MACFARLANES

BANKING AND FINANCE DISPUTE RESOLUTION

LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME

QUARTERLY UPDATE

Welcome to the first issue of our Quarterly Update. In this update, we look back at some of the highlights in banking and finance disputes and financial crime in 2015.

One of the prominent issues affecting banking and finance disputes last year was contractual interpretation. A key lesson from the cases is the need to draft all contractual provisions, including disclaimers, in the clearest possible terms, and to ensure that they remain appropriate under modern contract law.

As the march of regulatory enforcement has continued apace, the impact of financial crime on financial institutions was no less prominent. In particular, a bright light was thrown upon the need to probe the commercial rationale of every transaction as well as the role of every person involved. In this context, by far the most interesting development was the SFO's first ever Deferred Prosecution Agreement, involving the alleged failure of a commercial organisation to prevent bribery committed by an associated person - we consider some of the lessons from that decision in this update.

IN THIS ISSUE WE LOOK AT:

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2015 - SUPREME COURT WEIGHS IN WITH WIDE-RANGING GUIDANCE ON CONTRACTUAL INTERPRETATION

Throughout 2015, the Supreme Court delivered a number of important judgments on contractual interpretation which have direct relevance to banking and finance disputes. This has been a recurring theme for some time, and yet it remains difficult to predict those cases in which permission to appeal will be granted. Whilst the Supreme Court has previously declined permission in relation to specialist provisions such as section 2(1) of the ISDA Master Agreement in the landmark swaps litigation, *LBIE v Firth Rixson*, in 2015 it accepted a case involving interpretation of the LMA terms. Equally, whilst a provision affecting global financial contracts in respect of three trillion dollars has not passed the test, appeals which go to the heart of general interpretation under contract law are regularly being permitted.

RETURN TO THE ORTHODOX APPROACH TO CONTRACTUAL INTERPRETATION

The Supreme Court decision in *Arnold v Britton* [2015] UKSC 36 marked a return to the orthodox approach to contractual interpretation of commercial contracts – giving the words their ordinary and natural meaning. The case concerned the natural meaning of a service charge clause in lease agreements for several long lease holiday chalets. The lease agreements contained a covenant whereby the lessees agreed to pay *"rent as a proportionate part of the expenses and outgoings incurred by the Lessor … the yearly sum of Ninety Pounds and Value Added tax (if any) for the first Year of the term hereby granted increasing thereafter by Ten Pounds per hundred for every subsequent year or part thereof"*. The issue was whether the relevant clause required payment by the lessees of:

i. £90 with a 10 per cent yearly increase (which would have had the commercially absurd result that by 2072, the lessees would be paying over £500,000 in service charges per year); or

ii. a fair proportion of the services up to a maximum of £90, with that maximum rising by 10 per cent each year (i.e. the words "up to" should be read into the clause before *"Ninety Pounds")*.

The Supreme Court reiterated that the test for the Court is to identify the parties' intention by reference to what a reasonable person, having all the relevant background knowledge available to the parties, would understand the words to mean. Although commercial common sense is an important factor (and should be assessed as at the date of the agreement rather than retrospectively), the Court should be slow to reject the natural meaning of a provision. The clearer the natural meaning of the words, the more difficult it will be for the Court to justify departing from those words. The subjective intention of the parties is not relevant.

This decision moves away from a test based on business efficacy, which appeared to be the direction in which the Courts were moving, and marks a return to a position where clear drafting will not be required to give way to business common sense.

In this case, the Court construed a reference to *"proportionate part"* as being descriptive, and the second part of the clause as quantifying the sum payable. As such, the lessee was required to pay £90 per year with a 10 per cent yearly increase. The clause was clear and there was no reason to depart from the natural meaning. The fact that, in hindsight, this gave a commercially absurd result was irrelevant.

CONSTRUCTION OF LMA TERMS AND CONDITIONS FOR SECONDARY DEBT TRADING

In *TAEL One Partners Ltd v Morgan Stanley & Co International Plc* [2015] UKSC 12, the Supreme Court had to construe condition 11.9(a) of the Loan Market Association standard terms and conditions, commonly used in the secondary loan market. Although the terms under consideration have been superseded by the LMA's combined terms and conditions for par and distressed trading, the issues and clauses discussed were similar to those in the current trading documents.

