that Barclays was not (and had no intention of) engaging in any improper conduct in connection with its role in setting LIBOR rates. The alleged implied representations (on the claimants' case) were that, as at the date of the loans, Barclays *had not itself* previously attempted to manipulate the LIBOR rate; *was not* currently doing so; and *had no intention* to do so in the future. Further, Barclays (on the claimants' case) also impliedly represented that it had no reason to believe LIBOR *had been*, *was being* or *would be* manipulated by other banks.

The Claims

The claimant councils argued that Barclays had made fraudulent misrepresentations in connection with its participation in setting the LIBOR rates during the 2006 to 2008 period. Accordingly, their claim was for rescission of the LOBO loans, in an attempt to claim restitution of the sums paid thereunder and, commercially, to refinance their borrowing at lower and more affordable market rates. There was an alternative claim for damages on the grounds of negligent (i.e. non-fraudulent) misrepresentation. Given it was a strike out application, the Court was required to take the claimants' case at its highest, and assume the relevant pleaded facts were true. As such, the Court proceeded on the basis that the alleged representations were made, that each was false and Barclays made those false representations fraudulently.

We note that there was a further alternative issue about whether the claimants had sufficient knowledge such that it could be said that, in any event, they had affirmed the LOBO loans. A finding to that effect would have led the claimants to fail in their fraudulent misrepresentation claims. We do not consider this aspect of the decision in detail, save to note that, as a matter which was inherently factual in nature, the Court found against Barclays on this point – on the basis that the point could not fairly be resolved on a strike out application.

The Court's Decision

The Court found that the pleaded facts did not satisfy the test *in law* for reliance in an action for misrepresentation. As noted above, the conclusion was that, for the reliance element of the tort to be proved, a representee must be aware of a representation in the sense of it being "*actively present to his mind*" (at [102]). He or she must have turned his mind to the representation, and an assumption – here, that LIBOR was being set honestly and reliably by Barclays – was not enough. This decision was said to be justified by reference to the misrepresentation authorities generally, and also specifically by reference to the rate-manipulation implied misrepresentation cases (chiefly *PAG* and *Marme Inversiones 2007 v Natwest Markets plc* [2019] EWHC 366 (Comm) ("***Marme***")). The Court went on to find that, because the claimants had not pleaded that any of the alleged misrepresentations consciously operated on anyone's mind, the claims were bound to fail (at [157]). Accordingly, the claims were struck out before reaching the main trial.

First Issue – Whether Knowledge Requirement Is Correct

The primary issue raised by the decision is whether it is correct as a matter of legal principle. To reiterate, the Court found that an active awareness or "*active presence*" of the representation in the mind of the claimant is an essential element in a misrepresentation claim (see [102] and [151]). In short, the person must have turned his or her mind to what was being represented. A mere assumption of the relevant state of affairs is not enough.

This point was characterized by Barclays as an issue going to the reliance element of the tort of fraudulent misrepresentation. Barclays' defense (and the Court's decision) was that the councils had not relied on any representations made by Barclays because the relevant employees of the councils did not, at the time they were made, actively or consciously appreciate that the representations were being made to them. In accepting this submission, which had also previously been accepted (albeit *obiter*) by Mr Justice Picken in *Marme*, the Court placed weight on the distinction between a claim for misrepresentation (which is actionable in the general sense), and a claim for non-disclosure (which is only actionable if there exists a duty of utmost good faith, or where it is specifically contracted for) (at [95]). The Court also explicitly sanctioned an approach of breaking down the 'inducement' element of misrepresentation into its "*building blocks*" – essentially, in appropriate cases, looking at the individual smaller parts of that element (at [145]).

As a matter of principle – and in the event that it were to stand – the Court's decision has cut down the scope of implied misrepresentation under English law significantly. This is because, according to the Court, implied misrepresentation claims in effect require a level of awareness akin to actual knowledge. Mrs Justice Cockerill emphasized that the precise level of knowledge may be formulated in different ways: "*when that requirement is in issue, in some cases the question will be what the claimant consciously thought, but in other cases it may be better expressed by a focus on active presence*" (at [146]). Nonetheless, this case sets the bar higher for claimants when faced with an otherwise actionable implied fraudulent misrepresentation.

This finding does not sit well with the reasoning of the Court of Appeal in *PAG*. While in that case the Court of Appeal ultimately found in relation to the LIBOR claims at issue that it could not interfere with the trial judge's findings of fact that the Royal Bank of Scotland ("**RBS**") had not in fact manipulated the relevant GBP rates to which the claimant's swaps were tied (the only regulatory findings of manipulation as against RBS related to the setting of rates in Japanese Yen), it nonetheless made the following finding: "*[a] party to a contract containing a swap needs to be certain of the counterparty's honesty at the beginning of the deal not just in the future but throughout its course*" (at [125]). Indeed, it went on to find that, on the facts, the RBS had impliedly represented it was not manipulating LIBOR (and did not intend to do so). Moreover, the Court of Appeal found that this "*comparatively elementary representation would probably be inferred from a mere proposal of the swap transaction…*" (at [133], emphasis added).

