October 2016

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Structuring Foreign Investment to Ensure Treaty Protection

Although it is common practice for businesses to structure their investments abroad through jurisdictions that maximize tax and other advantages—such as the Isle of Man or the British Virgin Islands—investors less frequently plan to ensure that their foreign investments are structured so as to obtain protections from sovereign interference, such as regulatory takings or taxation. Often businesses are unaware that there is a network of treaties that protect investors abroad against abusive sovereign conduct. Taking advantage of that network can require advance planning.

These treaties include investment treaties between two States (bilateral investment treaties, or BITs), investment treaties between several States, which are typically related to a specific subject matter such as energy investments, or a specific region (multi-lateral investment treaties, or MITs) and free trade agreements (FTAs). BITs, MITs and FTAs typically contain substantive protections that allow foreign investors to bring claims against host States in specialized fora. But to obtain those protections, thought must be given to the holding structure for foreign investments so as to take advantage of an applicable and effective treaty.

Companies of all sizes and varieties that invest in foreign States often encounter difficulties with the foreign governments and their officials. Take, for example, recent fees and taxes levelled by Hungary on grocery stores that appear to have targeted major foreign grocery chains. In another well known example, international oil majors and mining

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Quinn Emanuel Named a "Litigation Powerhouse" by *Law360*

Quinn Emanuel has been named a "Litigation Powerhouse" and one of the top three firms for litigation by *Law360*. The firm was recognized for its many recent high-stakes victories, including its victories on behalf of the Federal Housing Finance Agency ("FHFA") in what has been described as a historic partnership between a government regulator and a private law firm. Quinn Emanuel won an $806 million judgment for FHFA in residential mortgage-backed securities litigation against Nomura. That trial victory came after winning nearly $18 billion in settlements from 16 other major investment banks that FHFA had sued on similar claims. The firm also won one of the largest private antitrust settlements in history—$1.86 billion—on behalf of a class accusing major banks of rigging the market for credit default swaps. According to *Law360*, Quinn Emanuel is "the go-to shop for high-dollar, high-profile litigation against Wall Street banks." Q

Charles Verhoeven and Kevin Johnson Named "Top Intellectual Property Attorneys" by the *Daily Journal*

San Francisco partner Charles Verhoeven and Silicon Valley partner Kevin Johnson were named to the *Daily Journal*'s annual list of "Top Intellectual Property Attorneys." Mr. Verhoeven was recognized for two outstanding patent victories on behalf of Google against plaintiff SimpleAir, Inc.: first, a $300 million defense jury verdict, and second, a complete Federal Circuit reversal of an $85 million verdict in a separate but related matter. Mr. Johnson was selected for his work on behalf of Samsung in the *Apple v. Samsung* smartphone wars. Both partners were also recognized as "Top IP Attorneys" by the *Daily Journal* in 2015. Q

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companies operating in Venezuela have been struck by several rounds of nationalization in recent years.

Notably, interference with foreign investment, such as expropriations and regulatory takings, is no longer the sole province of governments in developing States. In the wake of the global financial crisis, developed States also took regulatory steps that had disproportionate impact on foreign investors. For instance, in recent years the Kingdom of Spain, a European Union Member State with over 40 years of orderly democratic transitions, has had more claims brought against it pursuant to investment treaties than any other State in the world, all in relation to regulatory actions it took towards renewable energy investors. Belgium too has been the subject of a recent action brought by Chinese insurance company Ping An over the State-led break up of Fortis Bank.

Because of scenarios like those described above, it is highly advisable for businesses investing abroad to structure their investments in foreign host States—irrespective of that State's political risk profile—through States that have an effective investment treaty in place with the State hosting the investment. Below we provide background on those investment treaties and how businesses can structure their investments to obtain their protections

What Are Investment Treaties?

Investment treaties are public international law undertakings to protect and promote foreign covered "investments". Covered investments include tangible and intangible property, interests in companies, rights under contracts, licenses and so forth.

BITs, MITs and FTAs treaties provide protection from political risk. Those protections include, amongst others, obligations on the part of a State to provide investments fair and equitable treatment; to refrain from expropriation without prompt, adequate and effective compensation; to treat foreign investments no less favorably than nationals of the host State; and to refrain from discrimination on the basis of nationality. Some treaties oblige host States to comply with contracts and other forms of undertaking given with regard to foreign investments.

States consent to arbitrate disputes concerning breaches of those obligations through unilateral offers to arbitrate found in BITs, MITs and FTAs. These disputes are ordinarily adjudicated before a facility created by the World Bank to specifically hear disputes between investors and states known as the International Centre for the Settlement of Investment Disputes (ICSID) or *ad-hoc*, using a set of rules created by the United Nations Commission on International Trade Law (the UNCITRAL Rules).

Structuring Investments to Ensure Investment Treaty Protection

To ensure protection of an investment through a BIT or an FTA, the first step is to identify the BITs and FTAs that the host jurisdiction has entered into with other States and that are in force. Occasionally States sign investment treaties, but for various reasons fail to ratify them such that the agreement does not come into force, or in other instances, a State has let the agreement lapse. There are several means of identifying the investment treaties to which a particular State is party and lawyers specializing in investment treaty arbitration can assist in pinpointing a treaty between the host State and another State that will contain the most advantageous treaty protections.

