Business and Corporate Litigation
Summer 2012

Message from the Chair

William D. Johnston
Chair, Business and Corporate Litigation Committee

Fellow members of the Business and Corporate Litigation Committee -

It was wonderful to see so many of you in Chicago during the recent Annual Meeting - old friends and new friends/first-time attendees. Thanks also to those of you who dialed in for various meetings when you weren't able to attend in-person. (And sorry for some of the dial-in kinks that are still being worked out.)

This is to offer some highlights from the Annual Meeting, to share other news of importance to BCL Committee members, and to flag dates for upcoming meetings.

Annual Meeting

To re-cap some highlights of the Annual Meeting:

*CLE programs. Our Committee sponsored two CLE programs and co-sponsored five CLE programs, all outstanding. Special thanks to BCL Committee members who organized and presented the two sponsored programs - one of Supreme Court arbitration cases and the other on preferred stock.

*BCL Committee Meeting. We had our best-ever-attended Committee meeting, with many new faces and with subcommittee, task force, and working group leaders presenting reports on recent and anticipated activities.

*Meetings of our Subcommittees, Task Forces, and Working Groups. Many BCL Committee subcommittees, task forces, and working groups convened during the Annual Meeting. The Corporate Counseling and Litigation Subcommittee and the Indemnification and Insurance Subcommittee met jointly to discuss key considerations when litigation is filed in multiple jurisdictions.

*BCL Committee Dinner. We had a sell-out, largest-ever for an Annual Meeting gathering of our Committee members at Bin 36. The company, food, beverages, and service were excellent even if the AC wasn't (sorry about that, and thanks again for the kind indulgence). Thanks again to Gary Zhao and his law firm, SmithAmundsen LLC, for their generous sponsorship of the reception portion of the dinner.

*Public service project. Our Committee's Pro Bono and Public Service Committee partnered with the Business Law Section's Young Lawyer Committee and Junior Achievement of Chicago to present "Ask an Expert Day." Volunteers met with students from local high schools to discuss career paths and preparatory education. There were numerous volunteers, and the program was well-received. Special thanks to Subcommittee Co-Chairs Kristin Gore and Victoria Newman.

*Various gatherings. BCL Committee members also attended the Section Welcome Reception, the Diversity Networking Reception, the Section Luncheon, and the 22nd Annual Margaret Brent Women Lawyers of Achievement Awards Luncheon. I know from speaking with attendees that our Committee members were out in force -- networking, recruiting new Committee members, and encouraging active involvement with the BCL Committee. Thanks to all!

*Increase in BCL Committee Membership. During the Annual Meeting, we learned that membership recruitment efforts have been paying off. Year-to-year, we have seen our Committee increase in size from 1,768 members to 1,922
members - an increase of 154. That means that we currently are the fifth largest of the fifty committees in the Business Law Section. Larger committees include: Mergers and Acquisitions (4,131); Federal Regulation of Securities (2,658); Corporate Governance (2,325); and Commercial Finance (2,034). Of note is that the increase in BCL Committee membership was surpassed by only two committees, Legal Opinions (263) and Mergers and Acquisitions (163). Also of note is that numerous other committees have seen de minimis growth or even a decline in membership. Bottom line: please continue to reach out to other Business Law Section members and encourage them to join our Committee. We of course are not interested in "cannibalizing" from other BLS committees. But the fact is that many Section members enjoy membership in multiple committees of the Section. In addition, recent analysis has shown that only about 20% of Business Law Section members currently belong to a committee of the Section. And, of course, please remember your family and friends who may not yet belong to the Section or even to the ABA!

Other News

In other news:

* Gary Zhao. Hearty congratulations to Gary Zhao on becoming President of the Chinese American Bar Association of Greater Chicago!

* Michael Bernasconi. Michael Bernasconi, Co-Chair of our Sports-related Disputes Subcommittee, has again done us proud by serving as judge of the Court of Arbitration for Sport on anti-doping, selection and other matters in the Olympics in London!

* New Task Force of the Business Law Section. Our Committee was asked by the Business Law Section to take the lead in forming a Task Force on the Development of Business Conduct Standards Directed to Human Trafficking. We have done so, and Brad Newman and Denise Kraft are serving as Co-Chairs of the Task Force (which will work closely with an ABA trafficking task force established by new ABA President Laurel Bellows).

* Our Newest Subcommittee. I am delighted to report that the BCL Committee's newest subcommittee will soon be the Trial Practice Subcommittee. Co-Chairs will be Judge Gail Andler and Dan Formeller. Co-Vice Chairs will be Michaela Sozio and Charmagne Sutherlin. Many thanks to these four leaders for their vision and their energy!

* Section Strategic Planning Efforts. Business Law Section leadership is currently pursuing renewed strategic planning efforts, known as "Advance IV." Leaders are identifying and examining in-depth issues related to membership, content delivery, and technology. Immediate Past BCL Committee Chair Pete Walsh is serving as Co-Chair of the overall effort.

* Invitation to Submit Ideas for Programs. Please submit to Meetings and Programs Co-Vice Chair Stuart Riback (SRiback@wilkauslander.com) any ideas for programs to be presented either during meetings and/or through webinars or podcasts.

* Invitation to Submit Material for Publication. Please keep in mind the opportunity to submit material for publication in our Annual Review of Developments in Business and Corporate Litigation, our Network newsletter, Business Law Today, and/or The Business Lawyer. Please also keep in mind the opportunity to submit material to the Publications Board of the Business Law Section (either as an individual author or as a member of a committee or subcommittee).

Upcoming Meetings

Finally, please mark your calendars for, and plan to attend the following meetings:

* 2012 Fall Meeting (Washington, D.C. Nov. 15-16, 2012)
* 2013 Spring Meeting (Washington, D.C. Apr. 4-6, 2013)
* 2013 Annual Meeting (San Francisco, CA Aug. 8-10, 2013).

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Thank you for your involvement in - and support of - the Business and Corporate Litigation Committee, and please let me know if I can lend a hand in any way (wjohnston@ycst.com or (302) 571-6679).

Bill Johnston is a partner in the Wilmington, Delaware-based law firm of Young Conaway Stargatt & Taylor, LLP. He is a past chair of the firm's Corporate Counseling and Litigation practice group.

Updates

Compelling Arbitration: Who Knows the Rules to Apply?
By Judge William F. Highberger

Trial courts continue to receive very inconsistent direction from the U.S. Supreme Court, the California appellate courts and the National Labor Relations Board regarding the proper interpretation and application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to state trial court cases. Because the arbitration alternative has so much impact on case value and because it is also intimately tied up with whether or not a case can proceed on a class or "representative" basis, this is a highly important topic.

The Supremacy Clause

As discussed by the latest U.S. Supreme Court cases on the topic, with respect to many aspects of arbitration, the U.S. Constitution and laws adopted by Congress are supreme as to any inconsistent enactments by any of the several states. In Marmet Health Care Center, Inc. v. Brown (Feb. 21, 2012) 132 S.Ct. 1201, the Supreme Court rejected West Virginia's Supreme Court's reliance on "public policy" to prohibit mandatory arbitration of personal injury claims against nursing homes and to decide whether the arbitration clauses in its case were unenforceable under state common law principles that were not specific to arbitration and preempted by the FAA.

More...

Rules for Avoiding the Pitfalls of Filing Inadequate Affidavits by Custodians of Business Records
By Robert L. Rogers III

Courts routinely grant dispositive motions based upon business records when such records are accompanied by affidavits establishing their admissibility under the business records exception to hearsay. The rules permitting Courts to do so are key features that contain the cost of business litigation. However, litigators should not take these rules for granted. In several recent opinions, Florida's appellate courts have reversed judgments based upon the improper admission of records custodian affidavits when the affiants or proffered witnesses lacked sufficient knowledge about how the records were maintained. These cases highlight the importance of selecting the correct persons to act as records custodians and the need to assure that their affidavits contain all the elements required under the law governing the business records exception. This article analyzes the lessons to be learned from these cases and offers a list of "dos" and "don'ts."

