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Private Antitrust Litigation in the UK

Companies that have suffered losses from an infringement of EU or national EU Member State competition laws have expanding options for attempting to recover those losses. EU competition enforcement policy in recent years, both at the supra-national and the national Member State levels, has given significant emphasis to facilitating private damages actions. As a result, there has been a steady increase in such filings as claimants realize the benefits of these types of claims.

The UK has developed into a highly favorable forum for pursuing private damages actions for competition law violations. As discussed below, companies considering competition law damages claims—including claims based on collusion among multiple defendants—stand to benefit from assessing their claims under English law and, if appropriate, pursuing those claims through private actions before the English courts.

The Legal Basis for Private Antitrust Claims

Article 101 (the prohibition on anti-competitive agreements) and Article 102 (the prohibition on abuse of a dominant position) of the Treaty on the Functioning of the European Union ("TFEU") both have direct effect, which means that claims based on those provisions can be brought directly in the national courts of the EU Member States. In addition, Article 6 of Regulation (EC) No. 1/2003 specifically empowers Member States' national courts to apply Articles 101 and 102. Thus, any person or entity that has suffered loss or damage from a breach of EU competition law can bring a claim in the national courts of the Member States.

Why Bring a Private Antitrust Claim in the UK?

Member States have autonomy with respect to their domestic procedural rules governing private damages claims. As a practical matter, this autonomy generates

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INSIDE

John B. Quinn Named One of 50 Top Legal Innovators by *The American Lawyer*

The American Lawyer named John B. Quinn to its list of 50 top legal innovators of the last 50 years. Described as a "Master Strategist," Quinn was recognized for his unique vision of a litigation-only global law firm as well as his decision not to represent major money center banks so the firm could be adverse to them. Now, a mere 27 years after founding the firm, Quinn Emanuel is the world's biggest all-litigation firm thanks to Quinn's knack for "visualiz[ing] the future without relying on a road map of the past."

Quinn Emanuel Opens Office in Hong Kong *see page 6*

Quinn Emanuel Opens Sydney Office Led by Michael Mills and Michelle Fox *see page 11*

Fred Bennett Honored as the Outstanding Arbitration Lawyer in California

Fred Bennett, Chair of Quinn Emanuel's U.S. Arbitration Practice and Global Vice Chair of the firm's International Arbitration Practice, was recently honored with a 2013 USA & Canada Client Choice Award. This award, presented by the International Law Office (ILO) and Lexology, recognizes both firms and individual lawyers who stand apart for excellence in client service. Nominations and selection for the Client Choice Awards are based exclusively on detailed input from in-house counsel. Mr. Bennett was selected from over 2,000 nominees and was the only arbitration practitioner in California so honored. Q an inevitable degree of forum shopping by potential litigants hoping to ensure that a claim is brought in the most advantageous jurisdiction available.

The UK is widely regarded as one of the most claimant-friendly jurisdictions for a number of reasons, including: (i) the relative speed, integrity and efficiency of the English courts, as compared with those of many other Member States; (ii) the existence of experienced English judges, familiar with the management of major commercial disputes and accustomed to high damages claims and awards; (iii) the existence of a specialist competition court (the Competition Appeals Tribunal (the "CAT")) as a forum for competition claims; (iv) disclosure rules that are more extensive than those in other Member States, requiring parties to disclose documents that are harmful to their own case or helpful to their opponent's case; and (v) a flexible approach to funding arrangements (including, as of April 1, 2013, so-called "damages based agreements," as discussed below) to manage the potential costs and financial risks of litigation. The availability of the English courts as a forum for competition law claims also has been facilitated by those courts' generous approach to questions of jurisdiction in these types of claims.

Types of Action and Remedies Under English Law

Under English law, a claim for breach of competition law is generally characterized as a tortious action for breach of statutory duty (Garden Cottage Foods Ltd v. Milk Marketing Board [1984] AC 130). Liability is strict; there is no requirement to prove fault. A claimant, however, still needs to establish a clear causal connection between the competition law infringement and the losses suffered.

Three types of actions that can be brought in the English courts are: (i) stand-alone claims, where there has been no prior infringement decision by the European Commission or UK competition authorities; (ii) follow-on claims, where there has been a prior infringement decision; and (iii) follow-on consumer claims, which are representative damages claims that can only be brought by the Consumers' Association on behalf of named consumers, where there has been a prior infringement decision. It is also possible to have actions that are hybrid follow-on and stand-alone actions—for example, where claimants rely upon a Commission decision as the basis for their claims, but also allege that the infringement was longer lasting or wider in ambit than found by the Commission.

As the name suggests, a follow-on claim entitles a claimant to rely on a pre-existing decision of the European Commission or the UK competition authorities as evidence of competition law infringement. The underlying legal basis for follow-on claims is Article 16 of Regulation (EC) No. 1/2003, which provides that Member State courts cannot adopt a position that runs counter to a pre-existing European Commission decision. In follow-on actions based on a pre-existing Commission decision, the claimant does not face the often costly burden, as in a stand-alone action, of establishing a breach of the relevant competition law provision. Instead, a follow-on claimant need only prove causation and loss. Not surprisingly, claims that are, at least in part, follow-on claims are the most common type of private competition law actions brought in English Courts.

The remedies available to a private claimant are: (i) damages where the claimant has suffered loss as a result of a breach of EU and/or UK competition law; (ii) declaratory relief (e.g. that a particular contract, or part of it, is unenforceable and void or that particular conduct breaches EU and/or UK competition law); and (iii) injunctive relief either as an interim or final measure. In stand-alone claims there is also the possibility of obtaining exemplary damages—that is, damages awarded as a punitive measure to reflect the nature of a defendant's conduct. Exemplary damages are an exception to the general English law rule that damages seek only to compensate a claimant for his loss.