Once relevant investment treaties have been identified, they must be reviewed to determine that they (i) contain the necessary complement of investment protections; and (ii) allow investors themselves to bring claims against the host State. This review is essential, as not all investment treaties contain the full range of substantive protections and, in some cases, do not actually allow an investor to seek redress before an international tribunal for infringing upon those protections.

A review of potentially applicable investment treaties allows businesses to evaluate jurisdictions comparatively and identify one that both affords a company's investment vehicle or holding company access to an investment treaty, together with a suitable tax and regulatory regime. Jurisdictions such as the Netherlands, Luxembourg, and sometimes the offshore territories of the United Kingdom, the BVI, Jersey, Isle of Man and Gibraltar, are popular jurisdictions in that they offer tax advantages and are also party to a broad network of investment treaties with substantive investment protections.

Following that step, a business will typically incorporate a holding company in the chosen jurisdiction and insert it into the chain of ownership so that it sits above the investment or any locally-incorporated special purpose vehicle. It is critical that advice be taken before structuring the investment to ensure that issues such as control are assessed and accounted for.

Importantly, corporate re-structuring to achieve treaty protection can also be carried out for existing

investments, not just those that are in the planning stages. Where a company has identified that one of its investments may lack coverage by an investment treaty, it can restructure its investment in order to obtain the protections of an applicable treaty. Crucially, this restructuring must occur before a *dispute* arises in order for the investment to receive treaty protection in that dispute.

Enforcement of Treaty Protections

Once a company has structured its investment through a jurisdiction that has an applicable BIT, MIT or FTA in place with the host State for its investment, it has the ability to bring claims against that State before ICSID or under the UNCITRAL Rules to seek relief for certain kinds of government interference.

Thus, by way of example, in 2009, a Canadian gold mining company that had invested in developing two mining concessions in Venezuela, found itself the victim of wrongful government interference when Venezuela suspended mining activities and ultimately terminated the company's concessions, seized the company's assets and occupied the project site. After bringing claims at ICSID under the Canadian-Venezuelan BIT, the Canadian company obtained $760 million in damages for Venezuela's breaches of the BIT's "fair and equitable treatment" standard. Venezuela to date has paid 50% of the award and has committed to paying the award in full.

There is historically a record of States complying with awards rendered through investment treaty arbitration. For instance, Venezuela, the subject of numerous BIT claims, has traditionally paid awards issued against it, including the award described above. Further, Argentina, a State that for years opposed paying out the numerous awards rendered against in the wake of the collapse of the Argentine economy from 1998 to 2002, has begun to settle those awards, albeit often at a discount. Another prominent example is Ecuador's payment of a $100 million award to Occidental Petroleum in 2008.

Taking the above-described steps to ensure treaty protections are in place is necessary when investing in any jurisdiction. Such steps should be part of the routine due diligence efforts of any company seeking to make an investment abroad. Q

Quinn Emanuel Recognized for "Global Pro Bono Dispute of the Year" by *The American Lawyer*

Quinn Emanuel's work in *Morales-Santana v. Lynch* was recently recognized at *The American Lawyer*'s Global Legal Awards, which honored law firms that have played a substantial role in the most distinguished international legal work of the past year. The firm's achievements in *Morales-Santana v. Lynch* were selected from a group of more than 200 entries as "Global Pro Bono Dispute of the Year." On behalf of client Luis Ramon Morales-Santana, Quinn Emanuel won a landmark constitutional ruling by the Second Circuit, which held unconstitutional sections of the Immigration and Nationality Act governing the citizenship rights of children born to unmarried parents that facially discriminated on the basis of gender. The decision has broad implications not only as a matter of constitutional and statutory law, but also for numerous individuals (in the United States and elsewhere) who—like Mr. Morales—are now deemed to be U.S. citizens as a result of the Second Circuit's decision. After the firm's Second Circuit win, the Supreme Court granted the Solicitor General's certiorari petition. Quinn Emanuel is therefore representing Mr. Morales-Santana before the Supreme Court this term. Oral argument will be heard on November 9, 2016. Q

U.S. Claims Ability to Prosecute Foreign Actors Acting Abroad for Violating U.S. Sanctions Laws

On March 19, 2016, FBI agents arrested Turkish citizen and resident Reza Zarrab at Miami International Airport, soon after he landed with his wife and young child to visit Disney World. The principal charge, brought by the U.S. Attorney in Manhattan, Preet Bharara, was violating the Iran Transactions and Sanctions Regulations ("ITSR").

The case marks the first time that U.S. prosecutors have attempted to enforce a sanctions regime by putting in their cross-hairs a foreign citizen in a foreign country who directed a foreign bank to transfer funds between foreign entities. The prosecutors have justified the exercise of jurisdiction solely on the ground that the defendant ordered the funds transfers in U.S. dollars. This position, if accepted by the courts, would represent a paradigm shift in U.S. sanctions jurisdiction which puts foreign companies and individuals in peril of U.S. prosecution on the basis of the currency they use rather than U.S. citizenship, U.S. residency, or activity carried out in the territory of the United States.

Mr. Zarrab, who is represented by Quinn Emanuel, is a 34-year-old gold trader with dual Iranian and Turkish citizenship. The indictment against him charges that from 2010 to 2015, Mr. Zarrab engaged in hundreds of millions of dollars' worth of international funds transfers that illegally sought to evade U.S. sanctions laws against trading with or for the benefit of Iran or persons in Iran. On the sanctions charge alone, Mr. Zarrab faces a statutory maximum sentence of 20 years' imprisonment.

