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SEC/CORPORATE

Oregon State Court Refuses to Enforce Forum Selection Bylaw

In *Roberts v. TriQuint Semiconductor, Inc.,* No. 1402-02441 (Cir. Ct. Or. Aug 14, 2014), an Oregon state court, breaking with state courts in California, Illinois, New York and Texas, held that the bylaw of a Delaware corporation providing for derivative actions and other intra-corporate claims to be litigated exclusively in Delaware was unenforceable. TriQuint's board adopted the bylaw on the same day that it approved entering into a merger of equals with RF Micro Devices, Inc.

In reaching its conclusion, the Oregon court focused upon the timing of the bylaw's adoption:

> Enforcement of the bylaw would not be an issue had the board, at the very least, adopted it prior to any of its alleged wrongdoing, and with ample time for the shareholders to accept or reject the change.

The Oregon court cited *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011), a much-criticized 2011 federal District Court opinion that rejected the defendants' motion to dismiss a derivative action on the basis of an exclusive forum bylaw. The *Galaviz* court highlighted that the exclusive forum bylaw was adopted after certain alleged wrongdoing occurred. In June 2013, the Delaware Court of Chancery criticized *Galaviz* for failing "to appreciate the contractual framework established by the [Delaware General Corporation Law] for Delaware corporations and their stockholders." That criticism appeared in *Boilermakers v. Chevron,* 73 A.3d 934 (Del. Ch. 2013), which upheld the facial validity of exclusive forum bylaws adopted by Chevron and Fed Ex.

The *Triquint* court sought to distinguish *Boilermakers* by emphasizing that *Boilermakers* involved a facial challenge rather than a challenge to the enforcement of an exclusive forum bylaw in a particular situation. The court then went on to deny the defendants' motion to dismiss on the basis of public policy:

> Ultimately, the closeness of the timing of the bylaw amendment to the board's alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit, and keeping in mind that its enforcement will have the effect—and Defendants knew it would have the effect—of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust.

Taken to its logical extreme, the timing argument would impair the ability of a board to adopt, on a timely basis and without stockholder approval, bylaws that it believes are in the best interests of the company and its stockholders. Additionally, the court's conclusion does not take into account that: (a) Delaware law is clear that bylaw amendments bind all stockholders, regardless of when they purchase stock, (b) the Delaware Supreme Court has stated that deterring litigation is not *per se* impermissible and (c) the bylaw did not foreclose the plaintiffs' access to the courts. Rather, it directed litigation to the courts most familiar with Delaware law and where parallel merger litigation had been filed.

Putting aside whether the opinion was correctly decided, *TriQuint* signals that the best time to adopt an exclusive forum bylaw is on a "clear day," rather than in anticipation of or in response to specific litigation, including merger litigation.

BROKER-DEALER

SEC Announces Pilot Program to Widen Tick Sizes for Smaller Companies

On August 26, the Securities and Exchange Commission announced that the Financial Industry Regulatory Authority, Inc. and national securities exchanges proposed a 12-month pilot program to widen minimum quoting and trading increments (tick sizes) for smaller capitalization stocks. In June, the SEC had ordered FINRA and national securities exchanges to propose a tick size pilot program. Under the proposal, the pilot program will include National Market System common stocks with (i) a market capitalization of $5 billion or less, (ii) an average daily trading volume of one million shares or less, and (iii) a closing share price of at least $2 per share. The pilot program will have one control group at the current tick size increment of $0.01 per share and three test groups with 400 stocks in each test group.

- The first test group will quote at tick size increments of $0.05 per share and trade at the increments currently permitted.
- The second test group will also be quoted in $0.05 increments and be traded in $0.05 increments, subject to certain exceptions.
- The third test group will have the same tick sizes as the second test group, with an added "trade-at" requirement to prevent price matching by trading centers that do not display the best bid or offer. The proposal defines "trade-at" as "the execution by a trading center of a sell order for a [p]ilot [s]ecurity at the price of a protected bid or the execution of a buy order for a [p]ilot [s]ecurity at the price of a protected offer."

FINRA and the exchanges will collect and transmit statistics on the pilot securities, which will be made publicly available, to the SEC and provide an assessment at the end of the pilot period. The proposal will be subject to SEC approval after a 21-day public comment period.

Click here to read the proposal.