That representation about honesty may operate consciously or sub-consciously on a person's mind. Indeed, as argued by the claimants in *Leeds*, Barclays' position (and the Court's decision) effectively invites a "*rogue's charter*" (at [40]). This is because, in order to prove reliance on such a representation, the representee would need to ask themselves 'is the representor making an implied representation to me, and if so, what are its terms?'. However, as recognized by the Court of Appeal in *PAG*, some representations are so intrinsic to a proposed transaction that they do 'go without saying' (see, *contra,* Mrs Justice Cockerill at [152]). Representations as to the honesty of the counterparty and the integrity of an interest rate benchmark plainly fall into such a category. Accordingly, it is not obvious why a claimant's assumption that the counterparty has made the representation should not also be sufficient to prove reliance upon it, especially in circumstances where the claimant would not otherwise have entered into the relevant transaction had he or she known the truth. By holding to the contrary, *Leeds* significantly restricts the extent to which implied representations may practically operate in a commercial context, as a claimant would always need to actively turn his or her mind to all of the possible representations that may be made in a given scenario.

This leads to a linked criticism of the Court's reasoning. The Court did not give sufficient weight to the presumption of inducement – namely, that in cases of fraud, there is a presumption that the fraudster induced the claimant to rely on the representation. This is due to the very fact a fraud is being perpetrated. In this regard, both *Leeds* and *Marme* have led to the 'parsing' of the constituent elements of fraudulent misrepresentation to an unacceptable degree. This is a result of the Commercial Court's recent approach in this line of cases, in which it unpicks the "*building blocks*" of the elements of the tort (see *Leeds* at [145]), thereby losing sight of the broader point at stake in these rate-manipulation cases – namely, that "*fraud unravels everything*". That famous *dictum* of Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 has recently been re-emphasized by the Supreme Court in *Takhar v Gracefield* [2019] UKSC 13 (see Lord Kerr's speech at [43]–[53]).

Second Issue – Determination of the Point on a Strike Out

Given it was a strike out application, it was, as the Court acknowledged, for Barclays to persuade it that the case should not proceed to trial. Nonetheless, the Court found that because the claimants' pleadings could not *in law* satisfy the test for implied misrepresentation, the case should be struck out. Two key points may be made.

First, while the Court had the benefit of argument on the awareness issue, more weight should have been given to the point that here the Court was required to take the claimants' case at its highest, and assume the fraudulent misrepresentations had been falsely made (due to the fact it was a strike out application). The Court itself recognized that, were it not for the *PAG* and *Marme* decisions, it would be a "*short step*" towards finding that the issues on awareness were not suitable for summary determination ([149]). However, as the Court of Appeal recognized in *PAG*, its decision on the law of implied fraudulent misrepresentation was not the last word. The law in this area is still developing. Therefore, in accordance with well-established practice before the English Courts, it was not appropriate for the issue raised by Barclays to have been determined summarily.

Second, and more importantly, the Court found that there are some cases of misrepresentation where the element of awareness may come "*very close*" to an assumption, and careful analysis is required to make the relevant distinction ([147]). This is the crux of the issue, but the Court's reasoning on it was thin. For this reason, as well as in light of the significant impact that the decision will have on the tort of misrepresentation in England if the decision is allowed to stand, the outcome of any appeal will be eagerly awaited.

NOTED WITH INTEREST

The PTAB's Discretionary Power to Deny Institution of IPRs

Introduction

Since their creation in 2012, *inter partes* reviews ("IPRs") have played an important role in patent litigation. These proceedings are mini-trials at the Patent and Trademark Office ("PTO")—complete with depositions, experts, and live argument, and provide unique opportunities for litigants to advance strategic interests rapidly and cost-effectively. However, recent precedent in IPR proceedings has increased the hurdle for defendants petitioning for IPRs. In particular, the Patent Trial and Appeal Board ("PTAB"), the PTO administrative body that hears IPR proceedings, has increasingly relied on its discretionary power to deny institution of IPR petitions, citing concerns related to efficiency and conservation of judicial resources in view of co-pending district court litigation. The PTAB's use of discretionary denial increased in 2020 and several of its decisions have been made "precedential"—a rare designation that makes PTAB decisions binding in future cases. Large corporations who rely on IPRs as a tool to combat infringement suits have raised a number of challenges against the PTAB's discretionary denial practice, arguing both for modification of its application as well as for its outright repeal.

IPR Overview

The America Invents Act established IPR proceedings in 2012. These proceedings are held before the PTAB. Congress created IPRs to provide a more efficient means for adjudicating the validity of issued patents. To that end, IPRs permit only limited mandatory discovery (typically only expert depositions), and the PTAB must issue its patentability determination within one year of institution.

