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Multi-Jurisdictional Enforcement of Judgments

With more cross-border trade and foreign investments, businesses may find themselves in more disputes with counterparties before foreign courts or in international arbitration. Where a party chooses—or the parties' contract requires—litigation in a foreign court, it may obtain a final judgment for money damages from the foreign court. However, that court judgment may not end the dispute. The losing party (the judgment debtor) may refuse to pay on the judgment or settle the dispute at a reasonable discount in exchange for giving up appeal rights, and the prevailing party (the judgment creditor) may not have seized assets prior to the judgment. In this situation, the judgment creditor or a distressed debt fund that purchases the judgment may seek to recognize and enforce the judgment in countries where the judgment debtor has assets. Where the final judgment is large, the parties may find themselves fighting or defending a global campaign to recognize and enforce the judgment in multiple countries where the judgment debtor has assets.

This article provides a brief practical overview of multi-jurisdictional enforcement of judgments. First, this newsletter surveys the laws on recognition and enforcement of foreign judgments of several different jurisdictions. The Hague Convention on Choice of Court Agreements has not yet entered into force, and there are accordingly procedural and substantive differences in the enforcement laws across countries, which should be accounted for in any global strategy. Second, this newsletter touches on some practical considerations to mount a successful global campaign to either enforce a judgment or defend against enforcement.

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INSIDE

Philippe Pinsolle Wins 2014 France Arbitration Counsel of the Year at *Benchmark* and *Expert Guides'* Global Arbitration Awards

Paris-based partner Philippe Pinsolle was recently named France Arbitration Counsel of the Year at *Benchmark* and *Expert Guides'* 2014 Global Arbitration Awards. This honor is a recognition of Mr. Pinsolle's outstanding 20-year record in major international arbitrations in France and elsewhere. He has acted as counsel in more than 200 international arbitrations, with a particular focus on investor-state arbitrations and commercial disputes involving the energy, power, oil & gas, construction, and defense industries. He has been involved in arbitrations under the auspices of virtually all major arbitration institutions, including the ICC, the LCIA, the ICSID, the SCC, the AAA, the ICDR, the AFA, as well as in ad hoc cases under the UNCITRAL rules or otherwise. Mr. Pinsolle has also served as an arbitrator in more than 35 cases, as well as an expert witness on arbitration and French law issues.

Quinn Emanuel Named a Top Intellectual Property Firm by BTI Consulting

Quinn Emanuel was recognized as a "Go-To IP Litigation Firm" in a recent report published by BTI Consulting, a leading provider of strategic research to the legal community. BTI Consulting identified top IP law firms through interviews with more than 175 General Counsel and IP decision makers at Fortune 1000 companies. Quinn Emanuel was selected from among 520 law firms that offer intellectual property services.

Quinn Emanuel Receives Top Rankings in *The Legal 500 USA 2014*

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I. Survey of Recognition and Enforcement Laws

The laws that govern recognition and enforcement proceedings of foreign country judgments in various jurisdictions are often similar but not identical. This section provides a brief overview of those laws in several places where judgment debtors' assets may be located, which are also countries in which Quinn Emanuel has offices: the United States, the United Kingdom, France, Russia and Hong Kong.

United States: In the United States, recognition and enforcement of foreign judgments is governed by state law. Many states have enacted a version of the Uniform Foreign Money-Judgments Recognition Act (the "Recognition Act"), helping to harmonize the standards for recognition and enforcement across states. In New York, the Recognition Act was enacted in 1970 as Article 53 of the New York Civil Practice Law and Rules ("CPLR"), to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement" in New York. *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221, 792 N.E.2d 155, 159 (2003). Under Article 53, a foreign judgment is enforceable in New York if the foreign judgment is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." CPLR § 5302. A foreign judgment is conclusive where "it grants or denies recovery of a sum of money." CPLR § 5303. Unless a ground for non-recognition is met (as discussed below), "'foreign judgment[s] should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding.'" *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 458 (citing *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 83, 850 N.E.2d 647, 651 (2006)). Other states, such as California, Illinois and the District of Columbia, have likewise enacted a version of the Recognition Act. *See* Cal. Civ. Proc. Code § 1715; 735 Ill. Comp. Stat. 5/12-663; D.C. Code § 15-363. Similar to New York, foreign judgments in California, Illinois and the District of Columbia that grant or deny recovery of a sum of money and that are final, conclusive, and enforceable under the law of the foreign country should be recognized. *See, e.g.*, *Hyundai Sec. Co. v. Ik Chi Lee*, 215 Cal. App. 4th 682, 688, 155 Cal. Rptr. 3d 678, 681 (Cal. Ct. App. 2013). However, in contrast to New York, California, Illinois and the District of Columbia have now enacted the 2005 version as opposed to the 1962 version of the Recognition Act that remains in effect in New York. Accordingly, there are differences between each state's analogue statute of which judgment creditors and debtors should be aware. *See, e.g.*, *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 13-CV-1415, 2014 WL 4356135 (D.C. Sept. 4, 2014) ("[T]he New York statute governing recognition of foreign country judgments … provides New York courts with fewer grounds to withhold recognition of a foreign country judgment than are available to courts in the District of Columbia.")

Each state's statute further provides limited grounds for non-recognition of a foreign judgment. *See* CPLR § 5304; Cal. Civ. Proc. Code § 1716; 735 Ill. Comp. Stat. 5/12-664; D.C. Code § 15-364. Those grounds include, among others, if the judgment was rendered by a partial tribunal, the judgment was obtained by fraud, recognizing the judgment would be repugnant to public policy, the judgment conflicts with another final and conclusive judgment, or if the foreign proceeding was contrary to an agreement between the parties. *See, e.g.*, *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000) (refusing to recognize a Liberian judgment because the underlying proceeding occurred during "a state of chaos" and "civil war" in Liberia, "[t]he Liberian Constitution was ignored," and "the record show[ed] that the regular procedures governing the selection of justices and judges had not been followed since the suspension of the 1986 Constitution."); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995) (refusing to recognize Iranian judgment against the sister of the former Shah of Iran for lack of due process where the evidence showed defendant could not personally appear before Iranian courts, could not obtain proper legal representation in Iran, and could not obtain local witnesses on her behalf). Where a judgment debtor can show one or more of these grounds exist, a United States court might not recognize the foreign judgment in question.

