

International Dispute Resolution

June 2005 - Issue 11

Following on from the success of the symposium in Paris on "*Arbitration through Europe – addressing aspects of institutional arbitration*", this edition of the International Dispute Resolution newsletter includes updates on arbitration globally. In particular, a discussion on how CIETAC, China's biggest and most influential arbitration institution, is responding to the increasing influence of China in the global market and a report on the ongoing review of the UN's Model Law on International Commercial Arbitration.

This edition also contains a review of a recent case involving Bird & Bird, London. Bird & Bird acted for Jim Cobbe, the claimant, in *James Cobbe v Yeomans Row Management Limited & Others* [2005] EWHC 266 (Ch). The case explored the existing law on equitable jurisdiction and, in particular, proprietary estoppel. Formal judgment was given for our client on 25 February 2005. We hope that this new feature will be an interesting additional insight into the work undertaken by Bird & Bird's International Dispute Resolution Group.

Jane Player
International Dispute Resolution Group

Articles

Conflict of laws

Following a referral from the Court of Appeal, the European Court of Justice ("ECJ") decided that an English court cannot stay proceedings in favour of a state that is not a party to the Brussels Convention ("a non-contracting state") on the basis that there is a more suitable forum for trial.

In *Owusu v Jackson & Ors* (case C-281/02), Mr Owusu (the "claimant") suffered serious injuries in a diving accident in Jamaica. The claimant was domiciled in the UK. The claimant issued proceedings in the English courts against Mr Jackson, (the "first defendant") (who was also domiciled in the UK) and several Jamaican companies.

It was held that the claimant could bring his claim in England even though Jamaica may have been a more suitable forum. A stay could not be ordered under the Brussels Convention on the basis of "forum non conveniens" in respect of a non-contracting state. The ECJ held that the Brussels Convention precluded a court of a contracting state from declining the jurisdiction, conferred on it by Article 2 of the Convention, on the basis that a court of a non-contracting state would be a more appropriate forum for the trial. This decision appears to have restricted the flexibility that has currently been enjoyed by the English courts to ensure that a dispute is heard in its natural forum.

The importance of the case is in the determination of questions of jurisdiction where the claimant wishes to sue defendants domiciled in England and defendants domiciled in a non-contracting state in the same proceedings. Where a number of defendants are sued in England but only one is domiciled there, the English courts cannot stay proceedings even if the natural forum is a non-contracting state. The upshot of this case is that defendants may find themselves dragged into proceedings in England, even if they and the subject matter have no connection to England.



Joe Copping, UK



The new Italian Industrial Property Code: the main innovations

The pressing need for a uniform Code collating the different laws regulating IP matters, particularly those heard from 1990 onwards, has now been comprehensively satisfied.

On 19 March 2005, the Legislative Decree of 10 February 2005, no. 273, entered into force and introduces the "Italian Industrial Property Code". The dispositions concerning the proceedings will begin to operate within six months of the Legislative Decree coming into force.

The Code is composed of 245 articles and repeals 39 laws that were in force before its implementation.

The Code aims at simplifying and rationalising the entire discipline of Industrial Property rights. This "reformation process" has introduced substantial innovation in this field.

The most important outcome of the Code concerns the IP proceedings rules.

The Code confirmed the jurisdiction of the twelve *ad hoc* Courts (established according to the Legislative Decree no. 168/2003) in charge of IP disputes.

According to article 134 of the Code, these Courts have exclusive jurisdiction over IP litigation. They have the power to deal with disputes regarding national, international and Community trade marks, as well as patents and new plant varieties, utility models, designs and copyright, and unfair competition when "interfering with the protection of industrial and intellectual property".

Another important innovation set forth under the Code concerns the application to IP proceedings of the new procedural provisions governing the corporate proceedings introduced in 2003/2004.

