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From 20 Years to Zero in Six Trial Days

As widely reported in the national media, Quinn Emanuel achieved a stunning outcome in the trial of our client, Joseph Sigelman, the co-founder and former Co-CEO of a Colombian oil company called PetroTiger (*see, e.g.*, http://www.bloomberg.com/news/articles/2015-06-15/justice-department-stumbles-in-closely-watched-foreign-bribery-case; http://www.wsj.com/articles/ex-ceo-of-petrotiger-sentenced-to-probation-over-bribery-1434469990; *What Does the PetroTiger Case Mean for FCPA Compliance? Sigelman's Attorneys and Other Experts Weigh In*, The FCPA Report, June 24, 2015). When trial began on June 2, 2015 in federal district court in New Jersey, Sigelman faced more than twenty years in prison and multi-million dollar penalties on multiple counts of bribery, receiving kickbacks, money laundering and wire fraud. After less than two weeks of a trial projected to last six weeks, the Government dropped five and a half of the six counts, including all of the most serious ones, and agreed to a deal that got Sigelman a sentence of probation with no jail time and financial penalties only a small fraction of what was originally sought by the Government.

As significant as the favorable sentence was the nature of the plea agreed to by the Government. Rather than insisting on an admission that Sigelman knew he was making improper payments to a foreign official (which Sigelman, in fact, did *not* know), the Government accepted a "conscious avoidance" plea that Sigelman would have known had he conducted appropriate due diligence. In essence, Sigelman was permitted to plead to a form of criminal negligence instead of actual knowledge. In sentencing Sigelman to probation with no jail time, Judge Joseph Irenas criticized aspects of the Government's case, while comparing Sigelman's offense to a "character flaw"

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Quinn Emanuel to Open Shanghai Office; Hires Star Lateral Samuel Williamson for Expanding International White Collar Practice

White Collar specialist Samuel Williamson is joining the firm as a partner based in Shanghai, a new office for the firm. Before joining Quinn Emanuel, Williamson was head of Kirkland & Ellis' Asia-based Government Enforcement and Investigations Practice. He will have a similar role at Quinn Emanuel as managing partner of the firm's new Shanghai office, which will open once regulatory approvals are obtained.

Williamson, who is the only former U.S. prosecutor practicing in China, speaks both Mandarin and Japanese. He has extensive experience representing corporations and individuals in sensitive enforcement matters involving securities law, accounting and book-keeping standards and other internal financial controls, the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act, other corruption enforcement regimes, the Economic Espionage Act, antitrust and competition issues, health care programs, government sanctions and trade policies, and financial transactions. He has represented boards, audit committees, and special committees. Williamson received his J.D., *cum laude,* from Harvard Law School and clerked for the Honorable Gilbert S. Merritt on the Sixth Circuit Court of Appeals. He was a Fulbright Scholar at the National University of Singapore.

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and praising his prior good works and capacity to create jobs and do good in the future.

* * *

In May 2014, after a two-year investigation, the U.S. Department of Justice indicted Sigelman on six counts alleging that he had conspired with Gregory Weisman (PetroTiger's general counsel) and Knut Hammarskjold (PetroTiger's Co-CEO), to accept kickbacks, launder money, commit wire fraud, traffic in criminal proceeds, and bribe an employee of the Colombian state-owned oil company, Ecopetrol, to win a multi-million dollar contract. At the time of his indictment, the deck was stacked against Sigelman, as both Weisman and Hammarksjold already had pled guilty to conspiring with Sigelman to pay bribes and accept kickbacks and had agreed to cooperate with the Government.

In fact, even before pleading guilty, Weisman had engaged in robust cooperation with the Government. In December 2012, only days after being approached by the FBI, Weisman agreed to surreptitiously record a three-hour long conversation he had with his client Sigelman in which Weisman tried with little success to get Sigelman to admit to the crimes with which the Government would eventually charge him. At the time the recording was made, Weisman was acting as the general counsel of one of Sigelman's ventures, a multinational construction company based in the Philippines. He also had acted at various times throughout their relationship as Sigelman's personal attorney.

Even though the recording was mostly favorable to Sigelman, Quinn Emanuel moved to exclude its use at trial on the basis that Weisman, as Sigelman's current general counsel and sometime personal attorney, should not be permitted to exploit the privileged relationship between himself and Sigelman in an attempt to gather information against his client, a significant ethical breach by Weisman. Although the Court denied the motion, it proved to be an effective vehicle to introduce Judge Irenas to Weisman's willingness to disregard his professional duties and act against his client. This issue ultimately would prove to be a critical one at trial.

In addition to the difficulties of having two of his former friends and colleagues cooperating against him, Sigelman faced the fact that the case against him had begun with a referral to the U.S. government by PetroTiger, the company that he had co-founded and once led as co-CEO, which had used a large U.S. law firm to conduct an internal investigation and report to the Government. While many white collar cases start with a defendant's former employer making a self-disclosure, what made this one especially difficult was that the company itself was based in Colombia, and almost all of the relevant documents and witnesses were in Colombia as well. This meant that much of the key evidence in the case was not subject to the subpoena powers a criminal defendant usually enjoys. Without subpoena powers, Sigelman had very limited ability to obtain witnesses to testify on his behalf in court, and he had very limited access to documents. In contrast, the U.S. government had ready access to all the information it needed to put its case together because PetroTiger and Colombian law enforcement authorities were actively cooperating with the investigation. This was not a level playing field.

