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## Russia's Recently Enacted Anti-Bribery Laws

### *Introduction*

In January 2013, the Russian government amended the anti-corruption reforms that were first put into place in December 2008. These measures represent unprecedented activity in Russia's battle with corruption and achieve a high degree of parity with other prominent national anti-corruption laws. Further clarity and predictability will be provided through the course of enforcement, but it is apparent that the Russian government views corruption as a substantial economic impediment to the nation's continued growth.

### *Measuring Corruption Levels*

The level of corruption in Russia is estimated to reach, and possibly exceed, $300 billion each year. The Business Environment and Enterprise Performance Survey ("BEEPS"), a survey by the World Bank, found that in 2008 corruption was the 3rd most frequently cited problem for firms doing business in Russia. This disconcerting figure garners even more attention when considering that it increased to the 2nd most cited problem in 2011, overtaking complaints of an inadequately educated workforce. The measures characterizing corruption in Russia demonstrate that, although some areas have improved, corruption remains a significant problem in doing business. In fact, although the number of firms being required to pay bribes has reportedly decreased between 2008 and 2011, the amount of the average bribe has increased.

Despite the recent legislation, Transparency International, a non-governmental organization that

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## *Law360* Names Five Quinn Emanuel Partners "MVPs of the Year" for 2013 in Their Fields

Five Quinn Emanuel partners were named "MVPs of the Year" for 2013 in their respective practice areas. *Law360*'s "MVPs of the Year" recognizes attorneys who had extraordinary wins and contributed the most to their practice areas in the past year.

- **Kathleen Sullivan**, Appellate
- **Jane Byrne**, Insurance
- **Charles Verhoeven**, Intellectual Property
- **Philippe Selendy**, Banking
- **Paul Brinkman**, International Trade

## John Shaffer, Leading Restructuring and Bankruptcy Expert, Joins Quinn Emanuel's Los Angeles Office

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## Quinn Emanuel Opens Office in Brussels

The firm opened an office in Brussels, Belgium on February 18, 2014. Brussels is the firm's seventh European office, joining London, Mannheim, Moscow, Hamburg, Paris, and Munich. The Brussels office will focus on EU and Member State competition litigation and investigations.

Dr. Nadine Herrmann, head of Quinn Emanuel's European Competition Practice, leads the office as Managing Partner. Dr. Herrmann specializes in intellectual property and antitrust litigation, covering all aspects of German and European competition law. Joining her are Catherine Manley and Dr. Jan Jacob, both specialists in competition law. Ms. Manley is qualified to practice in the U.S. and Europe, and has experience providing strategic advice for clients during European Court proceedings as well as assisting with defenses to European Commission investigations. Dr. Jacob focuses on antitrust and intellectual property litigation. Q publishes a yearly Corruption Perception Index, recently ranked Russia 127th out of 177 countries, where number 1 has the least perceived corruption and number 177 the most. This represents only a modest improvement from 2008 when Russia ranked 147th. Although its trend on the Corruption Perception Index has been positive, Russia continues to find itself among a group of countries struggling with endemic violence and political unrest.

***The 2008 Anti-Corruption Law***

To address corruption, Russia's government, under President Medvedev, passed the centerpiece of recent anti-corruption efforts on December 25, 2008: "On Corruption Counteraction" ("Anti-Corruption Law"). The law was a component of President Medvedev's National Plan for Counteraction of Corruption adopted earlier that year. These laws followed Russia's ratification of the Council of Europe's "Criminal Law Convention on Corruption."

The 2008 Law included policy statements intolerant of corruption, created high level directives and responsibilities for official offices in combating corruption, and created reporting requirements, such as an official's income and attempts to induce corrupt acts. The law also amended other areas of Russian law to harmonize and clarify definitions, such as outlining permissible versus impermissible gifts, and the associated penalties. However, the Anti-Corruption Law did little to define the metes and bounds for corporate compliance, leaving substantial uncertainty for foreign entities and persons seeking to do business in Russia.

***The 2013 Amendment – Article 13.3***

On January 1, 2013, the Anti-Corruption Law was amended to include Article 13.3, which provides a greater degree of guidance. The amendment requires organizations doing business in Russia to implement anti-corruption measures. However, it appears from the amendment to Article 13 that a requirement for preventive measures will not serve as an independent basis for liability, as evidenced by the absence of a defined sanction without reference to a corrupt act. Further, it is likely, but not ultimately clear, that the preventive measures will serve as a defense to charges of corruption, which would be more akin to the United Kingdom Bribery Act ("UKBA"), rather than mitigation under the United State's Foreign Corrupt Practices Act ("FCPA").

Although the extent of the required measures remain unclear, the amendment appears to provide at least a set of minimum requirements for most businesses. Article 13.3 states that organizations are required to take steps to prevent corruption, and that measures may include the following:

- Appointment of subdivisions or officials responsible for preventing corruption and other offences;
- Cooperation with law enforcement bodies;
- Development and practical application of standards and procedures aimed at ensuring the organization's fair functioning;
- Adoption of a code of ethics and official conduct by an organization's employees;
- Prevention and settlement of conflicts of interest; and
- Prevention of the creation of unofficial reports or statements and of the use of forged documents.

