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Obtaining Evidence Abroad: Can the English Court Help?

Introduction

Consider the situation where plaintiff X is bringing proceedings in a US Court against defendant Y, but party Z, who holds critical evidence or potential evidence, is outside the jurisdiction. What kind of discovery or evidence gathering procedures can be ordered by a foreign court against Z in aid of the US proceedings? This article considers, from the perspective of England and Wales ("England" for short), the circumstances in which the High Court in London can, as a foreign court, help such plaintiffs obtain evidence from individuals or companies located in England, in support of overseas proceedings.

The concept of mutual cooperation between states on gathering evidence has been around for some time. The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 (usually referred to as the "Hague Evidence Convention") was ratified by the USA in 1972 and by the UK in 1976. As at today's date there are over 60 other countries who have also ratified the Convention. The UK implemented the Hague Evidence Convention into its domestic law by way of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "Act"), which governs the regime today. While the UK was a member of the European Union, the Taking of Evidence Regulation (Regulation (EC) 1206/2001) applied as between EU member states, but since the end of the Brexit transition period on 31 December 2020, that has ceased to apply in England.

The Act, and the relevant sections of the Civil Procedure Rules (which govern court procedure in

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INSIDE

Three Partners Selected for Forbes' America's Top 200 Lawyers List

Quinn Emanuel Chairman John B. Quinn and partners Alex Spiro and Kathleen Sullivan have been listed in Forbes' America's Top 200 Lawyers list. The inaugural America's Top 200 Lawyers list celebrates outstanding legal professionals, who have demonstrated exceptional expertise in their areas of practice, shattered barriers to become industry leaders, and earned the respect of both peers and clients.

Quinn Emanuel Ranked by The Legal 500 Europe, Middle East & Africa (EMEA)

The 2024 edition of The Legal 500 EMEA has once again ranked 17 attorneys across 9 practice areas in 6 jurisdictions. Clients and colleagues have praised our EMEA-based attorneys as "amazing litigators" and "true experts" who "show great leadership and experience" are "excellent, active, and professional" and provide "very polished and expert legal advice."

Associates Jacqueline Stykes and Alexandra Weissfisch Honored with a Pro Bono Award from Legal Services NYC

Quinn Emanuel associates Jacqueline Stykes and Alexandra Weissfisch were honored with a pro bono award from Legal Services NYC (LSNYC) at the Jazz for Justice Event. With LSNYC's support, Quinn Emanuel filed a breach of contract claim and TRO against predatory landlords in New York County Supreme Court. Jacqueline and Alex successfully thwarted the fraudulent deregulation of their client's rent-stabilized apartment and negotiated a settlement, including a rent waiver through June 2028.

England), lay down the process by which the English Court can assist foreign courts in response to a letter of request. A letter of request (a "Request") is the means by which a foreign court asks the English Court to order the taking of evidence and for that evidence to be transmitted to the requesting court. The regime set down by the Act is, generally speaking, restrictive in nature. This article identifies the key limits to a Request being entertained by the English Court, and notes the criteria and process that must be followed.

General Principles

The English Court has no inherent jurisdiction to act in aid of a foreign court; its ability to do so derives exclusively from the Act. Whilst there is no duty *per se* to comply with a Request, the Court has observed that "it is the duty and pleasure of the [English Court] to give all such assistance as it can to the requesting court within the limits imposed by the [Act]" *(USA v Philip Morris Inc [2004]* EWCA Civ 330 at [16]).

The Act specifies that the evidence sought by way of a Request first has to be for the purposes of "civil proceedings" (section 1(b) of the Act). 'Evidence' to be taken pursuant to the Act has been interpreted to mean exclusively evidence for trial. This means that the Act cannot be used, for example, to obtain evidence for interlocutory proceedings or bankruptcy/liquidation proceedings where there will not be a 'trial' (final merits hearing) in the English procedural sense of the word. Civil proceedings also exclusively means court proceedings, and a Request cannot be validly made in support of foreign arbitration proceedings (although there are other routes under the Arbitration Act 1996 for examination of witnesses in support of foreign arbitration, which are outside the scope of this article).

The type of evidence that may be ordered under the Act is typically examination of witnesses and/or production of documents. The Court, however, has a broad discretion (subject to the restrictions already mentioned), and the Court can make provision for obtaining evidence "as may appear to the court to be appropriate for the purpose of giving effect to the request" (section 2(1) of the Act). By way of specified examples, in addition to examination of witnesses and production of documents, section 2(2) of the Act provides that the Court, in response to a Request, could make provision for the inspection, photographing, preservation, custody or detention of any property, for the taking of samples of any property and the carrying out of any experiments on or with any property, for the medical examination of any person, and for the taking and testing of samples of blood from any person.

A crucial limiting factor for any Request in England is that the English Court has no power to order evidence to be taken that could not itself be ordered in English civil proceedings (section 2(3) of the Act). In practice, and most importantly for plaintiffs in courts such as in the US where discovery is a crucial step in proceedings, this means that the evidence that can be ordered to be produced is limited to evidence to be used in proof for trial. In other words, the Act cannot be used for pre-trial disclosure or disclosure that is of a train of enquiry nature: no fishing expeditions are allowed. If the Request seeks evidence in broad terms such that it takes on an investigatory nature, then it will be refused. For this reason, it is generally prudent to ensure, when asking a domestic Court to formulate a Request, both that the evidence is in fact relevant to issues at trial and that the Court confirms as much in the Request. Although the English Court will not take the requesting Court's assessment at face value, deference to the requesting court as a matter of judicial comity will mean the question of relevance of the requested evidence to the issues in the underlying claim is more likely to be accepted when explicitly referenced in the Request. If the requesting Court does not address the question of relevance at all, then the English Court will have to undertake that exercise and—given the nature of the legislative regime—is likely to view it through a restrictive lens.