Quinn Emanuel immediately set to work assembling a team of lawyers familiar with the Colombian legal system and began fighting to get access to what Sigelman needed to defend himself. Through multiple rounds of litigation in the Colombian courts, the firm obtained documents that shed light on the allegations against Sigelman and provided critical information for investigative leads. Firm lawyers persuaded a number of Colombian witnesses to agree to come to the United States and testify on Sigelman's behalf even though they had no legal obligation to do so and, due to the high-profile nature of the case in Colombia, faced the very real threat of retaliation in Colombia as a result.

In total, the pretrial effort from May 2014 to June 2015 spanned several continents, multiple judicial systems, and involved firm personnel from a number of different offices both domestic and international.

* * *

On June 11, only six trial days into evidence, the Department of Justice agreed to the extraordinary deal that allowed Sigelman to walk away from the trial without spending a single day in jail. That watershed moment was the culmination of months of preparation and a sound trial strategy executed with great precision.

The first step was to persuade the jury that the Government's case rested not on any hard evidence, but instead only on the untrustworthy and uncorroborated words of its two cooperating witnesses: Weisman and Hammarskjold. Lead partner Bill Burck set the stage in his opening statement,

which carefully went through the key pieces of the Government's documentary evidence and showed why none of it proved that Sigelman had committed any crime. At the same time, he introduced Weisman and Hammarskjold to the jury and explained why each was motivated to lie about Sigelman in order to save their own skins. The centerpiece of the opening was that the jury would ultimately conclude that the only truly incriminating evidence against Sigelman came from the testimony of the two cooperating witnesses who had every reason to lie to curry favor with the Government, but who could point to no hard documentary proof to corroborate their self-serving claims against Sigelman. The Quinn Emanuel team wanted to turn the Government's greatest perceived strength—the testimony of Sigelman's two friends and close business associates (one, his lawyer)—into its greatest potential weakness and make the case about the credibility of these cooperating witnesses. The press characterized Burck's opening as folksy and down-to-earth, confident and compelling. *See* http://www.mainjustice.com/justanticorruption/2015/06/03/sigelman-trial-opens-with-tale-of-greed-by-prosecution-folksy-approach-by-defense/.

The next step was to *prove* that Weisman and Hammarskjold were not credible. As its first witness, the Government called the lead FBI agent who investigated the case. Burck conducted a seemingly friendly cross-examination and nudged the agent to embrace enthusiastically the accuracy of the notes he had taken during witness interviews. This would prove a problem for the Government's next (and, as it turned out, last) witness, Weisman. The agent also admitted that the FBI had permitted David Duran, the alleged foreign official who was purportedly bribed, to enter and exit the U.S. without being charged with so much as a parking ticket. Duran was even allowed to vacation at Disneyworld with his wife while Sigelman was preparing for trial as an indicted criminal defendant. Duran's adventures in the US would turn out to be significant at sentencing.

The prosecutors then conducted a three-day direct examination of Weisman and delivered their best salvo of evidence against Sigelman. At the end of the day on Monday, June 8, they relinquished the witness to partner Bill Price—and watched their case crumble.

In what the judge variously described as a "symphony" and as a "bloodletting," Price conducted a cross-examination that systematically destroyed Weisman's credibility. Within the first two hours of cross on Tuesday, Price had elicited admissions from Weisman that he had committed tax fraud, that he cared only about himself and not even his family members whom he had recruited to participate (probably unwittingly) in his tax fraud scheme, that he was testifying against Sigelman in hopes of avoiding jail time, and that he had sculpted several accusations against Sigelman, leaving out what Weisman conceded was the whole truth, to give the misleading impression that Sigelman had done something illegal (although, typical of Weisman, he blamed the Government, not himself). Under cross examination about discrepancies between his testimony and FBI notes of interviews they had previously conducted of Weisman, Weisman placed the blame squarely on the FBI agent—explaining that he had told the entire truth and the FBI agent had simply left out important information, mischaracterized what he told them, or taken inaccurate notes.

Relative to these other admissions, Weisman may have thought it innocuous when, as a result of Price's carefully orchestrated questioning, he testified that during the course of his cooperation, an unnamed Government official had instructed him to commit a serious violation of his ethical duties as a lawyer. It was the third time in just a couple of hours that Weisman blamed the government for what appeared, on its face, to be inappropriate conduct by Weisman. In this last admission, the Quinn Emanuel team saw an opportunity to turn the Government against Weisman. During a break in testimony, the firm demanded that the Government identify the unnamed Government agent and hand over all the relevant documentation. Because its star witness had just testified that the Government had induced him to commit a serious ethical breach, the Government either had to own up to this misconduct or concede (as the Quinn Emanuel team always believed) that Weisman was lying. Minutes before Bill Price resumed his cross-examination of Weisman, the lead prosecutor told Price that Weisman's statement was false.