Despite being enumerated in Article 13.3, the law does not make clear that compliance mechanisms in these areas are sufficient. The law simply requires implementation of measures aimed at the prevention of corruption. If a violation occurs and one of these mechanisms was not in place, it may be determined that appropriate measures had not been taken. However, no court case to date has defined the extent of the required measures. Thus, it behooves those doing business in Russia to assess their existing internal compliance mechanisms and consider implementation of any enumerated mechanism in the law that may be lacking. Although the implications of failing to implement these listed measures has not been made clear, it is likely that failing to do so may deprive a business of potential defenses or mitigation strategies.

It is also important to note that the requirements may be interpreted to extend to third parties and non-Russian businesses. Thus, if a business in Russia has implemented the compliance mechanisms enumerated in Article 13.3, but has agents or deals with third parties who have not implemented such policies, it is possible that the business may have failed to take appropriate measures to prevent corrupt acts by these agents or third parties, especially where such agents or third parties act "on behalf of or in the interest of" the business. This may have far-reaching consequences, so businesses should take steps to assess potential exposure through third parties and agents, and, where practicable, encourage these organizations to implement compliance mechanisms. Further, the law does not require that a company be based in Russia to be subject to the compliance requirements; as such, businesses based outside of Russia but doing business there should assess exposures and existing compliance mechanisms.

Ultimately, Article 13.3 appears to bring anti-corruption laws more into accord with U.S. and U.K. laws. The message is clear that Russian authorities are taking corruption seriously, although it remains to be seen how enforcement over time will effectuate true institutional and cultural change, both within enforcement authorities, government offices, and businesses.

***Russian Ministry of Labor's Guidance***

The Ministry of Labor and Social Protection of the Russian Federation ("Ministry of Labor") has provided welcome guidance ("Recommendations") on the requirements set forth in the Anti-Corruption Law, and in particular Article 13.3. The Recommendations provide detailed information on measures, procedures, and policies meant to guide businesses in implementing adequate programs. Businesses looking to the Recommendations will find helpful information on implementation and examples of corruption problems, providing more illustrative direction as to what actions are considered corrupt acts, how to assess risks, and templates for compliance mechanisms.

Importantly, the Recommendations clarify that the necessary measures will differ between organizations and risks. For example, the Ministry of Labor has explained that the creation of an anti-corruption department for a small business may be unreasonable. Thus, it appears that the elements set forth in Article 13.3 may not be fully prescriptive for all organizations. It may be prudent, however, for businesses to tailor an alternative compliance mechanism as closely as possible to the listed compliance mechanisms of Article 13.3, as failure to do say may not comply with the appropriate measures requirement.

Additionally, comments by officials in the Ministry of Labor have pointed to the agreement between Russia's new anti-corruption laws and those of foreign countries. The compliance measures required under the Anti-Corruption Law appears to largely track U.K. and U.S. anti-corruption laws, which is welcome news for businesses already subject to, and in compliance with, these other international standards. The Recommendations provide some level of clarity on the parallels between the Anti-Corruption Law and other foreign anti-corruption regulations, at points even discussing the FCPA and UKBA. However, it is important to note there is not strict agreement between the laws.

***FCPA, UKBA, and the Anti-Corruption Law***

The Anti-Corruption Law has clear parallels to other important anti-corruption legislation in foreign countries, and the Ministry of Labor has acknowledged that the Recommendations derive, at least in part, from the experiences of foreign regulators. The Recommendations therefore will be a valuable resource for businesses, both to confirm the agreement with anti-corruption laws of other countries as well as to provide additional guidance on implementation of proposed measures. However, the Anti-Corruption Law does not exactly parallel other regulatory regimes and businesses should recognize potential differences for enforcement, exposure due to third parties, and the cost and benefits of adhering closely to the law and the associated Recommendations.

As noted above, the Anti-Corruption Law appears to harmonize with the FCPA and UKBA in that the regulatory regimes penalize the failure to institute compliance measures only in the event of a violation. For example, the UKBA states that if an organization has implemented "adequate procedures" against corrupt acts, the business may have a full defense against enterprise liability for the wrongful act. Thus, if a business subject to the UKBA does not have a compliance program but also does not come under charges of corruption, there should be no liability. Similarly, the Anti-Corruption Law does not envisage sanctions for failing to institute an anti-corruption program in absence of any charges of corruption. However, the Anti-Corruption Law does not clarify the standard for sufficiency of anti-corruption measures.

The FCPA and UKBA articulate slightly different extents of jurisdictional reach as compared to the Anti-Corruption Law. The FCPA is generally limited to reaching U.S. businesses or persons and their foreign subsidiaries, foreign businesses that have issued securities on a U.S. stock exchange, and non-U.S. businesses and persons making certain transactions within the U.S. Importantly, although the FCPA may not explicitly provide for extra-territoriality for non-U.S. businesses and persons, the Department of Justice has pursued non-U.S. businesses for corrupt acts abroad based upon relatively minimal contacts with the U.S. This fact highlights the importance of recognizing the potential differences between black letter law and the law as enforced. Similarly, the UKBA may reach a non-U.K. entity carrying on business with a "close connection" to the U.K. and hold that the non-U.K. entity is liable for acts carried out beyond the U.K. based on the failure to prevent corrupt acts. The Anti-Corruption Law, by contrast, simply reaches all "organizations" doing business in Russia. The Russian law's jurisdictional authority does not require the use of certain interstate means or through the additional theory of failure to prevent. In effect, these articulations of regulatory reach may not differ greatly despite the vague and broad extent of the Russian law's wording. As with other uncertainty surrounding this law, the tone and extent of enforcement efforts will clarify the practical reach and necessity to implement preventive measures.

