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Landmark Revisions to the AAA's Commercial Arbitration Rules

The American Arbitration Association's Rules are among the most widely used rules in the United States. Fred G. Bennett, a partner with Quinn Emanuel's Los Angeles office and the chair of the U.S. Arbitration Practice, was head of the AAA task force that, working with AAA executives, recently developed significant revisions to the rules. The task force's project was an ambitious, multi-year drafting effort based on input from the most eminent arbitration practitioners and arbitrators in the country. Reflecting this process, the revisions to the Rules were aimed at addressing the interviewees' requests for a more streamlined, cost-effective, and structured process. The revised Rules encourage a process that *keeps the ball rolling*—focusing the parties on the issues that matter to resolve a dispute in an economical and expeditious manner. *Good-faith engagement* is a central theme to the revisions. In this article, we discuss the more notable changes and how they might impact parties utilizing the revised Rules.

Early Engagement of Participants

A major objective of the new rules is to engage the parties, their counsel, and the tribunal early in the arbitration process in order to expedite the entire proceeding. The revised Rules add a number of default rules and procedures designed to get the ball rolling by getting the parties to give serious thought, early in the arbitration process, to substantive issues that may drive the arbitration. These revisions eliminate "dead zones" of ambiguity or confusion on the part of the parties as to what to do next, particularly in the early stages of an arbitral proceeding.

R-21 permits, at the discretion of the arbitrator "depending on the size and complexity of the arbitration," a preliminary hearing that "should be scheduled as soon as practicable" after the arbitrator is appointed. Significantly, the rule encourages the parties themselves to participate in the hearing. The preliminary hearing is essentially intended to establish the parameters of the contemplated proceeding, and

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Quinn Emanuel Arbitration Practitioners Recognized in *Global Arbitration Review*'s "International Who's Who of Commercial Arbitration"

Five Quinn Emanuel international arbitration partners have been named to *Global Arbitration Review*'s prestigious "International Who's Who of Commercial Arbitration" list for 2014. Quinn Emanuel's honorees included London partner Stephen Jagusch (Global Chair of the firm's international arbitration practice); Los Angeles partner Fred Bennett (Global Vice-Chair of the firm's international arbitration practice and Chair of its domestic arbitration practice); Paris managing partner Philippe Pinsolle; Hong Kong managing partner John Rhie; and London partner Anthony Sinclair. *Global Arbitration Review* annually selects leading worldwide commercial arbitration experts by independent client research and peer reviews. Q

Quinn Emanuel Expands International White Collar Team with the Addition of Juan Morillo

The firm is pleased to announce that Juan Morillo will join the Washington, D.C. office as a partner and Co-Chair of the White Collar and Corporate Investigations Group. Morillo joins the firm from Cleary Gottlieb, where he focused primarily on criminal defense and civil litigation for major corporate clients. He represents clients in federal, state, and congressional investigations and assists clients in crisis management and public relations strategies. Additionally, Morillo has substantial cross-border experience in criminal investigations and civil disputes. Morillo is highly ranked by numerous legal publications, including *Benchmark Litigation*, *Financial Times*, and *Legal 500*, and he was selected by *The American Lawyer* as one of the "Top 50 Litigators Under 45." Q the procedure envisioned by the revised Rules is something very different from the sort of scheduling order entered in federal court. Indeed, the protocols established under the Rules' Preliminary Hearing Procedures (numbered P-1 and P-2) expressly warn against "importing procedures from court systems" that might be inappropriate for arbitration.

The checklist of items in P-2 include a range of topics that require each party to develop a strategy and schedule for the arbitration in preparation for the conference, including, notably: the possibility of mediation; potential amendments; applicable procedural and substantive rules; the possibility of disposing of threshold and/or dispositive issues; possible bifurcation of the hearing; procedures for the hearing itself; and a schedule that includes both pre-hearing and hearing dates. P-2 also mandates that the tribunal issue a written order memorializing the decisions reached during the hearing.

In addition to the preliminary hearing, certain rules have been revised or added to assure the efficient administration of the case before the arbitrator(s) is appointed. Rule 11 is an example. The former rule—Rule 10—laid out an initial procedure for the parties to determine the arbitration venue, either by agreement, or by a request from one party that was not timely objected to by the other. Revised R-11 adds certainty to resolution of the venue issue by eliminating this "consent by silence" provision, and vesting the AAA with authority to determine the proper venue—in accordance with express guidelines—if the parties cannot agree. The AAA's involvement in the process is designed not only to achieve a fair result, but in a manner that will avoid stalling the arbitration on a threshold issue.

R-12 revises the procedures for appointing arbitrators from an AAA-generated roster. The rule clarifies that the parties do not have to exchange their lists, and that the failure to return a list impacts only the party that failed to respond, by waiving any of its objections to the neutrals on the list. R-43 authorizes use of electronic mail to deliver notices to parties without having to obtain advance permission from the parties and the tribunal. These revisions, while simple and relatively minor, are in line with the core theme of the new Rules generally—moving the arbitration forward to an expeditious resolution.

More Streamlined Discovery Process

The new rules make changes that clearly articulate the parameters of discovery in arbitration, as well as the methodology for assuring a full and fair exchange of relevant information, particularly electronically stored information. Parties often agree to arbitrate in anticipation of avoiding the expense and burden of expansive discovery in judicial proceedings. The revised Rules contain clearer guidelines concerning the respective responsibilities of the tribunals and parties. They are intended to incentivize parties to focus discovery on the merits of a dispute, and expedite the process through party cooperation and enhanced discovery powers of the arbitrator where necessary.

