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## The Rise of Biometrics Laws and Litigation

In recent years, there has been a significant rise in litigation, as well as legislation, concerning the use and collection of biometric data. Biometrics refers to the process of detecting and recording a person's unique physiological characteristics such as a person's fingerprints, iris pattern, face or voice, usually for identification and access control. Since biometric identifiers are unique to individuals and do not change with age, they are more reliable in verifying identity than token and knowledge-based methods, such as identity cards and passwords. The collection of biometric identifiers, however, raises privacy concerns about the ultimate use of this information, especially as an individual's biometric identifiers cannot be changed if compromised.

Several states have narrow biometric privacy laws, constraining collection of biometric data from K-12 students, or prohibiting state agencies from using biometric data in connection with ID cards, as examples. Currently, only three states (Illinois, Texas, and Washington) have comprehensive biometric privacy laws in place, with a fourth (California) set to go into effect on January 1, 2020. The first comprehensive legislation, Illinois's Biometric Information Privacy Act ("BIPA"), has been in effect since October 2008, but litigation under the statute began in earnest only recently in 2015, when several high profile suits were brought against social media websites. In just the past two years, over 200 class action complaints have been filed under the statute, vaulting BIPA into the spotlight as one of the hottest class action trends. (Although the biometric privacy laws of Texas and Washington are based on BIPA, both lack BIPA's private right of action. *See* Tex. Bus.

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## Award: Partners Named to *The Legal 500* Hall of Fame

Six Quinn Emanuel partners have been named into *The Legal 500* Hall of Fame under the following categories:

- **Jane Byrne** for Industry Focus – Insurance: Advice to Insurers;
- **William Price** for Dispute Resolution – Leading Trial Lawyers;
- **John B. Quinn** for Dispute Resolution – General Commercial Disputes, Dispute Resolution – Leading Trial Lawyers, Litigation – Commercial Litigation;
- **Karl Stern** for Industry Focus – Energy Litigation: Conventional Power, Industry Focus – Oil and Gas;
- **Kathleen Sullivan** for Dispute Resolution – Appellate; and
- **Charles Verhoeven** for Dispute Resolution – Leading Trial Lawyers, and Intellectual Property Patents – Litigation (full coverage).

*The Legal 500* Hall of Fame recognizes those who have been ranked as elite leading lawyers in their respective fields for at least eight of the last ten years.

## *The American Lawyer* Names Karl Stern "Litigator of the Week" for $720 Million Win Against Petrobras

Karl Stern was named the "Litigator of the Week" by *The American Lawyer* after winning a $720 million judgment confirming an arbitration award for Vantage Deepwater against state-owned Brazilian oil company Petrobras in a claim for breach of contract. After the award was issued last year, Petrobras challenged it in U.S. District Court for the Southern District of Texas, arguing that one of the arbitrators was biased and that the contract was procured through bribery. U.S. District Judge Alfred Bennett entered judgment rejecting Petrobras's arguments and confirming the award in Vantage's favor.

& Com. Code § 503.001; RCW 19.375 *et seq.*)

As BIPA litigation continues to increase in Illinois, more states are considering legislation to regulate the collection of biometric data. A federal bill was also introduced in March 2019 that would prohibit certain entities from using facial recognition technology and data without first obtaining user consent.

This article surveys the current legal landscape surrounding the collection and use of biometric data, and the implications for companies in the coming years—starting with the BIPA and the California statute, and ending with a look at the proposed state and federal legislation.

**Illinois.** BIPA regulates the collection and storage of "biometric identifiers," which is defined as a "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10. This definition excludes other data points such as photographs, demographic data, and writing samples. Similarly, the law also governs "biometric information," defined as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.* This provision is intended to prevent organizations from circumventing BIPA by converting biometric identifiers into other formats.

Under BIPA, before collecting or storing biometrics, a private entity (including individuals) must first: (1) provide written notice to individuals that the collection will occur as well as the purpose and length of the collection; and (2) receive informed written consent from the individual to proceed with the collection. Moreover, before sharing biometric data with third parties, a private entity must first obtain additional consent beyond the initial required consent. 740 ILCS 14/15(d)(1). Private entities cannot "sell, lease, trade, or otherwise profit from" an individual's biometric information, though it can "disclose, redisclose, or otherwise disseminate a person's or a customer's" biometric information if the person consents, or the disclosure is required by law. 740 ILCS 14/15(c)-(d). Private entities must also destroy collected biometric data once the purpose for which it was collected "has been satisfied," or within three years of the organization's last interaction with the individual, whichever occurs first. 740 ILCS 14/15(a), (c).

BIPA provides for a private right of action that allows "[a]ny person aggrieved" to seek $1,000 for each "negligent" violation of the act, and $5,000 for each "intentional or reckless" violation, plus attorneys' fees and costs. 740 ILCS 14/20. BIPA does not define what it means to be "aggrieved" by a violation of the act, leaving it to the courts to determine what level of harm a plaintiff must experience to have statutory standing. This has led BIPA defendants to argue that plaintiffs must suffer some type of actual harm such as monetary damages or injury caused by misuse of the data to assert a BIPA claim, and that mere technical violations of BIPA are insufficient to confer statutory standing. This was the key issue to be decided by the Illinois Supreme Court in *Rosenbach v. Six Flags Entertainment Corp.*, Case No. 2019 IL 123186, 2019 WL 323902 (Ill. Jan. 25, 2019). In a highly anticipated decision that will affect more than 200 pending cases, the Illinois Supreme Court held in January 2019 that plaintiffs need not "plead and prove that they sustained some actual injury or damage beyond infringement of the rights afforded them under [BIPA]" to have standing to sue. *Id.* at *7.