The UK's Specialist Competition Court

Private antitrust claims can be brought either in the High Court or before the CAT, depending on the type of action and the type of remedy sought. The CAT is an independent specialist judicial body established to hear appeals against certain decisions of the UK competition and sectoral regulatory authorities, as well as follow-on claims. Claims in the High Court are assigned to the Chancery Division or the Commercial Court (pursuant to Civil Procedural Rules 30.8 and 58.1(2), and paragraph 2.1 of the EU Competition Law Practice Direction). Judges in both divisions have undertaken specialist competition law training. Given that the Chancery judges sit on the CAT's panel of chairmen, there is arguably no substantial difference between the CAT and the High Court in terms of competition law expertise.

In practice, however, there are certain limitations to the CAT's powers, which have meant that claimants tend to favour bringing claims in the High Court instead. For example, a follow-on claim for damages (i.e. monetary relief) can be brought in either the CAT or the High Court, but if any other relief is sought (i.e. declaratory or injunctive) then the claim may only be brought in the High Court. Furthermore, the CAT is currently not permitted to hear stand-alone claims. Perhaps most significantly, if an infringement decision is under appeal, then a claim cannot be issued in the CAT without the CAT's express permission.

By contrast, in the High Court a claim can be issued even if an appeal against the infringement decision in question is still pending. In National Grid Electricity Transmission Plc v. ABB Limited & Ors [2009] EWHC 1326 (Ch), a case against members of the Gas Insulated Switchgear cartel, Sir Andrew Morritt refused an application by the defendant companies for a stay of proceedings pending the determination of the appeal against the European Commission's infringement decision (which most, though not all, of the defendants had appealed). While the actual trial could not take place until the appeals process had been exhausted, the Court ordered that further pre-trial steps should still be concluded before a stay would be imposed. This decision has recently been followed by Mr. Justice Field in the context of claims brought against MasterCard (WM Morrison Supermarkets plc and others v. MasterCard Incorporated and others [2013] EWHC 1071 (Comm)).

Claims in the High Court, pursuant to the Limitation Act 1980, must be brought within six years of the date that the cause of action accrued. Notably, the Limitation Act 1980 also provides an extension of that time period in cases where there has been deliberate concealment. In such circumstances, the six year period will only start to run from the time the claimant discovered the concealment or could reasonably have discovered it. Given the inherently secretive nature of cartel activity, there is typically scope for claimants to argue that the limitation period should only start to run from the date that the cartel was publicly exposed.

Claims in the CAT must be brought within a period of two years from the latest of: (i) the date on which the period for appealing the infringement decision expires; (ii) the date when any such appeal has been determined (where the appeal relates to the substance of the infringement decision, as opposed to only relating to the fine that has been imposed); or (iii) if the claimant does not suffer loss until after the date when an appeal has been determined, then two years from when the loss was suffered.

Generous Approach to Questions of Jurisdiction

Following a series of decisions, the English Courts have confirmed the UK as an attractive jurisdiction in which to bring cartel claims against multiple defendants. The first step for a claimant is to find one defendant that is domiciled in the UK against whom the claimant has an arguable claim (save in certain exceptional circumstances, under EU jurisdictional rules the English Courts are obliged to accept jurisdiction where a defendant is domiciled in the UK). Having found such a UK defendant, sometimes referred to as an "anchor defendant," it is almost always possible to establish jurisdiction to bring a claim in the same action in England against other non-UK defendants, provided those other defendants were also arguably involved in the same (or very closely related) competition law infringement. If the other defendants are domiciled in the EU, the claimant will have to show that the claim against the anchor defendant and the claim against the other EU defendants are so closely connected that the English Courts would regard it as expedient to avoid the risk of irreconcilable judgments that might otherwise arise from separate proceedings. In practice, this requirement will be satisfied where those other defendants were arguably involved in the same (or very closely related) competition law infringement as the anchor defendant.

Where a Commission Decision expressly finds that a UK-domiciled entity was involved in competition law infringement, then establishing an anchor defendant is straightforward. If, on the other hand, the Commission Decision is not expressly addressed to a UK-domiciled entity, then as a threshold matter any claim would need to be filed in the High Court, because the CAT will only hear follow-on cases where a UK-domiciled entity was found to have infringed competition law. *See* Emerson Electric and others v. Mersen UK Portslade Ltd, formerly Le Carbone (Great Britian) Ltd [2012] EWCA Civ 1559). Several steps then may be taken to secure an anchor defendant in the English courts.

First, one can show that a UK Company (such as a subsidiary company that is part of the same group as one of the addressees of the Commission decision) has sold the cartelised product (thereby "implementing" the cartel), even if those sales have not been made to the claimant itself. In these circumstances, it will also be necessary to allege that the UK subsidiary knew (directly or indirectly) of the cartel. Claimants have a great deal of latitude to make allegations of knowledge on the part of such "implementers," as the English Courts recognise that cartels are by definition shrouded in secrecy and that in most circumstances such knowledge can usually be inferred (KME Yorkshire Ltd & Ors v. Toshiba Carrier UK Ltd [2012] EWCA Civ 1190).

Second, one can show that the UK company (although not actually an addressee of the Decision) arguably participated in the competition law infringement, for example, by active involvement in the unlawful arrangement or agreement with a competitor.

