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The Brazil Practice Newsletter

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Quinn Emanuel Once Again Named to the "Fearsome Foursome"

Quinn Emanuel has once again been named one of the "four law firms that strike fear in the hearts of their litigation opponents more than any other in the industry," according to a report released Wednesday that calls the firms the "fearsome foursome." The 2019 "Fearsome Foursome" were selected by BTI Consulting based on over 350 phone interviews with General Counsel, Chief Legal Officers, and other legal decision makers at companies with at least $1 billion in revenue in the U.S. "These are the firms they most fear seeing on the other side of the table because they are relentless, very smart, and play to win — and win big," the report said. This is the sixth time Quinn Emanuel has been named to the "Fearsome Foursome."

International Arbitration Specialist Mark McNeill Joins QE in New York

Mark McNeill has joined the firm as a partner in the New York office. He previously headed Shearman & Sterling's arbitration practice in London. He has represented companies and States in numerous commercial and investment treaty arbitrations, including in matters involving intellectual property, technology, nuclear construction, pharmaceuticals, business combinations, oil & gas, taxation, mining, insurance, and reinsurance. Mark was also an Attorney-Adviser in the Office of the Legal Adviser of the U.S. Department of State, where he represented the United States in investor-state arbitrations under the investment chapter of the North American Free Trade Agreement (NAFTA).

QE Obtains Rare General Personal Jurisdiction Victory Post-*Daimler* over Brazilian Businessman

Quinn Emanuel represents Sequip Participações S.A., a Brazilian company, against Paulo Marinho, a wealthy Brazilian businessman who brought and lost a Brazilian arbitration against our client. Mr. Marinho refused to pay the award. After fruitless attempts to collect the award in Brazilian proceedings from Mr. Marinho, Sequip turned to Quinn Emanuel to enforce the award in Florida. Through a private investigator that we retained, we learned that Mr. Marinho had cleverly hidden his assets through a maze of British Virgin Islands ("BVI") shell companies and continued to enjoy those assets in Florida.

Mr. Marinho enjoyed a life of luxury, but claimed to own none of it as we moved to enforce Sequip's award against him. He lived in several luxury oceanside condos in Fisher Island, Miami—the richest zip code in the United States—and drove a Rolls Royce Ghost, a Bentley Azure, and a Rolls Royce Phantom. His Florida-based bank account statements were filled with regular multi-thousand dollar purchases in Florida. He was embroiled in past litigation with his neighbor in Florida over a leaky hot tub. And yet he claimed that he was merely a "visitor" or "guest" in Florida. As Sequip closed in on his assets, his wife had suspiciously become the ultimate owner of several Fisher Island condos through a chain of BVI companies. Almost all the funds drained his accounts as soon as we commenced our enforcement action on behalf of Sequip.

Despite these contacts with Florida, Mr. Marinho moved to dismiss for lack of personal jurisdiction. The U.S. Supreme Court, through its decision in

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Daimler AG v. Bauman, 134 S. Ct. 746 (2014), had substantially raised the bar on establishing general personal jurisdiction and established the onerous "at home" standard. Mr. Marinho maintained that, as a foreign non-citizen with a permanent residence in Brazil, he could not be subject to the exercise of general personal jurisdiction in U.S. courts.

After several contentious discovery hearings and a deposition in Buenos Aires, Quinn Emanuel obtained a rare general personal jurisdiction victory in the post-*Daimler* era over Mr. Marinho, convincing the Southern District of Florida federal court to deny Mr. Marinho's motion to dismiss. The Florida court held that Mr. Marinho's cumulative contacts, even if they were "primarily for pleasure," were so continuous and substantial that he was essentially "at home" in Florida. In so ruling, the court adopted wholesale Quinn Emanuel's arguments—directly lifting quotes from our brief.

Initially, the court's judgment said nothing about the amount Mr. Marinho owed Sequip, the rate of interest, or the date of currency conversion from Brazilian Reals to U.S. dollars. We moved to amend the judgment and again obtained victory for Sequip, defeating Mr. Marinho's arguments about the interest rate and date of conversion and winning an extra several hundred thousand U.S. dollars for Sequip.