In *Rosenbach v. Six Flags*, Plaintiff Stacy Rosenbach claimed that the Six Flags amusement park collected her 14-year-old son's fingerprints when he accessed a season pass, which she never consented to. The class action complaint asserted that Six Flags violated BIPA's procedural requirements by, among other things, failing to inform class members in writing that the biometric information was being collected, or obtain written releases from the class members before collecting biometric information.

Six Flags contended that Rosenbach and other class members had to show that some injury resulted from the collection of their biometric information to qualify as a "person aggrieved" under the statute. The appellate court agreed, holding that "a plaintiff who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person under . . . the act."

The Illinois Supreme Court reversed. It held that Six Flags' "contention that redress under the act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond infringement of the rights afforded them under the law would require that we disregard the commonly understood and accepted meaning of the term 'aggrieved'; depart from the plain and, we believe, unambiguous language of the law; read into the statute conditions or limitations the Legislature did not express; and interpret the law in a way that is inconsistent with the objectives and purposes the Legislature sought to achieve." *Id.* at *7. Rather, "an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act." *Id.* at *8. To require otherwise "would be completely antithetical to the Act's preventative and deterrent purposes." *Id.* at *7. The court noted the ease with which a private entity could comply with the law, stating that "[c]ompliance should not be

difficult; whatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded . . . ." *Id.* at *7.

This decision is likely to result in an increase in new BIPA lawsuits, with outcomes likely to be highly fact specific. Accordingly, companies that engage in the collection of biometric information from individuals in Illinois should closely examine how such information is collected, used, and shared, and evaluate compliance with BIPA.

**California.** The California Consumer Privacy Act ("CCPA") goes into effect on January 1, 2020. It is the first state privacy law modeled on the European Union's General Data Protection Regulation (GDPR). The law provides consumers more control over not only their biometric data, but many other types of personal information as well—thus making its scope much broader than BIPA. "Personal information" is defined under the CCPA as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." Cal. Civ. Code § 1798.140(o). The addition of the term "household" adds a dimension to a privacy law that is largely uncharted territory, and includes information that is not necessarily associated with a specific individual.

The CCPA also lists a wide range of examples of protected "personal information," including but not limited to:

- "Biometric information," defined as "an individual's physiological, biological or behavioral characteristics, including an individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with each other or with other identifying data, to establish individual identity";
- "Audio, electronic, visual, thermal, olfactory, or similar information";
- "Identifiers" such as social security numbers, drivers' license numbers, online identifiers, email addresses;
- "Unique personal identifiers" such as device identifiers and Internet Protocol addresses;
- "Geolocation data";
- "Commercial information" such as purchase histories or records of personal property; and
- "Internet or other electronic network activity information." *Id.*

"Personal information" does not include publicly available information. However, the CCPA specifically states that "biometric information collected by a business about a consumer without the consumer's knowledge" does not constitute "publicly available" information. *Id.* § 1798.140(o)(2).

Generally, the CCPA provides California residents: (1) the right to know what personal information large corporations are collecting about them; (2) the right to tell businesses not to share or sell their personal information; and (3) protections against businesses that compromise their personal information. *Id.* § 1798.100.

The CCPA applies only to for-profit entities that collect and process the personal information of California residents, do business in California, and meet at least one of the following criteria: (1) generate annual gross revenue in excess of $25 million; (2) receive or share personal information of more than 50,000 California residents annually; or (3) derive at least 50 percent of its annual revenue by selling the personal information of California residents. *Id.* § 1798.140(c). Nonprofit businesses, as well as companies that do not meet any of the three above thresholds, are not required to comply with the CCPA. *Id.*

The CCPA provides consumers a private right of action if their personal information "is subject to an unauthorized access and exfiltration, theft or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices." *Id.* § 1798.150. Consumers can file individual or class action lawsuits, and can recover between $100 to $750 in statutory damages per incident, or actual damages. *Id.*

Thus, although the type of personal information protected by the CCPA is much broader in scope compared to BIPA, the CCPA appears to require a showing of harm greater than required by BIPA before a private suit can be brought—requiring a showing of unauthorized access ***and*** "exfiltration, theft or disclosure," compared to BIPA's allowance for any "aggrieved person" to bring suit. Of course, the scope and meaning of this language is likely to be further developed by courts. The statutory damages for violations of the CCPA (up to $750 per incident) are substantially lower than BIPA (up to $5000 per incident). In any event, this private right of action should be expected to attract the plaintiffs' bar and class action litigation, just as BIPA has in recent years.

**Recent Biometrics Privacy Legislation.** More states are considering legislation to regulate the collection of biometric data, including:

- **Florida:** In February 2019, the "Florida Biometric Information Privacy Act" was introduced in both the House and Senate. Florida's proposed laws closely track Illinois's BIPA, regulating private companies' collection, storage, and dissemination

of individuals' biometric information. The proposed laws provide for a private right of action, which is framed in terms identical to BIPA, and allows "any person aggrieved by a violation" to proceed in court. Also similar to BIPA, the proposed laws call for the imposition of liquidated damages in the amount of $1,000 for negligent violations, $5,000 for intentional or reckless violations, or actual damages if greater, plus reasonable attorney fees. If passed, the new Florida law could take effect as early as October 2019.

