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Second Circuit Immunity Decision Upends Cross-Border Criminal Investigations

The Second Circuit Court of Appeals' recent decision in *United States v. Allen*, --- F.3d ----, 2017 WL 3040201 (2d Cir. July 19, 2017) (slip opinion available at https://goo.gl/FkfwNN), which holds that U.S. courts must give both use and derivative use immunity to individuals providing testimony lawfully compelled by a foreign government, will have far-reaching implications for all cross-border criminal investigations. The *Allen* case has the potential to be a landmark decision that could fundamentally change the relationships between the U.S. Justice Department and its counterparts around the world.

The LIBOR Investigations and Case Against Rabobank Traders

The *Allen* case involves bankers accused of manipulating the London Interbank Offered Rate ("LIBOR"). LIBOR, an influential benchmark interest rate, is calculated daily based on submissions to a central panel from a select group of banks. The submitting banks provide estimates of how much it costs them to borrow money, and the central panel consolidates the submissions into one rate. Because LIBOR is the basis for numerous other loans—for example, commercial borrowers' rates are commonly set at LIBOR plus some additional amount depending

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INSIDE

White Collar Trial Lawyer Joins Quinn Emanuel New York Office

Alex Spiro has joined Quinn Emanuel as a partner based in the firm's New York office. Alex was previously an attorney at Brafman & Associates, where he represented both companies and individuals in complex criminal cases in both state and federal courts. Prior to joining Brafman & Associates, Alex worked for the New York County District Attorney's Office, where he investigated countless cases and tried dozens more. Alex has served as lead counsel on more than 50 trials. Alex is well known for handling high profile cases for famous clients. He has deep experience in conducting internal investigations of companies and corporations in a variety of fields. Alex received his J.D. from Harvard Law School, where he continues to be part of the Teaching Faculty, and his B.A. in Bio Psychology from Tufts University. He has been published and has lectured on a variety of subjects related to psychology and the law. Q

Former U.S. Ambassador to UNESCO Rejoins the Firm

Crystal Nix-Hines has rejoined the firm as a partner in the Los Angeles office after leaving to serve as U.S. Ambassador to the United Nations Educational, Scientific and Cultural Organization. During her previous tenure with the firm, Ambassador Nix-Hines worked on numerous engagements at both the trial and appellate levels, including three successful cases before the U.S. Supreme Court. In addition to litigation, she will be part of the firm's new Crisis Law & Strategy Practice Group, which will provide crisis management advice to both companies and individuals on a 24/7 basis. Ambassador Nix-Hines has experience in the government, legal, and media sectors, including stints with U.S. Department of State, Disney, and *The New York Times*. Ambassador Nix-Hines earned a B.A. from Princeton University and a J.D. from Harvard Law School, where she graduated with honors and served as Supervising Editor of the Harvard Law Review. She served as a law clerk to the late Judge William Norris of the Ninth Circuit and to former Supreme Court Justices Thurgood Marshall and Sandra Day O'Connor. Q on their creditworthiness—the rate that the panel selects affects the rates applied to hundreds of trillions of dollars in securities and loans.

Both the U.S. Justice Department and the United Kingdom Financial Conduct Authority ("FCA") had begun investigating manipulation of LIBOR rates by 2013. The two investigations were coordinated in an effort to maximize compliance with both countries' evidentiary rules. FCA interviews are compulsory and subject only to a grant of direct use, not derivative use, immunity, and failure to testify as directed exposes a witness to potential imprisonment. Use and derivative use immunity are discussed at greater length below. To safeguard against potential Fifth Amendment concerns, the Justice Department implemented protocols such as interviewing witnesses prior to them giving any compelled testimony and restricting the flow of information between the investigations.

One of the LIBOR panel members was a Dutch bank called Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank"), which came under the scrutiny of both the FCA and the Justice Department. In particular, three traders—Anthony Allen, Anthony Conti, and Paul Robson—came under investigation, with all three giving compelled testimony before the FCA between January and June of 2013. The FCA initiated an enforcement action against Robson that November, and as is customary in such proceedings, it disclosed Allen's and Conti's testimony to Robson. Robson reviewed, marked up, and saved copies of both statements. The enforcement action was stayed a few months later, when Robson was indicted in the United States, and by August 2014, he had participated in a proffer session and agreed to cooperate with United States authorities.

Allen and Conti were indicted on October 16, 2014, based in part on evidence the government learned from Robson's cooperation. Robson did not testify before the grand jury, but an FBI agent who did later confirm that Robson was the sole source of his testimony "that Allen 'instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR and various currencies based on the means of those traders,' and that 'Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions as appropriate reason or justification for setting the rates.'" Robson, along with two other cooperators, testified for the prosecution at Allen's and Conti's trial, at which both were convicted.

The Second Circuit's Rejection of Any Derivative Use of Allen's and Conti's Compelled Testimony

The Second Circuit reversed the convictions on the grounds that Robson's testimony violated the Fifth Amendment because it was an impermissible "derivative use" of the testimony Allen and Conti had been compelled to give by the FCA. While it has long been true under Second Circuit law that a defendant's statements obtained overseas by foreign officials could be admitted against the defendant so long as they were made voluntarily (for example, not obtained through torture), the *Allen* Court distinguished that line of cases and barred the testimony. Specifically, the Second Circuit held that the "the Self-Incrimination Clause's prohibition of the use of compelled testimony arises from the text of the Constitution itself, and directly addresses what happens in American courtrooms, . . . [i]ts protections therefore apply in American courtrooms even when the defendant's testimony was compelled by foreign officials."

