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## Supreme Court Considers Expansion of Defendants' Ability to Challenge Class Certification in Securities Class Actions

On December 11, 2020, the Supreme Court granted the petition of Goldman Sachs Group, Inc. ("Goldman") for certiorari in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 955 F.3d 254 (2d Cir. 2020), a securities class action asserting that Goldman made certain misstatements in violation of Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5(b), which caused the value of Goldman's publicly-traded shares to decline. The Supreme Court will consider two important issues: ***First***, whether a court may consider the nature of the alleged misstatements themselves in determining whether, at the class certification stage, a defendant has rebutted the presumption of classwide reliance; and ***second***, which party has the burden of persuasion on the issue.

On April 7, 2020, the Second Circuit issued the underlying opinion on appeal, which was its second in the action. In *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* (*ATRS I*), 879 F.3d 474 (2d Cir. 2018), the Second Circuit initially reversed and remanded the District Court's opinion granting class certification

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## INSIDE



## Trial Lawyer and Healthcare Expert Anthony Bongiorno Joins Boston Office

Anthony Bongiorno has joined the firm as a partner in the Boston office. Anthony is a well-known first-chair trial lawyer. He was previously "partner-in-charge" at McDermott, Will, & Emery's Boston office. He has extensive experience in mass torts, product liability defense, and complex commercial litigation. His work has recently involved large health care systems, energy providers, international developers, and life sciences companies. Q

## Firm Earns Top Marks in 2021 Corporate Equality Index

The firm once again received a score of 100 percent on the Human Rights Campaign Foundation's 2021 Corporate Equality Index, the nation's premier benchmarking survey and report measuring corporate policies and practices related to LGBTQ workplace equality. The Human Rights Campaign Foundation is the educational arm of America's largest civil rights organization working to achieve equality for lesbian, gay, bisexual, transgender, and queer people. The firm has also earned a 100 percent ranking and the designation as a *Best Place to Work for LGBTQ Equality*. Q

## Quinn Emanuel Recruits Antitrust Expert Debra Bernstein, Expands to Atlanta

Experienced antitrust litigator Debra Bernstein has joined Quinn Emanuel as the head of the new Atlanta office. Bernstein's trial practice is nationwide, and includes representation of corporate plaintiffs and defendants in complex commercial litigation, with a particular focus on antitrust and class action work. She is regarded as a leader in the area of large corporate opt-out litigation, and is among the few antitrust lawyers in the US who has defended an antitrust case instituted in the International Trade Commission. Q for failing properly to apply the "preponderance of the evidence" standard in assessing whether Goldman successfully rebutted the presumption, set out in *Basic v. Levinson*, 485 U.S. 224 (1988), that "shareholders relied on Goldman's allegedly material misstatements in choosing to purchase its stock at the market price." *Ark. Teacher*, 955 F.3d at 254. On remand, the District Court again held that "Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence" and so "certified the class once more." *Id.* at 258. The Second Circuit affirmed the District Court again, and the Supreme Court granted Goldman's petition for certiorari.

The Court's decision could potentially expand the ability of securities class action defendants to narrow the plaintiff class at the certification stage, where reducing the class period or class size can have a significant impact on the potential damages, and therefore the parties' settlement calculus. In general, it is difficult for securities class action defendants to defeat class certification because putative classes often comprise similarly situated investors who purchased the same security, relied on the security's market price, and suffered losses from the same market events. Should the Supreme Court side with Goldman, however, securities class action defendants may be able to argue at the class certification stage that alleged misstatements are too "general" to be actionable, effectively expanding the ways in which securities class action defendants can challenge certification. The Court's decision has the potential to impact a substantial number of cases, given the frequency with which defendants argue that some or all of the alleged misstatements are too "general"—often termed "puffery"—to support securities fraud.

### *Plaintiffs' Allegations*

The misstatements alleged by Plaintiffs were statements by Goldman between 2006 and 2010 asserting, among other things, that Goldman's "reputation is one of our most important assets," that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest," and that "[w]e are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us." *Id.* Plaintiffs alleged these statements were false because, in fact, Goldman knew at the time "that it was riddled with undisclosed conflicts of interest." *Id.* at 259.

Plaintiffs' claim rests in large part on allegations that Goldman marketed to investors a collateralized debt obligation as an "ordinary asset-backed security," *id.* at 259, even while permitting the hedge fund Paulson & Co. ("Paulson") to "play an active role in selecting the mortgages that constituted the CDO." *Id.* Plaintiffs claim that Paulson chose mortgages it believed would default—many of which did default—earning Paulson approximately $1 billion because Paulson had bet against the CDO. *Id.* Plaintiffs also alleged that Goldman itself had sold short other CDOs it marketed to investors. *See id.* The Second Circuit summarized that "[t]he crux of their claim is that Goldman's representations about being conflict free artificially maintained and inflated the stock price and that the revelations of Goldman's conflicts" caused Goldman stock to decline. *Id.* In particular, investors alleged that Goldman's shares declined sharply in value on three separate occasions, each of which followed directly from the announcement that government authorities were investigating Goldman's alleged conflicts of interest. *See id.* at 259.