Finally, one can show that the UK Company is a parent of a company that either participated in or knowingly implemented the cartel in question. It may even be possible (although this has not yet been established in law) to establish a UK anchor by bringing a claim against a UK company that has been involved only in the manufacture or production of the cartelised product (and not in any selling or marketing activities), or by bringing a claim against a UK company that sold products incorporating the cartelised product. In such cases, it would be necessary to show that the UK Company in question is part of the same "undertaking" or group that was found by the Commission to have participated in the cartel.

Even where there is no UK-domiciled defendant, the English Courts could still accept jurisdiction over a follow-on claim if the breach of competition law occurred, or the damage was suffered, in England, or where there is a contractual agreement between the parties that the English Courts should have jurisdiction over their disputes. Where all of the potential defendants are domiciled outside the EU, the anchor does not have to be UK domiciled; it can simply be any defendant against whom a claim can be brought in the English Courts. Provided there is a closely related claim against other defendants that are domiciled outside the EU arising out of the same infringement, it should be possible to join those other defendants as "necessary or proper parties" to the English action (pursuant to Civil Procedure Rule Practice Direction 6B paragraph 3.1(3)).

When a Commission decision finding infringement is issued, a private claimant seeking relief in the UK courts should move promptly to secure that jurisdiction, given that the defendants may attempt to bring their own action in another EU Member court concerning the same competition law infringement. Defendants may bring actions for negative declarations of non-liability in jurisdictions known for their inefficient legal procedures (often called "the Italian torpedo;" see, for example, Cooper Tire v. Shell Chemicals UK Ltd [2009] EWHC 2609 (Comm)). If such a prior action has already been instituted and is still pending, an English court is likely to decline jurisdiction.

Flexible Options for Funding Claims

Recent changes in the economics of English litigation, including the emergence of litigation finance companies and, as of 1 April 2013, the advent of so-called "damages based agreements," afford litigants the opportunity in the right cases to structure new and innovative funding arrangements whereby they may mitigate all or a substantial portion of their cost exposure. "Damages based agreements" are contingency fee arrangements that permit solicitors and barristers to represent their clients in exchange for a share in any damages, dependent on the success of the claim and recovery from the opponent. Thus, the potential now exists to finance each element of the costs of litigation with no up-front payment by the client and with financial support provided on a non-recourse basis. This means the client would not have to pay anything if the claim were not successful, and the lawyers and/or third party funder would receive any payment from a share of the proceeds in the event of a successful outcome.

Strong Political Support for Private Antitrust Litigation

In 2012, the UK government's Department of Business Innovation and Skills conducted a public consultation to consider proposed reforms to improve the current approach to private antitrust litigation. The government's final plans for reform were published in January 2013 and include the following: (i) to introduce an "opt-out" collective actions regime (both for stand-alone and follow-on claims) for both businesses and consumers—these cases would only be heard in the CAT; (ii) to introduce an "opt-out" collective settlement regime to be supervised by the CAT; (iii) to bolster the powers of the CAT to ensure that it becomes a "major venue" for antitrust litigation, by (a) permitting the CAT to hear stand-alone claims, (b) permitting the CAT to grant injunctions to stop anti-competitive behaviour, (c) enabling the transfer of competition law cases between the High Court and the CAT, (d) harmonizing the limitation periods in the CAT with those in the High Court, and (e) introducing a fast track procedure for simpler competition claims in the CAT. These reforms are far-reaching and demonstrate a clear intention to further facilitate and encourage private damages actions as far as possible.

Similarly, after approximately a decade in the making, in June 2013 the European Commission finally published its own equally far-reaching proposals to further advance private damages actions and the options for collective redress within Member States. With this level of political support and interest, the scope for these types of private claims within the EU (and, particularly, the UK) should only increase going forward.

First Decision by PTO Under America Invents Act Invalidates Business Method Patent

The United States Patent & Trademark Office ("PTO") recently issued its first decision under the transitional program for covered business method ("CBM") patents—a creation of the Leahy-Smith America Invents Act ("AIA")—in *SAP America, Inc. v. Versata Development Group, Inc.*, Case CBM2012-00001 (MPT) (Paper 70) (PTAB June 11, 2013) ("*SAP America*" or "Slip op."). With its debut opinion, the PTO's Patent Trial & Appeal Board ("PTAB") invalidated, as unpatentably abstract, patent claims that had previously been the basis for a $345 million infringement verdict affirmed by the United States Court of Appeals for the Federal Circuit. Issued only nine months after the patent challenger requested review, the PTAB's decision confirms this new post-issuance review procedure is likely to have a significant impact on the prosecution and defense of infringement lawsuits asserting business method patents.

Transitional Program for Covered Business Method Patents

Scheduled to conclude in 2020 (absent legislative extension), the transitional program for CBM patents is one of three streamlined post-issuance review procedures created by the AIA. This program is dedicated to the review of patents that claim a method or apparatus for data processing or other operations used in the practice, administration, or management of a financial product or service, excluding those covering "technological inventions," and allows patent challengers to obtain PTAB adjudication of the validity of such CBM patents within 12-18 months of requesting review.