Tael entered into an agreement to lend approximately $32m to Finspace SA. The loan included interest, which accrued daily, and was payable three months in arrears, with a "Payment Premium", to be paid by Finspace on repayment of the principal. Tael sold $11m of the loan to Morgan Stanley (MS). When the loan was refinanced, Tael claimed that condition 11.9(a) required MS to pay it a proportion of the Payment Premium.

Condition 11.9(a) states that the lender is entitled to any interest or fees that *"are expressed to accrue by reference to the lapse of time"*, to the extent that they accrued before the transfer of the loan. Tael argued that the Payment Premium fell within this definition, as the words should be understood to mean fees that were *"calculated by reference to the lapse of time"*.

The Supreme Court disagreed. Tael's interpretation of condition 11.9(a) was not the natural meaning of the provision. The method of calculation of the Payment Premium should not be confused with the accrual of the right to it. The right had not accrued before the sale of the loan, and so the seller, Tael, was not entitled to any part of it. It was only when the right to the Payment Premium had accrued that it would be calculated by reference to the lapse of time. This conclusion was supported by the context whereby the conditions made no provision for notification to Tael of the payment of the Payment Premium.

In conclusion, where a loan is sold on the secondary market under LMA standard terms, the right to the Payment Premium transfers to the buyer. The purchase price of the loan should either reflect this or the parties should expressly vary the contractual terms.

NEW GUIDANCE ON INTERPRETING PENALTY CLAUSES

The Supreme Court has recently delivered new guidance on penalty clauses in the combined cases of *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67.

In the first case, the Respondent and his co-founder had sold a controlling stake in their marketing company to the Appellant entity. The sale was made pursuant to a contract negotiated by experienced commercial lawyers on each side. It provided that two particular tranches of the sale price would be paid at a later date, by reference to financial formulae relating to the company's profitability. The contract also included various non-compete restrictions on the sellers, who remained minority shareholders after the sale. Crucially, breach of the non-compete provisions would result in:

i. non-payment of that seller's portion of the deferred sale price tranches; and

ii. the purchaser being entitled forcibly to purchase that seller's remaining shares, at a price excluding goodwill (which was a significant component of the shares' value).

The Respondent subsequently admitted breaching the non-compete provisions, but argued that they were unenforceable penalties.

In the second case, the Appellant individual had parked his car in a commercial car park for longer than the permitted two hour period, during which parking was free. By entering the car park, the Appellant had accepted contractual terms which clearly stated that overstaying would result in a one-off £85 charge. However, the Appellant argued that he should not have to pay this charge because it was a penalty and, therefore, unenforceable.

The Supreme Court, having extensively reviewed the authorities in this area, concluded that a provision is not penal where:

i. the sanction it imposes protects a legitimate interest of the innocent party; and

ii. the impact of the sanction is proportionate to the defence of that legitimate interest.

Importantly, a legitimate interest may exist even where there is no direct financial loss flowing from the act or omission triggering the sanction. So in the Makdessi case, the Appellant company had a legitimate interest in protecting the critical goodwill of the business it had acquired, which was proportionately defended by the price adjustment and compulsory purchase provisions. Similarly, in the ParkingEye case, the Respondent company had a legitimate interest in ensuring that the car park was efficiently managed, which the penalty charge reasonably and proportionately protected. Where no such legitimate interest is being protected by the clause in question, it will still be regarded as an unenforceable penalty.

CHANGE TO THE LAW ON IMPLIED TERMS

In *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72, the Supreme Court has recently clarified the law on implied terms. It has confirmed that for a term to be implied into a contract it must be necessary for business efficacy or, alternatively, be so obvious as to go without saying. This represents a radical shift away from *Attorney General of Belize and others v Belize Telecom* [2009] UKPC 10, which it is suggested has been misinterpreted by academics and judges alike. Whilst the Supreme Court's judgment stops short of determining that Belize was incorrectly decided, it found that when implying terms, the old rules set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] UKPC 13 should apply.

Lord Neuberger did not wish to reformulate the principles set out in *BP Refinery,* but added six comments on the requirements for implication:

- First, the implication of a term is not dependent on proof of the actual intention of the parties when negotiating the contract, but on the answer of *"notional reasonable people in the position of the parties at the time they were contracting".*

- Second, a term should not be implied simply because it appears fair or because one considers that the parties would have agreed to it if it were suggested.