Critically, the prohibition extends not only to using the statements themselves at trial, but to any derivative use of the statements. In other words, the government cannot introduce *any* evidence at trial that was identified as a result of the compelled testimony. Quoting *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972), the Court held that:

> the government bears "the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." This burden is "not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

In *Allen*, the fundamental question was whether Robson's review of Allen's and Conti's compelled FCA testimony amounted to an impermissible derivative use of the testimony. The government was thus required to prove "at a minimum, that the witness's review of the compelled testimony did not shape, alter, or affect the evidence used by the government." The district court conducted a two-day evidentiary hearing after the trial to ascertain whether Robson's testimony was sufficiently independent of the compelled testimony. Notwithstanding the district court's determination that Robson's testimony was not tainted, the Second Circuit reversed that finding. Most persuasive to the Second Circuit was that Robson's own testimony to the FCA—which he gave prior to reading Allen's and Conti's testimony—"omits or contradicts in material parts the testimony Robson later provided indirectly to the grand jury and directly to the petit jury." Moreover, Robson's testimony that he was able to "segregate the effects of his exposure" to the transcripts was little more than a "bare, generalized denial of taint," which for "a witness who has materially altered his testimony after being substantially exposed to a defendant's compelled testimony is insufficient as a matter of law to sustain the prosecution's burden of proof under *Kastigar* that that witness's testimony was derived from a wholly independent source."

Allen *Represents a Potential Sea Change in the Working Relationships Between the U.S. Justice Department and Foreign Prosecutors That May Compel Testimony*

The rule in *Allen* may have a sweeping effect on multi-jurisdictional criminal investigations. As the Second Circuit noted, such investigations are an increasingly important part of the Justice Department's work. The Court quoted former Assistant Attorney General Leslie Caldwell, who said in 2016, "[c]ollaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement." Indeed, the Court noted that the Justice Department has begun the "embedding of U.S. prosecutors in foreign law enforcement," including the FCA itself.

Allen thus will apply far beyond LIBOR. As the Justice Department continues to pursue cooperative investigations with other countries, it must be mindful of countries like the United Kingdom, Singapore, Ireland, Canada, and others that compel testimony and take steps to ensure that such testimony is not used even indirectly.. In fact, it is conceivable that *every* cross-border investigation that involves compelled testimony of someone who eventually is charged in the United States could fall under *Allen* and necessitate a *Kastigar* hearing to ensure no derivative use of that testimony.

One way that the government might address this is suggested in the *Allen* decision:

> The most effective way to demonstrate that a witness's testimony was untainted by exposure to a defendant's immunized testimony is by demonstrating that his or her testimony was unchanged from comparable testimony given before the exposure. Thus, typically, the prosecution can meet its burden by memorializing (or "canning") the witness's testimony prior to his or her exposure.

At the same time, *Allen* itself demonstrates the precariousness of this approach, as the witness's original testimony was materially inconsistent with his subsequent testimony in the United States. For the Second Circuit, this "actually *evidences* . . . the taint." It is also notable that the *Allen* Court rejected the Justice Department's attempts to erect a wall between its investigation and the FCA's investigation. Even though the Justice Department interviewed witnesses before they testified to the FCA, thereby ensuring that they had a legitimate alternate source of investigative leads, and otherwise took steps to prevent using compelled testimony, such measures were undermined by the FCA's standard procedure of disclosing to targets the evidence against them, including other witnesses' compelled testimony. This demonstrates the difficulty imposed by *Allen* and the extent to which the Justice Department is somewhat at the mercy of its foreign counterparts' practices.

Moreover, even if the Justice Department could prevail on its foreign counterparts not to, for example, show witnesses the transcripts of others' compelled testimony, it is not clear that this would necessarily solve the problem. *Allen* has the potential to extend even beyond cases where a cooperator reviews a defendant's compelled testimony, because *Kastigar* by its terms requires the government to demonstrate that all the evidence—not just witness testimony—derives from legitimate independent sources. In other words, *Allen* arguably requires the government to meet its *Kastigar* burden in *every* case that involves a joint investigation where the defendant gave compelled testimony. *Allen* thus represents a potentially significant shift in the weight the Justice Department must carry in such cases. Indeed, as noted in footnote 110 of the *Allen* decision, the government had taken the position that the Self-Incrimination Clause would not have prevented it from simply introducing the transcripts of Allen's and Conti's testimony directly as evidence. If every cross-border investigation conducted with the FCA or countries with similar practices now leads to a *Kastigar* hearing, it will drain scarce time and resources and thereby raise the stakes for any prosecutor considering pursuing such a case. Q

The UK Unwired Planet FRAND Decision

Background

In recent years, "FRAND" issues have been a hot topic, subject to litigation and administrative scrutiny around the world. Generally speaking, Standard-essential patents ("SEPs"), are patents that are required to implement a technical standard. Numerous technical standards govern a wide range of technologies from WiFi and cellular telephones to electrical plugs and outlets. In many cases, the organizations that set the standards require their members to be prepared to license their SEPs to implementers of the standards on fair, reasonable and non-discriminatory, i.e., FRAND, terms and conditions. But what exactly does that mean? On May 4, 2017, the UK High Court of Justice (Patents), Mister Justice Birss, weighed in, issuing a 166-page opinion that sets a FRAND royalty for a portfolio of patents asserted against providers of wireless products. Although the extent to which this decision will be followed is unclear, particularly in the United States, anyone currently grappling with the complex process of assessing contractual and competition law obligations in the context of FRAND commitments should be familiar with it.

