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Exiting Long-Term Contracts with Governments: Trends in Production Sharing Agreement Disputes in the Oil & Gas Sector

The Rise of Disputes Under Production Sharing Agreements

With growing political and economic instability in many parts of the world, a number of long-term investors have been bringing their operations to a close and withdrawing from troubled States. Simultaneously, many of the original Production Sharing Agreements (under which those investments had taken place) are reaching the end of their contractual life. Both developments - often connected - have led to a significant number of disputes between international investors and host Governments. This article looks at recent trends in those disputes and considers how best corporations can protect themselves.

The history of Production Sharing Agreements ("PSAs") is well-known in the industry. First developed in Indonesia, they became a common instrument to regulate hydrocarbon production from the 1990s (especially in the developing world). PSAs are also long-term in nature. Typically, they provide for a term of 20 or 25 years from the commercialization of the asset. From those two facts alone - 25 year terms and a start date in the 1990s - one can see that many earlier PSAs have either just ended, or will do so soon. Equally, it is no surprise that a number of PSAs concern some of the more challenging areas of the world, forcing even the largest oil companies to reassess their on-going engagement in those jurisdictions.

Whether for reasons that are perceived by a State to be legitimate, or for opportunistic motives to have one final push to monetize a departing investor (or "Contractor"), the termination of PSAs has created a

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INSIDE

Quinn Emanuel Conducts Mock Jury Trials in Frankfurt and Munich, Germany

The firm hosted mock trial events in Frankfurt and Munich, Germany in December. As far as we are aware, these are the first U.S.-style jury trials conducted for a German audience in Germany. Both events were well-attended by lawyers from German companies and law firms. The events were an excellent opportunity to learn about U.S. jury trials, including jury service, jury selection, witness preparation and the role of the judge in jury trials. The firm's founding partner, John B. Quinn, served as the moderator and judge, while firm partners Manisha M. Sheth and Steven Madison played the role of plaintiff's and defense counsel, respectively. Q

New Partner Julianne Hughes-Jennett Joins London Office

Julianne Hughes-Jennett has joined the firm as a partner in our London office. Hughes-Jennett brings almost 20 years' experience advising on high profile litigation and arbitration matters, with a particular focus on the energy and commodities sectors. Julianne is also recognized as a leading advisor on business and human rights issues and advises clients regularly in the telecommunications and technology, financial, mining and construction sectors on the human rights impact of their operations. She also has significant experience in business and human rights investigations and litigation. Q new wave of disputes. Those disputes cover most aspects of petroleum operations. And it is something for which surprisingly few investors are preparing.

It has required - or should require - oil and gas companies to take their internal, end-of-PSA planning activities seriously. That will help them minimise the likelihood of a final dispute. Or, more likely, maximize a favorable settlement or successful defence against a State claim when they come to depart from the asset.

This article begins by illustrating certain areas in which we have seen many claims arise. Thereafter, it identifies ways in which a Contractor can best mitigate those risks and prepare for the inevitable claims. Whilst these disputes cover most aspects of petroleum operations, our focus is on two core categories:

(a) First, what one might describe as **Operational Disputes**. Within that broad category, three sub-topics are particularly relevant: allegations by the State of environmental damage; disputes concerning project assets; and issues regarding abandonment and/or decommissioning.

(b) Secondly, we highlight disputes concerning **Cost Recovery**. In particular, we will consider how past and current audit claims are often raised by State entities at the end of a PSA, either in their own right or to exercise leverage over other claims.

After describing each of those elements in more detail, we then close with a practical overview of what can be done by the Contractor by way of preparation. Put simply, *to prepare is to protect*. And whilst the natural focus of that advice is what *the Operator* should be doing, it should not be forgotten that co-ordination amongst the other Contractor parties (typically under a parallel Joint Operating Agreement) is also likely to be important.

Issues Arising from Operational Disputes

As noted above, we have seen three operational topics arise frequently in any end-of-PSA planning: allegations of environmental damage; asset disputes; and (perhaps the most important of all) abandonment and decommissioning. What are the key risks and issues with each?

For the first two, the key battleground in any dispute is likely to be on the evidence. Most problems arise with *evidencing* the existence (or non-existence) of alleged environmental damage. Or *evidencing* whether project assets have been damaged or poorly maintained, as States will often argue. At that stage, of course, most of the assets will typically have passed to the State.

On the environmental side, it is helpful to ensure that all of the Operator's records are up-to-date and accessible. That is obvious, but what does that mean in practice? That the Operator has a copy of the original Environmental Impact Assessment (even if were carried out before it came onto the asset); that the Operator has records of the monitoring programs implemented by it, and the reports that have been prepared as a result; and that the Operator has proper records of its waste management activities. Perhaps more important is any proof that the Government (or the relevant State entity) has been involved in those activities, or at least has been aware of what has been happening. States will often claim to have had no knowledge of their earlier involvement.

On the asset side, it is helpful to prepare and maintain a proper asset register. Beyond that, the Operator would be advised to keep up-to-date maintenance records, including a clear statement of the Operator's inspection and maintenance procedures. Equally, it would be helpful to be able to demonstrate the date and results of past inspections, as well as the maintenance work undertaken. As with environmental claims, it would be important to be able to demonstrate the Government's knowledge of, and participation in, those activities.