Finally, the effect of compliance with the requirements of the Anti-Corruption Law is not yet clear. The FCPA provides for the mitigation of fines and penalties in circumstances when a business has implemented the proper corruption prevention mechanisms and a violation occurs. The UKBA provides an even more robust incentive to implement the preventive measures by creating a complete defense against a corruption charge. In the U.K. a company need only demonstrate that they had "adequate procedures" to prevent violations in order to avoid liability. In contrast, the Anti-Corruption Law is unclear about what type of benefit a business may gain from compliance. It appears unlikely for independent liability to attach for a failure to institute sufficient anti-corruption mechanisms, but the law does not indicate whether mitigation or a complete defense may result. Given the similarities between the Anti-Corruption Law and foreign laws, it is possible that some level of defense akin to the UKBA will be available to businesses that can demonstrate compliance with the law. It is important once again to note that strict compliance with mechanisms specifically provided in Article 13.3 may not guarantee exemption from liability for corruption acts.

***Conclusion***

The Anti-Bribery Act and the 2013 amendment, in particular Article 13.3, represent a substantial step toward addressing corruption in the Russian Federation. Given the relative ambiguity in numerous areas of the law, it may be difficult to predict and develop a regulatory and compliance environment over the short term. The Recommendations by the Ministry of Labor go a great distance in helping to create a normative compliance environment, but realistically it will be enforcement over time that will provide a true picture of the extent and effect of the Anti-Corruption Law on Russian politics and business. For those subject to the FCPA and UKBA, compliance with the new Russian law may not require a substantial change, but it remains important to analyze how such organizations' anti-corruption measures appear to comply with the Russian law. Q

## John Shaffer, Leading Restructuring and Bankruptcy Expert, Joins Quinn Emanuel's Los Angeles Office

John Shaffer, one of the nation's leading restructuring experts, has joined the Los Angeles office as a partner. Mr. Shaffer joined the firm from Stutman, Treister & Glatt, where he was a senior shareholder focusing primarily on complex restructuring matters. He represents debtors, creditors, and purchasers of assets in the financial services, health care, real estate, and transportation industries. Mr. Shaffer is a prominent figure in bankruptcy circles. He chairs the National Bankruptcy Conference's Chapter 11 Committee, was appointed by Chief Justice Rehnquist to the Judicial Conference's Advisory Committee on the Federal Bankruptcy Rules, and is a Fellow of the American College of Bankruptcy. Q

## Bruce Van Dalsem Named *Best Lawyers'* 2014 Los Angeles Copyright Lawyer of the Year

Bruce Van Dalsem has been recognized as *Best Lawyers'* 2014 Los Angeles Copyright Lawyer of the Year. Only a single lawyer in each practice area and location is honored as the Lawyer of the Year. Mr. Van Dalsem has been a partner in Quinn Emanuel's Los Angeles office since 2005. In addition to copyright and trademark law, Mr. Van Dalsem's practice also focuses on corporate governance disputes, financial services, banking, entertainment, real estate and commercial litigation. Q

## Are Courtroom Technology Costs Reasonably Necessary To The Conduct Of Litigation In California Courts?

As the use of courtroom presentation technology becomes more and more commonplace, courts have had commensurate struggles with assessing its necessity and awarding costs accordingly. A notable issue regarding the scope of recoverable costs arose in *Bender v. Los Angeles*, 217 Cal. App. 4th 968 (2013). In *Bender*, the Second District Court of Appeal in California affirmed an award of costs of approximately $24,000 for "courtroom presentations." In so holding, the court revised its interpretation of California statutes providing for recovery of costs, and at the same time, offered a possible new calculus for litigants approaching trial strategy.

***Background of* Bender**

The *Bender* case involved allegations that sheriff's deputies battered Mr. Bender, the plaintiff, when they arrested him at the apartment complex he managed. Mr. Bender returned home to the apartment complex late one evening, and saw three sheriff's deputies enter the complex immediately prior to his entry. The deputies arrested two individuals from an upstairs apartment. While the deputies escorted the two arrestees out of the complex, one deputy stopped to pick up broken glass on the stairs. As Mr. Bender approached with an offer to help, the deputy accused Mr. Bender of smoking marijuana with the arrested individuals. Though Mr. Bender vehemently denied the accusation and remained cooperative in his responses, the interaction quickly escalated. Spewing racial epithets, the deputy arrested Mr. Bender and escorted him to the patrol car. He then pepper sprayed Mr. Bender in the face before he and the other deputies physically beat Mr. Bender. Both before and after the altercation, Mr. Bender "did not resist."

Two videos were recorded during these events. The first recording occurred in the patrol car following Mr. Bender's arrest while Mr. Bender was interviewed by one of the deputies. The second recording occurred at the police station where another law enforcement agent interviewed him about the night's events.