- **Arizona:** Arizona HB 2478 was introduced on January 28, 2019, which, if passed, will prohibit entities from capturing, converting, or storing an individual's biometric identifier in a database for a commercial purpose unless (1) it provides "a mechanism to prevent the subsequent use of a biometric identifier for a commercial purpose; or (2) advance notice [is] provided and consent [is] obtained from the individual." HB 2478 does not create a private right of action.
- **Massachusetts**: Another recent privacy bill to encompass biometric information is Massachusetts Bill S.120, introduced on January 22, 2019. It is a hybrid of the BIPA and Texas/Washington models, but is not limited solely to biometric data. The bill requires companies collecting consumer personal information—which includes all information "relating to an identified or identifiable consumer" including biometric data—to put the individual on notice of the data collection before or at the time of collection, respond to opt out requests, and provide the individual with the right to access and/or delete the collected data. The bill provides a private right of action, but it does not require affirmative written consent.
- **New York**: New York lawmakers introduced NY SB 1203 on January 11, 2019, which regulates the collection of "biometric identifiers" and "biometric information." The proposed law is substantially similar to BIPA, and includes a private right of action. This is the third year New York has tried to pass this legislation.

A bipartisan federal bill was also recently introduced in the Senate on March 14, 2019 to regulate the commercial applications of facial recognition technology. The bill, "The Commercial Facial Recognition Privacy Act of 2019" ("the Act"), would prohibit certain entities from using facial recognition technology and data without first obtaining user consent. *See* S.847, *available at* https://www.congress.gov/bill/116th-congress/senate-bill/847 text. "Facial recognition data" is defined under the Act as any unique attribute or feature of the face of a consumer that is used by facial recognition technology to uniquely identify a specific individual, while "facial recognition technology" is defined as technology that analyzes facial features ***and*** is used for the purposes of unique personal identification. S.847 § 2(5).

The Act prohibits controllers (*i.e.*, the entities making decisions regarding how data is processed) from knowingly using facial recognition technology to collect facial recognition data unless the controller obtains affirmative consent from the consumer ***and*** provides the consumer with proper notice. *Id.* § 3. Such notice must:

- Inform consumers that facial recognition technology is present;
- Provide information about where the consumer can learn more about the facial recognition technology being used; and
- Provide documentation that includes information explaining the capabilities of the technology in terms that consumers can understand. *Id.*

There is no private right of action under the Act. Instead, violations of the Act may be enforced by the FTC or a state's attorney general. *Id.* § 4.

The Act expressly states that it does not preempt or affect any state statute or regulation currently in effect, except to the extent that the state statute or regulation is "inconsistent" with the provisions of the Act. *Id.* § 6. Notably, state statutes and regulations will not be considered inconsistent with the Act if they provide consumers greater protections than those provided in the Act. *Id.* Thus, if passed, it does not appear that the Act will preempt stricter state laws that regulate facial recognition technology, such as BIPA and the CCPA.

**Conclusion**. In light of the recent Illinois Supreme Court decision, BIPA litigation is likely to increase. The broad protections of the CCPA may also encourage similar class action litigation once it becomes effective in 2020. Biometric privacy issues are likely to continue growing in scope as more companies begin to use this technology and as more jurisdictions pass biometric-focused legislation.

## Philippe Pinsolle Appointed Member of the Court of Arbitration of the Singapore International Arbitration Centre

Partner and Head of International Arbitration for Continental Europe, Philippe Pinsolle, has been selected to serve as a court member with The Singapore International Arbitration Centre. SIAC is a dedicated non-profit which promotes international arbitration.

## Where the Federal Rules Don't Tread: Depositions in Distant Locations

Since the 2015 amendments to the Federal Rules, much has been written about costs related to electronic document discovery as courts have focused on finding the appropriate balance between relevance and proportionality. How does this play out when it comes to the location of depositions? What should a witness or party do when the proposed location of a deposition poses an undue burden or expense, and can some or all of the cost be shifted to the party seeking the deposition?

**The Location of Party Depositions Is Not Set by the Federal Rules of Civil Procedure.** The Federal Rules expressly provide for depositions by in-person, oral examination. Fed. R. Civ. P. 30. Under Rule 45, which authorizes the service of a subpoena, non-parties can be compelled to appear at a deposition, but only if it takes place within 100 miles of that person's residence, place of employment, or place where the person regularly conducts business in person. Fed. R. Civ. P. 45(c). Rule 30, which governs depositions generally, addresses such matters as the timing and number of depositions (*i.e.*, when leave from the court is and is not required) and the manner in which depositions should be conducted (*e.g.*, length, objections, recording methods). *See* Fed. R. Civ. P. 30(a)–(f). In contrast to Rule 45, Rule 30 does not contain a geographic limitation on the location of a party deposition. Instead, Rule 30 permits the noticing party to unilaterally select the location and requires only that the notice "state the time and place of the deposition and, if known, the deponent's name and address." Fed. R. Civ. P. 30(b)(1). The unilateral ability for the opposing party to select the time and place of a deposition does not typically result in a dispute, however, because courts expect the parties to be reasonable and accommodating when scheduling depositions. Nevertheless, in some cases, travel-related expenses for depositions may be so significant and so one-sided that a party will seek either a different location or to have the opposing party pay all or some of the expenses associated with conducting the deposition at the noticed location.