### *The District Court Denies Goldman's Motion to Dismiss and Certifies the Class*

Goldman initially moved to dismiss the complaint in the trial court, arguing that the alleged misstatements were "too general and vague for a reasonable shareholder to have relied on them." *Id.* at 260. The District Court rejected this argument in large part, holding that "most of Goldman's statements presented an actionable question of materiality," though the District Court did dismiss certain statements as immaterial. *Id.*

After discovery, Plaintiffs sought class certification pursuant to FRCP 23. In opposing, Goldman challenged the *Basic* presumption, noted above. Under *Basic*, a court can presume that all class members relied on the alleged misstatements if plaintiffs establish that "defendants' misstatements were publicly known, their shares traded in an efficient market, and [the] plaintiffs purchased the shares at the market price after the misstatements were made but before the truth was revealed.'" *Id.* at 260-61 (quoting *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* (*ATRS I*), 879 F.3d 474, 484-85 (2d Cir. 2018)). A defendant can attempt to rebut the presumption, as Goldman did, by introducing evidence that the alleged misstatements had no effect on the share price. *See id.* at 261.

The District Court rejected Goldman's arguments and certified the class. On appeal, the Second Circuit vacated, holding that the trial court "failed to apply the 'preponderance of the evidence' standard" and improperly rejected as irrelevant certain additional evidence that Goldman attempted to introduce. *See id.* at 261. On remand, the District Court evaluated Goldman's evidence, again held that Goldman failed to rebut the *Basic* presumption, and again certified the class. *Id.* at 262.

***Goldman Appeals Class Certification and the Second Circuit Affirms***

Goldman appealed the second District Court decision on two main grounds. First, Goldman argued that the trial court failed properly to apply the "inflation maintenance" theory of liability, under which a plaintiff need not plead that each alleged misstatement *caused* artificial inflation in a company's stock price, but only *maintained* existing price inflation that a stock would have shed had the Company instead made a true statement. *See id.* at 264. Goldman argued that the alleged misstatements were no more than "general statements" that can never be sufficient to support an inflation-maintenance theory of securities fraud liability. *See id.* at 264-65. Second, Goldman argued that the District Court abused its discretion when it held that Goldman's evidence "failed to rebut the *Basic* presumption by a preponderance of the evidence." *Id.* at 264.

In support of its first point, Goldman asserted that there are only two types of alleged misstatements that a plaintiff can argue *maintain* price inflation, that neither category includes the types of "general" misstatements identified by Plaintiffs, *see id.* at 266, and therefore the District Court should have found, at the class certification stage, that those "general" statements were insufficient to support liability. The Circuit rejected Goldman's argument, noting in particular that none of Goldman's cited authority limited the application of the inflation-maintenance theory to particular statements. *See id.* Of greater concern to the Circuit was that Goldman's proposal, to rebut the *Basic* presumption by deeming certain statements too "general" on their face to have had any impact on the price of a stock, was "really a means for smuggling materiality into Rule 23," *id.* at 267, which was contrary to the principle that "'materiality . . . is not an appropriate consideration at the class certification stage.'" *Id.* at 267 (quoting *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 484-85 (2d Cir. 2018)). The Court also noted that Goldman's test is contrary to FRCP 23(b)(3) because "[w]hether alleged misstatements are too general . . . has nothing to do with the issue of whether common questions predominate over individual ones." *Id.* Even if Goldman's proposed test "might weed out potentially unmeritorious claims," the Court noted that "Rule 23 is not a weed whacker for merits problems." *Id.* In support, the Court relied on *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013) for the proposition that "[m]erits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'" *Id.* at 268 (italics original).

Goldman also made the policy-based argument that "rejecting its theory would open the floodgates to unmeritorious litigation by allowing courts to certify classes that it believes should lose on the merits," and in particular that, in the event of a stock drop, a plaintiff could identify any previous positive statement and claim that it supports a theory of inflation-maintenance. *See id.* at 269. While acknowledging that "class certification can pressure defendants into settling large claims, meritorious or not, because of the financial risk of going to trial," the Court was unimpressed by Goldman's parade of horribles, explaining that (i) claims lacking merit because the statements are too generalized will not reach the class certification stage, *id.* at 269; (ii) a defendant has a second opportunity to attack materiality at summary judgment, *id.*; and (iii) a defendant can "present evidence to disprove price impact" of a particular statement "when seeking to rebut the *Basic* presumption," as Goldman itself did. *Id.* Having rejected Goldman's invitation to evaluate the "generality" of misstatements at the class certification stage, the Circuit held that the District Court did not abuse its discretion in finding Goldman's evidence inadequate to rebut the *Basic* presumption. *See id.* at 270-74.

Further, in addressing this issue, the Second Circuit recognized that Goldman "bears the burden of persuasion," *id.* at 272, meaning that "[o]nce the shareholders successfully invoke *Basic*, which happened here, the question is not which side has better evidence, but whether the defendant has rebutted the presumption." *Id.* at 272 n.19.

***The Dissent***

Judge Sullivan dissented, observing that information concerning Goldman's alleged conflicts of interest, which was the underlying factual basis for Plaintiffs' allegations of falsity, were disclosed to the public in 36 news stories prior to the three significant stock drops identified by Plaintiffs, but that those prior 36 revelations had no effect on Goldman's stock price. *See id.* at 277. Judge Sullivan also disagreed with the Court's refusal to consider the "nature of the alleged misstatements"—meaning, in Goldman's terms, their "generality." *See id.* at 278. Judge Sullivan rejected the majority's determination that it could not review materiality at the class certification stage, arguing that "[o]nce a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price." *Id.* at 278. Judge Sullivan concluded that, although such an inquiry is similar to an assessment of materiality, that "does not make it improper," and the "generic quality of Goldman's alleged misstatements, coupled with the undisputed fact" that prior disclosures had no effect on the stock price, "clearly compels the conclusion that the stock drop following the corrective disclosures was attributable to something *other* than the misstatements alleged in the complaint." *Id.* at 278-79 (italics original). Judge Sullivan would therefore have reversed and decertified the class.