- Third, the requirement for a term to be reasonable and equitable adds nothing as, if a term satisfies the other requirements, it will most likely be reasonable and equitable.

- Fourth, only one of either the "requirement of business efficacy" or the "officious bystander" tests needs to be satisfied.

- Fifth, it is important to formulate the question of the officious bystander carefully; Lord Neuberger did not elaborate on this point, but cited Lewison on *'The Interpretation of Contracts 5th ed (2011)'*, which is critical of questions which suggest only one answer, and comments that a question may produce a different answer if put in a more neutral or easy to understand way.

- Finally, Lord Neuberger stated that *"necessity for business efficacy involves a value judgment"*, and the test is not one of "absolute necessity". Lord Neuberger suggested that a more helpful way of putting it would be that *"a term can only be implied if, without the term, the contract would lack commercial or practical coherence"*.

Lord Neuberger then continued to address the process of contractual interpretation and implication; he stressed that implication can only take place after the process of interpreting the express terms is complete. Lord Carnworth disagreed with this distinction, finding that in some circumstances it could be appropriate to reconsider the interpretation of express terms once it has been decided whether to imply a term, remaining more faithful to the decision in *Belize*. Crucially, there is complete agreement that the *Belize* judgment did nothing to dilute the requirement of necessity.

THE MEANING OF "ASSETS" IN STANDARD FORM FREEZING ORDERS

In the recent Supreme Court decision in *JSC BTA Bank v Ablyazov* [2015] UKSC 64, it has been held that the proceeds of a loan fall within the meaning of "asset" as described in the standard form Freezing Order to which the Defendant (Mukhtar Ablyazov) was subject. As a result, Mr Ablyazov was prevented from disposing of or dealing with loan proceeds (which were being used by him for living and legal expenses) whilst he was subject to the Order. Respondents are therefore unable to exceed their permitted weekly or monthly spending by using borrowing or credit facilities whilst subject to the standard form Freezing Order.

The issues before the Supreme Court were:

i. whether Mr Ablyazov's right to draw down under certain loan agreements, made between himself and "friends", was an "asset" within the meaning of the Freezing Order;

ii. whether the exercise of that right by directing the lender to pay the sum to a third party constituted "disposing of", "dealing with" or "diminishing the value of" the assets; and

iii. whether the proceeds of the loan agreements were "assets" within the meaning of the extended definition in paragraph 5 of the Freezing Order.

In unanimously finding that the proceeds of the loans were to be considered "assets" within the meaning of the Order, the Supreme Court considered that the sole question was what the Freezing Order in fact meant. It noted that the most recent Freezing Order standard forms (including the Commercial Court standard form) had extended the definition of assets in paragraph 5, and that this extension was designed to cover assets which the Respondent controlled, not just assets which he legally or beneficially owned. The Respondent was in fact dealing with the assets of the lender as if they were his own. Therefore, the powers under the loan agreement were affected by the Freezing Order: *"The whole focus … of the paragraph is the Respondent's power to deal with the lender's assets as if they were his own. It follows that the focus … is not on assets which the Defendant owns (whether legally or beneficially), but on assets which he does not own but which he has power to dispose of or deal with as if he did"* (Lord Clarke).

Financial institutions upon which a Freezing Order might be served, not to mention Claimants and Respondents, should therefore take note of this confirmation that the standard form Freezing Order does not allow a Respondent to reduce his net asset position to the detriment of the Claimant through borrowing and credit facilities, including overdrafts or credit cards, whilst subject to the terms of the Order.

OTHER NOTABLE CASES AND DEVELOPMENTS

COURT OF APPEAL ADOPTS "BACK TO BASICS APPROACH" TO ISSUES OF *FORUM CONVENIENS*

Jurisdiction disputes often turn on the question of whether England is *"clearly or distinctly the appropriate forum"* to hear a dispute (*"forum conveniens"*). In the case of *Erste Group Bank A.G. v JSC "VMZ Red October" and others* [2015] EWCA Civ 379, the Court of Appeal said that it should take a practical approach to this issue, and not attach too much importance to technical considerations. This involves standing back and identifying where the fundamental focus of the litigation is to be found. In this case, England was not the appropriate forum to determine what was *"overwhelmingly a Russian case"*.