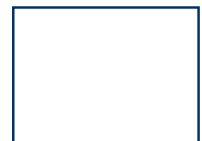
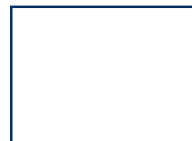
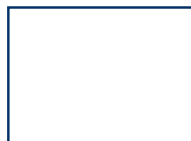
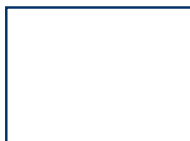
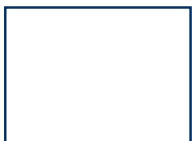
These provisions have a significant bearing on the ordinary procedure under the Code of Civil Procedure. The "new procedure", in general terms, is characterised by a preliminary and direct exchange of information between the parties without their

filing before a court. Only when one of the parties requests judicial intervention will a hearing be scheduled and a judge designated. This new procedure is characterised by the "privatisation" of the pre-trial phase by referring the case to the judge only when it is ready for evidence collection and decision.

Further innovations introduced by the Code concern the delicate issue of restorative damages.

Article 125 of the Code explicitly provides not only for the recovery of lost profits but also for an account of the profits of the infringer. An account of profits will be assessed by the judge, based on the revenues gained by virtue of the violation of the rights and the compensation that the infringer should have paid as royalties.

This should make it easier for the holder of the infringed rights to give evidence of the damage suffered and therefore increase the possibility of recovering greater damages in line with the current tendency in case law.



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The Code also confers on domain names the express qualification of distinctive signs. In fact, in this regard, article 12 on the "Novelty" feature prohibits the registration of trade marks identical or similar to previous domain names. Article 22 in turn prohibits the registration of domain names conflicting with previous trade marks.

A provision with significant implications has also been introduced in relation to trade secrets. These are now expressly considered specific objects for protection within industrial property rights. In this respect, article 98 of the Code protects confidential information, including business information, as well as technical industrial expertise.

The provisions regarding inventions developed by researchers are also of interest. Where a researcher is employed by a university or public administration body that has research among its institutional purposes, the researcher will now be exclusively entitled to the rights arising from the invention.

The Code has also introduced a definition of piracy, distinguishing it from counterfeiting. Comprehensive infringements of IP rights will now be considered piracy if such infringements are carried out by fraud.

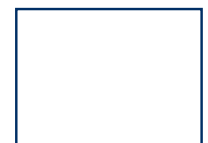
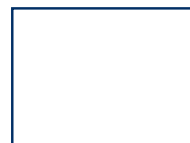
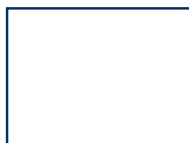
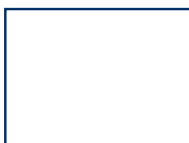
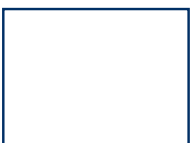
Finally, the new legislative body does not consolidate the law regulating copyright. This continues to be governed by law no. 633/1941.

 **Rahul Kakkar & Marilina Palmiotto,**
Italy

Forum shopping - competence of courts regarding Community and national designs

Previously, many cases of design right protection in German intellectual property law referred to product piracy. However, the German Design Act (in force since June 2004) sets lower requirements of protection and provides for a wider scope of protection of designs: the Community Design Regulation (the "Regulation") (in force since March 2002) offers Community-wide protection of registered and unregistered designs. As a consequence, design rights have become more attractive, and the number of design infringement cases and invalidity proceedings is likely to rise significantly.

The success of each party in such proceedings partly depends on the competency of the court deciding the case. Claimants should carefully consider which court, and maybe even which chamber of a court, should decide the case ("forum shopping"). In Community design issues there might even be a choice between jurisdictions.



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Court competence for Community design issues

The Regulation provides for "Community design courts" (Art. 80), to be designated by the Member States. These courts have exclusive jurisdiction *inter alia* for:

- actions for the infringement of a Community design, whether registered or unregistered;
- actions for a declaration of invalidity of an unregistered Community design; and
- counterclaims for a declaration of invalidity of a Community design (whether registered or unregistered), in the context of an infringement action (Art. 81).

Article 82 of the Regulation lays down rules to determine which Member State's Community design courts have jurisdiction in the proceedings (above). There are five basic jurisdiction rules, which prevail over each other in order. According to the rules, the courts of a Member State have jurisdiction:

1. if the defendant is domiciled in that Member State;
2. if the defendant has an establishment in that Member State;
3. if the claimant is domiciled in that Member State;
4. if the claimant has an establishment in that Member State; or
5. in the Spanish courts (i.e. where the Office for the Harmonisation of the Internal Market has its seat).