Price then administered the coup de grâce. With just five questions, he was able to pin down Weisman and ask: "So what you said to the jury…under oath was false, correct?" "Yes," Weisman responded. During follow up questioning, Weisman tried to back off this admission by saying that he had previously "misremembered" the facts. Price noticeably paused to consider which of the thousand deaths he could inflict by turning this statement against the witness,

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FedEx Drivers: Employees or Independent Contractors? The Ninth Circuit Weighs in on California's Murky "Right-to-Control" Test

In a closely watched case last year, the Ninth Circuit ruled that FedEx's drivers are employees—not independent contractors—as a matter of law under California's "right-to-control" test. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014). As set forth by the California Supreme Court, the touchstone of that test is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired result." *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399, 404 (Cal. 1989). In concluding that FedEx's drivers are employees, the Ninth Circuit rejected the Northern District of California Court's finding that the drivers were independent contractors based on the express language of the FedEx employment agreement.

The reasoning behind the Ninth Circuit's opinion was best captured by Judges Trott and Goodwin in their concurrence, which offered the following anecdote: Abraham Lincoln reportedly asked, "If you call a dog's tail a leg, how many legs does a dog have?" His answer was, "Four. Calling a dog's tail a leg does not make it a leg."

Alexander, 765 F.3d at 998. Along these lines, the court reasoned that "when called upon to characterize a written enactment" the tribunal should "look to the 'underlying reality rather than the form or label.'" *Id.* Specific factors the Court considered include the fact that FedEx's drivers are required to wear FedEx uniforms ("a uniform shirt with the FedEx logo, uniform pants or shorts, dark shoes and socks, and, if the driver chooses to wear a jacket or cap, a uniform jacket and cap with the FedEx logo"), drive FedEx-approved vehicles (among other requirements, painted "FedEx white" and marked with the FedEx logo), and groom themselves according to FedEx's appearance standards ("clean shaven, hair neat and trimmed"). *Id.*, at 986-87. Further, the fact that FedEx's drivers are scheduled to work 9.5 to 11 hours every working day; are not supposed to leave their terminals in the morning until all of their packages are available; and must return to the terminals no later than a specified time, effectively means that "FedEx tells its drivers what packages to deliver, on what days, and at what times." *Id.*, at 987. Finally, because FedEx negotiates the delivery window for packages directly with its customers, drivers lack control over when specific packages must be delivered. Altogether, the Ninth Circuit held that these stringent controls exercised over the conduct, appearance, and schedule of its drivers meant that the drivers are properly considered "employees" regardless of the label attributed to them by their employment agreements.

The Court also noted that a majority of the so-called "secondary factors" outlined in *Borello* supported a finding that FedEx's drivers were employees. For example: the second factor (distinct occupation or business), third factor (whether the work is performed under the principal's direction), fourth factor (skill required in the occupation), fifth factor (length of time for performance of services), and eighth factor (whether the work is part of the principal's regular business), all suggested the drivers are employees. The remaining factors were either neutral (method of payment), or favored FedEx (the right to terminate at will, the provision of tools and equipment, the parties' beliefs).

The lesson for California employers: a cleverly-drafted employment agreement is not enough to turn an employee into an independent contractor.

Mistakes Smart Clients Sometimes Make When They Hire Litigation Counsel

In-house counsel are more sophisticated today than ever when hiring outside litigation counsel. Still, sometimes important criteria are overlooked when selecting a lawyer to represent them in court. Here are some common mistakes intelligent clients sometimes make when selecting litigation counsel.

Hiring Litigators Without Real Trial Experience

Surprisingly, in-house counsel often hire lawyers without any real trial experience. Shockingly, it is common for clients to hire trial lawyers without asking how many cases they have tried. There is a difference between a litigator and a trial lawyer. Good litigators excel at written advocacy and legal strategy. They can even be effective in short hearings before a judge. But trial lawyers possess an additional skill set. The ability to examine and cross examine live witnesses effectively, to think quickly on their feet, to convert complex and technical issues into terms jurors can understand, to connect with lay folks, read their signals, and react instinctively on the fly, to understand the process, the written and unwritten rules of the game—these are among the skills of a real trial lawyer.

Clients hire counsel knowing that most cases settle

before trial and presume therefore that trial experience is irrelevant. But settlement values invariably reflect the parties' expectations of how they will fare at trial. And those that hire lawyers without a credible trial threat can expect to pay more on average in any settlement. Once your opponent realizes your lawyer is unable or unwilling to go to trial, you're significantly disadvantaged, at any stage of the case. Wise clients hire lawyers who excel as both litigators *and* trial lawyers.

Beguiled by Kaplan's "The Law of the Instrument"

American philosopher Abraham Kaplan coined the phrase "the law of the instrument" as a form of the human tendency to overvalue familiarity. In *The Psychology of Science,* Psychologist Abraham Maslow further described the phenomenon this way: "if all you have is a hammer, everything tends to look like a nail." Whereas in-house counsel tend to hire lawyers they know—through personal or professional experience—the lawyers they know are not always the best for the job. Clearly, clients must be able to trust their lawyers and work well with them. When selecting the best person for the job, however, an over-reliance on familiarity often leads to poor choices. Lawsuits are *sui generis*. No two are alike. The best lawyer for one case is not going to be the best lawyer for every case. Yet, sophisticated clients too often go back to the same lawyer over and over again to represent them in court, without properly assessing whether he or she is in fact the best choice for each unique assignment. Factors that should be considered include the fit between the lawyer and the venue, the lawyer's expertise in the subject matter, the temperament of the court, the lawyer's reputation, strategic vision for the case, litigation style, and ability to work effectively with witnesses and opposing counsel. Clients who go back to the same litigation counsel for every case in every locale will eventually pay the price.