Witness Evidence / Deposition

In the case of a request for a witness to give evidence by deposition, the test is (consistently with the principles already referred to), "whether the intended witnesses can reasonably be expected to have relevant evidence to give on the topics mentioned in the [Request], and second whether the intention underlying the formulation of those topics is an intention to obtain evidence for use at the trial or is some other investigatory, and therefore impermissible intention." *(First American Corporation v Zayed* [1999] 1 WLR 1154). To be clear, the fact that the party procuring the Request does not know in advance what the witness will say does not in itself make it a fishing expedition. By way of contrasting examples, in *Land Rover North America Inc v Windh* [2005] EWHC 432 (QB) the Request both "state[d] and demonstrate[d] that the proposed witness ha[d] potential evidence to give which [was] of relevance to the issues to be tried" and "indicate[d] that the purpose in making the request was to obtain evidence to be used at trial". The Order made for oral depositions on the basis of that Request was upheld on appeal. By contrast, in *Smith v Phillip Morris Companies Inc* [2006] EWHC 916 (QB), the Request in that case was of a "very wide ambit" and "range[d] far wider than […] the explanation about the significance of [the intended deponent's] testimony could possibly justify". Specifically, and by way of example, it was observed that "all the documents […] were dated before the start of the pleaded conspiracy, and […] the topics for examination are far wider than London meetings of the kind [the intended deponent] is said to have had". For this reason, the Order implementing the Request was set aside on appeal.

The above demonstrates that care must be taken when defining the scope of the evidence requested. Whilst it has been fairly observed that "the width of a request may be an inevitable consequence of the complexities of the issues and of the witnesses involvement in them" *(First American Corporation v Zayed*, [1999] 1 WLR 1154), particularly when a Request is made by a Court in a jurisdiction such as the US which is accustomed to broad discovery processes, the restrictive approach of the English Court must be kept in mind and reflected in the Request if it is to avoid the risk of being set aside as being too broad.

In addition to any Request for oral testimony not being a fishing expedition and having relevance to issues for trial, any Request for such evidence must also not be oppressive to the witness. When assessing an allegation of oppressiveness of a Request, the Court will balance the legitimate requirements of the foreign court and the burden the requirements may place on the intended deponent. Whether a Request is oppressive will turn on the facts of each case, but it is worth noting in particular that "the court will not allow uncertain, vague or other objectionable requests to be implemented. A witness is entitled to know within reasonable limits the matters about which he or she is to be examined" (*per* Lord Woolf M.R. *in State of Minnesota v. Philip Morris Inc.* (unreported), 30 July 1997). Thus, width, uncertainty, or vagueness of a Request may lead to it being assessed as oppressive and being liable to be set aside.

Oppression that may arise as a result of external factors, can often be neutralised by appropriate protections being in place. It was noted in *Compagnie des Grands Hôtels d'Afrique v Purdy* [2021] EWHC 1031 (QB) that the Senior Master in that case had "held [at first instance] that not every risk of oppression had to be averted: it was sufficient on the facts of this case that the risk of oppression did not have to be avoided provided that it could be alleviated to a sensible and acceptable degree" and this was approved as a matter of principle by the High Court on appeal. In that case, the intended witness was also the subject of a criminal investigation in Morocco and which, it was said, could lead to evidence being given that might be used against her at a criminal trial. The combination of a Protective Order and undertakings given by the applicant was deemed sufficient to alleviate the risk of oppression to a "sensible and acceptable degree". Similarly, in *Productivity-Quality Systems Inc v Cybermetrics Corp* [2019] EWHC 2518 (QB) it was held that despite the prospect of confidential source code being disclosed to a competitor, such concerns could be allayed by a Protective Order being sought in the foreign (US) proceedings, and by undertakings given to the English Court in the Request proceedings. The mere prospect of disclosure of confidential materials is accordingly not oppressive enough to prevent disclosure being ordered, if appropriate protections can be put in place.

Production of Documents

Documentary evidence is the second type of evidence most commonly sought pursuant to a Request. It has already been noted earlier that any evidence sought by way of a Request has to be evidence for trial, and cannot be of an investigatory nature (*i.e.* akin to discovery). Section 2(4) of the Act and the caselaw makes clear that the restrictive nature of the regime under the Act goes further in this context. When it comes to documentary evidence, an Order in response to a Request *cannot* require someone "to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power" (section 2(4)(a) of the Act) nor "to produce any documents other than particular documents specified in the order[,] being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power" (section 4(2)(b) of the Act). The former criterion, in short, denies any obligation to give any "disclosure" of documents in general terms (in the strict sense, distinguished from the *inspection* of disclosed documents). The latter subsection imposes a strict requirement of particularity (the "Particularity Criterion").

The House of Lords (formerly the final court of appeal in England, prior to the establishment of the UK Supreme Court) has previously opined that, in relation to the Particularity Criterion, "a strict attitude is to be taken by English courts in giving effect to foreign requests for the production of documents by non-party witnesses" (*Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] A.C. 547 *per* Lord Wilberforce at 609), and "[w]hat is called for is the specification of "particular documents" which I would construe as meaning individual documents separately described" (*Ibid. per* Lord Diplock).

The subsequent caselaw on the Particularity Criterion was summarised in the more recent case of *Galas v Adere* [2018] EWHC 2366 (QB). Therein, it was reiterated that the test to be applied when considering the Particularity Criterion was the two-fold test as described by Lord Fraser in *Asbestos Insurance Coverage Cases* [1985] 1 W.L.R. 331. Specifically, the test is "[f]irst, what must be specified in the order is either individual documents separately described, or a compendious description of several documents provided that the exact document in each

case is clearly indicated. Secondly, the documents must be "actual documents about which there is evidence that they exist or did exist and are likely to be in the possession of the addressee"." (*Galas*, at [31]). Drawing a distinction between a compendious description (allowed) and a class of documents (not allowed) is not immediately obvious for the purposes of assessing which side of the line a Request might fall. Lord Fraser gave an example of the dividing line in the following terms: "an order for production of the respondents' "monthly bank statements for the year 1984 relating to his current account" with a named bank would satisfy the requirements of the paragraph, provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for "all the respondent's bank statements for 1984" would in my view refer to a class of documents and would not be admissible." This emphasises that language of the type "all X and Y between A and B", as typically seen in discovery and disclosure requests, will not be permitted when it comes to a Request pursuant to the Act.