CFTC

NFA Issues Notice Setting Effective Date for Risk Exposure Report Filing Through WinJammer

On August 22, National Futures Association issued Notice I-14-20 to advise swap dealers (SDs) and major swap participants (MSPs) that, effective September 30, SDs and MSPs will be required to submit quarterly Risk Exposure Reports to NFA and the Commodity Futures Trading Commission through WinJammer. The Notice implements recent amendments to NFA Compliance Rule 2-49, which authorizes NFA to require SDs and MSPs to submit requested reports, documents and notices to both NFA and the CFTC in a form and manner prescribed by NFA. SDs and MSPs must contact NFA by September 12 to obtain access to WinJammer.

NFA Notice I-14-20 is available here.

CFTC Staff Issues Interpretation of Secured Amount Depository Requirements

On August 28, the Commodity Futures Trading Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) issued an Interpretation of CFTC Regulation 30.7(c) that permits a futures commission merchant (FCM) to deposit Regulation 30.7 secured amount funds into deposit accounts maintained by deposit-taking banks licensed in the United Kingdom.

CFTC Regulation 30.7(c) requires, among other things, that an FCM deposit secured amount funds under the laws and regulations of the foreign jurisdiction that provide the greatest degree of protection to such funds. Regulation 30.7(c) also prohibits an FCM from waiving any protections afforded to such funds under the laws of the foreign jurisdiction. While a UK investment firm that is not a bank is required by the UK Financial Conduct Authority to deposit cash collateral with one or more third-party banks as "client money," a UK investment firm that is also a licensed deposit-taking bank may instead utilize the "bank exception" to hold cash collateral as a deposit subject to UK Prudential Regulation Authority regulations. The DSIO Interpretation states that an FCM is not waiving rights in violation of Regulation 30.7(c) if it deposits secured amount funds with a UK investment firm that has elected the "bank exemption." The Interpretation reminds FCMs that CFTC Regulation 1.11 requires an FCM to monitor segregation risks associated with holding customer funds at a particular depository, and notes it may be appropriate for FCMs to compare risk profiles of UK banks as part of the depository selection process.

CFTC Staff Letter No. 14-110 is available here.

LITIGATION

Second Circuit Holds Contractual Forum Selection Clause Supersedes FINRA Mandatory Arbitration Rule

On August 21, the US Court of Appeals for the Second Circuit decided two closely watched appeals regarding the intersection of Financial Industry Regulatory Authority, Inc. rules regarding mandatory arbitration of disputes and contractual forum selection clauses providing for a judicial forum. *Goldman, Sachs & Co. v. Golden Empire Schools Financing Authority, et al.*, Nos. 13-797-cv; 13-2247-cv (2d Cir. Aug. 21, 2014). The Second Circuit's decision in *Golden Empire* provides important guidance for broker-dealers and institutional market participants in drafting and interpreting forum selection clauses.

Golden Empire decided the appeal of two district court decisions, *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 922 F. Supp. 2d 435 (S.D.N.Y. 2013) and *Citigroup Global Mkts. Inc. v. N.C. E. Mun. Power Agency*, No. 13 CV 1703 (S.D.N.Y. May 10, 2013). In each case, a municipal authority sought to issue debt in the form of auction rate securities (ARS) and engaged investment banks (Goldman, Sachs & Co. and Citigroup, respectively) to underwrite the issuances. The banks and municipal authorities entered into agreements containing substantially identical forum selection clauses governing broker-dealer services provided as an ancillary part of the transaction. The clauses provided that "all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court in the County of New York and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court." The ARS market sustained substantial liquidity disruptions during the financial crisis. ARS issuers, including the appellants in *Golden Empire,* commenced a series of FINRA arbitrations against the banks seeking compensation for alleged losses sustained during the market disruption. (These suits were separate and apart from litigations and arbitrations brought by ARS *investors*.) With regard to the issuer claims, the banks in *Golden Empire* argued that the forum selection clause excerpted above superseded FINRA Rule 12200, which provides for arbitration of customer disputes. The Second Circuit agreed, after reconciling two prior decisions in that circuit, *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005) (holding forum selection clause did not supersede agreement to arbitrate) and *Applied Energetics, Inc. v. NewOak Capital Mkts. LLC*, 645 F.3d 522, 526 (2d Cir. 2011) (holding forum selection clause superseded FINRA Rule 12200). The Second Circuit noted that while the forum selection clause in *Bank Julius* only provided that a customer "submits to the jurisdiction of any New York State or Federal Court" and that "any Action *may* be heard" in such court, the clause in *Applied Energetics* provided that "[a]ny dispute arising out of this Agreement *shall* be adjudicated in" New York. The clause in *Bank Julius* was also "not exclusive of any rights or remedies provided under any other agreement," while the one at issue in *Applied Energetics* provided that it "constitute[d] the entire understanding and agreement" of the parties. The Second Circuit held that the forum selection language in the *Golden Empire* broker-dealer agreements was "indistinguishable" from that in *Applied Energetics* because it was "all inclusive and mandatory," whereas the *Bank Julius* clause "simply waived objection to jurisdiction in New York."