Quinn Emanuel was prepared to continue our battle on Mr. Marinho's appeal to the Eleventh Circuit, but in the summer of 2019, as a result of our series of victories, Mr. Marinho agreed to a favorable global settlement with Sequip. The case is *Sequip Participações S.A. v. Paulo Roberto Franco Marinho,* Case No. 15-MC-23737-JAL (S.D. Fl.).

The SFO's Corporate Co-operation Guidance: Clarifying the Burdens of Cooperation, but Keeping the Benefits Obscure

A few weeks ago the UK Serious Fraud Office ("SFO") published its long-anticipated guidance on the steps companies should take when choosing to cooperate with the agency's investigations. A mere five pages long, the SFO's Corporate Co-operation Guidance (the "Guidance") nevertheless provides welcome insight on what the SFO takes cooperation to mean, and what actions will be perceived as inconsistent with cooperation. The Guidance is focused on two areas: (1) preserving and providing material (e.g., electronic communications, financial records, etc.) to the SFO; and (2) providing the SFO with witness accounts (i.e., interview memoranda or notes) and navigating attendant privilege issues. The latter section of the Guidance is notably double-edged, offering clarity with a cost by imposing an additional burden when asserting claims of privilege over witness accounts. While a step in the direction of clarity, the Guidance leaves certain key questions unanswered and indicates potential points of tension with equivalent guidance provided by the U.S. Department of Justice ("DOJ").

I. Overview

Much of the Guidance simply restates good investigative procedure and will look familiar to white collar and financial crime practitioners in the U.S. and UK. Despite the Guidance's disclaimer that "co-operation means that no checklist exists that can cover every case," the document looks and feels like a checklist, especially across its middle three pages, where it ticks off bulleted steps that the SFO views as consistent with cooperation. Rather than a deficiency, the checklist approach is refreshingly simple, direct, and clear, and seems more likely to produce concrete results than the use of amorphous standards. For companies considering cooperation, the SFO's stringent expectations and the consequent burden on the company, in terms of time, resources, and transparency, are now clearer than they have ever been.

The Guidance's primary drawback is that any potential benefit a company gains for taking on the burden of cooperation is left unclear. The Guidance is nearly silent on what form the benefit will take or how cooperation will be factored into the SFO's broader decision-making process around the resolution of an investigation. Although perhaps to be expected in light of the SFO's previous reticence to issue guidance documents, it heavily caveats any suggestion that an organisation's adherence to the terms of the Guidance will deliver a particular result. For instance, the Guidance notes that: (1) "even full, robust co-operation . . . does not guarantee any particular outcome"; (2) "each case will turn on its own facts"; and (3) an "organisation's co-operation is only one of many factors" that the SFO will take into account when deciding how an organisation should be treated. Companies understandably want to know

what benefits they are likely to receive in exchange for cooperating with an SFO investigation. The SFO, on the other hand, wants to preserve discretion to weigh up the value of cooperation as appropriate given the wider circumstances. Thus, while the SFO's baseline expectations for cooperation have become much clearer, the mechanism by which cooperation credit will be given for meeting those expectations remains unhelpfully murky. The SFO may rightly feel that it has sufficient leverage over its investigative targets to make this asymmetry work. However, the risk is that companies will be aware only of the upfront cost of cooperation, but not its potential return, and thus will be under-incentivized to cooperate with the SFO. This issue will be most acute in situations where a company is not the target of an investigation, but would consider self-reporting misconduct to gain closure and reduce future exposure. The SFO's cooperation carrot may seem too uncertain.

Nevertheless, the Guidance is a step toward clarity. It confirms what the SFO views as appropriate investigative steps for companies to take in the context of cooperation. It likewise offers direction on specific investigative steps in key areas, including preservation and production of electronic data, production of company financial information, and the handling of company staff as witnesses during internal investigations. The Guidance is particularly useful when it comes to the treatment of digital evidence and devices, which is an area of perennial concern for corporate counsel in light of rapidly evolving corporate and personal communication technologies and the varied retention, encryption, and BYOD practices employed across different companies. The Guidance is similarly straightforward and prescriptive when it comes to the preservation and production of financial records and analysis. Despite keeping the precise benefits of cooperation obscure, the SFO has taken a significant step in clarifying what cooperation means in practice.