Procedural Considerations

From a practical perspective, the party seeking the evidence that is the subject of a Request must apply to the English High Court and ask the Court to implement that Request by way of an Order. Such application may be made without notice to (i.e. without serving it on) the person from whom evidence is sought (as set out in CPR 34.17(1)), and will generally be dealt with by the Senior Master without the need for a hearing. That said, more recently the Senior Master has observed that the "preferable course" is for the proposed witness to be contacted directly to see if evidence can be provided on a voluntary basis, and it is only if it is believed the witness may try to evade service or in fact doesn't respond that a without notice application would be appropriate. As such, seeking voluntary cooperation in the first instance now appears to be the preferable way to proceed unless there are circumstances that make that impractical or undesirable.

If an application is made without notice, and if an Order is granted, then the recipient has the opportunity to apply to set aside the Order. If the application is made on notice, then there will be a hearing (unless the application is uncontested or the parties agree for it to be dealt with on paper) before the Senior Master gives any Order.

It is worth bearing in mind that if the recipient of the Request is to be a corporate entity, then whilst a company can be ordered to produce documents via its proper officer, it cannot be ordered to give witness evidence *(Penn-Texas Corporation v Murat Anstalt* [1964] 1 QB 40). In circumstances where witness evidence is required, it is therefore necessary to specify a particular intended deponent in order for the Request to be valid. Procedural guidance from the Treasury Solicitor's office suggests that if a Request seeks evidence from (for example) "the representative of X Ltd", then the company nominated must be asked to nominate a person to give the evidence. The flip side to this, however, is that a Request will not be granted (absent an individual being specified) if the company in question refuses to nominate an individual. Without a specific person being nominated in the Request, a recalcitrant company could thereby frustrate a plaintiff's Request by refusing to nominate an individual.

Overall, parties to foreign litigation must have their expectations managed as to what type and scope of evidence could be ordered by the English Court pursuant to the Act. For all the reasons set out above, whilst the regime is still a relatively powerful tool, it is limited in its scope. The key message for foreign litigants looking to make use of the Act is that the English Court will not order wide ranging discovery/disclosure against parties in England, even if such processes are available in the domestic jurisdiction where the litigation is taking place. If such discovery/disclosure processes are needed, foreign plaintiffs may need to explore other routes in their domestic court, e.g. for service out of the jurisdiction.

NOTED WITH INTEREST

The Evolving Name, Image, and Likeness Landscape in College Sports

Beginning in 2021, college athletes were, for the first time, allowed to profit off of their name, image, and likeness (NIL). Professional athletes of course have been accustomed to this as a revenue stream for decades, with many making more money from their multi-million-dollar endorsement deals with companies like Nike, PepsiCo, Under Armour, Coca-Cola, Amazon, and Chase than they do from their annual salaries and winnings. On June 21, 2021, the Supreme Court issued its decision in *NCAA v. Alston*, which held that the NCAA's rules restricting certain education-related benefits for student-athletes violated federal antitrust laws, opening the door to NIL compensation. Despite the significance of this shift, with many student-athletes now making upwards of five, six, or seven figures, there has been minimal official guidance on exactly *how* this should be regulated (from the NCAA or otherwise). Many states have stepped in and legislated around NIL, but there is no standard regulatory framework for the relevant stakeholders—universities, the NCAA, college athletes, boosters (i.e. representatives of an institution's athletic interests), and NIL collectives (such as Division Street associated with the University of Oregon and the 12th Man+ Fund associated with Texas A&M)—to follow. This sudden change—which effectively stripped the NCAA of its power to implement compensation rules due to potential antitrust violations—has provided more questions than answers. Who can be compensated for NIL? How do compensation structures work? Can college athletes be paid for attending certain institutions? Are college athletes now employees? Can they unionize? While some of these questions are beginning to be answered, others will require additional regulation and guidance.

Background

While there are several ways for student-athletes to capitalize on their NIL—including licensing agreements, business sponsorships, participation in sports camps, and autograph signings—the method that has represented the biggest change in college sports is the proliferation of collectives. Collectives are entities that are separate from the university and can serve several purposes in the NIL space. They often are formed by boosters or alumni who create school or sport specific entities that raise funds and help create NIL opportunities for student-athletes. Collectives have created a new type of arms race in college sports, where boosters are attempting to use NIL to fund their favorite college teams and outbid competitors for talent. *See* Ross Dellenger, *Big Money Donors Have Stepped out of the Shadows to Create 'Chaotic' NIL Market*, SI (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting.

NIL stakeholders—including these boosters—are subject to three tiers of laws, rules, and regulations: federal law, state law, and the NCAA Bylaws. Currently, there is no overarching federal law that specifically governs NIL, though several members of Congress have already introduced legislation and the NCAA has been heavily lobbying for a set of standardized laws. Among the biggest priorities on the NCAA's wish list are: (1) a uniform national NIL standard to preempt the patchwork of state laws that have been passed or proposed so that all student-athletes across conferences are operating under the same regulations and certain states do not pass laws that further hamstring the NCAA's regulatory power; (2) limited antitrust protection at a time when the association is increasingly vulnerable to legal challenges so that the NCAA can regain some of the regulatory power it lost after *Alston* with respect to student athlete compensation; and (3) a designation that student-athletes are not employees of their schools, conferences, or the NCAA, which would further reshape college athletics through granting student-athletes the federal protections that come with the employee classification, including the ability to unionize. *See* Eric Prisbell, *Examining the NCAA's Aggressive Push for Federal NIL Laws*, On3NIL (Sept. 25, 2023), https://www.on3.com/nil/news/ncaa-aggressively-pushes-for-federal-nil-bill-corey-booker-lindsey-graham-tommy-tuberville-joe-manchin/.