For their part, the municipal issuers argued that the agreements did not cover their entire relationships with the banks and that, in any event, the phrase "all actions and proceedings" did not include arbitrations. The Second Circuit disposed of the first argument by pointing out that the forum selection clause provided for "all actions and proceedings arising out of . . . any of the transactions contemplated," and that this clause "plainly include[s]" the ARS issuances made. As to the second argument, the Second Circuit interpreted the phrase "all actions and proceedings" based upon its "plain meaning as generally understood," and noted that "[a]rbitrations are regularly described as 'proceedings' by the United States Supreme Court, our Circuit, New York state courts, the C.P.L.R., and the FINRA Rules." Thus, the Second Circuit held that the phrase "actions and proceedings" included arbitrations even though "arbitrations" were not specifically mentioned as such "actions or proceedings," despite a contrary holding by the US Court of Appeals for the Fourth Circuit. *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013).

Practical Advice

The Second Circuit's decision in *Golden Empire* provides guidance for the drafting of an enforceable forum selection clauses in a broker-dealer agreement:

- Use "shall" and not "may." The Second Circuit distinguished an earlier case (*Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005)), in which a (weaker) forum selection clause stated that the bank's customer "submits to the jurisdiction [of a Court]" and "agrees that any action **may** be heard [in such court]." The Second Circuit noted that such language did not "specifically preclude" arbitration.
- Use a merger clause, such as "this constitutes the entire agreement between the parties related to the subject matter hereof."
- Do not use language such as "This agreement is not exclusive of any rights and remedies provided by any other agreement." That language was used in *Bank Julius* to sustain a prior agreement to arbitrate.
- While the Second Circuit does not require a specific preclusive reference to arbitration in the forum selection clause ("and precludes arbitration of such claims"), such a reference does not hurt, and could help in other circuits. In any event, make sure that the language conforms to the first three points above.
- There is no presumption of arbitrability in disputes over whether an agreement to arbitrate has been made. The Second Circuit had previously said as much in *Applied Energetics*, but some lower courts continue to miss that point.
- The Second Circuit held that arbitrations are "actions and proceedings." The Second Circuit explicitly disagreed with the *Carilion* case from the Fourth Circuit on this point.

The decision is available here.

Delaware Court Denies Attorneys' Fees for Stockholders in Appraisal Proceedings

The Delaware Court of Chancery recently held that certain stockholders who launched appraisal proceedings challenging a merger lacked standing to obtain reimbursement of attorneys' fees from a $10.7 million settlement in a separate class action challenging the same merger.

In 2010, a group of stockholders (Appraisal Claimants) of Orchard Enterprises, Inc. perfected their appraisal rights after Orchard effected a cash-out merger with its controlling stockholder, Dimensional Associates, LLC. In 2012, while the appraisal proceeding was pending, a group of minority stockholders filed a class action alleging that Dimensional and members of Orchard's board of directors breached their fiduciary duty when they negotiated the merger. Although the Appraisal Claimants did not seek to intervene in or take part in the class action, after the settlement in the class action, they sought an award of attorneys' fees for their counsel in the initial appraisal proceeding.

Although the court held that the appraisal proceeding contributed in some measure to the settlement in the class action, the court nevertheless held that the Appraisal Claimants lacked standing to obtain a fee award. The court found that the Appraisal Claimants pursued their own interests and chose not to join or take part in the class action. The court emphasized that the Appraisal Claimants chose not to represent a class or extend the benefits of their efforts to the other stockholders. The court stated, "That was a perfectly acceptable choice, but it carries a consequence: Under the circumstances, the Appraisal Claimants and their counsel lack standing to obtain a fee award."

In re Orchard Enterprises Inc. Stockholder Litig., No. 7840-VCL (Del. Ch. Aug. 22, 2014).

SEC Charges Executive With Insider Trading Ahead of Client Announcements

The Securities and Exchange Commission recently filed a complaint in the US District Court for the Southern District of New York against a director at an investor relations firm charging him with multiple instances of insider trading ahead of impending news announcements by clients.