II. Guidance Highlights: The Hallmarks of Full Cooperation

The SFO identifies the following steps, among others, as forming part of full cooperation by any organisation:

- Reporting actual or suspected wrong-doing within a reasonable time of the issue or suspicions coming to light
- Identifying responsible employees without regard to seniority or position; likewise not pinning undue blame on employees or tipping employees off to the existence of an investigation
- Observing best practice in the preservation and production of corporate data and notifying the SFO when the company suspects data may have been lost, deleted, or destroyed
- Providing relevant material to the SFO promptly, in a structured format, and on a rolling basis where appropriate
- Providing relevant material that is held abroad if it is in the possession or under the control of the company
- Providing a privilege log that states the basis for asserting privilege
- Making accountants or appropriate members of staff available to speak about financial records and money flow when requested
- Providing the SFO with background information concerning industry knowledge and common practices
- Providing information about other market actors to help advance the SFO's investigation
- Keeping the SFO closely informed regarding key developments with potential witnesses
- Refraining from sharing or inviting comment from a witness on another person's account or showing the witness documents that they have not previously seen
- Providing notes of witness interviews and preparing to waive privilege over such notes where it would otherwise apply
- Consulting with the SFO before interviewing witnesses or taking disciplinary action against staff involved in the investigation

At least two points stand out here as potential irritants in the cooperation process. The first is that cooperating companies are expected to disclose foreign-held data within their control. This will no doubt create conflicts with foreign data privacy and data protection laws. The SFO will need to adjudicate such conflicts on a case-by-case basis, but the larger potential fines under the EU General Data Protection Regulation will no doubt make this a challenging trade-off for companies that otherwise would like to offer full cooperation with regard to their global data.

The second point relates to the requirement to have independent counsel certify the existence of privilege over interview memoranda and similar documents that a company intends to withhold on the basis of privilege. While perhaps understandable that the SFO does not want to take a company's word for it, the requirement to have independent counsel certify each privilege assertion will be cumbersome,

time-consuming, and costly. Time will tell, but the added burden of certification may prove to be a significant stumbling block for companies otherwise poised to offer full and timely cooperation.

III. Comparison with U.S. Practice: The Benefits of Cooperation; Handling Witnesses; Waiving Privilege

There are three areas where the Guidance diverges notably from the equivalent U.S. practice under DOJ's Foreign Corrupt Practices Act Corporate Enforcement Policy (the "FCPA" and "FCPA Policy"):

1. ***The benefits of cooperation:*** The FCPA Policy, which is controlling for FCPA enforcement actions and used as "nonbinding guidance" for criminal prosecutions outside of the FCPA context, expressly provides for: (1) a "presumption" that DOJ will decline to prosecute companies that voluntarily self-disclose, fully cooperate, and timely and appropriately remediate underlying issues; and (2) a 25% penalty reduction for companies that do not voluntarily self-disclose, but nevertheless do cooperate and remediate.

To be sure, there are still ambiguities regarding how the FCPA Policy will ultimately be administered, but the commitment to some form of concrete incentive for cooperation offers companies far greater certainty as to what they can expect if their cooperation is successful. While the SFO and DOJ appear to take a similar view that cooperation is just "one of many factors" that they will consider in determining how to resolve an investigation, the SFO's Guidance does not provide a company with any real certainty about the benefits that it might receive for cooperating.

2. ***Handling witnesses:*** In a March 2019 update to the FCPA Policy, DOJ explained that although it may ask a company to de-conflict "witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that [DOJ] intends to take as part of its investigation," it "will not take any steps to affirmatively direct a company's internal investigation efforts." Further, in light of a May 2019 S.D.N.Y. decision in *United States v. Connolly*, DOJ may now also be concerned about even creating the appearance of providing such direction, as it would increase the risk of a company's investigative actions being imputed to the government (which brings along attendant constitutional protections). *See* S.D.N.Y. Decision May Have Outsized Implications on DOJ's "Outsourcing" of Investigations.