United Kingdom: Foreign judgments are not directly enforceable in the United Kingdom. Instead, depending on which country the foreign judgment is from, there are different enforcement procedures prescribed by regulation, statute or the common law.

For judgments from other European Union member states or parties to the Lugano Convention, the procedure for registering a foreign judgment in the UK is set out in the Brussels I Regulation. The Regulation provides the simplest procedure for enforcing foreign judgments in the UK, and is not limited to money judgments or final judgments. Where the judgment of an EU member state or a party to the Lugano Convention has been certified with a European Enforcement Order, it may be enforced in the UK without the need to apply for registration of the judgment.

For judgments from particular Commonwealth countries and former British colonies, the enforcement procedure is set out in the Administration of Justice Act

1920. For judgments from particular foreign countries that have reciprocal arrangements for recognizing UK judgments in their jurisdictions, the enforcement procedure is set out in the Foreign Judgments (Reciprocal Enforcement) Act 1933. Those two Acts apply to judgments from, amongst other countries, Canada, Australia, India, Israel, Singapore, New Zealand, the British Virgin Islands and the Cayman Islands. Pursuant to the Acts, a foreign judgment may be registered in the UK if it is for the payment of a sum of money in respect of compensation or damages, provided that the judgment is from a superior court and/or a recognized court of record (rather than district or county courts), and it is not subject to an appeal. The two statutes provide for limited defenses to registration. These defenses principally concern fraud, due process and the foreign court's jurisdiction over the judgment debtor. There is no provision for the UK court to reconsider the merits of the case during the registration process.

For judgments from non-EU countries that are not covered by either the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933, the common law allows the holder of a foreign judgment to sue on that judgment as a debt. This latter group includes, for example, judgments from the United States and Russia. In England and Wales, foreign judgments can be enforced at common law only if they are: (1) *for a "definite sum of money*", which includes amounts actually ascertained and amounts that merely require an arithmetic calculation; (2) *"final and conclusive"*, meaning that the foreign court would treat the judgment as *res judicata* and not able to be re-opened. A foreign judgment may be final and conclusive even though an appeal is pending in a foreign country; and (3) *issued by a court that had jurisdiction over the party against whom the judgment is to be enforced*, which the English court will evaluate as a question of English private international law (rather than the law of the foreign country). As with the statutes referred to above, the common law provides for some defenses to enforcement on the grounds of fraud, breaches of natural justice, and that the judgment is contrary to the English public policy. Importantly, there is no basis for the English courts to question or reconsider the merits of a foreign judgment. Enforcement of foreign judgments at common law in Scotland and Northern Ireland is on similar terms.

Russia: Arbitrazh Procedural Code ("APC") of Russia provides that foreign judgments may be enforced on the basis of international treaty or federal law. Although a strict reading of this provision permits enforcement where provided for in a treaty (e.g., mutual legal assistance treaty ("MLAT")) or in a Russian federal law (e.g., Russian bankruptcy law allows enforcement of foreign decisions on insolvency on the grounds of reciprocity even in the absence of an international treaty), our lawyers were the first to successfully enforce a foreign judgment where there was no direct MLAT or federal law. Specifically, the Russian courts enforced a decision of the UK High Court on the basis of a combination of international treaties (which, in their entirety, were seen by the courts as grounds for enforcement) and principles of reciprocity and comity (see *Société Générale et. al. v. Yukos, case No. A40-53839/2005*). In this case none of the grounds to deny the recognition and enforcement of the foreign judgment were applicable, namely:

1. The judgment has not entered into force in the state of the foreign court;
2. The party was not timely and properly notified of the time and place the case was being considered, or could not give its explanations to the court for other reasons;
3. A Russian court has exclusive jurisdiction to consider the case;
4. An effective judgment of a Russian court has already been already delivered in a dispute between the same parties on the same subject matter and on the same grounds;
5. There is a case concerning a dispute between the same parties, on the same subject matter and on the same grounds pending in a Russian court, which was commenced prior to the of proceedings in a foreign court;
6. The term for the enforcement of the foreign court judgment has expired and was not restored by the Russian court;
7. The enforcement of the foreign court judgment would contradict the public policy of Russia.

Russian cassation court referred to the Agreement between the UK and Russia on economic co-operation dated November 9, 1992 which established a national regime of access to the trial on the territory of both countries. The court also emphasized the right to a fair trial established by the Convention for the Protection of Human Rights and Fundamental Freedoms. The court also referred to Agreement on partnership and cooperation between the European Communities and the Russian Federation and Vienna Convention on International Treaties. This legal position has been relied upon in other cases involving the enforcement of UK and Dutch judgments in Russia. See, e.g., *Boegli-Gravures S.A. v. LLC Darsail-ASP, case No. A40-119397/11*, *Rentpool B.V v. LLC Podyomnie technologii, case No. A41- 9613/09*.

Moreover, there has been a trend in Russia to allow enforcement of a broader category of judgments, such as decisions on procedural matters and summary

judgments. In particular, in *Mabofi v. Rosgas A.G.* the trial court in Hungary rejected Mabofi's claim based on the ICAC arbitration clause in the contract. The Hungarian appellate court reversed the trial court's decision, *inter alia*, on the basis of exclusive jurisdiction of Hungarian courts over the case. A Russian court considered that Hungarian appellate court's decision to have automatic effect in Russia on the basis of a USSR-Hungarian MLAT as judgment in non-property case. Similarly, in *Société Générale et. al. v. Yukos,* the court enforced a summary judgment of the UK court. At the same time, interim decisions, such as injunctive rulings, cannot be recognized and enforced (Information Letter of the Supreme Arbitrazh Court of Russia No. 78 dated 7 July 2004).