The case is also interesting because the Court of Appeal considered the use of "anchor defendants". This involves issuing proceedings against a party over whom the English Courts have jurisdiction and joining foreign defendants to the proceedings on the basis that they are "necessary and proper parties" to those proceedings. This can be a useful way of bringing the real target of a claim before the English Courts. However, the Court of Appeal reduced the scope for using this tactic by holding that the rules not only require a claimant to show that it has an arguable claim against an "anchor defendant" but also that it is reasonable for the English Court to try that claim.

MISSELLING CLAIMS – LANDMARK DECISION ON NEGLIGENT MISREPRESENTATION AHEAD

In *Taberna Europe CDO II plc v Selskabet (formerly Roskilde Bank A/S) (In Bankruptcy)* [2015] EWHC 871, the Defendant Danish Bank (Roskilde) had issued subordinated notes which were purchased in the secondary market by Taberna (an Irish investment vehicle) from Deutsche Bank in February 2008, for just over €26m. Taberna alleged eight counts of misrepresentation by Roskilde, but only one was successful - a representation in respect of the level of Roskilde's non-performing loans. Justice Eder's conclusion that negligent misrepresentation under section 2(1) of the Misrepresentation Act 1967 extended to loss sustained as a result of contracting with a third party (Taberna – Deutsche Bank), but not arising under the contract with the representor (Roskilde), is a novel interpretation of the wording of section 2(1). As a consequence, representations made in publications issued by financial institutions which are designed for the primary market on and before an issue of subordinated debt could be actionable by secondary market purchasers long after the publications were first issued. On the facts, Eder J also found that the disclaimer wording included in some of the bank's publications afforded it no protection. This finding of issuer liability to a secondary market investor has significant potential consequences for the financial markets. The outcome of what will be a landmark appeal (listed for Q4 2016) is eagerly anticipated.

NORWICH PHARMACAL ORDERS IN RESTITUTIONARY CLAIMS

The first instance decision in *Santander UK plc v The Royal Bank of Scotland plc and others* [2015] EWHC 2560 (Ch), last September, revealed a divergence in judicial opinion as to the requirements for obtaining a "Norwich Pharmacal" Order – an Order requiring a third party to disclose information to a claimant for the purposes of proceedings against a proposed defendant. Santander mistakenly transferred monies to the account of a customer of RBS believing that it had received its own customer's instruction to do so. The recipient did not return the money or consent to his details being passed on to Santander. Santander, therefore, made an application seeking information from RBS about its customer.

Initially, Master Matthews declined to make the requested Order because there was no evidence of wrongdoing by RBS' customer before money arrived in his account. A claim in restitution against the RBS customer only arose after the money had been transmitted. Such a claim did not constitute a wrongdoing capable of justifying a Norwich Pharmacal Order. However, a similar application made by Santander then came before Justice Birss who decided, relying on *Bankers Trust v Shapira*, that a claim in restitution does involve a wrong capable of justifying a Norwich Pharmacal Order.

In Master Matthews' opinion, *Bankers Trust* could be distinguished from the present application because that claim involved:

i. a fraud, in which the bank had become involved; and

ii. an equitable proprietary interest.

However, upon reconsideration at the request of Santander, he was bound by the decision of Birss J and allowed the application.

At present, therefore, a claim in restitution does amount to wrongdoing capable of justifying a Norwich Pharmacal Order, but, given this divergence in judicial opinion, it is likely that the issue will be revisited in due course.

THE DUTY OF GOOD FAITH IN "RELATIONAL CONTRACTS"

In *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) the Court considered the circumstances in which a duty of good faith should be implied by law into commercial contracts.

The specific issues which arose were: (i) the type of commercial contracts in which a requirement to act honestly and with integrity should be implied; and (ii) the sort of behaviour which could amount to a breach of the requirement.

In *Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB)* [2013] 1 All ER (Comm) 132), the Court had considered that where parties to a contract have a long term relationship, such as in the case of a joint venture or franchise agreement (otherwise termed "relational" contracts), good faith, co-operation and loyalty are required. As such, good faith was more likely to be implied as a term of the contract.