Mr. Bender subsequently filed suit against the county of Los Angeles and against the sheriff's deputies involved in the altercation. He alleged causes of action for assault and battery, false arrest and false imprisonment, intentional infliction of emotional distress, and violations of the Bane and Ralph Acts—two California statutes aimed against violence and threats. During trial, the recorded videos—both from the police station of from the patrol car—were played for the jury, who returned a verdict for Mr. Bender in excess of $500,000 for economic, non-economic, and punitive damages. The court also awarded Mr. Bender just under $1,000,000 in attorney fees and costs, and denied defendants' motion to tax, *i.e.* deduct costs in the amount of $24,103.75 for courtroom technology. The defendants appealed, among other things, the court's refusal to tax those technological costs.

***California Provisions for Recovery of Costs***

California has two statutes outlining the recovery of costs. Under California Code of Civil Procedure § 1032(b), "a prevailing party is entitled as a matter of right to recover costs in any action or proceeding," except as otherwise provided by statute. California Code of Civil Procedure § 1033 then outlines costs that are allowable or not allowable. For instance, section 1033 expressly provides that "models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact." It also expressly prohibits items such as "costs in investigation of jurors or in preparation for voir dire." But section 1033 also outlines a grey area. It gives a trial court discretion to determine "items not mentioned in th[e] section" so long as those costs were "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation."

Until the *Bender* decision, California courts had grappled with this grey area concerning the determination of what costs were "reasonably necessary." This uncertainty has emerged in particular with respect to costs relating to technological products that were unavailable at the time section 1033 was codified. For example, does the discretionary provision allow a court to reward litigants for the use of novel, and often times expensive, technological aids? Or are those items outside of the purview of recoverable items because they were not expressly listed as "recoverable costs"?

Most litigants had looked to a 1995 case, *Science Applications International Corp. v. Superior Court*, 39 Cal. App. 4th 1095 (1995), for guidance regarding what kind of courtroom presentation technology might be recoverable. In *Science Applications*, California's Fourth District Court of Appeal granted in part and denied in part a writ of mandamus to vacate an award of costs for a breach of contract case. The Court of Appeal reviewed the costs and held that many of the costs were overbroad. For instance, the court held as not recoverable costs for equipment rental, the use of a technician, and videotaped deposition edits. The court reasoned these costs were for "a high-powered way of retrieving documents" and for "state-of-the-art approach to testimony." Litigants have since used this

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## Appellate Update

The general rule in federal court is that only a final judgment (*i.e.*, a judgment that ends the case) is appealable as of right. So-called "interlocutory" decisions—such as a decision denying a defendant's motion to dismiss, a decision denying a defendant's motion for summary judgment, or an evidentiary ruling—are not appealable as of right and instead may be appealed only at the end of the case. (Other court systems, such as New York's, are different in that they allow immediate appeals of interlocutory orders.) Yet, such decisions can have substantial impact on how the case proceeds and on the parties' settlement positions. Accordingly, the question frequently arises whether an interlocutory order can come within one of the recognized exceptions to the final-judgment rule, several of which involve seeking permission to appeal from the district court and/or the appellate court.

***Orders Granting or Denying a Preliminary Injunction.*** This category is not so much an exception to the final-judgment rule as an additional category, like final judgments, that is appealable as of right. *See* 28 U.S.C. § 1292(a)(1).

***Orders That Involve a Controlling Question of Law as to Which There Is Substantial Ground for Difference of Opinion.*** Under section 1292(b), the district court may certify an otherwise non-appealable order in a civil action if it "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The typical way to demonstrate "substantial ground for difference of opinion" is by noting that other district courts within the circuit, or courts in other circuits, have taken different approaches to the relevant question of law. There is no express timeline for seeking permission to appeal from the district court; but once the district court grants permission, the party seeking to appeal must request the appellate court's permission within 10 days. The appellate court may decline to review an order certified under § 1292(b) for any reason.

***Orders that Dispose of Certain Claims or Parties.*** Where a case involves multiple defendants, a district court will sometimes grant one defendant's motion to dismiss (or for summary judgment), and not a second defendant's motion. Similarly, where a case involves multiple claims, a district court will sometimes dismiss one claim but not another. In these scenarios, the plaintiff who wishes to take an interlocutory appeal regarding the party or claim that was dismissed or disposed of via summary judgment may ask the district court to enter its order as a judgment under Federal Rule of Civil Procedure 54(b). The district court may do so only after determining that the party or claim has been finally decided and that there is no just reason to delay an appeal until after final judgment. Although an appellate court can review the district court's application of these criteria, there is no formal requirement (unlike in the section 1292(b) situation) to seek permission from the appellate court after the district court enters the order as a Rule 54(b) judgment.

***Orders Granting or Denying Class Certification.*** In the specific context of certification of a class action, Federal Rule of Civil Procedure 23(f) allows a party to seek an appellate court's permission to appeal the grant or denial of class certification. Unlike in the Section 1292(b) context, permission need not first be sought from the district court. The petition for permission to appeal must be filed with the court of appeals within 14 days after the district court entered its order granting or denying class certification.

***Orders Within the "Collateral Order" Doctrine.*** Under the collateral order doctrine, a narrow class of rulings that would not otherwise be appealable are deemed appealable because they involve issues too important to be denied review and too independent of the action itself to require that appellate consideration be deferred until the whole case is adjudicated. There are three prerequisites: the order must conclusively determine the disputed question, must resolve an important issue completely separate from the merits of the action, and must be effectively unreviewable on appeal from a final judgment. Examples of orders that have met these requirements include orders denying claims of qualified immunity, orders denying claims of foreign sovereign immunity, and orders affirming a receiver's plan of distribution, *see, e.g.*, *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 330-31 (7th Cir. 2010).