More...

Are SEC Equity Receiverships "Foreign Proceedings" Within the Meaning of UNCITRAL's Model Law on Cross-Border Insolvencies?
By Insolvency and Creditors' Rights Practice Group

A federal district court in Texas has recently concluded that an SEC equity receivership is collective in nature as that term is used in the definition of a "foreign proceeding" in section 101(23) of the Bankruptcy Code, which is based on the Model Law on Cross-Border Insolvency (the "Model Law")
developed by the United Nations Commission on International Trade Law ("UNCITRAL"). This decision may assist equity receivers appointed in the United States in their efforts to marshal assets and obtain information in foreign jurisdictions around the world.

More...

Subcommittee Updates

Membership

Elizabeth Stong, Chair

The Membership Subcommittee serves as the Committee's liaison to the Section on matters related to member recruitment and retention. Our recent efforts include targeted e-mail campaigns to prospective members, participation in the Section's monthly Membership Committee conference calls, and support of the Section's plans to tailor the way in which it participates in the ABA Annual Meeting to the evolving needs of Section members, including members who practice in areas that touch on the subjects addressed by other ABA Sections. For the upcoming year, the Membership Subcommittee is pleased to invite all Committee members to participate in several outreach initiatives, including a new member mentoring program and further law student involvement in Committee programs and activities.

Subcommittee Vice Chair Caroline Pham provided the Membership Subcommittee's report at the ABA Annual Meeting in August. As of June 2012, the Committee had the second largest year-over-year membership increase in the Section, with 154 new members, representing an 8.7% gain. This was exceeded only by the Mergers and Acquisitions Committee, with 163 new members reflecting a 4.1% gain. Section-wide, the Committee is now the fifth-largest committee in terms of membership numbers, with 1,922 total members. The five largest Section committees are now:

1. Mergers and Acquisitions (4,131 members)
2. Federal Regulation of Securities (2,658 members)
3. Corporate Governance (2,325 members)
4. Commercial Finance (2,034 members)
5. Business and Corporate Litigation (1,922 members)

The strong increase in Committee membership numbers is due in part to two successful email campaigns launched in November and December 2011. The campaigns were targeted to law students and lawyers/associate members, with 1.8% and 2.6% gains year-over-year in each class of membership, respectively. Overall, as of June 2012, the Section saw a year-over-year increase of 3.3%, from 52,526 to 54,241 members. The ABA currently has over 377,000 members in total.

The Committee also actively participates in the Section's membership initiatives, including the inaugural Law Student Speed Mentoring event at the Annual Meeting and the annual Law Student Program at the Section's standalone Fall Meeting, and recruitment of underrepresented groups. Section retention initiatives include the Essentials Podcast series and the Business Breakfast Club.

In the upcoming year, the Membership Subcommittee plans to continue and expand its participation in Section membership efforts. We are also excited to assist in the launch of a new Committee initiative targeted at providing mentors for new Committee members. This program will match up new members of the Committee with existing members who have indicated a willingness to share their knowledge and experience as mentors. These Committee mentors can, among other things, introduce the new members to Committee leadership, structure, and activities, and serve as a guide or "buddy" at Section meetings. Stay tuned for more details and instructions on signing up to be a mentor as this new initiative is rolled out.
We welcome the input of all Committee members in our outreach efforts and look forward to the coming year.

**Sports-Related Disputes**

*Michael Bernasconi, Chair*

After the successful launch of the Subcommittee at the Spring Meeting 2012 in Las Vegas, the Subcommittee has now turned its attention to the planning of the Olympic Session that will take place at the 2013 Spring meeting in Washington DC.

Subcommittee Chair, Michael Bernasconi, was selected and attended the London Olympic Games as one of the 12 judges of the Ad hoc Division of the Court of Arbitration for Sport, i.e. the Court that had jurisdiction to judge any kind of dispute arising out or during the Olympic Games, in relation with all disciplines.

Subcommittee Vice-Chair, Hon. Judge Goldberg, attended the ABA Annual Meeting.

At the Fall Meeting 2012 in Washington DC, both Michael Bernasconi and Hon. Judge Goldberg will be happy to answer any questions from Committee members interested in participating in the activity of the Subcommittee and in planning the 2013 Spring Olympic session.

**Securities Litigation**

*Sarah Cave, Chair*

The Securities Litigation Subcommittee held a meeting of at the Annual Meeting. It was lightly attended, but we resolved to do the following:

1. Obtain and maintain a current membership list and hold quarterly teleconferences to stimulate interest in the group.
2. Work on a CLE program for the Spring Meeting focused on M&A litigation issues and trends.
3. Develop a plan to increase membership and actual participation in the subcommittee.
4. Solicit authors and participation in the ABA Annual Review for the Securities Litigation Chapter.

**Pro Bono and Public Service**

*Kristin Gore and Victoria Newman, Co-Chairs*

On Thursday, August 2nd from 3:00 p.m. 4:30 p.m. prior to the start of the Business Law Section’s meetings at the ABA Annual Meeting in Chicago, the Pro Bono and Public Service Subcommittee, along with the Business Law Section’s Young Lawyer Committee, will partner with Junior Achievement of Chicago for “Ask an Expert Day.” The volunteer team will meet with students from local high schools to discuss their career paths and education. The program is intended to assist students in understanding the relationship between obtaining an education and the working world. We are seeking volunteers for this effort. If you have any questions about this year’s JA volunteer experience, the plans for 2012 or would like to volunteer, contact Kristin Gore at kjgore@carltonfields.com or Victoria Newman at victoria.newman@hklaw.com.

**Corporate Counseling and Litigation**

*Denise Kraft, Chair*

Members of the Corporate Counseling and Litigation Subcommittee enjoyed a busy and productive Annual Meeting in Chicago. On August 4, Subcommittee Co-Vice Chair Lewis H. Lazarus led a CLE panel presentation entitled “Structuring and Enforcing Rights and Preferences of Preferred Stockholders: What Recent Delaware Case Law Means for Issuers, Preferred Stockholders and Common Stockholders -- How Much Can Preferred be Preferred?” The CLE’s attendees benefited from the thoughts of Delaware Supreme Court Chief Justice Myron T. Steele, among others, on this increasingly important topic. The following day, the
Subcommittee held a joint meeting with members of the Indemnification and Insurance Subcommittee. The meeting featured a roundtable discussion, led by Michael A. Pittenger, Danielle Gibbs and Tyler O'Connell, of important considerations when stockholder class actions challenging public company M&A transactions are brought in multiple jurisdictions. The Subcommittee is currently considering whether to seek to sponsor a CLE on this topic.

Looking forward to the Business Law Section's Fall Meeting in Washington, D.C., the Subcommittee will again meet jointly with the Indemnification and Insurance Subcommittee. It is currently anticipated that the meeting will feature a guided discussion on business valuation disputes. The meeting may also include updates on recent corporate law developments and issues for future panel presentations. Anyone with an interest is welcome to attend and participate.
COMPELLING ARBITRATION: WHO KNOWS THE RULES TO APPLY?

By Judge William F. Highberger

Superior Court Judge, Los Angeles (CA) Superior Court

Trial courts continue to receive very inconsistent direction from the U.S. Supreme Court, the California appellate courts and the National Labor Relations Board regarding the proper interpretation and application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq., to state trial court cases. Because the arbitration alternative has so much impact on case value and because it is also intimately tied up with whether or not a case can proceed on a class or “representative” basis, this is a highly important topic.

