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## A New Wave of Cuba-Related Litigation - Title III Helms-Burton Act Claims

On April 17, 2019, the Trump administration announced that it would allow the suspension of Title III of the Helms-Burton Act to lapse as of May 2, 2019, thereby allowing eligible individuals and companies to file lawsuits in U.S. courts seeking compensation for property expropriated by the Cuban government since 1959. This is the first time since the law became effective 23 years ago that Title III would be activated, after it had been suspended by every U.S. president since the law came into effect.

Since 2017, recently restored diplomatic relations between the United States and Cuba have been rapidly deteriorating: the Trump administration reinstated travel restrictions for U.S. citizens to Cuba and published the Cuba Restricted List, prohibiting U.S. individuals and companies from doing business with the entities listed. In November 2018, the U.S. administration signaled that it was seriously reviewing Title III of the Helms-Burton Act. And, in March 2019, the administration announced that it would only suspend Title III for another 45 days instead of the standard 6 months. This latest, most severe step appears to be a response to Cuba's continued military, security, and intelligence support of Venezuela's Nicolás Maduro, in the face of one of the worst man-made humanitarian crises in the world.

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INSIDE



## Liesl Fichardt Named to *The Lawyer Hot 100* List

London partner Liesl Fichardt has been named to *The Lawyer Hot 100* list for 2019. The list is based on hundreds of nominations and recognizes "the most daring, innovative, and creative lawyers" in all legal fields.

## Three Partners Named to Top 30 Life Sciences Litigation Practitioners in the United States

*Best of the Best USA Expert Guide* has identified New York partners Kathleen M. Sullivan, Peter Armenio, and Sandra Bresnick in the Guide's annual Top 30 Litigation Experts in the United States list for 2019 in the area of Life Sciences.

## Michael Lyle Named "Litigator of the Week" by *The American Lawyer Litigation Daily*

Michael Lyle has been named "Litigator of the Week" by *The American Lawyer Litigation Daily* for not only defeating a $120-million breach of contract claim for firm client, Express Scripts, but also for winning a $20-million counterclaim. The litigation arose after Express Scripts terminated its contract with HM Compounding, which had breached the contract and driven up prescription costs for Express Scripts' customers. HM Compounding sued in 2013, alleging that the termination was an attempt to eliminate compounding pharmacies from Express Scripts' pharmacy network. Mr. Lyle and the QE team moved for and obtained what were effectively case-terminating sanctions based on HM Compounding's discovery violations, with the court awarding $360,000 in monetary sanctions, striking HM Compounding's damages expert, and inviting supplemental summary judgment briefing. Four days before the start of trial, the Court granted summary judgment in Express Scripts' favor on all of HM Compounding's claims and held that HM Compounding was liable on Express Scripts' counterclaims, leaving only the amount of Express Scripts' damages for the jury to decide. HM Compounding then agreed to the $20-million consent judgment sought by Express Scripts.

**What is the Helms-Burton Act?**

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, known as the "Helms-Burton Act" after its sponsors, was initially tabled in 1995. In 1996, however, the Cuban Air Force shot down two civilian planes flown by a Miami-based humanitarian non-profit group whose mission was rescuing raft refugees from international waters between the United States and Cuba. Two weeks later, the law was enacted by President Clinton.

The Helms-Burton Act had four primary objectives: (1) to codify the United States' embargo on Cuba, thereby requiring consent of Congress for modification of the sanctions; (2) to articulate explicit conditions precedent to be met before the embargo could be lifted; (3) to dissuade foreign countries from doing business with Cuba and exclude from the United States any foreign nationals who traffic in confiscated property; and (4) to protect Americans' rights in property confiscated by the Castro regime.

Title III of the Act created a private right of action for U.S. nationals in U.S. courts against those individuals or corporations "trafficking" in property expropriated by the Cuban government since 1959. The activation of Title III, after its 23-year suspension, exposes companies all around the world, but particularly in the U.S., Canada, and Europe (primarily France and Spain), to legal action in U.S. courts by those whose property was confiscated by the Castro regime between 1959 and 1996.

Some of the international criticism of Title III is centered around how broadly the Helms-Burton Act defines "trafficking." The term essentially creates civil liability for any person who "knowingly and intentionally" engages in commercial activity that has interest in, or derives revenue from, property that was confiscated by the Cuban government. Notably, because Title III has been inactive since the enactment of the law, there is substantial uncertainty as to how broadly courts will read the term "trafficking" in litigation arising under Title III.

**Who can bring claims and what are the remedies?**

Claims may be brought by both U.S. citizens and foreign persons or companies who were subject to the jurisdiction of the United States at the time that their property was confiscated and who submitted claims that were evaluated and certified by the U.S. Justice Department's Foreign Claims Settlement Commission ("FCSC"). The FCSC is authorized by the International Claims Settlement Act of 1949 to consider the validity and value of claims by US nationals arising from the nationalization or expropriation of their property. Under Title III, courts are directed to accept FCSC-certified claims as conclusive. These "certified claims" are afforded priority and are given special status. U.S. nationals, who were entitled to bring their claims before the FCSC for certification but failed to do so are prohibited from pursuing an action under Title III.

Claims that were not eligible for certification before the FCSC and that were thus not presented for certification, so called "uncertified claims," may be brought by individuals and companies who were Cuban citizens (or nationals of countries other than the United States) at the time their property was confiscated but who later became naturalized U.S. citizens or incorporated in the United States. Plaintiffs asserting claims uncertified by the FCSC should expect challenges in establishing title to confiscated properties. A special master may be appointed by the court to make determinations as to the validity of the plaintiff's ownership claim and the value of the confiscated property.