Hiring Lawyers, Not Law Firms

In response to the big law excesses of the 80's, in-house counsel in the 90's became fond of saying "we hire lawyers, not law firms." This reflected the clients' view that the skill and qualification of a given lawyer was more meaningful than the institutional attributes of the firm they worked for. Most still repeat that mantra today. The truth, however, is that clients hire both the lawyer *and* the law firm. Yet even the most sophisticated in-house clients struggle to understand the factors that differentiate one big firm from another in ways that might be relevant for a litigation engagement. Does the firm's compensation system reward collaboration or incent competition between its partners? Does the firm's fee system allow for the firm to share in the client's expected risk and reward for a given matter? How are cases staffed? What are the unforced attrition rates and how is turnover addressed? Does the firm train associates in ways other than at the expense of the client? How does the firm manage inefficiency, cost expectations, and outcome probabilities? Clients should understand that lawyers come into any new engagement with the baggage of their firm. Some good and some not so good. Clients that understand this and can differentiate between firms will be happier in the end.

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Michael Mills Wins *Best Lawyers'* Sydney Class Action Litigation "Lawyer of the Year" Award

Michael Mills has been named the 2016 Sydney Class Action Litigation "Lawyer of the Year" by *Best Lawyers*. Only a single lawyer in each practice area and geographic region is selected for the "Lawyer of the Year" honor each year. Mills has long been recognized as one of Australia's leading class action lawyers, but with his move to Quinn Emanuel, he is now in the relatively rare position for Australian litigation of acting for both plaintiffs and defendants in a number of high profile class action matters. In addition to this extraordinary accolade, Mills was generally recognized by *Best Lawyers* in the areas of Alternative Dispute Resolution, Insurance Law, Litigation, Product Liability Litigation, and Regulatory Practice. *Best Lawyers* carefully compiles its top lawyer lists on an annual basis, selecting only the most outstanding attorneys from each area via exhaustive peer-review surveys with leading practitioners.

Insurance Litigation Update

New York's First Judicial Department Splits from Other Courts and Applies Common Interest Privilege to Communications Not in Anticipation of Litigation. Last December, the Appellate Division of the Supreme Court of New York, First Judicial Department issued a decision in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 124 A.D. 3d 129 (2014), which could have important implications for protecting communications among insurers that are part of a joint defense group. The First Department held that reasonably anticipating litigation is not required to take advantage of the common interest privilege. *Id.* at 131-32. Although the case was decided within the context of a merger agreement between two companies, the rationale of the decision would allow communications between insurance defense groups to stay protected even when some or all of the insurers in the group are not anticipating litigation.

In *Ambac Assurance*, Ambac, a financial guaranty insurer, brought suit against Countrywide Home Loans and certain of its affiliates (collectively "Countrywide"), as well as Bank of America Corp. ("Bank of America"), in connection with Ambac's insurance for certain residential mortgage-backed securitizations offered by Countrywide prior to Countrywide's merger with Bank of America. *Id.* at 131. Specifically, Ambac alleged that one of the companies, Countrywide, fraudulently induced it to insure payments on mortgage-backed securities, and that Bank of America was liable as Countrywide's successor-in-interest. *Id.* With regard to its successor liability claims, Ambac sought disclosure of documents related to communications between Bank of America, Countrywide and their counsel for the period of time between the entry and close of the merger between the two companies. *Id.* at 131-32. Bank of America argued that the common interest doctrine applied protecting the documents from disclosure. *Id.* At 132.

The Supreme Court of New York upheld a determination by a Special Referee that the documents at issue were not automatically protected by the Attorney Client privilege. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 980 N.Y.S.2d 274 (Sup. Ct. 2013). The Supreme Court held that New York law requires parties communicating with each other to reasonably anticipate litigation in order to take advantage of the common interest doctrine. *Id.*

On appeal, the First Department reversed the Supreme Court and held that parties did not need to reasonably anticipate litigation in order to claim protection of communications under the common interest doctrine. *Ambac Assurance*, 124 A.D. 3d at 137. The court reasoned that "imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel." *Id.*

Delaware and some federal courts have similarly held that anticipation of litigation is not necessary to establish a common interest. *Id.* at 131. It is unclear, however, whether New York will join this line of cases because the state's appellate courts are now split on the issue. As recently as last year, the Second Department Appellate Division of New York had held that reasonable anticipation of litigation is required under the common interest doctrine. *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 206 (2013).

If New York does follow the federal and Delaware rules by adopting *Ambac Assurance*, the rule could have important implications in the insurance industry. It has been common practice for insurance companies to create joint defense groups across an insurance tower even when only one company is involved in litigation. Any communications between insurance companies and counsel in such defense groups would be protected from disclosure under the rule articulated in *Ambac Assurance*. Under the former rule, insurance companies would risk the disclosure of any communications when such defense groups were formed.

EU Litigation Update

Recognition and Enforcement of Arbitral Awards in Russia: Recent Developments. Recent decisions concerning the enforcement of international arbitration awards in Russian courts have yielded mixed results. Russian courts have limited arbitrability by determining that disputes pertaining to two different types of contracts with a public element were not arbitrable. It is hoped that these new concepts of arbitrability do not begin to influence the attitudes of Russian courts to foreign arbitration awards. More encouraging, however, is the flexible treatment shown by a Russian court towards enforcement of an LCIA award.