The Supremacy Clause

As discussed by the latest U.S. Supreme Court cases on the topic, with respect to many aspects of arbitration, the U.S. Constitution and laws adopted by Congress are supreme as to any inconsistent enactments by any of the several states. In Marmet Health Care Center, Inc. v. Brown (Feb. 21, 2012) 132 S.Ct. 1201, the Supreme Court rejected West Virginia’s Supreme Court’s reliance on “public policy” to prohibit mandatory arbitration of personal injury claims against nursing homes and to decide whether the arbitration clauses in its case were unenforceable under state common law principles that were not specific to arbitration and preempted by the FAA. The U.S. Supreme Court stated:

State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle. The state court held unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.

The decision of the state court found the FAA’s coverage to be more limited than mandated by this Court’s previous cases. The decision of the State Supreme Court of Appeals must be vacated. When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U. S. Const., Art. VI, cl. 2. . . .

The state court considered whether the state public policy was pre-empted by the FAA. The state court found unpersuasive this Court’s interpretation of the FAA, calling it “tendentious” . . ., and “created from whole cloth” . . . . It later concluded that “Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public”. . . . The court thus concluded that the FAA does not pre-empt the state public policy against predispute arbitration agreements that apply to claims of personal injury or wrongful death against nursing homes.
The West Virginia court’s interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.

Justice Carlos Moreno v. Justice Antonin Scalia’s Jurisprudence on the “Savings Clause”

In the last decade, a number of California appellate cases, led by decisions authored by now retired Supreme Court Justice Carlos Moreno, have found compulsory arbitration clauses “unconscionable” and thus unenforceable. The holdings, based on “unconscionability” or reliance on “general state law contract principles,” have been the stated basis for non-enforcement of contracts otherwise covered by FAA, and have relied on the FAA’s “savings” clause which allow courts to refuse to enforce arbitration contracts based “upon such grounds as exist at law or in equity for the revocation of any contract.” (FAA, § 2.)

In *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161, overruled by *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, Justice Moreno wrote for the majority: “[S]uch class action or arbitration waivers are indisputably one-sided. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”

In *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 465, Justice Moreno wrote, “The principle that in the case of certain unwaivable statutory rights, class action waivers are forbidden when class actions would be the most effective practical means of vindicating those rights is an arbitration-neutral rule: it applies to class waivers in arbitration and nonarbitration provisions alike. [Citation.] ‘The *Armendariz* requirements are . . . applications of general state law contract principles regarding the unwaivability of public rights to the unique context of arbitration, and accordingly are not preempted by the FAA.’” (Referring to *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.)


As noted below, the U.S. Supreme Court majority did not see it the same way.

And Back In Washington

Even as California courts set up roadblocks to mandatory arbitration and class action waivers accomplished via mandatory arbitration, the U.S. Supreme Court has routinely enforced mandatory arbitration clauses and overruled lower courts routinely to do so. In particular, although in 2003 the U.S. Supreme Court contemplated in an oddly decided 4-1-3-1 decision in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, that class arbitration could be allowed under the FAA if the contract authorized such a proceeding, the majority in 2010 in *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.* (2010) 130 S.Ct. 1758, came out soundly against implying any right to class arbitration under the FAA if a contract was silent on authorizing this. The majority decision recited at length all the due process horrors which attach to submitting
high-stakes class action claims to arbitration subject to limited judicial review and with broad arbitrator discretion to ignore otherwise controlling law.

**AT&T Mobility** was decided only one year later and basically leveraged off *Stolt-Nielsen*’s holding that class arbitration was a bad idea. **AT&T Mobility** was also based on a somewhat unique record that created a very pro-consumer process for arbitration of individual claims. Only time will tell if a later U.S. Supreme Court majority limits the logic of that decision to its unique facts. The reasoning of **AT&T Mobility** soundly rejected reliance on the “savings” clause of the FAA to allow state-law based impediments to enforcement of arbitration.

As analyzed by Justice Scalia in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) 524 U.S. 214, 227–228:

This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

As we have said, a federal statute’s saving clause “‘cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.’”

Since **AT&T Mobility** was decided slightly more that one year ago, the U.S. Supreme Court has issued another decision after full briefing and argument overturning a decision protecting federal statutory claims from mandatory arbitration and three summary “G/V/R” orders (standing for Granting the cert. petition, Vacating the lower court decisions summarily without need for any further briefing or argument, and Remanding for further consideration by the lower court) rejecting decisions from California, Florida and West Virginia which appeared to flout the highest court’s reading of the FAA.

**NLRB Takes A Different View Of Class Action Waivers**

A very different view of the propriety of class-action waivers has recently come from the National Labor Relations Board. The Board issued *D.R. Horton, Inc.*, 357 NLRB No. 184, 192 LRRM (BNA) 1137, 2012 NLRB LEXIS 11, 2012 WL 36274, in a very odd procedural posture – with only two members acting for what should be a five-person body. The board found that enforcement of mandatory arbitration with a class action waiver violated non-union employees’ Section 7 rights under the National Labor Relations Act, 29 U.S.C. § 157.

There is a question with respect to the precedential value of *D.R. Horton, Inc.*, because in *New Process Steel v. NLRB* (2010) 130 S.Ct. 488, the U.S. Supreme Court had held that a prior attempt to issue a Board decision with only two members acting was invalid for lack of the needed minimum quorum under 29 U.S.C. §§ 153(a) and (b).)

Moreover, since *D.R. Horton* is the result of the balancing of two different federal statutes, it does not encounter the kind of supremacy clause problems which apply to efforts to rely on state “public policy” or similar state law reasons to reject arbitration or class action
waivers. But federal law questions are suitable issues for the U.S. Supreme Court to review, and the Supreme Court does not appear to have ever extended the NLRA to apply in such a context totally devoid of union involvement.

Further, NLRB decisions are not self-enforcing (29 U.S.C. §§ 160 (e) and (f)). D.R. Horton has filed a petition to vacate with the United States Court of Appeals for the Fifth Circuit. Whether the NLRB’s ruling will stand remains open to question, both on its legal merits and the no-quorum issue. The NLRB decision itself is presumably no more than potentially persuasive, but not controlling, authority in state court since it is not from the U.S. Supreme Court on a federal law question.

While Back In California


Given the express conflict between Iskanian and the contrary published decisions in Brown and Reyes and given the holding in Iskanian that Gentry is no longer good law, one can almost guarantee that a petition for review will be filed in Iskanian with the state Supreme Court. So we may well have three important arbitration cases awaiting decision in the coming months. Hopefully some or all of these anticipated decisions will provide coherence and consistency to a body of law which presently is so disjointed.

Can You Give Me A Decision Tree To Use?: Yes

Arbitration agreements, with or without express class-action waivers, seem to come in an almost infinite variety of forms. Since AT&T Mobility’s threshold premise is that courts are to enforce the agreement made, each case needs to focus on the contract terms.

1. Does the FAA apply, i.e. is there coverage? The answer is almost always yes unless you have a worked exempted by the narrowly interpreted “employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” exception in FAA §1 (and they typically have a union and union contract protecting them).
2. **What does the alleged arbitration agreement say?** What claims are submitted? What alternative processes, if any, are overly barred? Who is the provider? What is said about finality? Any discussion of class or representative claims as allowed or prohibited? Are the rules of procedure designated?


4. **Is the arbitration agreement itself unenforceable on some “general state law contract principles” that are not specific to arbitration?** In theory you can have an enforceable arbitration agreement even if you would find the contract, as a whole, is unenforceable (because the arbitrator can address the same question in due course). *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-49, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 403-04. Cases like *AT&T Mobility* and *Marmer* have not told us how to look beyond the arbitration agreement itself (and its practical impacts) to the contract as a whole to test an assertion that under “general state law contract principles” we are being asked to enforce an unconscionable contract. There are, of course, any number of reasons not dependent on “unconscionability” analysis why a contract, as a whole, may be unenforceable even if the arbitration clause survives analysis, but this is uncharted territory to the best of my analysis. Maybe the U.S. Supreme Court will interpret the FAA “savings” clause as only applicable to valid challenges under general state law principles to the arbitration clause itself (e.g. lack of capacity for a minor?). If so, arguments about improper limitations on remedies and damages, improper limitations on the statute of limitations, unfair or oppressive commercial terms and the like drop out of the unconscionability analysis, leaving many plaintiff’s counsel with very little to argue.