A Community design court has jurisdiction for actions anywhere within the territory of the Member States. It may also grant provisional and protective measures which are applicable in the territory of any Member State (Art. 90(3) CDR).

Alternatively, an infringement action may be filed in the Member State, in which the infringement is committed or threatened. This may be advantageous depending on the national law of the respective Member States. Particularly whether the laws of the Member States offer further protection for designs, e.g. under unfair competition law. The downside

is that the effect of such a decision is limited to the respective Member State. For parallel infringement actions in other Member States, further claims would have to be filed. In Germany, specific Regional Courts have been selected as Community Design Courts (Sec. 63 German Design Act).

German national designs

For any claims under the German design law, the Regional Courts have exclusive jurisdiction (Sec. 52(1) German Design Act). As with Community designs, most of the German States have restricted courts' competence for (national) design cases to specific regional courts. A claim which is not only based on the German Design Act but also on unfair competition law can also be brought before the respective Design Courts (Sec. 53 German Design Act).

Claims regarding a German design right can be filed either with the court of the defendant's domicile/establishment or, in infringement actions, the place where an act of infringement is committed/threatened. As design



infringements are often committed Germany-wide, e.g. via the internet, television or supra-regional press, the claimant can usually choose the national court. The claimant generally has the choice between the chamber for civil law and that for commercial matters.

Furthermore, the jurisdiction of some courts may be more favourable to design right owners than that of other courts. A claimant may wish to choose or avoid a court that has already dealt with similar cases. Generally, claimants should choose courts with strong experience in design right issues, e.g. the Regional Court Cologne and the Regional Court Düsseldorf. The Regional Court Cologne is often chosen because of its experience in design right matters.



Julia Pothmann, Germany

The UNCITRAL Model Law on arbitration: reform of interim measures of protection

The Working Group II (Arbitration) has been reviewing the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration for some time. The issue of *ex parte* interim measures is a key point of importance and controversy.

Background

The present rules regarding *ex parte* interim measures are under review after observations that several Member States do not have any provision for dealing with the power of courts to issue interim protective measures in favour of parties to arbitration agreements. Consequently, some courts are unwilling to issue interim measures, while others are uncertain about the circumstances in which such court assistance should be available. The courts in some Member States have tried to define the situations in which the court may issue

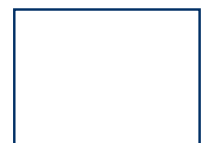
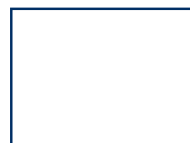
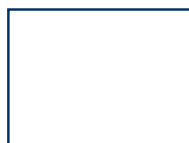
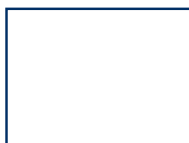
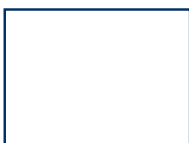
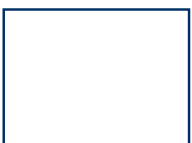
interim measures. However, findings vary about the extent to which courts may legitimately intervene to support the work of the arbitration tribunals without usurping their authority.

Redrafting the UNCITRAL Model Law

To prompt further discussions, the UNCITRAL Secretariat drafted a revised version of paragraph 7 of article 17 of the Model Law taking into account discussions and decisions at the 41st session of the Working Group.

The Working Group has not decided about whether the interim provisions should be formulated as opt-in or opt-out provisions for the parties so, the Secretariat drafted the following text containing two alternatives:

"[Unless otherwise agreed by the parties.] [If expressly agreed by the parties] a party may file, without notice to the other party, a request for an interim measure of protection together with an application for a preliminary order directing the other party to take no action to frustrate the purpose of the interim measure requested."



Despite wide divergence of views at its 42nd session on 10-14 January 2005, the Working Group agreed to retain the words "unless otherwise agreed by the parties" and to delete the words "if expressly agreed by the parties".

At its 42nd session, the Working Group also accepted the Secretariat's revision of the draft providing that:

- a preliminary order is limited to a period of 20 days
- a tribunal has more flexibility regarding the requesting party's obligation to provide security. In particular, security does not have to be provided if the tribunal considers it inappropriate or unnecessary

The Working Group also agreed to ask the Commission for time to be allocated for two additional sessions before the 39th session of the Commission in 2006, at which the Commission would be expected to review and adopt the draft provision.