News stories about Mr. Zarrab's case to date have focused on such glossy topics as his offer to post a $50 million bond and pay for a private armed guard service as a means of obtaining bail (an effort that was unsuccessful) or the central role he played in a corruption scandal that struck the government led by Turkish Prime Minister Recep Tayyip Erdogan in late 2013. The manner in which U.S. prosecutors have alleged that Mr. Zarrab transgressed U.S. sanctions law, however, is at least as worthy of note, because of the implications for foreign companies and individuals who directly or indirectly perform services for sanctioned governments or sanctioned entities and whom to date have believed themselves beyond the reach of U.S. prosecution so long as they do not conduct activity in the United States.

The indictment against Mr. Zarrab charges that he conspired to illegally export the "service" of "international financial transactions" from the United States, by requesting funds transfers from one foreign country to another (for example, from Turkey to China) and for the benefit of Iran (for example, to help an Iranian company pay for goods such as shoes or clothes purchased from a Chinese company). In recent briefing opposing Mr. Zarrab's motion to dismiss the indictment, U.S. prosecutors clarified that they believe that this conduct is illegal solely because Mr. Zarrab requested foreign banks to make funds transfers to other foreign banks in the currency of U.S. dollars. In the prosecutors' view, the request by a customer of a foreign bank that the transfer be effected in U.S. dollar means that Mr. Zarrab caused a dollar clearing transaction to take place in the United States. According to U.S. prosecutors, the "service" exported by Mr. Zarrab for the benefit of an Iranian person or company was the dollar clearing transaction performed by a U.S. bank, as one component of a funds transfer from one foreign country to another and requested by a non-U.S. citizen or resident, from outside the United States.

Mr. Zarrab's motion to dismiss the indictment is pending. He has argued that the International Emergency Economic Powers Act ("IEEPA"), the statute under which the ITSR were promulgated, expressly limits jurisdiction to "any person, or with respect to any property, subject to the jurisdiction of the United States." He has further pointed out that the phrase operative in his prosecution—"person . . . subject to the jurisdiction of the United States"—has been interpreted for decades in sanctions law, including by Congress and by the U.S. Office of Foreign Assets Control to mean, at an outer limit, (1) citizens of the United States, (2) persons actually within the United States, (3) corporations organized under U.S. law, and (4) organizations owned by any of the foregoing.

Mr. Zarrab has argued that because it is undisputed that he fits none of these four categories, he cannot be charged under IEEPA and the ITSR. Also included as part of his motion to dismiss was a catalogue of all prior reported U.S. criminal prosecutions for violating the prohibition on the export of services from the United States and for the benefit of Iran, which shows that in each those prior prosecutions, the defendants squarely fitted within the four categories of persons historically deemed to constitute the only persons "subject to the jurisdiction of the United States."

The most recent highly publicized prosecutions involving high-volume transactions for the benefit of Iran targeted multinational banks such as Credit Suisse and BNP Paribas. Those cases, however, involved a bank that operates at least in part in the United States and clearing transactions that were undertaken either by a U.S. arm of the bank itself, or by U.S. banks with whom the defendant bank had a correspondent banking relationship. The charging of a bank customer who acted from outside the United States, and through banks not alleged to have engaged in wrongdoing, is a step that takes a far broader view of criminal jurisdiction. In the past, enforcement against foreign actors acting abroad has taken the form of "designating" such actors—a secondary sanction that results in U.S. persons being forbidden from dealing with such actors but no criminal penalty.

The skirmishing to date has exposed that the U.S. government and its high-profile target, Mr. Zarrab, disagree about a central, critical question underpinning U.S. sanctions laws: their territorial reach. Prosecutors have contended that IEEPA, which has served as the foundation for regulations imposing sanctions relating to numerous countries (including the Balkans, Myanmar, Colombia, Iraq, Libya, The Sudan, and Syria) is intended to create extraterritorial jurisdiction—jurisdiction founded on "effects" in the United States, including those caused by actions taken by foreign persons acting outside the United States. Mr. Zarrab has argued that this viewpoint misapprehends the very nature of sanctions laws, which prohibit U.S. persons and persons in the United States from trading with a designated enemy but cannot, absent complementary sanctions imposed by other countries or treaty bodies, regulate the conduct of foreign persons acting outside the United States.

The stakes of the resolution of Mr. Zarrab's motion are high for foreign individual companies or individuals who while outside the United States engage in funds transfers directly or indirectly for the benefit of sanctioned countries or sanctioned entities. The courts will either hold a jurisdictional line that has been observed since the beginning of the 20th century—that U.S. sanctions laws regulate the conduct of U.S. persons or person in the U.S. only—or green-light extraterritorial jurisdiction based on effects in the U.S. as slender as the execution of a dollar clearing transaction by a U.S. correspondent bank. Q

Prominent Russian Counsel Joins Moscow Office

Prominent Russian counsel, Kirill Parinov, has joined Quinn Emanuel as managing partner of its Moscow office. Mr. Parinov's practice focuses on cross-border litigation, international arbitration, and complex financial disputes. Prior to joining Quinn Emanuel, he served as Group General Counsel and a member of the Management Board for Norilsk Nickel, where he oversaw a global team of over 180 people spread across 8 jurisdictions, covering all areas of litigation affecting a multinational company with a U.S. listing in the heavily regulated mining industry. Prior to this, he was General Counsel of Interros and Sidanco Oil Company. Mr. Parinov was also employed by Atlantic Richfield Company, Vinson & Elkins, and Freshfields in both Moscow and Washington, D.C. He holds a degree in law from Lomonosov Moscow State University and a Master's degree from Southern Methodist University. Since 2008, Mr. Parinov has been a Member of the Joint Commission on Corporate Ethics of the Russian Union of Industrialists and Entrepreneurs and, due to his expertise in developing cross-border litigation and complex financial strategies across the globe, he regularly appears as a panelist or keynote speaker at international seminars and conferences. Q