The Russian Federation is a party to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. International commercial arbitration is also governed by the Law of the Russian Federation "On the International Commercial Arbitration" No. 5338-1 dated July 7, 1993, which is predicated upon the UNCITRAL Model Law. The rules on domestic arbitration set out in the Federal Law of the Russian Federation "On the Arbitration Tribunals in the Russian Federation" No. 102-FZ dated July 24, 2002.

Arbitrability of Disputes Arising out of Public Procurement Agreements (Case No. A40-148581/12-25-702). This dispute arose out of an agreement between a state owned enterprise of the Moscow Health Department

and the company ArbatStroy LLC over a contract for the modification of fire escapes in Moscow hospitals. The agreement contained an arbitration clause referring disputes to the Domestic Arbitration Institution located at the law firm Peresvet. The enterprise filed a claim against ArbatStroy LLC for breach of the agreement and the tribunal sustained the claim.

The enterprise then applied to the state court for recognition and enforcement of the award, and ArbatStroy LLC simultaneously sought annulment of the same award. By its Resolution dated January 28, 2014 the Presidium of the Supreme Arbitrazh Court (the "SAC") annulled the award.

The SAC held that the agreement between the enterprise and ArbatStroy LLC was a public procurement agreement executed pursuant to a public bidding process conducted by the enterprise under the Federal Law "On Placing Orders for the Delivery of Goods, Works and Services for the State and Municipal Needs" No. 94-FZ dated July 21, 2005 (the "2005 Procurement Law").

The SAC determined that disputes arising out of agreements concluded under the 2005 Procurement Law are not arbitrable. It reasoned, inter alia, that such agreements have a number of public elements as they are executed in the public interest by a public authority or entity for governmental or municipal needs and these needs are financed from the budget. According to the SAC, the principles of arbitration, including confidentiality requirements, are inconsistent with the publicly-driven principles underlying public procurement policies and procedures, such as transparency, facilitation of competition, prevention of corruption and so on.

The SAC's decision raises questions as to whether its findings concerning public procurement contracts may also apply to international commercial arbitration awards issued by Russian-seated tribunals or the enforcement of international arbitration awards in Russia. Many public procurement agreements, including those between foreign companies, contain arbitration clauses. The SAC decision in this case puts these arbitration clauses at risk and could possibly lead to Russian courts refusing recognition of arbitral awards where the award emanates from a public procurement contract dispute.

Arbitrability of Disputes Arising out of the Agreements for the Lease of Forest Plots (Case No. A26-9592/2012). In early 2014 the courts also considered the arbitrability of a dispute arising from forest plot lease agreements. On February 11, 2014, the SAC ruled that this dispute was not arbitrable because the forest plot lease agreement was of a public nature. It based this decision on, inter alia, the fact that such agreements are concluded by special state or municipal authorities; the leased property is a forest plot owned by the state or municipalities; the purpose of the agreement is to procure forest conservation; lease payments are payable to the public budget.

This case has clear parallels with the case discussed above, where Russian courts refused to give force to arbitration agreements in public procurement contracts. Taken together, these decisions raise questions as to whether Russian courts will continue to rely on public interest considerations when dealing with arbitration clauses in other contracts with private parties, particularly in the context of enforcing a foreign arbitral award in Russia.

Proper Notification of a Party to the Arbitral Proceedings (Case No. A65-30438/2012). There has also been good news coming out of Russia as regards enforcement of arbitration awards. On April 24, 2012 a sole LCIA arbitrator issued an award in favor of Autorobot-Strefa Sp. Z o.o. in its dispute with Sollers-Elabuga LLC.

Autorobot-Strefa Sp. Z o.o. sought recognition and enforcement of this award in Russia. The first instance court as well as the first appellate court to hear the case refused recognition and enforcement. They found that the notification of appointment of the sole arbitrator and the notification on the resumption of the arbitral proceedings were handed over to persons who were not employees or authorized representatives of Sollers-Elabuga LLC.

However, the SAC overturned the decisions of the lower courts on June 24, 2014. The SAC found that the general counsel of Sollers OJSC, the sole shareholder of Sollers-Elabuga LLC had sent a letter to the LCIA Court on behalf of Sollers-Elabuga LLC. In those circumstances, notifications by the LCIA Court addressed and delivered to that person were deemed to be validly served on Sollers-Elabuga LLC. The SAC further held that when representing a subsidiary in the arbitration, a lawyer of the parent company was performing his employee's duties and his authority was apparent. The SAC resolved that the LCIA award should be recognized and enforced.

This decision stands as an example of the Russian courts refusing to take an overly formal approach to the notification of a party in the arbitration. Instead, it enforced an award against a company relying on employee's duties and apparent authority. This decision therefore provides encouragement for foreign enforcement efforts in Russia.

German Federal Supreme Court Establishes New Rules for Enforcement of Potentially Invalid Patents. In a recent decision (*Case No. X ZR 61/13, order dated September 16, 2014*) the German Federal Supreme Court ruled in favor of the defendant represented by Quinn Emanuel in a patent infringement proceeding, that enforcement of a judgment finding infringement should generally be stayed if the patent in suit was found invalid at trial level by the Federal Patent Court. This decision is remarkable not only in that it represents a departure from standing case law of the Supreme Court. The Supreme Court even changed its

opinion expressed in a published order made in the same proceeding a few weeks earlier (*Case No. X ZR 61/13, order dated July 8, 2014*).