According to the complaint, Michael Anthony Dupre Lucarelli, who allegedly obtained access to material, nonpublic information through his position as a Director of Market Intelligence at a Manhattan investor relations firm, traded in securities belonging to companies that his firm was advising in advance of significant corporate announcements. The SEC alleged that Lucarelli followed a "consistent pattern" of purchasing or selling securities in the days or weeks before the client made the corporate announcement, then exiting his position shortly after the announcement, sometimes within hours. Lucarelli allegedly reaped illicit profits of nearly $1 million.

The SEC's complaint charges Lucarelli with violating Section 17(a) of the Securities Act of 1933, Sections 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5, and Section 14(e) of the Exchange Act and Rule 14e-3. It seeks a permanent injunction, disgorgement of profits and civil monetary penalties.

SEC v. Lucarelli, No. 14-mj-01878 (S.D.N.Y. Aug. 25, 2014).

UK DEVELOPMENTS

Financial Conduct Authority Provides Guidance on Its Approach to Attestations for FCA Authorized Firms

On August 26, the UK Financial Conduct Authority (FCA) published a letter dated August 22, 2014 (Letter) addressed to the FCA Practitioner Panel. The Panel is a statutory body representing the interests of the financial services industry that was established to ensure that the FCA effectively consults with practitioners and consumers in connection with its rules and guidance. The Letter is the FCA's formal response to the FCA Practitioner Panel's request for more detailed guidance on the principles under which the FCA's attestation powers operate – which had previously been unclear.

In the Letter, the FCA confirms that it has introduced attestations as a formal "supervisory tool" and that when they are used the FCA seeks a personal commitment from an approved person at the relevant FCA-authorized firm that specific action has been taken or will be taken. The FCA's stated aim for attestations is to ensure that there is clear accountability and senior management focus on specific issues where the FCA would like to see change within firms (often without any ongoing regulatory involvement).

The FCA further notes that it will usually ask for an attestation to be given by the person with the most appropriate significant influence function – i.e., the person responsible for the area of the firm where the issue has arisen. The Letter notes that the most usual scenarios where attestations are required by the FCA are:

1. *Notification*: Where there are emerging risks at firms that are unlikely to result in consumer detriment, the FCA may ask an appropriate approved person at the firm to attest that the person will notify the FCA if the risk identified changes in its nature, magnitude or extent. This type of attestation is essentially to ensure that the firm monitors the risk and notifies the FCA of anything relevant.

2. *Undertaking*: Where the FCA requires a firm to take action, but the risk is unlikely to result in material consumer detriment, the FCA may ask for an attestation that the specific action will be undertaken.

3. *Self-certification*: Where the FCA is confident that the firm can resolve more significant issues itself, the FCA may ask for an attestation that the risks have been mitigated or resolved.

4. *Verification*. Where the FCA wants a firm to resolve issues or mitigate risks, the FCA may require that a verification is given confirming that certain action has been taken.

The FCA's guidance on its use of attestations is particularly welcome as the FCA has been using this new "supervisory tool" more and more since November 2012, when the FCA required the CEOs of many firms to provide attestations that they had discussed the FCA's conflicts of interest guidance with their boards, reviewed and closed off all the issues flagged in the conflicts guidance and satisfied themselves as to their own firms' conflicts arrangements. This initial request for an attestation came as a surprise to many CEOs, but it indicated the FCA's growing desire to have individuals take personal responsibility for specific compliance issues. In the Letter, the FCA highlighted that all approved persons must deal with the FCA in an open and cooperative way and that any failure to meet FCA requirements (including non-compliance with an attestation request) could result in enforcement action being taken against the relevant individual.

The Letter (and the FCA Practitioner Panel's letter requesting the guidance on attestations) are available here.

A Reminder About Careful Drafting of Confidentiality Clauses

The recent decision by the High Court of England and Wales (Chancery Division) in *Richmond Pharmacology Limited (Company) v. Chester Overseas Limited, et al.* underscores the need to carefully draft confidentiality clauses and to incorporate specific exceptions where these exceptions are reasonably foreseeable in the future.