In *D&G Cars* it was held that the particular features of the contract (which was a five-year contract setting out the procedure for disposing of recovered vehicles by D&G Cars, for the Essex Police Authority) warranted the inclusion of an implied term. It was a *"'relational' contract par excellence"* due to:

i. the length of the contractual relationship;

ii. the number of transactions; and

iii. the substance of the contract (which, in this case, was dealing with the public's property as potential evidence for criminal investigations).

The Court concluded that acts which would *"compromise the mutual trust and confidence"* between the parties would be a key factor in determining whether there had been a breach of this implied term.

Parties negotiating what could be termed "relational" contracts should, therefore, be cautious about the risk that they may be found to be subject to implied duties of good faith/integrity, and the consequential opportunities for parties to allege breaches of such an implied term further down the line.

Given the current lack of certainty, it is likely that the Court will provide further guidance in the future as to the type of contract which can be a "relational" contract, and what constitutes a breach of integrity.

A NEW FINANCIAL LIST FOR 2016

An important development in 2016 will be the progress of the Financial List, a new court initiative designed to help English law respond to rapid changes in the global financial markets. The Financial List comprises a specialist group of judges, drawn from the Commercial Court and the Chancery Division, who will focus on cases in which:

i. the principal financial dispute is worth at least £50m or equivalent;

ii. particular financial market expertise is required; or

iii. issues of general market importance are raised.

Such cases will allow for streamlined procedure, and for declarations of general authoritative guidance extending beyond the specific issues of the dispute at hand.

FINANCIAL CRIME

Basic risk management for financial institutions has never been more under the spotlight than in 2015, as illustrated by a number of financial crime related cases.

ANTI-MONEY LAUNDERING – THE NEED TO PROBE COMMERCIAL RATIONALE

The Privy Council's decision in *Credit Agricole v Papadimitriou* (24 March 2015), and the recent financial penalty imposed upon Barclays Bank by the FCA (26 November 2015), highlight the great importance of interrogating obvious red flags in the context of both day-to-day banking and financial transactions. In both cases, the financial institution was penalised for failing to question the commercial rationale of the relevant transaction.

The Claimants in Papadimitriou had been the victims of a $15m fraud. They alleged that this fraud had succeeded partly because the bank had failed to follow up on warning signs apparent from the source of certain funds (Panama and Liechtenstein) so as to seek an explanation for the underlying transaction. Had the bank done so, it would probably have deduced that the payment flows were designed to conceal the origin of the funds, and stopped them from leaving the relevant account. Instead, the Privy Council found that the bank was on constructive notice of the victims' proprietary rights and that, as a result of its due diligence failings, it should compensate the Claimants in the amount of c.$10m. The relevant events occurred in 2000/2001, long before the implementation of the more sophisticated checks and controls which are expected today. Nevertheless, the Privy Council's finding that there is an obligation to probe the commercial rationale of an underlying transaction, by seeking explanations for unusual features, is a very modern reminder of the need for vigilance, and the pitfalls of lazily waving transactions through without question.

In the case of Barclays, the FCA did not make a finding that the £1.88bn transaction in question (an investment in notes backed by warrants and third party bonds), which had been executed for ultra-high-net-worth "sensitive" PEPS, actually involved financial crime. However, the FCA found that despite many red flags the bank failed to establish the purpose and nature of the transaction, and failed to sufficiently corroborate the clients' stated sources of wealth and funds for the transaction through enhanced due diligence (EDD).

These failings occurred in circumstances where features of the business relationship indicated a higher level of financial crime risk, such as:

- the transaction involved a number of offshore companies and a trust across multiple jurisdictions, as well as temporary bank accounts in different currency denominations;
- the size of the transaction was extraordinary compared to previous deals;
- difficulties in obtaining adequate documents including a complete Trust Deed;
- clients demanding an exceptional degree of confidentiality;
- clients changing tack when questioned about certain proposed levels of investment or payments to third parties; and
- the total investment was received in more than 20 separate transfers with names of individual transferors unexpectedly omitted.

At one point, a volte face by the clients in regard to a proposal that one client would share in the deal proceeds without having made a capital contribution, led to the bank agreeing not to require the clients to answer additional EDD questions. In addition, the heightened degree of confidentiality caused the bank not to enter the clients' details on the computer systems.