**Courts May Order Deposition Locations Changed or Costs Shifted to the Requesting Party.** Assuming a party has not exceeded its permitted number of depositions, only the most unusual circumstances will persuade a court to order the total prohibition of a deposition. *See Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error."); *Zimmerman v. Al Jazeera Am., LLC*, 329 F.R.D. 1, 5 (D.D.C. 2018) ("complete prohibition of a deposition is an extraordinary measure which should be resorted to only in rare occasions"). Accordingly, if the parties are unable to agree on the location of a deposition, the Federal Rules permit a party to seek a protective order under Rule 26(c), which provides that a "court may, for good cause, issue an order to protect a party or person from ... undue burden or expense." *See Philadelphia Indem. Ins. Co. v. Fed. Ins. Co.*, 215 F.R.D. 492, 495 (E.D. Pa. 2003) ("Usually, a party seeking discovery may set the place where the deposition will take place, subject to the power of the courts to grant a protective order designating a different location."). The burden of showing good cause is on the party seeking the protective order. Courts have broad discretion in determining the place of a deposition and related relief. In the exercise of that discretion, a court generally focuses on cost, convenience, and efficiency. To determine whether good cause exists, courts typically begin with the presumptive location developed through case law.

**Depositions of a Plaintiff Corporation and Its Agents Should Presumptively Take Place in the District in Which the Suit Was Brought.** The rationale behind this presumption is straightforward—since plaintiff selected the forum, it may not be heard to complain about having to appear there for a deposition, even if its witnesses reside in a foreign country. *See Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) (even though it would require travel from Hong Kong, the district court did not abuse its discretion by ordering plaintiff's witnesses to travel from Hong Kong for depositions in San Francisco because plaintiff filed suit in the district and "should therefore expect to have to appear there"); *Nippondenso Co., Ltd. v. Denso Distributors*, 1987 WL 14111, at *2 (E.D. Pa. Sept. 21, 1987) (ordering plaintiff either to produce its former executive for deposition in Philadelphia, and incur his costs of travel from Japan, or to pay defendant's expenses to send one of its attorneys to depose the witness at his residence or place of business in Japan, "including the cost of travel and appropriate meals and lodging").

**Depositions of a Defendant Corporation and Its Agents Should Presumptively Take Place in the Corporation's Principal Place of Business or Where the Witness Works or Resides.** *See Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is well settled that the deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business, especially when, as in this case, the corporation is the defendant."); *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) (noting that "case law indicates that it will be presumed that the defendant will be examined at his residence or place of business or employment"). This presumption is recognized even when the principal place of business is a foreign country. *See U.S. ex rel. Barko v. Halliburton Co.*, 270 F.R.D. 26, 29 (D.D.C. 2010)

(ordering that corporate deposition of defendant take place in Amman, Jordan, its principal place of business, and denying plaintiff's request that its expenses to attend be shifted to defendant).

**Courts May Order a Deposition Held in a Different Location "When Justice Requires."** 8A Wright & Miller, Fed. Prac. & Proc. § 2112 (3d ed.). It is quite common for a defendant corporation, its agents, and managers to be deposed in places other than the principal place of business. *See Sugarhill Records Ltd. v. Motown Rec. Corp.*, 105 F.R.D. 166, 171 (S.D.N.Y. 1985) ("Corporate defendants are frequently deposed in places other than the location of the principal place of business . . . for the convenience of all parties and in the general interests of judicial economy."). To determine whether justice requires setting the deposition for a different location or attaching conditions, courts typically focus on cost, convenience, and efficiency. *See, e.g.*, *SEC v. Aly*, 320 F.R.D. 116, 118 (S.D.N.Y. 2017) ("Factors guiding the [c]ourt's discretion include the cost, convenience, and litigation efficiency of the designated location."). Many courts evaluate those general principles through more specific factors, including: (1) whether all counsel are located in the forum district; (2) the number of corporate representatives the opposing party seeks to depose; (3) the likelihood of significant discovery disputes arising during the deposition, requiring the court's intervention; (4) whether the persons sought to be deposed often travel to the forum district for business; and (5) the equities with regard to the nature of the claim and the parties' relationship. *See, e.g.*, *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 629 (C.D. Cal. 2005). When foreign defendants are involved, courts may also consider other specific factors, including whether the foreign nation's laws or procedures would impede the deposition and whether the deposition may be a potential affront to the country's sovereignty. *See In re Vitamin Antitrust Litig.*, 2001 WL 35814436, at *4 (D.D.C. Sept. 11, 2001) (ordering depositions of defendant foreign corporations and agents to take place in U.S. on condition that "plaintiffs shall reimburse defendants for the reasonable costs of deponents' travel . . . including lodging and food, to attend the depositions").

**The 2015 Federal Rules Amendments Meant to Ensure the Availability of Cost-Shifting, Not Make It More Frequent.** In 2015, the U.S. Supreme Court approved an amendment to Rule 26 that codified the courts' inherent authority to shift discovery costs. Specifically, the amendment states that when entering a protective order to protect a party or person from, among other things, "undue burden or expense," the court may specify the "time and place *or the allocation of expenses*, for the disclosure or discovery[.]" Fed. R. Civ. P. 26(c)(1)(B) (emphasis added). The advisory committee explained, however, that the amendment "does not mean that cost-shifting should become a common practice[]" and "[t]he assumption remains that the responding party ordinarily bears the costs of responding." Fed. R. Civ. P. 26 advisory committee's notes. Accordingly, as in the document discovery context, the particular facts of the case have and continue to determine whether the court will exercise its discretion to shift costs to the requesting party in the deposition context. *See Oxbow Carbon & Minerals LLC v. Union P. R.R. Co.*, 322 F.R.D. 1, 10-11 (D.D.C. 2017) (determining whether document discovery warrants cost-shifting turns on the specific needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving those issues); 8A Wright & Miller, Fed. Prac. & Proc. § 2112 (3d ed.) ("the court has a wide discretion in selecting the place of examination and in attaching conditions concerning the payment of expenses," which depend on the particular facts of the case).