***The Issues Pending Before the Supreme Court***

The parties have raised two issues for consideration by the Supreme Court. Each, unsurprisingly, characterizes them differently.

First, Goldman asserts that the first issue is whether a defendant in a securities class action can rebut the *Basic* presumption by "pointing to the generic nature of the alleged misstatements in showing that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality." Pet. for Writ of Cert., *Goldman Sachs Group, Inc. v. Ark. Teacher Ret. Sys.* (No. 20-222), at I (Questions Presented). Plaintiffs view the issue as whether a defendant can "defeat class certification by showing that its statements were immaterial, so long as it casts the argument as going toward price impact rather than materiality." Br. in Opp., *Goldman Sachs Group, Inc. v. Ark. Teacher Ret. Sys.* (No. 20-222), at i (Questions Presented). Goldman has also reiterated its fear of the "ease with which inflation-maintenance plaintiffs will be able to obtain class certification" if courts are not empowered to evaluate alleged misstatements on their face. Pet. at 26. In response, Plaintiffs have noted the various protections Defendants have against unmeritorious claims. Opp. at 21-24.

Second, the parties dispute, and have also raised for consideration, whether a defendant seeking to rebut the *Basic* presumption has the burden only of production, or also of persuasion, the Second Circuit having held the latter. *See* Pet. at I; Opp. at i. Goldman alleges that there is a Circuit split on this issue, arguing that the Second and Seventh Circuits have determined that a defendant has the burden of persuasion to rebut the *Basic* presumption, but in the Eighth Circuit, the burden of persuasion remains with the plaintiff even if the defendant produces evidence to rebut the presumption. Pet. at 21-24. In Goldman's view, "the private cause of action for securities fraud . . . and the *Basic* presumption are judicial creations," and there is no statute or Rule of Evidence that would alter Federal Rule of Evidence 301, Pet. at 23, which provides that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," but that such evidence "does not shift the burden of persuasion, which remains on the party who had it originally." By contrast, Plaintiffs acknowledge that the Second and Seventh Circuits have, indeed, rejected Plaintiffs' argument, but argue that the Eighth Circuit was speaking only in *dictum*, and there is no true Circuit split. Opp. at 27-29. On the merits, Plaintiff cites the Supreme Court's decision in *Halliburton Co. v. Erica P.. John Fund, Inc.*, 573 U.S. 258, 279 (2014), that a defendant can rebut the *Basic* presumption by showing a lack of price impact, and interprets "show" to mean a defendant must "*actually* rebut the presumption through evidence that persuasively shows a lack of price impact." *Id.* at 29 (emphasis original).

The case is not yet set for argument, but it is unlikely to be heard before March 2021.

# NOTED WITH INTEREST

## California Privacy Rights Act (Proposition 24): A Summary of Key Changes

On November 3, 2020, California voters passed Proposition 24, also known as the California Privacy Rights Act of 2020 (CPRA). The proposition amends the California Consumer Privacy Act (CCPA), which went into effect on January 1, 2020 and significantly enhanced consumer privacy rights. The CPRA makes a number of changes to the CCPA, most of which will become effective on January 1, 2023. Before then, businesses will need to evaluate their policies and procedures to ensure compliance with the CPRA. Businesses that fail to do so could face significant liability, including administrative fines and monetary damages.

***Changes to Coverage Thresholds***. Currently, to qualify as a "business" for purposes of the CCPA, a business must satisfy at least one of three threshold requirements: (1) have an annual gross revenue in excess of $25 million; (2) annually buy, receive for the business's commercial purposes, sell, or share for commercial purposes the personal information of 50,000 or more consumers, households, or devices; or (3) derive 50 percent or more of its annual revenue from selling consumers' personal information. The CPRA narrows the second requirement by (1) no longer counting devices and (2) increasing the annual threshold from 50,000 to 100,000 or more consumers or households. The CPRA also amends the first requirement by specifying that "annual gross revenue" is that of the "preceding calendar year" and broadens the third requirement by covering "selling *or sharing*" consumers' personal information.

***Disclosures Regarding Sensitive Personal Information***. Currently, the CCPA requires that businesses inform consumers of the types of personal information collected and the purposes for which that information is collected. This requirement remains largely the same, but the CPRA also creates a new category of information referred to as "sensitive personal information," which includes, for example, a consumer's social security number and a consumer's precise geolocation. The CPRA requires that businesses disclose the types of sensitive personal information collected, the purposes for which that information is collected, and whether that information is sold or shared.

***Retention of Personal Information***. The CPRA requires that businesses inform consumers how long the business intends to retain each category of personal information, or if that is not possible, how it determines the retention period. The CPRA also specifies that a business cannot retain personal information "longer than reasonably necessary." The CCPA did not explicitly address data retention, so this standard will need to be developed further through regulations or case law.

***Agreements with Third Parties***. The CPRA requires businesses that disclose personal information to third parties to include certain terms in their agreements with those third parties. For example, the agreement must require that the third party comply with the relevant provisions of the CCPA and grant the business the right to ensure that the third party uses the disclosed information consistent with the business's obligations under the CCPA.

***Reasonable Security Procedures and Practices***. The CPRA requires that businesses implement "reasonable security procedures and practices" to prevent unauthorized or illegal access, destruction, use, modification, or disclosure of consumers' personal information, with the reasonableness being judged in light of the personal information collected by the business. The "California Data Breach Report," prepared by the California Attorney General in 2016, identifies 20 controls for a "minimum level of information security," such as "controlled use of administrative privileges," and will likely serve as a good baseline for accessing the reasonableness of security procedures and practices.