The transitional program for CBM patents is defendant-friendly as compared to either PTO reexamination proceedings or district court litigation. Unlike reexamination proceedings, which consider only whether an invention is anticipated or obvious under 35 U.S.C. §§ 102 or 103 in light of prior art that was not previously considered by the PTO, an infringement defendant can challenge the validity of a patent claim in a transitional CBM proceeding on *any* potential invalidity ground (although for patents filed before March 16, 2013, only certain prior art can be asserted). As compared to district court litigation, the patent-challenger enjoys a lower burden of proof and more favorable principles of claim construction because the proceeding is conducted by the PTO. Because a patent is presumed valid, 35 U.S.C. § 282(a), a litigant challenging the validity of a duly issued patent claim in district court must prove invalidity by clear and convincing evidence, *Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1310 (Fed. Cir. 2011). Given the heightened burden of proof and the often-technical nature of the subject matter, it is often understandably difficult for a litigant to convince a jury of laypeople to second-guess the PTO's decision to allow patent claims. In the PTAB, however, the validity challenge is tried to a specialized panel of tech-savvy administrative law judges and the challenger need only prove invalidity by a preponderance of the evidence. Further, as the PTAB confirmed in its decision in *SAP America*, it will also apply the PTO's "broadest reasonable interpretation" of a claim's terms in evaluating its validity rather than the claim construction principles applied by district courts. In most instances, giving claim language its "broadest reasonable interpretation" will make it more difficult for patent holders to distinguish the claimed invention from the prior art and to establish that an invention is not too abstract to be eligible for patenting.

The $345 Million Infringement Verdict Against SAP

In 2007, Versata Development Group, Inc. ("Versata") sued SAP America, Inc. ("SAP") in district court for infringement of three claims of U.S. Patent No. 6,553,350 (the "'350 patent"), directed to methods of pricing products for different purchasers and related storage media, and certain claims of another patent not relevant here. The asserted claims of the '350 patent disclosed a method for pricing products and services. Whereas the prior art disclosed a "paradigm of WHO (the purchasing agent) is buying WHAT (the product)" in a tabular format, the claimed invention was an alleged improvement of the prior art because it reduced the need for large tables of data by arranging customers and products into hierarchical groupings. Following a jury verdict of infringement, the district court entered judgment as a matter of law that the claims of the other patent were not infringed and ordered a retrial on the issue of damages. A second jury awarded Versata $345 million in damages for infringement of the three asserted claims of the '350 patent. The parties cross-appealed to the Federal Circuit. On May 1, 2013, the Federal Circuit affirmed the infringement and damages verdict, although it vacated the injunctive relief awarded as overbroad.

First PTAB Ruling Invalidates CBM Patent

While the cross-appeals were pending in the Federal Circuit, SAP filed a petition on September 16, 2012, the first day the transitional program for CBM patents program became available, for review of five claims of the '350 patent, including the three claims found valid and infringed in the district court. SAP contended the claims were invalid for failure to comply with 35 U.S.C. § 101 (patentable subject matter), § 102 (novelty), and § 112 (specification requirements). The PTAB instituted review on SAP's § 101 and § 102 challenges but denied review of SAP's § 112-based challenges. To obtain an expedited trial on patentability of subject matter, SAP agreed to abandon its novelty-based arguments. In its debut ruling on June 11, 2013, only nine months after the petition was filed, the PTAB invalidated Versata's patent claims.

Specifically, the PTAB concluded that the challenged claims recited an unpatentably abstract idea: "determining a price using organizational and product group hierarchies, which are akin to management organizational charts." Slip op. at 28. Finding the idea to be a "'disembodied concept' [and] a basic building block of human ingenuity," the PTAB then considered whether the claims incorporate sufficiently meaningful limitations "to ensure that the claims are more than just an abstract idea and not just a mere drafting effort designed to monopolize the idea itself." *Id.* at 29. The PTAB determined the claims were not sufficiently limited merely because they recite "general purpose computer hardware (processor, memory, storage)" and additional steps such as "storing, retrieving, sorting, eliminating, and receiving" data. *Id.* at 30, 33. Thus, the PTAB canceled the claims as unpatentably abstract. *Id.* at 34.

The Impact of the PTAB's SAP America Decision

Given the timing of the PTAB's decision, it remains to be seen exactly what, if any, impact it will have on the $345 million judgment against SAP. Despite the significant stakes, the Federal Circuit denied SAP's motion to stay the appeal and its petition for rehearing or rehearing *en banc* following the PTAB's decision. On August 21, 2013, the case was remanded back to the district court for further proceedings with the $345 million verdict still in place. Any petition for *certiorari* to the Supreme Court, should SAP decide to file one, is due in November 2013. Meanwhile, Versata unsuccessfully requested rehearing in the PTAB. Versata may also appeal the final decision of the PTAB to the Federal Circuit.

For future litigants, the PTAB's decision confirms that the transitional program for CBM patents has teeth. Infringement defendants should consider initiating PTAB review of covered business method patents being asserted against them as an opportunity to quickly and cost-effectively challenge validity in a defendant-friendly forum that strips patent holders of the legal presumptions that make invalidating patents in district court so challenging. Just as importantly, however, in developing their litigation strategy, patent holders need to consider the strong possibility that any covered business method patent claims they assert in litigation will be subject to review by the PTAB first under the transitional program. Thus, although it is unclear exactly what effect the PTAB's first decision will have for SAP and Versata themselves, it is clear that the transitional program for CBM patents will be an important battlefield in business method patent litigation in coming years. Q

Quinn Emanuel Opens Office in Hong Kong

The firm has opened an office in Hong Kong to represent clients in international arbitration and cross-border disputes. The office will be headed by John Rhie, Chair of the firm's Asian International Arbitration practice. John is based in Hong Kong and is the managing partner of that office. Current firm partner Carey Ramos is moving from New York City to join John in Hong Kong as a senior partner.