Under R-22, the tribunal now possesses greater control over the pre-hearing exchange of information in order to promote efficient dispute resolution. These powers include the authority to require the exchange of materials that each party intends to rely upon, to order the parties to update document exchanges, and to require parties to provide documents in their possession or control that are "[r]elevant and material to the outcome of disputed issues" (so long as those materials are not readily available to the opposing party otherwise). This "relevant and material" standard essentially prescribes the recommended limits of discovery—and, importantly, is narrower than the "reasonably calculated to lead to admissible evidence" standard for discovery in federal courts and many state courts. Thus, parties are disincentivized from engaging in fishing expeditions or otherwise wasteful discovery efforts.

R-23 grants the tribunal tools to keep discovery proceedings focused. For example, where necessary the tribunal may create search parameters for electronic data, and allocate discovery costs. This allows the tribunal to play a more intimate, active role in ensuring the fair and expeditious exchange of information during the discovery period. R-23 expressly authorizes the arbitrator to issue enforcement orders for willful non-compliance, including the ability to draw adverse inferences and issue an interim award of costs.

The difference in the discovery contemplated by the revised Rules is highlighted by the revised Procedures for Large, Complex Commercial Disputes. This is a special section of the Rules (now numbered L-1 through L-3) that applies, unless the parties otherwise agree, to all arbitrations involving a claim of at least $500,000. Under the old version of L-3 (previously numbered as L-4), depositions and interrogatories were allowed "upon good cause shown" against persons who had information "necessary to determination of the matter." The new L-3 incorporates the "relevant and material to the outcome of the case" standard of R-22 and R-23, and directs the tribunal to permit depositions only in "exceptional cases" upon a showing of good cause.

Moreover, the tribunal may allocate the cost of taking the deposition. By eliminating one form of discovery altogether (interrogatories) and stating that another (depositions) should be "exceptional" and subject to cost-shifting, these revisions disincentivize wasteful discovery campaigns. The revised Rules even attempt to protect the parties from exercising complete control over the discovery process. Whereas under the old version of L-3, parties could "conduct such discovery as agreed," under the new version the parties "shall address" discovery issues in accordance with R-22.

Quasi-Mandatory Mediation

The Rules now mandate, under R-9, that parties "shall" mediate any dispute that involves a claim or counterclaim that exceeds $75,000. Any party may opt out by providing notice to the AAA and the other parties. But by requiring affirmative action to avoid a mediation, the new rules basically incorporate the mediation process into every AAA arbitration. The rules provide great flexibility to the mediation process—it may be scheduled at any time during the arbitration, provided only that it "shall not serve to delay the arbitration proceedings." This seemingly minor administrative footnote has more substantial practical implications—unlike a pre-merits mediation, a concurrent mediation disincentivizes bad-faith use of mediation by a party to drag its heels and delay dispute resolution.

Additional Tools to Discipline Uncooperative Parties

While mandatory mediation under R-9 seeks to gently foster a more cooperative atmosphere, other portions of the revised Rules take a more muscular stance in addressing the problem of uncooperative parties. Prior to the revised Rules, a tribunal's authority to enforce its orders and deal with uncooperative parties was implied, but not comprehensively articulated in the rules. As a result, arbitrators sometimes were uncertain as to how far their powers truly extended, and tended to go no further than allocating costs and fees at the end of the arbitral process. The revised Rules now provide a comprehensive set of enforcement tools for the tribunal to use.

Under the new R-58, a tribunal may sanction a party, upon the request of a litigant, when the party fails to comply with either its obligations under the Rules or under an order issued by the tribunal. However, reflecting a concern for the potential influence of sanctions on the substantive proceedings of an arbitration, R-58 imposes a series of procedural protections for parties subject to a sanction request. The party must receive an opportunity to respond to the request prior to the tribunal making any sanctions determination. Importantly, any sanctions order that "limits any party's participation in the arbitration or results in an adverse determination of an issue or issues" must be preceded by submission of evidence and legal argument by the parties. Any such order also must be explained by the tribunal in writing, thus creating a record of any sanctions that may significantly affect the course of the arbitration. Finally, R-58 expressly forbids the tribunal from entering a default award as a sanction.

At the same time, R-57 disincentivizes a common tactic used by parties attempting to avoid arbitration—the outright refusal to pay arbitration fees and expenses as they are incurred. This may occur, for example, when a respondent asserts counterclaims and thus both parties are invoiced for administrative fees. Under both the old and revised R-57, any party may advance the fees and charges owed by a nonpaying party in order to allow the arbitration proceeding to continue. However, under the revised rule, a party may request that the tribunal "take specific measures relating to a party's non-payment," which expressly include "limiting a party's ability to assert or pursue their claim." As with new R-58, R-57 now provides protection to the "sanctioned" party—a party subject to a request for such relief under R-57 must receive an opportunity to respond. Any order by the tribunal that "limits any party's participation in the arbitration" requires the party "who has made appropriate payments" to submit such evidence that the tribunal requires.