The Dispute

In March 2014, Unwired Planet ("UP") sued Huawei and other companies for infringement of six UK patents, taken from a portfolio of about 2000 patents that UP had acquired from Ericsson, contending the patents are essential to the 2G GSM, 3G UMTS, and 4G LTE standards. After filing suit, UP offered the defendants a license to the entire portfolio and then later offered terms for a license limited only to essential patents. The defendants, in turn, challenged the validity and essentiality of the asserted patents and contended UP's conduct was an "abuse of dominant position" under EU competition law. (Unwired Planet ¶ 5.) After a series of separate technical trials in which the court concluded two of the UP patents were valid, essential and infringed, the court conducted a comprehensive bench trial to assess these issues and set forth his conclusions in a detailed 166-page opinion, which is available at https://www.judiciary.gov.uk/wp-content/uploads/2017/04/unwired-planet-v-huawei-20170405.pdf.

The High Court's Opinion

The UK court's opinion is multi-faceted and includes many points of interest. Among other things, the UK court concluded the "underlying purpose" of FRAND is to reward innovation while avoiding "hold up" by the SEP owner and/or "hold out" or "reverse hold up" by economically powerful licensees. (Unwired Planet ¶¶ 92-95.) In the former situation, a SEP owner is able to "hold implementers to ransom" by declining to license the SEP, and in the latter situation the potential licensee "unduly drag[s] our the process of license negotiation," eventually forcing the SEP owner to accept a lower than FRAND licensing rate. (*Id.*) In examining the tension between "hold out" and "hold up," the court looked to decisions from other jurisdictions, including the European Union Court of Justice's decision in *Huawei v. ZTE* (Case C-170/13) 16th July 2015 [2015] Bus LR 1261, as well as *Microsoft v Motorola*, Case No. C10-1823JLR2013, US Dist LEXIS 60233 (W.D. Wash. April 25, 2013), a Washington district court decision which considered FRAND license terms in the context of a breach of contract inquiry under Washington law.

Relatedly, the UK court provided its view on what FRAND obligations mean for parties to a negotiation, with the court reasoning that FRAND not only describes a set of license terms but also "the process by which a set of terms are agreed." (*Id.* ¶ 162.) According to the court, both the patent holder and the implementer are required to negotiate fairly to agree on FRAND terms, with the understanding that offers during negotiation may be higher or lower than FRAND as long as they do not "disrupt or prejudice the negotiations themselves . . . ." (*Id.* ¶ 765.)

The UK court appears to depart from U.S. decisions in notable ways. First, unlike in *Motorola*, where the court concluded that FRAND extends to a range of possible royalty rates, the UK court concluded that FRAND should denote a single-rate. The court explained that each party would be "entitled to insist on FRAND terms and neither would be entitled to insist on anything other than FRAND terms." (*Id.* ¶ 156.) But as a corollary to this finding, the court also concluded that an offer above or below the single FRAND rate would not violate competition law unless its departure from the actual FRAND rate was "excessive" (*Id.* ¶ 153), and that a party need not to show a violation of competition law to invoke rights stemming from a FRAND commitment.

Second, in calculating the FRAND royalty rate, the UK court permitted the patent owner to recoup some of the value attributable to incorporation of the patented technology in the standard in contrast to the Federal Circuit's recent conclusion that "the patentee's royalty must be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014).

The UK court employed two methodologies to calculate a FRAND royalty rate, the first an analysis of comparable license rates including past licenses for the same technology, and the second a "top down" approach used to "cross check" the results of the comparable license analysis. (*Unwired Planet* ¶ 806(10).) The "top down" approach assigns a value to the total aggregate SEP royalty burden of a particular standard on a product and then allocates some portion of that aggregate royalty burden to the particular patent at issue.

Conclusion

The *Unwired Planet* decision is a significant addition to a fairly limited, but growing, body of FRAND-related case law. Although it is unclear whether and, if so, the extent to which this decision will be adopted by other courts, any lawyer whose practice concerns SEPs and FRAND licensing disputes should be aware of it. Q

PRACTICE AREA NOTES

Entertainment Litigation Update

New Frontiers in Fan Fiction? Among the most common trends in modern entertainment are "fan art" and "fan fiction." From movies like *Star Wars,* to book series like *Harry Potter*, to epic television shows like *Game of Thrones*, fans of pop-culture phenomena increasingly want to participate in their favorite fictional worlds by creating their own stories based on already-existing characters, settings, and plotlines. From art to short stories to novels to feature-length films, the Internet has spawned "fan-fic" communities for virtually every fictional book, movie, TV show, and video game of note.