John joins Quinn Emanuel from Kim & Chang in Seoul, Korea. He has broad experience acting as both an arbitrator and an advocate in arbitrations under the auspices of all the major arbitration institutions, including HKIAC, LCIA, ICSID, SIAC and AAA. He has lectured widely on international arbitration and is an adjunct professor at Seoul National University. He is highly ranked by legal publications such as *Chambers*, which complimented his "excellent assimilation of and detailed analysis of the facts." In 2011, *Global Arbitration Review* listed John as one of the top 45 international arbitration lawyers under the age of 45.

Carey Ramos, who has been ranked by *Chambers* and other legal publications for his media and intellectual property expertise, concentrates on complex business litigation, particularly in cross-border disputes and international arbitration. He has represented major Asian high tech, telecom, media and consumer electronics companies in intellectual property, antitrust, and other commercial disputes and has served as an arbitrator and advocate in major international arbitrations. Carey will assist the firm's Asian clients with respect to litigation in the US and EU. He will also work with John Rhie in the development of the firm's international arbitration practice in Asia. Q

Bankruptcy & Restructuring Litigation Update

Second Circuit Addresses the Scope of the Bankruptcy Automatic Stay. The automatic stay triggered upon the filing of a voluntary bankruptcy petition is one of the fundamental protections available to a debtor. The automatic stay generally prohibits "the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor" and bars "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a). This benefit is intended to give the debtor a breathing spell and brings all of the assets of the debtor and claims against it into a single forum, the bankruptcy court, for resolution.

The automatic stay is a "debtor" protection. The literal language of § 362(a) does not extend the automatic stay to non-debtor entities that have not commenced bankruptcy cases but that may be affiliated with the debtors. Some courts have nevertheless interpreted § 362(a) to protect a non debtor where continuing a lawsuit against it would impede the debtor's orderly reorganization or liquidation; other courts have invoked their equitable power under 11 U.S.C. § 105(a) to achieve the same result. But the scope of a bankruptcy court's authority to enjoin actions against a non debtor is far from settled. A recent decision by the Second Circuit, *In re Residential Capital, LLC*, --- Fed. Appx. ---, 2013 WL 3491311(2nd Cir. July 15, 2013), declined to impose a *per se* rule against the imposition of the automatic stay in favor of a non-debtor and instead determined that a case-by-case assessment is necessary to determine the applicability of the automatic stay to a non-debtor.

Residential Capital, LLC and its affiliate debtors (the "Debtors" or "ResCap") were one of the largest originators and servicers of residential mortgage loans in the country. Residential mortgage-backed securities issued by ResCap depreciated in value as a result of the 2007-2008 financial crisis. These market losses prompted the filing of a number of lawsuits against ResCap, their corporate parents and/or their officers and directors. On May 14, 2012, the Debtors filed their petitions for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), citing exposure to these lawsuits as a reason for the bankruptcy filing.

One of the lawsuits against ResCap was commenced by the Federal Housing Finance Agency ("FHFA"). In addition to naming the Debtors as defendants, FHFA also sued certain direct and indirect corporate parents and an affiliate of the Debtors (the "Non-Debtor Defendants"). FHFA removed the Debtors as defendants and sought to continue the lawsuit against the Non-Debtor Defendants. The Debtors in turn moved the Bankruptcy Court to enter a declaratory judgment extending the automatic stay to the Non-Debtor Defendants under both §§ 362(a) and 105(a), even though the Debtor Defendants were no longer part of the lawsuit.

The United States District Court for the Southern District of New York (the "District Court") withdrew the Debtors' motion from the Bankruptcy Court and assumed jurisdiction. In a bench decision, the District Court denied the Debtors' motion. The District Court reasoned that because FHFA did not continue the lawsuit against the Debtors, the property of the bankruptcy estates was not at risk; as a result the automatic stay under § 362(a) could not as a matter of law be extended to the Non-Debtor Defendants.

The Debtors appealed to the Second Circuit, arguing that continuation of the proceeding against the Non-Debtor Defendants would nonetheless impede the Debtors' prospects for successful reorganization. The Debtors argued they would bear the burden of discovery because the documents sought by FHFA were in their possession, and the extensive depositions to which the Debtors' key personnel would be subject could distract them from focusing on the Chapter 11 process. The Debtors further cited their contractual liability to indemnify the Non-Debtor Defendants for legal costs and any judgment and potential depletion of insurance coverage available to the Debtors as the Debtors and the Non-Debtor Defendants were co-insureds under a number of policies that had a first billed, first paid provision.

The Second Circuit agreed, concluding the District Court erred by failing to make factual findings and holding as a categorical matter that the automatic stay set forth in § 362(a) cannot be applied. 2013 WL 3491311 at *1 ("[There] are no explicit findings with regard to ResCap's request under Section 362(a)."). The Second Circuit relied upon preexisting Circuit case-law which applied the automatic stay to a debtor's wholly owned subsidiary on the basis that "a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate." *Id.* (quoting *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 287 (2d Cir. 2003)). The Second Circuit remanded the case to the District Court and requested that the appropriate fact-findings be entered within 60 days. *Id.* It expressed no view on whether the Non-Debtor Defendants are entitled to have the lawsuit against them enjoined. *Id.* ("[W]e do not have to reach that question until" until the requisite findings are made).

The decision confirmed that the automatic stay may be extended to a non-debtor if permitting the litigation to continue against it would impose an "immediate adverse consequence" on the estate. A party to a lawsuit with both debtor and non-debtor defendants cannot avoid application of the automatic stay by simply dropping the debtor defendants and proceeding with the action against the non-debtor entities in lieu of the debtor entities. This decision further clarifies that the Second Circuit's application of the automatic stay to a non-debtor on the basis of "immediate adverse consequence" to the estate is not necessarily limited to the context of where the non-debtor is a wholly owned subsidiary of the debtor.