While there is no uniform federal NIL law, other federal laws, like Title IX, are implicated by the changing landscape. Because 95% of NIL collective dollars are distributed to men, and because collectives often coordinate their activities with colleges and universities, those institutions may be opening themselves up to liability and potential gender-based discrimination lawsuits. *See* Eric Prisbell, *Why NIL and Title IX are 'about to collide*,' On3NIL (Sept. 18, 2023), https://www.on3.com/nil/news/why-nil-and-title-ix-are-about-to-collide/.

The state law NIL landscape consists of a patchwork of different legislation that continues to be repealed, revised, and refined in light of the everchanging NIL landscape, with 31 states having some form of state law governing or restricting NIL arrangements.

The NCAA issued interim guidance in July 2021, and altered that guidance in 2022. This guidance included prohibitions on pay-for-play and improper recruiting inducements and required that student-athletes were paid only for work performed. *New Interim Policy Key Takeaways*, NCAA (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf. Due to *Alston*, however, the NCAA did not provide specific and tailored guidance regarding the implementation of NIL to avoid engaging in potential antitrust violations. At the end of 2023, NCAA President Charlie Baker sent a letter to all Division I schools with a proposal that would allow those schools to offer student-athletes "enhanced educational benefits" and enter into NIL licensing opportunities with their student-athletes. Ralph D. Russo, *NCAA President Charlie Baker Calls For New Tier of Division I Where Schools Can Pay Athletes*, AP News (Dec. 5, 2023), https://apnews.com/article/ncaa-baker-nil-c26542c528df277385fea7167026dbe6. He also proposed the creation of a subdivision of Division I schools with "the highest resources to invest in their student-athletes" to invest at least $30,000 per year into an enhanced educational trust fund for at least half of the institution's eligible student-athletes within the framework of Title IX. *Id.*

Recent Developments

The lack of regulation has created uncertainty and risk

for those involved and has catalyzed some more targeted action, including by the NCAA, student-athletes, and federal agencies. At the beginning of this year, the NCAA Division I Council approved NIL disclosure and transparency rules, including disclosure requirements, standardized contracts, and comprehensive NIL education for student-athletes. *See* Meghan Durham Wright, *Division I Council Approves NIL Disclosure and Transparency Rules*, NCAA (Jan. 10, 2024), https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx. These rules will be implemented in August 2024.

The NCAA's latest action—Baker's March 1, 2024 letter to Division I schools halting any investigations into third-party NIL collectives—resulted from an injunction entered in federal court in Tennessee that prohibits the NCAA from punishing any athletes or boosters for negotiating name, image and likeness deals during the recruiting process or while they are in the transfer portal, which had previously been prohibited under NCAA guidelines. *See* Pete Nakos, *Charlie Baker halts NCAA's NIL Investigations Following Preliminary Injunction in Tennessee*, On3NIL (Mar. 1, 2024), https://www.on3.com/nil/news/ncaa-issues-updated-nil-guidance-after-preliminary-injunction-decision/; *see also* Dan Murphy, *NCAA Can't Enforce NIL Rules After Judge Grants injunction*, ESPN (Feb. 23, 2024), https://www.espn.com/college-sports/story/_/id/39585390/ncaa-enforce-nil-rules-judge-grants-injunction. The underlying case represents a challenge to the NCAA's rules by the attorneys general of Tennessee and Virginia who argue the NCAA is illegally restricting opportunities for student-athletes by preventing them from negotiating the terms of NIL deals prior to deciding where they want to go to school. *Id.* The court's grant of the preliminary injunction shows that the judge believes that the attorneys general have a reasonable chance of winning their case, which could further shift the regulations that member schools and student-athletes operate under.

Another hot button issue in the NIL world is the potential classification of student-athletes as employees of the colleges or universities for which they play. Student-athletes' push for an employee classification is driven by their desire to have a seat at the table to negotiate compensation, working conditions, practice hours, and travel and the new ability to profit off of their NIL. Most recently, the Dartmouth men's basketball team voted to unionize after the National Labor Relations Board (NLRB) determined that the student-athletes were indeed employees. *See* Jimmy Golen, *Dartmouth Men's Basketball Team Votes to Unionize, Though Steps Remain Before Forming Labor Union*, AP News (Mar. 5, 2024), https://apnews.com/article/dartmouth-union-ncaa-basketball-players-2fd912fade62ffd81218a6dc91461962. Additionally, in November 2023, an administrative law judge began proceedings regarding another NLRB complaint against the NCAA, the Pac-12 Conference, and the University of Southern California, alleging that those three entities have been joint employers of the student-athletes because the NCAA and Pac-12 had control over the athletes' working conditions and "administered a common labor policy" with USC regarding those conditions. *See* Steve Berkowitz, *NCAA, Pac-12, USC Trial Begins with NLRB over Athletes' Employment Status*, USA Today (Nov. 7, 2023) https://www.usatoday.com/story/sports/college/2023/11/07/ncaa-pac-12-usc-student-athlete-misclassification-trial/71483085007/. If the NLRB prevails, then it could open the door to all student-athletes being classified as employees and covered by the National Labor Relations Act (NLRA) because, although the NLRA only applies to private employers, under the joint employee theory, the NCAA and conferences—both private organizations—would be employers of all student-athletes, regardless of the public or private status of the athlete's college or university.

This issue regarding student-athletes' classification as employees could serve as the next big issue in the NIL landscape, with potentially only a federal legislative solution resolving the issue once and for all.