IPR proceedings have played an increasingly important role in patent litigation since their inception, offering several strategic advantages to defendants in infringement actions. For example, the PTAB's patentability determinations have historically favored patent challengers. According to statistics published by the PTO, in the period between October 2020 and March 2021 the PTAB invalidated at least one challenged claim in more than 82% of its final written decisions. In addition, some district courts are willing to stay infringement actions pending the outcome of an IPR. Accordingly, IPRs have become an important part of defensive strategy in patent cases.

Discretionary Denial at the PTAB

However, recent PTAB precedent has increased the burden on Petitioners seeking to challenge patents in an IPR. In particular, the U.S. code grants the PTAB some discretion to determine whether to institute an IPR challenge. *See* 35 U.S.C. § 314(a). Historically, the PTAB largely focused its institution decisions on the merits of a petition, infrequently invoking § 314(a) to deny petitions. But recently the PTAB has relied on its discretionary authority to deny institution of IPR petitions. In May 2020 the PTAB designated as precedential the *Fintiv* decision outlining six factors it weighs when considering discretionary denial under § 314(a):

1. whether the district court granted a stay or evidence exists that one may be granted if an IPR proceeding is instituted;
2. proximity of the court's trial date to the PTAB's projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board's exercise of discretion, including the merits of the petition.

Apple Inc. v. Fintiv, Inc., IPR2020-00019, Paper 11 at 5–6 (PTAB March 20, 2020) (precedential, designated May 5, 2020) ("Fintiv"). In the year since, the PTAB has frequently relied on *Fintiv* to deny petitions. According to some resources, discretionary denials increased 60% in 2020. *See* https://www.unifiedpatents.com/insights/2020-ptab-discretionary-denials-report (current as of August 10, 2021).

***PTAB Guidance Regarding* Fintiv**

Throughout 2020 the PTAB issued several precedential decisions clarifying its application of discretionary denial under *Fintiv.* For example, in *Sotera*, the PTAB explained that *Fintiv* is meant to provide "a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review." *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019 Paper 12 at 14 (PTAB December 1, 2020) (precedential, designated December 17, 2020) ("*Sotera*"). Namely, the PTAB examines whether an IPR would merely duplicate efforts already undertaken in the co-pending litigation. In *Sotera* the PTAB granted institution of IPR, citing petitioner's stipulation that it would not pursue any invalidity grounds in the district court that were raised or could have been raised in its IPR petition. *Id*. at 18-21. The PTAB found that this stipulation "strongly" weighed in favor of institution, since it ensured that the IPR would serve as a "true alternative" to the district court litigation by eliminating overlapping arguments. *Id*. at 19.

In another precedential decision, *Snap Inc.,* the PTAB considered, *inter alia*, the relative timing of proceedings in the district court and the IPR. The PTAB found that the *Fintiv* factors weighed in favor of institution, noting that the co-pending district court litigation was stayed and, thus, the district court would not reach a validity determination before a final written decision at the PTAB. *See Snap, Inc. v. SRK Technology LLC*, IPR2020-00820 Paper 15 at 9 (PTAB October 21, 2020) (precedential, designated December 17, 2020) ("*Snap*"). The PTAB found that this factor weighed "strongly" in favor of institution. *Id.*

The PTAB's focus in its precedential decisions on the degree of overlap of issues and the relative timing of the proceedings is echoed in recent non-precedential cases. For example, in *Philip Morris* the PTAB granted institution where a defendant before the International Trade Commission ("ITC") completely dropped its validity defenses at the ITC for the patent claims challenged in its IPR petition. *Philip Morris Prods., S.A. v. RAI Strategic Holdings, Inc.*, IPR2020-01602 Paper 9 at 13 (PTAB April 2, 2021). Thus, similar to *Sotera*, the PTAB reasoned that institution should be granted because overlap in issues across the proceedings was eliminated by petitioner's withdrawal of its invalidity defense at the ITC. *Id.* at 14-15. In *Teso* on the other hand, the PTAB held that timing was a particularly significant factor in its decision to deny institution. *Teso LT, UAB v. Luminati Networks Ltd.*, IPR2021-00122 Paper 12 at 11 (PTAB April 20, 2021) ("*Teso*"). In that case the parties had already made significant investments in the co-pending district court case and trial was scheduled to occur ten months before the PTAB would make its patentability determination. *Id.* at 7-9. This, combined with the overlap in prior art across proceedings weighed heavily in favor of denial. *Id.* at 11.

***Challenges to* Fintiv**

Several companies have raised a number of arguments challenging the legitimacy and application of *Fintiv*. For example, Apple and Google filed suit seeking a declaratory judgment against the PTAB in the Northern District of California, arguing that the PTAB's discretionary denial practice violates the America Invents Act. *Apple Inc. v. Iancu*, 5:20-cv-06128-EJD, Dkt. 1 (N.D. Cal. August 31, 2020). In particular, Apple and Google argue that the statute expressly allows defendants to file an IPR within one year of being served with a complaint for infringement. *Id.* ¶ 6. Thus, they conclude that the PTAB's practice of denying petitions in view of the district court schedule—petitions that are otherwise timely-filed under the statute—violates the AIA. *Id.* Plaintiffs further argued that *Fintiv* amounts to improper rulemaking by the PTAB without providing a notice and comment period as required under the Administrative Procedures Act. *Id.* ¶¶ 8-9. This challenge remains pending in California.