***Limit Sharing of Personal Data***. Currently, the CCPA gives consumers the right to prevent businesses from selling their personal information. The CPRA expands this right by giving consumers the right to prevent sharing, in addition to selling, of their personal information.

***Correct Personal Data***. The CPRA requires that businesses inform consumers that they have the right to request that inaccurate personal information be corrected. Businesses are required to use "commercially reasonable efforts to correct the inaccurate information as directed by the consumer."

***Limit Use of "Sensitive" Personal Data***. The CPRA gives consumers the right to limit businesses' use of their sensitive personal information to certain enumerated purposes, such as using the information in the manner "reasonably expected" by consumers based on the goods or services provided. Businesses will want to put policies and procedures in place to ensure that they can segregate sensitive personal information from other personal information, so that they can appropriately limit the use of consumers' sensitive personal information.

***Eliminates Cure Period for Civil Penalties***. Currently, a business is in violation of the CCPA and thus subject to civil penalties if it fails to cure any noncompliance within 30 days of being notified of such noncompliance. The CPRA eliminates the 30-day cure period and also permits a new, heightened penalty of up to $7,500 (as opposed to $2,500) for violations involving the personal information of consumers whom a business knows are under 16 years of age.

***Broadens Private Right of Action***. Currently, a consumer may bring suit under the CCPA if the consumer's nonencrypted and nonredacted personal information is "subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and practices" and the consumer gave the business 30 days to cure the violation. The CPRA expands this right of action to cover data breaches of email addresses along with information that would permit access to the account (e.g., a password or security question). And the CPRA clarifies that implementing reasonable security procedures and practices following a breach "does not constitute a cure with respect to that breach."

***Creates a New State Enforcement Agency***. Effective December 2020, the CPRA created a new agency, the California Privacy Protection Agency (CPPA), which "is vested with full administrative power, authority, and jurisdiction to implement and enforce the California Consumer Privacy Act of 2018." The agency will have broad authority to "investigate possible violations" of the CCPA. And if the agency determines that a violation has occurred, then it may require that the violator cease and desist violation of the CCPA and/or pay an administrative fine of up to $7,500 per violation, depending on the circumstances. An interested party may seek review of the agency's decision in the state trial courts, subject to an abuse of discretion standard of review. The CPPA will be funded with at least $10 million annually, and the five members of its board must be appointed by March 16, 2021, 90 days from the CPRA's effective date. Given that the CPPA will oversee enforcement of the CCPA in conjunction with the California Attorney General, which was previously only able to pursue a few cases per year due to limited resources, there will likely be an uptick in enforcement actions. Q

# PRACTICE AREA NOTES

## Patent Litigation Update

### *New Challenge to IPR Discretionary Denials in View of Parallel Patent Litigation*

On August 31, 2020, four leading tech companies filed a declaratory action against Andrei Iancu, the Director of the U.S. Patent and Trademark Office ("USPTO"), challenging the USPTO's discretionary authority under 35 U.S.C. § 314(a) to deny *inter partes* review ("IPR") petitions in view of parallel patent litigation. *Apple, Inc. v. Iancu*, Case No. 5:20-CV-06128-EJD, Dkt. 1 (N.D. Cal. Aug. 31, 2020). Just two weeks later, several self-proclaimed Small Business Inventors, led by the non-profit US Inventor, moved to intervene seeking to enhance the Director's discretionary authority. Dkt. 28. Soon after, US Inventor moved for a preliminary injunction to enjoin the USPTO from instituting ***any IPRs*** until it promulgates rules on this issue. Dkt. 34. On February 5, 2021, the Court denied the motion to intervene and further denied the motion for preliminary injunction as moot. The ultimate outcome of Plaintiffs' claims could have far-reaching consequences for the adjudication of hundreds of IPR petitions filed every year.

**I. Plaintiffs' Challenge to the "*NHK-Fintiv* Rule"**

Plaintiffs assert that the Director adopted an improper discretionary rule for IPR denial by designating as precedential two recent decisions by the Patent Trial and Appeal Board ("PTAB"), *NHK Spring Co. v. Intri-Plex Technologies, Inc.* and *Apple Inc. v. Fintiv, Inc.* The six discretionary factors articulated by the PTAB in these institution denials concern the stage, similarity, and merits of parallel district court litigation, namely (1) whether the court has granted or will grant a stay; (2) proximity of the court's trial date to the deadline for an IPR final written decision; (3) investment in the parallel proceeding by the court and the parties; (4) overlap between issues raised; (5) whether the same parties are involved; and (6) other circumstances impacting the Board's discretion, including the merits. *See Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, Paper 11 at 6-6 (P.T.A.B. Mar. 20, 2020); *NHK Spring Co. v. Intri-Plex Technologies, Inc.*, No. IPR2018-00752, Paper 8, at 20 (P.T.A.B. Sept. 12, 2018).

Plaintiffs contend this "*NHK-Fintiv* Rule" runs afoul of the "weeding out" mechanism served by IPRs of eliminating weak patents. *Apple, Inc. et al.*, Case No. 5:20-CV-06128-EJD, Dkt. 1 at ¶ 2. They assert the rule violates the America Invents Act (AIA), is arbitrary and capricious, and violates the Administrative Procedure Act ("APA"). *Id.* ¶¶ 61-77.