**Costs Associated with the Deposition of a Foreign Witness May be Shifted to the Other Party.** For example, in *Haviland & Co. v. Montgomery Ward & Co.*, the court departed from the general rule that plaintiff's officers are subject to deposition in the district where it filed suit based on the poor health of the witness, a resident of France. 31 F.R.D. 578 (S.D.N.Y. 1962). However, as a condition for overriding that presumption, the court ordered that plaintiff had the option to produce the deponent in New York or pay the deposing party's (defendant) expenses to travel to France for the deposition, including "first class air travel for its counsel, a per diem allowance for necessary attendance upon such deposition, and a reasonable counsel fee for attendance thereat." *Id.* at 580. In *Republic of Turkey v. Christie's, Inc.*, the Southern District of New York again held it was appropriate to depart from the general rule requiring plaintiff to appear for deposition in the forum where it brought suit. 326 F.R.D. 402 (S.D.N.Y. 2018). The court's decision to override the presumption was based on balancing the parties' relative burdens—the distance plaintiff's witnesses would have to travel (over 14 hours) and defendant's need for in-person depositions due to the complexities of interpreters and foreign language documents. *Id.* at 406. Instead of New York or Turkey, the court ordered that plaintiff could either agree to hold the depositions in London, a location neither party sought, and reimburse defendant approximately 25% of the extra costs compared to New York depositions, or plaintiff could pay nothing and produce the deponents in New York. *Id.* at 406-07 (noting defendant was not required to cover the full amount of extra costs because

both parties bore responsibility for the necessity of the depositions).

In *Cadent Ltd. v. 3M Unitek Corp.*, an oft-cited case from the Central District of California, an Israeli company filed suit in Los Angeles, but refused to produce its witnesses there after defendant noticed several depositions of plaintiff and its officers (and an employee) who resided in Israel and New Jersey. 232 F.R.D. 625, 628 (C.D. Cal. 2005). Defendant moved to compel the depositions to be taken in Los Angeles and plaintiff sought a protective order requiring that the depositions be held in Israel, plaintiff's principal place of business or, alternatively, in New York or Los Angeles, provided defendant paid, respectively, some or all plaintiff's related expenses. *Id.* Rather than starting with the presumption that a plaintiff should be deposed in the district in which suit was brought, the court seemed to accept plaintiff's argument that the presumption it should make was the one ordinarily afforded corporate *defendants*, *i.e.*, that the deposition should occur at the principal place of business. *Id.* The court noted, however, that a "number of factors serve to dissipate the presumption" and "may persuade the court to require the deposition to be conducted in the forum district or some other place." *Id.* at 628-29. Noting that even corporate *defendants* are "frequently deposed in places other than the location of the principal place of business, especially in the forum," the court found that "several common sense factors militate[d] toward holding the depositions in Los Angeles." *Id.* at 630. In the court's view, it appeared "more convenient, less time consuming, and less expensive" to conduct the depositions in Los Angeles rather than Israel (which might be "dangerous") or New York or New Jersey because counsel for all parties resided in and had offices in Los Angeles, at least one deponent periodically traveled to Los Angeles, and plaintiff conducted business in the district. *Id.* Again appearing to work from the presumption that corporate depositions should be conducted at the principal place of business, the court partially shifted plaintiff's travel costs to defendants, ordering defendants to pay half the costs of airfare and lodging for the deponents' trip from Israel to Los Angeles because depositions in Los Angeles "may save defendants considerable expense." *Id.* The court noted that the prevailing party could ultimately recover those costs. *Id.* (while the court did not specify, a prevailing party may be entitled to recover certain costs pursuant to Rule 45(d)(1)).

**Deposition Costs Will Not Be Shifted When Doing So Would Result in Unfairness.** For example, in *Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, a court in the District of Columbia ordered that the corporate designee(s) of the party that initiated the dispute must come to the U.S. from Mexico for depositions and denied its request that the associated expenses be shifted to the deposing party. 292 F.R.D. 19, 22 (D.D.C. 2013). Focusing on the fact that the foreign party had initiated the suit in the U.S., the court rejected the argument the deposing party was more able to bear the associated travel expenses and noted that the plaintiff company had expanded its presence within the U.S., including occasionally sending officers to the U.S., and that it had some control over travel costs through its selection of Rule 30(b)(6) designees. *Id.* at 24-25. In *U.S. ex rel. Barko v. Halliburton Co.*, the court ruled there was no basis to deviate from the general rule that a corporate deposition of defendant occur in the defendant's principal place of business, even though that was in Amman, Jordan. 270 F.R.D. 26, 29 (D.D.C. 2010). After defendant moved to dismiss the complaint based on a lack of personal jurisdiction, the court granted plaintiff limited jurisdictional discovery and plaintiff noticed a deposition for Washington, DC. *Id.* at 27. A key factor in this case was defendant's agreement that the deposition would be conducted "pursuant to the Federal Rules." *Id.* at 29 (this "case does not involve a foreign jurisdiction in which the taking of a deposition pursuant to the Federal Rules was barred by the law of the foreign country"). In ruling, the court rejected plaintiff's unsupported assertion that the deposition may require judicial intervention and plaintiff's equitable argument that conducting a deposition in Jordan "puts a greater burden on the plaintiff than would be on the defendant if the deposition were conducted in the United States." *Id.* The court further found "no basis" to grant plaintiff's request to shift plaintiff's extra costs associated with conducting the deposition in Jordan to defendant. *Id.*