International Trade Update

Litigating the First Case of International Economic Cyber Espionage Under Section 337 of the Tariff Act. In what has been described by analysts as the case that "could be the most significant development in U.S. steel trade in a quarter of a century," on May 26, 2016 the U.S. International Trade Commission (ITC) instituted investigation in *Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002. The Respondents in the investigation include nine out of ten of the largest Chinese steel makers that also occupy positions from second to eighteenth on the list of the world's largest steel companies. The complaint—filed by Quinn Emanuel on behalf U. S. Steel on April 26, 2016—alleged three categories of violations by Respondents under section 337 of the Tariff Act of 1930:

(i) A conspiracy to fix prices and control output and expert volumes.

(ii) Theft of trade secrets.

(iii) False designation of origin or manufacturer.

By spurring investigation of these claims at the ITC, Quinn Emanuel is seeking to put an end to illegal practices that are causing extensive damage to U. S. Steel and that also threaten to destroy or substantially injure an industry in the United States: anti-competitive conduct, cyber-theft and illegal transshipment. While each of the three illegal practices are frequently faced by legitimate enterprises, the cyber-theft of trade secrets—or electronic industrial espionage—is increasingly severe and widespread.

Whereas it is not uncommon for the ITC to institute investigations based on claims of trade secret theft, this is the first time the ITC has instituted an investigation where the alleged unfair act is trade secret theft through computer hacking. Perhaps as a result, the investigation into the violation of misappropriation and use of trade secrets has garnered the most attention from court-watchers. The case also appears to be the first ITC investigation where a sovereign state is alleged to have perpetrated the trade secret theft. U. S. Steel alleges that elements of the Chinese government targeted a well-known U. S. Steel researcher to steal U. S. Steel's confidential and highly valuable research and trade secrets relating to the next generation of advanced high-strength steels—strong, light and thin-gauge steels used to manufacture fuel-efficient cars. The market for this new lightweight yet strong steel is projected to reach over $21.17 billion by 2021, at a CAGR of 8.2% from 2016 to 2021. And even those estimates are conservative. U. S. Steel further alleges that elements of the Chinese government passed this proprietary, highly-valuable information on to Chinese steelmakers, who then improved their manufacturing processes through the use of U. S. Steel's trade secrets. To date, Respondents' attempts to prevent, terminate and limit the investigation have failed. As discovery is ongoing, this case affords U. S. Steel the unprecedented opportunity to seek through nationwide subpoena power the testimony and production of relevant documents directly from the Chinese steel manufacturer respondents. As with any opportunity, there are an equal amount of challenges, including the logistics and coordination involved in the anticipated review of volumes of documents in Mandarin from several dozen respondents and the imposition and verification of additional safeguards in the identification of the U. S. Steel trade secrets exfiltrated in the cyber breach.

As computers become ever more ubiquitous and online activity increases, the threat and incidences of being hacked, sabotaged and spied on by malign actors also rises. One of the avenues presented to companies that have become victims of cyber-theft and misappropriation of trade secrets is a Section 337 investigation at the ITC. Although damages are not available as a remedy in a Section 337 investigation, the ITC is empowered to exclude products based on trade secret theft from importation into the United States. As one reporter proclaimed, this is "an ITC fight like you've never seen before." And likely not the last.

Patent Litigation Update

Federal Circuit Upholds Ruling That a Coined Term Rendered Functional Claims Indefinite. In *Advanced Ground Information Systems, Inc. v. Life360, Inc.*, --- F.3d ---, No. 2015-1732 (Fed. Cir. Jul. 28, 2016) the United States Court of Appeals for the Federal Circuit upheld the invalidation of two patents based a failure to meet the definiteness requirements of 35 U.S.C. § 112. The *AGIS* decision explains how, under the evolving law of the Federal Circuit, the claims of a patent may be held indefinite based on the use of undefined coined terms—that is, terms not commonly used by persons of skill in the relevant art.

The plaintiff-patentee AGIS brought an infringement suit on two patents in the United States District Court for the Southern District of Florida. Generally speaking, the patents were directed to establishing a communications network for users of mobile devices. All of the asserted claims recited a "symbol generator," which in the context of the claims is a component for generating symbols for display on mobile devices. For example, one patent described generating symbols on the users' cellular phones to represent the location of other users.

The defendant, Life360, offered a two-step

argument that the "symbol generator" term rendered the claims indefinite. First, the defendant argued this term invokes § 112, ¶ 6, which authorizes the use of means-plus-function claiming. (Section 112, ¶ 6 refers to the provision as set forth in the statute before the organizational amendments made by the Leahy-Smith America Invents Act.) Second, the defendant pointed to established Federal Circuit law that a computer implemented means-plus-function term requires that the specification disclose an algorithm for performing the function, on pain of failure to satisfy the § 112, ¶ 2 requirement of definiteness. *See, e.g., Aristocrat Techs. Austl. Pty Ltd. v. Int'l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008).