Ulf Mellqvist & Mats Jansson,
Sweden

Admissibility under French law of unlawfully obtained evidence

Is it possible to record a person's telephone conversation without his consent and use it as evidence in a trial? Can someone rely on a document stolen from the offices of another party? Or information obtained as a result of entrapment?

These questions raise the issue of whether evidence obtained in an unlawful or improper manner is admissible at trial. This note deals with the test of admissibility, firstly in criminal proceedings, and then in all other areas of French law.

Criminal law

Article 427 of the code of criminal procedure states:

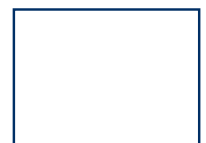
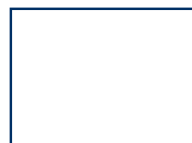
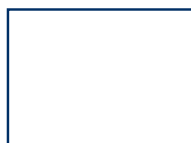
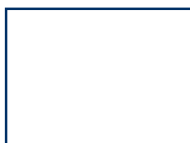
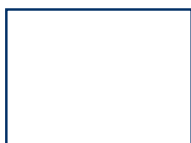
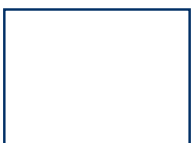
"Except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction."

The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him."

Thus, French law does not authorise a judge in criminal proceedings to reject a piece of evidence even though it is obtained in an unlawful manner. Indeed, the judge may not consider how it was obtained but may only assess the evidence on the question of whether it is convincing. The parties are merely obliged to serve the evidence on all the parties.

The rule applies to the evidence used by both the defence and the victims, whether corporate entities or private persons. A defendant is even released from his professional or medical duty of confidentiality when such disclosure is needed for the purpose of his own defence.

Hence, on 11 June 2002, the *cour de cassation* overruled a Court of Appeal judgment which had refused to examine evidence obtained from a poll to prove discriminatory behaviour.



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However, this rule does not apply when the law expressly provides otherwise. For instance, article 205 of the code of civil procedure, which bans the children of divorcing couples from giving evidence in proceedings connected with the divorce. Therefore, illegally recorded conversations of the children would be inadmissible in criminal proceedings for non payment of subsidies to a spouse.

With a few rare exceptions, evidence obtained in an improper, or even criminal manner, will be admissible in criminal proceedings.

Other areas of French law

In contrast with criminal proceedings, evidence obtained in an unlawful or improper manner is inadmissible in all other areas of French law.

As an example, on 7 October 2004, the civil section of the *cour de cassation* reaffirmed that:

"a private telephone conversation which is recorded and kept without the person's knowledge is an improper process which makes the evidence inadmissible."

Therefore, in a commercial or civil case, a defendant may consider the possibility of challenging the evidence on grounds of how it was obtained.

But what criteria do the French courts apply in deciding whether evidence was obtained illegally or improperly?

The evidence is admissible if both parties are supposed to have the same document or were in a position to legally access it, provided it is exchanged between them or their lawyers before trial. The rationale for this approach is that the evidence was legitimately available to the parties, notwithstanding that they actually obtained it in an unlawful or improper manner.

There is, however, one notable exception in labour law. When evidence is used by an employee against his employer, it is always admissible providing it has been obtained in the course of the professional activity. Although, interestingly, evidence must be lawfully obtained when used by an employer against an employee.

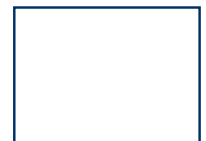
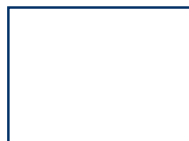
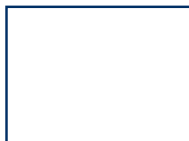
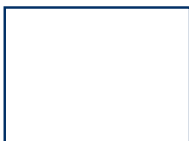
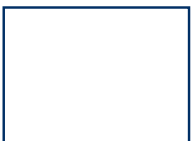
Conclusion

Therefore, the admissibility of evidence obtained unlawfully or improperly is generally clear:

- in criminal proceedings, such evidence is admissible provided it is discussed in an adversarial way in court
- in all other areas of French law, such evidence is only admissible where it has been obtained in an adversarial manner



Christian Curtil, France



CIETAC arbitration rules revised

In light of China's accession to the World Trade Organisation and with greater globalisation, a growing number of international transactions now feature a Chinese party. As such, the need to resolve disputes by Chinese arbitration is becoming increasingly important.