The Supreme Court's decision in *Alston* and the NCAA's subsequent guidance on NIL worked a sea change in college sports. The proliferation of donor-funded collectives has further complicated the NIL landscape. College sports will continue to evolve as stakeholders and regulators continue to refine their policies and regulations.

Government & Regulatory Litigation

Businesses Should Scrub Public Statements, as the SEC Focuses on "AI Washing"

In March, the U.S. Securities and Exchange Commission (SEC) settled a pair of enforcement actions against investment advisory firms that the SEC says misled investors about their use of artificial intelligence (AI). The actions came after months of warnings from senior SEC officials that the agency intends to crack down on businesses that make unfounded claims to the public about their use of AI – a practice the agency refers to as "AI washing." The SEC will surely continue to investigate and bring actions involving suspected AI washing, and these early cases serve notice to regulated entities – investment advisers, broker-dealers, and companies that raise money from the public – that the SEC will make good on its promise to penalize those that mislead investors about their use of AI.

"One Shouldn't Greenwash and One Shouldn't AI Wash."

SEC Chair Gary Gensler hails AI as "the most transformative technology of our time, on par with the internet and mass production of automobiles" and insists that the SEC is "technology neutral." [SEC Chair Gary Gensler, Remarks Before the National Press Club, "Isaac Newton to AI" (July 17, 2023), https://www.sec.gov/news/speech/gensler-isaac-newton-ai-remarks-07-17-2023.] He worries, however, that businesses may be tempted to overstate their AI capabilities in order to "create buzz" and attract investors. "Don't do it," he warned attendees at The Messenger AI Summit in Washington, D.C., in December. "One shouldn't greenwash, and one shouldn't AI wash." *See* Richard Vanderford, SEC Head Warns Against 'AI Washing,' the High-Tech Version of 'Greenwashing', WSJ (Dec. 5, 2023), https://www.wsj.com/articles/sec-head-warns-against-ai-washing-the-high-tech-version-of-greenwashing-6ff60da9; Hailey Konnath, SEC Chair Warns Businesses Against AI Washing: 'Don't Do It', Law360 (Dec. 5, 2023), https://www.law360.com/articles/1773759.

"Greenwashing" refers to exaggerated or false claims about a business's Environmental, Social, and Governance (ESG) practices. SEC Commissioner Allison Herren Lee, It's Not Easy Being Green[1] : Bringing Transparency and Accountability to Sustainable Investing (May 25, 2022), https://www.sec.gov/news/statement/lee-statement-esg-052522. Examples of greenwashing might include an investment manager misleading investors about the criteria it uses to make investment decisions, or using green-sounding fund names that mislead investors about the funds' investment objectives. Greenwashing might also include public company disclosures that falsely describe a manufacturing process or products as "sustainable" or "environmentally friendly." The SEC's Division of Enforcement has been keenly focused on these sorts of embellishments in recent years; it has even created a dedicated Climate and ESG Task Force to proactively identify ESG-related misconduct, which is some cases amounts to little more than deficient policies and procedures. SEC enforcement actions targeting greenwashing include an action against an asset management firm that failed to establish reasonable policies and procedures governing the use of ESG criteria in making how investment decisions; an action against a sham company that falsely claimed to run environmentally-friendly manufacturing facilities; and an action against a mining company that failed to assess and disclose environmental risks and related financial risks to the company. *See*, *e.g.*, Examples of Enforcement Actions Related to ESG Issues or Statements, available at https://www.sec.gov/securities-topics/enforcement-task-force-focused-climate-esg-issues.

"Fraud is Fraud, and Bad Actors Have a New Tool, AI, to Exploit the Public."

Like greenwashing, AI washing involves making false claims about whether, how, or the extent to which a business relies on AI technology. "We've seen time and again that when new technologies come along, they can create buzz from investors as well as false claims from [salespeople]," Chair Gensler observed in February. SEC Chair Gary Gensler, Prepared Remarks Before the Yale Law School, "AI, Finance, Movies, and the Law" (Feb. 13, 2024), https://www.sec.gov/news/speech/gensler-ai-021324. Broadly, the SEC is concerned about "false claims" from two market segments: false claims by companies (issuers) to investors, and false claims by financial services firms to their investor clients.

For companies that raise money from the public, Chair Gensler warns that their disclosures must be sufficiently clear and detailed: "Claims about prospects should have a reasonable basis, and investors should be told that basis. When disclosing material risks about AI—and a company may face multiple risks, including operational, legal, and competitive—investors benefit from disclosures particularized to the company, not from boilerplate language." *Id.*

Chair Gensler has given a similar admonishment to financial services firms: "Investment advisers or broker-dealers also should not mislead the public by saying they are using an AI model when they are not, nor say they are using an AI model in a particular way but not do so. Such AI washing, whether it's by companies raising money or financial intermediaries, such as investment advisers and

broker-dealers, may violate the securities laws." *Id.*

Indeed, like false statements about a company's quarterly earnings or an adviser's investing track record, false statements about a business's use of AI technology could amount to fraud. After all, Chair Gensler reckons, "[f]raud is fraud, and bad actors have a new tool, AI, to exploit the public." If you are AI washing, Gensler warns, "ya got trouble." *Id.*

"Neither of the Firms Had the AI Capabilities That They Claimed They Had."

In March, the SEC notched two early successes in its efforts to root out AI washing. In settled actions against Delphia (USA) Inc. and Global Predictions Inc., the SEC found that the investment advisers made false and misleading statements to investors about the firms' purported use of AI. Delphia agreed to pay a civil penalty of $225,000, and Global Predictions agreed to pay a civil penalty of $175,000, to settle fraud and other charges. SEC Press Release, SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence (March 18, 2024) (Delphia and Global Predictions Press Release), https://www.sec.gov/news/press-release/2024-36.