To that extent, then, evidence is king. However, that is not to say that *the Contractor* will have the burden of proof in any dispute. As noted below, quite the contrary. Rather, in any pre-termination negotiations (or dispute that might follow), it is simply helpful to have as powerful an arsenal as possible against any allegations advanced by the State. The burden should remain *on the State* to prove environmental harm or asset damage.

Whether the Contractor bears any liability for abandonment and/or decommissioning features in almost every end-of-PSA debate. Here, a distinction can be drawn between wells that *have already been* abandoned before termination (where the debate is often whether they have been abandoned properly), and on the other hand which party carries the burden of paying for the *future* abandonment of wells, after the Operator has departed.

On the former, we are back primarily in the realm of evidence. For wells that have already been abandoned, it is helpful for the Operator to have maintained good records showing, amongst other things: (a) the steps taken by them to plug and/or abandon wells; (b) the results of any monitoring of abandoned wells; and (c) the status of any abandoned wells at the end of a PSA. Once again, that is not to shift the burden of proof. It seeks only to fortify the Contractor's position as far as possible.

On the second question, we move outside the strict realms of evidence. We are now in the realm of law and contract. Ultimately, whether the departing Operator is responsible for the costs of *future* abandonment or decommissioning will depend on the terms of the PSA. Many older PSAs contain no such provision. Absent such a provision, the Contractor's position should be that it has *no* such responsibility, despite inevitable arguments by the State to the contrary.

A related topic concerns wells which have been *suspended* before termination, but not yet abandoned. There, we return to the importance of evidence. It would be helpful (at the very least) to maintain the contemporaneous records justifying the Operator's decision to suspend rather than abandon (and ideally showing the Government's buy-in to those proposals as well).

Disputes Concerning Cost Recovery

This brings us to the second of our core categories. Cost recovery provisions are the economic heart of a PSA. Yet this is rarely a closed issue when the PSA ends. Why so?

Unsurprisingly, during the earlier stages of a PSA, cost recovery audits are often resolved commercially. The Operator does not wish to rock the boat, and will often agree - on a commercial, sometimes even expressly without prejudice, basis - to certain audit exceptions asserted by the State, however illegitimate those exceptions might have been.

However, that flexibility often comes to an end at the close of a PSA. States often seek to reverse recovered costs; Contractors have little incentive to concede points; and the State often seeks to leverage cost recovery issues to settle other end-of-PSA claims.

For an Operator, two points are important: one practical, one legal. From a practical perspective, and echoing the points raised earlier, it is helpful for the Contractor to have documented its position on cost recovery comprehensively, with well-reasoned explanations for its position in any exchanges with the auditors. This is particularly important for the later PSA audits. In short, a Contractor needs to be mindful of these disputes years in advance and plan accordingly.

On the legal side, there are at least two further tools in the Operator's armoury. First, the role of burden of proof (a subject broached above); secondly, the relevance of limitation periods.

On the former, unless the PSA terms say otherwise, the better argument is that the burden is *on the State* to prove that certain costs are not recoverable, rather than on the Contractor to prove that they are. That can have a critical impact on the outcome of any Cost Recovery disputes. On the latter, most PSAs will contain time-limits for audits, which would supplement any prescription periods that have effect under the applicable law. Relying on those terms can be an effective tool in defeating some of the more egregious attempts by the State to reverse long-since recovered costs.

What Practical Steps Should an Operator Bear in Mind when Planning for the End of a PSA?

Having touched upon those two core categories - operational disputes and cost recovery - what next? How best to sum up the practical steps that any Operator should take in the lead-up to the termination of a PSA?

First, and self-evidently, any Operator (and PSA party) should identify early on likely areas of risk (operational; environmental; handover). At the very least, that will guide the focus of document management and preservation activities, as well as help direct the pre-handover actions to mitigate that risk. On this, one further point is worth emphasizing. *It is critical to ensure that all of this is done in conjunction with the Operator's legal teams.* That is often forgotten, as the operational teams get carried away with their own planning. Yet those analyses should be covered by privilege - they cannot be confused with, or be seen to be, operational documents (which thereby run the risk of falling into the hands of your counterparty).

Secondly, given the long-term nature of a PSA (and the fact that the Operator may well not have been there from the outset, having farmed-in at some point during the life of the asset), effective document management will be also key. The relevance of evidence has been highlighted throughout this note. In short, the operational records need some AWE: they need to be <u>A</u>ccessible; <u>W</u>ell-Organised; and <u>E</u>xhaustive. But there is a particular nuance in PSA disputes. They also need to be user-friendly to those unfamiliar with either the operations or the records, as disputes often arise long after the relevant people have departed. On that point, the Operator should also consider entering into formal retainers for key, departing staff who were involved materially in either the operations or the handover process. Their evidence is likely to be important. Attention too often is on the preservation of documents, rather than live witnesses who can bring those documents to life.

As well as being AWEsome, the Operator's documentary record also needs to be maintained securely and confidentially. That is obvious. But often forgotten is the need to ensure that you have copies available (whether in hard or electronic format) *out of the country*. Once you have left, access can often be difficult, if not impossible. Drilling down further, at an early stage the Operator should also ensure that it has developed a register of all formal exchanges with the Ministry and its relevant departments, and a system for capturing the e-mail correspondence of key officers and employees. As noted above, when it comes to a dispute States can often forget how active their involvement has been.