Agreeing with the district court that, on the first step, the claim term invokes § 112, ¶ 6, the Federal Circuit highlighted the changed standard for resolving this question established in *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1348 (Fed. Cir. 2015) (en banc). Before that 2015 opinion, courts applied a strong presumption that where a claim lacks the special phrase "means for," it is not a means-and-function claim intended to invoke § 112, ¶ 6. In *Williamson*, the *en banc* Federal Circuit eliminated the "strong" presumption and replaced it with a rebuttable presumption—one that a challenger may overcome by a preponderance of the evidence. The standard for determining if the claims fall outside of the provisions of Paragraph 6 is "whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure." *Id*. at 1349. If the answer is "yes", then the claim term is not a means-and-function term.

Plaintiff-patentee AGIS argued in the district court that it had presented unrebutted evidence from its expert that persons of ordinary skill in the art would have understood the claimed "symbol generator" to have a sufficiently definite meaning as the name for structure. However, the Federal Circuit relied on the admission, by the same expert, that the term "symbol generator" was a term coined for the purposes of the patents-in-suit. Reasoning that a coined term is by definition not commonly used by persons of skill in the relevant art, the Federal Circuit concluded that it would therefore not be understood by those persons to have a sufficiently definite meaning as the name for structure. It then went on to note that "symbol generator" by itself does not identify any structure—*i.e.*, it merely states a function. Accordingly, the claims invoked § 112, ¶ 6, and the appellate court affirmed that the first step was met. Notably, the opinion did not scrutinize whether anything in the specification amounted to a definition of this coined term, suggesting that neither party presented such a contention.

At the second step, the Federal Circuit relied on an established line of cases that place very specific demands on the structure corresponding to a computer implemented means-plus-function term. For such terms, the specification must disclose an algorithm for performing the function. *E.g., Aristocrat,* 521 F.3d at 1333*; Finisar Corp. v. DirecTV Grp., Inc.,* 523 F.3d 1323, 1340 (Fed. Cir. 2008). Although there is flexibility in how a patentee may disclose an algorithm, including by prose description, the failure to identify a corresponding algorithm runs afoul of the statutory requirement to "distinctly claim[ ]" what the inventor regards as the invention. 35 U.S.C. § 112, ¶ 2.

Applying these cases, the Federal Circuit found that it was not enough that one of the patents described generating symbols via map and location databases. The Court agreed that this disclosure merely addressed the medium through which the symbols are generated. As is common in cases following *Aristocrat*, a failure to explain how a computer would carry out the claimed function proved fatal under § 112, ¶ 2, rendering the claims invalid. Indeed, *AGIS* explicitly quotes the rationale from *Aristocrat* that functional claim language cannot be supported merely with a general purpose computer, as that would effectively permit pure functional claiming.

In light of *AGIS*, parties will want to carefully consider the role of expert testimony in a potential indefiniteness challenge. For the type of two-step challenge presented in the *AGIS* case, the Federal Circuit acknowledged the relevance of expert testimony, but found it wanting in particulars. Moreover, in the context of a dispute over whether claim terms would be understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure, or whether the claim terms would be understood as coined terms, courts in other cases may look to intrinsic evidence of the specification. Such intrinsic evidence is generally regarded as reliable evidence. Indeed, under the current dual standard for appellate review, legal determinations relevant to indefiniteness, including the assessment of intrinsic evidence, are reviewed *de novo*, whereas underlying findings of fact based on extrinsic evidence are reviewed for clear error. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015). In *AGIS*, the critical role of expert testimony in the dispute triggered clear-error review of the district court's opinion, which was ultimately upheld in its entirety.

Entertainment Litigation Update

Pokémon GO: What Legal Pitfalls Await Augmented Reality Games? On July 6, 2016, Pokémon GO launched in the United States to immediate popularity—more than 45 million people downloaded

and played the game on their smartphones in its first month. The inescapable media coverage of Pokémon GO introduced many to the concept of "augmented reality games"—or "AR games"—which use technology, such as smartphones, to prompt or direct users to take physical actions. By layering a virtual game universe on top of the real world, these AR games take to a new level more established activities, such as geocaching, in which players use GPS coordinates to track down hidden "treasure" (usually small boxes with little trinkets) or "checking in" online with a physical location.

Pokémon GO works by spawning virtual "Pokémon" (fictional animals with special abilities) at real world locations, which players identify using the game app on their mobile devices. The app also provides the real world locations where players can acquire or replenish virtual game items; can gain points, level up, and improve in status (at virtual "PokéStops"); and can battle (at virtual Pokémon gyms). Players can also add "lures" to PokéStops to attract more Pokémon for a short time—and, because the lures are visible to other players, the lures may also draw other players looking for an abundance of Pokémon. The game selects PokéStops and Pokémon gyms based on known points of interest in communities, but provides an online form for requests to remove certain locations from use as a PokéStop or Pokémon gym, as well as a form to report inappropriate game play. *See* https://support.pokemongo.nianticlabs.com/hc/en-us/articles/221968408. While game play is free, in-app purchases are available.

While many have praised AR games' effect of drawing gamers away from their home computer and TV screens and into live interaction with humans in the real world, not everyone is happy with the consequences. Media reports have focused on two groups of the discontented: those unhappy with the travel of Pokémon GO players to a given physical location (such as police stations, museums, or homeowners' yards) and Pokémon GO players who have been injured in pursuit of a game objective.