France: The recognition of foreign judgments in France is governed by a number of established and limited grounds. However, these grounds are not codified legislatively but rather arise from jurisprudence, where they have gradually evolved. The famous *Munzer* decision (Civ. 1re, 7 janv. 1964, *GADIP*, nº 41; *Rev. crit. DIP* 1964. 344), rendered by the French Cour de cassation in 1964, was the first to lay out the conditions which must be met for the recognition of any foreign judgment, irrespective of subject. They were as follows: (1) the judgment had to conform to public order; (2) the foreign judge had to have had international jurisdiction according to French law (meaning there must have been a substantial connection between the dispute and jurisdiction where it was adjudicated, as assessed by a French judge on the basis of the circumstances of each case, *see Simitch* (Civ. 1re, 6 févr. 1985, n°83-11.241, *GADIP* nº 70 ; *Rev. crit. DIP* 1985. 369)); (3) due process must have been respected; (4) the proper applicable law must have been applied to the dispute, according to French conflict of law rules; and (5) there must have been a total absence of fraud.

Two of these conditions have since been struck down in subsequent cases. In the 2007 *Cornelissen* decision (Civ. 1re, 20 févr. 2007, n°05-14.082, *Rev. crit*. DIP 2007. 420), the requirement that a French judge review the law applicable to the dispute according to local conflict of law rules was removed. This requirement had been heavily criticized by doctrinal authorities and was largely a French particularity. *See* P. Mayer, V. Heuzé, *Droit International* Privé, Montéchristien, Lextenso, 2010 at para 387. When deciding to remove it, the Cour de cassation noted that it was sometimes relevant but largely unnecessary in the assessment of whether a foreign judgment ought to be executed on French territory. Moreover, in the *Bachir* ruling of 1967 (Civ. 1re, 4 oct. 1967, *GADIP*, nº 45 ; *Rev. crit. DIP* 1968. 98), the requirement of due process, which centered on the need for a judgment to be enforceable and rendered by the proper authorities in its original jurisdiction, was placed under the umbrella of public order. Today, there are therefore three criteria used to evaluate foreign judgments in France: public order, international jurisdiction and absence of fraud. It is also worth noting that this general regime governing the recognition of foreign judgments is in some narrow cases where treaties are in place, inapplicable. For example, the recognition of a civil or commercial judgment from one E.U. country in another E.U. country is not governed by the above conditions but by the *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.

Hong Kong: Hong Kong is a Special Administrative Region of the People's Republic of China. A foreign judgment can be enforced in Hong Kong either under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (the "Ordinance") or at common law. Enforcement under the Ordinance is the easier route because it requires only an *ex parte* application with the local court. But this avenue is limited to judgments entered in the following countries: Australia, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, The Netherlands, New Zealand, and Singapore. The other substantive requirements for recognition under the Ordinance are that the underlying judgment (1) must be final and conclusive and (2) must be a money judgment. *Prime Credit Leasing SDN BHD v. Tan Cho Lung*, 4 HKLRD 741 (2006); *Cova Enterprises Ltd. v. Tjanaka*, 1 HKLRD 199 (2003). A Hong Kong court will not enforce a foreign judgment that provides for injunctive relief or is penal in nature. *See Nanus Asia Co. Inc. v. Standard Chartered Bank*, 1 HKLR 396 (1990). Only limited defenses, including those related to the foreign court's lack of jurisdiction, improper service, procurement of the foreign judgment by fraud, and the public policy concerns of Hong Kong, are available. A Hong Kong court will not reexamine the merits of the underlying foreign litigation.

An action to enforce a foreign judgment at common law is a comparatively cumbersome process. It is in essence an independent suit in Hong Kong and the judgment creditor must follow normally applicable service procedures. Judgments entered in the United States and the United Kingdom can be enforced in Hong Kong only at common law. *Islamic Republic of Iran Shipping Lines v. Phiniqia International Shipping LLC*, HKEC 1205 (2014); *Morgan Stanley & Co. International Ltd. v. Pilot Lead Investments Ltd.*, 2 HKLRD 731 (2006). To be eligible for common-law recognition, the judgment must (1) be for a

definite sum of money; (2) be final and conclusive; and (3) have been entered by a court with competent jurisdiction over the defendant. *Id*. With respect to finality, a Hong Kong court will generally refrain from enforcing a judgment during the pendency of an appeal. This raises the possibility of undue delay and asset dissipation. Judgment creditors can ameliorate that risk by requesting interim injunctive relief. With respect to jurisdiction, it is governed by private international law as interpreted in Hong Kong, not the law of the foreign forum. Jurisdiction can generally be asserted on the basis of the defendant's physical presence in the foreign forum, appearance in the underlying legal proceeding or prior contractual consent to jurisdiction. As with the Ordinance, only limited defenses on the grounds of fraud, breaches of natural justice, and Hong Kong public policy can be raised. There is no mechanism for reconsideration of the merits of the underlying foreign litigation.

The recognition in Hong Kong of judgments entered on the Chinese mainland is governed by a separate set of rules.

II. Practical Considerations for a Global Campaign

Where a judgment creditor is considering filing multi-jurisdictional enforcement proceedings, or a judgment debtor finds itself defending multi-jurisdictional enforcement proceedings, certain practical considerations can make a difference between a winning and losing campaign. Below are some key considerations that every judgment creditor and debtor should bear in mind.