The case involved a shareholders agreement which contained a standard confidentiality clause requiring the parties to treat as strictly confidential all commercially sensitive information concerning the company subject to certain prescribed exceptions. One of the exceptions allowed disclosure to a professional advisor provided that the advisor agrees to be bound by a similar confidentiality obligation. Unsurprisingly, however, there was no specific exception allowing disclosures to a potential third-party buyer. Under the terms of the clause as drafted, the shareholder was required to obtain consent to make the disclosures.

Over time Chester Overseas Limited decided to sell its shares and engaged a corporate finance advisor (Advisor) to assist in facilitating the sale. After the initial discussions regarding a management buy-out fell through, the Advisor sought to generate interest from third parties. In doing so, the Advisor took care to obtain nondisclosure agreements from certain of these potential buyers prior to disclosing the sensitive information.

In its decision, the High Court stated that while the shareholder was entitled to disclose the information to its Advisor pursuant to the professional advisor exception, it was not authorized to disclose the confidential information to third parties.

While the High Court's decision regarding the confidentiality clause may not come as a surprise, it does reinforce the need to carefully consider a client's position in future transactions governed under English law.

The High Court's decision is available here.

EU DEVELOPMENTS

Update on Timing and Scope of ESMA Clearing Obligations

On August 18, the consultation period closed for responding to the draft regulatory technical standards (RTS) published by the European Securities and Markets Authority (ESMA) for the mandatory clearing of certain interest rate swaps (IRS) as required under the European Market Infrastructure Regulation (EMIR). The consultation period for credit default swaps (CDS) will close on September 18.

The classes of IRS that will be subject to the EMIR mandatory clearing requirement must settle in a single settlement currency in either EUR, GBP or USD and include:

- basis swaps and fixed-to-float IRS, referencing either EURIBOR or LIBOR, with a maturity of 28 days to 50 years (this category includes instruments settling in JPY);
- forward rate agreements (FRAs), referencing either EURIBOR or LIBOR, with a maturity of three days to three years: and
- overnight index swaps (OIS), referencing EONIA, FedFunds or SONIA, with a maturity of seven days to three years.

The Commodity Futures Trading Commission (CFTC) issued CFTC Regulation 50.4, effective on February 11, 2013, implementing the first mandatory clearing determinations under the Dodd-Frank Wall Street Reform and Consumer Protection Act. The classes of IRS to be cleared under that rule are largely similar to the list above; however, CFTC Regulation 50.4 does not require any IRS that has a notional amount that can change over the life of the swap to be cleared. Additionally, the IRS under CFTC Regulation 50.4 includes FRAs settling in JPY, with both FRAs and OIS having a maximum maturity of two years.

The classes of CDS that will be subject to the EMIR mandatory clearing requirement must settle in EUR only and include index CDS (untranched), referencing iTraxx Europe and iTraxx Europe Crossover indices, with a series of 11 onwards and a maturity period of five years.

The list of CDS required to be cleared under CFTC Regulation 50.4 is broader than the list above and covers iTraxx Europe HiVol, European untranched indices with a broader range of applicable series, and USD-denominated North American untranched indices being traded in North America.

ESMA, once it considers the responses to its consultations for the draft RTS on IRS and CDS, will issue final RTSs, which are then required to be endorsed by the European Commission before each RTS becomes effective, which is expected to be around November 2014 to January 2015 for IRS and around December 2014 to February 2015 for CDS.

ESMA currently intends to adopt a phased-in implementation schedule from the date at which the RTS for IRS and CDS come into force to encourage an orderly process of application as follows:

- Category 1 – Clearing members of at least one EMIR-authorized CCP that clears the specified IRS or CDS products subject to the clearing obligation, six months;
- Category 2 – Non-clearing members that are financial counterparties (as defined under EMIR) or alternative investment funds (AIFs) (as defined under the Alternative Investment Fund Managers Directive) which qualify as non-financial counterparties above the EMIR clearing threshold, 18 months; and
- Category 3 – Non-clearing members that are non-financial counterparties above the clearing threshold as defined under EMIR (excluding AIFs), three years.

Category 1 entities, therefore, are currently expected to commence clearing of IRS around May to July 2015; Category 2, around May to July 2016; and Category 3, around November 2017 to January 2018. Similarly, Category 1 entities are expected to begin to clear CDS around June to August 2015; Category 2, around June to August 2016; and Category 3, around December 2017 to February 2018.

The responses to the ESMA consultation on the clearing obligation for IRS can be found here. The ESMA draft RTS for IRS and for CDS can be found here. CFTC Regulation 50.4 can be found here.

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SEC/CORPORATE

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UK/EU DEVELOPMENTS

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