In contrast, the SFO's Guidance asks companies to obtain pre-approval before speaking with witnesses, and directs companies on types information and documents should not be shared with those witnesses.

3. ***Waiving privilege:*** The SFO's Guidance contemplates that a company should – notably the language does not say "shall" – consider waiving privilege over interview memoranda in furtherance of its cooperation in an SFO investigation.

In contrast, the FCPA Policy expressly states that a company need not waive attorney-client privilege or work product protections as part of its cooperation in a DOJ investigation. That SFO and DOJ guidance take markedly different approaches here is important because a company making a selective disclosure of privileged materials to the SFO opens itself up to the argument that it has waived privilege with regard to the subject matter of those disclosures.

IV. Conclusion

The Guidance offers welcome and much-needed insight into how the SFO thinks about corporate cooperation and sets forth the investigative steps it expects companies to take. The nature of the benefits that will flow to cooperating companies remains obscure, however, and the Guidance lacks the presumption of declination offered by DOJ. Moreover, potential issues with the Guidance related to foreign data protection laws and the requirement for the independent legal certification of privilege assertions may further complicate a company's decision to cooperate.

Brazil Practice Contacts

Quinn Emanuel's Brazil Practice represents clients in disputes around the world involving Brazilian parties and investments in Brazil. We have represented individuals and companies in some of the most complex and important recent Brazilian disputes. If you have any questions about the issues addressed in this memorandum or would like to discuss how Quinn Emanuel can assist you, please do not hesitate to reach out to:

Michael Carlinsky
Head of Brazil Practice
michaelcarlinsky@quinnemanuel.com
+1 212-849-7150

Lucas Bento
Senior Associate
lucasbento@quinnemanuel.com
+1 212-849-7552

quinn emanuel urquhart & sullivan, llp

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LOS ANGELES
865 S. Figueroa St.,
10th Floor
Los Angeles, CA 90017
+1 213-443-3000

NEW YORK
51 Madison Ave.,
22nd Floor
New York, NY 10010
+1 212-849-7000

SAN FRANCISCO
50 California St.,
22nd Floor
San Francisco, CA 94111
+1 415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr.,
5th Floor
Redwood Shores, CA 94065
+1 650-801-5000

CHICAGO
191 North Wacker Dr.,
Suite 2700
Chicago, IL 60606
+1 312-705-7400

WASHINGTON, D.C.
1300 I Street NW,
Suite 900
Washington, DC 20005
+1 202-538-8000

HOUSTON
Pennzoil Place
711 Louisiana St.,
Suite 500
Houston, TX 77002
+1 713-221-7000

SEATTLE
600 University Street,
Suite 2800
Seattle, WA 98101
+1 206-905-7000

BOSTON
111 Huntington Ave.,
Suite 520
Boston, MA 02199
+1 617-712-7100

SALT LAKE CITY
60 E. South Temple,
Suite 500
Salt Lake City, UT 84111
+1 801-515-7300

TOKYO
Hibiya U-1 Bldg., 25F
1-1-7, Uchisaiwai-cho,
Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
90 High Holborn
London WC1V 6LJ
United Kingdom
+44 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 40 89728 7000

MUNICH
Hermann-Sack-Straße 3
80331 Munich
Germany
+49 89 20608 3000

PARIS
6 rue Lamennais
75008 Paris
France
+33 1 73 44 60 00

HONG KONG
1307-1308 Two Exchange Square
8 Connaught Place
Central Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth Street
Sydney, NSW 2000
Australia
+61 2 9146 3500

BRUSSELS
Blue Tower
Avenue Louise 326
5th floor
1050 Brussels
Belgium
+32 2 416 50 00

ZURICH
Dufourstrasse 29
8008 Zürich
Switzerland
+41 44 253 80 00

SHANGHAI
Unit 502-503, 5th Floor, Nordic House
3 Fenyang Road, Xuhui District
Shanghai 200031
China
+86 21 3401 8600

PERTH
Level 41
108 St Georges Terrace
Perth, WA 6000
Australia
+61 8 6382 3000

STUTTGART
Büchsenstraße 10, 4th Floor
70173 Stuttgart
Germany
+49 711 1856 9000