First, the location of assets. Before incurring the cost and time of bringing an enforcement action, a judgment creditor should be reasonably certain that there are assets against which to enforce the domesticated judgment and that those assets cannot be moved out of the jurisdiction while the enforcement action is pending. When formulating a defense strategy, a judgment debtor should consider whether it can legally remove assets from the jurisdiction without affecting its business and whether information on the location of its assets is easily obtained. For example, a publicly-listed company may have more public information about its assets and may be less able to move its assets quickly than a privately held company.

Second, the sequence of enforcement actions. If the judgment will be domesticated in several jurisdictions, the judgment creditor should decide whether to bring all the enforcement actions at once, or whether to bring them seriatim. If the recognition actions will be brought one after another, there could be an advantage in first domesticating a judgment in a respected jurisdiction with straightforward enforcement procedures, like New York, or choosing a particular jurisdiction which has prior judgments rendered by the foreign court that issued the judgment. Thereafter, the judgment creditor could proceed to domesticate the judgment in other jurisdictions with a higher threshold for domesticating foreign judgments. Although a judgment debtor would generally not be in a hurry to obtain a decision in any of the enforcement actions against it, if it was highly confident in defeating an enforcement action in a particular jurisdiction, it might consider speeding that action up to obtain a favorable decision first, such as by electing not to make procedural motions that could slow down the action.

Third, asset freezes. Some jurisdictions may allow assets to be frozen pending the outcome of the recognition proceedings, such as in France or New York, whereas other jurisdictions may require a high threshold to be met before the courts will freeze assets before the court has domesticated a foreign judgment. A judgment creditor should consider asset freezing wherever possible and a judgment debtor might consider removing assets from jurisdictions that easily allow asset freezes prior to the judgment creditor commencing an action.

Fourth, discovery. Some jurisdictions allow broad discovery, such as the United States. It might even be possible to get discovery from third parties, such as financial institutions, whether located within the U.S. or extraterritorially. In other jurisdictions, courts may only allow limited discovery, or bank secrecy laws may limit the amount of information that can be obtained from financial institutions. As part of a global strategy, a judgment creditor should consider an enforcement action in jurisdictions that permit liberal discovery. A judgment debtor should be aware that if an enforcement action is brought in a jurisdiction with liberal discovery, that particular action could be especially damaging to its global defense.

Every one of the issues above requires coordination at the global level to implement effectively. There are also a myriad of mundane but important ways for global collaboration, such as sharing translations of document exhibits to reduce client fees and cross-checking pleadings in every jurisdiction to ensure that they are consistent with each other. It is therefore important for the judgment creditor and debtor not only to retain the best lawyers in each jurisdiction but to assemble a team of lawyers in multiple countries who collaborate well with each other. This is one reason Quinn Emanuel not only has leading litigation specialists worldwide, but also places a premium on collaboration across offices and operating as one firm.

New York Federal Court Holds That Arbitrator's Undisclosed Serious Health Condition Is Not Ground for Vacatur

There are several differences between court litigation and international arbitration, but two in particular stand out. First, whereas the losing party at trial can bring an appeal, the losing party in an arbitration can only seek limited review of arbitration awards, which impose high standards for setting aside the award. Second, whereas litigants in court proceedings are unable to pick their judge, parties in international arbitration get to select their party appointed arbitrator and often have some say in choosing the chair of a three-person tribunal. Especially because the award rendered by the arbitrators cannot be easily set aside, arbitrator selection is one of the most important decisions that a party must make. It is crucial for a party in an arbitration to choose arbitrators with appropriate legal and practical knowledge and who understand the business perspective of the appointing party. Less obvious but no less important, it is helpful to know if a potential arbitrator may have serious health issues that could jeopardize the conduct or outcome of the arbitration.

A recent decision of the United States District Court for the Southern District of New York ("SDNY") highlights these two key characteristics of international arbitration and how they relate to each other. In *Zurich American Ins. Co. v. Team Tankers A.S.*, 2014 WL 2945803 (S.D.N.Y. 2014), the SDNY denied a motion to vacate a 14 page-award for manifest disregard of the law and for arbitrator misconduct and corruption due to an arbitrator's failure to disclose to the parties his diagnosis of an inoperable brain tumor.

The arbitration concerned a dispute between Zurich American Insurance Company, as subrogee of Vinmar International Ltd., a charterer, and Team Tankers A/S, a marine transportation company, over the contamination of 3,500 metric tons of Acrylonitrile ("ACN"), a liquid chemical that is a versatile raw material. In June 2008, Vinmar chartered the M/V Siteam Explorer from Team Tankers to transport the ACN from Houston, Texas to Ulsan, South Korea, where it expected to find a purchaser. Independent surveyors took samples of the ACN before it was loaded and after it was discharged. Some of these samples were tested immediately for quality control and test results showed the ACN remained on specification. Unfortunately for Vinmar, the ACN market tanked precipitously while the ship was at sea. Vinmar stored the cargo in the Ulsan shore tanks for several weeks whilst it sought a buyer, and directed an independent surveyor to retest the ACN samples. Test results showed that a sample taken from the vessel's tanks before unloading in Ulsan had yellowed to an inacceptable level. And a sample from the shore tanks in Houston, which was never exposed to the vessel's tanks, remained unchanged. Armed with these results, Vinmar informed the shipbroker that it held Team Tankers responsible for the ACN's degradation. Unable to remediate the ACN, Vinmar eventually sold it at discounted prices.

The charterparty was governed by an arbitration clause providing that disputes be resolved by the Society of Maritime Arbitrators, Inc ("SMA"). Petitioners appointed Louis P. Sheinbaum as an arbitrator, Respondents appointed Anthony J. Siciliano, and in April 2011, Sheinbaum and Siciliano selected Donald J. Szostak as chairman. The panel held multiple hearings, took testimony from employees, experts and the vessel's master. The parties also submitted extensive briefing and the panel received declarations and materials from the manufacturer of the ACN.