The China International Economic and Trade Arbitration Commission (CIETAC), China's biggest and most influential arbitration institution, has recently revised its arbitration rules. The new rules came into effect in May 2005. The changes bring CIETAC procedures closer to those of other international arbitration commissions in several respects. This is to be welcomed by foreign parties doing business in China.

Arbitrators of any nationality

One of the most significant changes under the new rules is that parties, by mutual agreement, may now select arbitrators outside CIETAC's Panel of Arbitrators. This will enhance the pool from which potential arbitrators may be chosen - currently it consists

predominantly of Chinese nationals - and hopefully will result in arbitrators with a greater breadth of knowledge and experience being selected to hear cases.

Notwithstanding this, CIETAC will continue to maintain some control over the selection process in that any arbitrator chosen outside of the panel must be approved by the Chairman of CIETAC. Further, if parties can not agree on a presiding arbitrator CIETAC ultimately will make the appointment from its panel.

Seat of the arbitration

The new rules allow for CIETAC arbitration to be conducted with the 'seat' outside China for the first time. This means that for the first time CIETAC arbitrators may be governed by the procedural arbitration law of other jurisdictions. In common law jurisdictions the place at which the award is signed establishes the origin of the award. However, the new rules provide that any award will be deemed to be issued from the seat of the arbitration. This is significant as it may assist to avoid unexpected enforcement problems under the common law rule.

Disclosure of potential conflicts

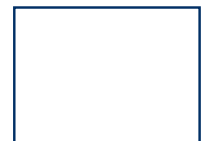
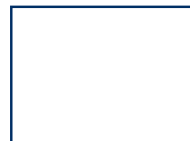
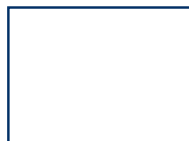
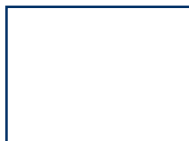
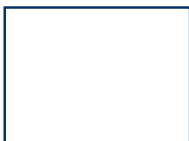
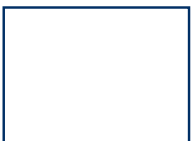
The new rules have enhanced the requirements placed on arbitrators to disclose potential conflicts of interest. It is hoped that this change will lead to greater transparency and reduce the possibility of decisions being tainted by bias.

Choice of other arbitral rules / procedural flexibility

These new rules confer a greater degree of autonomy on both foreign and local parties.

Parties now have the right to adopt and incorporate other arbitration rules into the CIETAC rules. It is hoped that this will result in more stringent standards.

A further change is that arbitrators will no longer be constrained by rigid court-style procedure. They will be permitted to conduct common law style or "adversarial" proceedings in which the parties alone elect what evidence is placed before the arbitrator. The new flexibility will allow cross-examination of witnesses, pre-hearing conferences, the issuing of directions and establish the framing of terms of reference.



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New time deadlines

The new rules have reduced the time period in which cases may be conducted. The new time limits allow 6 months for foreign-related cases, 4 months for domestic cases and 3 months for summary procedures. It is hoped that this will lead to greater efficiency and cost savings.

Costs

Under the old rules the recovery of a winning party's costs was limited to 10% of any damages awarded. The new rules are a significant improvement in that they eliminate this restriction. This may assist in making smaller claims economically viable.

Jurisdiction

The new rules have clarified the scope of CIETAC's jurisdiction in that they only list the categories of cases that CIETAC will hear. Previously, it listed the categories that it would and would not hear, which often led to confusion. Any case that is not included in the new list will automatically be outside of CIETAC's jurisdiction.

Conclusion

The changes represent a great leap forward in bringing CIETAC's practices in line with those of its international counterparts.

While CIETAC has introduced reforms in response to Chinese and foreign criticism, several issues still remain largely unresolved. Examples of this include CIETAC's failure to address arbitrators' low remuneration packages and the high fees charged for big-ticket cases.