**Where Costs May Not Fairly be Imposed on Either Party, Courts Have Discretion to Order a Deposition by Other Means.** For example, in *Hernandez v. Hendrix Produce, Inc.*, a court in the Southern District of Georgia ordered plaintiffs, migrant workers residing in rural Mexico, to pay $1,000 to defendant produce company to cover the expense of web-based video depositions of workers where internet depositions would save workers $15,000 in expenses traveling from Mexico for in-person depositions in Georgia. 297 F.R.D. 538, 540-41 (S.D. Ga. 2014). In *SEC v. Aly*, a court in the Southern District of New York departed from the general rule that a defendant should be deposed where he resides after concluding a deposition in either New York, Pakistan, or another country would not eliminate an undue burden for one of the parties. 320 F.R.D. 116, 118-19 (S.D.N.Y. 2017). Instead, the court ordered that the deposition be conducted by videoconference, which is "frequently a preferred solution to mitigate the burden of a deposition

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## International Arbitration Update

***Appealing Arbitrations on Points of Law: Recent Developments and Trends***

Most arbitration-friendly jurisdictions, including those in the United States, restrict the rights of parties to appeal an arbitral award to the domestic courts to narrow, carefully prescribed grounds. One of those arbitration-friendly jurisdictions – Singapore – announced recently that parties might be allowed to appeal to the local courts on questions of law arising out of an arbitral award. At present, the Singaporean International Arbitration Act (the IAA) only permits an application to set aside on classically narrow grounds (jurisdiction; procedural irregularity; fraud, corruption or public policy; *cf* section 24 of the IAA). A consultation exercise will be launched shortly, given the need to amend the nation state's arbitration law.

Many participants in arbitration consider the finality of an arbitral award to be a principal advantage of arbitration. Had the parties wanted to be tied-up in the local courts, they would have chosen to have their disputes resolved there in the first place. As such, the proposal by the Singaporean Ministry of Law appears to sail against the prevailing currents by expanding, rather than narrowing, the rights to appeal. Most systems of law do not provide for such a right, and the UNCITRAL Model Law (which is adopted in numerous states, and formed the basis of the IAA) equally makes no such provision.

In a written response to the topic by the Minister for Law in Singapore, K. Shanmugam, it appears that the Ministry drew inspiration from other jurisdictions on this issue:

> [A]s part of my Ministry's efforts to update the legal framework, my Ministry has noted that in certain other jurisdictions, parties to an arbitration may appeal against an award on a question of law... [In Singapore there] is no avenue for parties who wish to appeal to our Courts on a point of law in the award in international arbitrations.

Written answer by Minister for Law, K Shanmugam, to Parliamentary Question on the International Arbitration Act, 1 April 2019, § 4.

One of those jurisdictions is likely to be England & Wales, given its close historic relationship with Singapore and its role as a major seat of arbitration. (The arbitration law of Hong Kong also includes such a right, perhaps pointing to an interest in its principal competitor seat in Asia.)

Under English law, a party *is* given the right to appeal to the court on questions of law:

> Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

English Arbitration Act 1996, § 69(1).

However, the "right" is neither absolute nor mandatory. Although the right to appeal is a *default* provision, parties may *opt out* of it. More often than not, the parties do so impliedly by choosing popular institutional arbitration rules, such as the ICC or the LCIA (which confirm in express and sufficiently comprehensive terms the finality of the Award). Given the prevalence of institutional arbitration, it is not surprising that few appeals on a point of law ever arise in England.

An English court's power to grant leave to appeal is narrowed further by section 69(3) of the 1996 Act. To some extent, this also seeks to prevent parties from characterizing questions of fact as questions of law, which otherwise would not be able to be referred to the Courts. As such, the determination by the Court of the question of law must (amongst other things) "substantially affect the rights of one or more of the parties," and require that it be "just and proper in all the circumstances for the court to determine the question." It also requires the Court to conclude either that "the decision of the tribunal on the question is obviously wrong," or that "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt."

The first of those two tests ("obviously wrong") has been described in various ways by the English Courts. Some have observed "that the error should normally be demonstrable on the face of the award itself and . . . not require too close a scrutiny to expose it." Others have held that the error should be a "major intellectual aberration." In any case, the Courts are expected to address the law and take at least a prima facie view on the correct conclusion. Whether they consider that the decision is wrong is not determinative by itself – it needs to be "obviously" so.

How might the Singaporean proposal differ from this approach in England & Wales? At this early stage, it is difficult to say with certainty. However, it seems likely there will be one material point of distinction between the two schemes. Unlike under English law, it appears that Singapore might only be considering an *opt-in* mechanism:

> One of the amendments we are considering will allow parties to appeal to the courts on a question of law arising out of an arbitration award, provided that they have agreed to contract in or opt in to this mechanism. Such appeals could be heard in the High Court, with safeguards to prevent frivolous or

vexatious appeals.

Written answer by Minister for Law, K Shanmugam, to Parliamentary Question on the International Arbitration Act, 1 April 2019, § 5.