Additional Flexibility to Ensure a Fair Hearing of Evidence

Revised R-35 (formerly R-32) has been revised to promote more efficient arbitration proceedings and provide more flexibility in the presentation of evidence. R-35 underscores the increasingly common practice of the use of written witness statements in arbitration proceedings, as reflected by the change in phrasing from "affidavit" in the old R-32 to "written statement" in R-35. To help ensure the full presentation of all relevant evidence at the hearing, R-35 expressly authorizes the use of hearings conducted by "electronic or other means" (e.g., telephonic or video hearings), as well as the temporary relocation of a hearing to a venue where a witness who has "essential" testimony may be subpoenaed to testify before the tribunal. And to encourage parties to make witnesses available and to provide the tribunal with an additional tool to enforce compliance with its orders, the tribunal is expressly

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Federal Prosecution of Trade Secret Theft

Attorney General Eric Holder said, "There are only two categories of companies affected by trade secret theft: Those that know they've been compromised—and those that don't know it yet." According to former FBI Director Robert Mueller III, the "theft of trade secrets and critical technologies . . . costs our nation upwards of $250 billion a year." This article discusses federal prosecution of trade secret theft in the United States, including (a) what a victim should consider before requesting prosecution, and (b) information security practices that companies should adopt to discourage theft and to permit prosecution.

I. The Economic Espionage Act

The Economic Espionage Act ("Act"), 18 U.S.C. § 1831 *et seq.*, was the first federal statute that specifically criminalized trade secret theft. The statute primarily prohibits two types of theft: "economic espionage," theft for the benefit of a foreign government or agent, *see* 18 U.S.C. § 1831; and "theft of trade secrets," more generally known as theft for pecuniary gain, *see* 18 U.S.C. § 1832. Enacted shortly after the Cold War, the Act was a response to concerns about former spies who, finding themselves unemployed and in the United States, could adapt to the new political climate by stealing trade secrets from U.S. companies for foreign firms. Notwithstanding this origin, most prosecutions under the Act involve theft for pecuniary gain, not theft to benefit a foreign concern.

The Act requires the government to prove beyond a reasonable doubt that:

1. The defendant misappropriated information (or conspired or attempted to do so);
2. The defendant knew or believed this information was proprietary and that he had no claim to it; and
3. The information was in fact a trade secret.

See 18 U.S.C. §§ 1831(a)-32(a). The statute defines "trade secret" broadly to include all forms of tangible or intangible business information—be it a scientific method or engineering plans—so long as: (1) the owner has taken "reasonable measures" to keep the information secret, and (2) the information derives "independent economic value" from its confidentiality. 18 U.S.C. § 1839. The Act provides for injunctive relief and forfeiture of property derived from or used in connection with an offense.

II. Trade Secret Theft Prosecutions

The Justice Department has recognized the threat posed by intellectual property crimes like trade secret theft. The Department has established a Computer Hacking/Intellectual Property ("CHIP") section and has established 25 specialized CHIP units in various U.S. Attorney's Offices. Currently, the DOJ has more than 250 CHIP prosecutors.

Nevertheless, criminal prosecutions have been uncommon. In 2012, the Justice Department reported 12 prosecutions for charges of 18 U.S.C. § 1832, less than the 18 prosecutions reported that the Department reported in 2006. Several factors contribute to the infrequency of trade secret theft prosecutions. Federal prosecutors are required to consider several factors in deciding to bring charges under the Act, including the scope of the criminal activity (including involvement of a foreign government), the type of trade secret misappropriated, and the effectiveness of available civil remedies. *See* U.S. Attorney's Manual Ch. 9-59.000. Other factors include budget limitations, the Department's focus on matters involving national security and financial fraud, the relative complexity of trade secret investigations and prosecutions, and a recognition that in many cases the victim can and will seek a civil remedy. The tide may be turning, however, given the Department of Justice's announcement of a renewed commitment to the prosecution of "trade secret theft or economic espionage" and identification of intellectual property investigations as one of the Department's top four enforcement priorities. *See* U.S. Department of Justice PRO IP Act Annual Report to Congress at 16 (Dec. 2011).

III. Techniques to Improve Chances and Results of Prosecution

For many corporations, intellectual property, including trade secrets, is among their most valuable assets. We have observed with our clients that the deterrent effect of a criminal prosecution or conviction for trade secret theft is significant, particularly when the greatest threat is an employee moving to work for a competitor.

A victim of a trade secret theft can and should take certain steps to reduce its vulnerability to a trade-secrets theft, to persuade federal authorities to prosecute if a theft occurs, and to ensure that a prosecution does not impede the victim's business interests:

- **Take Measures to Ensure Secrecy**: As an absolute condition of a trade thief's liability, the owner of the secret must have taken "reasonable measures" to keep the information in question secret. 18 U.S.C. § 1839(3)(A). Physical security measures, limited employee access to confidential information, and notification to employees that the information was confidential are all measures that one federal appellate court has cited in concluding that one corporate victim took reasonable measures to keep information private. A February 2013 report from the Executive Office of the President suggests that corporations should conduct background checks on potential employees, mark pertinent documents "confidential," and adopt and enforce information security policies and training programs. Employee training programs, confidentiality agreements, and limited or partial dissemination are other measures that a corporation should consider taking in order to ensure a defendant's liability, among other reasons.