Background. Germany is the European country where by far the most patent litigation cases are brought. The German patent litigation system is characterized by the principle of bifurcation, which means that infringement and validity of patents are tried in separate proceedings before different courts. Infringement suits are tried before civil courts (District Courts and Higher Regional Courts) whereas nullity suits are tried before the Federal Patent Court. The two proceedings are only united in a sense that the Federal Supreme Court is the ultimate court of appeal. The infringement courts will consider validity issues merely in a limited way, i.e. by staying the infringement case if they consider it highly likely that a pending parallel nullity action will eventually lead to revocation of the patent in suit. Infringement cases are being adjudged considerably quicker (typically within 10 to 12 months from filing) than nullity cases (typically within 24 to 30 months from filing). The different standards applied by infringement and nullity courts when testing validity of the patent and the different durations of the proceedings can be disadvantageous for the defendant: It is possible that the infringement courts will find the patent infringed, but do not find it sufficiently likely that the patent will be revoked. In such case, the defendant can be enjoined for a considerable period of time without a ruling on validity being made by the Federal Patent Court.

The Facts of the Instant Matter. In the instant matter, the patent proprietor was able to enforce an injunction for 18 months before the Federal Patent Court found the patent in suit invalid. In fact, the nullity proceeding took such a long time that the finding of infringement had been confirmed on appeal by the Higher Regional Court in the meantime. The finding of invalidity by the Federal Patent Court did not formally affect the injunction because only a final revocation confirmed by the Supreme Court will render existing injunctions void. The patent proprietor, however, appealed the nullity judgment to the Supreme Court so that the patent formally remained in force. The only possibility to align the bifurcated proceedings in this situation is to request a stay of enforcement of the injunction based on the preliminary revocation of the patent in suit. The pertinent procedural rules of the German Code of Civil Procedure, which are applied to all civil matters including patent cases, however, provide for an extremely high threshold for staying judgments by the Higher Regional Court, thus rendering it practically impossible to obtain a stay of enforcement.

The Ruling of the Supreme Court. Quinn Emanuel filed a stay motion with the Supreme Court arguing that revocation of the patent in suit by the Federal Patent Court is an exceptional circumstance that warrants a stay of enforcement. This motion was dismissed by the Supreme Court with reference to established case law. The firm then filed a further motion with the Supreme Court arguing that the defendant's right to be heard had been violated. This further motion focused on the argument that application of the general rules of the Code of Civil Procedure would result in an unacceptable disadvantage to the defendant in patent infringement proceedings, as it cannot influence the timing of the nullity proceedings so that it is a mere matter of luck whether or not the Federal Patent Court's ruling issues before or after the Higher Regional Court has made its ruling on infringement. Following this further motion, the same panel at the Supreme Court reversed its previous decision and ordered a stay of enforcement. In this unprecedented decision, the Supreme Court held that for the purpose of requesting a stay of enforcement based on a not final revocation of the patent in suit, judgments entering an injunction in patent infringement proceedings that have been reviewed and confirmed on appeal are nevertheless to be treated like District Court judgments that have not yet undergone such a review. The Supreme Court reasoned its decision in that the rationale behind the general rules of the Code of Civil Procedure does not fit in a situation where the infringement courts do not review the validity of the patent in suit due to the bifurcated litigation system. To this extent, the judgment cannot be assumed to have the same high degree of correctness as it is assumed by law with respect to the infringement finding. The Supreme Court's ruling will be published in the court's official journal as the judges consider the decision to be of particular importance for the development of the law.

ITC Litigation Update

ITC Introduces New Pilot Program for Modification and Advisory Opinion Proceedings for New and Redesigned Products. In order to obtain remedial relief at the ITC, a complainant must establish that products imported into the United States violate Section 337. This typically requires months of discovery, a full evidentiary hearing, and exhaustive review by the ITC. In many cases, the products that form the basis for a finding of violation are obsolete by the time the remedial orders are issued, leaving complainants and importers to question whether new or redesigned products fall within the orders' scope. The ITC's new pilot program seeks to reshape, simplify and expedite

the procedures used to answer this important question.

In reaction to concerns expressed by both importers and complainants about how to obtain clear and timely rulings on whether new or redesigned products are covered by existing remedial orders, the ITC launched a pilot program in February 2015 with the stated goals of improving and expediting existing procedures to better meet the needs of those impacted by ITC remedial orders. In particular, the new program is designed to test potential revisions to existing procedures for modification proceedings and advisory opinions.

Under Rule 210.76, any person may petition the ITC to modify the scope of an existing remedial order based on "changed conditions of fact or law." 19 C.F.R. § 210.76(a)(1). Similarly, if a petitioner has previously been found by the ITC to be in violation of Section 337 and can present "new evidence or evidence that could not have been presented at the prior proceeding . . ." (e.g., that the new or redesigned product does not infringe), the ITC will typically institute a modification proceeding. 19 C.F.R. § 210.76(a)(2). Modification proceedings are conducted *inter partes*, resulting in an evidence-based determination based on the record, and are appealable to the U.S. Court of Appeals for the Federal Circuit. Resolution of modification proceedings typically takes 6 to 12 months.