Vinmar argued that the ACN was contaminated by remnants in the ship's tanks on its previous cargo, a chemical called pygas. Team Tankers argued that the yellowing was most likely caused by a combination of heat and the passage of time. On August 26, 2013, the panel issued a 2-1 decision in favor of Team Tankers, characterizing the dispute as "a classic case of well-qualified experts interpreting the results of highly technical test evidence differently." Award at 6. Because Claimants had not shown the ACN was damaged aboard the ship, the majority denied their claim. It also held that even if Claimants had shown that the cargo was damaged aboard the ship, Team Tankers would not have been liable because it "exercised the requisite statutory 'due diligence' to make the ship seaworthy." Award at 10, 12. Finally, the majority held that even if Claimants had prevailed in establishing liability, it would not be able to prove damages. Award at 12.

At some point in 2012, before the award was issued, Szostak was diagnosed with an inoperable brain tumor and never informed the parties of his diagnosis. In January 2014, he passed away.

Zurich American Insurance Company moved in the SDNY to vacate the award for manifest disregard of the law and for Szostak's failure to disclose his diagnosis.

On the manifest disregard of the law ground, the court began its analysis by noting that the United States Court of Appeals for the Second Circuit (covering New York, New Jersey and Connecticut, hereinafter,

"Second Circuit") "recognizes the viability" of the doctrine after *Hall Street Associates, L.L.C v. Mattel, Inc.*, 552 U.S. 576, 584-85 (2008), a Supreme Court case which put into question the doctrine's continued existence. Indeed, conflicting opinions have emerged since *Hall Street*. *See e.g. Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (noting, in dicta, that manifest disregard of law is not valid ground for vacating or modifying an award under the FAA); *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1281, 1283 (9th Cir. 2009)(noting that an arbitrator's manifest disregard of the law remains a valid ground for vacatur in the form of a judicial gloss on the statutorily enumerated grounds in the FAA); *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281, 285 (7th Cir 2011)(accepting Quinn Emanuel's argument that in the 7th circuit, "manifest disregard of the law is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act."). Despite recognizing its viability, the court held that the doctrine is one of "last resort", noting that "its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply." *Zurich American*, 2014 WL 2945803 at *4 (citing *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003). The court reviewed the award's reasoning and held that Petitioners did not meet "their extraordinary burden of showing that the majority manifestly disregarded the law in finding that the Petitioners did not establish a prima facie case." *Zurich American*, 2014 WL 2945803, at *8.

This holding is significant as it may allay concerns by some corporate counsel and commentators about the desirability of New York as a seat for international arbitration because, in their view, the doctrine renders the international awards issued in New York vulnerable to being set aside. *See e.g.* Henri Alvarez, *Judicial Review of NAFTA Chapter 11 Arbitral Awards*, in Emmanuel Gaillard & Fréderic Bachand (eds.), Fifteen Years of NAFTA Chapter 11 Arbitration, 161-62 (Juris Publishing, 2011)(likening the doctrine to other "domestic standards of review" that Canadian and Mexican courts apply to international arbitration awards, raising "the risk of producing uncertain results" and "compromising the finality and viability of awards."). The decision also suggests that the doctrine's threshold is extremely high.

Next, the court considered Petitioners' second ground for vacatur, namely that Szostak's failure to disclose his medical condition constituted corruption under FAA § 10(a)(2) and misconduct under § 10(a)(3). Under those sections of the FAA and applicable case law, vacatur is warranted "where there was evident partiality or corruption in the arbitrators", FAA § 10(a)(2), or "where the arbitrators were guilty of misconduct . . . which amount[s] to a denial of fundamental fairness of the arbitration proceedings." FAA § 10(a)(3); *Roche v. Local 32B-32J Serv. Emps. Int'l Union*, 755 F.Supp. 622, 624 (S.D.N.Y. 1991). Petitioners argued that Szostak's failure to disclose his medical condition violated the SMA rules or ethics code, contending that the brain tumor affected the arbitrator's cognitive functions and impartiality. *Zurich Americans*, 2014 WL 2945803, at *9. The court rejected this argument, holding that "a violation of arbitration rules or ethics codes is not a ground for vacating an arbitration award." *Id.*, at *9. Notably, the court held that under the FAA, "an arbitrator is under no duty to disclose medical conditions . . . Any number of matters—brain tumors, substance issues, marital problems, lack of sleep—might affect an arbitrator's concentration or faculties. Parties are entitled to *unbiased* and *uncorrupted* arbitrators . . ., not *perfect* arbitrators." *Id.*, at *10 (emphasis added).

The decision indicates that New York courts will not allow parties to "transform a personal tragedy into a second chance for parties disappointed with the outcome of their arbitration." *Id.*, at *11. Thus, it highlights the care that needs to be taken in selecting arbitrators. If the *Zurich American* approach is widely adopted, arbitrators would not need to disclose serious health conditions that may impair the discharge of their arbitral duties. It would be even more crucial for clients to rely on experienced arbitration counsel, who may be familiar with the personal situations of prominent arbitrators. Such counsel can help identify risks of delays in the arbitration due to illness of an arbitrator, or of having to reconstitute a tribunal should an arbitrator resign due to ill health, or, as in *Zurich American*, of receiving an award drafted by an arbitrator whose "concentration or faculties" are impaired. With such knowledge, clients can be discretely steered in their selection of arbitrator in order to maximize efficiency and the likelihood of success in the arbitration.

Trademark Litigation Update

Supreme Court Opens the Door to More False Advertising Claims. In a unanimous decision, *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court held that a plaintiff does not need to be a direct competitor in order to pursue a false advertising claim under the Lanham Act. *Id.* at 1394.