The Helms-Burton Act provides civil remedies in the form of money damages that are the greater of (1) the amount certified by the FCSC plus interest; (2) the amount determined by a court-appointed special master plus interest; or (3) the fair market value of the property, calculated as either current value of the property or the value of the property at the time of expropriation plus interest, whichever is greater. The claimant may also recover court costs and attorneys' fees.

Title III also provides treble damages against defendants facing claims certified by the FCSC and against defendants who confront uncertified claims and fail to cease "trafficking" in the confiscated property within 30 days after they are provided notice by a claimant that an action is to be initiated against them.

Title III specifies that only cases in which the amount in controversy exceeds $50,000 (exclusive of interest, costs, and attorneys' fees) may be brought under the Section. Of the approximately 6,000 certified claims, only a little over 900 refer to original losses in excess of $50,000. Importantly, with almost 60 years of interest, these qualifying claims will have grown considerably in value. Considering that Cubans who became naturalized U.S. citizens during the Castro regime are now eligible to bring uncertified claims, the number of potential law suits could be much higher.

**Defenses to claims brought under Title III**

There are a number of potential defenses to claims brought under Title III of the Helms-Burton Act:

- **Personal Jurisdiction**

A primary defense to any claim under Title III will be a challenge to personal jurisdiction. This is especially true for non-U.S. defendants who do not themselves do business in the United States. To establish general

jurisdiction, plaintiffs must show the defendant is "at home" under *Daimler AG v. Bauman*, 571 U.S. 117 (2014). This can be very difficult to show for non-U.S. defendants who do not have a principal place of business in the United States. Likewise, to establish specific jurisdiction, plaintiffs must show that their claims arise from contacts in the United States. Thus, the alleged trafficking activity must necessarily take place in the United States. And to establish quasi in rem jurisdiction, a plaintiff must identify property of the defendant that is within the court's district and show that the defendant has "sufficient minimum contacts" with the forum state such that the action does not offend "traditional notions of fair play and substantial justice." As such, it will also be extremely difficult to establish quasi in rem jurisdiction over a foreign defendant whose only property in the forum is not the subject of the litigation.

- **Statute of Limitations and other bars**

Under Title III, claims brought more than two years after the trafficking has ceased are time-barred. This statute of limitations period may have started to run, or even expired, while the previous presidential suspensions were in effect, as the statute is triggered by the ceasing of "trafficking" in the confiscated property. Furthermore, if any claim was previously denied by the FCSC, courts must accept that finding as conclusive.

- **Blocking statutes/foreign extraterritorial measures**

Some jurisdictions, including Canada, Mexico, the United Kingdom, and the European Union, passed legislation to block judgments under the Helms-Burton Act, making them essentially unenforceable in the jurisdiction where the defendants have assets. As such, even if potential plaintiffs could successfully pursue a Title III action in the U.S., those with interests in jurisdictions that have adopted blocking legislation may be deterred from bringing the claim due to adverse consequences they may face overseas. Additionally, many potential plaintiffs are large corporate groups that own assets in foreign jurisdictions that have adopted "clawback" regulations, which provide an avenue, through countersuit, to reclaim any damages awarded in a Title III case, plus attorney's fees and costs. These potential plaintiffs may be deterred from bringing a Title III action in the U.S. by the likelihood of retaliatory litigation abroad.

- **Exemption of certain industries**

Title IV of the Helms-Burton Act carves out some limited exceptions from the term "trafficking," including "the delivery of international telecommunication signals to Cuba," trading and holding publicly traded securities, and the "transactions and uses of property incident to *lawful* travel to Cuba."

- **Challenging title to confiscated properties**

The ability to challenge title to confiscated properties turns on whether a claim has been certified by the FCSC. For certified claims, certification by the FCSC serves as conclusive proof of title and ownership and provides a presumption in favor of the valuation of the property set by the FCSC, which is rebuttable only by clear and convincing evidence. However, defendants facing uncertified claims may challenge title and valuation of a property under a lower preponderance of the evidence standard.

- **International legal considerations**

Shortly after Congress passed the Helms-Burton Act, several countries initiated proceedings against the United States in the WTO, claiming that Title III violated the United States' obligations under international law. However, these proceedings were dismissed after the United States suspended Title III. Nevertheless, defendants facing a claim under Title III could encourage foreign countries to reinitiate proceedings before the WTO, which may, in turn, put pressure on the United States to reimplement the stay on Title III claims.

**What steps should concerned companies take?**

Potential claimants should consider the following prior to initiating litigation:

- Determine whether the claim was previously certified.
- If the claim was not certified, carefully consider facts to ensure ability to prove title/ownership of confiscated property.
- Evaluate the claim to ensure that the amount in controversy exceeds $50,000 (exclusive of interest, costs, and attorney's fees).
- Identify all potential defendants, including Cuban state-owned companies and others who benefited from the confiscated property, or otherwise engaged in trafficking.
- If claim was not certified, send 30-day notice letter to maintain ability to obtain treble damages if defendant does not cease trafficking activities.
- If litigation can be reasonably anticipated, ensure that all potentially relevant electronically stored information is preserved and issue document holds to key individuals with any information about Cuba-related claims.

Similarly, potential defendants should take the following proactive steps to limit their exposure going forward:

- Evaluate present assets to determine whether they can be traced back to property that was confiscated by the Cuban government.
- Evaluate present business interests to determine

whether the interest relates to or derives revenue from expropriated property.