***Writ of Mandamus from the Appellate Court.*** A party also may obtain review of a non-final order if the appellate court grants a writ of mandamus under Federal Rule of Appellate Procedure 21. A petition for such a writ of mandamus requests that the appellate court direct the district court. Traditionally, federal courts have granted petitions for a writ of mandamus only to confine a lower court to a lawful exercise of its jurisdiction or to compel a lower court to exercise its authority when it had a duty to do so. The availability of relief through a writ of mandamus requires analysis of several factors, such as whether other adequate means exist to attain relief, whether the absence of such relief will result in damage or prejudice, and whether the district court decision is clearly erroneous as a matter of law. Mandamus, while quite infrequent, has been granted, for example, where a bankruptcy court's decision "amounted to the review of an order or decision of the FCC" and contravened the Second Circuit's mandate on a prior appeal, *In re F.C.C.*, 217 F.3d 125, 134 (2d Cir. 2000), and where a district court had closed a jury trial to the public, *In re Cincinnati Enquirer, a Div. of Gannett Satellite Info., Inc.*, 85 F.3d 255, 256-57 (6th Cir. 1996).

In sum, although several means exist to permit review on appeal of an order in the absence of a final judgment, the ability to obtain such review often depends in part on the district court or appellate court exercising its discretion to permit such review. The option should nevertheless be kept in mind by clients who have suffered an adverse decision in the district court.

## Class Action Litigation Update

*Cy pres* disbursements have become a popular feature of class action settlement agreements, but given the recent denial of certiorari in *Marek v. Lane*, Supreme Court guidance in the law of *cy pres* will have to wait until another day. Fortunately, it should be a short wait. In a rare statement regarding the denial, Chief Justice Roberts noted that "fundamental concerns" of *cy pres* provisions remain unaddressed and that the Supreme Court "may need to clarify the limits on the use of such remedies." *Marek v. Lane*, No. 13-136, slip op. at 14 (U.S. 2013) (Roberts, C. J., statement respecting denial of cert.). That the Chief Justice elected to enter such a statement means the Court may be willing to address *cy pres* relief when the right circumstances arise.

A *cy pres* remedy is a settlement feature that assigns plaintiffs an indirect benefit, typically in the form of defendant donations to a non-profit relevant to the plaintiff's asserted rights. *Cy pres* provisions are used in class action settlements when there is an issue about funds remaining after distribution or when it is impractical or impossible to identify class members.

The facts of *Lane* were intriguing. A Facebook advertising program, named Beacon, allowed defendant Facebook to send news alerts to a user's friends about purchases made online. To obtain this information, Facebook partnered with many third-party retailers that were already collecting data about online consumers, including Travelocity, Fandango, Overstock.com, Zappos, Hotwire, and Gamefly. The case gained media attention because of the story of one of its named plaintiffs: Sean Lane filed the lawsuit after he bought his wife a diamond ring on Overstock.com, only to have her spot the purchase in a Facebook news feed, spoiling the surprise. Ellen Nakashima, *Feeling Betrayed, Facebook Users Force Site to Honor Their Privacy*, The Washington Post (Nov. 30, 2007).

According to the settlement approved by the district court, Facebook would obtain a full release from class members in exchange for terminating the advertising program and establishing and funding a foundation dedicated to protecting the privacy rights of Internet users. *Lane v. Facebook, Inc.*, No. 08-3845, 2010 WL 9013059 at *6 (N.D. Cal. Mar. 17, 2010). The settlement was heavily criticized because, although it provided for attorney's fees and compensation to class representatives, the absent class members would not receive any monetary relief. Moreover, because the privacy foundation effectively would be controlled by Facebook, critics like the Electronic Privacy Information Center argued that the foundation would function more like a public relations organization for Facebook than an effective tool for consumer privacy protection.

*Cy pres* distributions have been increasingly questioned by federal district courts, which must consider whether they meet the standard for class action settlements of Federal Rule of Civil Procedure 23(e)(2). Under the Rule, all aspects of a settlement must be "fair, reasonable, and adequate" for class members. *See, e.g.*, *In re Hydroxycut Mktg. and Sales Practice Litig.*, No. 3:09-md-2087 (S.D. Cal. Nov. 19, 2013) (denying final settlement approval after finding *cy pres* provisions did not benefit the class and expressing concern over the large size of the *cy pres* distribution); *In re Thornburg Mortgage, Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1111 (D.N.M. 2012) (finding a *cy pres* award "a bad idea and inappropriate," and questioning *cy pres* generally).

Scrutiny also has come from the appellate courts. The Third Circuit has stated that *cy pres* distributions are "most appropriate where further individual distributions are economically infeasible," but that these types of distributions of leftover funds may also be appropriate in other contexts. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (vacating a $35 million class action settlement that awarded only $3 million directly to the class members).

In contrast, the Second, Fifth, and Seventh Circuits have all held that *cy pres* awards are permissible only where it is not possible to compensate class members directly. *See, e.g.*, *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 474-75 n.15-16 (5th Cir. 2011); *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675-76 (7th Cir. 2013).