We are therefore talking about a lot of information (which is one reason, of course, why it needs to be marshalled carefully). With the Operator's records for handover, however, it is also essential to create a system which recognizes that those documents are merely a *sub-set* of the Operator's own records. A thorough exercise needs to be completed to filter out any legal advice or commercially-sensitive materials, including exchanges with JV partners, from any "handover materials". That includes, but is often forgotten, the Operator's records left on site.

Finally, should there be settlement discussions with the relevant Ministry in the lead-up to (or following) the termination of the PSA, one further aspect is worth underscoring. Be wary of the practical ambit of any without prejudice discussions that you believe you have agreed. The concept of "without prejudice" is not always a term of art, and documents you believe are protected may end up on the record, even illegitimately (or at least attempts made to place them on the record). As a basic principle, a Contractor should ensure that a member of its legal team is involved actively in leading those discussions, to maximize the chance of clothing anything sent with privilege. Beyond that, just be careful - even if you believe that your communications are protected, never say anything that you would not want a future arbitral tribunal to hear.

Thereafter, should a settlement be reached, great care needs to be taken to ensure that it provides the actual closure that the Contractor desires. States can be determined; Governments and Ministries change; Ministers often need to be seen to be tough. Any settlement needs to be documented properly; it needs to be stated to be comprehensive and final; and needs to address each of the risk areas identified in the Contractor's initial analysis. Chief amongst those are likely to be: (a) unresolved cost recovery audits; (b) any discrepancies in lifting allocation; (c) the condition of the block upon departure (with a particular nod to environmental and abandonment issues); and (d) the condition and status of all assets, fixed and mobile.

It is inevitable that more of these disputes will arise as more PSAs come to an end. Armed with these observations, however, parties to long-term contracts should be able to identify many of the key risks and have additional insight into how best to prepare for them. Q

NOTED WITH INTEREST

English Courts Affirm Robust Approach to Upholding International Arbitration Awards

Two of the key advantages of international arbitration as a dispute resolution mechanism are the certainty of outcome and the narrow rights to appeal from an arbitral award. Nevertheless, parties which are dissatisfied with the outcome of arbitral awards often seek to challenge them in the local courts of the jurisdiction in which the arbitration is legally "seated" (generally the venue where the hearing is held, although the parties can agree on a different venue for the hearing should they wish without affecting the legal "seat").

In a recent case where an arbitration award was then challenged by the losing parties (in which Quinn Emanuel represented the successful party), the Commercial Court in London affirmed the generally-accepted principle that the English courts should only overturn an arbitral award in exceptional circumstances.

Background

Quinn Emanuel acts for Qatar Foundation for Education, Science and Community Development ("**QF**"). In 2008, QF engaged two international construction contractors, Obrascon Huarte Lain SA and Contrack (Cyprus) Limited (part of the Orascom Construction group) (together the "**Contractors**"), to design and construct a new state-of-the-art hospital complex in Doha, the capital of Qatar, for a price of approximately £1.9 billion. In July 2014, QF terminated the contract with the Contractors on the basis that they were in default, notably because of significant delays to the project. QF then commenced an arbitration against the Contractors, seeking (among other things) a declaration that the termination of the contract was valid and lawful and that, as a consequence, it was entitled to recover from the Contractors the additional costs of completing the project with a replacement contractor.

In November 2018, the arbitral tribunal, made up of a distinguished ex-English Court of Appeal judge and two experienced Queen's Counsel (senior barristers) specializing in construction disputes, rendered an award in which it found that the termination of the Contractors' contract was valid and lawful. One month later, the Contractors commenced proceedings in the Commercial Court in London, where the arbitration was seated, seeking to have the tribunal's finding on the validity of the termination remitted for re-consideration on the basis of "serious irregularity" (one of the possible limited grounds for challenging an arbitration award under the English Arbitration Act).

The Contractors argued that the tribunal had decided the termination issue in QF's favour on the basis of a legal analysis which was not put to the parties and which the Contractors had not had an opportunity to address. The Contractors also argued that this alleged serious irregularity had caused them "substantial injustice" (a requirement for challenging an arbitration award successfully for serious irregularity under the Arbitration Act).

Challenges to Awards Under the English Arbitration Act

The Arbitration Act was drafted deliberately to provide only limited grounds for challenging or appealing an arbitral award. In broad terms, the three grounds are that: (i) the tribunal lacked substantive jurisdiction (section 67 of the Act); (ii) there was a serious irregularity causing substantial injustice (section 68); and (iii) the tribunal erred on a point of law (section 69). (The right of appeal under section 69 can be excluded by agreement between the parties, which it often is in the arbitration agreements of major international contracts.)

This case concerned section 68 of the Act, which is intended to address failures in the arbitration process. It provides that an award may be challenged on nine grounds of "serious irregularity", which largely concern the procedural aspects of the arbitration. It has been stated that section 68 was intended to deal with cases where "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

If one of the grounds is met, the party challenging the award also has to show that the serious irregularity has caused or will cause it "substantial injustice", although this is – in practice – almost always the case should serious irregularity be established.