Under the ITC's pilot program, a modification proceeding may be commenced by filing a petition that alleges facts as to why a new or redesigned product should be carved out of the existing remedial order. For petitions involving purely legal questions, the Office of General Counsel ("OGC") will conduct the proceeding and provide its recommendation to the ITC, which will then issue a decision within 60-90 days. Petitions requiring minimal fact-finding will be referred to the Office of Unfair Import Investigations ("OUII"), which will provide a recommendation to the ITC. The ITC's decision will normally issue within 90-180 days. If the petition indicates a need for extensive fact-finding, the ITC may refer the proceeding to an Administrative Law Judge ("ALJ") to develop the record and issue an initial determination. The ITC's decision will normally issue within 6-9 months. (*See* USITC Pilot Program for Rulings on Redesigned Products in Commission Post-Order Proceedings: Background and Facts, available at http://www.usitc.gov/press_room/featured_news/pilot_program_will_test_expedited_procedures_usitc.htm.)

A party seeking a ruling on whether a new or redesigned product will violate an existing remedial order may also seek an advisory opinion under Rule 210.79(a). Pursuant to that rule, the requesting party must show that it has "a compelling business need for the advice and has framed his request as fully and accurately as possible." 19 C.F.R. § 210.79(a). As with modification proceedings, advisory opinion proceedings are *inter partes* and typically involve fact-finding. Unlike rulings in modification proceedings, however, advisory opinions are not appealable to the Federal Circuit. Advisory opinion proceedings have historically ranged from 9 to 12 months.

Much like the procedures outlined in the ITC's pilot program for modification proceedings, the new procedures for advisory opinion requests are designed to provide expedited resolution. Requests involving purely legal questions are referred to the OGC to be resolved within 60-90 days. Requests involving minimal fact-finding are referred to OUII to be resolved within 90-180 days. If the request involves more extensive fact-finding, the ITC may refer the proceeding to an ALJ to develop the record and issue an initial determination. The ITC's decision will normally issue within 6-9 months.

To date, the procedures reflected in the new pilot program have been used only once. *(Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823. While the advisory opinion in the 823 investigation issued in June 2014, the procedures used in that investigation closely resemble those outlined in the ITC's new pilot program.) In that investigation, the ITC issued a general exclusion order and cease and desist order against several respondents. One of the respondents filed a request for an advisory opinion under Commission Rule 210.79 as to whether its new products were covered by the exclusion order. The ITC instituted the proceeding, referred it to OUII, and ordered OUII to issue a report within 90 days. OUII issued its report, finding that the products at issue fell outside of the exclusion order. The ITC adopted the report.

The success of the ITC's pilot program remains to be determined. But the Commission's recognition that its current procedures are inadequate is an important first step in addressing the problem.

VICTORIES

Ninth Circuit Pro Bono Victory

The firm obtained a pro bono civil rights victory in a Ninth Circuit appeal on behalf of a California state prison inmate, Maurice Olivier. Proceeding *pro se* in the district court, Mr. Olivier alleged prison officials inflicted cruel and unusual punishment upon him in violation of the Eight Amendment in a variety of ways over a period of several years, including by denying him all access to outdoor exercise for months at a time, illuminating his cell twenty-four hours a day, and failing to treat his severe medical problems, including insomnia and migraine headaches.

After the district court twice dismissed his complaint, Mr. Olivier appealed, and the firm was appointed to represent him *pro bono*. A team of Quinn Emanuel associates designed an appeal strategy, prepared briefing that pieced together the necessary allegations for Mr. Olivier's claims from the many prison grievance documents referenced in his complaint, and argued the case to the Ninth Circuit. After oral argument, the Ninth Circuit adopted the firm's argument in its entirety, unanimously agreeing on every contested claim for relief, resulting in a complete victory for the client.

Appellate Victory on Contractual Limitation of Liability

The firm achieved an important appellate victory in New York for its clients Cointer Chile and Azvi Chile in the Appellate Division, First Department, in their long-running lawsuit against their former financial advisor, The Bank of Nova Scotia. The Appellate Division's decision reinstated a claim for breach of contract based on Scotia's alleged gross negligence that seeks more than $80 million in damages. The lower court had dismissed the claim based on a liability disclaimer in the parties' contract.

The case involves a botched financial model that Scotia prepared for the plaintiffs—a joint venture comprised of Cointer Chile, Azvi Chile, and S.A. de Obras y Servicios Copasa (who is separately represented by Wilk Auslander)—to support the plaintiffs' competitive bid for several hundred million dollars to construct and operate what was to be Chile's longest highway. The plaintiffs alleged Scotia's financial model contained a critical error that caused their bid to be undervalued by more than $80 million (a fact they did not know until after they submitted their bid), and that Scotia should have caught the error before sending the financial model to the plaintiffs by implementing routine audit procedures. The undervalued bid prevailed, and the plaintiffs were awarded the bid by the Chilean government. If Scotia's financial model had been correct, the plaintiffs allege, they still would have won the bid, but at a price approximately $80 million higher. Chilean law required the plaintiffs to follow through with their original bid, notwithstanding the error in the model, or forfeit a $10 million bond.

The trial court dismissed the plaintiffs' breach of contract claim for failing to deliver an accurate financial model on the grounds that Scotia was protected by a liability disclaimer in the parties' contract, and that the plaintiffs had not adequately pleaded gross negligence. New York law does not permit a party to disclaim liability for gross negligence.