A number of circuits have emphasized that a nexus must exist between a *cy pres* award and the class members' interests. *See In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002); *Nachshin v. AOL*, LLC, 663 F.3d 1034, 1038-39 (9th Cir. 2011). The Ninth Circuit most recently articulated its position in *Lane*, affirming final approval of the controversial settlement agreement and noting, over an ardent dissent, that, the *cy pres* recipient organization need not be "ideal," so long as the connection between the recipient and the class is "substantial." *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) *cert. denied*, 13-136, 2013 WL 5878083 (U.S. Nov. 4, 2013).

On petition for certiorari, the *Lane* settlement objectors argued that the Ninth Circuit had split with the Second, Third, Fifth, Seventh, and Eighth Circuits in upholding the approval of a settlement under which all monetary relief went to the *cy pres* recipient and absent class members received no direct benefit. Petition for Writ of Certiorari at 19, 25, *Marek v. Lane*, No. 13-136 (2013). Although the Supreme Court did not address the parties' arguments, Justice Roberts' unexpected statement set forth a list of fundamental concerns relating to the use of the *cy pres* remedy in class actions, including "when, if ever, such relief should be considered"; "what the respective roles of the judge and parties are in shaping a *cy pres* remedy"; and "how closely the goals of any enlisted organization must correspond to the interests of the class." *Marek v. Lane*, No. 13-136, slip op. at 14 (U.S. 2013). Although certiorari was denied in *Lane*, given the Supreme Court's recent attention to class action jurisprudence, the activity in the federal courts, and the Chief Justice's apparent interest, it may not be long before the fate of *cy pres* class action settlements is conclusively determined.

## International Arbitration Update

***Australia's Highest Court Upholds Constitutionality of the Country's International Arbitration Law.*** In *TCL Air Conditioner (Zhongshan) Co. Ltd. v. The Judges of the Federal Court of Australia* [2013] HCA 5, Australia's High Court unanimously upheld a key provision of the country's International Arbitration Act (the "IA act") concerning the enforceability of arbitral decisions. The IA Act gives force of law in Australia to the UNCITRAL Model Law on International Commercial Arbitration. The case arose from an agreement between a Chinese company, TCL Air Conditioner (TCL), and an Australian one, Castel Electronics. The agreement provided that disputes were to be submitted to arbitration in Australia. An arbitration between the companies resulted in an award to Castel. After TCL defaulted, Castel asked the Federal Court of Australia to enforce the award under the IA Act. TCL then petitioned the High Court to block any such enforcement on the ground that the IA Act violated Chapter III of Australia's Constitution, which vests Australia's judicial power in courts.

TCL made two interrelated arguments to the High Court: first, TCL argued that the IA Act impairs the institutional integrity of the Federal Court by requiring it to rubber-stamp arbitral awards; and second, TCL claimed that the IA Act impermissibly vests judicial power in arbitral tribunals. Essentially, TCL argued that the IA Act unconstitutionally required courts to enforce an arbitration award, regardless of whether the award was correct or whether the arbitrator made a mistake of law. The High Court disagreed. It reasoned that the IA Act did not demean the integrity of Australia's courts, because it provided ways for them to set aside an award, including instances when the award conflicts with Australia's "public policy." The High Court also emphasized the consensual and private nature of an arbitration agreement, and contrasted it to the nature of judicial power, which is sovereign and independent of consent: "The determination of a dispute by an arbitrator does not involve the exercise of the sovereign power of the State to determine or decide controversies." The decision puts to rest a serious challenge to the enforceability of arbitral awards in Australia.

***U.S. Supreme Court to Decide Whether Courts or Arbitrators Should Determine Whether a Precondition to Arbitration Has Been Satisfied.*** On December 2, 2013, the U.S. Supreme Court heard argument in *BG Group PLC v. Republic of Argentina*. 133 S. Ct. 2795 (2013) (granting cert.). The issue before the Court is whether "in disputes involving a multi-staged dispute resolution process, a court or the arbitrator determines whether a precondition to arbitration has been satisfied." The dispute concerns a

Britain-Argentina bilateral investment treaty ("BIT"). The BIT governs disputes between investors in one state against a host state, and provides that disputes can be arbitrated only after they have been submitted to the host state's courts for 18 months without resolution.

The case arose when the value of a British corporation's investments in Argentina substantially diminished due to policies that Argentina implemented after the country's economic troubles in the early 2000s. Instead of submitting the dispute to an Argentinean court, it was submitted directly to an arbitration panel. Pursuant to Article 32(b) of the 1969 Vienna Convention on the Law of Treaties, the arbitral panel found the precondition of first submitting the dispute to a court need not be followed, because doing so would be "absurd and unreasonable" in light of Argentina's post-crisis reforms, which restricted the investor's access to the nation's courts.

On appeal by Argentina, the D.C. Circuit noted that the BIT was silent about deciding arbitrability, and that it called for courts to first attempt to resolve disputes. 665 F.3d 1363, 1369 (D.C. Cir. 2012). It found that there was no clear and unmistakable evidence that the parties wanted to arbitrate arbitrability, and reversed the district court's ruling. *Id.* at 1371-72.