In another challenge, Fitbit and Garmin have petitioned the PTAB's precedential-setting panel (the Precedential Opinion Panel, or "POP") to vacate *Fintiv* denials that are based on the schedule of co-pending ITC investigations. *Garmin Int'l, Inc. v. Koninklijke Philips N.V.*, IPR2020-00754, Paper 13 Ex. 3007 (December 1, 2020) ("*Garmin*"). Fitbit and Garmin argue, *inter alia*, that the expedited nature of ITC proceedings would always weigh against institution. *Id.* at 1-2. Petitioners further argue that the PTAB should not consider ITC investigations in its *Fintiv* analysis, since the ITC lacks the authority to invalidate a patent. *Id.* at 2. The POP is still considering this request. Q

PRACTICE AREA NOTES

ESG Litigation Update

U.S. Supreme Court Requires More Than "General Corporate Activity" in U.S. to Bring Alien Tort Statute Claims in U.S. Courts

On June 17, 2021, the U.S. Supreme Court delivered its opinion in *Nestlé USA, Inc. v Doe,* 593 U.S. ___ (2021). The suit was brought by a group of citizens from Mali under the U.S. Alien Tort Statute ("**ATS**"), alleging that Nestlé and Cargill aided and abetted the perpetration of child slavery and forced labor at cocoa plantations in the Ivory Coast, where these individuals said they had been trafficked as child slaves to produce cocoa. The ATS is a U.S. federal law first adopted in 1789 that gives the U.S. federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for certain torts committed in violation of the law of nations or a U.S. treaty.

The district court initially dismissed the claim but the Court of Appeals for the Ninth Circuit reversed, holding that the suit could proceed on the basis that the plaintiffs pleaded that the corporate defendants had made or approved "every major operational decision" in the United States. Nestlé and Cargill successfully petitioned the U.S. Supreme Court for review.

Looking Beyond "General Corporate Activity"

By an 8-1 majority on this point, the Court determined that the plaintiffs' complaint did not overcome the presumption against extraterritorial application of the ATS set forth in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (a case where Quinn Emanuel represented Royal Dutch Petroleum in the Supreme Court). Since nearly all the corporate conduct that allegedly aided and abetted forced labor occurred overseas in the Ivory Coast, the plaintiffs were required to plead specific factual allegations of U.S.-based conduct that aided and abetted those alleged extraterritorial violations to overcome the presumption.

While the Ninth Circuit permitted the suit to proceed on the basis that the plaintiffs alleged that the defendants had made "operational decisions" in the United States, the Supreme Court held that "allegations of general corporate activity—like decision making—cannot alone establish domestic application of the ATS." Rather, as Justice Thomas wrote for the Court:

"To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity common to most corporations."

The Court did not provide detail as to what sort of additional domestic U.S. conduct must be shown, but the Court's decision will undoubtedly have practical implications for plaintiffs and defendants alike in ATS cases. To survive a motion to dismiss, a plaintiff must now allege specific details of U.S.-based activity that "draw a specific connection" between the foreign violation and the domestic conduct, and not rely on "generic allegations" of "activity common to most corporations". Conversely, corporate defendants will have greater chances of dismissal in cases where ATS claims allege only generic corporate activity in the U.S.

In some respects, this approach departs from the more permissive trend seen in actions brought in other jurisdictions against companies for alleged violations of the law of nations. For instance, the U.K. Supreme Court refused various challenges to jurisdiction in *Lungowe v Vedanta Resources Plc,* [2019] UKSC 20 and *Okpabi v Royal Dutch Shell Plc*, [2021] UKSC 3, both of which involved claims brought against English-domiciled parent companies together with a foreign subsidiary. Those claims also involved alleged harms that took place overseas, but which the respective claimants in both cases contended arose from the operational control exercised by the English parent company. Following the *Vedanta* and *Okpabi* decisions, a claim before the English courts could, for instance, be asserted on the basis of corporate activity such as the promulgation of group policies or management by a parent of the activities of its subsidiaries.

An Unanswered Question on Claims Against U.S. Corporations

An open question since the U.S. Supreme Court's decision in *Jesner v Arab Bank*, 138 S. Ct. 1386 (2018), which held foreign corporations are not subject to ATS liability, is whether domestic corporations are equally immune from such claims. While the question of corporate liability under the ATS has now been presented to the Supreme Court on three occasions (and was squarely presented in *Nestlé*), the Court has yet to definitively rule on whether domestic corporations may be subject to ATS liability, each time resolving the case before it on narrower or alternative grounds. While several of the Justices in *Nestlé* expressed support for the position that domestic corporations could be subject to ATS liability, the Court has yet to directly rule on the question.