- Review future business opportunities carefully to determine whether they could create liability under Title III.
- Include provisions in future contracts requiring disclosure, representations, and warranties with respect to "trafficking," as defined under Title III, and include associated remedies for failure to meet obligations thereunder.
- For foreign entities, become familiar with the laws of foreign countries to identify potential blocking statutes, claw-back provisions, and other potential protections.
- If litigation can be reasonably anticipated, particularly with respect to claims that are already certified, ensure that all potentially relevant electronically stored information is preserved and issue document holds to key individuals with any information about Cuba-related assets.

# NOTED WITH INTEREST

## ISDA's Proposed Rules Aimed At Manufactured Defaults

On March 6, 2019, the International Swaps and Derivatives Association, the main trade group for credit default swaps ("CDS"), proposed amendments to the rules governing the standard-form contracts on which CDS are written. The proposed amendments are aimed at addressing "issues relating to narrowly tailored credit events," also known as manufactured defaults. *See* Proposed Amendments to the 2014 ISDA Credit Derivatives Definitions Relating to Narrowly Tailored Credit Events (hereinafter, "Proposed Amendments") para. (a)(1) (Mar. 6, 2019), https://www.isda.org/2019/03/06/proposed-amendments-to-the-2014-isda-credit-derivatives-definitions-relating-to-narrowly-tailored-credit-events. These amendments may be a step forward, but they fall short of addressing certain strategies already known to the market, including a strategy used by CDS sellers to avoid credit events (and thus avoid paying out on CDS)—referred to here as a "manufactured non-default."

A brief framework of CDS is helpful to understand the import—and limitations—of these proposed amendments. A CDS can roughly be compared to insurance on an investment. As a very simple example, consider an investor that invests in debt issued by ACME corporation. If ACME corporation does well, it will pay off its debt in full and on time. But if ACME corporation does poorly, it may miss payments, causing the investor to suffer losses. A CDS contract lets the investor hedge its investment in ACME corporation. In a typical CDS contract, the investor—a CDS buyer—agrees to make periodic payments to a CDS seller for a specific period of time—similar to an insurance premium. If, during that time, ACME corporation defaults, the CDS seller pays the investor a lump sum equal to the credit loss on the loan determined by an ISDA auction, thereby allowing the investor to mitigate the losses he would otherwise have suffered. Though this example helps to conceptualize how CDS typically work, CDS buyers do not actually have to own debt issued by ACME corporation to purchase CDS. Thus, CDS contracts can be viewed as a "bet" on the company: CDS sellers—who are long on the company—bet that the company will remain healthy and pay off its debts in full and on time. CDS buyers—who are short on the company—bet that the company will suffer losses and default on its debt.

CDS market participants have devised several creative—and controversial—strategies in an attempt to ensure that their bets will pay off, including so-called "manufactured defaults." In a manufactured default, an otherwise healthy company agrees to default on a portion of its debts in exchange for something of value from the CDS market participants. One of the most famous manufactured defaults was engineered in 2013 by the Blackstone Group, LP and involved Spanish gaming company Codere SA. More recently, Quinn Emanuel successfully represented an investor to prevent Blackstone from engineering a similar manufactured default on CDS referencing debt issued by homebuilder Hovnanian.

In the Codere-Hovnanian-type of manufactured default, a CDS buyer offers the company an incentive—like below-market financing—to default on a portion of its outstanding debt. The default is a technical one. In Codere, the company defaulted simply by making an interest payment two days late. In Hovnanian, the company missed a payment on debt held by an affiliate, which, because of its relationship to the debtor, would not take any actions adverse to the company for missing

the payment. Nevertheless, these technical defaults require CDS sellers to pay the CDS buyers the amounts due under the CDS contract. But the result perverts market expectations: a company otherwise able to pay its debts defaults. The CDS seller must pay under the CDS contract, even though the seller correctly evaluated the company's ability to pay. The CDS buyer, who incorrectly assessed the company as a default risk, receives payment as if its assessment were correct.

In Hovnanian, Quinn Emanuel brought claims for violations of Sections 10(b), 14(e), and 20(a) of the Securities Exchange Act asserting a cross-market manipulation theory. After significant market attention, the CDS buyers and the Company agreed to a settlement.

ISDA's proposed amendments come on the heels of the Hovnanian case. These proposed amendments would change the definition of "failure to pay" set forth in the 2014 ISDA Credit Derivatives Definitions to add a "credit deterioration requirement." If the credit deterioration requirement is included in the CDS contract, a failure to pay would not trigger payment under the CDS contract "if such failure does not directly or indirectly either result from, or result in, a deterioration in the creditworthiness or financial condition of the Reference Entity." Proposed Amendments, Annex 1, para. 1.2. Together with the proposed amendments, ISDA published a memo to provide interpretive guidance describing whether this requirement has been met in a given situation by setting out a "non-exhaustive list" of considerations, many of which reflect the experience of the Codere-Hovnanian manufactured default. Proposed Amendments, para. (b)(2); *id.*, Annex 1, para. 2.10(a)-(f).

The proposed amendment to the definition of "failure to pay," however, fails to address manufactured *non*-defaults, which have recently created their own controversy. Manufactured non-defaults involve strategies by CDS sellers to avoid paying out on CDS contracts by taking steps to ensure that a company does not default even when the company would otherwise be unable to pay its debts as they come due. The RadioShack CDS are a prime example. With RadioShack, CDS sellers had received significant payments from CDS buyers on CDS that expired December 20, 2014. To ensure that RadioShack did not default before that date, the CDS sellers agreed to a "rescue package" that would keep RadioShack afloat temporarily. As a result, the CDS sellers kept the payments made by CDS buyers even though RadioShack probably would have otherwise defaulted before December 20. CDS buyers asked ISDA to declare a credit event anyway, but ISDA declined to do so.