Court Confirms Practice of Upholding Awards Wherever Possible

In her judgment on 2 October 2019, Mrs Justice Carr set out the legal principles governing challenges to arbitral awards. She observed that there is "a high threshold for a successful challenge, reflecting the purpose of the Act which is to reduce the extent of court intervention in the arbitral process" and that section 68 "is not to be used simply because one of the parties is dissatisfied with the result".

At the same time, Carr J noted that it is well-established that the courts will intervene where appropriate. In particular, if an arbitrator or arbitral tribunal decides the case on the basis of a point which one party has not had a fair opportunity to address, that is likely to amount to a breach of the tribunal's general duty to act fairly and impartially and to give each party a reasonable opportunity to put its case (as codified in section 33 of the Act) and satisfy one of the grounds for serious irregularity under the Act. She observed: "It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him".

However, balance is required. Carr J also stated that "this does not mean that every nuance or inference which the tribunal wishes to draw needs to be put to the parties if it differs from that which has been precisely contended for in the arbitration" and that "a tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration".

In this case, the Contractors had argued that the arbitral tribunal had reached their conclusion on the requirements for a valid termination of a contract under Qatari law by adopting a conclusion which had neither been argued for by QF nor raised with the Contractors prior to the arbitrators making their decision. Carr J considered the tribunal's award, the arguments by counsel during the arbitration and the cross-examination of the parties' Qatari law experts to determine whether this was borne out. She found that the Contractors' case on the legal requirements for a valid termination had been addressed by counsel in argument, had been put to the parties' Qatari law experts (but rejected by QF's expert) and had been addressed by the Tribunal. She also found that the Tribunal's reasoning did not involve any conclusions which had not been put to the parties during the arbitration. In doing so, she adopted a robust approach to the interpretation of the award in which she identified the substance of the Tribunal's reasoning (which was clear in any event). She rejected the approach of the Contractors, which was to seek to critique the award on a word-by-word level and to read into the award statements which simply were not there.

Conclusion

Carr J's judgment is a good example of the general approach of the English courts, which, as she herself stated, was to "strive to uphold arbitration awards". London has long been one of the leading centers in the world for international arbitration (alongside with Paris, Geneva, Hong Kong or New York where Quinn Emanuel has also offices) for this very reason: the courts recognize that commercial entities choose arbitration because it is intended to produce final and binding results which cannot easily be challenged, unless something has gone seriously wrong with the arbitral process.

However, the reality is that dissatisfied parties to arbitrations will still often seek to challenge them before the local courts of the seat of the arbitration, notwithstanding the principles set out above. Such challenges must therefore be contested robustly (as this case was). Q

PRACTICE AREA NOTES

Asia-Pacific Litigation Update

Recent Changes to the International Dispute Resolution Framework

The last few years have witnessed a number of significant developments in treaties facilitating the resolution of international disputes, many of which have an Asian nexus. On the Alternative Dispute Resolution front, August 2019 witnessed the signing of the Singapore Convention on Mediation (the Singapore Convention), while the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) replaced the failed Trans-Pacific Partnership (TPP) when it came into effect at the close of 2018. On the conventional, court-based front, the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention) was adopted by the Hague Conference on Private International Law (HCCH) in July 2019.

The Singapore Convention

Mediation is a popular dispute resolution tool to facilitate the commercial settlement of disputes, without the formality of either arbitration or litigation. Unlike an arbitrator, the mediator's role is not to adjudicate, but rather to facilitate discussions between disputing parties to arrive at a mutually acceptable solution. The mediation process is thought to offer greater flexibility, as well as be more cost and time efficient, than traditional dispute resolution processes. However, a regular criticism of mediation was the lack of an efficient and harmonized framework for the cross-border enforcement of settlement agreements. It was in response to this criticism that the Singapore Convention was developed and adopted by the United Nations, through the auspices of the United Nations Commission on International Trade Law (UNCITRAL).

The lack of a framework for the enforcement of mediated settlement agreements meant that, typically, the non-breaching party could only enforce the settlement agreement as a fresh contract claim, either through court proceedings or via arbitration (had the parties so agreed). The commencement of such proceedings could be both costly and time consuming, with the parties having then to deal with enforcement issues wherever the assets of their counterparty might have been found.

In June 2018, and after three years of lively debate, a finalized draft of the Singapore Convention was issued by Working Group II of UNCITRAL. The Singapore Convention was intended to be similar to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), becoming an instrument in the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. It was further meant to strengthen access to justice and the rule of law by ensuring that a settlement reached by the parties became binding and enforceable in accordance with a simplified and streamlined procedure.

Like the New York Convention, the application of the Singapore Convention is also limited to international commercial disputes. As such, disputes concerning (for example) family law, inheritance law or employment law are excluded. Unlike the New York Convention, however – but similar to the UNCITRAL-developed Convention on Contracts for the International Sale of Goods (CISG) – parties may opt-out of the Singapore Convention.

On August 7, 2019, Senior Officials representing 70 countries attended the Singapore Convention Signing Ceremony and Conference in Singapore, while 46 States, including the world's two largest economies - the United States and China - along with such Asian economic powerhouses as India and South Korea, signed up to the convention. Although Japan is not yet a signatory to the Singapore Convention, serious discussions to that end are currently taking place. The Convention will enter into force six months after being ratified by at least three of the signatory States.