What exposure does Niantic, the game maker, face from these unhappy groups?

Trespass/Nuisance. Private property owners have already filed two putative class action complaints alleging nuisance and trespass violations: *Marder v. Niantic* (N.D. Cal., filed July 29, 2016) and *Docich v. Niantic* (N.D. Cal., filed Aug. 10, 2016). These complaints contend that Niantic's placement of geographical markers on private property causes players to make unwanted incursions onto the land, causing harm, and that Niantic's proffered solutions—allowing property owners to opt-out from being a game destination and reminding users not to venture onto private property without permission—do not absolve Niantic.

The plaintiffs' claims seem unlikely to succeed. Tort liability for the acts of third parties is traditionally predicated on the defendant's creation of an *unreasonable* risk of harm to the plaintiff. Unlike the foreseeable risk of reckless driving arising from a radio station offering a cash prize and interview to the first driver to catch a disk jockey driving around Los Angeles, the complained-of harm is not a necessary component of the game. *Contrast Weirum v. RKO General, Inc.*, 15 Cal. 3d 40 (1975) (affirming liability against a radio station for contest participants' reckless driving that killed another driver). Rather, the facts are more like those the *Weirum* court distinguished, such as harms arising from limited sporting event tickets or "get it while they last" sales. As the court explained, "any haste involved in the purchase of the commodity is an incidental and unavoidable result of the scarcity of the commodity itself. In such situations there is no attempt, as here, to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination." 15 Cal. 3d at 49; *see also Melton v. Boustred*, 183 Cal. App. 4th 521 (2010) (sustaining demurrer, summarizing other cases involving alleged liability for third party acts, and rejecting plaintiff's argument that "a homeowner of common sense would know that a public invitation posted on MySpace to a free party offering music and alcohol was substantially certain to result in an injury").

Because nuisance and trespass are not "a necessary component" of Pokémon GO, the putative class action plaintiffs will have difficulty pleading and establishing that Niantic "engaged in active conduct that increased the risk of harm to plaintiffs," which is necessary to impose "a legal duty … to prevent the harm inflicted by unknown third persons." *Melton,* 183 Cal. App. 4th at 535.

Negligence/Failure to Warn. Niantic is also unlikely to be held liable for injuries players sustain as a result of their real world activities following a Pokémon GO's map or playing late at night (when some of the best Pokémon appear for capture) in dangerous areas. Courts have historically been loathe to find a duty to protect all recipients of information from the potentially harmful consequences of relying on generally published information, even when the readers subscribed to the publication. *E.g., First Equity Corp. of Florida v. Standard & Poor's Corp.,* 869 F.2d 175 (2d Cir. 1989) (summarizing New York and Florida precedent and affirming dismissal of claims, explaining: "The publication at issue is a source of information disseminated to a wide public. The class of potential plaintiffs is multitudinous. Even the most careful preparation will not avoid all errors."). The same

holds true for interactive information. For example, a court dismissed claims against Google filed by a Google Maps user who was struck by a car while following Google Maps' walking directions on a heavily trafficked rural highway. *Rosenberg v. Harwood,* No. 100916536, 2011 WL 3153314 (Utah Dist. Ct. May 27, 2011). While recognizing that Google may have foreseen some harm, the court concluded that the actual likelihood of injury was relatively low, the relationship between Google and the plaintiff was somewhat attenuated, and policy considerations weighed strongly against imposing the suggested duties on Google because of the heavy burdens associated with such a duty.

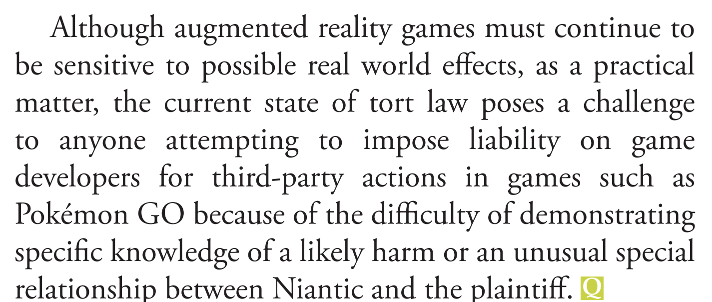
In addition, to the extent an injury results from a player's use of a "lure" to attract other players, Niantic may also have a defense under the Communications Decency Act because a third party, not Niantic, is the publisher of the allegedly harmful content. *See, e.g.*, *Doe v. MySpace Inc.,* 2008 WL 2068064 (5th Cir. May 16, 2008) (dismissing negligence claims against MySpace predicated on sexual assault of MySpace user by another user); *Gibson v. Craigslist, Inc.,* No. 08 Civ. 7735 (RMB), 2009 U.S. Dist. LEXIS 53246 (S.D.N.Y. 2009) (dismissing claim against Craigslist for third-party posted ad for gun that was used to shoot plaintiff).

Location Privacy. Because AR games are based around real-life conduct, they necessarily track users' physical locations and may broadcast them to other players. Such location data has been the center of an evolving privacy law debate for many years. Last year, the Federal Trade Commission, which has established itself as the chief regulator for internet privacy, issued a lengthy report setting forth best data privacy practices. *See* Federal Trade Commission, "Internet of Things: Privacy & Security in a Connected World" (January 2015), available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf. The FTC report recommends, among other things, that smartphone apps developers apply data minimization practices in order to protect consumer privacy. These practices include limiting the collection of data to that which is truly necessary to the service, obtaining user consent to collect that data, encrypting that data, limiting the length of time for its retention, and anonymizing it as associated with any particular user. Pokémon Go's privacy policy sets forth its location data collection and sharing practices, including that it will aggregate and anonymize any location data shared with third parties. *See* Niantic Labs, Pokémon Go Privacy Policy, (July 1, 2016), available at https://www.nianticlabs.com/privacy/pokemongo/en. It thus seems to be complying with best privacy practices.