5. **If the arbitration agreement is a slight bit “unconscionable,” should you blue pencil it under *Armendariz* rather than denying it effect?** This too seems to be virgin territory in the argument of the effectiveness of class action waivers. (It also may not be relevant if acceptable attacks under the “savings” clause remain limited to the “separate” agreement to arbitrate tested in isolation.) Simply put, if a slight fix works to make the arbitration clause NOT unconscionable, does the author of the adhesion contract get this benefit (and with it the elimination of class action exposure) or not?

6. **The “Volt” Issue:** If some deviation from the default provisions of the FAA is contemplated, is it “antithetical” to the FAA under *Volt Information Sciences v. Board of Trustees* (1989) 489 U.S. 468: FAA tolerates the parties’ free will choice to adopt state law in lieu of FAA rules if that is the contract they actually make and the terms they adopt do not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives” of the FAA. The California Supreme Court cited *Volt* in both *Discover Bank* and *Sonic-Calabasas A* to justify its anti-arbitration holdings. We know by 20/20 hindsight that the U.S. Supreme Court did not see it the same way.
7. To what extent may a trial court follow its reasonable conclusions about what the U.S. Supreme Court mandates by general statement in FAA cases as compared to more specific holdings by various California Courts of Appeal? It is not easy to reconcile the general tenor of decisions in this field from the U.S. Supreme Court with most of the post-Concepcion decisions from the California intermediate appellate courts (with the notable exception of the recent Iskanian decision). Should a trial court just stay this part of its dockets until the state Supreme Court rules on the pending appeals? Should a trial court rule one way and issue a decision which also says this outcome is mandated by state appellate authorities which appear inconsistent with recent U.S. Supreme Court decisions and invite appeal and/or writ practice? Is it possible to reconcile all these cases like a talented law professor?

8. How to apply D.R. Horton? Or not? Since the decision was rendered without the minimum necessary quorum (because the third member was recused), does it count for anything? By law, NLRB decisions are not self-enforcing or immediately effective, and the NLRB has to seek enforcement of its orders in a United States Court of Appeals. It is far from obvious that D.R. Horton will receive judicial approval in the federal courts, so how much deference should be given to it presently. It is presumably no more than persuasive authority since it is not from the U.S. Supreme Court on a federal law question.

9. Is AT&T Mobility Limited To Its Unique Facts? The form contract at issue there was unique and very pro-consumer. While other businesses may adopt its terms going forward, virtually every case we will see for many years will have a less advantageous arbitration process in place. Will this be enough to produce an inconsistent result from a majority of the U.S. Supreme Court in the future when a different fact pattern and different clause is at issue? If so, is that all a plaintiff has to show to avoid the stated reasoning of AT&T Mobility, which is not so limited?
KEY U.S. SUPREME COURT ARBITRATION CASES

(* = Cases most relevant to motions to compel arbitration in California state court)

* Marmet Health Care Center, Inc. v. Brown (Feb. 21, 2012) 132 S.Ct. 1201 (per curiam with any dissent noted). Grant/vacate/remand order to West Virginia’s highest court to reject reliance on “public policy” to prohibit mandatory arbitration of personal injury claims against nursing homes and to decide “whether, absent that general public policy, the arbitration clauses in Brown’s case and Taylor’s case are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.”

CompuCredit Corp. v. Greenwood (Jan. 10, 2012) 132 S.Ct. 665 (8-1) Claims arising under the Credit Repair Organizations Act (“CROA”), 15 U.S.C. § 1679 et seq., are subject to arbitration under Federal Arbitration Act (“FAA”) pursuant to a valid arbitration agreement even though CROA speaks of “right to sue” for statutory violations.

KPMG LLP v. Cocchi (2011) 132 S.Ct. 23 (per curiam without any dissent noted). Grant/vacate/remand order to Florida appellate courts to consider further whether two of four claims (i.e. shareholder derivative-type claims) were subject to immediate arbitration even if two other claims which were “direct” claims and not derivative in nature were not subject to binding arbitration.

* Sonic-Calabasas A, Inc. v. Moreno (2011) 132 S.Ct. 496 (no dissent recorded). Grant/vacate/remand order to California Supreme Court (opinion below at 51 Cal.4th 659) California Supreme Court’s early 2011 decision refusing to compel contractual arbitration of “Berman hearings” before California Labor Commissioner vacated “for further consideration in light of AT&T Mobility LLC v. Concepcion.”


* Rent-A-Center, West, Inc. v. Jackson (2010) 130 S.Ct. 2772 (5-4, from 9th Circuit re Nevada employee dispute) Under FAA, arbitrator, not court, to determine unconscionability attack on arbitration agreement where agreement expressly assigns that decision to arbitrator. General attack on contract’s overall legality does not bar referral to arbitration: “Thus, a party’s challenge to another provision of the contact, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. ‘[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.’” Id. at 2778.

* Stolt-Nielsen SA v. AnimalFeeds Int'l Corp. (2010) 130 S.Ct. 1758 (5-3, from 2nd Circuit). When arbitration agreement silent, class arbitration not allowed under FAA, and any award so providing exceeds arbitrator’s authority and is unenforceable.

Hall Street Associates v. Mattel, Inc. (2008) 552 U.S. 576 (6-3, from 9th Circuit re Oregon facts). Parties may not contract for additional terms for vacating or modifying arbitration awards
in federal court; FAA §§ 10 and 11 control. But parties “may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.” *Id.* at 590.


*Volt Information Sciences, Inc. v. Board of Trustees [Stanford University]* (1989) 489 U.S. 468 (6-2, from 6th DAC California). If parties contract for state law to apply, state court can apply C.C.P. §1281.2 to stay arbitration of certain claims while related claims involving parties not subject to mandatory arbitration are litigated; doing so does not offend FAA: “The question before us, therefore, is whether the application of … §1281.2(c) to stay arbitration under this contract in interstate commerce, in according with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.” *Id.* at 477.

*Doctor’s Associates, Inc. v. Casarotto* (1996) 517 U.S. 681 (8-1, from Montana state courts). Montana statute providing arbitration agreement was unenforceable unless “typed in underlined capital letters on the first page of the contract” preempted by FAA: “Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. +++ It bears reiteration … that a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot.’” *Id.* at 687.

*Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265 (7-2, from Alabama state courts) State court judgment refusing to compel arbitration under FAA unless parties contemplated connection to interstate commerce overturned; FAA’s coverage terms read “broadly, extending the Act’s reach to the limits of Congress’ Commerce Clause power.”
RECENT POST-CONCEPCION CASES FROM CALIFORNIA AND ELSEWHERE

Iskanian v. CLS Transportation Los Angeles, LLC (June 4, 2012) __ Cal.App.4th __, 2012 Cal.App.LEXIS 650 (disagreeing with Brown and Reyes and holding Gentry invalidated by Concepcion)

Kilgore v. KeyBank, N.A. (9th Cir. 2012) 673 F.3d 947 (enforcing individual-only arbitration for consumer claims for injunctive and other relief pled as class action under Unfair Competition Law, rejecting prior California state cases which held contrary to California public policy to do so)


Ajamian v. CantorCO2e, L.P. (Feb. 16, 2012) 203 Cal.App.4th 771 (CEO’s claim not subject to mandatory arbitration as limits on damages and other terms unconscionable)

In re American Express Merchants’ Litigation (2d Cir. Feb. 1, 2012) 667 F.3rd 204 (merchant customers’ Sherman Act antitrust case not subject to mandatory arbitration as individual claim)

Reyes v. Macy’s, Inc. (2011) 202 Cal. App. 4th 1119 (PAGA claim not susceptible of individual arbitration)

Wisdom v. Accentcare, Inc. (Jan. 3, 2012) 202 Cal. App. 4th 591 (arbitration clause applicable to employee only unconscionable and not enforced)

Sanchez v. Valencia Holding Co. (2011) 201 Cal.App.4th 74 (arbitration contract unconscionable where prohibition on class arbitration combined with “poison pill” negating arbitration clause if class waiver unenforceable)


Roberts v. El Cajon Motors, Inc. (2011) 200 Cal.App.4th 832 (denial of arbitration upheld based on waiver for five-months delay during which “pick off” settlements of individual claims of putative class members were being obtained)

Zullo v. Superior Court (2011) 197 Cal.App.4th 477 (arbitration denied based on unconscionability with one-sided burdens on employee claimant)


In re DirecTV Early Cancellation Fee Marketing and Sales Practices Litigation (C.D.Cal. 2011) 810 F. Supp. 2d 1060 (private attorney general claims under UCL and CLRA not subject to arbitration as brought to enforce public right although other claims are ordered into arbitration)

Lewis v. UBS Financial Services, Inc. (N.D.Cal. 2011) 818 F.Supp.2d 1161 (Concepcion overrules Gentry)

Meyer v. T-Mobile USA, Inc. (N.D.Cal. 2011) 2011 U.S. Dist. LEXIS 108249, 2011 WL 4434810 (disagreeing with In re DirecTV and compelling arbitration of UCL and CLRA claims)

Rules for Avoiding the Pitfalls of Filing Inadequate Affidavits by Custodians of Business Records

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Courts routinely grant dispositive motions based upon business records when such records are accompanied by affidavits establishing their admissibility under the business records exception to hearsay. The rules permitting Courts to do so are key features that contain the cost of business litigation. However, litigators should not take these rules for granted. In several recent opinions, Florida's appellate courts have reversed judgments based upon the improper admission of records custodian affidavits when the affiants or proffered witnesses lacked sufficient knowledge about how the records were maintained. These cases highlight the importance of selecting the correct persons to act as records custodians and the need to assure that their affidavits contain all the elements required under the law governing the business records exception. This article analyzes the lessons to be learned from these cases and offers a list of "dos" and "don'ts."

Rules of Evidence Governing the Business Records Exception to Hearsay

Subject to certain exceptions, hearsay—any oral or written statement offered to prove the truth of the matter asserted, other than one made by the declarant while testifying—is inadmissible. The Federal Rules of Evidence and the evidentiary rules of most states recognize a "business records" exception to hearsay, under which records that are made and kept by a company in its ordinary course of regularly conducted business are admissible if they are "made at or near the time" of the events they record "by—or from information transmitted by—someone with knowledge," so long as neither the source of information nor the method or circumstances of preparing the records indicate that the records are untrustworthy.

A party who wishes to introduce a business record at trial or in support of a dispositive motion must establish each of these elements in one of two ways. First, the party can have the records custodian or other qualified person testify about these facts at the trial or evidentiary hearing. Alternatively, the party can proffer a written "certification" (affidavit) of the records custodian attesting to such facts. A party who chooses the second option must serve "reasonable written notice" to every other adverse party of its intention to proffer such evidence and must "make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."

Most litigants prefer the second option because it is less expensive. It is more convenient for a business to have its custodian execute an affidavit than to force him to miss hours or even days of work travelling to a court to testify. It is also safer. By using an affidavit, a litigant can prevent the custodian from being cross-examined by an adversary, and thereby limit the risk that the custodian will provide harmful answers.
"Dos" and "Don'ts" for Preparing Affidavits of Business Records Custodians

Recent Florida appellate opinions have shown that if a party submits the affidavit of a purported records custodian who lacks knowledge about how business records are collected or maintained, or attempts to establish the foundation for admission of a business record through the testimony of a witness who lacks such knowledge, the party risks rejection of the affidavit and refusal by the court to admit the business records. Florida courts have also confirmed that even if a records custodian possesses the required knowledge, his affidavit may be stricken and the admission of the purported business records may be denied if the affidavit fails to attest to all of the required elements. These opinions call attention to the following rules that attorneys should follow when introducing business records through affidavits:

1. Do not let your client sign an affidavit without reading it, understanding it, and ensuring that every statement in it is true and accurate. This is common sense—no one should ever sign an affidavit without reading it and making sure it is true and accurate. However, because affidavits are typically drafted by attorneys who represent the employers of the persons asked to sign them, employees often sign them without much thought. To avoid risking harm to the affiant’s credibility by filing an affidavit containing false statements, attorneys should stress to both their clients and their selected affiants that they need to closely review the affidavits and confirm the truth of all statements contained in them. Attorneys must assure the affiants that they will not anger their employers if they propose revisions. Even if such revisions call into question whether the document can be admitted as a business record, it is better to learn this before the affidavit is filed.

2. Assume that the person signing an affidavit will be required to explain the statements in the affidavit. Adverse parties have the right to challenge the statements made in an affidavit, and they typically do so by deposing the affiant. Assume that if any statement in an affidavit is untrue, or if the affiant lacks knowledge about any element needed to establish the admissibility of the proffered business records, the adverse party will find out. Litigants must consider the possibility of a deposition when selecting the person who will sign an affidavit.

3. When identifying who will sign the affidavit, select an employee who is familiar with how the business records are created and maintained. This is one of several key lessons to be learned from the recent cases: litigants occasionally fail to choose the correct employees with the knowledge required to establish the admissibility of their business records. The company should not simply select any employee with access to documents or the company's computer system. The person selected to sign the affidavit must know: (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records. If the selected affiant does not know one or more of these facts, a person who does must be found to execute an affidavit. (Note, the affidavit does not have to be executed by the employee who prepared the document that the client seeks to introduce. But he or she must know that the document was made by, or from information transmitted by, a person with knowledge of the events they record.)

4. If the affidavit contains statements about computerized data or data compilations, select a person who knows about the computer system to sign the affidavit. This is the lesson
illustrated most clearly by *Glarum*, in which Florida's Fourth District Court of Appeal reversed the entry of summary judgment because the plaintiff offered the affidavit of an employee of a loan servicer who knew nothing about the servicer's data entry system and could not verify the accuracy of that data, even though he relied upon that data to establish the amount of damages owed. If an affiant bases his certification upon data maintained on his employer's computer system, he must be familiar with the computer system and must know who, how, and when data entries are made. The affiant does not have to be the person who actually entered the data; he does not even need to be able to identify the specific persons who made specific data entries. But the affiant must know which department's employees entered the pertinent data, and he must be able to confirm that the data entries were correctly made.

(5) Do not assume that a single person can serve as the records custodian and that only one affidavit is required. Multiple affidavits may be required for any number of reasons. For example, suppose that the only employee who knows that a key record was made by a person with knowledge of the events recorded therein knows nothing about the company's record keeping practices. The company may need to provide two affidavits to establish the admissibility of that record—one by the employee with knowledge of who made the key document and another from an employee familiar with the company's record keeping practices who can attest that the document was created and kept in the ordinary course of the company's regular conducted business. In addition, different records may require different custodians. For example, although an employee of the current loan servicer may have sufficient knowledge to establish the admissibility of a current servicer's records, she may not be able to establish the admissibility of the prior loan servicer's records, and an affidavit for those records may need to be obtained from the prior loan servicer.