- **Make No Assumptions About Your Employees, Corporation, or Confidential Information**: Every employee should be required to abide by the corporation's security measures. In over 90% of trade secrets prosecutions, the defendant was an "insider." Many of those defendants had doctorate degrees. One defendant had been nominated for a Nobel Prize. Every corporation, regardless of size or sophistication, should enforce security measures without exception. Most victims in federal trade secrets prosecutions are large corporations; the list includes DuPont, Dow Chemical, and Boeing. And while most trade secrets that have become the subject of federal prosecutions are "high tech," less obvious information—such as tobacco and even advance copies of a Nike catalogue—have been the basis for prosecution.
- **Seek Immediate Relief:** Most victims' primary concern is immediate injunctive relief to prevent the disclosure or use of the stolen trade secret. That goal often conflicts with the time that law enforcement would require to investigate and to decide whether to prosecute. To address this conflict, the EEA provides a civil remedy allowing the Department of Justice to obtain an injunction against violation of the EEA. 18 U.S.C. § 1836. Moreover, while federal prosecutors were previously required to secure approval from senior Department of Justice officials before bringing charges under the EEA, federal prosecutors are now free to bring charges under § 1832 without seeking approval.
- **Seek Protection of Confidential Information:** Victims of trade secret theft also express concern that involving federal authorities will threaten their ability to keep the trade secret confidential. Many feel that this additional exposure, along with a perceived lack of prosecutorial commitment (and technical expertise in complex cases) counsel against seeking criminal prosecution. Indeed, it would potentially defeat the purpose of a trade secrets prosecution for a secret to lose its confidential status as a consequence of prosecution. For that reason, the EEA expressly permits a court to enter a protective order "necessary and appropriate to preserve the confidentiality of trade secrets." 18 U.S.C. § 1835. This mechanism allows a victim to ensure the confidentiality of the trade secret that is the basis for the prosecution. During its initial reporting of the offense to federal authorities, the victim should convey its serious interest in keeping as much information about the offense as confidential as possible.
- **Understand the Prosecutor's Interest**: Federal prosecutors know that a victim can pursue civil remedies for a trade-secret theft. For some prosecutors, the availability of these remedies may militate against charging. Prosecutors are likely to be wary of being used as a tool in a corporate victim's attempt to use law-enforcement means to further competitive ends. For this reason, a corporate victim should clearly express at the outset its genuine interest in the criminal resolution of a criminal offense.
- **Use the Pursuit of Civil Remedies to Aid Prosecutors**: While prosecutors will resist being used as a tool in a dispute among competitors, pursuit of civil and criminal remedies need not be mutually exclusive. In one prominent case, DuPont obtained evidence in a civil case that a foreign firm and its executives stole trade secrets related to DuPont's Kevlar fabric. The Department of Justice had initiated and ceased investigating the offense before DuPont filed suit, but partly on the basis of evidence DuPont discovered in the civil case—including documents that federal authorities would have otherwise had to obtain through time-consuming coordination with the foreign government—federal prosecutors sought and obtained an indictment of the foreign firm and the executives.

All companies have information that would be valuable to a competitor. Over time, some of this information could be stolen or compromised. It should be protected to ensure that the company has the choice to press for criminal prosecution if the circumstances so require.

authorized to ignore the witness' statement or report should the witness fail to appear for examination following the tribunal's request.

Emergency Relief Prior to the Appointment of the Arbitral Panel

A number of the revisions to the Rules that were implemented provide parties with options for emergency relief. These changes range from minor tweaks, such as increasing the ceiling on a documents-only proceeding from $10,000 to $25,000 under the Rules' Expedited Procedures (E-6), to major additions, such as the formal incorporation of measures for obtaining emergency relief into the main body of the Rules (R-38).

The AAA's Rules previously made available the emergency relief now embodied by R-38, in substantial part, in its Optional Rules of Emergency Measures, as well as in the AAA's International Rules. The new R-38 fully codifies emergency relief into the main body of the Commercial Arbitration Rules. In practicality, this means any arbitration clause entered into after the effective date of the new Rules incorporates emergency relief as a matter of course, without any need for the clause to expressly incorporate relevant rules.

Care should be taken to distinguish emergency relief from interim measures. R-37 authorizes the tribunal to grant injunctions and other relief it "deems necessary," and was present in the old Rules. R-38, in contrast, provides for procedures for the appointment of an emergency arbitrator, on an expedited basis, to consider and grant a request for temporary relief pending the appointment of the tribunal. Under R-38, a single emergency arbitrator will be appointed within one business day of a party's request for emergency relief. The requesting party must explain both why it is entitled to its requested relief and why that relief is needed *on an emergency basis*.

R-38 applies the familiar standards for injunctive relief in courts to emergency relief procedures. Relief is authorized if "immediate and irreparable loss or damage shall result" otherwise. R-38 does not permit *ex parte* applications. The requesting party must notify all other parties of its request. Upon appointment, the emergency arbitrator will establish an appropriate schedule, which must permit a "reasonable opportunity to all parties to be heard." However, in accordance with the Rules' emphasis on flexibility, telephonic and video hearings are permitted. And importantly, the Rules expressly state that a request for interim measures to a judicial authority is not "incompatible" with R-38 and is not a waiver of the requesting party's right to arbitrate.

Dispositive Motions

The new rules also address the use of dispositive motions in AAA proceedings. R-33 articulates a threshold for a party being allowed to bring a dispositive motion in an arbitration proceeding. Under the rule, dispositive motions are allowed only if the moving party can demonstrate that the "motion is likely to succeed and dispose of or narrow the issues in the case." This heightened standard (not applicable to judicial proceedings) avoids the parties wasting time and expense—and the arbitration process being disrupted—by motions to dismiss, summary judgment papers, or other dispositive motions that have little chance of succeeding on the merits.

Conclusion

The first revisions to the AAA Commercial Rules in over a decade are a true landmark in U.S. arbitration practice. As explained above, the revisions are substantive. In combination, they were designed to proactively distance an arbitration from litigation processes that have crept into arbitration proceedings over the years, threatening the AAA's reputation as the nation's premier source of time- and cost-efficient alternatives to litigation. It thus behooves any serious arbitration practitioner—particularly one who perceives arbitration essentially as "litigation in a conference room"—to study and internalize the new revisions before embarking on a new arbitration that will be governed by them.