London Litigation Update

UK Supreme Court Rules on Unjust Enrichment and Subjective Devaluation.

Benedetti v. Sawiris & Ors [2013] UKSC 50. The Supreme Court has recently confirmed that where a claim for unjust enrichment relates to services received by a defendant, the starting point for identifying the value of the benefit conferred on the defendant is the price that a reasonable person in the position of the defendant would have agreed to pay for the services at the time that they were received (i.e. their objective market value). Importantly, however, the Court also accepted that a defendant is entitled to prove that he subjectively valued the services in question at less than their market price and so reduce the valuation accordingly (a principle known as 'subjective devaluation'). Conversely, save in exceptional circumstances (which the Court did not specify), the principle of 'subjective revaluation' should not be recognised (meaning that a claimant may not invoke a defendant's subjective willingness to pay a higher sum for the benefit as a reason for valuing the benefit at a higher rate).

The dispute arose out of the acquisition of Wind Telecomunicazioni SpA by entities associated with the Egyptian businessman Naguib Sawiris. Mr. Alessandro Benedetti, an Italian businessman resident in Switzerland (described in the High Court has having "extremely varied and largely opportunistic" business activities), had performed a facilitative role in the context of the transaction, having originally approached Mr. Sawiris as a potential investor in 2002. At around the time of the acquisition in 2005, Mr. Sawiris and Mr. Benedetti discussed the fee for his services and Mr. Sawiris offered to pay him €75.1 million (far less than the amount Mr. Benedetti sought). Separately, and without Mr. Sawiris' knowledge, Mr. Benedetti (acting as a director of a company incorporated for the purposes of the transaction) had entered into a brokerage agreement with one of his own companies (ITM) pursuant to which ITM was to be paid €87 million. That amount was ultimately reduced to €67 million and was paid to ITM in August 2005.

Mr. Benedetti claimed that he had not been properly compensated for his services. Both at first instance and in the Court of Appeal it was accepted that the objective market value of the services Mr. Benedetti had performed was €36.3 million, but the amount that he was ultimately awarded differed significantly.

The Supreme Court held that the starting point for valuing the unjust enrichment where services had been provided was the price that a reasonable person in the position of a defendant would have agreed to pay for them (that assessment may also take into account the personal characteristics of a defendant). In this case, the objective market value of Mr. Benedetti's services at the time that they were received by the defendants was €36.3 million. The Court refused to recognise the principle of 'subjective revaluation' and so did not permit Mr. Benedetti to recover more than the market value on the basis that Mr. Sawiris had arguably valued his services at a higher price (by reference to his offer of €75.1 million). In any event, the Court considered there was insufficient evidence to establish Mr. Sawiris' true, subjective opinion of the value of Mr. Benedetti's services at the relevant time such as to warrant a departure from the market rate. As to further remuneration, the fact that Mr. Benedetti had already received €67 million through the payment to ITM meant that he was not entitled to any further payment.

The decision is significant as it represents a new authority on the principle of 'subjective devaluation' (even though, on the facts, this was not applicable as there was no suggestion that Mr. Benedetti's services should be valued below the accepted market rate). As a result, where appropriate, a defendant to an unjust enrichment claim will now be entitled to adduce evidence to try and reduce the value ascribed to the benefit that they have received from the claimant so as to try and reduce the amount of any restitutionary award. The Court acknowledged, however, that this is a developing area of law. It remains to be seen how effective this new approach will be in practice.

Court of Appeal Provides Guidance on Bases for Non-Domiciled Defendants.

Joint Stock Company 'Aeroflot Russian Airlines' v. Berezovsky and Others [2013] EWCA Civ 784. The Court of Appeal has recently ruled on various different bases for finding jurisdiction against defendants not domiciled in England and Wales, clarifying important interpretations in relation to Article 6(1) of the Brussels Regulation and 2007 Lugano Convention as well as Section 9 of the Arbitration Act 1996.

The Claimant brought claims for fraud against Berezovsky, Glushkov and various companies which were said to have been created or controlled by those individuals. Even though only Berezovsky and Glushkov were domiciled in England, the claims were issued in the English High Court in respect of all of the Defendants. The non-domiciled Defendants challenged the English Court's jurisdiction in the High Court and the Court of Appeal.

Two features of the Court of Appeal's decision provide important clarification as to key legal standards to be applied in determining jurisdiction challenges.

First, the Court considered one Defendant's argument that there was a Swiss ICC arbitration agreement that ousted the Court's jurisdiction in respect of the claim against it. The Claimant argued that the arbitration agreement was null and void under Section 9(4) of the Arbitration Act 1996. The Court of Appeal held that the standard of proof under Section 9(4) is one of the balance of probabilities and that a court should carry out that exercise in considering a jurisdiction challenge (as opposed to leaving the matter to the Tribunal). In this case, the Claimant failed to meet that test and so a stay of the Court proceeding against the relevant Defendant was ordered under section 9(1) of the Arbitration Act.

Secondly, two of the Defendants argued that the claims against them did not have a sufficient connection to the claims against the English-domiciled defendants to justify jurisdiction under Article 6(1) of the Brussels Regulation and Lugano Convention (which establishes jurisdiction over foreign defendants within the EU where an 'anchor defendant' is domiciled within the jurisdiction and the claim against the foreign defendant is closely connected to the claim against the anchor defendant). The Court of Appeal did not accept that a claimant had to surmount a substantive merits test in order to establish co-defendant jurisdiction under Article 6(1): what is required is not a "good arguable case" on the substantive merits, but merely a "good arguable case" that there is a sufficient connection between the claim against the anchor defendant and the claim against the foreign defendant, such that there is a risk of irreconcilable judgments if the claims were determined separately in separate jurisdictions. This conclusion is a strong affirmation of the principle that a Court will not 'look behind' the claim against an 'anchor defendant' in applying Article 6(1).