As much fun as fan fiction can be for its creators and consumers, its authors may find themselves in a precarious legal position. After all, the entire fan fiction model is based on using others' intellectual property (characters, locations, and events first imagined and described by someone else) to create, and sometimes profit from, one's own derivative art or story. Works that criticize, analyze or parody the original work may qualify as lawful fair use, such as *The Wind Done Gone*, which used characters, plot, and major scenes from *Gone With The Wind,* but inverted its racial perspective to parody the original. *Suntrust Bank v. Houghton Mifflin Co.,* 268 F. 3d 1257 (11th Cir. 2001). But unlike *The Wind Done Gone,* most fan fiction does not seek to savage the original work, but to participate in the world—and world view—originally created by someone else.

One type of such fan art is somewhat "factual" in its approach, such as *The Seinfeld Aptitude Test*, a book offering a collection of trivia questions about the television show. *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (1998). The book included pictures of *Seinfeld* characters and questions about characters and events from 84 of the 86 episodes that had aired at the time of publishing. *Id.* at 135-36. The court reasoned that the plaintiff could effectively aggregate all episodes of *Seinfeld* as a single "work" for purposes of assessing similarity of expression, and held *The SAT* had substantially infringed Castle Rock's copyrights in the *Seinfeld* universe. The court rejected the defendants' fair use defense, noting that the statutory fair-use factors cut in favor of Castle Rock and that "free speech and public interest considerations [were] of little relevance in this case, which concern[ed] garden-variety infringement of creative fictional works." *Id.* at 146.

Two decades after *Castle Rock*, the Southern District of New York again grappled with fair use in the fan "reference book" context, ultimately holding that publication of an avid fan's *Harry Potter Lexicon* was not a fair use and enjoining its further sale. *Warner Brothers., Inc. v. RDR Books,* 575 F. Supp. 513 (S.D. N.Y. 2008). The decision recognized the mostly transformative purpose of the reference guide, but placed great weight on the extensive, unattributed quotations of the original author's work—all seven of J.K. Rowling's *Harry Potter* books, *Fantastic Beasts & Where to Find Them,* and *Quidditch Through the Ages*—and on Ms. Rowling's testimony that the defendant had "plunder[ed] all of the 'plums in [her] cake.'" *Id.* at 562.

But Warner Brothers' victory did not end the fan's devotion—or the fan reference genre. Following the decision, the fan published a new version of the book, acknowledging the lawsuit and expressing his intent to "create a new, different book with a new focus and purpose, mindful of the guidelines of the court," and explaining that "[o]ne of the most important goals of this new book is to avoid giving away too much or using J.K. Rowling's own unique expressions." Steve Vander Ark, *The Lexicon: An Unauthorized Guide to Harry Potter Fiction and Related Materials* (2009). Apparently, he succeeded. That book—along with many other "unofficial" *Harry Potter* guides—remains on sale today.

More classic "fan fiction" uses characters, settings, and other elements from the original work to tell a story that is the extension of that world, such as the novel *60 Years Later,* set 60 years after publication of J.D. Salinger's *Catcher In The Rye*, to "tell[] the story of a 76-year-old Holden Caulfield, referred to as 'Mr. C,' in a world that includes Mr. C's 90-year-old author, a 'fictionalized Salinger,'" who "has been haunted by his creation and now wishes to bring him back to life in order to kill him." *Salinger v. Colting*, 607 F. 3d 68 (2d Cir. 2010). The Second Circuit concluded that the trial court did not commit clear error in holding that the plaintiff was likely to succeed on the merits and finding that "[i]t is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents' previous statements regarding the book discuss no such critique, and in fact reference various other purposes behind the book." 607 F. 3d at 83. Nonetheless, it vacated the preliminary injunction because the lower court erroneously held that irreparable harm could be presumed. Following the remand, the matter resolved, and an electronic version of the book is currently available on Amazon.

The latest prominent dispute in the fan fiction universe, *Paramount Pictures Corp. & Columbia Broadcasting Station v. Axanar Productions, Inc.* (C.D. Cal. 2017), dealt with an unauthorized *Star Trek* prequel and perhaps marks the boldest course yet for copyright owners ultimately embracing fan fiction. The plaintiffs originally followed the well-trod path of suing the defendants for copyright infringement after it raised over a million dollars via crowdsourcing to fund a professional-quality fan fiction piece about the exploits of Garth of Izar (Captain Kirk's idol) years before the events of the first *Star Trek* television series—even though countless *Star Trek* fan fiction spinoffs had been made previously without raising the ire of Paramount or CBS (owners of the *Star Trek* franchise's copyrights). Their principal complaint seemed to be not just that "by Defendants' own admission, [they] unabashedly take Paramount's and CBS's intellectual property, but that "the *Axanar* Works are intended to be professional quality productions that … aim to "look and feel like a true Star Trek movie." After the trial court denied summary judgment motions, 2017 WL 83506, 121 U.S.P.Q.2d 1699 (Jan. 3, 2017), the case settled, and Axanar Productions will proceed with filming after reducing the length of the film and making other substantive changes. But the plaintiffs have made their own remarkable accommodation as well. CBS and Paramount issued a set of ten guidelines for fan-fiction creators regulating the length (no more than two episodes of no more than 15 minutes each), content (no drugs, alcohol, or nudity), and other aspects of *Star Trek* fan fiction in exchange for the tacit promise not to sue or otherwise interfere with those creators who follow the guidelines. Moreover, CBS established a *"Star Trek* Film Academy" designed to train aspiring Trekkie fan-filmmakers.