Once ratified, parties from ratifying States can streamline the process of enforcing cross-border mediated settlements, by simply supplying the competent authority of a contracting State with the signed settlement agreement, accompanied by evidence that the agreement was the result of international mediation.

The New Comprehensive and Progressive (Free Trade) Agreement for Trans-Pacific Partnership

Although the TPP was signed on 4 February 2016, following the withdrawal of the United States in 2017 it never entered into force. Following the United States' departure, however, Japan took the initiative and moved the discussions with the remaining parties over to a new, yet very similar free trade agreement: the CPTPP.

In January 2018, all of the non-US TPP signatories reached agreement to conclude the CPTPP, and the formal signing ceremony was held on 8 March 2018 in Santiago, Chile. Along with Japan and Chile, signatories included Mexico, Singapore, New Zealand, Canada, Australia and Vietnam; representing approximately 15% of the world's economy. Each of the signatories, other than Chile, have ascended to the treaty. Interestingly, the United States, along with the United Kingdom, Columbia, Taiwan, Indonesia, South Korea and Thailand, have all expressed an interest in joining the CPTPP in the future.

Despite recent controversies surrounding Investment-Treaty Arbitration, for the most part the CPTPP allows for a fairly conventional dispute resolution mechanism for investors from signatory states to settle their disputes with CPTPP member states by way of international arbitration. New Zealand did, however, enter into five separate side letters: two (with Australia and Chile) disallowing Investor-State arbitration; and three (with Brunei, Malaysia and Vietnam), requiring some form of Investor-State mediation before an investor may move to arbitration.

The distinction between the CPTPP and the Japan-European Union (EU) Economic Partnership Agreement (the EPA) is notable. The European Union and Japan signed the EPA on July 17, 2018. It is the largest trade agreement ever negotiated by the EU, and it has created an open trade zone covering over 600 million people. Though finalized, the EU and Japan have yet to reach agreement on how they intend to settle Investor-State disputes. Discussions on how to deal with investor-state disputes remain on-going. Japan continues to push for conventional international arbitration, while Europe pushes for their newly-proposed investment court system.

The Hague Judgments Convention

On July 2, 2019, the delegates of the 22nd Diplomatic Session of the HCCH adopted the Hague Judgments Convention. Some describe the Hague Judgments Convention as a revolutionary instrument, akin to a form of "New York Convention of Judicial Judgments," as it seeks to make foreign judgments as readily enforceable as foreign arbitral awards. This may, however, be an optimistic evolution of the situation, as the Convention has yet to enter into force. Uruguay became the first signatory state, thereby indicating its eventual intention to accede to the convention. The very next day, the EU announced that it would also start preparing for accession. It is hoped by many in Europe that the Hague Judgments Convention can help address most post-Brexit judgment recognition issues between the EU and the United Kingdom. It is also noteworthy that China dispatched the largest number of delegates to the HCCH in order to participate actively in the discussions, with the Chinese government now also considering ascension to the convention.

The Convention will enter into force 12 months after the accession of the first two states. As no States have yet ascended, we are at least a year away from the Convention coming into effect. As such, the Hague Judgments Convention has not yet changed the international disputes settlement scenario materially (if at all). It is, however, important to monitor the situation as the Convention has the potential to have a significant impact on international dispute resolution.

Conclusion

While the Singapore Convention and the Hague Judgments Convention have yet to come into effect, the CPTPP entered into force as between Australia, Canada, Japan, Mexico, New Zealand and Singapore in December 2018, with Vietnam participating from January 2019. As such, investors are now in a position to plan their investments in CPTPP economies while considering the Convention's investor protection provisions.

The Singapore Convention, meanwhile, will likely come into force soon and will include some of the world's largest economies. Although mediation has always been a commonly utilized form of dispute resolution, this new Convention may act to encourage further use of cross-border mediation as a means of settling complex commercial disputes.

Commercial parties should take a "wait-and-see" approach to the Hague Judgments Convention, as there is still no certainty that it will enter into force. That being said, as both the EU and China are considering ascension to the Convention, we may in the future witness a significant new development in the efficient handling of international disputes.

Trial Practice Update

Issues Impacting Jury Selection in Sexual Harassment Cases

Workplace sex discrimination and harassment claims present evolving challenges in the #MeToo era. The jurors who will be selected to assess the proof at trial are unlikely to view it with fresh eyes given the widespread coverage of these issues in the mainstream media. The #MeToo Movement has brought more cases into the public discourse, emphasizing the extent of such misconduct across all industries and at every level of a company, as well as the failure of some institutions to investigate and respond appropriately to such complaints.

Studies show that most individuals have had either personal experience with discrimination, harassment, or sexual misconduct or know someone who has had such personal experience. Generally speaking, plaintiffs asserting sexual harassment or discrimination claims tend to benefit from jurors with related experience, because such jurors are likely be empathetic to the allegations, the type and quality of evidence, as well as the challenges of proof created by reporting delays or issues of memory. On the other hand, there is a possibility that such a juror might not be empathetic because he or she endured something personally that they perceive to be much worse (and without compensation).