"In the 12 months of 2013, Quinn Emanuel gave to me: Four new offices, $14 billion in settlements, and 100+ victories."

WON 9-0 Supreme Court victory for Shell Oil in a landmark decision curbing the reach of the Alien Tort Statute.

WON two Ninth Circuit victories upholding Shell Oil's permits for oil and gas exploration in the Alaskan Arctic.

WON summary judgment for YouTube and Google in precedent-setting, billion-dollar copyright case brought by Viacom.

WON $5.15 billion settlement for FHFA from J.P. Morgan.

WON $1.9 billion settlement for FHFA from Deutsche Bank.

WON $885 million settlement for FHFA from UBS.

WON $360+ million settlement for Assured Guaranty from UBS.

WON court trial for BlackRock in structured finance matter resulting in the release of tens of millions of dollars from escrow.

WON dismissal for Sandoz in $500 million securities litigation.

WON multi-billion dollar settlement for MBIA Insurance Corporation in its landmark litigation regarding financial insurance for over $22 billion of RMBS securitizations.

WON trial for Zurich in fraudulent transfer case against 30 corporate plaintiffs.

WON $63 million judgment for Access Industries in breach of investment management agreement action.

WON, for Elliott Management, recovery of tens of millions of dollars of artwork owned by convicted fraudster Marc Dreier.

WON affirmance of dismissal of fraud and breach of contract claims against Swiss Re arising from Swiss Re's management of a synthetic CDO.

WON Second Circuit affirmance of dismissal of putative class action for State Farm Mutual Automobile Insurance Company.

WON appellate affirmance of $89 million FINRA arbitration award.

WON dismissal with prejudice for Pitney Bowes and two officers in securities fraud class action matter.

WON dismissal for VeriSign in securities class action matter.

WON dismissal of $100 million in derivative claims asserted against senior executives of Paulson & Co. Inc. serving as directors of MSR Hotels & Resorts.

WON Federal Circuit affirmance of summary judgment of non-infringement for American Express Company in patent case involving the American Express Travelers Cheque Card.

WON Ohio Supreme Court reversal of certification of a class of approximately 100,000 Ohio State Farm policyholders seeking to recover more than $100 million in compensatory and punitive damages.

WON, for Fifth Third Bank, affirmance of dismissal of $70 million fraud claim.

WON judgment for Micron Technology that all 12 patents asserted by Rambus were unenforceable due to spoliation.

WON Ninth Circuit reversal of $172.5 million judgment against Mattel for trade-secret misappropriation.

WON defensive patent infringement case for one of the world's leading courier and logistics companies against a non-practicing entity.

WON Federal Circuit affirmance of unanimous jury verdict of both non-infringement and invalidity in patent case involving Google's AdSense advertising products.

WON unanimous jury defense verdict in patent case, and won related antitrust counterclaim for Walker Process fraud.

WON motion to dismiss all trademark claims on laches and CDA grounds for Google.

WON post-trial judgment overturning $70 million jury verdict against Cisco in dispute with software start-up.

WON dismissal for the NFL and the Baltimore Ravens of copyright action involving the Ravens' inaugural logo.

WON defense victory for Samsung against Apple in German proceedings regarding various smartphones, defeating alleged unfair competition claims.

WON first-instance verdict for Booking.com against a main competitor regarding German unfair competition law.

WON Russian arbitration and two related Russian litigations for prominent Ukrainian businessman regarding control over leading Hungarian gas trader.

WON, as co-counsel, an ICSID arbitration seeking $250 million in damages against the Kingdom of Cambodia.

WON judgment in U.S. Bankruptcy Court that foreign liquidator could not terminate sale of $230 million SIPA customer claim to Farnum Place, LLC.

WON Second Circuit victory for Entergy holding Vermont's efforts to close a nuclear power plant preempted.

WON 5-0 victory for AIG in West Virginia Supreme Court overturning a $58 million jury verdict in insurance dispute.

WON dismissal of products case for Pfizer Inc. defeating attempt to create new form of liability in New York against pharmaceutical innovators for alleged injuries caused by generic versions of their medications.

WON summary judgment for defendant MicroStrategy, Inc. in patent litigation suit.

WON summary judgment of non-infringement for Google, Motorola Mobility, HTC, and Samsung.

WON summary judgment for Pfizer Inc. in multi-million dollar products liability action; co-defendants either settled with plaintiffs or went to trial.

WON New York Court of Appeals vacatur of summary judgment in precedent-setting $400 million reinsurance case.

WON, for Vimeo, outright dismissal of 144 separate copyright claims under Millennium Copyright Act dispute with music rights companies in SDNY.

WON Federal Circuit affirmance of summary judgment of non-infringement for Barnes & Noble in patent case involving Barnes & Noble's NOOK eReaders.

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Quinn Emanuel Urquhart & Sullivan, LLP is a 650-lawyer business litigation firm — the largest in the United States devoted solely to business litigation and arbitration. Our lawyers have tried 2247 cases and won 1988, or 88.5%. When we represent defendants, our trial experience gets us better settlements or defense verdicts. When representing plaintiffs, our lawyers have won over $27 billion in judgments and settlements. We have also obtained four 9-figure jury verdicts, thirteen 9-figure settlements, and seven 10-figure settlements. For more information, visit our web site at www.quinnemanuel.com.