As fan fiction continues to grow and expand in popularity, just as interesting as how courts handle the inevitable substantial similarity and fair use questions will be whether other media companies choose to offer fan-fiction creators professional artistic development opportunities and clear guidelines—while also extending the reach of the copyright holder's imaginative works. The legacy of the *Axanar* litigation may prove to be not its legal principles, but to provoke the question sooner of how best to win with the fans that make their work valuable.

International Trade Update

The Legal Implications of the Use of Blockchain in International Trade. What has become popularly known as "blockchain" is a form of Distributed Ledger Technology ("DLT"). At its core, blockchain is for electronic record-keeping. In recent years, blockchain has gained the most attention for its role as the underlying technology of cryptocurrencies, such as Bitcoin.

The true potential of blockchain technology has yet to be realized. International trade, in particular, is ripe for disruption by blockchain technologies. International trade, and the logistics underlying it, has not changed much for centuries. Blockchain promises to revolutionize global trade, and blockchain technologies are already being utilized in the core conduct of trade. With systemic changes to international trade will come new legal opportunities and challenges for lawyers, particularly in the fields of intellectual property law, contract law, and regulatory law.

Blockchain Basics. A blockchain is a recordkeeping computer program that creates an unchangeable digital ledger that records the storage and transfer of digital assets, maintained across a network of peer-to-peer computers rather than routing through a central server. The record of transactions is stored chronologically in the blockchain, consisting of virtual "blocks" of data linked together by a sequence of short digests of data or a "hash." This hash is what is stored on block and transferred via blockchain.

But because each hash is a product of the data recorded in the preceding blocks in the chain, it is nearly impossible to manipulate the records of any transaction without disrupting the entire blockchain. Furthermore, each node holds all or part of an entire blockchain, and applies that blockchain's algorithm to verify new blocks and allow them to be added to the chain. Indeed, even if one node fails, all the other nodes can continue operating. Since each block only contains a digest, the hashed data cannot be decrypted to produce the full underlying transaction data. And as the system is decentralized, all parties to the system have access to the blockchain in order to verify, authenticate, and audit transactions.

Thus, these characteristics of the blockchain system enable its key benefits: reliability, availability, transparency, irrevocability, and immutability.

BlockChain and Global Trade. Today, international trade is cumbersome and hampered by costs—both in time and money. On a physical level, it has been estimated that shipping documents on average weigh up to 40kg per vessel, and cost up to 10% of the value of the goods. Indeed, numerous documents are required for export transactions depending on the destination and type of product. Each document must be accurately filled out, with a slight error resulting in nonpayment, delays, and even confiscation of goods. And every stop along the supply chain, whether for inspection or paperwork, increases the time and cost of the transaction. Moreover, a current lack of transparency along the supply chain can undermine trust amongst the parties. Often when making a purchase, buyers do not know where the goods they ordered are coming from, who made them, or even whether they have been shipped.

Blockchain promises a better way. On a physical level, blockchain can make much of the logistics of international trade paperless, replacing paper ledgers with universal digital ledgers. Blockchain can also ensure that every party necessary to a transaction—whether the seller, buyer, shipper, or regulatory authority—has access to real time, digital information about every step of the transaction and supply chain. Malicious parties would face greater difficulties, as transactions could be auditable, chains of custody verifiable, and records immutable.

No longer entirely theoretical, the actual use of blockchain in international trade has already begun. The first blockchain-based trade deal occurred in September 2016, with a transaction guaranteeing the export of almost $100,000 worth of cheese and butter from an Irish food co-operative. The efficiency gains were substantial, cutting a process that normally takes over a week to several hours. And this is not just a one-off occurrence—both start-ups and established corporations are now using blockchain in a wide-variety of transactions including, for example, assuring recipients that pharmaceuticals remain within an acceptable temperature range in transit, increasing transparency of the environmental impact of manufacturing, tracking the movements of minerals from the mine to the store, and tracking produce, processed foods, and meat from farm to factory to shelves.

Inevitably, these novel applications of blockchain will pose legal implications for international trade. Lawyers who specialize in international trade issueswill have to adapt, particularly in the fields of intellectual property law, regulatory law, and contract law.

Regulatory and Legislative Impact. A fundamental role that lawyers will serve as global trade utilizes blockchain will be to create regulatory and legislative support structures for this technology. Currently, there is a global patchwork of laws and regulations that will affect the initial implementation of blockchain. Regulations are imposed at every step of the international supply chain, whether regulating the service provider (such as export/import regulations or the regulation of financial institutions), certain kinds of transactions, or technical standard imposed on computers and networks that blockchain runs on. Further many countries have extensive restrictions on the localization and the cross-border transfer of certain kinds of data.