Voir dire is therefore key to jury selection of prospective jurors. As a first step, Plaintiffs' counsel would be wise to seek jurors likely to presume that complaints of harassment or discrimination are credible. Research by the Doar Research Center suggests that younger and female jurors are more likely to do so compared to their older and male counterparts. In addition, these groups are more likely to believe that gender-based discrimination or harassment is prevalent. Doar's research further shows that youth is correlated with believing that harassment based on gender or any other identity is common. *See* Ellen Brickman and Chad Lackey, The Doar Research Center, "Perceptions of Discrimination And Harassment in a # MeToo World" (2018), at 9.

Jury selection in a sexual harassment or discrimination trial, as in any case, will include the court striking jurors "for cause" and the parties using preemptory challenges to remove jurors if they cannot weigh fairly the evidence or follow the Court's instructions. Voir dire requires cultivating candor in jurors' answers, where many may not be inclined to share intimate but relevant experiences and opinions. The highly personal questioning needed to assess bias demands a tone of respect and patience. Empathy needs to be explicit and repeated to avoid jurors withdrawing or responding negatively to questioning, particularly in a formal, sterile environment. *See* Claire C. Kates, *Protecting the Impartial Jury: A Solution of Questions*, 35 St. Louis U. Pub. L. Rev. 415, 432–34 (2016) (In questionnaires in Arizona between 1997 and 2000, "prospective jurors stated that they were concerned by the fact that lawyers do not seem to listen…; lawyers are perceived to pick on the jurors they do not like and belittle them; and the questions asked by the lawyers invade privacy of the potential jurors.").

Where possible, counsel should seek to strike a balance between providing privacy to individual jurors and allowing jurors to have the benefit of each other's responses. Privacy to an individual juror provides comfort for that juror and, as a result, facilitates openness and honesty. Moreover, privacy is particularly important when asking about jurors' experiences about traumatic experiences because such conversations can be re-traumatizing. At the same time, it may be valuable to have jurors hear one another's responses to the voir dire. Where jurors have can hear each other's answers, that may cultivate openness across the group and facilitate a more open conversation. Often the first prospective juror who opens up inspires the others to be candid as well, which might suggest starting with a prospective juror who seems most forthcoming where possible. Last, some attorneys have reported jurors being "more forthcoming and expressive in their responses to voir dire questions on the issue of sexual harassment and assault" in the post #MeToo era. Laura L. Cominic, Theodore O. Prosise, "Jury Selection in the #MeToo Era," *Tsongas The Advantage Blog* (Sept. 7, 2019).

It is important to remember that closing voir dire to the public or allowing for portions of communications to be completely private vary by courthouse, and are constrained by the public's First Amendment right of access. *United States v. Loera*, 2018 WL 5624143, at *1 (E.D.N.Y. Oct. 30, 2018) ("[T]he presumption of an open voir dire proceeding 'may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" (quoting *Press–Enterprise Co v. Superior Court of California*, 464 U.S. 501, 510 (1984))). A more informal practice of sidebar conversations may be sufficient to protect jurors and encourage candor. *See* Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions?*, 3 Rutgers J. L. & Urb. Pol'y 287 (2006) (describing how "it is easier for a juror to lie in response to a sensitive question than to call attention to himself and the issue" due to "concerns about privacy").

Each court will have its own rules and procedures for conducting voir dire. In some courts, the judge or a law clerk will conduct the questioning with input from the parties. In other courts, counsel for each side will be allowed directly to conduct questioning of the jury pool. Where litigators are allowed to conduct the questioning, voir dire will involve competing goals: the selection of a jury, of course, but also the ultimate jury's first impressions of the facts and issues of the case, as well as the attorneys themselves. Where allowed by the court, parties should seek to use written questionnaires for potential jurors as part of voir dire, including the opportunity for jurors to indicate that they prefer to discuss answers in private.

Finally, litigators should be prepared to articulate to the court where the line on "for cause" strikes should lie, and to use preemptory strikes for borderline cases. Preemptory challenges on the basis of sex, race, ethnicity or religion are prohibited under the *Batson* doctrine, and counsel must be careful to adhere to this prohibition where seeking to use statistical assumptions based on race or gender to stand in for factual information about a specific juror's attitudes.

Trademark & Copyright Litigation Update

Circuit Splits Impact Results in Trademark Infringement Cases

Where one sues, or is sued, for trademark infringement can make all the difference in how the case is resolved. The circuits (particularly the Second and the Ninth) are split on how to factor First Amendment interests in a trademark case when the unauthorized trademark use occurs in an expressive work, such as a movie or TV program. The circuits are also split on whether a plaintiff can receive an award of profits without showing the defendant acted willfully. The Supreme Court will attempt to address that split in the upcoming term.

Where the use of a trademark in an expressive work is at issue, the Second and Ninth Circuits have diverged on the extent to which the First Amendment protects such uses from a claim of infringement under the Lanham Act. In the late 1980s, the Second Circuit developed a test for balancing the First Amendment against the Lanham Act where the title of an expressive work is alleged to be false advertising. In *Rogers v. Grimaldi*, the Second Circuit held that the use of the trademark is protected by the First Amendment if the title: (1) has "at least some artistic relevance to the work" ***and*** (2) is "not explicitly misleading as to the content of the work." *Rogers v. Grimaldi*, 875 F.2d 994, 1000-01 (2d Cir. 1989). The Second Circuit later applied this framework to trademark infringement claims. *E.g., Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). Other circuits, including the Ninth Circuit, have since adopted the *Rogers* test for trademark infringement claims based on expressive works.