Trial Practice Update

A New Vantage Point: Advantages of Virtual Presentations in the Zoom Era

Litigating in the virtual courtroom can present some key advantages when done right. Although lawyers and litigants look forward to a long-awaited return to physical courthouses, it is apparent that the virtual courthouse may be here to stay. Some courts have already indicated their willingness to continue virtual operations, or take a hybrid approach to proceedings, even as traditional in-court trials and hearings resume. After more than a year spent working out the proper protocols, many courts have grown accustomed to the technology, and view virtual proceedings as more productive and efficient than live ones in some circumstances. *See e.g.,* Message from Chief Judge of the Court of Appeals and the State of New York, Janet DiFiore (Apr. 19, 2021) ("We are drafting a responsible plan that will limit the number of people physically present in our courthouses to safe and responsible levels, and we will do so by relying on the *permanent integration of remote technology and virtual appearances* to hear those matters not requiring the physical presence of lawyers and litigants in our buildings.") (emphasis added); "As Pandemic Lingers, Courts Lean into Virtual Technology" (Feb. 18, 2021) *available at* https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology ("Video jury trials are a tool that can be used, and it's a tool we need to use unless we are going to be backed up forever and ever . . . It has worked better than my initial expectations, all the way around.").

In light of the "new normal," it is important to consider how the virtual courtroom can actually enhance your presentation. One obvious benefit is that a remote trial or hearing can save significant time and expense by eliminating the need for multiple parties, witnesses, experts, attorneys and/or support staff to travel to one location for a traditional in-person proceeding. Virtual proceedings may also provide more flexibility to parties when scheduling a hearing or trial and choosing the witnesses who will appear at it. A less obvious advantage of the virtual courtroom? The opportunity to visually present your case in a format that may not be feasible in the traditional in-person setting, or may be more effectively presented using remote technology tools.

Remote videoconference proceedings may allow a party to focus the court's attention on key evidence in a way that is simply impossible to do live. While an attorney ordinarily may be limited to providing hard copy documents or displaying exhibits for the court from a distance, in a virtual proceeding, the court is guaranteed to get an up-close-and-personal view of the evidence via the screen-share function. During virtual presentations trial graphics can be used even more effectively to engage the trier of fact and to instantly draw the court's attention to key exhibits, timelines, and legal arguments. This is especially helpful in cases involving evidence in the form of excel spreadsheets or other complex document compilations, which can be notoriously difficult to present and print in a readable format. Unlike in the traditional courtroom setting where participants may be flipping through hard copy documents, distracted, or straining to see a screen, an attorney or legal assistant who is familiar with the material can use the screen-sharing function to ensure that everyone is, quite literally, on the same page.

In cases involving technical subject matter, such as litigation related to the workings of heavy machinery, complicated technology, or intricate intellectual property and trade secrets, remote proceedings provide parties with an opportunity to present evidence and testimony in a new way. For example, as was done in a recent virtual arbitration hearing, a virtual proceeding can allow a witness to *visually demonstrate* how the technology actually works – in real-time – as opposed to merely explaining how it works during the witness's examination. The effect of a live demonstration can be extremely powerful. With the assistance of an on-site camera crew, the witness walks the court through the actual mechanics of the technology, often gaining immense credibility, while also answering questions from the examining attorney and judge. Of course, be sure to clear demonstratives and presentations with the court pursuant to the applicable rules in your forum.

Despite the advantages and convenience of remote proceedings, it is unclear whether the virtual format will continue in the post-pandemic era absent the consent of all parties and the court (for example, it is unclear whether "good cause" will continue to exist to empower courts to order virtual proceedings when the pandemic resolves). But the takeaway here is this: as litigants continue to navigate the "new normal," if given the choice between a virtual proceeding or a traditional in-person one, parties should not reflexively assume that in-person presentation is better presentation. Depending on the nature of the case and proceeding, persuasion may be achieved more effectively from afar.

Trademark & Copyright Litigation Update

Conflicts in the Duration of Copyright Protections Under United States and International Law

An issue that courts have not yet addressed, but which may become of increasing significance for musicians, authors, artists, their estates, and their copyright attorneys alike, is the existing conflict between the duration for copyright protections under United States and international laws.

United States law protects a copyrighted work for the life of the author plus 70 years. 17 U.S.C. § 302. By contrast, the Berne Convention, the leading international copyright treaty, only protects copyrighted works for the life of the author plus 50 years. The 50-year deadline under the Berne Convention is approaching, or has already passed, for an increasing number of iconic works from the 20th Century. This ranges from the music of Jimi Hendrix and Janis Joplin (*The Conundrum at the Heart of Public Domain Day 2021*, WLNR 4139241, Ms. Nadia Rowe and Michal Jaworski, February 8, 2021), to written and subsequent film works of Ian Fleming, such as "James Bond." *What Does It Mean That James Bond's in the Public Domain in Canada?* Katharine Trendacosta, January 8, 2015.