Relying on the federal policy favoring arbitration, and Supreme Court cases indicating there is a presumption that arbitrators decide whether conditions precedent to arbitration have been met, the British corporation asked the Supreme Court to overturn the D.C. Circuit. However, Argentina relied on other Supreme Court decisions, which state that "the default presumption is that a court, not an arbitrator, has the final say" as to whether the parties have agreed to arbitrate. Meanwhile, the United States, which is a party to BITs containing similar language to the provision at issue, argued that a new standard should be implemented in disputes between private investors and a sovereign. It argued that courts "should review de novo arbitral rulings on consent-based objections to arbitration," and requested that the Court remand the case for a decision on whether Argentina's objection was consent-based. At oral argument, some Justices questioned whether the Government's position had any precedential support and whether it made sense. Other Justices pondered the implications of one party being a sovereign. Given that there are thousands of BITs, the Court's decision could impact the way conditions precedent to arbitration are evaluated in numerous investor-state disputes.

***California Court Rules that Foreign Company's Affiliate May Bring Suit, Despite Arbitrator's Finding that It Was Jurisdictionally Barred from Initiating Arbitration.*** In *Boeing Co. v. KB Yuzhnoye*, No. CV 13-730 ABC (AJWx) (C.D. Cal. Oct. 28, 2103), Judge Audrey Collins of the U.S. District Court for the Central District of California found that Old Kvaerner, an affiliate of the Norwegian company Kvaerner Moss, could join Boeing's claims of unjust enrichment and breach of contract against the Russian company Energia and Ukraine's Yuzhnoye. Kvaerner Moss, Boeing, Energia, and Yuzhnoye were parties to a "Creation Agreement," which provided that they and their affiliates would be reimbursed for certain payments they made under the Agreement. Old Kvaerner claims that, as an affiliate, it made payments that should have been reimbursed by Energia and Yuzhnoye, but were not.

Energia and Yuzhnoye argued that a Swedish arbitration award barred Old Kvaerner's claims. In that arbitration, the arbitrator decided that the Creation Agreement did not give affiliates the right to initiate arbitration. Nonetheless, Judge Collins ruled that the arbitration award "concerned only [arbitral] jurisdiction," not substantive rights, and therefore it did not bar Old Kvaerner from asserting those rights in court. The decision has potential significance regarding recourses available to parties who are blocked from joining or initiating arbitration.

## Asylum Granted in Time for the New Year

In December 2013, Quinn Emanuel obtained a grant of asylum for a pro bono client introduced to Quinn Emanuel by the New York Asylum Office. The client, an ethnic Tibetan Buddhist, was born and raised in Nepal. While studying abroad as a college student, the client became politically and religiously active. Indeed, when he returned to Nepal during breaks from school, the client acted as a journalist and engaged in a variety of political activities that (1) he hoped would lead to a more democratic and pluralistic Nepal, and (2) protested Chinese control of, and the impact of Chinese policies on, Tibet. The client's political activities included, among other things, assisting the U.S. Embassy in Nepal in monitoring the treatment of Tibetans in that country as part of President Bush's "Freedom Agenda." As a direct result of his activism, the client was repeatedly detained and tortured by both the police forces loyal to the government of Nepal and the Maoist guerrillas who waged a ten-year civil war in Nepal. The client came to the United States in 2009. During his time in the United States, the client sought care for the serious mental and emotional distress resulting from the torture he suffered. It was during his treatment that he learned that he could try to seek asylum here.

The complication of seeking asylum, however, was that immigration law generally requires that an asylum application be filed within one year of the applicant's arrival in the United States. By the time client's application was filed, it was late by nearly three years.

There is limited case-law addressing when an exception to the filing deadline should be granted. Quinn Emanuel crafted an argument that an exception to the statutory deadline was warranted based on the totality of the circumstances. Due to the end of civil war and other recent political developments in Nepal, Quinn Emanuel also had to frame the historical conditions in Nepal to make it difficult for the Government to claim that the country conditions in Nepal had changed in a way that would negate client's asylum eligibility.

## Complete Dismissal For CIFG Against Fortis Bank Entity

Quinn Emanuel recently succeeded in winning a complete dismissal of a complaint filed against its client CIFG Assurance North America, Inc. ("CIFG") in the New York State Supreme Court, Commercial Division. Plaintiff Royal Park Investments, SA/NV – a special purpose vehicle formed to hold Fortis Bank assets – owned a portion of a mortgage backed securities bond issuance insured by CIFG. CIFG and Plaintiff RPI subsequently entered into an arrangement whereby CIFG made a payment to RPI and obtained the right to recover any insurance payments it made on RPI's bonds — in effect canceling the insurance as it related to RPI's bonds. After the securities defaulted and CIFG paid out the insurance proceeds to the bond holders (and recovered the payment it made on behalf of RPI's bonds), CIFG liquidated the collateral and collected the proceeds of the liquidation from the indenture trustee. RPI brought suit claiming that it had not agreed to forego its share of the liquidated collateral and that CIFG was unjustly enriched. Quinn Emanuel moved to dismiss and for summary judgment on the basis that the language in the governing documents was unambiguous. The Commercial Division adopted Quinn Emanuel's arguments in full, dismissing RPI's claims with prejudice.