The Lanham Act is the primary federal trademark statute, and it prohibits misrepresenting the "nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities" in commercial advertising or promotions. 15 U.S.C. §1125(a)(1)(B). Circuit courts, however, have been split on how to determine who has standing to bring a claim of false advertising under the Lanham Act. *See Lexmark*, 134 S. Ct. at 1385. Some circuits, for example, explicitly required a plaintiff to be an "actual competitor" of the defendant to have standing, while other circuits applied a lower standard, such as that a plaintiff merely have a "reasonable interest" to protect. *Id.*

In *Lexmark*, Static Control brought a claim against Lexmark under §1125(a)(1)(B) of the Lanham Act. *See id.* at 1384. Lexmark produced laser printers and toner cartridges for their printers. *Id.* at 1383. Static Control did not sell cartridges—and thus was not a direct competitor of Lexmark—but rather created components that "remanufacturers" needed to refurbish Lexmark cartridges, which the remanufacturers could then sell in direct competition with Lexmark. *Id.* at 1384. In its lawsuit, Static Control alleged that Lexmark violated §1125(a)(1)(B) of the Lanham Act by: (1) misleading Lexmark customers into thinking that they must return their used cartridges to Lexmark; and (2) falsely advising remanufacturers that it was illegal to use Static Control's products to refurbish Lexmark cartridges. *Id.* Static Control alleged that these actions would divert sales from Static Control to Lexmark, harming Static Control's business reputation in the process. *See id.* The Supreme Court granted certiorari to decide the appropriate analytical framework for determining a party's standing to bring a Lanham Act false advertising claim.

The Supreme Court held that the cause of action could only extend to Static Control if: (1) its interests fell within the "zone of interests" of the statute; and (2) its injuries were proximately caused by violations of the statute. *See id.* at 1388, 1390.

The Lanham Act's "zone of interests" are defined by a detailed statement of purpose within the Act. *See id.* at 1389. The Court determined that plaintiffs who can allege "an injury to a commercial interest in reputation or sales" are within the zone, while consumers and companies who are simply misled into buying "a disappointing product" do not fall within the zone. *Id.* at 1390. If a plaintiff falls within the zone, then the analysis turns to proximate causation. *See id.* Under §1125(a), a plaintiff must generally show "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff." *Id.* at 1391. If the deception only harms another commercial actor that in turn affects the plaintiff, proximate cause will not be found. *Id.*

The Court held that Static Control satisfied both prongs. *Id.* at 1393. The "zone of interests" prong was relatively clear, with the Court holding that there was "no doubt" that the company was "within the zone" of the Lanham Act. *Id.* The proximate cause prong was less clear, as Static Control's injuries were not directly linked to customers, but rather "include[d] the intervening link of injury to the remanufacturers." *Id.* at 1394. However, the Court found that Static Control's allegations satisfied the proximate cause prong for at least two reasons. First, Static Control alleged that Lexmark disparaged its business by calling it illegal; "[w]hen a defendant harms a plaintiff's reputation by casting aspersions on its business, the plaintiff's injury flows directly from the audience's belief in the disparaging statements." *Id.* at 1393. Second, false advertising that reduced the remanufacturers' business necessarily injured Static Control, because it designed, manufactured, and sold microchips that were necessary for refurbishing Lexmark toner cartridges and had no other use. *Id.* at 1394. Given the "relatively unique circumstances" of the case, where there was "very close to a 1:1 relationship" between Static Control's and the remanufacturers' sales, the Court determined that Static Control sufficiently pled proximate causation. *Id.*

The Court explicitly rejected the idea that plaintiffs suing under §1125(a) need to be in direct competition with defendants in order to show proximate cause. *Id.* at 1394. Even if a defendant only meant to harm its immediate competitors and a plaintiff "merely suffered collateral damage" from the defendant's actions, a plaintiff could still pursue a claim under §1125(a). *Id.* The plaintiff's harm need only be "directly" caused by the defendant's actions, such that the targeted competing companies and the plaintiff are equally "immediate victim[s]." *Id.*

Lexmark may open the door to more litigation. While the Court underscored the "relatively unique" factual pattern of the case, *id.* at 1394, future plaintiffs may test the boundaries of the Court's decision to see how far the Court's proximate cause analysis can be extended to give more companies standing under the Lanham Act.

Product Liability Update

Some Courts Loosening Restrictions on Punitive Damages. The 1990s and 2000s saw many developments

restricting the frequency and size of punitive damages awards in tort litigation, including both state tort-reform legislation capping the size of awards and the procedures for imposing them, as well as court decisions limiting awards as a matter of substantive due process. Those decisions included the U.S. Supreme Court's landmark opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which generally held that a punitive damages award more than nine times the compensatory award will rarely survive due process. Within the last year, however, several large, high-profile punitive verdicts and other state law developments have prompted a renewed focus on punitive damages awards in tort litigation.

First, in April 2014, a federal jury in the Actos MDL in the Western District of Louisiana awarded $1.5 million in compensatory damages and $9 billion in punitive damages against Eli Lilly and Takeda in a case in which the plaintiff alleged his bladder cancer was caused by the prescription medication Actos. Daniel Siegal, *Takeda, Eli Lilly Stuck with $9B Actos Verdict*, Law360 (Aug. 28, 2014), http://www.law360.com/articles/572238/takeda-eli-lilly-stuck-with-9b-actos-verdict. The case was the first bellwether to be tried from the Actos MDL, and over 2,900 such suits remain pending against Takeda and Eli Lilly. *See* Anjali Rao Koppala & Chang-Ran Kim, *Takeda, Lilly Lose Bid To Overturn $9 Billion Award for Hiding Cancer Risk*, Reuters (Aug. 30, 2014), http://uk.reuters.com/article/2014/08/30/uk-takeda-pharma-actos-idUKKBN0GT05320140830. The MDL court denied the defendants' post-trial motion for judgment as a matter of law seeking to set aside the verdict on grounds of federal preemption and evidentiary insufficiency, leaving in place the $9 billion punitive damages judgment. *Allen*, No. 6:12-cv-00064-RFD-PJH, at 2-3, 101. The parties now await determination of a motion for a new trial in which the defendants primarily argue that the punitive damages award must be reduced under *Campbell*, given the 6000-to-1 ratio. Memorandum of Law in Support of Defendants' Rule 59 Motion for a New Trial, at 2-8, 12, *Allen v. Takeda Pharms. N. Am., Inc.*, No. 6:12-cv-00064 (W.D. La. Sept. 5, 2014).