According to the SEC's order against Delphia, the firm falsely claimed in SEC filings, in a press release, and on its website that it used AI to "predict which companies and trends are about to make it big and invest in them before everyone else." Meanwhile, the SEC's order against Global Predictions found that the firm falsely claimed on its website and on social media that it was the "first regulated AI financial advisor" and that it could provide "AI-driven forecasts." Despite these claims, SEC Enforcement Director Gurbir Grewal explained, "neither of the firms had the AI capabilities that they claimed they had. Simply put, that's called AI washing, and it hurts investors." SEC Enforcement Director Gurbir Grewal Discusses AI Washing Enforcement Cases, YouTube (March 18, 2024) (Grewal YouTube Statement), https://www.sec.gov/news/sec-videos/sec-enforcement-director-gurbir-grewal-discusses-ai-washing-enforcement-cases.

According to Grewal, the SEC is "committed to protecting [investors] against those engaged in 'AI washing.'" Delphia and Global Predictions Press Release. The Delphia and Global Predictions cases should serve as a warning to businesses that claim to use AI, Grewal says, that they must ensure that any representations about the use of AI are not false or misleading. Grewal YouTube Statement.

Regulated Entities "Should Say What They're Doing, and Do What They Say."

The same day the SEC announced charges against Delphia and Global Predictions, Chair Gensler weighed in again on the risks of AI washing. "Investment advisers or broker dealers might want to tap into the excitement about AI by telling you that they're using this new technology to help you get a better return," he said. Meanwhile, public companies "might think that they will enhance their stock price by talking about their use of AI." In either case, the SEC wants to make sure regulated entities are "telling the truth." In short, "they should say what they're doing, and do what they're saying." SEC Chair Gary Gensler, Video Transcript, Chair Gary Gensler on AI Washing (March 18, 2024), https://www.sec.gov/news/video-transcript/sec-chair-gary-gensler-ai-washing.

And the SEC is determined to ascertain whether regulated entities *are* accurately saying what they're doing. It has been widely reported that the SEC's Division of Examinations is conducting a "sweep" of investment advisers to gather information on firms' AI-related marketing materials, algorithmic models used in connection with portfolio management, and internal compliance training efforts, among other topics. *See, e.g.*, Richard Vanderford, SEC Probes Investment Advisers' Use of AI, WSJ (Dec. 10, 2024), https://www.wsj.com/articles/sec-probes-investment-advisers-use-of-ai-48485279. The SEC is also investigating a number of public companies that claim to incorporate AI technology in their product offerings or services.

The SEC is casting a wide net, and the sweeps will surely result in additional cases. Indeed, Enforcement Director Grewal recently advised compliance professionals to watch for and take lessons from "future [AI-related] enforcement actions." "While perhaps not quite yet a perfect storm, there's certainly one brewing around AI," he said. SEC Enforcement Director Gurbir Grewal, Remarks at Program on Corporate Compliance and Enforcement Spring Conference 2024 (April 15, 2024), https://www.sec.gov/news/speech/gurbir-remarks-pcce-041524.

Businesses that use AI, but haven't yet received information requests from the SEC, should be on the lookout. Take this time to reevaluate past and forthcoming statements on the businesses' use of AI—financial services firms, in particular, must make sure any statements about their use of AI comply with the SEC's Marketing Rule. "The bottom line: you must ensure that your representations regarding your use of AI are not materially false or misleading." *Id.*

Environmental, Social and Governance (ESG) Update

EU Finally Approves Game-Changing Corporate Sustainability Due Diligence Directive Impacting EU and Non-EU Companies

After lengthy and difficult negotiations, on 24 April 2024, the EU Parliament finally approved the Corporate Sustainability Due Diligence Directive (the 'CSDDD' or the 'Directive'). This milestone paves the way for its eventual adoption by the EU once the remaining formalities are satisfied (approval by the European Council and subsequently publication in the Official Journal of the EU). The CSDDD is expected to enter into force in Q3 2024 and represents a significant shift in the EU's approach to ESG regulation. It is by far one of the most significant pieces of legislation in the EU's expanding corpus of ESG regulation, and is expected to have a significant impact on companies and their supply chains which are based not just in Europe but elsewhere around the world.

By way of context, it is worth noting that the EU's legislative action follows long-standing international standards which have been on the radar of major businesses for over a decade. Many major corporates have already expressly endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) and assess their operations by reference to other established standards on human rights and the environment, such as the OECD Guidelines for Multinational Enterprises. The CSDDD's contribution to this landscape reflects an increasing crystallisation of soft law international norms into hard-edged legal obligations. Indeed, the CSDDD is closely aligned to these standards, adopting the same language of the UNGPs which requires companies to "identify, prevent and mitigate…adverse human rights impacts." As a directive, each EU Member State will in due course need to transpose the Directive into their national law, which will establish certain minimum standards across the Union but also introduce potential complexity in the regulatory landscape applying to companies.

The scope of the Directive is wide. One of its most important features is its extraterritorial effect: it is not solely focussed on companies which are established or headquartered in EU countries. Non-EU companies which have a significant turnover in the EU *(i.e.* net EUR 450 million) will also fall in-scope, as will others meeting specific criteria. Moreover, companies which are caught by the CSDDD must also take into account the potential for adverse human rights impacts and environmental harm throughout their value chain, meaning a company's non-EU overseas subsidiaries or business relationships would need to be considered too. The expected phase-in, however, will take place over time. The largest companies (those with over 5,000 employees and a turnover of EUR 1,500 million) will be subject to obligations within three years from the Directive's entry into force, with smaller companies having more time (up to five years) to comply with the corresponding requirements.