Another manufactured non-default strategy used by CDS sellers is known as CDS "orphaning," attempted recently for CDS referencing newspaper publisher McClatchy Co. At a point when McClatchy was clearly headed toward default, it agreed with a CDS seller to refinance its debt using a wholly owned subsidiary to take out new loans that were used to pay the parent company's debts. As a result, McClatchy's debts were paid in full, thereby ensuring the CDS seller would not have to pay out under the CDS contracts. The fact that the subsidiary might default on its debt was irrelevant because the CDS contracts did not protect against the subsidiary's default. Thus, the CDS seller was paid by CDS buyers to protect against an essentially default-proof investment.

The proposed amendments fail to account for these CDS seller strategies because they rely on the occurrence of a "failure to pay." Admittedly, addressing manufactured non-defaults through an amendment is more difficult because, in a manufactured non-default, a credit event never occurs and CDS payments are never triggered. One way to address manufactured non-defaults may be to make a "restructuring" credit event—which occurs when there is a reduction in, or change in the composition of, principal or interest payments, a postponement in these payments, or a change in the priority of payments—a standard credit event in North American CDS contracts, just as it is in European CDS contracts. But there are reasons why restructuring typically is not a credit event in North American CDS contracts—including the complexity in determining when a restructuring is a credit event and its lack of a counterpart in CDS index trades—and these reasons may outweigh the benefits, suggesting that other solutions should be favored. ISDA opened the proposed amendments to a comment period through April 10, 2019. On May 24, 2019, ISDA published a second proposed amendment aimed at clarifying the definition of Original Principal Balance, with a comment period open through June 17, 2019. This additional proposed amendment does not address manufactured non-defaults. ISDA has not yet published additional responses. As ISDA responds to comments it receives on the proposed amendments, it will be interesting to see if ISDA chooses to broaden the amendments to address other strategies like manufactured non-defaults or if ISDA leaves manufactured non-defaults and other strategies to be addressed at a later date.

## Asia-Pacific Litigation Update

***Developments in Alternative Dispute Resolution in Japan***

Developments over the past two years set the stage for Japan's transformation into a more favored venue for alternative dispute resolution ("ADR"). These include:

- The Japanese Government's June 2017 announcement of its "Basic Policy on Economic and Fiscal Management and Reform," which recognized the importance of arbitration to efficiently resolve disputes among multinational corporations and expressed the government's commitment to expanding the country's capability to host international arbitration, including by establishing new hearing facilities in Tokyo and Osaka in cooperation with private organizations.
- The May 2018 opening of the Japan International Dispute Resolution Center in Osaka ("JIDRC-Osaka")—the first of two state-of-the-art hearing facilities contemplated by the government's 2017 policy announcement. JIDRC-Osaka may be reserved by private arbitration associations and private entities for arbitration proceedings. A second hearing facility, JIDRC-Tokyo, is still in the planning stages.
- The September 2018 opening of the International Arbitration Center in Tokyo ("IACT") as Asia's first private arbitration association with an emphasis on intellectual-property disputes. The chair of the IACT's governing board is former Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit. The IACT has assembled an extensive roster of experienced arbitrators, including retired judges from Japan's IP High Court and the U.S. Federal Circuit.
- The November 2018 opening of the Japan International Mediation Center ("JIMC") on the campus of Doshisha University in Kyoto in cooperation with the Japan Arbitration Association ("JAA"). The JIMC has an extensive panel of 48 participating domestic and foreign mediators from 13 jurisdictions around the world. The JIMC has a short set of default rules to facilitate mediations and ensure confidentiality. Parties are free to modify the rules by agreement. Parties to JIMC mediations may conduct their meetings on the Doshisha campus or elect to use facilities at the ancient Kodaiji Temple.
- The January 2019 enactment of substantive amendments to the rules of the Japan Commercial Arbitration Association ("JCAA"). These amendments created procedures to facilitate ongoing interaction between the parties and arbitrators and to increase the certainty of arbitral awards. The JCAA has also emphasized its ability to offer qualified foreign arbitrators to conduct proceedings in English and other languages by, for the first time, publishing its list of more than 120 Japanese and foreign arbitrators. Tracing its roots back to 1953, the JCAA is one of Japan's oldest arbitration associations and has cooperation agreements with over 40 sister organizations throughout the world.
- The 130-year anniversary of the first maritime arbitration conducted in Japan by the predecessor to the Tokyo Maritime Arbitration Commission ("TOMAC"), which is administered by the Japan Shipping Exchange ("JSE"). Maritime arbitrations by TOMAC have become increasingly diverse over the years, expanding from disputes over ship purchases, building, and repair to insurance coverage, underwriting, and financing.

Although Japanese companies traditionally have consented to ADR in foreign jurisdictions, their demand for Japan-based arbitration is on the rise as arbitrations and mediations involving Japanese companies have increased both in number and value. Moreover, recent growth in foreign direct investment in Japan has vastly increased the number of foreign subsidiaries operating in Japan as well as the number of foreign stakeholders in Japanese companies. *See,* https://www.jetro.go.jp/en/invest/reports/report2018/ch3.html. The expanding ADR infrastructure in Japan as well as the availability of qualified foreign arbitrators and mediators makes Japan a more accommodating ADR venue not only for Japanese companies but also for foreign stakeholders who may prefer the efficiency of ADR for disputes involving their Japanese investments.