(6) Clearly lay out all of the elements for admissibility in the affidavit, and do not use overly-simplistic, incomplete language. A records custodian's affidavit must do more than simply set forth the affiant's credentials as a records custodian, identify the documents that the client seeks to introduce, and state that those documents "are kept in the ordinary course of business." The affidavit must state (a) that the records were made at or near the time of the events they record; (b) that the records were made by or from information transmitted by a person with knowledge of the events they record; (c) that the records were kept in the ordinary course of business; and (d) that it was the regular practice of the business to make such records. An affidavit that omits one or more of these key elements may be stricken by the Court.

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1 See, e.g., Fed. R. Civ. P. 56(c)(1)(A); Fed. R. Evid. 803(6); Fed. R. Evid. 902(11); Fla. R. Civ. P. 1.510(c); Fla. Stat. § 90.803(6)(a)-(c); Fla. Stat. 90.902(11).
2 See, e.g., Glarum v. LaSalle Bank National Assoc., 83 So. 3d 780, 781-83 (Fla. 4th DCA 2011) (reversing a trial court's entry of summary judgment because of the Court's improper admission of an affidavit of the loan servicer's records custodian, where the custodian lacked sufficient knowledge of the loan servicer's records and electronic data entry system); Mazine v. M&I Bank, 67 So. 3d 1129, 1131-32 (Fla. 1st DCA 2011) (reversing the entry of final judgment in favor of the plaintiff based upon the trial court's improper admission of the plaintiff's affidavit attesting to the amount of damages, where the witness offered at trial to establish the admissibility of the affidavit lacked sufficient knowledge of plaintiff's record keeping practices to establish that the affidavit was a business record); cf. Weisenberg v. Deutsche Bank National Trust Co., 89 So. 3d 1111, 1112 (Fla. 4th DCA 2012) (recognizing that an affidavit of a records custodian may be rejected when the affiant does "not know who, how, or when the data entries were made" onto a business's computer system, but affirming the admission of an affidavit of a bank's records custodian because the affiant "was familiar with the bank's record-keeping system and had knowledge of how the data was uploaded into the system").
Fed. R. Evid. 802; see also Fla. Stat. § 90.802.

Fed. R. Evid. 803(6); see also Fla. Stat. § 90.803(6)(a).

Fed. R. Evid. 803(6)(D); see also Fla. Stat. § 90.803(6)(a). The Federal Rules of Evidence also contain a self-authentication provision which provides that extrinsic evidence of authenticity is not required for an original or copy of a business record if it is accompanied by a certification from the custodian of the records or "another qualified person" declaring that the record was made at or near the time by (or from information transmitted by) someone with knowledge, that the record was kept in the ordinary course of the company's regularly conducted business, and that making the record was a regular practice of the company. Fed. R. Evid. 902(11); see also Fla. Stat. § 90.902(11).

Fed. R. Evid. 902(11); see also Fla. Stat. § 90.803(6)(c).

See Mazine, 67 So. 3d at 131. In Mazine, the First DCA reversed the admission at trial of the affidavit of the plaintiff's records custodian attesting to amounts due and owing because the affiant did not testify at trial and the witness who did testify lacked the knowledge required to establish that the affidavit was a business record. Id. The First DCA did not opine on whether the affiant had sufficient knowledge of the company's records to opine on the amounts owed. See id. (Because the judgment was not entered on a motion for summary judgment, the court could not consider the affidavit on its face, and the plaintiff had to look for an exception to hearsay as a basis for admitting the affidavit.) It is questionable whether the affidavit could have been admitted as a business record even if the trial witness did have sufficient knowledge to serve as a records custodian, as it was probably created exclusively for the lawsuit and not in the ordinary course of the plaintiff's regularly conducted business.

See United Automobile Ins. Co. v. Affiliated Healthcare Centers, Inc., 43 So. 3d 127, 129-31 (Fla. 3d DCA 2010) (acknowledging that the trial court had correctly refused to admit documents offered as business records because the affidavit of the custodian of such records failed to state that the documents were "prepared or made by information transmitted by a person with knowledge," but reversing the trial court's refusal to permit the affidavit to be revised). Fed. R. Evid. 902(11); see also Fla. Stat. § 90.803(6)(c).

See, e.g., Glarum, 83 So. 3d at 792-93.

Id.; Weisenberg, 89 So. 3d at 1112; Vilvar v. Deutsche Bank Trust Co. Americas, 83 So. 3d 853, 854-55 (Fla. 4th DCA 2011) (affirming the admissibility of the affidavit of the plaintiff's loan officer on grounds that "she was familiar with [the servicer's] books, records, and documents relevant to the allegations in the complaint, and that all of the books, records and documents concerning the loan were kept by [the servicer] in the regular course of its business").

United, 43 So. 3d at 130; Mazine, 67 So. 3d at 1132.

United, 43 So. 3d at 130; Mazine, 67 So. 3d at 1132.

See Glarum, 83 So. 3d at 782-83; cf. Weisenberg, 89 So. 3d at 1112 (affirming the trial court's admission of the affidavit of the loan servicer's servicing agent on grounds that the agent's deposition testimony "demonstrated that she was familiar with the bank's record keeping system and had knowledge of how the data was uploaded").

Glarum, 83 So. 3d at 782-83; Weisenberg, 89 So. 3d at 1112.

Weisenberg, 89 So. 3d at 1112; Glarum, 83 So. 3d at 782 n.2.

Glarum, 83 So. 3d at 782-83; Weisenberg, 89 So. 3d at 1112.

See Glarum, 83 So. 3d 782-83 (pointing out that the employee of a loan servicer who provided an affidavit aimed at establishing the admissibility of business records lacked sufficient knowledge concerning both the data supplied by his own employer and by a prior loan servicer).

United, 43 So. 3d at 129 n.2, 130 (affirming an order striking such an affidavit because the records custodian failed to state that the business records were made by or from information transmitted by a person with knowledge of the events they recorded).

Id. at 130-31.

Id.
Are SEC Equity Receiverships “Foreign Proceedings” Within the Meaning of UNCITRAL’s Model Law on Cross-Border Insolvencies?

A federal district court in Texas has recently concluded that an SEC equity receivership is collective in nature as that term is used in the definition of a “foreign proceeding” in section 101(23) of the Bankruptcy Code, which is based on the Model Law on Cross-Border Insolvency (the “Model Law”) developed by the United Nations Commission on International Trade Law (“UNCITRAL”). This decision may assist equity receivers appointed in the United States in their efforts to marshal assets and obtain information in foreign jurisdictions around the world.

The case, In re Stanford International Bank, Ltd., 3:09-CV-0721-N (N. D. Tex.), arose out of the notorious international Ponzi scheme masterminded by Allen Stanford, who was recently sentenced to 110 years in prison for securities fraud. The Stanford cases present a striking example of court-appointed representatives competing around the world for control of the assets of a multinational enterprise. The central issue before the Texas court was whether to recognize a liquidation proceeding filed in an Antiguan court as a “foreign proceeding” under Chapter 15 of the United States Bankruptcy Code, 11 U.S.C. §§ 1501 et seq.

Foreign Proceedings Under the Model Law

Chapter 15 is derived from the UNCITRAL Model Law. The United States enacted Chapter 15 in 2005 to assist representatives of debtors in foreign insolvency proceedings to obtain relief in United States courts, and to foster coordination and cooperation between the insolvency courts of different jurisdictions with concurrent jurisdiction over a debtor’s assets.

The term “foreign proceeding” is defined in the Model Law and in section 101(23) of the U.S. Bankruptcy Code as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.”