At the heart of the CSDDD are – as its name suggests – due diligence obligations. Art 4 of the Directive provides that companies must conduct human rights and environmental due diligence, with the precise requirements of this due diligence set out in detail throughout the Directive. Those obligations will apply both to the upstream and downstream aspects of a company's supply chain. Among other things, companies will necessarily need to put in place appropriate policies, but also preventative action plans and systems to enable them to comply with these due diligence requirements in their value chain. In addition, the Directive will also push companies to take robust action on climate: businesses will be expected to put in place climate transition plans which include emission reduction objectives, including with respect to Scope 1, 2 and 3 emissions, compatible with the 1.5°C temperature goal set out in the Paris Agreement.

Systems, adequate controls, robust processes: all will be necessary if companies are to comply with the Directive's requirements. Companies which fail to adapt do so at their peril. The Directive contemplates that non-compliant companies may be subject to severe financial penalties: administrative fines could reach up to 5% of a company's *global* turnover and other sanctions imposed by national enforcement authorities. The discovery of potential adverse human rights and environmental impacts within a company's supply chain also entails significant reputational risk for businesses and the potential for other civil suits.

In that regard, the liability regime introduced by the CSDDD is likely to herald a potential new wave of supply chain litigation, meaning that affected companies should begin to assess their operations with litigation risk squarely in mind. Failures of due diligence have already found expression in legal claims in Europe such as those involving breaches of duties of care or equivalent obligations under national law (such as pursuant to the French Duty of Vigilance or Germany's Supply Chain Due Diligence Act, the LkSG). Some of this national legislation is likely to be amended to conform with the CSDDD's requirements, but there are already indicators that corporates are increasingly being held to account in the civil courts for adverse human rights or environmental impacts in their extended supply chain; that trend is only likely to grow, particularly since Art 22 of the Directive expressly requires EU Member States to ensure that there exists a civil liability regime for failure to comply with certain of their obligations under the Directive.

The CSDDD has been described in many quarters as a 'game changer' and a 'landmark' piece of legislation. While its exact impact remains to be seen, it is clear that the Directive will undoubtedly have a wide-reaching effect and is already requiring many companies to change their

approach to supply chain risk and management. Proactive movers should reap the benefit of the time before the Directive's implementation to adapt, develop and tailor their operational policies and framework accordingly.

Middle East Update

Saudi Arabia's Vision 2030: Recent Reports of Potential Changes in Project Delivery Serve as a Reminder to Ensure That Parties Invest In a Developed Claims Strategy

With so much of Saudi Arabia's Vision 2030 being facilitated by the development of the well-publicized "giga-projects", the spotlight remains on how, and when, those extraordinary projects will be delivered. Recent press coverage suggests that what can feasibly be achieved by 2030 in relation to projects currently in the construction phase is a matter under active consideration by the relevant developers and authorities.

In an area of the world where the funding of major projects is so reliant upon fluctuating oil prices, it is not uncommon for changes to be made to project delivery strategies during the construction phase. However, such changes can frequently result in significant variations to design and scope (including de-scoping), corresponding revisions to project scheduling, or both, as projects are recalibrated. This can act as a catalyst for substantial time and money claims which, if not properly advanced and resolved, can themselves have adverse consequences for project delivery.

Recent press coverage

As the Kingdom moves closer to its 2030 deadline, positive signs are starting to emerge. One of the first giga-projects to be announced, Diriyah Gate, recently confirmed that it was on course to complete by 2027. Red Sea Global recently opened two luxury hotel resorts on the Red Sea coast as part of its role in delivering Vision 2030. It was also confirmed that Trojena, the mountain resort within NEOM, would complete by 2027 in advance of hosting the Asian Winter Games in 2029.

However, the multitude of challenges faced in delivering this unprecedented vision were recently brought further into relief in April 2024 when Bloomberg first reported an alleged decision by the state-backed developer, NEOM, to scale back what will be completed by 2030 of the first phase of its flagship 170 km long development, "The Line". The unconfirmed report claimed that original plans to have 1.5 million people living in the development by 2030 as part of its first phase, have been reduced to just 300,000 people residing there by that date, within a 2.4 km section of the build. There were also reports that NEOM's budget had not, at that point, been approved for the present year.

Reports of potential funding issues were perhaps allayed for the time being by an official announcement that NEOM had secured a SAR 10 billion (c. US$ 2.7 billion) revolving credit facility from a group of nine Saudi-listed banks, which NEOM advised would support its short-term financing requirements. The suggestion that the project had been downsized was rejected by the Saudi Arabian Minister of Economy and Planning, in an interview given to CNBC at the World Economic Forum event in Riyadh in late-April 2024, when he confirmed that, "*for NEOM, the projects, the intended scale is continuing as planned. There is no change in scale…it is a long-term project that is modular in design*". As to changes being made more broadly to projects under development across the country, the Minister maintained that all of the "*anchor projects…will be delivered to their scale and in a manner that in terms of priorities suits the needs of the projects, the returns of these projects, and the economic impact.*"

That focus on the economic impact was placed further into context by the candid remarks of the Saudi Arabian Minister of Finance who, also speaking at the World Economic Forum event, was reported to have said, "*There are challenges… We don't have ego. We will change course, we will adjust, we will extend some of the projects, we will downscale some projects, we will accelerate some projects*".

Genuine claims arising from changes in delivery strategy will need to be addressed expediently

The review and adjustment of project delivery strategies to suit fiscal objectives is not surprising, particularly in circumstances where one of the primary goals of Vision 2030 is to increase economic growth and diversity through non-oil related industries. Nonetheless, experience has shown that such adjustments can quickly act to the detriment of projects and increase potential heads of claim in both scope and value, if the parties do not have and implement robust claims strategies to ensure that resulting claims are sought to be actively resolved at the project level.