***Japan's Arbitration Treaties & Legislative Framework***

Arbitration in Japan is conducted according to familiar international conventions. Since 1961, Japan has been a contracting state to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention). Japan is also a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and has bilateral treaties with fourteen countries concerning the mutual enforcement of arbitral awards.

Arbitration awards rendered in Japan, therefore, are generally enforceable outside of Japan as demonstrated by a recent affirmance by the courts in Hong Kong of a Japanese commercial arbitral award. *See Paloma Co. v. Capxon Elec. Indus. Co.*, [2018] HKCFI 1147 (C.F.I.). Japanese courts likewise have been respectful of arbitration awards and have shown a willingness to enforce awards rendered outside of Japan with "the same effect as a final

and conclusive judgment." Japanese Arbitration Law, Law No. 138 of 2003 (hereinafter, "JAL"), art. 45, para. 1 (Japan).

Japan's current Arbitration Law (the "JAL"), enacted in 2004, is based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985) (UNCITRAL Model Law). Notwithstanding enactment of the JAL, parties are generally free to agree upon their own procedural rules provided that they do not conflict with substantive provisions of the JAL. JAL, art. 26, para. 1. Arbitration associations such as TOMAC, IACT, and the JCAA generally have their own procedural rules, which, in many circumstances, may be modified by party agreement.

Thus, mirroring the UNCITRAL Model Law, arbitration in Japan enjoys substantial procedural flexibility. Parties are generally free to agree on the number and selection of arbitrators. JAL, art. 16, para. 1. If the parties fail to agree, the default is three arbitrators where there are two parties to the dispute, and the court determines the number of arbitrators where there are more than two parties. JAL, art. 16.

Aside from requiring impartiality and independence from the parties, the JAL does not impose any specific technical qualifications on arbitrators. However, where the court appoints arbitrators in the absence of party agreement, the court must determine whether the arbitrators should be of a different nationality from the parties themselves. JAL, art. 17, para. 6.

Reasonable doubt concerning arbitrator impartiality and independence is one of the few specified grounds for challenging an award. JAL, art. 18, para. 1. The JAL requires arbitrators to affirmatively disclose any facts that might raise questions about their impartiality or independence. JAL, art. 18, paras. 3 & 4. To further address these concerns, the JAA published a "Code of Ethics for Arbitrators" in 2008. As of January 2019, arbitrators have an ongoing duty to assess their potential conflicts and notify the parties of any changed circumstances. *Commercial Arbitration Rules*, Japan Comm. Arb. Assoc. (hereinafter, "JCAA"), art. 24, para. 4 (Jan. 1, 2019), http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitoration_Rules.pdf.

Absent an agreement between the parties, the JAL gives arbitrators broad discretion to determine the admissibility and probative value of evidence. JAL, art. 26, para. 3. Although arbitrators themselves have no authority to compel production of evidence, obtaining their consent is a prerequisite for a party wishing to seek court assistance to compel the production of documents or testimony. JAL, art. 35, para. 2.

The JAL generally requires that the arbitral award be reduced to writing and, at least, memorialize the date and location of the arbitration and provide a statement of the reasons and bases for the award. JAL, art. 39, para. 1. A majority of the arbitrators must sign the award. *Id.*

The JCAA's amended rules now prohibit dissenting arbitrators from disclosing "dissenting or individual opinion in any manner." JCAA, art. 63. While recognizing that "differing opinions are found in authoritative articles and textbooks on whether a dissenting opinion may be disclosed in an arbitral award," the JCAA ultimately determined that barring dissenting opinions is in the best interest of "sound and stable" dispute resolution. JCAA notes to January 1, 2019 Rules Amendments.

The JAL similarly promotes certainty of settlement during arbitration by permitting party settlements to be reduced to the form of an enforceable arbitral award. JAL, art. 38. The JCAA's recent rules amendments likewise promote settlement by introducing the concept of "interactive arbitration." The new rules require arbitrators, at various stages of the proceeding, to disclose their preliminary—but non-binding—views to the parties on the factual and legal issues material to resolving the dispute. JCAA, art. 56. This procedure serves the dual purposes of focusing the issues and promoting settlement.

Finally, Japan's Foreign Lawyer Law ("JFLL") has cracked open the door to the participation of foreign lawyers in "an international arbitration case" conducted in Japan where one or more of the parties is not a Japanese entity. Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers, Act No. 69 of 2014 (hereinafter, "JFLL"), art. 2(xi) (Japan). Although there are unresolved ambiguities in this exception, such as whether a Japanese subsidiary of a foreign corporation qualifies as a non-Japanese entity, the JFLL expressly permits two classes of foreign lawyers to represent clients in international arbitration proceedings and intervening settlement discussions. The permitted classes include: (1) Japan-resident foreign lawyers authorized by the Ministry of Justice to advise domestic clients on the laws of their home countries, JFLL, art. 5-3, and (2) non-resident, licensed foreign lawyers who are retained in their home countries to represent a party in the Japan-based arbitration. JFLL, art. 58-2.

Aside from these qualifications, the JFLL does not impose any additional visa or travel restrictions on foreign lawyers, court reporters, interpreters, or other support staff entering the country to participate in international arbitrations. Moreover, the statutory authorization for foreign lawyer representation in an international arbitration is available without restriction as to the substantive law to be applied (Japanese law or otherwise) in resolving the underlying dispute.