A U.S. court may recognize an insolvency proceeding commenced in a foreign country as either a foreign “main” or a “non-main” proceeding, depending on the location of the debtor’s center of main interests (often referred to as its “COMI”). The center of main interests term was derived from the European Union Convention on Insolvency Proceedings that was in the process of being adopted when UNCITRAL drafted the Model Law. In the European Union, the COMI location determines the choice of law for most issues. Under the Model Law, however, it determines only whether a proceeding is a foreign main or non-main proceeding. COMI is not a defined term in the European Insolvency Regulation or the Model Law, but the preamble to the European Insolvency Regulation provides that “The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties.” Although there is a presumption that the debtor’s COMI is located in its place of registration, that presumption may be rebutted by objective factors ascertainable to third parties.
A “main proceeding” is one that was filed where the debtor has its COMI, and a “non-main” proceeding arises where the debtor has another non-transitory establishment. The principal difference between a main proceeding and a non-main proceeding is the relief available following recognition. For example, a representative of a main foreign proceeding is automatically entitled to a stay of all proceedings pending against the debtor in the territorial United States, identical to the stay that automatically arises upon any domestic bankruptcy filing. The foreign representative may recover post-petition transfers of estate property, may sell estate property with all of the protections of section 363 of the Bankruptcy Code, and may, unless the court orders otherwise, operate the business of the debtor. While some of this relief, and other forms of relief, may also be available in non-main proceedings upon specific application and where necessary to effectuate the purposes of Chapter 15 and to protect the assets of the debtor and the interests of the creditors, any such relief granted to a representative of a foreign non-main proceeding must be predicated upon a determination that the relief relates to assets that, under the law of the United States, should be administered in the foreign main proceeding. Litigation about COMI has often been contentious in a number of jurisdictions around the world.

**The International Competition For Recognition In The Stanford Cases**

Stanford International Bank, Ltd. ("SIB") was registered in Antigua. It was a member of a group of companies (the “Stanford Entities”) owned directly or indirectly by Allen Stanford, through which he conducted his Ponzi scheme. The SEC commenced an enforcement action under the federal securities laws against SIB, related companies and individuals on February 17, 2009, and immediately obtained the appointment of a receiver to take possession of all assets, wherever located, of the Stanford Entities, and to address all claims asserted against them.1

A week later the Financial Services Regulatory Commission of Antigua, an entity that purported to regulate SIB in Antigua, obtained the appointment of joint liquidators for SIB, who placed SIB into liquidation in Antigua. The joint liquidators then sought recognition of the Antiguan proceeding as a foreign main proceeding in the Texas district court where the SEC enforcement action was pending. The receiver’s parallel request for an order entitling him to intervene in the Antiguan liquidation proceeding was denied.2 Both the receiver and the joint liquidators also sought recognition of their respective proceedings as foreign main proceedings in Canada and the United Kingdom under those countries’ versions of the Model Law, and they

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1 Federal equity receivers like the Stanford receiver are frequently appointed at the request of the SEC following commencement of enforcement actions in security fraud cases, and in particular in Ponzi schemes like the Stanford scheme. The court has broad equitable discretion to specify the duties the receiver is to carry out, depending on the facts of the case. In general receivers are authorized, as the Stanford receiver was authorized, to operate and/or liquidate the business where appropriate and necessary to maximize asset value, to marshal the assets, and in some cases they are also authorized to devise a fair and equitable claims and distribution process. See *Eberhard v. Marcu*, 530 F.3d 122, 131-32 (2d. Cir. 2008); and see generally, “Equity Receiverships In SEC Enforcement Actions,” Richard B. Roper, 59 ADVOCTX 26 (2012). These receivers, who are fiduciaries for all creditors and victims of the Ponzi scheme, are comparable to trustees in bankruptcy in regard to their obligations to the creditor body as a whole, and are distinguished from the receivers appointed in jurisdictions around the world at the request of secured creditors, who act only for the secured creditor.

2 Antigua has not adopted the Model Law.
both requested the assistance of the Swiss courts in seizing assets of the Stanford Entities located in Swiss banks.\(^3\)

The Canadian courts denied recognition to the Antiguan proceeding, and granted recognition to the SEC receivership proceedings as a foreign main proceeding, holding that it was in the best interests of the Canadian creditors to cooperate with the U.S. receiver rather than with the Antiguan liquidators. They also held that SIB’s “real and substantial connection” was with the U.S. and not with Antigua (thus locating SIB’s COMI in the U.S.). Finally, they held that the Antiguan liquidators’ wrongful behavior in moving electronic data from SIB’s Canadian computers to Antigua and then erasing the data from the computers before commencing their proceeding for recognition justified denial of recognition to the Antiguan proceeding.

The U.K. courts reached the opposite conclusion, recognizing the Antiguan proceeding as the foreign main proceeding and denying the receiver’s request for recognition. They found that the receivership was not a foreign proceeding because the receiver’s powers derived, not from a law relating to insolvency or adjustment of debt, but from the order appointing him.

The Court of Appeals also found that the receivership was not a collective action because its stated purpose was to prevent waste and dissipation of assets for the principal benefit of investors, not to liquidate assets and distribute proceeds to the wider class of all creditors.\(^5\)

Moreover, the U.K. courts held that SIB’s COMI was at its place of registration in Antigua. Under the Model Law, the presumption is that the COMI is at the place of registration, and the party objecting to the place of registration as the COMI bears the burden of rebutting the presumption by proving that objective factors ascertainable by third parties place the COMI elsewhere. These rebutting facts must be facts in the public domain and facts that creditors would learn in the ordinary course of business with the company; the purpose of the rule is to ensure that those who deal with a debtor will know what law would govern its insolvency.\(^6\)

The UK courts rejected the receiver’s argument that the existence of fraud by a group of companies required a finding that the COMI of each company is that of the fraudulent entity as a whole, and that because the Stanford Ponzi scheme as a whole was directed from the US, SIB’s COMI should be found to be the US:

\[
\text{[E]ach company or individual has its own COMI. Under [the Model Law], as applied in England and Wales, it is not possible to have a COMI of some loose aggregation of companies and individuals. It follows that there can be no COMI by reference to an entity}\]

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\(^3\) Switzerland has not yet adopted the Model Law.
\(^6\) In the Matter of Stanford International Bank LTD, [2010] EWCA Civ. 137, 3 W.L.R. at 967-68; see Re Eurofood IFSC Ltd [2006] Ch. 508.
comprising all those involved in the fraudulent Ponzi scheme. The COMI of SIB depends on the application of the presumption to SIB.\textsuperscript{7}

The Swiss court also recognized the Antiguan proceeding and declined to recognize the U.S. receivership.

**The Texas Decision**

On July 30, 2012, the Texas district court issued its decision denying recognition to the Antiguan proceeding as a foreign main proceeding. In contrast to the U.K. courts, the Texas court accepted the receiver’s argument that in light of Stanford’s use of all of his companies to perpetuate the fraud, the court should consider the COMI of the Stanford group, rather than of SIB as a stand alone entity. The court pierced the corporate veils of the Stanford Entities and “aggregated” them to determine that the presumption that SIB’s COMI was in Antigua because it was registered there was rebutted by a host of other factors that located the nerve center of the entire fraudulent Stanford enterprise in the United States.\textsuperscript{8} As a consequence, the court recognized the Antigua proceeding as a non-main proceeding.\textsuperscript{9}

The issues before the court did not require it to consider whether the receivership was a collective proceeding, as that phrase is used in the definition of a foreign proceeding in Chapter 15 and the Model Law. The Court nevertheless addressed that question directly:

"The Court notes language in other U.S. court opinions that contrasts a collective proceeding to a receivership, which they state is non-collective. See, e.g., Betcorp, 400 B.R. at 281. However, those courts describe receiverships as “remed[ies] instigated at the request, and for the benefit, of a single secured creditor.” Id. This is not the type of receivership in place here. Rather, the Court instituted this Receivership at the request of the SEC for the benefit of all Stanford Entities’ investor-victims and creditors. Thus, although the Court does not need to find that the Receivership is collective in nature, it does so."\textsuperscript{10}

\textsuperscript{7} In the Matter of Stanford International Bank LTD, [2010] EWCA Civ. 137, 3 W.L.R. at 967-68.