First, they posit the rule overrides congressional judgment embodied in several specific statutes, including the one-year statutory deadline to file an IPR petition after an accused infringer is served with a complaint. *Id.* ¶¶ 61-67. They argue this deadline embodies Congressional judgment that "so long as the IPR is filed within a year after a lawsuit against the petitioner starts, IPR is appropriate." *Id.* Plaintiffs argue that Congress, by not expressly providing it, has denied the Director any discretionary privilege to deny institution in view of parallel district court proceedings. *Id.*

Plaintiffs next contend the rule is arbitrary and capricious by arguing the PTAB's discretionary factors are uncertain and indeterminate. *Id.* ¶¶ 68-75. For instance, they argue the rule's second factor—concerning proximity of trial date—calls for speculation as to when trial will begin. *Id.* Plaintiffs similarly point to the application of the fourth factor—overlap of issues—as inconsistently applied by the PTAB. *Id.* Here, they contend the PTAB selectively finds overlapping issues to favor or disfavor institution depending only on how distant it perceives trial to be. *Id.*

Finally, Plaintiffs argue the rule is procedurally invalid under the APA. *Id.* ¶¶ 76-77. They argue the *NHK-Fintiv* rule amounts to a substantive rule that required, but never received, notice-and-comment under the APA. *Id.*

**II. Proposed Intervenors' Effort To Expand USPTO Discretion and Enjoin All IPRs**

Like Plaintiffs, Proposed Intervenors complained about *ad hoc* rule-making and unpredictability from the PTAB. *Apple, Inc .*, Dkt. 28-1 (N.D. Cal. Sep. 14, 2020). But in contrast to Plaintiffs, intervenors sought to increase the frequency of discretionary denials, complaining of growing expenses associated with IPR proceedings for patent inventors against large corporate opponents. Dkt. 34.

In this vein, proposed intervenors sought a declaration that the Director's "adjudicative rulemaking" is unlawful and seek to compel notice-and-comment rulemaking. Dkt. 28-1. at 22. The intervenors also sought an injunction preventing PTAB panels from treating any prior precedential decisions analyzing discretionary considerations as precedential. *Id.* They primarily rested this argument on a recent Federal Circuit decision, *Facebook, Inc. v. Windy City Innovations, LLC,* arguing the decision makes clear "the Director's current practice of marking certain decisions 'precedential' does not constitute th[e] required rulemaking." Dkt. 28-1 at 11; Dkt. 34 at 11. Finally, intervenors moved for a preliminary injunction against Director Iancu to enjoin him from instituting any IPR trials until the completion of notice-and-comment rule making. Dkt. 28-1 at 22.

On January 14, 2021, the Court held a hearing on proposed intervenors' motions to intervene and for preliminary injunction . Three weeks later, on February 5, the Court denied the motion to intervene, including because the proposed intervention would "unduly delay and prejudice the adjudication of the original parties' case." Dkt. 101 at 10. The Court further denied the motion for a preliminary injunction as moot.

The parties concluded their briefing of both the motion to dismiss and motion for summary judgment on February 4, and no hearing has yet been set.

## International Arbitration Update

***Halliburton v Chubb: UK Supreme Court Provides Guidance on an Arbitrator's Duties of Impartiality, Disclosure, and Confidentiality***

This month's International Arbitration Update considers the landmark UK Supreme Court decision of *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

The decision is important because it provides guidance on the disclosures that parties should expect from an arbitrator when circumstances exist which might give rise to justifiable doubts as to his or her impartiality. In providing this guidance, the Supreme Court discussed the interaction between an arbitrator's duties of impartiality, disclosure, and confidentiality, which are not easily reconciled.

***Synopsis***

The arbitration at the heart of the matter arose from the April 2010 Deepwater Horizon rig incident. The rig was owned and operated by Transocean Holdings LLC (Transocean), while Halliburton provided cementing and well-monitoring services. Both Transocean and Halliburton purchased liability insurance from Chubb on the "Bermuda Form" policy.

The incident resulted in extensive litigation against Transocean, Halliburton, and others. Halliburton subsequently agreed to a settlement in the billions of US dollars and made a claim on its liability insurance policy with Chubb, which refused to pay because it disagreed with the reasonableness of the settlement amount (among other contentions).

The Bermuda Form provided for dispute resolution by arbitration seated in London with a tribunal of three arbitrators. Halliburton and Chubb each appointed an arbitrator, and Mr. Kenneth Rokison QC was appointed as the chairperson of the tribunal by the UK High Court when the party-appointed arbitrators failed to agree on a candidate.

Following his appointment, Mr. Rokison accepted appointments in two subsequent arbitrations arising from the Deepwater Horizon incident. In the first appointment, occurring approximately six months after Mr. Rokison was appointed chairperson in the Halliburton and Chubb dispute, Chubb appointed Mr. Rokison in an excess liability claim made by Transocean. In the second appointment, occurring approximately one year after he was appointed chairperson in the Halliburton and Chubb dispute, Mr. Rokison accepted an appointment as a substitute arbitrator in a claim made by Transocean against a different insurer. It was generally accepted that the first appointment was of more concern than the second because of the common party (Chubb).

Halliburton learned of Mr. Rokison's further appointments and sought to remove him as chairperson pursuant to section 24(1)(a) of the *Arbitration Act 1996*

(UK). Section 24(1)(a) empowers the court to remove an arbitrator where there are circumstances giving rise to justifiable doubts as to his or her impartiality (i.e. apparent bias). A substantively similar ground for removal exists in Article 12(2) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 (as amended in 2006), which meant that the dispute (and its resolution) was relevant for all Model Law countries (including, Australia, China, Germany, Hong Kong, Japan, and Singapore).

The circumstances alleged by Halliburton to give rise to justifiable doubts as to Mr. Rokison's impartiality were his acceptance of the overlapping appointments and the failure to disclose such appointments.