Through these many developments, the Japanese

government and private ADR associations are building the legal and physical infrastructure necessary to encourage not only domestic but also international parties to resolve their disputes in Japan. Faced with disputes of growing complexity and the escalating cost of traditional litigation, the world's corporations can now look to Japan as an attractive venue for resolving conflicts with their commercial partners.

## Trial Practice Update

***Written Witness Statements at Civil Trials and Evidentiary Hearings***

Live witness testimony—whether in person or via video—often is the default vehicle for trial testimony in the United States. Fact finders expect to see and hear directly from witnesses to assess credibility. Parties prefer to present their direct evidence through live witnesses who can offer the trial story with emotion, credibility, and conviction that is lost if presented in written form. This practice stands in contrast to fora outside the United States, including the High Court of Justice in England and Wales and international arbitrations, where parties routinely use written witness statements to present direct testimony. Increasingly, however, proceedings in the United States are adopting the use of written witness statements to present direct testimony of witnesses under a party's control in non-jury trial settings—including in United States Federal District Courts and administrative agencies.

***Use of Witness Statements in United States Federal District Courts***

The use of written witness statements *in lieu* of oral testimony for direct examination is permissible in non-jury trials before federal district courts so long as the witness adopts the statement in open court and is made available for cross-examination. For instance, the Ninth Circuit expressly approved the use of witness statements to present direct testimony as a standard procedure of the Bankruptcy Court in the Central District of California. *In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992). This mode of presenting direct testimony is generally permissible only (1) in bench trials, (2) where the witness is under the control of a party, and (3) if the procedure permits oral cross-examination and redirect examination in open court, preserving an opportunity for the judge to evaluate witness demeanor and credibility. These requirements are consistent with local rules governing the use of written witness statements. For example, the Central District of California's current Local Rule 43-1 permits the use of witness statements under these circumstances. *See* C.D. Cal. Civ. L.R. 43-1 ("Non-Jury Trial—Narrative Statements. In any matter tried in that court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness' cross-examination at the trial. Such written, direct testimony shall be adopted by the witness orally in open court, unless such requirement is waived."). Other judges and jurisdictions have similar rules. For instance: Judges Illston, Orrick, and White in the Northern District of California have guidelines allowing for the use of witness statements presenting direct testimony in bench trials, and the District of Minnesota's Rules of Procedure for Expedited Trials are similarly permissive. Over half of the forty-one judges in the District Court for the Southern District of New York (21 of 41) in fact *require* the use of direct witness statements in bench trials unless otherwise ordered. Further, some judges in the Southern District of New York will admit a witness' written testimony into evidence without subjecting the witness to cross-examination if the opposing party does not intend to cross-examine that witness at trial. For example, Judge Gardephe's Individual Rules of Practice state: "Three business days after submission of [sworn written testimony], counsel for each party shall submit a list of all affiants whom he or she intends to cross-examine at the trial. Only those witnesses who will be cross-examined need appear at trial."

***Use of Witness Statements in United States Administrative Proceedings***

Witness statements also are commonly used for direct testimony before federal administrative agencies acting in an adjudicatory capacity. Of the five active Administrative Law Judges ("ALJs") at the International Trade Commission, two—Judges Bullock and Shaw—require all direct testimony, with the exception of adverse witnesses, to be presented in witness statements as the default in their Ground Rules. Judge Lord requires the direct testimony of all experts to be made via witness statements. Others—Judges Cheney and McNamara—require live direct testimony unless otherwise ordered. Other federal agencies allow the use of written witness statements upon motion. By way of example, the procedural rules of the Federal Deposit Insurance Corporation permit the use of witness statements in place of oral direct testimony upon motion of any party or on the ALJ's own motion. 12 C.F.R. § 308.106(a). Some agencies even require written witness statements in all proceedings of a certain type. For example, direct testimony is required to be submitted in the form of written witness statements in hearings involving the imposition of civil monetary penalties for violations of certain statutory provisions by the Food and Drug Administration. 21 C.F.R. § 17.37(b).

***Use of Witness Statements in the High Court of Justice in England and Wales***

High Court judges in England and Wales are given broad discretion to control the presentation of evidence, including by ordering the use of written witness statements. *See* Civil Procedure Rules 32.2, 32.4, 32.5. As a result of procedural reform in the 1980's, the High Court has increasingly used written witness statements instead of oral testimony to present direct evidence, and this practice has essentially become the default. Lord Justice Jackson, Review of Civil Litigation Costs: Preliminary Report 401 (2010), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf. The procedure is similar to that used in United States Federal District Courts. The written statement containing all of the witness's direct testimony is served prior to trial. *Id.* at 402. During trial, the witness is cross-examined orally by the other party's counsel. *Id.* The witness may not testify at trial regarding new issues not contained in her/his witness statement without permission of the court. *See* Civil Procedure Rule 32.5(3)-(4).

***Use of Witness Statements in Arbitral Proceedings***

Witness statements are used extensively in international arbitration proceedings, and some U.S.-based arbitrators have promoted the expanded use of written direct testimony in domestic arbitrations as well. *See, e.g.*, Raymond G. Bender, *Presenting Witness Testimony in U.S. Domestic Arbitration: Should Written Witness Statements Become the Norm?*, 69 Disp. Resol. J., no. 4, 2014, at 39, 39-40. The American Arbitration Association and JAMS both permit testimony in the form of written witness statements. *See, e.g.*, *Commercial Arbitration Rules and Mediation Procedures*, Am. Arb. Ass'n, Rule 35(a) (Oct. 1, 2013), https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf; *Comprehensive Arbitration Rules & Procedures*, JAMS, Rule 22(e) (July 1, 2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf. In the international arbitration context, both the United Nations Commission on International Trade Law ("UNCITRAL") and the International Chamber of Commerce rules likewise permit the use of written witness statements. *See UNCITRAL Arbitration Rules*, U.N. Comm'n on Int'l Trade Law, art. 27(2) (Feb. 2014), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf; *Arbitration Rules*, International Chamber of Commerce, art. 25(6) (Mar. 1, 2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration.