Quinn Emanuel Elects Thirteen New Partners

The firm is pleased to announce that nine Associates and four Of Counsel have been elected to its partnership, effective January 1, 2014. This class is the largest in firm history.

Stephen A. Broome is based in New York. His practice focuses on complex commercial disputes in trial and appellate courts and domestic and international arbitral tribunals. Steve has extensive experience litigating contract disputes, fiduciary duty and fraud claims, claims relating to complex financial products and transactions, and claims relating to bankruptcy. Steve received a B.A. with first-class honors from the University of British Columbia, a M. Sc. with honors from the London School of Economics, and he graduated with high honors and *Order of the Coif* from George Washington University Law School. Before joining the firm, Steve was a law clerk for Judge Richard C. Wesley of the U.S. Court of Appeals for the Second Circuit.

Valerie Roddy is based in Los Angeles. Her practice focuses on complex commercial litigation, including patent litigation in federal courts and before the International Trade Commission, securities litigation, and consumer class action litigation. Valerie received her Bachelor of Arts, *summa cum laude*, and Master of Arts degree from Tulane University and her law degree from New York University School of Law, where she was an editor of the *Law Review*. Valerie was named a Southern California "Rising Star" by *Super Lawyers* magazine in 2013.

Ray Zado is based in Silicon Valley. Ray's practice focuses on intellectual property litigation in the federal courts and before the International Trade Commission. Ray has represented clients involved in a variety of complex technologies, including semiconductor memory devices, analog circuits including voltage regulators and power supplies, image and signal processing, computer systems architecture, Internet infrastructure, business process software and services, and social networking and gaming software. Ray received B.A. degrees in Physics and English (with a minor in Electrical Engineering) from Cornell University, and a J.D. from the University of Southern California, where he was a Senior Editor of the *Southern California Law Review*.

Evangeline Shih is based in New York. Before joining Quinn Emanuel, she was a partner at Jones Day. Evangeline's practice focuses on intellectual property, in particular patent litigation and prosecution in the pharmaceutical and life sciences areas. She has over a decade of experience litigating Hatch-Waxman cases and has been recognized as a "Rising Star" *Super Lawyer* in New York in 2011, 2012, and 2013. Evangeline received a Bachelor of Arts degree in Molecular Biology from Princeton University and her J.D. from Fordham Law School.

Todd Anten is based in New York. Todd's practice focuses on intellectual property (particularly copyright, trademark, and unfair competition) and general appellate litigation, including before the U.S. Supreme Court. He also has broad experience in complex commercial litigation, including contract and Alien Tort Statute matters. Todd received his B.A., *magna cum laude*, from the University of Pennsylvania, his M.A. from the Annenberg School for Communication, and his J.D. from Columbia Law School. Todd was a law clerk for Judge Victor Marrero of the Southern District of New York.

Adam B. Wolfson is based in Los Angeles. Adam's practice focuses on high-stakes, bet-the-company complex commercial litigation and intellectual property disputes, with a particular emphasis in antitrust, unfair competition, and intellectual property. Adam has represented companies and individuals in a wide variety of disputes ranging from $2 million to over $2 billion, and he has tried and litigated cases in state and federal courts throughout the country, as well as before the International Trade Commission and multiple arbitration forums. Adam received a Bachelor's of Arts in Political Science, *cum laude*, from the University of California, Los Angeles and a J.D., *cum laude*, from the University of Michigan Law School where he was a member of the *Michigan Law Review*. He is admitted to practice in both New York and California.

Andrew S. Corkhill is based in New York. He has extensive experience representing both plaintiffs and defendants in a broad range of litigation and arbitration matters involving complex financial transactions and instruments, including structured financial products and derivatives. Andrew received a B.A., *first class honors and the university medal*, and an LL.B., *first class honors*, from the University of Sydney, as well as an LL.M. from Harvard Law School. Following law school, he clerked for a Justice of the Federal Court of Australia.

Thomas Voisin is based in Paris, France. His practice focuses on international arbitration. He has represented companies in numerous international arbitrations, including ad hoc (including under UNCITRAL Rules) and under the Rules of the ICC, with particular focus on disputes arising in the oil & gas, power, transportation, mining, aviation, and chemical sectors. Thomas received a Bachelor of Laws, *with honors,* from the University of Panthéon-Assas (Paris II) in 2002, a DEA (Masters) in European Law, *with honors*, in 2003 and the DESS (LL.M.) in Litigation, Arbitration and Alternative Dispute Resolution, *with honors*, in 2004. He received a Magister Juris degree from the University of Oxford in 2007.

Stephen Hauss is based in Washington, D.C. His practice focuses on white collar matters, including Congressional investigations, the Foreign Corrupt Practices Act (FCPA), antitrust and market manipulation matters, and regulatory investigations. Stephen regularly represents clients in multi-jurisdictional investigations and litigation in the United States, Europe, the Middle East, Asia and Africa. Stephen received a Bachelor's of Arts in Political Science, *summa cum laude*, from the University of California, Los Angeles and a J.D., *cum laude*, from Harvard Law School. Prior to joining the firm, Stephen was a law clerk for the Honorable F. Dennis Saylor IV.

Corey Worcester is based in New York. Corey is an experienced trial lawyer whose practice focuses on complex litigations and arbitrations. He has represented clients in a variety of cases, including antitrust, securities, corporate governance, insurance, licensing, and intellectual property actions, as well as government investigations. Corey is a graduate of Columbia Law School and received his B.S. in Industrial and Labor Relations from Cornell University.