\textsuperscript{8} The reference to the “nerve center” as the correlative of COMI is based on the Supreme Court’s decision in Hertz Corp. v. Friend, 130 S.C.t 1181, 1192, in which the Court adopted the “nerve center” test for identifying a company’s principal place of business, the concept that U.S. courts often draw on in determining COMI.

\textsuperscript{9} The court strictly limited the relief it granted to the joint liquidators to the examination of witnesses and the taking of evidence concerning SIB’s assets, affairs, rights, obligations or liabilities. It then conditioned this very limited relief on a number of stringent obligations which were apparently designed to cure the damage done to the receiver’s efforts to collect the Stanford assets by the liquidators’ opposition abroad: it directed the joint liquidators (a) to make available to the Receiver, the SEC and other interested parties all information relevant to the Stanford Entities under their possession, control or knowledge wherever located; (b) to use best efforts to obtain reciprocal rights for the Receiver in Antiguan courts; (c) to consult with the Receiver, the SEC and other interested parties and use best efforts to adopt a common claims and/or distribution process; (d) to apply to the Court for the authority to make any payment from Stanford assets for any activity undertaken by them in the United States or to any U.S. person; and (e) to apply to the Court for authority to take any action whatsoever in the United States except for the examination of witnesses and the taking of evidence. They are also precluded from taking any action to disrupt, interfere, or otherwise prevent efforts related to the Receivership by the U.S. Department of Justice, the SEC any other US governmental agency, the Receiver and other interested parties, absent approval of the Court, from duplicating without consent the efforts made by those entities in the prosecution of claims or actions already commenced before the date of the decision, and they are precluded from filing any litigation in the United States absent approval of the Court. Order, July 30, 2012, at 56-58. [ECF # 176] 3:09-cv-00721-N.

\textsuperscript{10} Order, July 30, 2012, at 18 n. 20. [ECF # 176] 3:09-cv-00721-N.
Analysis

An open question is whether the finding that the receivership is collective would require a foreign court to recognize the receivership as a “foreign proceeding” within the meaning of the Model Law. This conclusion may be subject to challenge for several reasons. First, the court focused on the “collective action” part of the definition of a foreign proceeding, and did not address the requirement that that the proceeding also arise “under a law relating to insolvency or adjustment of debt,” which was central to the U.K. courts’ analysis. A critic might agree with the U.K. courts that the order appointing the receiver did not in fact authorize the receiver to act for the benefit of all creditors of the Ponzi scheme. Moreover, as the U.K. Court of Appeals noted, the complaint pursuant to which the receiver was appointed was predicated on the securities laws, which are neither laws relating to insolvency nor to the adjustment of debt.

Furthermore, as the U.K. Court of Appeals noted, recognition of a foreign proceeding under the Model Law is vested in the domestic court. Identification of the proceeding as a foreign proceeding by the foreign court is not binding on the domestic court. 11

Finally, the conclusion is purely dicta: neither the question of whether the receivership is collective, nor the broader question of whether it constitutes a foreign proceeding under the Model Law, was before the court. 12

But a fundamental problem for the receiver is how to enforce and exercise the world-wide jurisdiction over the Stanford Entities’ assets that the court conferred upon him. The refusal by the U.K. and Swiss courts to recognize the receivership as the main proceeding for the Stanford Entities has undoubtedly hindered the receiver from maximizing recoveries for the fraud victims and creditors. 13 This problem would be alleviated


12 There is, however, additional U.S. authority for the proposition that federal equity receiverships should be considered insolvency proceedings. In holding that a creditor of a receivership estate’s claim was governed by the law of federal equity receiverships and not by the Uniform Commercial Code, the Second Circuit observed that “An ‘insolvency proceeding’ is ‘any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.’ U.C.C. § 1-201(22) (1996). We agree with the District Court that receiverships are ‘insolvency proceedings’ . . . .” Securities and Exchange Commission v. Credit Bancorp, Ltd., 290 F.3d 80, 90 (2d Cir. 2002).

13 It appears from the decision that the Antiguan liquidators have continued to oppose the receiver’s efforts to collect assets:

This action has a peculiarly worrying history. Notwithstanding the Antiguan institution of proceedings despite this Court’s Receivership Order, see supra p. 2, the long account of happenings in the life of this suit demonstrates that the Joint Liquidator’s repeated interference with the Receivership is the norm. For example, early on in the action, without notice to the Receiver or the Canadian court, the Former Joint Liquidators entered one of the Stanford Entities in Canada and wiped its computer systems clean of information [footnote omitted]. Second, the current Joint Liquidators have attempted numerous times to unseat the Receiver from his role as the recognized foreign representative in Canada. Further the Joint Liquidators have actively objected to criminal seizure proceedings by the U.S. Department of Justice (“DOJ”) in Canada, the United Kingdom and Switzerland, 92 at 11-16, and have taken affirmative steps to block the repatriation of Estate assets generally in the United Kingdom and Canada, H’g Tr. 50. Fourth, the Joint Liquidators have proven to be extremely litigious and calculating in this Court, filing multiple notices of objection to the Receiver’s requests in this and other
in every country which has adopted the Model Law if the receivership were readily recognized as a foreign proceeding. A more generous interpretation of “foreign proceeding” may also be compatible with the purposes of the Model Law. Thus, while each court must apply its own precedents in analyzing a petition for recognition, a United States district court decision that this kind of equity receivership, which in practice may be the functional equivalent of a bankruptcy case, is a collective proceeding may well be influential with foreign courts considering whether to recognize a receivership.

It may also be helpful to future receivers seeking recognition abroad to arm themselves with orders that contain the direction that the U.K. courts found lacking in the Stanford order. For example, the U.K. Court of Appeals acknowledged that the common law of equity receiverships encompassed the authority to liquidate assets and distribute proceeds to creditors and victims, and also acknowledged that receivers are able to propose subsequent orders providing such authority after they are first appointed. But the court did not find that the order in this case contained such authority, which was fatal to the receiver’s claim. If the original order appointing a receiver does not contain such authority, the receiver would be well advised to request a supplemental order before seeking recognition abroad as a foreign representative of a foreign proceeding.

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Stanford MDL suits, and filing motions to pursue claims the Receiver was already pursuing. [footnote omitted] The Joint Liquidators have admitted that they seek funds first and foremost to fund their current operations, which include challenging the Receiver’s authority worldwide, not to distribute to investor-victims and creditors. Id. at 50-53.

Order, p. 5, July 30, 2012 [ECF 176], 3:09-cv-00721-N.

But see Securities and Exchange Commission v. The American Board of Trade, 830 F.2d 431, 436-37 (2d Cir. 1987), in which the Court of Appeals for the Second Circuit expressed concern about the substitution of equity receiverships, with no statutory guidance for the presentation and adjudication of claims, for the well-developed law governing bankruptcy cases. The Court repeated this concern in SEC v. Malek, 397 F.Appx. 711, *4 (2d Cir. 2010): “[T]his Court has consistently expressed a preference against the liquidation of defendant corporations through the mechanism of federal securities receiverships, as opposed to through the bankruptcy courts. See, e.g., Eberhard, 530 F.3d at 132 (noting that “receivership should not be used as an alternative to bankruptcy”); Am. Bd. of Trade, 830 F.2d at 436 (noting frequent admonition that “equity receiverships should not be used to effect the liquidation of defendants in actions brought under the securities laws”); Esbitt, 335 F.2d at 143 (“We see no reason why violation of the Securities Act should result in the liquidation of an insolvent corporation via an equity receivership instead of the normal bankruptcy procedures...”).” Despite this often expressed preference by the Second Circuit, it has never reversed a district court decision approving a receiver’s liquidation, because by the time the matter reaches the Court of Appeals the receiver has invested so much time and money in the process that it would be wasteful and not in the best interests of the creditors to send the case to bankruptcy court.