***Pros and Cons of Written Witness Statements***

So why use witness statements instead of live direct testimony? A principle reason is efficiency. Parties often have strict time limits at trial, and using a witness statement allows a party offering direct testimony to enter that testimony in a fraction of the time it would otherwise take to present the testimony live. This is particularly true for expert witnesses, who often have lengthy direct examinations, particularly in intellectual property cases and cases involving complex subject matter: trial time for such experts can be shortened by several hours through the use of written statements. Further, less trial time is spent dealing with live objections over testimony and exhibits because objections will be handled pre-trial. And because written testimony is prepared and served in advance of trial, the trial can be streamlined so that the court and counsel are able to focus on the most relevant issues. The time saved on direct also allows the parties to spend more time on cross-examinations, which is critical to any successful trial. Thus, without lengthy direct testimony, proceedings can be shorter, saving the parties and the court valuable time and potentially lowering costs.

Another reason is predictability. Live testimony inherently has some amount of uncertainty, no matter how well-prepared a witness might be. Witnesses may forget things, get stage fright, or go off script and open the door to topics that may be unhelpful or even harmful. This is especially true with inexperienced witnesses, who often are the key fact witnesses in a case. Witness statements remove most of that uncertainty and risk. Written witness statements also limit the scope of direct—and, absent an agreement to go beyond the scope of direct, cross-examination as well—while also minimizing the risk that relevant evidence is missed. This benefit also is seen in the arbitration context, where the general rule is that cross-examinations are limited to the scope of the direct witness statements. Albert Bates Jr. & R. Zachary Torres-Fowler, *Expectations and Practices Concerning Examinations in International Arbitration*, Legal Intelligencer (Jan. 15, 2018). Moreover, parties will be able to see in advance of trial whether the opposing party is attempting to introduce new evidence or theories at trial, which is often difficult to do in real time. Thus, they can address these new theories and/or evidence through motion practice in advance of and without disrupting the trial.

Written statements also streamline the entry of physical evidence into the record. In particular, written statements avoid the need to spend trial time presenting live testimony on laying foundation for and establishing authenticity and admissibility of physical evidence (unless otherwise stipulated to in advance by the parties).

*(continued on page 11)*

# VICTORIES

## Unconstitutional Encroachment…by the Jupiter Police Department

In late January 2019, dozens of men and women visited a day spa in the quiet, seaside community of Jupiter, Florida for private, relaxing massages. As a matter of course, these customers—many of whom were of retirement age—disrobed. Unbeknownst to them, the Jupiter Police Department ("JPD") was secretly watching and recording these private encounters through hidden surveillance cameras the JPD surreptitiously installed as part of a run-of-the-mill investigation into low-level prostitution. As part of this investigation, the JPD claims to have collected video surveillance footage of Robert Kraft—the owner of the six-time Super Bowl Champion New England Patriots—participating in paid sex acts. On February 22, 2019, the JPD, in a televised press conference, announced it was charging Mr. Kraft (among other men) with solicitation of prostitution. Shortly thereafter, Mr. Kraft retained Quinn Emanuel to lead his defense.

The firm quickly sought a protective order to prevent the public disclosure of the video footage. With dozens of media organizations seeking access to the videos, the firm had to convince the Court that Florida's public access laws, which are perhaps the most liberal in the country, must yield to Mr. Kraft's constitutional rights. This was no simple task. For one, the Florida Constitution expressly recognizes the public's right to access public records. *See* Fla. Const. Art. 1 § 24. Beyond that, the Florida Constitution states that an individual's constitutional right to privacy "shall not be construed to limit the public's right of access to public records[.]" Fla. Const. Art. 1 § 23. Notwithstanding these challenges, Judge Leonard Hanser of Florida's 15th Judicial Circuit Court agreed with Mr. Kraft that a protective order was necessary to protect his constitutional rights—namely, his constitutional rights to a fair trial. Accordingly, Judge Hanser, following extensive briefing and an all-day hearing, entered a protective order preventing the State from disseminating the videos until a jury was empaneled, a plea resolved the case, the State dismissed the charges, or any other time at which the Court found Mr. Kraft's fair trial rights were not at risk.