Jordan Goldstein is based in New York. He has a nationwide practice with broad experience representing private and public clients in high-stakes litigation involving complex financial products and transactions. Prior to joining the firm, Jordan held a senior position in the U.S. Department of Justice's National Security Division, and prior to that served in the Department of Justice's Office of Legal Counsel. Jordan is a *magna cum laude* graduate of Harvard Law School and holds an M.B.A. from Harvard Business School; he earned his Bachelor of Arts at Georgetown University, where he graduated *summa cum laude* and first in his class. After graduating law school, Jordan was as a law clerk for The Honorable Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

Marissa Ducca is based in Washington, D.C. Her practice focuses on intellectual property litigation in district courts and the International Trade Commission. Marissa has particular experience in the "smartphone wars" and has litigated cases covering mobile communication, software, semiconductor, medical device, and internet technologies. Before becoming an attorney, she worked as an engineer in the telecommunications and automation control fields. Marissa has an Electrical Engineering degree from Purdue University and a law degree, *magna cum laude* from Case Western Reserve University, where she was publisher of the *Case Western Law Review*.

Douglas E. Fleming, III is based in New York. He regularly defends companies in complex litigation, concentrating his practice in the areas of mass torts, products liability, environmental toxic torts, and insurance. Mr. Fleming represents companies primarily in the pharmaceutical, medical device, chemical, consumer product, and insurance industries. He has litigated cases throughout the United States at both the trial and appellate levels. Doug also has previously served as a New York City Public Attorney. Doug is a *magna cum laude* graduate of St. John's University School of Law and earned his Bachelor of Arts from the University of Notre Dame. Q

Appellate Victory: Quinn Emanuel Secures Complete Reversal, New Trial in Bad Faith/Punitive Damages Case

On October 25, 2013, Quinn Emanuel obtained a unanimous decision from the West Virginia Supreme Court of Appeals vacating all that remained of a $58 million jury verdict in a bad faith and punitive damages case against Chartis Claims, Inc. and Commerce and Industry Insurance Company, both subsidiaries of AIG. The firm had previously obtained a post-trial remittitur of the verdict, one of the largest in West Virginia history, to $30 million.

The origins of the case, captioned *AIG Domestic Claims, Inc. v. Hess Oil Co.*, reach back to the late 1990s, when the Chartis companies agreed to insure an underground gasoline storage tank owned by a West Virginia oil distributor called Hess Oil. In 1998, the West Virginia Department of Environmental Protection alerted Hess to a leak from the tank that Chartis had insured. Hess submitted an insurance claim for the cleanup, and Chartis accepted coverage and remediated the site for a decade. During the course of this cleanup, Hess sold its business and dissolved. In 2008 a new Chartis claims analyst sought to increase reserves to continue the remediation. She discovered, through a routine FOIA request, that Hess had been notified of a leak at the same site in 1997—*before* it applied for the policy—but had not informed Chartis of that prior leak in its insurance application. When Hess's former shareholders refused to provide any information about any of the spills, Chartis notified Hess that it was disclaiming coverage.

In various cross-claims and counterclaims filed after the environmental contractor sued Hess for payment (Chartis later settled that claim), Hess sued Chartis for bad faith denial of coverage and punitive damages, and Chartis filed a cross-claim seeking rescission of the insurance contract. At trial, Hess's only evidence of injury concerned emotional distress allegedly suffered by Hess's several former shareholders as an alleged consequence of Hess's disclaiming insurance coverage based on Hess's misrepresentations. Over Chartis's trial counsel's repeated objections that a corporation and its shareholders are separate entities—whether before dissolution or after—the trial judge allowed the shareholders to testify about their emotional distress, and instructed the jury that it could award damages to Hess for injuries suffered "through its former shareholders." The jury found Chartis liable, awarding Hess $5 million in compensatory damages. The jury followed this award with a jaw-dropping $53 million punitive damages award.

Chartis retained Quinn Emanuel to take the lead role on post-trial motions and the subsequent appeal. The firm's team, led by appellate practice chair Kathleen Sullivan, convinced the trial court that it was obligated under West Virginia law to reduce the $53 million punitive damages award to no more than $25 million (or five times compensatory damages), and then turned to the West Virginia Supreme Court of Appeals to eliminate the remaining $30 million judgment. In the Supreme Court, Quinn Emanuel argued that the trial court had ignored the basic principle that a corporation is separate from its shareholders, and that it had therefore erred in admitting evidence of, and instructing the jury to award, damages suffered only by Hess's former shareholders. Quinn Emanuel's briefs also highlighted the trial court's other instructional and procedural errors, and argued that Hess had not put on evidence showing the intentional wrongdoing required for an award of punitive damages.

Just one month after Ms. Sullivan presented a marathon two-hour oral argument in Charleston, the West Virginia high court issued a unanimous published decision vacating the judgment, declining Hess's request to reinstate the jury verdict, and remanding for a new trial on all claims. The Court—in a case of first impression interpreting West Virginia's newly-revised corporations statute—agreed with Chartis that Hess could not recover damages for its former shareholders' emotional harms. The Court further agreed that the trial court had incorrectly instructed the jury as to the legal standard applicable to Chartis's misrepresentation claim. The Court concluded that the only proper remedy for these errors was to vacate the entire judgment, eliminating both the compensatory award and all remaining punitive damages.

Appellate Victory for UniCredit Preventing Fraud Claims

Quinn Emanuel recently won an appeal for client UniCredit S.p.A. in the New York Supreme Court, Appellate Division, First Department, preventing the plaintiff in a real estate transaction from asserting fraud claims.