Second, on July 18 of this year, a Florida jury awarded a plaintiff $17 million in compensatory damages and $23 billion in punitive damages in *Robinson v. R J. Reynolds Tobacco Co.*, a wrongful death action brought by an individual smoker's spouse, against R. J. Reynolds Tobacco Co. and other tobacco companies. *See* Jennifer Kay, *RJ Reynolds Vows To Fight $23.6B in Damages*, AP (July 20, 2014 3:04 AM), http://bigstory.ap.org/article/fla-jury-slams-rj-reynolds-236b-damages. *Robinson* was part of the so-called *Engle* progeny litigation, which is comprised of thousands of individual lawsuits filed against tobacco companies in Florida courts after the Florida Supreme Court's decision in *Engle v. Liggett Group, Inc.* (*Engle III*), 945 So. 2d 1246 (Fla. 2006), which decertified and vacated a $145 billion class action award and held that key trial findings on liability would be issue preclusive in follow-on litigation brought by the individual plaintiffs. Although the *Robinson* verdict is subject to pending motions for post-trial reduction, as well as potential appeal—indeed, it presents a punitive-to-compensatory ratio of more than 1300 to 1 and is 950 times bigger than the largest *Engle* progeny punitive damages award upheld on appeal—it nevertheless has been widely reported and may have a significant impact on other *Engle* progeny cases.

Third, on September 9 the Supreme Court of Missouri struck down the state's statutory cap on punitive damages as violating the Missouri state constitutional right to a trial by jury. *Lewellen v. Franklin*, No. SC 92871, 2014 WL 4425202, *4-6 (Mo. Sept. 9, 2014). *Lewellen* involved a verdict of $25,000 in compensatory damages and $1 million in punitive damages against the owner of a car dealership for defrauding the plaintiff and violating state commercial practices law, which was reduced to $500,000 pursuant to Missouri's cap on punitive damages. *Id.* at *3. On appeal, the supreme court held that "[u]nder the common law as it existed at the time the Missouri Constitution was adopted, imposing punitive damages was a peculiar function of the jury," and thus the statutory cap infringed on the plaintiff's right to jury trial by "chang[ing] the right to a jury determination of punitive damages as it existed in 1820." *Id.* at *5. The court further concluded that the award was not grossly excessive under *Campbell*, given the reported reprehensibility of the defendants' conduct. *Id.* at *4-5. Following *Lewellen*, the Supreme Court of Montana is also poised to rule on the constitutionality of its state's punitive damages cap, after hearing arguments in late September. *See* Order of August 27, 2014, *Masters Grp. Int'l, Inc. v. Comerica Bank*, No. DA 14-0113 (Mont. Aug. 27, 2014).

Since each of the foregoing decisions is subject to further potential review or interpretation, it is difficult to determine whether they represent significant trends or simply one-time aberrations. Significantly, the U.S. Supreme Court may further address punitive damages awards this Term through a pending petition for certiorari to resolve a split of authority on whether due process requires the court to review such verdicts de novo or with deference to what "a rational jury could have awarded." *Stevenson v. First Am. Title Ins. Co.*, 845 N.W.2d 395 (Wis. 2014), *petition for cert. filed* (U.S. July 30, 2014) (No. 14-106). Notwithstanding the recognized restrictions on punitive damages, corporations should be mindful of these recent developments in defending themselves in products liability and mass tort cases.

VICTORIES

Wage and Hour Class Action Victory

A recent order denying class certification dealt the coup de grace to a class action filed against the firm's client, Barnes & Noble Booksellers, Inc. Barnes & Noble was accused of various violations of the California Labor Code, including misclassification of employees as "exempt" from overtime pay and minimum wages, and failure to provide meal and rest breaks.

Plaintiff contended Barnes & Noble had a uniform practice of misclassifying Store Managers as exempt to avoid paying overtime to these employees. Quinn Emanuel elicited damaging testimony from plaintiff's proposed class representative and his own supporting declarants (current and former employees) showing that most tasks performed by Barnes & Noble Store Managers were, in fact, managerial in nature. The firm also marshaled dozens of its own declarations and deposed proposed class members and their supervisors to destroy plaintiff's premise that Barnes & Noble systematically misclassified its Store Managers.

Despite a plea by plaintiff at the hearing that they be permitted to submit a trial plan that might satisfy the concerns highlighted by the California Supreme Court in its recent *Duran v. U.S. Bank* decision, the Court denied certification in its entirety. It ruled that plaintiff failed to satisfy his burden to demonstrate common issues predominated over individual issues, that plaintiff was a sufficient class representative, or that a class action was a superior method to adjudicate plaintiff's claims.

This win followed one a few years ago where the firm also defeated certification in a wage and hour class action on behalf of Barnes & Noble's Assistant Store Managers, giving the company twin victories on claims where other employers have incurred huge liabilities during the recent wave of class action litigation under state and federal labor laws.