Simultaneously, Quinn Emanuel mounted an aggressive constitutional challenge to the legality of the videos. In particular, Mr. Kraft challenged the search warrant that authorized the use of covert video surveillance as violative of his Fourth Amendment rights. In the Fourth Amendment context, it is widely recognized that "covert video surveillance is a severe intrusion into a person's privacy expectations, which provokes an immediate negative visceral reaction and raises the specter of the Orwellian state." *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 421 (6th Cir. 2012). As a result, covert video surveillance is "justifiable only in rare circumstances." *Bernhard v. City of Ontario*, 270 F. App'x 518, 520 (9th Cir. 2008). Thus, in order to lawfully use covert video surveillance in connection with a law enforcement investigation, the State must establish that such invasive surveillance is absolutely necessary, particularized, appropriate in duration, and minimized to avoid surveilling lawful activity. *See United States v. Mesa-Rincon*, 911 F.2d 1433 (10th Cir. 1990). Quinn Emanuel filed a motion to suppress, arguing that these requirements were not met. Among other things, Quinn Emanuel argued that the search warrant issued here was facially invalid insofar as it failed to contain ***any*** minimization instructions. As a result, the warrant allowed the JPD to conduct unfettered recording of all activity—legal or illegal—and any type of person (male or female) entering the Spa. After extensive briefing and a three-day suppression hearing, Judge Hanser agreed with Mr. Kraft that the search warrant failed to satisfy the minimization standard. According to Judge Hanser, the warrant "fail[ed] to consider and include instructions on minimizing the impact on women…in a setting with a high legitimate expectation of privacy" and contained "no minimization techniques or directives" to be implemented by the JPD when "viewing male spa clients receiving lawful services." Judge Hanser, therefore, suppressed the videos as unlawfully obtained. He also suppressed all evidence derived therefrom, including a subsequent traffic stop that allowed the JPD to identify Mr. Kraft.

Immediately after the videos were suppressed, Quinn Emanuel filed a motion to modify the protective order to have the videos permanently sealed in light of the Court's determination that they were illegally obtained. That motion is pending. Meanwhile, the State has filed an interlocutory appeal of Judge Hanser's order granting suppression, which will likely be heard by Florida's Fourth District Court of Appeal. The State has also filed a motion to stay the proceeding before Judge Hanser during the pendency of its appeal, which, together with its interlocutory appeal, make it impossible for the State to proceed with its case against Mr. Kraft at this time. Quinn Emanuel will continue to represent Mr. Kraft through the State's appeal.

## Appellate Victory Before D.C. Circuit In Terrorism Case

Quinn Emanuel won an important appellate victory for seven Kenyan nationals whose immediate family member, Moses Kinyua, was severely injured in the 1998 terrorist attacks on the U.S. Embassy in Nairobi, where

he worked. Mr. Kinyua never fully recovered from his injuries and died in 2012. In 2014, Mr. Kinyua's family (represented by a different firm) filed wrongful death claims against Sudan and Iran in the D.C. District Court for the states' respective roles in sponsoring the terrorist attack on the embassy.

Sudan filed a motion to dismiss the Kinyua family's claims on the asserted basis that the claims were time barred under the applicable statutes of limitations. The district court granted Sudan's motion. Iran, however, had failed to appear and therefore defaulted. Nevertheless, the district court also dismissed the claims against Iran on statute of limitations grounds. The Kinyua family thought they were too late and out of luck.

Then the family hired Quinn Emanuel as their appellate counsel. On appeal, the firm argued that the district court exceeded its authority in invoking the statute of limitations *sua sponte* on behalf of a defaulting defendant like Iran. The D.C. Circuit Court of Appeals agreed, and reinstated the family's claims against Iran. As a result, the Kinyua family is now in a position to recover from the U.S. Victims of State Sponsored Terrorism Fund, which provides compensation to eligible U.S. persons (and their families) who hold judgments against state sponsors of terrorism.

*(practice area notes continued from page 9)*

Doing so minimizes the risk that key documents in the case are missed and do not make it into the trial record.

Finally, if the judge or arbitrator allows a witness' written testimony into evidence without subjecting the witness to cross-examination because the opposing party waives this right, then a weak witness may escape taking the stand altogether and yet her/his testimony will get into evidence. This is another potential advantage of using a witness statement.

There are, of course, potential drawbacks. A witness who offers direct testimony through a witness statement may not have an opportunity to get comfortable and warmed up on the stand before cross-examination begins. The witness also does not get an opportunity to fully introduce herself to the fact finder and gain credibility early on. Instead, the witness is cross-examined first. And a proceeding where each witness is almost immediately cross-examined gives opposing parties an advantage—they get to attack their adversary's case and tell their story first, while making their adversary's witnesses appear defensive. This can be especially problematic for plaintiffs, who typically present their case-in-chief first. Instead of presenting live evidence at the outset, a plaintiff must wait as the defendant makes its points through cross-examination, potentially shifting momentum early on in the defendant's favor.

Further, because witness statements are served well in advance of trial, an opposing party has more time to prepare effective cross-examinations. Accordingly, when using written statements instead of live direct testimony, redirect examinations are absolutely critical. Before trial, parties should be prepared to redirect their witnesses on important topics where a witness might be vulnerable or that are critical to winning. Redirect examination plays an elevated role in diffusing and undermining any points won or damage done during cross-examination when using written witness examinations.

Another potential drawback may be presented where the court provides an opposing party the opportunity to present rebuttal testimony after having had a chance to review the written direct testimony. In that scenario, the opposing party will be able to take its time preparing for and directly rebutting the points made on direct—as opposed to live testimony at trial, where the time between direct and rebuttal witnesses is more limited and may not present the opposing party with adequate time to fully prepare its rebuttal witnesses. On the other hand, if the court orders simultaneous exchange of all direct witness statements, then there is an increased risk that a party's rebuttal statements will fail to fully address all of the points that are made in the opposing party's witness statements.

## *Latinvex* ranks Quinn Emanuel as #1 Law Firm for Litigation in Latin America

*Latinvex* once again ranked Quinn Emanuel as the number-one firm for Litigation, FCPA & Fraud practices in Latin America. The firm was also ranked third out of 28 firms in Arbitration. *Latinvex* rankings are based on value, prominence and scope of work, as well as references from clients and peers.

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# business litigation report

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