The dispute arose out of the failed purchase of a combined hotel and condominium development at 400 Fifth Avenue in New City. UniCredit was the primary lender to the developer of the property, 400 Fifth Realty LLC, which had planned to sell the hotel and residential units to Honua Fifth Avenue LLC. Honua backed out of the deal and, in December 2009, brought suit seeking to reclaim a $45 million deposit that it had made toward the purchase and other relief.

Soon after filing the complaint, Honua obtained a notice of pendency that would effectively prevent 400 Fifth from selling the property to a willing buyer. The original complaint did not include UniCredit, and the first amended complaint named UniCredit as a party but did not assert any causes of action against UniCredit.

The litigation proceeded for almost two years until October 2012, when 400 Fifth announced that it had found a new buyer and sought to cancel the notice of pendency. Honua took action and sought leave to amend to add fraud claims against both 400 Fifth and UniCredit. UniCredit denied that it committed any fraud and vigorously opposed the proposed fraud claims. The trial court held that it would cancel the notice of pendency upon the posting of an undertaking, and it denied Honua leave to amend. In November 2013, the Appellate Division affirmed the trial court in full, holding that Honua could not proceed with its proposed fraud claims because it had failed to plead fraud with particularity or to allege a cognizable injury.

Quinn Emanuel Persuades New York Court to Reject New Theory of Liability Against Pharmaceutical Innovators

On October 8, 2013, the New York Supreme Court dismissed claims against Quinn Emanuel client Pfizer Inc., holding as a matter of New York law that a brand-name pharmaceutical manufacturer does not owe a duty in tort to the consumer of the generic equivalent of that medication. *Weese v. Pfizer, Inc.*, 2013 WL 5691993 (N.Y. Sup. Ct. Oct. 8, 2013) (notice of appeal filed). This ruling is the first time that a New York state court has ruled on this novel theory of liability, which has also been rejected by other state and federal courts across the country under different state laws. This ruling is particularly significant for Pfizer because it is headquartered in New York and will have positive implications for all brand-name pharmaceutical manufacturers.

The plaintiffs' theory of liability—which has been dubbed "innovator liability"—touches upon a fundamental principle of tort law: whether a defendant owes a duty of care to the plaintiff. Innovator liability was concocted after the U.S. Supreme Court held in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), that manufacturers of generic medications cannot be liable under state tort law for failing to adequately warn about the risks associated with taking their medications. Those claims are preempted by federal law. In light of that ruling, plaintiffs redirected their generic drug cases against brand-name manufacturers like Pfizer. Because federal law requires generic manufacturers to copy the label from the corresponding brand-name drug, the plaintiffs posited that the brand-name manufacturer should be liable to those who are injured from a generic copy of their drug, which bears a copy of their warning label. It is argued that these consumers of generic medications are foreseeable and so are injuries resulting from inadequacies in the warming labels that accompany those medications.

Although innovator liability has received mostly negative treatment from federal and state courts, it has met with some success in state courts, and no one had yet tested this theory in New York state courts. Whether a duty in tort exists is often a challenging exercise that requires balancing long-standing precedent and public policy considerations. *Weese* is the first time a New York state court has addressed whether innovator liability is cognizable under New York law.

In *Weese*, the Court held that Pfizer did not owe a duty of reasonable care and was thus not subject to tort liability as a matter of law to a consumer of a generic equivalent of its medication. The Court ruled that unlike in cases that trace the boundaries of tort duties under New York law, under these circumstances, "Pfizer had no intentional role in placing the specific product with the plaintiff. It was not the seller. Indeed, a third party—a competitor—manufactured and sold the product." The connection between Pfizer and the warning label accompanying a generic medication "is even more attenuated" because "[t]he label existed as a requirement of another third party, the federal government, aimed at the generic manufacturer." The Court held that Pfizer's duties with respect to its products and labels "should not extend to products and labeling over which it has no control, even if those products and labels mirror its own, because it has done nothing toward putting them in the hands of consumers." Q

quinn emanuel
865 South Figueroa Street, 10th Floor, Los Angeles, California 90017

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LOS ANGELES
865 S. Figueroa St., 10th Floor
Los Angeles, CA 90017
213-443-3000

NEW YORK
51 Madison Ave., 22nd Floor
New York, NY 10010
212-849-7000

SAN FRANCISCO
50 California St., 22nd Floor
San Francisco, CA 94111
415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr., 5th Floor
Redwood Shores, CA 94065
650-801-5000

CHICAGO
500 West Madison St., Suite 2450
Chicago, IL 60661
312-705-7400

WASHINGTON, D.C.
777 6th Street NW, 11th Floor
Washington, DC 20001-3706
202-538-8000

TOKYO
NBF Hibiya Bldg., 25F
1-1-7, Uchisaiwai-cho, Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
One Fleet Place
London EC4M 7RA
United Kingdom
+44 (0) 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 (0) 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 (0) 40 89728 7000

MUNICH
Oberanger 28,
80331 Munich
Germany
+49 (0) 89 20608 3000

PARIS
25 rue Balzac
75008 Paris
France
+33 (0)1 53 53 68 97

MOSCOW
Paveletskaya Plaza
Paveletskaya Square, 2/3
115054 Moscow
Russia
+7 499 277 1000

HONG KONG
1307-1308 Two Exchange Square
8 Connaught Place
Central Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth Street
Sydney, NSW 2000
Australia
+61 2 9146 3500