***Discussion***

Halliburton's main contention in the Supreme Court was that the non-disclosure of overlapping arbitrations indicated a lack of regard for the interests of the non-common party, and therefore constituted apparent bias. Specifically, Mr. Rokison's non-disclosure gave Chubb the unfair advantage of being a common party to two related arbitrations with a joint arbitrator while Halliburton was ignorant of the proceedings. The principal way in which the unfairness would arise is if Mr. Rokison was influenced in his decision making in the Halliburton and Chubb arbitration by the arguments and evidence presented in the other arbitrations. As a consequence, Halliburton contended that Mr. Rokison was in breach of his duty of impartiality and should therefore be removed as chairperson.

The Supreme Court considered whether there existed an appearance of bias in Mr. Rokison's conduct by application of the well-established test of *"whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"* (*Porter v Magill* [2001] UKHL 67 at [103], cited at ¶ 52 of the decision).

Most parties consider an arbitrator accepting a subsequent appointment from their opponent as a matter of concern, particularly when the issues in the two disputes are similar, and would expect the arbitrator to disclose that potential appointment before accepting it. Overlapping appointments are not, however, uncommon in certain specialized industries. For example, the Grain and Feed Trade Association (GAFTA) and the London Maritime Arbitrators Association (LMAA), who intervened in the dispute, informed the Supreme Court that overlapping appointments are common in their fields. Similarly, the Supreme Court acknowledged that in insurance and reinsurance fields, there is a practice of a common arbitrator being appointed to oversee multiple arbitrations involving claims arising from the same incident (¶ 128 of the decision).

The general principle that can be taken from the decision is that there is *no strict prohibition* on arbitrators accepting overlapping appointments, even those involving a common party. The practice is not inherently problematic so long as the arbitrator can approach each arbitration objectively and with an open mind. Each case is fact-specific as to whether a fair-minded and informed observer would conclude the possibility of bias, and that will in large turn on the *"custom and practice in arbitration in the relevant field"* (¶ 127-¶ 131 of the decision).

Importantly, the Supreme Court's position is harmonious with the position in the IBA Guidelines on Conflicts of Interest in International Arbitration. These guidelines are frequently referenced by arbitrators and parties alike when considering the duties of impartiality and disclosure. The guidelines state that if the arbitrator currently serves (or has served within the past three years) as arbitrator in another arbitration on a related issue involving one of the parties, this is a situation that may give rise to justifiable doubts as to the arbitrator's impartiality *and therefore requires disclosure* (¶ 3.1.5 and also ¶ 3.1.3 and footnote 5 of the guidelines, which are cited at ¶ 133 of the decision). Therefore, the guidelines can continue to be referenced on this issue.

As to the duty of disclosure and the disclosure of overlapping appointments, the Supreme Court was unequivocal: unless the parties to the arbitration otherwise agree, arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias (¶ 135-¶ 136 of the decision). This is an ongoing duty and arises when the arbitrator acquires the requisite knowledge of such facts and circumstances (¶ 119-¶ 120 of the decision).

The Supreme Court also addressed the content of the required disclosure, which may clash with the duty of confidentiality. That duty, at least in English law, is not absolute (¶ 83-¶ 102 of the decision). Notwithstanding that qualification, most parties expect that their arbitration will be a private affair. That expectation may be undone by an arbitrator's disclosure of an overlapping appointment. For example, if Mr. Rokison disclosed the existence of the arbitration between Chubb and Transocean to Halliburton, Transocean's expectation of privacy would be dashed.

In considering the boundaries of the duty of confidentiality vis-à-vis the duty of disclosure, and the practices in the arbitration community, the Supreme Court held that at least in Bermuda Form arbitrations, an arbitrator may disclose: (1) the identity of the common party who was seeking to appoint that arbitrator; (2) whether the proposed appointment in the second arbitration by the common party was to be a party-appointment or otherwise; and (3) a statement of the fact that the second arbitration arose out of the similar facts (¶ 104 and ¶ 146 of the decision).

The Supreme Court declined to extend this conclusion to non-Bermuda Form arbitrations, but found it unsurprising that disclosures along the lines of points 1 to 3 above were common practice in arbitration community (¶ 105 of the decision). Support can therefore be drawn from the decision for the proposition that arbitrators should make such disclosures in all commercial arbitrations unless the parties have agreed otherwise.

***Conclusion***

Halliburton's application to remove Mr. Rokison was ultimately unsuccessful. While the Supreme Court found that Mr. Rokison was under a duty to disclose his subsequent appointments to Halliburton, for fact-specific reasons (the timing of the assessment of apparent bias), the Supreme Court found that a fair-minded and informed observer would not conclude that there was a real possibility of bias (¶ 146-¶ 150 of the decision).

As noted above, the decision is of relevance to all Model Law countries because of the substantially similar test for apparent bias. In this regard, when faced with a situation of an arbitrator considering an overlapping appointment with a common party, the appointment should be disclosed to the non-common party. This is because the failure to disclose may well lead a fair-minded observer to conclude the possibility of bias. Following disclosure, the non-common party can then decide what it wishes to do with that information, and the arbitrator has in effect fortified himself or herself against a bias challenge on the grounds of non-disclosure.

## Construction Litigation Update

***Recent Decisions by English Courts on Provisions Allowing for the Correction of Arbitration Awards***

It is widely recognised that parties who are dissatisfied with arbitration awards will generally have very limited rights to challenge those awards. Indeed, the finality of arbitration awards is often one of the attractions of arbitration as a dispute resolution mechanism.

However, another (albeit limited) option that might be available to a party who considers that an award contains errors is to ask the tribunal that issued the award to correct or interpret the award, a procedure that is permitted under the rules of most arbitral institutions and the arbitration laws in many jurisdictions.