That will not be possible in all cases and each matter will turn on its merits. However, a failure by contractors to invest in the proper formulation and substantiation of a claim at that stage, all too often leaves an owner's professional team with no choice but to reject it. Aside from delaying recovery of what may otherwise be genuine entitlement with the corresponding effects this may have on project progress, the failure to properly invest in claim strategy at an early stage can also lead to issues when the time comes to forensically plead the case for the purposes of formal dispute resolution. That is particularly so where earlier attempts to advance the claim are not prepared with those later requirements in mind, notwithstanding that they are essentially the same threshold against which the owner's professional team, properly advised, will also be assessing potential liability.

Similarly, there can sometimes arise a failure or reluctance to expediently address entitlement, with claims left to accumulate for resolution on a global basis at a later stage. There may be many legitimate reasons driving that as an approach. However, it often renders the delivery of the project contingent on an assumption that later agreement will be possible. Otherwise, the failure to maintain cash flow by recognizing genuine entitlement can and frequently does cause the relationship between the parties to break down, with corresponding effects on progress, as bargaining positions and competing interests evolve during the project lifecycle, and deadlines move closer.

As a result, how claims are presented, analyzed and responded to, can take on an exponentially greater significance where issues do arise following a change in project delivery strategy.

Traditional procurement and the adoption of an adversarial approach

The recent press coverage also highlights various challenges which were raised during a panel discussion in January 2024 at Quinn Emanuel's construction disputes symposium in Riyadh. The panel included representatives from a number of the leading owner/developer and contractor entities in the country who are at the forefront of delivering key projects as part of Vision 2030. They very kindly shared with the audience details of the issues which they face.

What was striking about the discussion was the fact that the issues identified are not new to the region, or the industry. They are the same issues which Quinn Emanuel's construction disputes team has litigated and arbitrated extensively in neighbouring countries who have gone through significant redevelopment over the last few decades. Whether the issues stem from a shortage of skilled staff and labour, a scarcity of equipment and materials, incomplete or poorly defined design and specifications, unsuitable contracting models, unachievable and unrealistic scheduling, draconian risk allocation, cash flow and change management, or otherwise, these are all issues which have had to be previously grappled with in one form or another.

Underlying all of those issues was the well-known fact that so much of what tends to go wrong with construction projects in the region stems from failures arising during the procurement process. Yet, other than in respect of some very limited examples, traditional procurement has remained the preferred procurement route of choice, with contracts awarded to the lowest priced technically compliant bids.

The rush to award contracts over recent years, in combination with a traditional procurement approach, has inevitably led to a highly competitive market, but also a contracting environment which risks fostering, out of commercial necessity, an adversarial approach given the prevailing market conditions. Again, while each case will turn on its merits, opportunities may need to be actively taken by contractors to better any less than optimal commercial positions which have been adopted in order to win the bid. When one adds to that mix any post-award uncertainty as to the timing, extent and funding of a project, or the instruction of significant variations as part of an amended delivery strategy, it can lay the foundation for extensive and complex construction disputes when such scope and corresponding time-related claims do materialize. In those circumstances, how the parties approach the advancement and resolution of claims can be as relevant to project delivery as any change in broader project delivery strategy.

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Quinn Emanuel's highly-experienced and successful construction and engineering disputes practice is based out of our Riyadh, London and Doha offices. They have decades of collective experience resolving construction disputes throughout the Middle East region in a wide array of sectors.

VICTORIES

Quinn Emanuel Associates Help Secure Approval of Largest Solar Project in the U.S.

Quinn Emanuel recently played a key role in the approval of the country's largest solar project, Oak Run Solar, securing an estimated $35 million in future union wages for its pro bono client IBEW (International Brotherhood of Electrical Workers) Local Union 683.

Before Oak Run could move forward, the OPSB (Ohio Power Siting Board) had to make a finding that the 6,000 acre project, located in three Ohio townships, would serve the public interest. Oak Run would generate tens of millions of dollars in wages for construction and operation, provide millions of dollars annually to surrounding municipalities, and incorporate an unprecedented commitment to agrivoltaics, or the dual use of land for solar energy production and agriculture. Despite these economic and climate benefits, the project found itself in the crosshairs of an organized, well-funded, and highly politicized opposition effort. This vocal opposition led the three Townships to intervene in opposition to the project with a sizeable portion of their legal fees being paid by an as-yet unidentified "private individual."

Quinn Emanuel associates Daniel Loud and Andrew Shifren traveled to the OPSB hearing in Columbus Ohio to take the direct testimony of two IBEW Local 683 leaders and to cross-examine township witnesses hostile to the project.

The OPSB opinion, entered on March 21, 2024, based its approval of Oak Run in part on IBEW's testimony about the significant economic and jobs benefits of the project, as well as the damning evidence, elicited on cross-examination, that the Townships had not even deigned to read the project Application.

Local opposition, frequently spurred by misinformation from interest groups with unknown sources of funding, is the single most important roadblock preventing the buildout of new green energy projects.

Preliminary Injunction Win For OpenAI

Quinn Emanuel scored an important victory for OpenAI when U.S. District Court Judge Yvonne Gonzalez Rogers granted the ChatGPT maker's motion for a preliminary injunction against a company and its owner who were using "Open AI" and the domain name open.ai.

The Defendants vigorously argued against the injunction, alleging that they held superior trademark rights, they were the senior user, that OpenAI has known about their use, that—unlike OpenAI—they had a registered trademark, that OpenAI's mark was merely descriptive and had no secondary meaning, that more than a year before the lawsuit, OpenAI wanted to buy their domain name and "related IP rights," and that OpenAI's "delay" doomed its claims.

Quinn Emanuel fought back, rejecting Defendant's claims, exposing Defendants' deceptive conduct to the US Patent and Trademark Office, and demonstrating that none of Defendants' various alleged uses were bona fide uses in commerce sufficient to give rise to trademark rights, the victoryestablished that OpenAI's mark was, as Judge Gonzales Rogers found, "one of the most recognized in the artificial intelligence industry, if not the world." Q

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business litigation report

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