Trademark/Copyright Litigation Update

Ninth Circuit Affirms District Court Denial of Preliminary Injunction in Ad-Skipping Case. On July 24, 2013, the Ninth Circuit Court of Appeals weighed in for the first time in the closely-watched copyright infringement and breach of contract dispute between satellite TV provider Dish Networks and Fox Broadcasting over Dish's controversial ad-skipping "AutoHop" and "PrimeTime Anytime" technologies. The Ninth Circuit's opinion in *Fox Broad. Co., et al. v. Dish Network LLC, et al*, No. 12-57048, 2013 WL 3814917 (9th Cir. Jul. 24, 2013)—the first case to reach the Ninth Circuit out of a trio of AutoHop/PrimeTime Anytime lawsuits brought against Dish by Fox, CBS and NBC—completely affirmed the Central District of California's denial of preliminary injunctive relief in the case.

Dish's AutoHop feature works in conjunction with Dish's PrimeTime Anytime technology to allow customers to set their Dish receivers to (1) automatically record all primetime programming from each of the four major broadcast networks using their set-top boxes; (2) automatically store copies of that programming for up to eight days; and then (3) automatically skip all commercial breaks upon playback. Customers with AutoHop enabled only see the first and last few seconds of each commercial break. To create this functionality, Dish technicians in Wyoming are employed to manually view primetime programming from each of the four broadcast networks each night and technologically "mark" the beginning and end of each commercial break, transmitting files with the commercial breaks marked to subscribers' set-top boxes, where they can be utilized by the AutoHop feature starting at 3 a.m. ET the following morning. To ensure the accuracy of its AutoHop feature, Dish employs three central devices to record and store "quality assurance" copies of the primetime block of programming of each of the four broadcast networks to test the "marked" files submitted to consumers and to ensure that no portion of any program has been inadvertently cut off by the manual marking of commercial breaks by Dish technicians. *Fox Broad. Co., et al. v. Dish Network LLC, et al*, No. 12-57048, 2013 WL 3814917, at *5-9 (9th Cir. Jul. 24, 2013).

Like CBS and NBC, Fox responded to Dish's PrimeTime Anytime and AutoHop features by bringing suit against Dish in the Central District of California. Fox quickly moved for a preliminary injunction in the case, alleging that Dish's AutoHop and PrimeTime Anytime functionality constituted both direct and indirect copyright infringement and breached Dish's distribution contract with the network. The relevant distribution contract, among other things, prohibited Dish from (1) distributing Fox programs on an "interactive, time-delayed, video-on-demand or similar basis" except in the case of Fox Video On Demand where fast-forward-functionality was disabled; (2) recording, copying, duplication and/or authorization of the recording, copying, or duplication of Fox's signal; and (3) frustrating or circumventing any portion of the distribution contract. *Fox Broad. Co., et al. v. Dish Network LLC, et al*, No. 12-57048, 2013 WL 3814917 at *5-6 (9th Cir. Jul. 24, 2013). The district court denied Fox's request for preliminary injunctive relief, finding that Fox had not demonstrated a likelihood of success on the merits for most of its copyright infringement and contract claims, and failed to show irreparable harm for the limited claims with respect to which it did show a likelihood of success on the merits. *Fox Broad. Co. v. Dish Network, LLC*, 905 F. Supp. 2d 1088, 1102-06, 1108-11.

On appeal, the Ninth Circuit affirmed the district court in full. As to Fox's claim of direct copyright infringement against Dish based on the PrimeTime Anytime feature, the Court held that although Fox had ownership of the copyrights of some of the shows recorded using this feature, the question of direct copyright infringement ultimately turns on "who makes the copy" and, as Dish's customers had to enable PrimeTime Anytime, Dish could not be liable for direct infringement: "[o]perating a system used to make copies at the user's command does not mean that the system operator, rather than the user, caused copies to be made." *Fox Broad. Co., et al. v. Dish Network LLC, et al*, No. 12-57048, 2013 WL 3814917 at *12 (9th Cir. Jul. 24, 2013). Fox also could not establish a likelihood of success on the merits of its secondary copyright infringement claims against Dish for the AutoHop and PrimeTime Anytime features because the recording of primetime programming and the skipping of commercials constitute "noncommercial, nonprofit" fair uses on the part of consumers, in part because Fox does not own the copyright to "the ads in the commercial breaks" and so "commercial-skipping does not implicate any copyright interest." *Id*. at *13-17. And although the last question was "much closer," the "very deferential standard of review" applicable to preliminary injunctions was enough to convince the Ninth Circuit that the district court's finding that Fox was not likely to succeed on the merits of its breach of contract claim should be affirmed notwithstanding that the AutoHop and PrimeTime Anytime features were probably covered by the term of the contract prohibiting Dish from distributing programming on an "interactive, time-delayed, video-on-demand or *similar* basis." *Id*. at *20-22.