The Second and Ninth Circuits, however, apply the *Rogers* test in meaningfully different ways. When the Second Circuit adopted *Rogers* for use in trademark infringement cases, it held that whether a use of a trademark in an expressive work is explicitly misleading "must be made, in the first instance, by application of the venerable *Polaroid* factors." *Twin Peaks,* 996 F.2d at 1379. The Second Circuit also held that, where the likelihood

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Law360 Names Three Partners 2019 "MVPs of the Year"

Law360 has named three of the firm's partners 2019 "MVP's of the Year" in their practice areas. The publication's annual list recognizes exemplary individuals who have achieved incredible levels of success. The Quinn Emanuel partners named MVPs are: Media & Entertainment - Luke Nikas; International Arbitration - Isabelle Michou; and Class Action - Shon Morgan. Q

QE Lawyer Publishes Treatise on Section 1782

Lucas Bento, an associate in Quinn Emanuel's New York office, published recently "The Globalization of Discovery: The Law and Practice under 28 U.S.C. § 1782." The US has the most extensive discovery procedure of any jurisdiction worldwide. Section 1782 allows any "interested party" to foreign proceedings to seek US-style discovery from a person or entity located in the United States. Mr. Bento's book is the first to provide a comprehensive overview of the law and practice of Section 1782. The statute can be used to obtain evidence in the United States for use in pending foreign civil and criminal proceedings or arbitral proceedings, and can be used prior to the commencement of any such foreign action.

As the largest business litigation and arbitration firm in the world, Quinn Emanuel is uniquely positioned to assist litigants in proceedings outside the United States with either seeking or resisting applications for discovery in the United States under Section 1782. The firm has pursued, and opposed, Section 1782 discovery applications successfully in a wide variety of disputes on behalf of clients around the world (including the further case note mentioned later in this newsletter). Among its many recent successes, Quinn Emanuel obtained a significant victory in the Second Circuit in which the court held that Section 1782 can be used to obtain documents located outside of the United States. With over 800 lawyers, many of them dual-qualified, and 23 offices in 11 countries, our firm has as a significant part of its practice litigation involving disputes in multiple jurisdictions. Q

(continued from page 9)

of confusion is "particularly compelling," the "explicitly misleading" prong is satisfied. *Id.* Accordingly, in the Second Circuit, the same eight factors for determining whether an authorized trademark use is likely to cause confusion in a normal trademark case governs the question of whether such use is explicitly misleading and therefore actionable in the context of expressive works.

By contrast, the Ninth Circuit treats the explicitly misleading inquiry as a threshold requirement that is separate and apart from the likelihood of confusion test. Thus, for a use to be explicitly misleading, the Ninth Circuit requires that there be "an 'explicit indication,' 'overt claim,' or 'explicit misstatement.'" *Twentieth Century Fox Television v. Empire Distrib. Inc.*, 875 F.3d 1192, 1199 (9th Cir. 2017). A trademark infringement plaintiff need not meet this standard in the Second Circuit, but instead show only that there is a particularly compelling likelihood of confusion arising from the use of a trademark in an expressive work. In the Ninth Circuit, however, the likelihood of confusion factors are irrelevant to whether a trademark use in an expressive work is explicitly misleading.

The circuits are also split on whether a plaintiff in a trademark infringement case must prove the defendant committed willful infringement before receiving an award of the defendant's profits under 15 U.S.C. § 1117(a). That statute permits an award of profits "subject to the principles of equity," which many courts have interpreted as incorporating the common law requirement of willfulness, while other courts have looked to a host of equitable factors to determine whether a plaintiff is entitled to profits. *Id.*; *see, e.g., Quick Techs. v. Sage Grp. PLC*, 313 F.3d 338, 349 (5th Cir. 2002) (considering factors including "(1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) the adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether it is a case of palming off").

Congress amended Section 1117(a) in 1999 to clarify that an award of profits in a trademark ***dilution*** case requires "a willful violation." Courts have since wrestled with the question of whether Congress' express inclusion of a willfulness requirement for dilution claims, but not including a similar requirement for trademark infringement, should be construed as negating the willfulness requirement for trademark infringement. The Federal Circuit recently rejected that view in *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782, 789 (Fed. Cir. 2016), finding that willfulness remains a requirement for trademark infringement because Section 1117(a) requires an award of profits be "subject to the principles of equity." The court reasoned that the amendment "was simply to correct an error in the 1996 Dilution Act" and the insertion of a willfulness requirement for dilution "does not create a negative pregnant that willfulness is always required in dilution cases but never for infringement." *Id.*

The Supreme Court has granted certiorari in *Romag* and will determine whether Section 1117(a) requires plaintiffs to show that a trademark infringer acted willfully before obtaining an award of profits. Until then, the circuits remain split on whether willfulness is required. Q