Future app developers who unveil similar games or features to Pokémon Go should ensure before launch that their privacy policies are robust and their location data is secure. Location data leakage, either through technological bugs or liberal data sharing policies, bears a significant risk of privacy class-action lawsuits. Just this past September, a Massachusetts district court allowed a privacy case to move forward which alleged that a smartphone news application had shared its users' location data with third parties without consent. *See Yershov v. Gannet Satellite Info. Network, Inc.*, No. 14-CV-13112, 2016 WL 4607868, at *2 (D. Mass. Sept. 2, 2016). Citing the Supreme Court's recent privacy law decision in *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016), *Yershov* explained that "an individual's right to privacy, both as to certain personal information and private locations, has long been regarded as providing a basis for a lawsuit in English or American courts. Also in September, a California district court allowed a smartphone privacy case to proceed to trial, explaining that smartphone applications' "community norms of privacy" "are very much in flux." *Opperman v. Path, Inc.*, No. 13-CV-00453, 2016 WL 4719263, at *11 (N.D. Cal. Sept. 8, 2016) (privacy claims based on application's unauthorized upload and sharing of address book data were not appropriate for summary judgment).

Reflecting this recognized "flux" in the law, many location privacy claims have been dismissed outright for failure to state a claim. *See, e.g., In re Google Android Consumer Privacy Litig.*, No. 11-MD-02264, 2013 WL 1283236, at *14 (N.D. Cal. Mar. 26, 2013) (dismissing all substantive claims for privacy violations based on Google's alleged unauthorized tracking of user location data and failure to de-anonymize that data); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1078 (N.D. Cal. 2012) (dismissing Stored Communications Act claim alleging that Apple's smartphones had transmitted location data even after users affirmatively revoked permission to do so, but allowing two state law claims to proceed). Given the evolving state of the law, however, AR developers seeking to capitalize on Pokémon Go's success should take care to adopt best practices to insulate themselves from privacy claims.

* * *



Although augmented reality games must continue to be sensitive to possible real world effects, as a practical matter, the current state of tort law poses a challenge to anyone attempting to impose liability on game developers for third-party actions in games such as Pokémon GO because of the difficulty of demonstrating specific knowledge of a likely harm or an unusual special relationship between Niantic and the plaintiff.

Victory for FIFA in Class Action

The firm recently obtained a complete dismissal of an antitrust class action suit brought against its client FIFA (the Fédération Internationale de Football Association) in the United States District Court for the District of Nevada before The Hon. James C. Mahan.

FIFA hosts the World Cup—the world's premiere soccer event—every four years, and in 2014, it hosted the World Cup in Brazil. Tickets for the 2014 World Cup matches, which were in high demand, were sold in two basic formats: standalone, "face-value" tickets, to attend a given match, and "hospitality packages," which included a match ticket as well as amenities such as parking, lodging, food, beverages, and other services. Because hospitality packages include more services than a face-value ticket, they also cost more money—a fact that would strike most as unsurprising.

But in September 2015, two individuals—Vicki Palivos and George Kleanthis—filed a class action against FIFA and five other entities alleging that the sale of hospitality packages to the 2014 World Cup was the result of an international conspiracy in violation of the antitrust laws and civil RICO, both of which allow recovery of treble damages. At the heart of plaintiffs' complaint was an allegation that FIFA and its co-defendants had tricked consumers, including Ms. Palivos and Mr. Kleanthis, into buying these relatively more-expensive hospitality packages instead of face-value tickets by (a) circumventing U.S. and Brazilian law, which plaintiffs alleged did not allow for the sale of tickets to be higher than the "face value" of individual match tickets, and (b) falsely claiming individual match tickets were sold out so that individuals would be forced to purchase more expensive hospitality packages. Given the number of hospitality packages sold in the United States, FIFA was facing a lawsuit that could potentially cost them hundreds of millions of dollars.

On behalf of FIFA, the firm quickly spotted a key flaw in plaintiffs' action. From FIFA records, it appeared that neither plaintiff had actually purchased a hospitality package to the 2014 World Cup and thus had no standing to pursue the class action on behalf of themselves or others. Armed with this knowledge, the firm sought to resolve the lawsuit by informing plaintiffs' counsel of the facts and requesting that plaintiffs withdraw the complaint so as to make time-consuming and costly motion practice unnecessary. Plaintiffs, however, refused, apparently in the hopes that they might capitalize on an unrelated criminal investigation into FIFA's business practices to obtain an early settlement. (Quinn Emanuel also represents FIFA in the criminal investigation.)

This tactic was unsuccessful. Quinn Emanuel defended the case aggressively, moving to dismiss it with prejudice, on both the merits and for lack of personal jurisdiction. FIFA also moved for sanctions under Rule 11, characterizing the case as a strike suit that could not be pursued in federal court or indeed in any court.