On this, it is worth recalling that Singapore already permits an appeal on issues of law for *domestic* arbitration (under section 49 of the IAA, which is similar to section 69 of the English Arbitration Act 1996). That scheme applies as a default mechanism, but with the possibility (as with England) for the parties to opt out. Read together with the Minister's written responses, it would appear that Singapore may change the *opt-out* nature of the domestic provision into one which is *opt-in* for international arbitrations. Equally, it is interesting that the proposal anticipates the Singaporean Courts adopting "safeguards to prevent frivolous appeals," which may well evoke echoes of section 69(3) and the attempts by the English statute to narrow the scope of any appeal.

Where does this leave us? From a classical arbitration view point, it is a concern. State courts should have a narrow role when it comes to the review of an arbitral award, and this proposal would extend that role. However, to the extent that arbitration is about party autonomy, it represents the possibility of the parties agreeing to a further safeguard should things go wrong. Provided that appropriate "safeguards" *are* incorporated in the amended statute, perhaps along the lines of the English Act, this could be seen as *adding* an additional right, rather than *diluting* existing ones. In that scenario, the remaining risk is a party "agreeing" to opt-in to the scheme only because they have no leverage when the arbitration clause was negotiated. At the very least, anyone anticipating negotiating a Singapore-seated arbitration clause in the future needs to be aware of this potential change, and the importance of ensuring that their preference is clear from the outset.

## Antitrust & Competition Update

***Enhanced Antitrust Scrutiny of the Digital Economy***

The rise of the digital economy has delivered innovative products, revolutionary business models and a favorable business environment with more choice, easier access and better deals for consumers. This new market reality credited to tech leaders, such as Amazon and Google, raises questions of whether today's competition laws adequately address the issues raised by the digital economy, namely: (i) access to and the use of big data; (ii) the treatment of online platforms; and (iii) online commerce. Naturally, a series of difficult questions arise: How do we define the relevant market(s) when the basic antitrust tool, *i.e.*, the small but significant non-transitory increase in price (SSNIP) test, is not available because digital platforms often feature zero price strategies where one side of the market they serve is often free? How do we measure the market power of platforms? Should big data be treated as an "essential facility"? Can the use of data constitute an abuse of a dominant position? Is the current EU merger regime able to capture "killer" acquisitions where a dominant incumbent buys out a nascent technology that might have emerged as a competitive threat?

Below we discuss two recent key developments: a report on competition policy in the digital age commissioned by the European antitrust enforcer, and the Bundeskartellamt decision in the Facebook case. Whereas none of the above has the last word on antitrust enforcement – EU Competition Commissioner Margrethe Vestager has already acknowledged that there is room for debate around the report and Facebook has appealed the decision – both developments likely pave the way for enhanced antitrust scrutiny in digital markets.

**Latest from the European Commission.** The European Commission recently published its much awaited report on the digital economy (available at http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf). Its authors conclude that the existing EU merger control regime does not require amendments to tackle "killer" acquisitions, but suggest that if these deals are identified, it should be for the merging companies to prove no anti-competitive effects or offsetting efficiencies. The authors also conclude that the EU competition law framework is sufficiently sound and flexible to address competition law issues in the era of the digital economy. However, they also recommend several amendments to the traditional tools used to assess anticompetitive conduct and deviations from existing case law. For example, the report: (i) advocates placing less emphasis on rigid market definition analysis in antitrust cases; (ii) emphasizes the need for new theories of harm; and (iii) recommends condemning practices which can "potentially" exclude competitors or "tend to restrict competition" even when consumer harm cannot be measured with precision. The report also proposes departures from well-established case law by lowering the burden of proof or reversing it by introducing certain types of *per se* abuse.

To justify their suggestions, the authors allude to certain specificities of the digital markets (Chapter 2), in particular: (i) the very high returns to scale resulting from the fact that the cost of production of digital services is proportionally much less than the number of customers served; (ii) network externalities resulting from the fact that the usefulness of a particular technology or service for any individual user increases as the number of users who use it increases; and (iii) the role of data collected by incumbent operators in developing new, innovative

*(continued on page 11)*

# VICTORIES

## Appellate Victory in the California Supreme Court

Quinn Emanuel won a significant appellate victory for its client Southern California Gas Co. ("SoCalGas") in the California Supreme Court. The unanimous, published opinion by Justice Cuéllar reinforces and clarifies the scope of California's economic loss rule, which is a tort doctrine that limits recovery in negligence to those who have suffered physical harm to person or property. This was one of the most-watched business cases in the California Supreme Court this term, and the decision was a resounding victory for the client.

For decades, defendant SoCalGas has stored natural gas in a facility outside of Los Angeles. In October 2015, the facility sprang a leak that took four months to fix. Following the leak, SoCalGas faced a series of lawsuits from area residents and homeowners who claimed property damage and physical injury. This case did not involve those plaintiffs. Instead, plaintiffs here were businesses located in a nearby suburb called Porter Ranch who claimed that, because some residents chose to temporarily relocate during the leak, downtown foot traffic declined, and their businesses did not make as much money as they had hoped. They initiated a class action against SoCalGas seeking lost profits, despite the fact that they did not suffer any direct, physical harm or property damage. SoCalGas' potential exposure was enormous.

After the trial court overruled SoCalGas' demurrer, ruling that pure economic losses like these are recoverable in negligence, the court of appeal reversed and held that the complaint should be dismissed. But the California Supreme Court granted a petition for review, over SoCalGas's opposition.