Despite some obvious high risk indicators, therefore, the bank failed to guard against the risk of it being used to facilitate financial crime by exercising proper vigilance. By failing to take appropriate EDD measures; to corroborate the clients' sources of wealth and funds; to conduct enhance monitoring; and to maintain adequate records, as well as its decision ultimately to accommodate the clients in almost every respect, the bank inevitably incurred a very stiff penalty of £72m.

BRIBERY AND CORRUPTION – FIRST EVER DEFERRED PROSECUTION AGREEMENT

The year culminated in the Serious Fraud Office (SFO) obtaining court approval for the first ever Deferred Prosecution Agreement (DPA) under Schedule 17 to the Crime and Courts Act 2013 (in force since 24 February 2014) (click **here** for our eBulletin on the topic). In what was a double first, the DPA related to an alleged offence by a commercial organisation under section 7 of the Bribery Act 2010, namely failure to prevent bribery committed by an associated person.

In this case, a UK banking institution, SB, together with an overseas affiliate, ST, was negotiating the terms of a joint mandate for a private placement on behalf of a foreign government (FG). Whilst doing so, SB failed properly to address the sudden introduction to the deal of an overseas, fee-sharing intermediary (A). This event should have triggered a concern about a possible "associated person", and it should have caused an immediate probe into the specific purpose and role of A, including its proposed interaction with the client, FG. Whilst SB conducted due diligence in relation to the client, FG, it allowed the due diligence on A to be conducted by its affiliate, ST.

This is the first case to consider the meaning of "associated" person under section 8 of the Bribery Act, which is defined as a person who performs services for and on behalf of a commercial organisation, intending to obtain or retain business or an advantage in the conduct of business for the organisation. Examples are given in section 8 of employee, agent, or subsidiary. ST was not a subsidiary of SB, but an affiliate, and, without giving any reasons, the judge agreed that both ST and its Chief Executive and Head of Investment Banking were associated persons. It is possible that this was because SB and ST were acting jointly, such that they were considered to be providing services for each other. Any debate about this was curtailed when SB agreed with the SFO's conclusions in the statement of facts submitted to the Court as part of the DPA proposal.

One of the questions raised at the time of DPAs being introduced was whether the SFO would use them for serious cases or save them for cases at the lower end of the spectrum. Nevertheless, the facts of this case made it easy for the Court to bless a DPA as being in the interests of justice - the possible offence was self-reported at the earliest opportunity; the extent of SB's co-operation in the subsequent investigation was fulsome; and SB itself had become a substantially different organisation since the events in question following a corporate acquisition.

As the SFO itself has said since the DPA was approved, the priority for commercial organisations should not be spending heavily on policies, but developing a culture in which individuals can identify high risk situations and react accordingly. Failures to conduct enhanced due diligence in the face of red flags such as the involvement of a third party in a government transaction in a high risk country, or to identify and deal with the presence of a PEP, at the very least call for rigorous refreshment of internal training programmes.

CONTACT DETAILS

If you would like further information or specific advice on any of the issues raised in this update please see the following page for details of our banking and finance dispute resolution team.

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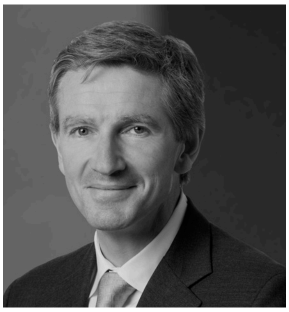
LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME



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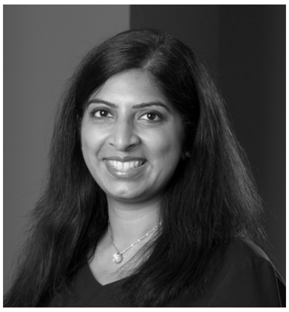

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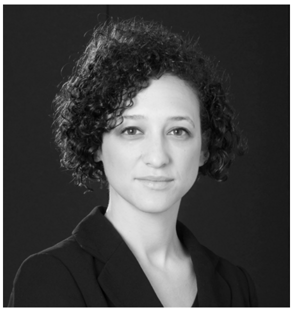

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