In a recent construction case (in which Quinn Emanuel represented the successful party), the English Commercial Court reaffirmed the limited purpose of correction/interpretation applications and the fact that challenges arising from a tribunal's decision to make corrections to an award will only be permitted in exceptional circumstances. Another recent Commercial Court decision also provides insight into the circumstances in which courts will intervene to address inadequacies in an arbitration award when a tribunal has refused to interpret the award, and the time limits in which such challenges can be made.

***Corrections and Interpretations Applications: Background***

As stated above, the arbitration rules of most arbitral institutions permit the parties to seek corrections to or interpretation of an arbitration award in certain circumstances. For example, Article 36 of the ICC Arbitration provides that the tribunal may, of its own initiative or on the application of a party, correct a *"clerical, computational or typographical error, or any errors of similar nature."* Article 27 of the LCIA Rules is to similar effect.

For arbitrations seated in England, Section 57 of the Arbitration Act 1996 provides that a party may apply to a tribunal *"to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award."* However, this provision will only apply in the absence of an alternative provision agreed to by the parties. As stated above, the arbitration laws in other jurisdictions contain provisions to similar effect.

A party who is dissatisfied with a tribunal's decision to correct or interpret an award (or its refusal to do so) may apply to the Commercial Court to challenge the tribunal's corrections or the original award. The relevant provisions for such challenges are sections 67 (substantive jurisdiction), 68 (serious irregularity), or 69 (point of law) of the Arbitration Act (which were addressed in the firm's December 2019 update). Such challenges must be made *"within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process"* (section 70(3) of the Arbitration Act).

***Recent Decisions on Corrections and Interpretation Applications***

As set out in the firm's December 2019 update, the firm acts for Qatar Foundation for Education, Science and Community Development ("QF") in an ICC arbitration against two international construction contractors, Obrascon Huarte Lain SA and Contrack (Cyprus) Limited (part of the Orascom Construction group). QF made a successful application to the tribunal for interpretation of one of its awards. Following QF's application, the tribunal issued an addendum award, confirming that findings made by the tribunal in the award did not preclude QF from raising a defence that had yet to be heard by the tribunal. An addendum award was issued by the tribunal. The arbitration respondents issued a challenge in the Commercial Court in respect of the addendum. It was argued that the tribunal had acted in excess of its jurisdiction or there had been a serious

*(continued on page 11)*

## Victory in EpiPen ERISA Putative Class Action

Quinn Emanuel achieved an important victory for its client, Express Scripts, in a massive putative ERISA class action in the federal district court of Minnesota concerning the cost of EpiPen.

Plaintiffs were members of ERISA-governed health plans. They alleged that the rebates and fees that Express Scripts and other pharmacy benefit managers ("PBMs") negotiated with Mylan, the manufacturer of EpiPen, caused health plan members to pay too much for EpiPen prescriptions. Plaintiffs brought suit in the federal district court in Minnesota, alleging that the PBMs owed fiduciary duties under ERISA to plan participants and that by negotiating the rebates and fees for EpiPen, Express Scripts, and other PBMs breached those fiduciary duties. Plaintiffs sought to certify a nationwide class of hundreds of thousands of participants in ERISA plans who had paid out-of-pocket for an EpiPen from January 1, 2007, through the present.

The firm obtained a number of important early successes in the litigation. First, Quinn Emanuel successfully opposed the consolidation of the cases in an ongoing multi-district litigation against Mylan in Kansas; instead, the cases against Express Scripts and the other PBMs were consolidated in Minnesota. Second, the firm, along with counsel for the other PBMs, successfully persuaded the Minnesota district court judge to dismiss one of the two ERISA claims.

At the class-certification stage, Quinn Emanuel, working with counsel for the other defendant PBMs, prepared a comprehensive 100-page joint opposition brief, which relied on hundreds of pages of evidence and six expert reports. All the defendants agreed that counsel from Quinn Emanuel should handle the oral argument on behalf of all the PBMs in opposition to the motion for class certification. A few weeks after Quinn Emanuel's argument in July 2020, Judge Paul A. Magnuson issued an opinion denying class certification for the reasons the firm had pressed in the joint opposition brief and at oral argument. The court reasoned that "Plaintiffs must allege that Defendants were fiduciaries of Plaintiffs' ERISA plans with respect to the rebates/discounts Defendants received from Mylan, that Defendants breached their fiduciary duties to the ERISA plan participants, and that Plaintiffs were injured as a result of the breach," but "Plaintiffs cannot establish that proof of these elements will be common to the entire class, and class certification of the broad classes Plaintiffs seek is therefore inappropriate." In particular, the court found that "Defendant PBMs managed pharmacy benefits for thousands of plans, each with its own specific provisions governing the PBMs' behavior. For example, many plans required the PBMs to pass along 100% of any negotiated rebate or discount from Mylan, and sometimes 100% of the PBM's administrative fee, to the plan itself." The court went on to conclude that "Plaintiffs cannot escape that the PBM/client contracts are the foundation for their claims, and because they vary from client to client, are not amenable to classwide proof."

Plaintiffs then petitioned the U.S. Court of Appeals for the Eighth Circuit to overturn the denial of the class certification. Quinn Emanuel, working with counsel for the other defendant PBMs, prepared another successful opposition brief. The Eighth Circuit denied the petition in September 2020, less than ten days after receiving the opposition brief.

Thereafter, Express Scripts and the plaintiffs reached a settlement. The plaintiffs agreed to dismiss with prejudice their remaining claims against Express Scripts, and the district court entered a final judgment of dismissal in November 2020.