When the 50-year period under the Berne Convention expires, arguably copyrighted works enters the "public domain" in international locations while, at the same time, remaining subject to protection for a number of additional years in the United States. The difference between this duration of copyright protection, and how it may impact the rights of copyright holders in both the United States and abroad, has not been squarely addressed to date. However, when clients, attorneys, and courts do face the issue, it may raise complicated questions related to ownership and the substantive rights of copyright holders.

For example, "ownership" of a work is often determined by reference to the laws of the country that has the "closest relationship to the work," usually found to be the country where it was created. *See*, *e.g., Auto. Data Sols., Inc. v. Directed Elecs. Canada, Inc.*, 2018 WL 4742289, at *6 (C.D. Cal. Aug. 15, 2018). And certain courts have treated the question of whether a work is in the public domain as one that turns on ownership. *E.g. Tastefully Simple, Inc. v. Two Sisters Gourmet, L.L.C.*, 134 F. App'x 1, 5 (6th Cir. 2005); *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000). Consider a hypothetical piece of work that was prepared in the United Kingdom in 1972, and copyrighted both in the United Kingdom and United States. Under this precedent, an argument could be made that United Kingdom law applies to determine ownership; that under the Berne Convention, ownership expires in 2022; and, thus, that the copyright holder may no longer assert a claim for infringement, even in the United States, after 2022 when the 50-year Berne Convention period expires.

When evaluating substantive issues such as "infringement," by contrast, courts typically apply the laws of the country where the infringement is alleged to have taken place. *Auto. Data*, 2018 WL 4742289, at *6. Thus, for the same 1972 hypothetical piece of work, an argument could be made that in a case brought in the United States, United State law should apply and a copyright holder should be permitted to assert infringement at any time within the life of the author plus 70-year period.

No courts appear to have addressed this specific issue of whether, in the context of competing laws regarding the duration of copyright protection, a copyright holder's rights either in the United States or abroad should turn on issues of ownership, infringement, or other choice-of-law principles. However, prior precedent illustrates the principles courts may look to when faced with the issue. For example, courts have addressed duration issues in the context of copyrighted works that span significant time frames, and expire at different points in time. In *Klinger v. Conan Doyle Estate, Ltd.*, the Seventh Circuit considered whether certain stories about the famed detective Sherlock Holmes could continue to be protected after the majority, but not all (46 out of 56), of these stories had entered the public domain. 755 F.3d 496, 497 (7th Cir. 2014). The estate of Sir Arthur Conan Doyle argued that the original characters in the 46 stories could not be lawfully copied without a license from the writer until the copyright on the later work, in which that character appears in a different form, expire. *Id.* at 500. In an opinion authored by Judge Richard Posner, the court rejected this theory: "[w] e cannot find any basis in statute or case law for extending a copyright beyond its expiration. When a story falls into the public domain, story elements—including characters covered by the expired copyright—become fair game for follow-on authors." *Id*. Applying similar principles, a court could find that if a copyright falls into the public domain under the Berne Convention, it can no longer be subject to protection in the United States.

By contrast, courts and United States statutes recognize a strong policy in favor of protecting the rights of both American and foreign copyright holders. *See, e.g.*, *Golan v. Holder*, 609 F.3d 1076, (10th Cir., 2010). This is illustrated, for example, by Section 514(a) of the Uruguay Round Agreements Act, Codified at 17 U.S.C. Section 104A, which provides for the restoration of foreign-based copyrights that have fallen into the public domain in the United States as a result of a copyright lapse due to noncompliance with U.S. copyright formalities. Analogizing and relying on this precedent, an argument could be made that the longer, 70-year copyright duration should apply to maximize the protection afforded to copyright holders even after the 50-year duration under the Berne Convention expires.

It remains unclear how this issue may be resolved if or when raised to a court, but given this uncertainty, attorneys and their clients should be cognizant of the issue in preparing copyright cases, whether on the plaintiff or defense side. This should include a close evaluation and consideration where a work was prepared, and the merits of any potential argument that it should or should not continue to be protected, including a consideration of the policy arguments that can be made given the existing uncertainty.

Digital Asset Litigation Update

Are Stablecoins Securities?

Stablecoins—cryptocurrencies that aim to maintain stable value relative to a benchmark such as a commodity, a fiat currency, or a basket of assets like real estate—have recently exploded in prominence. The stablecoin market cap doubled in just four months in 2020, with total dollar-pegged stablecoin supply reaching $100 billion as of May 2021. This increased prominence raises the question of whether stablecoins satisfy the U.S. Supreme Court's test in *SEC v. W.J. Howey Co.* 328 U.S. 293, 298-99 (1946), which the SEC and lower courts have applied to evaluate whether cryptocurrencies constitute an "investment contract," and hence securities subject to the securities laws and SEC oversight. What is now well-known in crypto circles as the "*Howey* test" finds there to be an investment contract if: "a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promoter or a third party." SEC Chairman Gary Gensler has emphasized that the SEC will focus on this exact question in the years to come, and particularly on stablecoins the SEC views as derivatives of securities. *See* Prepared Remarks of Gary Gensler at the American Bar Association, July 21, 2021.