The existing network of international agreements may provide a means to address these difficulties and new international agreements such as the proposed Trans-Pacific Partnership may include regulations that are an even better fit for blockchain. This July, for example, the United Nations Commission on International Trade Law ("UNCITRAL"), whose key mandate is to remove legal obstacles to international trade through modernization and harmonization of trade law, adopted the UNCITRAL Model Law on Electronic Transferable Records. This Model Law "legally enables the use of electronic transferable records that are functionally equivalent to transferable documents and instruments including bills of lading, bills of exchange, promissory notes and warehouse receipts."

Blockchain also has the potential to enable regulatory structures that provide authorities and parties real time, secure data at every stage of a supply chain. Rather than manually submitting information to regulators, all required information in the supply chain can be accessible instantly, globally, and updated in real time. This in turn creates efficiencies on the part of the regulator who has constant, digital access to this information to audit or monitor industry, and even automate the review of the data. Which authorities are permitted to access this blockchain data, when they are permitted to access it, and what they are permitted to do with it are all immediate concerns that must be addressed by a blockchain regulatory structure. Private practice lawyers must lobby for clients' interests, as government lawyers create and enforce new regulatory structures.

Thus, companies implementing blockchain technology will inevitably require legal advice regarding how existing local regulations and laws, existing trade agreements, and trade agreements under negotiation, may impact the use of blockchain in their supply chain.

Smart Contracts. The "smart contract" is an application of blockchain with long-term implications for nearly every legal context in which a contract might apply. And it will no doubt be particularly impactful for international trade, given the ubiquity of contracts governing these transactions. At their core, smart contracts are contracts stored on a blockchain and implemented by computer algorithms. These computer algorithms can, without relying on human intervention, verify, execute, and enforce the terms of a business agreement. This, for example, would allow smart contracts to collect taxes, issue regulatory reports, and handle other requirements based on certain events (*e.g.*, releasing an escrow payment at the occurrence of a triggering event, such as the last day of a month).

Lawyers may find smart contracts shift the nexus of disputes in transactions to the moment of dynamic execution, given that the contract is self-enforcing by nature. This dynamic execution also promises to challenge the core common law tenets behind contract law, including traditional remedies for breach, and likely will require contract doctrine to evolve. Such questions that may need to be addressed include: How does one terminate a self-executive contract for duress, mistake, or misrepresentation? How does one terminate a self executing contract at all? What are parties' options if circumstances change in the middle of a self-executing contract, such that performance is no longer preferable or viable? How does ambiguity affect a smart contract?

Courts will have to craft the law of "dynamic transactions" as issues of first impression appear. Litigators will be a driving force for the creation of such law and how it looks, and likewise will need to keep themselves and their clients appraised of what is sure to be a rapidly evolving doctrine.

Intellectual Property. Finally, blockchain has the potential to change how international intellectual property rights are registered and enforced, and how the owners of such rights will be compensated. Blockchain is uniquely suited to create a secure, immutable, and real time platform for the creation and distribution of intellectual property. At its most basic level, blockchain promises an indisputable record of filing for all intellectual property rights that could be accessed globally. This means blockchain offers a novel way for creators of intellectual property to demonstrate first use, whether in trademark, patents, or copyrights.

For lawyers representing traditional parties in the realm of creative intellectual property, getting up to speed on how blockchain companies may address piracy, control intellectual property, and monetize intellectual property is critical. A number of new, global music distribution and streaming platforms are appearing, all of which will challenge traditional paths and modes of distribution. In the winter of 2016, the U.S. Department of Commerce's Internet Policy Taskforce held a public meeting entitled "Developing the Digital Marketplace for Copyrighted Works," to discuss the impact of blockchain on a single, immutable copyright registry.

Conclusion. While many of the promises of blockchain have yet to be realized, its implementation into the core conduct and logistics of international trade has begun. Lawyers will be involved at every stage of implementation, and will see the effects in their practice for the foreseeable future. The rise of blockchain technology in international trade thus promises a multitude of challenges and opportunities for practitioners.

Patent Litigation Update

What's at Stake in the* Oil States *Case? Supreme Court Granted Cert. to Review Constitutionality of Patent Office IPR Proceedings. This term, the Supreme Court will hear a challenge to the constitutionality of inter partes review (IPR) in *Oil States Energy Services LLC v. Greene's Energy Group, LLC*. Oil States has revived an argument last rejected by the Federal Circuit in 2015—that administrative adjudications of patent validity violate both Article III and the Seventh Amendment right to a jury trial. *See MCM Portfolio, LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015).

Created in 2011 with the passage of the America Invents Act (AIA), the IPR system is the most recent congressional effort to create an administrative-review process that is "an effective and efficient alternative to often costly and protracted district court litigation." H.R. Rep. No. 112–98, 2011 U.S.C.C.A.N. 67, 75, at 45. IPR allows a party—often, an accused patent-infringer—to petition the Patent and Trademark Office (PTO) to cancel a patent on the ground that it was anticipated by prior art or obvious. 35 U.S.C. § 311(b). Would-be litigants quickly seized on this new option, and by 2016, the Patent Trial and Appeal Board (PTAB) became the most popular patent-review venue in the country, outpacing even the so-called "rocket docket" in the Eastern District of Texas. *2016 Annual Patent Disputes Report*, Unified Patents, https://www.unifiedpatents.com/news/2016/12/28/2016-annual-patent-dispute-report.