In opposing the motion, plaintiffs attempted to convince the Court, by references to the criminal investigation of FIFA, that their suit should be permitted to proceed because FIFA *must* have done something wrong. Also, while the motions to dismiss were pending, plaintiffs attempted to serve no less than 201 document requests—in essence, a massive fishing expedition into FIFA's business practices. Plaintiffs tried to amend their complaint after the motion to dismiss had been fully briefed, asserting entirely new theories of liability.

Quinn Emanuel was able to obtain a complete victory for FIFA. Plaintiffs' requests to conduct document discovery and jurisdictional discovery were denied, and in July 2016—less than a year after the action was filed, Judge Mahan dismissed the class action complaint, agreeing with FIFA that because plaintiffs never bought hospitality packages, they lacked standing to bring the claims. The Court also denied plaintiffs leave to amend and entered judgment in favor of FIFA. Finally, although the Court did not award Rule 11 sanctions, it noted in its opinion dismissing the case that it was "amused" by plaintiffs' attempts to keep their claims alive, describing their tactics as "questionable" and remarking that "a competent attorney would not have" behaved the way plaintiffs' counsel did.

Immigration Victory

The firm recently won a *pro bono* victory for Andre Mulder in U.S. Immigration Court. Mr. Mulder was born in Brazil in 1983 and lived on the streets for the first years of his life. He was adopted from a Brazilian orphanage when he was eight by a U.S. citizen. While at the orphanage, he was abused by the administrators and other children, which resulted in mental impairment.

As an adult living in the United States, Mr. Mulder was convicted of several misdemeanor assault crimes, the last of which was elevated to a felony under Michigan's repeat offender statutes. After Mr. Mulder served his sentence, the Department of Homeland

Security ("DHS") detained him, arguing that he was removable because he had pled guilty to a "crime of violence" that met the statutory definition for an aggravated felony. (8 U.S.C. § 1227(a)(2); 18 U.S.C. § 16(b)). Mr. Mulder represented himself in his initial removal hearing, which resulted in the Immigration Judge ordering him deported to Brazil. Mr. Mulder's case was then recommended to Quinn Emanuel by the Catholic Legal Immigration Network's Pro Bono Project.

On appeal, Quinn Emanuel argued that Mr. Mulder was not afforded adequate safeguards during his *pro se* hearing, given his mental incompetency, and that the statute defining a "crime of violence," (18 U.S.C. § 16(b))—on which the DHS's case hinged—was unconstitutionally void for vagueness under the Due Process Clause. The Bureau of Immigration Appeals agreed with Mr. Mulder that the Immigration Judge had not provided adequate safeguards to Mr. Mulder and remanded the case to a new Immigration Judge without resolving the constitutional issue.

On remand, the firm successfully sought strong procedural safeguards for Mr. Mulder. Mr. Mulder was being held at a facility far from family and experts who could help with his case. Following a hearing on safeguards, he was moved to a facility closer to his family and given a clean slate to present his case, for the first time, with the assistance of counsel.

At the subsequent removal hearing, Quinn Emanuel again argued that the relevant portion of the statute defining a "crime of violence" was unconstitutionally vague, and in the alternative that the criminal statute Mr. Mulder was convicted of violating did not meet the definition of a "crime of violence." The strength of Mr. Mulder's case was aided when, just subsequent to the hearing, the Sixth Circuit Court of Appeals issued a controlling decision agreeing with Mr. Mulder's contention that the relevant portion of the "crime of violence" statute was unconstitutionally vague. Following that ruling, the Immigration Judge issued an order terminating the proceedings, and Mr. Mulder was released after two years of detention. He immediately went back home to Grand Rapids, Michigan to reunite with his family and friends, and to meet his newborn child, who had been born while Mr. Mulder was in detention.

Securities Law Victory

The firm recently obtained a dismissal of a putative securities class action in the United States District Court for the Central District of California brought by a group of investors against the firm's client, Amira Nature Foods, Ltd., a global specialty rice company based in India. The allegations in the initial complaint repeated almost verbatim baseless allegations against Amira made by a notorious short-seller in two so-called "investment research" reports, which accused Amira of filing fraudulent financial statements with the U.S. Securities and Exchange Commission (SEC) and engaging in unethical business practices. The investors specifically alleged, among other things, that Amira defrauded them by overstating the revenues reported in its SEC filings by more than 100 percent. The investors filed their putative class action lawsuit one day after the short-seller published its first report attacking Amira and amended their complaint twice thereafter.

In July, the Court issued a detailed 26-page opinion and order dismissing the investors' second amended complaint without prejudice and granting them leave to amend again within two weeks. Among other things, the Court found that the investors failed to adequately allege how Amira's disclosures to the SEC misstated, much less overstated, the company's revenues and failed to plausibly allege that Amira made any false or misleading statements about its business to the SEC. The Court was persuaded that the investors' heavy reliance on the short-seller reports to plead their claims was insufficient as a matter of law to state a claim under the securities laws and set forth a detailed roadmap for the steps they would need to take to state a plausible claim against Amira. When the investors failed to file a third amended complaint by court-ordered deadline, the Court dismissed the case and entered judgment for Amira.

The Court's dismissal of the second amended complaint is a significant signal to investors seeking to turn baseless allegations levied against publicly traded companies by short-sellers into securities class actions that doing so is an uphill battle. The Court's decision affirms that accusations of securities law violations conjured up by short-sellers are not on their own a sufficient basis for investors to pursue the companies targeted by the short-sellers. Q

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