Two important federal district court decisions applied the *Howey* test to "non-stable" cryptocurrencies in 2020: *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020) ("*Telegram*"), and *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020) ("*Kik*"). In *Telegram*, the Southern District of New York granted the SEC's request for an injunction preventing the distribution of "Gram" tokens by Telegram Group Inc., finding that Telegram's initial private sale, coupled with the potential for public resale, constituted a scheme to distribute unregistered securities. *Telegram*, 448 F. Supp. 3d at 352. Then, in September 2020, the Southern District of New York again ruled in favor of the SEC at summary judgment in *SEC v. Kik Interactive Inc*, finding that the "Kin" tokens that Kik had offered and sold through a pre-sale and initial coin offering also constituted securities. *Kik*, 492 F. Supp. 3d at 169.

Of note, the biggest current non-stablecoin case being litigated under *Howey* – whether the cryptocurrency XRP is a security – is in midstream, with Ripple Labs vigorously contesting the SEC's case, and winning various pretrial discovery battles along the way. *SEC v. Ripple Labs Inc.*, No. 1:20-cv-10832 (S.D.N.Y. Dec. 22, 2020). Yet no court has analyzed *Howey* as applied to stablecoins (XRP is not a stablecoin), meaning that stablecoin projects need to try to predict how a court would apply the *Howey* test without direct precedent.

Many stablecoin projects share similarities with other cryptocurrency projects with respect to the first, second, and fourth prongs of the *Howey* test as applied in *Telegram* and *Kik*. Regarding prongs one and two, for example, both *Telegram* and *Kik* noted there was there was no dispute that an investment of money had occurred. They both also held that defendants had established a common enterprise given they had pooled money earned from initial offerings and used it to fund their operations and develop their blockchain systems. Numerous stablecoin projects are arguably similar in this respect, given they offer stablecoins for other currencies, then use those to fund the operations and development of a blockchain ecosystem. Stablecoin projects are also potentially implicated by *Howey*'s fourth prong. This prong states that the expectation of profits should stem "*solely* from the efforts of the promoter or a third party," but lower courts have adopted a more relaxed test, and will ask whether the "*reasonable expectation* of profits [were] derived from the entrepreneurial or managerial efforts of another." *Telegram*, 448 F. Supp. 3d at 375. Many centralized stablecoin projects—which are algorithmic, crypto-collateralized, and fiat-collateralized—would arguably meet this version of the "efforts of another" prong, given stabilization mechanisms generally rely on the minting entity's efforts in initial development and ongoing management and verification. However, not all stablecoin projects may be treated equally, and may not be treated equally at different points in their life cycles. An argument could be made that a purely algorithmic stablecoin project would not meet this prong, at least after the algorithm was operating successfully, thereby eliminating the ongoing management and verification that was at play in *Telegram*. This dividing line was reflected in the no action letters issued by the SEC to TurnKey Jet, Inc. and Pocketful of Quarters, Inc. *See* TurnKey Jet, Inc., SEC No-Action Letter (Apr. 3, 2019); Pocketful of Quarters, Inc., SEC No-Action Letter (July 25, 2019). In reaching its recommendation for nonenforcement, the SEC noted that Turnkey and Pocketful would not use any funds derived from the sale of the tokens to develop the associated token networks, which were to be fully operational upon any sale of the tokens, and the tokens would be immediately usable for their intended purpose at the time they are sold.