But while IPR petitions have proven popular for third-party challengers, patent owners—including Oil States—are markedly less fond of the process, which they argue "takes a patent infringement claim out of the jury's hands and entrusts it to bureaucrats." Oil States' Cert Petition at 13. Patentees aren't the only detractors. In a remarkable statement, former Chief Judge of the Federal Circuit, Randall R. Rader, described the AIA proceedings as "death squads, killing property rights." "Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill," *Bloomberg BNA*, October 29, 2013, https://www.bna.com/rader-regrets-cls-n17179879684/.

Over 1,000 patents were "killed" in IPR proceedings as of December 2016. "Patent Trial and Appeal Board Statistics 12/31/2016," United States Patent and Trademark Office, https://www.uspto.gov/sites/default/files/documents/2016-2-29%20 PTAB.pdf. But while Judge Rader may view the killings as extrajudicial, his colleagues have been less sympathetic to the argument that a patent entitles the holder to the safeguards attendant to a jury trial in an Article III tribunal. Faced with multiple challenges to administrative review—ex parte reexamination and IPR—the Federal Circuit has held firm that, while patent disputes arise between *private* parties, the patents themselves are *public* rights that may be reviewed and extinguished by the body responsible for administering them according to a complex regulatory scheme. In other words, the PTO giveth, and the PTO taketh away.

After declining to review the 2015 *MCM Portfolio* decision, in which the Federal Circuit upheld the IPR process as constitutional, the Supreme Court has given patentees new hope that it may guarantee them an Article III forum in which to defend their right of exclusion. But will a decision by the Supreme Court holding the IPR process unconstitutional open the proverbial floodgates of patent litigation in the district courts? After all, patent litigation has been in decline in the past two years. After a spike in 2015, the number of patent suits filed in the district courts dropped significantly, from 5,823 in 2015 to 4,520 in 2016. "2016 Fourth Quarter Litigation Update," Lex Machina, January 12, 2017, https://lexmachina.com/q4-litigation-update/. Ostensibly, some patent disputes have been rerouted to the PTAB for IPR review. IPR has hardly supplanted traditional patent litigation, but the number of petitions filed is significant enough—over 1,600 in each of the past two fiscal years—to have an appreciable impact on the courts. *AIA Trial Statistics*, United States Patent and Trademark Office, https://www.uspto.gov/patents-application-process/appealing-patent-decisions/statistics/aia-trial-statistics. This assumes, of course, that challengers choose to pursue their claims through the judicial process. But challengers face higher obstacles in the district courts, including the cost of litigation and Article III standing requirements, which may actually deter them from pursuing those claims. Former patentees whose patents were invalidated by IPR may also begin petitioning the courts to re-open their cases, raising the question of retroactivity. Finally, a decision in favor of *Oil States* raises broader questions about the future of the PTAB and its independence as a review body. Should the Supreme Court reverse the Federal Circuit, it is quite possible that this case will usher in a new era in patent litigation. Q

Victory by Settlement in False Claims Act Case

The firm recently obtained a remarkable settlement on behalf of its client, ACADEMI Training Center, LLC (f/k/a/ Blackwater USA), resolving a False Claims Act case that had been ongoing for seven years. The case was originally filed in 2011. It arose out of allegations that ACADEMI submitted invoices to the State Department for payment that contained false and misleading statements about the services that the company provided pursuant to a defense contract with the State Department. That contract required ACADEMI to provide security services to State Department and U.S. Embassy personnel in Kabul, Afghanistan. It contained a number of specific requirements, including a requirement that certain ACADEMI personnel be proficient with five firearms, including two belt-fed machine guns called the M-240 and M-249. To demonstrate their proficiency on the five weapons, ACADEMI was required to conduct initial qualification testing on each of the five weapons, followed by requalification testing on each weapon every quarter. In order to pass the requalification test, ACADEMI personnel had to achieve a certain minimum passing score set by the Contract.

Relators claimed that from April 2007 through August 2011, ACADEMI committed fraud against the State Department by falsifying its shooters' M-240 and M-249 scores by recording passing scores for individuals who were not properly qualified under the contract and then improperly billing the State Department for these individuals. Specifically, Relators claimed that ACADEMI's firearms instructors did not score shooters properly on the M-240 and M-249 requalifications because they did not switch out targets between shooters and did not walk up to the targets to inspect the number of holes each shooter achieved on the targets. Instead, Relators claim that ACADEMI's firearms instructors would simply count the number of misses by spotting dirt splashes and would then subtract that number from the total shots fired in order to determine whether a shooter achieved a passing score. According to Relators, this scoring method—used by only two out of more than two dozen instructors—was so inherently unreliable that the recorded scores could not possibly have been accurate. As a result, Relators claimed that all of ACADEMI's invoices to the State Department over the life of the contract were false and fraudulent and warranted total disgorgement. However, after aggressively pursuing discovery from the State Department, we were able to develop a number of defenses that positioned ACADEMI for a remarkable pre-trial settlement.