## Third Victory for Brazilian Oil Company in Consortium Dispute

The firm's Paris and London offices recently obtained a third decisive victory for one of our Brazilian oil and gas clients.

The firm's client previously held a 30% interest in an oil project off the coast of Rio de Janeiro. Two other Brazilian oil and gas companies held a 30% interest and a 40% interest, respectively.

The latter company failed to contribute its share of some of the costs and expenses of the project and was removed from the project and required to transfer its 40% interest to the remaining two parties in equal shares – without compensation – pursuant to the mandatory withdrawal provisions of the parties' Joint Operating Agreement, which followed the standard industry form issued by the Association of International Petroleum Negotiators (AIPN).

The three parties had also incorporated a special purpose company in the Netherlands to conduct some of the operations of the oil project. The Shareholders Agreement for the Dutch company contained provisions related to and mirroring those of the parties' Joint Operating Agreement. In particular, following its removal from the project under the Joint Operating Agreement, the Shareholders Agreement required the defaulting company also to transfer its shares in the Dutch company to the remaining two companies in equal shares – again without compensation.

The validity of the relevant parts of the Shareholders Agreement was challenged by the defaulting company in an arbitration hearing in May 2020 before a tribunal made up of Melanie van Leeuwen, Timothy Martin, and Professor Dr. Arthur S. Hartkamp. The defaulting company also sought, in the alternative, compensation for the loss of its shares in the Dutch company, which it valued at USD 200 million.

In an award issued in December 2020, the arbitral tribunal comprehensively rejected these claims and upheld the validity and effectiveness of the relevant contractual provisions of the Shareholders Agreement under Dutch law. In practical terms, this meant that the defaulting company had been excluded from both the project (its interest in which it valued at USD 500 million) and the Dutch law company (its shareholding in which it valued at a further USD 200 million) following non-payment of a much smaller sum of around USD 20 million towards the costs and expenses of the project.

The arbitral tribunal also upheld our client's claim for reimbursement of around USD 5 million towards the Dutch company's costs and expenses, which the aggrieved company had refused to make, and which our client had made in its place prior to its removal from the Dutch company. Q

*(Construction Litigation Update continued from page 9)*

irregularity under sections 67 and 68 of the Arbitration Act because the addendum had limited the findings made in the original award and was alleged to have gone beyond the permissible scope of an interpretation application.

In his judgment ([2020] EWHC 1643 (Comm)), Mr. Justice Butcher noted that the power of a tribunal to make corrections under the various rules is generally limited to uncontroversial matters, such as typographical errors. The purpose of an interpretation of an award is to eliminate any ambiguities or uncertainties that might exist to ensure that the award is sufficiently clear to enable a party to enforce it. Tribunals are typically not empowered to allow applications for interpretation that amount to attempted appeals aimed at altering the decision made by the tribunal in the award or raising a new argument.

Butcher, J. found that the challenge could not succeed under Section 67, as this section only concerns challenges to the tribunal's substantive jurisdiction to decide issues in the arbitration. In rejecting the contractor's section 68 challenge, Butcher, J. held that the power to correct errors of a *"similar nature"* to *"clerical, computational or typographical errors"* gave the tribunal a degree of latitude as to what errors may be corrected. His Honour also found that no substantial injustice was caused by virtue of the corrections, as whether QF's defence would succeed was still to be litigated and determined in the arbitration.

The High Court also took a similar approach in the recent decision of *Rees v. Windsor-Clive and Others* [2020] EWHC 2986 (Ch). In that decision, the Court refused the claimant's challenge against a further award issued by the arbitral tribunal, which was rendered to correct mistakes made by the tribunal in the first award. The tribunal's mistakes, in this instance, arose out of a failure to properly consider evidence, which led to an incorrect finding in the first award.

Also of note is the earlier case of *Xstrara Coal v. Benxi Iron* [2020] EWHC 324, in which (the same) Butcher, J. permitted Xstrata Coal to challenge an award (issued in September 2010) under Section 68 of the Arbitration Act. This followed the arbitrator's refusal to correct and clarify the award. Xstrara Coal's application before the Chinese courts to enforce the award had been refused on 25 April 2014 on the basis that the award did not clearly express how Xstrara Coal was said to be a party to the arbitration agreement. Xstrara Coal then asked the original arbitrator to clarify the award in this regard. The arbitrator refused to do so because he believed that such a clarification went beyond the limited powers bestowed upon him to clarify and correct awards.

Butcher, J. agreed that the award was ambiguous to the extent that it resulted in serious irregularity. His Honour accepted Xstrata Coal's submission that its inability to enforce the award in China meant that this irregularity had caused it substantial injustice. Butcher, J. also rejected Benxi Iron's argument that the Section 68 challenge was made out of time as the 28-day time limit for such a challenge under Section 70 had expired, assuming that time began to run when the award was issued. In effect, His Honour held that the time limit under Section 70 in such circumstances began to run when the arbitrator refused Xstrata Coal's interpretation application.

***Conclusion***

Although applications for corrections and/or interpretations ought only be granted by arbitrators on limited grounds, the English courts are unlikely to overturn corrections or interpretations that an arbitral tribunal considers necessary or appropriate. However, the courts may intervene where an award contains a serious irregularity and such irregularity has not been or cannot be cured by way of correction or interpretation by the tribunal. If a party makes a correction/interpretation application and the application is refused (and the party wishes to challenge that decision), the 28-day time limit for challenges to the award imposed by Section 70(3) of the Arbitration Act will not commence until the parties have been notified of the outcome of the correction/interpretation application. Q

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business litigation report

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