VICTORIES

Precedent-Setting Victory in the Second Circuit

Quinn Emanuel achieved a precedent-setting victory in the United States Court of Appeals for the Second Circuit on October 7 in a case resolving uncertainty over the scope of discovery available in American courts in support of litigation and arbitration proceedings in other jurisdictions. Following the forced sale of Banco Popular de Español, S.A. ("BPE") to Banco Santander, S.A. in June 2017, various interested parties (including some represented by the firm) initiated or intervened in civil and criminal proceedings in a number of European and private forums. In support of those proceedings, Quinn Emanuel filed discovery applications in New York under a federal statute, 28 U.S.C. § 1782, that allows discovery from persons who "reside" or are "found" in the United States for use in proceedings outside of the United States. Although the district court denied the application with respect to Banco Santander itself, it permitted discovery from the bank's U.S. affiliate, Santander Investment Securities, Inc., and it rejected the argument that such discovery should be limited to documents located in the United States.

On appeal, the Second Circuit was asked to decide (1) whether Banco Santander "resides or is found" within the judicial district for purposes of discovery under Section 1782, and (2) whether Section 1782 permits discovery of documents physically located outside of the

United States. On the first question, the Second Circuit ruled that Section 1782 reaches "to the limits of personal jurisdiction consistent with due process," rejecting Banco Santander's attempt to narrow the statute's applicability and instead formulating a new test to be applied when discovery is sought from corporations that are neither incorporated nor headquartered in a U.S. judicial district. Although the Court went on to decide on the facts before it that Banco Santander itself was not subject to discovery under the newly-announced standard, its decision provides a roadmap for future discovery applications.

On the second question—whether Section 1782 allows discovery of documents located abroad, even if the responding entity itself "resides or is found" in the United States—the Court accepted Quinn Emanuel's position that the statute's express reference to the Federal Rules of Civil Procedure defined the territorial scope of available discovery, permitting access to all documents within a responding party's possession, custody or control, regardless of physical location. At Quinn Emanuel's urging, the Court also rejected Banco Santander's argument that such discovery was barred by the so-called "presumption against extraterritoriality," a presumption that Congress ordinarily does not mean for its legislation to have effect outside of the United States, as well as its argument that the legislative history and prior non-precedential appellate and lower court decisions supported a categorical bar to the discoverability under Section 1782 of documents located abroad.

The Second Circuit's decision clarifies both the standard for obtaining discovery in the United States for use in foreign proceedings, as well as the scope of discovery available in such circumstances from corporations that are present in the United States but that maintain relevant documents elsewhere. The decision thereby reaffirms the importance of Section 1782 as a discovery device for litigants in judicial and arbitral proceedings around the globe.

Quinn Emanuel Scores Another Victory for Olaplex in the Federal Circuit

On behalf of the California-based startup Olaplex, which invented novel products and processes for strengthening and repairing hair during bleaching treatments, Quinn Emanuel convinced the Federal Circuit recently to vacate and remand a Patent Trial and Appeal Board ("PTAB") decision that had invalidated one of Olaplex's crucial patents (the '419 Patent).

Olaplex invented and patented a process that uses maleic acid during hair bleaching treatments to protect and repair the damage that bleaching causes to hair. Industry giant L'Oréal approached Olaplex, purportedly to inquire about acquiring Olaplex. Under protection of a non-disclosure agreement, Olaplex provided L'Oréal a copy of a then-unpublished patent application concerning the maleic acid process. About a year later, L'Oréal introduced to the market its own suite of products and processes using maleic acid. Olaplex sued L'Oréal in federal district court for patent infringement and other claims, and with Quinn Emanuel won a substantial jury verdict in a recently concluded trial in August 2019.

Before that federal court trial, L'Oréal had petitioned the PTAB seeking invalidation of Olaplex's '419 Patent on the maleic acid process as obvious in light of the prior art. The PTAB ultimately agreed with L'Oréal that the patent was invalid. Part of the PTAB's decision addressed the objective evidence of non-obviousness known as copying; the idea being that, if the patent challenger or others copied from the patent rather than using the prior art, this is strong circumstantial evidence that the prior art did not make the invention obvious (because, if it did, there would have been no need to copy). Although the PTAB found as a matter of fact that L'Oréal had copied from Olaplex's then-unpublished patent rather than developed the process independently, the PTAB ruled as a matter of law that copying matters only when the thing copied is a patented product as opposed to the patent itself.

QE's challenge on appeal was to navigate through numerous Federal Circuit precedents to show that the PTAB had taken out of context a quote from the Circuit's decision in *Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317 (Fed. Cir. 2004). We did so by explaining that what really drove that decision was the Circuit's concern that copying doctrine should not be so broad as to assume that copying has occurred whenever the product/process of a competitor of the patent owner bears close similarities to the challenged patent. We emphasized that we had much more here, thereby alleviating that concern: (1) L'Oréal had gained access to a copy of an unpublished patent application to which, unlike a published patent, very few in the world had access; and (2) there was evidence that L'Oréal's research changed course to focus on maleic acid shortly after it obtained the unpublished application.

In a unanimous decision authored by Judge Reyna, the Federal Circuit agreed with Quinn Emanuel and Olaplex and vacated the PTAB's decision, remanding for the PTAB to weigh this important evidence of copying in determining whether the '419 Patent is obvious. Q quinn emanuel

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