First, we were able to establish an extensive record that showed that the State Department's monitors were not only on site watching ACADEMI's requalifications, but that they also never once criticized the way in which ACADEMI or its firearms instructors conducted weapons requalifications. In fact, the documentation obtained in discovery specifically noted that the State Department monitors observed "no anomalies" with the way in which ACADEMI conducted its requalifications. Similarly, deposition testimony from several State Department witnesses further confirmed their satisfaction with ACADEMI's performance under the contract generally, and its performance of weapons requalifications, specifically.

Beyond government knowledge and tacit approval of the requalification approval process, we also developed a compelling materiality defense; that is, that the State Department's decision to make payments on the disputed invoices would not have been affected had it known about ACADEMI's use of the "count-misses" method. In this respect, the State Department official who was responsible for approving ACADEMI's invoices testified at his deposition that even if ACADEMI were committing fraud in connection with its weapons requalifications (which it was not), the State Department would still have approved its invoices. Our materiality defense was also buttressed by the fact that the State Department continued to make payments to ACADEMI even after learning of Relators allegations; the State Department continued to contract with ACADEMI even after learning of Relators' allegations; and the State Department never, even to this day, asked ACADEMI for a refund, credit, or otherwise.

Ultimately, these defenses, and pending, potentially case-crippling Daubert motions, facilitated a settlement at less than cost of trial, a far cry from the over $400 million originally sought.

Resounding Victory Against Teva in Largest M&A Litigation in Latin American History

The firm represents Fernando and Leopoldo de Jesus Espinosa Abdala, two Mexican businessman who owned Representaciones e Investigaciones Médicas, S.A. de C.V. ("Rimsa"), a leading pharmaceutical company in Mexico. In 2015, the Espinosas sold

Rimsa to Teva Pharmaceutical Industries Limited, one of the world's largest pharmaceutical companies, for $2.3 billion. Teva sued the Espinosas in New York state court seeking rescission of the transaction, return of the entire purchase price and punitive damages. Teva alleged that the Espinosas defrauded it by failing to disclose that several of Rimsa's products violated Mexican pharmaceutical regulations. This is the largest such case in Latin American history and one of the largest failed transaction litigations in U.S. history.

Quinn Emanuel has accomplished three major victories in the case to date:

First, after acquiring Rimsa, Teva filed a complaint against the Espinosas before the Mexican pharmaceutical regulator, accusing them of extensively violating Mexican regulators and consumers for years. From June 2016 to March 2017, the Mexican pharmaceutical regulator investigated these allegations in detail. In March 2017, the regulator cleared the Espinosas of any wrongdoing and refrained from taking any action against them.

Second, on May 2017, Teva sued the Espinosas and moved for a preliminary injunction in New York, seeking to freeze their assets worldwide, including the $2.3 billion purchase price. The court denied Teva's motion, finding that Teva was not likely to succeed on the merits and that there was no evidence that the Espinosas had engaged in any conduct to dissipate their assets which would justify a freezing order.

Third, in late 2016, the Espinosas moved to dismiss Teva's lawsuit. On August 2, 2017, the court dismissed Teva's case almost in its entirety. Specifically, the court dismissed Teva's fraud, rescission and punitive damages claims and allowed only a small breach of contract claim to proceed, on which, under the terms of the sale agreement, damages would be capped at $45 million. This remaining claim is worth less than 1% of Teva's initial damages claim.

Supreme Court Victory for State Farm Insured

In *Simmons Sporting Goods, Inc. v. Lawson*, No. 17-109, 2017 U.S. LEXIS 4810 (U.S. Oct. 2, 2017), we successfully represented Simmons Sporting Goods, Inc., before the United States Supreme Court. Simmons, the largest sporting goods store chain in the South, is an insured of firm client State Farm Fire and Casualty Company.

On October 2, 2017, the Supreme Court granted our certiorari petition for Simmons, vacated the judgment below, and remanded the case for reconsideration by the Arkansas Court of Appeals in light of the Supreme Court's opinion in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). *Bristol-Myers* holds that specific personal jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction, such that there must be a connection between the forum and the specific claims at issue.

In *Simmons*, the plaintiff was an Arkansas resident who was seriously injured in a fall in Simmons' Louisiana store. The plaintiff brought suit against Simmons in Arkansas state court. After the trial court dismissed the case for lack of personal jurisdiction, the Arkansas Court of Appeals reversed. The Arkansas Court of Appeals held that specific personal jurisdiction over Simmons existed based on Simmons' advertising in Arkansas, despite the facts that the plaintiff was not influenced by the advertising in deciding to visit the store and her claim was not in any way related to the advertising.

In our certiorari petition, we argued that the reliance by Arkansas Court of Appeals on Simmons' advertising and its belief that Simmons should anticipate that Arkansas residents in general would visit its store contradicted the Supreme Court's clear requirement in *Bristol-Myers* that "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Id.* at 1780 (citation omitted). This jurisdictional issue is an important one for Simmons and other corporate defendants, with numerous customers from other states.

Douglas Dunham and Ellen Quackenbos wrote the successful certiorari petition for Simmons, with guidance and input from Sheila Birnbaum. Legal assistant Ian Garrity assisted with the preparation of the petition. Q

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business litigation report

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- We have won five 9-figure jury verdicts.
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