SoCalGas then retained Quinn Emanuel to work with trial counsel on the merits phase of the case, and we convinced the California Supreme Court to affirm the court of appeal's decision and deny recovery to all the businesses in Porter Ranch that claimed to suffer financial harm due to the gas leak allegedly caused by SoCalGas' negligence. Our arguments relied on the newly adopted Restatement (3rd) of Torts on Economic Injury, California precedent and policy to explain why allowing recovery for this kind of purely financial loss would open the floodgates for all kinds of new claims and create limitless, rippling liability for those accused of even a single negligent act.

On the plaintiffs' view, as the California Supreme Court explained, a defendant might be liable if a negligent accident blocked a bridge or tunnel and caused economic losses to all those who could not reach business destinations on the other side. The California Supreme Court agreed with SoCalGas' arguments that any such result would be untenable, and reaffirmed that a tort plaintiff cannot sue in negligence for purely economic losses caused by harm to a third party. The Court's decision will have a profound impact not just on SoCalGas but on California businesses as a whole, given it eliminates the threat of potentially billions of dollars of negligence liability in mass disaster cases from indirect and purely economic harm. Q

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*(noted with interest continued from page 7)*

location inconvenient to one or both sides." *Id.* at 119; *see also Robinson v. Tracy*, 16 F.R.D. 113, 115 (D. Mo. 1954) (declining plaintiff's request to shift travel costs to defendant and ordering that deposition be conducted via written questions pursuant to Rule 31).

**Conclusion**. In sum, when it appears practical or efficient to do so, courts will follow general presumptions regarding the location of party depositions. If, however, conducting the deposition at a particular location will result in "undue burden or expense," all bets are off. The court may order the deposition to take place in a different location, require one party to pay all or some of the other party's associated costs, or order the deposition to be conducted by some alternative means. Indeed, as one court succinctly stated, a court "may be as inventive as the necessities of a particular case require." *DePetro v. Exxon Inc.*, 118 F.R.D. 523, 525 (M.D. Ala. 1988). Q

services and products. The report concludes that taken together, these features results in strong "economies of scope" in the digital economy, which favor the development of data-rich ecosystems and large incumbent digital players and make it too difficult for new entrants to compete effectively. In light of the foregoing, the authors make a number of important suggestions for the application of competition law in digital markets.

To give a few examples, the report proposes a presumption in favor of a duty to ensure interoperability under certain circumstances, such as where dominant platforms try to expand into neighboring markets thereby making it even more difficult for users to leave or switch operators (Chapter 4). This approach goes beyond established case law (*e.g.*, the *Microsoft* case, Case T-201/04, *Microsoft Corp. v Commission*, ECR [2007] II-3601) according to which the Commission first must establish that the input in question (*i.e.*, the data in the extant case) was indispensable to the exercise of a specific activity by competitors.

The report also proposes that certain conduct, such as practices by a dominant platform which restrict multi-homing (*i.e.*, the ability to use more than one platform), should be treated as *prima facie* "suspect" and reverses the burden of proof by suggesting that it will then be up to the operators in question to put forward a solid efficiency defense and demonstrate the procompetitive nature of their practices (p. 57). It should be noted that the Commission has yet to accept an efficiency-based defense as a sufficient justification for behavior that would otherwise be an abuse of a dominant position.

Further, the report considers the rule-setting function of dominant platforms, notably marketplaces, to have significant competitive implications (Chapter 4). In this regard, the report notes the platforms' ability to dictate terms of access to information that is generated, provide model contracts, impose price controls, etc. In such circumstances, dominant operators should, according to the authors, have a special responsibility to ensure that competition on their platforms is fair, unbiased, and pro-user.

The report will inform the future direction of European Commission enforcement and will likely lead to enhanced antitrust scrutiny for digital markets, underpinned by new theories of harm and a flexible, perhaps innovative, application of the existing framework. *See, e.g.*, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-digitised-world_en; https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law-0_en).

**The German Facebook case.** On 7 February 2019 the Bundeskartellamt, Germany's Federal Cartel Office (FCO), adopted a decision prohibiting Facebook from gathering data from different sources including the Facebook website, Facebook-owned services such as WhatsApp and Instagram and third party websites, and combining them with the respective users' accounts without the users' consent. The FCO also imposed on Facebook far reaching restrictions in the processing of collected user data (https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html) and ordered Facebook to adapt its terms of service and data processing and to develop possible solutions within four months.

To reach its decision, the FCO found Facebook to be dominant on the national market for social networks and concluded that "the extent" to which Facebook collects, merges and uses data in user accounts constituted an abuse of its dominant position. The German enforcer placed great importance on the fact that whereas users were aware that their data is collected and used, many of them were unaware that Facebook could collect such information also from third party websites, including those featuring "Like" or "Share" buttons. The FCO also found that Facebook's terms of service and the manner and extent to which it collects and uses data were in violation of the European data protection rules to the detriment of users, without, however, clearly establishing such a violation.

The decision has important implications for behavior which involves both data protection and competition law issues and involves an overlap between the respective roles of competition agencies and data protection agencies. By contrast, in the *Facebook/WhatsApp* merger decision (COMP/M.7217 – Facebook/WhatsApp, para 164), the European Commission found that the increased concentration of data within the control of Facebook as a result of the merger would not fall within the scope of EU competition law rules but rather within the scope of EU data protection rules. Facebook has appealed the decision.

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# business litigation report

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