The question of Dish's liability for creating "quality assurance" copies to support the functionality of its AutoHop feature was a somewhat different matter: the Ninth Circuit did not disturb the district court's finding that Fox was likely to succeed on the merits of its copyright infringement and breach of contract claims relating to Dish's "quality assurance" copies for AutoHop. *Fox Broad. Co., et al. v. Dish Network LLC, et al*, No. 12-57048, 2013 WL 3814917 at *24 (9th Cir. Jul. 24, 2013). The Ninth Circuit nevertheless affirmed the district court's finding that preliminary injunctive relief was not justified with respect to these claims because any irreparable harm suffered by Fox "d[oes] not 'flow from' the quality assurance copies themselves, but from the entire AutoHop program… the record demonstrates that the AutoHop [marked files] are created using an entirely separate process and the quality assurance copies are used only to test whether this process is working." *Id*. at *24. Irreparable harm was also not shown by Fox because "Fox's existing licensing agreements could, at the very least, constitute a starting point or an aid in calculating damages." *Id*.

Although not a final ruling on the merits of Fox's case, the Ninth Circuit's opinion provides a useful guidepost for disputes over content distribution by broadcasters and cable and satellite providers in an era of increasing technological change.

Favorable Result for Motorola Mobility and Time Warner Cable in Billion-Dollar Patent Litigation Against TiVo

Quinn Emanuel successfully obtained a very favorable settlement for clients Motorola Mobility and Time Warner Cable ("TWC") in a patent infringement suit filed by TiVo, Inc. in the Eastern District of Texas. The TiVo patents-in-suit related to DVR functionality that permits a viewer to simultaneously record and playback a TV program. TiVo had previously secured over $1 billion litigation settlements relating to these patents and was seeking almost $4 billion in damages against Motorola and TWC. However, Quinn Emanuel helped secure a settlement for a fraction of that amount and at a significantly smaller royalty rate than had been paid by previous defendants. In fact, when the terms of the parties' settlement were made public, TiVo's stock price fell 19% within a couple hours.

The firm took the case over from another firm in the middle of expert discovery and less than three months before the start of trial. Upon being retained, the Quinn Emanuel team immediately got to work preparing a trial strategy while at the same time drafting responsive expert reports, summary judgment motions, *Daubert* motions, and motions *in limine*.

Quinn Emanuel prevailed on two key pre-trial motions. First, evidence obtained during discovery showed that TiVo derived the idea for its DVR patents from one of Motorola's predecessor companies and that in fact Motorola, not TiVo, was the first company to develop the claimed technology. TiVo's attorneys filed numerous motions, including a request for sanctions under Rule 11, to try to keep this evidence from the jury but were unable to do so, leaving TiVo to face the prospect of having its key patents invalidated. Second, because Motorola had filed suit against TiVo first, Motorola was technically the plaintiff and therefore entitled to present its case regarding the invalidity of TiVo's patent to the jury first. Recognizing the dire implications of allowing Motorola to go first, TiVo filed several motions to be named a plaintiff and to switch the order of proof at trial. Once again, Quinn Emanuel defeated each of these motions, putting TiVo at a huge procedural disadvantage. The case settled shortly thereafter.

Quinn Emanuel Helps Pro Bono Client Obtain Favorable Settlement in Discrimination and Retaliation Case

The firm obtained a favorable settlement in a pro bono case alleging racial discrimination, sexual harassment and retaliation. Our client complained to her employer that she was being sexually harassed by a co-worker. The employer claimed that it conducted an investigation and concluded that there was no sexual harassment. Shortly thereafter, our client was terminated for alleged misconduct. Our client initially represented herself and filed a complaint of discrimination and harassment with the EEOC. Her charge was initially dismissed, with the EEOC indicating that there was insufficient evidence to show that she was terminated in retaliation for her complaints. She appealed and the dismissal was later reversed. Our client then filed a pro se complaint in state court in New York, and Quinn Emanuel took the case pro bono. Although the employer had strong evidence that the termination was due to our client's misconduct—leaving a large sum of money unattended while she took a break during her shift—the firm aggressively pursued depositions and other discovery. This aggressive strategy paid off, as Quinn Emanuel was able to negotiate a favorable settlement for the client at the conclusion of depositions. Q

Quinn Emanuel Opens Sydney Office Led by Michael Mills and Michelle Fox

The firm has opened an office in Sydney, Australia, headed by partners Michael Mills and Michelle Fox, who joined the firm from Herbert Smith Freehills. With the shift of economic power from the Atlantic to the Pacific, Australia has not only become a significant international player, but also a critical connection point for the firm in Asia-Pacific.

Michael Mills is widely recognized as one of Australia's leading litigators for complex dispute resolution, alternative dispute resolution and insurance by *Legal 500* and *Best Lawyers*. He has been lead defense lawyer for some of Australia's largest and most complex disputes. He is described by *Chambers Global* as the "go to partner for a number of major corporations and leading directors."

Michelle Fox has practiced in the US, the UK, and now Australia, retaining practicing certificates in all 3 jurisdictions. She represents some of Australia's leading companies in complex commercial litigation matters and is sought by leading companies for advice on corporate exposures. Michelle is ranked as a leading individual by *Legal 500* for Insurance litigation in Australia, and by *Best Lawyers* for litigation and insurance.

Michael and Michelle work as a team on most matters. Both specialize in complex litigation across a number of practice areas, including securities, mass tort, products liability, directors and officers liability, class actions, insurance and reinsurance disputes, as well as financial services regulatory disputes. Their more high-profile cases have included representing the directors' and officers' of Babcock & Brown and the directors' and officers' insurers of the HIH Group in regulatory and litigation proceedings arising out of what were each reported to be Australia's largest corporate collapses at the time ($10.2 billion and $5.6 billion, respectively). As Chambers describes them, the pair are "incisive, personable and brilliant." Q quinn emanuel

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