## Summary Judgment Victory for Vimeo on Copyright Claims and Certification for Appeal on Two Important DMCA Issues

Quinn Emanuel obtained another victory on behalf of Vimeo in its defense against a multitude of Digital Millennium Copyright Act ("DMCA") claims by various record companies. The record companies brought claims on user-created videos hosted by Vimeo that contained copyrighted music allegedly in violation of the owners' copyright. The United States District Court for the Southern District of New York granted Vimeo's motion for summary judgment several months ago on 144 of 199 of the record companies' DMCA claims, but recently decided Vimeo's motion for reconsideration and for certification of questions for appellate review. The Court reversed itself, and awarded Vimeo summary judgment on 17 additional DMCA claims. In addition, the Southern District certified to the Second Circuit all of Vimeo's questions on all remaining claims for which Vimeo had not previously won summary judgment or sought review, while refusing to certify any question presented by the record companies.

The Southern District initially denied Vimeo a summary judgment finding that it was entitled to safe harbor protection under the DMCA as to 17 videos. The Court had determined that, because Vimeo employees allegedly "interacted" with the videos containing copyrighted music, a reasonable juror could conclude "that Defendants were 'aware of facts or circumstances from which infringing activity is apparent,'" red flag knowledge that precludes safe harbor protection from infringement suits. Reversing itself, the Court agreed with Vimeo as to fifteen videos that there was no evidence showing Vimeo employees actually viewed the videos, and Vimeo was thus entitled to summary judgment granting it safe harbor protection as to these videos. As for another two videos, the Court reversed its prior finding that the "infringing activity in each video was "objectively' obvious to a reasonable person,'" because the copyrighted songs actually played in each video "for only a short time in the background … during the middle of the video and [were] otherwise a less significant aspect of the video."

The Court then certified two questions posed by Vimeo for interlocutory appeal: (1) "[w]hether the DMCA's safe harbor provisions are applicable to sounds recordings fixed prior to February 15, 1972," and (2) "[w]hether … a service provider's viewing of a user-generated video containing all or virtually all of a recognizable, copyrighted song may establish 'facts or circumstances' giving rise to 'red flag' knowledge of infringement." As to the first question posed by Vimeo, the Court acknowledged "a substantial ground for difference of opinion" on the reach of the DMCA and noted that the "issue is a question of first impression in the Second Circuit." Regarding the second question, the Court "recognize[d] that determining whether a defendant has 'red flag' knowledge of infringement is a difficult question that has important ramifications for service providers such as Vimeo," underscoring that its prior decision "may lead service providers to be more aggressive in further investigating or even removing copyrighted content that they encounter." The appeal before the Second Circuit on these issues will have a critical impact on the safe harbor protection afforded to internet service providers who rely on a strong DMCA in order to provide services to the public.

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*(Noted With Interest continued from page 5)*

framework to argue whether or not cost expenditures are "high-powered" and "state-of-the-art" means of trial conduct.

**Bender *Offers A New Approach***

The *Bender* court provides a new framework for this grey area. The *Bender* court faced an award of costs that "included charges for creating designated excerpts from deposition transcripts and video, converting exhibits to computer formats (Tiff's & JPEG's), and design and production of electronic presentations," and a technician to run them. The defendant-appellants asserted that these costs should have been taxed and thereby deducted them from Mr. Bender's cost award. They argued that the use of cutting edge technology was "explicitly unrecoverable" under section 1033. The Court of Appeal disagreed. Not only were such costs not statutorily barred, but the court also asserted "it would be *inconceivable* for plaintiff's counsel to forego the use of [the] technology" in this case. The technology, stated the court, served an essential role in showing the jury both the plaintiff's physical state—as shown through the videos of the plaintiff taken in the patrol car and at the police station—and in displaying the "key parts" of other witnesses' depositions shown at trial.

With this holding, the *Bender* court deviated from the framework offered by the *Science Applications* court. No longer were "high-powered" or "state-of-the-art" technological costs barred from recovery of costs. Rather, the court took a new approach to conceiving what it means to be reasonably necessary to provide an effective trial in today's courtrooms.

Of course, it should be noted that the reasonableness of the dollar amount also may have affected the decision, apart from an initial determination of whether a technological device was "reasonably necessary." In *Science Applications*, the Court of Appeal was "troubled" by the amount of expenses sought at near $500,000. It reasoned that "[i]f a party litigant chooses unwisely to expend monies in trial presentation in excess of the value of the case, utilizing advanced methods of information storage, retrieval, and display, when more conventional if less impressive methods are available, the party must stand his own costs." The $24,000 cost is quite low especially in relation to the damages and overall fees and costs award in *Bender*, but that expense is modest compared to the parallel costs in a more complex type of litigation where the courtroom technology is likewise more complex and much more expensive.

It is unclear what impact *Bender* will have on the law in California or whether its holding will be applied in other circumstances. Uncertainty remains regarding any individual trial judge's acceptance of this type of costs, but there is no question that litigants will keep employing new technologies in the courtroom because of their effectiveness and impact on the outcome. The inevitable increase in use of courtroom technology eventually may moot the underlying question altogether, but for now *Bender* provides a notable new benchmark for litigants grappling with cost issues in California courts.

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# business litigation report

# quinn emanuel urquhart & sullivan, llp

Published by Quinn Emanuel Urquhart & Sullivan, LLP as a service to clients and friends of the firm. It is written by the firm's attorneys. The Noted with Interest section is a digest of articles and other published material. If you would like a copy of anything summarized here, please contact David Henri at 213-443-3000.

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