Second Circuit Pro Bono Victory

In July 2014, the firm won a *pro bono* victory in the U.S. Court of Appeals for the Second Circuit in an appeal involving the Individuals with Disabilities in Education Act ("IDEA"), a federal law that guarantees students with disabilities a "free appropriate public education." In *E.M. v. New York City Department of Education*, Judge Carney (joined by Judges Jacobs and Kearse) issued a 50-page decision vacating the district court's judgment that had declined to require the New York City Department of Education to pay the tuition for a private program in which the firm's client had placed her severely autistic daughter because she believed that the public school could not offer a safe and appropriate learning environment. The court concluded that the client had standing to seek public payment of that private school tuition even though she could not afford to pay the tuition nor had the school initially billed her, holding that "[t]he IDEA promises a free appropriate education to disabled children without regard to their families' financial status."

The client, E.M., had placed her daughter N.M. in a private school for autistic students because she believed that the public school program E.M. had been offered would not be safe for N.M., who is severely autistic and frequently engaged in self-harming behaviors. E.M., however, could not afford to pay N.M.'s tuition at the private school. Instead, she signed an enrollment contract with the school obligating her to pay the tuition, while the school left all of the payment deadlines in the form contract blank and agreed orally that it would hold off enforcing the contract while E.M. sought the tuition from the DOE.

While many cases have reaffirmed the right of parents to enroll their students in private school and seek reimbursement for the tuition under the IDEA, only a few district courts in the Second Circuit had addressed whether a low-income parent can seek retroactive payment of tuition that the school hasn't required the parent to pay. And indeed, administrative judges at both the city and state level had determined that E.M. did not have standing, because N.M. had received an appropriate education at no cost to E.M.

In its decision, the Second Circuit concluded unanimously that E.M. had standing. It held that the tuition contract E.M. had signed, in spite of certain blanks in the contract and notwithstanding that it had not been enforced five years after it was signed, was at least sufficient to give E.M. "a well-founded basis for fearing exposure to suit for nonpayment," and thus presented an injury-in-fact for standing purposes. The Court also decided in the alternative that, even if E.M. had reached an oral agreement with the school that she would have no obligation to pay tuition "unless and until" she succeeded in obtaining that tuition through an IDEA action against the Department of Education, E.M. *still* had standing to pursue her claim.

This holding is especially important for low-income families, as parents now have standing to seek tuition payments even where they have reached an explicit understanding with the private school that they will not be required to pay tuition under their enrollment contract "unless and until" such tuition is received from the Department of Education through

an IDEA proceeding. Previously, schools and parents had been hesitant to reach such explicit arrangements for fear of jeopardizing the parents' standing.

Product Liability Victory

On August 29, 2014, the firm obtained an order dismissing with prejudice a class action challenging the efficacy of Pfizer's highly successful antidepressant, Zoloft. Plaintiff Laura Plumlee brought suit under California's consumer protection statutes, the Unfair Competition Law, the Consumers Legal Remedies Act, and the False Advertising Law, seeking restitution on behalf of every Californian who had purchased or paid for Zoloft since it was first approved by the FDA in 1991. The essence of her claim was that Zoloft was no more effective than a placebo and that Pfizer had failed to disclose certain negative clinical trial data that bore on the efficacy of the product and, had it been disclosed, would have revealed that Zoloft only worked due to the "placebo effect." On behalf of Pfizer, Quinn Emanuel responded with judicially noticeable documents showing not only that the FDA had considered the same trial data plaintiff alleged had not been disclosed when it approved the medication, but also showed that the results of those same negative studies were actually made clear on the product label in multiple places.

The issue that led to the dismissal was statute of limitations. The plaintiff alleged she had used Zoloft from 2005-2008, but did not file her lawsuit until 2013, over 5 years later. The longest statute of limitations available under the consumer statutes is 4 years. On the first pleading motion, Judge Koh of the Northern District of California dismissed plaintiff's claims as untimely, but gave her leave to amend, directing her to show what steps she had taken towards diligence, if she wanted to take advantage of the delayed discovery rule. Plaintiff amended, but instead of showing diligence, claimed that there was no information in the public domain accessible to a layperson, so that even if she had been diligent, she could not have discovered that she had a claim. When it filed its opposition, Pfizer showed her allegation of no available information was untrue. Pfizer submitted a Request for Judicial Notice, attaching a voluminous submission of articles, books, and websites discussing antidepressants, including Zoloft specifically, and the placebo effect, as well as other issues plaintiff raised in her complaint. This time the Court dismissed her claims with prejudice.

Quinn Emanuel Receives Top Rankings in *The Legal 500 USA 2014*

The firm and its partners received top rankings in *The Legal 500 USA 2014* guide. Quinn Emanuel received top rankings in Financial Services Litigation, Trade Secrets Litigation, Corporate Restructuring, Energy Litigation, Insurance (Advice to Insurers), Copyright, Patent Litigation, International Trade Commission Proceedings, Trademarks Litigation, Product Liability and Mass Tort Defense, Securities Litigation, Supreme Court & Appellate, and White-Collar Criminal Defense. Six of the firm's attorneys were also selected to *The Legal 500*'s elite "Leading Lawyers" list:

John B. Quinn: Ranked as a First Tier "Leading Trial Lawyer."

Kathleen Sullivan: Ranked as a "Leading Lawyer" in the Supreme Court & Appellate category.

Charles Verhoeven: Ranked as a "Leading Trial Lawyer" and also a "Leading Lawyer" in the Patent Litigation category.

William Price: Ranked as a "Leading Trial Lawyer."

Jane Byrne: Ranked as a "Leading Lawyer" in the Insurance: Advice to Insurers category.

Sheila Birnbaum: Ranked as a "Leading Lawyer" in the Product Liability and Mass Tort Defense (Pharmaceuticals and Medical Devices) category.

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business litigation report

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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 David Henri at 213-443-3000.

- We are a business litigation firm of more than 650 lawyers — the largest in the world devoted solely to business litigation and arbitration.
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