The third prong in the *Howey* test—whether an individual is led to expect profits—is one of the most discussed and is where stablecoins are more likely to diverge from other cryptocurrencies. *Telegram* held that an investor possesses an expectation of profit when her motivation to partake in the relevant scheme is the prospect of a return on investment, even where that motivation is secondary to a motive unrelated to profit. *Id*. at 371. In evaluating the expectation of profit, *Telegram* discounted the initial purchasers' legal disclaimers of an intent to resell, finding sufficient evidence of such intent in the "economic realities" of the sale, including the initial sale of Grams at a discount relative to the expected market price in a post-launch public market. *Id*. at 372. *Kik* likewise analyzed the economic realities underpinning the Kin offering, finding a reasonable expectation of profit where purchasers depended on a centralized entity, there Kik, to ensure that the coin's "consumptive use," and hence value, would materialize. 492 F. Supp. 3d at 178. Stablecoins are certainly distinguishable from the "non-stable" cryptos at issue in *Telegram* and *Kik*—where cryptocurrencies have become vehicles for high-growth, high-risk investment, stablecoins aim for constancy. Nevertheless, the *Telegram* and *Kik* courts' flexible reasoning and focus on economic realities might allow the SEC or private counsel the latitude necessary to argue that *Howey* is applicable to stablecoins. Algorithmic stablecoins that must ramp up to a stable value sometimes offer discounted sales prior to successful stabilization. These sales may support an argument that initial purchasers, despite formal disclaimers by issuers and purchasers alike, buy with the intent for resale following stabilization at the higher price. Likewise, stablecoins pegged to assets other than fiat (such as gold, a consumer price index, or diamonds, for example) may be analyzed to assess whether potential growth in the value of the underlying asset is sufficient evidence of an expectation of profit under *Telegram*'s realities-driven analysis. Stablecoins also present possible opportunities for profit through arbitrage. For example, the March 12, 2020 collapse in bitcoin prices drove investors to the safe-harbor of stablecoins, increasing demand and causing the price of most dollar-pegged stablecoins to jump up to between $1.03 and $1.06, opening profit opportunities for holders willing to sell. If "investors" in fiat-pegged stablecoins can expect to sell their holdings in excess of the peg during downturns in the crypto market, this, arguably, may be a sufficient expectation of profit under *Telegram* and *Kik.* Finally, as Chairman Gensler has recently emphasized, stablecoins whose value is backed directly or synthetically by an instrument deemed to be a security, whether equities or other cryptocurrencies, may face enforcement action or civil litigation under the theory that, in economic reality, the stablecoin is simply a derivative of a security.

Successive extensions of the *Howey* test have raised as many questions as they have answered for cryptocurrencies, including stablecoins. The complexity of the findings of the *Telegram* and *Kik* opinions continue to demonstrate the opacity of the regulatory landscape. It continues to be difficult to draw broader conclusions or extrapolate rules or principles from enforcement actions that, as the *Telegram* court notes, are specific to the facts of a particular project and digital asset. However, as discussed above, the SEC, plaintiffs' counsel, and stablecoin issuers must all take notice of the trends signaled in *Telegram* and *Kik* as they adapt to the shifting lines and rationales that separate securities from non-securities. Q

VICTORIES

Firm Obtains a $1.5 Billion+ Arbitral Award in Favor of Algerian Client

Sonatrach's long-running arbitration against Tunisian-controlled Medex just concluded with Sonatrach being awarded the staggering amount of $1,569,359,664.38 and DZA 2,320,699,249.16 ($17 million).

In 2002, Sonatrach (Algeria's national oil and gas company and one of the largest players in Africa) entered into two exploration and production sharing agreements with Medex Petroleum North Africa LDT (a BVI corporation) in relation to two blocks located in the Algerian desert (Bouharet Nord, and Erg Issouane). Gas had already been discovered on these blocks, the issue was to develop them. Medex had very little oil and gas expertise, but it did invest close to $ 250 million during the first years of the project. The 2008 crisis hit and Medex defaulted, so it sought to sell its participating interest. In the meantime, the development of the gas fields was brought to a halt because Medex could no longer finance its part and was blocking all decisions at the operational level.

Sonatrach needed to regain control over the fields urgently in order to sell the gas. Because governing Algerian law does not authorize an aggrieved party to terminate an agreement unilaterally where, as here, the contract contained no provision to that effect, Quinn Emanuel had to convince the Arbitral Tribunal to order termination.

Prior to arbitration, ICC mediation was mandatory. Quinn Emanuel commenced ICC mediation at the end of 2014 but discontinued it after four months because it was going nowhere and then started arbitration.

The Arbitral Tribunal confirmed that it had jurisdiction almost immediately but, more importantly, accepted Quinn Emanuel's request to bifurcate the issue of termination from any quantum issue. That was a major procedural victory because quantum, which was very complex, would have delayed the decision considerably.

Medex challenged the jurisdictional decision before the Swiss Federal Tribunal. The Federal Tribunal used this case to render its landmark decision on multi-tier resolution clauses, holding that pre-arbitral steps were mandatory, but, in a typically Swiss pragmatic fashion, it also held that the remedy was not to annul the arbitration *ab initio* but merely to suspend the arbitration pending the completion of the pre-arbitral steps. As a result, the arbitration was suspended for one month only and resumed afterwards.

In 2016, the Tribunal declared that the agreements were annulled *ab initio* as a result of Medex's breaches. This was another major victory. The blocks were released and Sonatrach began the process of re-obtaining them from ALNAFT (the authority that awards blocks in Algeria). It did so and, at the end of 2018, it concluded a new agreement with Total to develop the Erg Issouane block.

In the meantime, Quinn Emanuel pursed the quantum phase which progressed like a roller-coaster, not least because of the Total deal that led the experts on both sides to issue completely new reports in the course of the quantum phase. Interestingly, Medex took the view that it was claimant in the quantum phase, and claimed in excess of $2 billion from Sonatrach.

Medex lost once again and Sonatrach has now received a $1.5 billion+ final award. Q

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business litigation report

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