On appeal, the firm persuaded the Appellate Division to reverse, successfully arguing that it was premature for the trial court to dismiss the gross negligence-based breach of contract claim on a motion to dismiss. The Appellate Division also upheld an additional breach of contract claim asserted by Cointer and Azvi that the lower court had sustained—and which Scotia had cross-appealed—and rejected Scotia's argument that it should be indemnified for legal fees and other losses incurred in the case.

New Mexico Class Action Victory for Uber

The firm obtained another victory for client Uber Technologies, Inc. in its continued defense of Uber's operations around the U.S. Uber began offering its service in New Mexico in May of 2014. In September of 2014, New Mexico taxicab and limousine companies brought a class action lawsuit against Uber under New Mexico's Motor Carrier Act and Unfair Practices Act. The plaintiffs claimed that Uber was operating as an unauthorized transportation service carrier by failing to adhere to various taxicab regulations and requested that the court permanently enjoin them from doing any business in New Mexico.

Quinn Emanuel attorneys stepped in and briefed and argued against the injunction on short notice. The court rejected the plaintiffs' request for a preliminary injunction, accepting the firm's argument that due to the innovative nature of Uber's service, the matter was best left to the jurisdiction of New Mexico Public Regulation Commission. Subsequently, on Uber's motion, the Court dismissed the plaintiffs' claim pursuant to the primary jurisdiction doctrine. After the court's ruling, the plaintiffs voluntarily dismissed an unrelated negligence claim based on an isolated car accident.

By defeating the plaintiffs' request for injunctive relief and obtaining dismissal of the suit in its entirety, the firm ensured that Uber will continue to be available to users in the State of New Mexico. The opinion will also serve as valuable precedent for arguing that courts across the country should defer to regulatory agencies and refrain from hearing similar claims in the future. Q

(Lead Article continued from page 3)

but the judge jumped into the silence and asked incredulously: "Misremembered? Did you have a hallucination?" "No, I just . . . ." Weisman trailed off.

Sensing that this was a prime opportunity to reach a favorable deal, Quinn Emanuel approached the prosecutors in the courtroom to see if they were ready to talk. They were. The judge sent the jury home early for a four-day weekend, and Burck negotiated the deal that resolved the case.

Perhaps the only downside to the early end of the trial was that the rest of the firm's trial plan went unexecuted. In particular, partner Juan Morillo was waiting on deck to take on the most important legal issue in the case—whether Ecopetrol, the Colombian state-owned company that employed David Duran, was an instrumentality of the Colombian government as required by the FCPA. Morillo had used his unmatched expertise with transnational white collar investigations to pull together expert witnesses in Colombia, despite their initial reluctance to support a criminal defendant against the combined might of the United States and Colombian governments, and develop legal theories based on the complex interaction between American and Colombian law that went to the very heart of the case.

The efforts of Bill Burck, Bill Price, and Juan Morillo, would not have been possible without a dedicated team of counsel, associates, paralegals, and assistants who helped brainstorm the opening statement and cross-examinations, who found and prepared witnesses in the United States, Colombia, and Europe, who traveled across the globe to secure key documents, who penned the dozens of briefs and motions we filed pre-trial and during trial, and who handled the extensive logistics involved in bringing together a team of litigators from around the country to try a case against the U.S. government.

At sentencing, the judge questioned the Government's complaint that FCPA cases present particular evidentiary difficulties that favor defendants. In particular, the judge noted that the Government had unique access to witnesses and evidence from Colombia, including David Duran, the alleged foreign official in this case. The judge rejected the assertion that Sigelman should receive any jail time as a deterrent to others, noting that the Government had made choices in the case, from relying on the testimony of Weisman to permitting Duran to enter and exit the U.S. at will, that helped lead to the outcome of the trial. The judge said to the lead prosecutor: "You chose not to complete the trial, not me. In some form you're going to have to explain why." For our client, the answer is clear.

The huge amount of preparation that went into every facet of this trial gave the Quinn Emanuel team confidence that they knew the Government's case inside and out before the jury was even impaneled. There would be no surprises, and they were ready for anything and everything the prosecutors threw their way. The firm's trial strategy wore down the Government's case and opened up an opportunity to resolve the case favorably for our client without the risk inherent in taking the case to the jury. And then the Quinn Emanuel team's solid relationship with the Government, built on professionalism and goodwill that were never compromised even in the heat of battle, enabled us to use that opportunity to secure for Sigelman the deal that saved him millions of dollars in penalties and, most importantly, saved him from potentially decades in prison. Q

Quinn Emanuel Bolsters Russian/CIS Litigation Practice with Hire of Highly Rated Litigator Nick Marsh in London

Nick Marsh, a highly rated commercial litigator and international arbitration specialist, has joined Quinn Emanuel as a partner based in the firm's London office. Marsh has extensive experience with banking, fraud, and offshore disputes, including shareholder and joint venture litigation involving international parties. His practice focuses on Russian and CIS disputes, important jurisdictions for the firm's growing litigation and arbitration practice. He holds a degree in both French and German (*First Class Honours*) from the University of Bristol and is fluent in Spanish, French, and German, with a working understanding of Russian and Italian. Marsh has been recognized as a leading lawyer by many prominent legal publications including *Chambers & Partners* and *Legal 500*. *Chambers Global* quotes one source as calling Nick a "superb litigator, one of the very best I have ever dealt with." Q

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business litigation report

quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact Becca Voake at 213-443-3165.

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