It remains important for CIETAC to embrace continuing change in order to establish itself as a leading modern arbitral body.

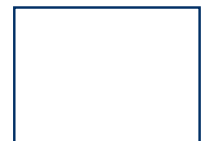
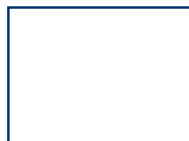
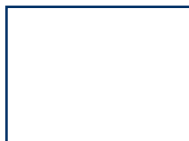
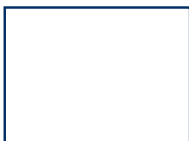
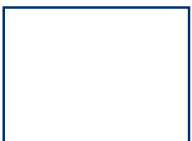
Edward Alder & Rosamund Cresswell,
China & Hong Kong



German case on Distribution Law (District Court of Stuttgart) - February 2004

The District Court of Stuttgart ("court") has come up with a useful clarification on the nature of exclusive software distribution agreements and structuring related business models under German law (District Court of Stuttgart, non-appealable decision of 26 February 2004 (docket no. 40 O 168/00 KfH)).

The claimant, a German software company, had entered into an exclusive distribution agreement with a German distributor of hardware and software (the "agreement"). In the agreement, the defendant had committed to pay to the claimant from each sale of the claimant's software products (the "software") 50% of the recommended end user list price subject to a minimum payment of €125,000 for the initial 10 months of the agreement, payable in 6 instalments (the "minimum payment"). The delivery of the software was organised so that for



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each purchase the defendant would ask the claimant to send him a licence key. The defendant would hand it over to the end user, who would then download the software from the claimant's website.

During the initial 10 month period, the defendant achieved only a fraction of the anticipated revenues and did not pay the agreed minimum payment. Shortly after that, the defendant found himself in an inferior market position because the claimant had co-developed a competing product with a third party (to which the claimant had sold off all rights of exploitation). The defendant declared that the agreement had expired. In response, the claimant terminated for cause and for alleged failure to comply with the agreed payment terms. The defendant claimed rights to withhold the payment for several reasons, including:

- (i) allegedly incomplete software documentation;
- (ii) lack of performance by the claimant. The defendant alleged that the claimant had not granted it a comprehensive copyright licence which could be sub-licensed to end users with the software licence and also alleged that the claimant had not

delivered (in advance) a sufficient number of licence keys. Thus, not enough end users were provided with rights of use to meet to the defendant's overall sales target; and

- (iii) the principle of estoppel due to the change in the market in respect of the competing product.

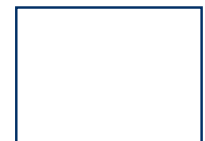
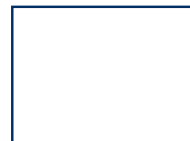
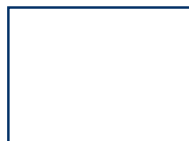
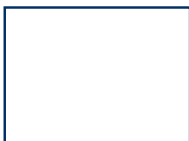
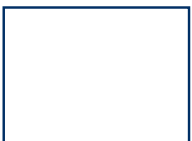
The court awarded the claimant's claim in full. It stated that the payment obligation was *de facto* an agreed lump-sum payment. Thus, it was due in full, independent of the defendant's lack of success in marketing the software. The court found that the agreement had burdened the defendant with the entire risk of merchantability and market success. In particular, the court rejected the defendant's allegations as to (i) on the basis of lack of evidence. As for (ii), the court made it clear that the defendant, apart from holding a licence for demonstration purposes, did not hold a right of use and exploitation in the software independent of the individual orders by end users which could be sub-licensed. The court confirmed that there was no express contractual provision to that end. The court also took as a strong indication the manner in which the software was delivered

and made available to the end users, i.e. the pass-through of the licence key from the claimant to the defendant on to the end user effectively resulting in not more than *ad hoc* sub-licences. Finally as for (iii), the court decided that no share of risk had been agreed between the parties. It would be normal in any distribution agreement to presume that the distributor was better placed to estimate the marketing opportunities than the producer. The court gave weight to the fact that the claimant had no direct influence on the sales efforts of the defendant. In the court's view, the claimant had wanted to obtain an additional protection by agreeing on minimum revenue targets in exchange for the exclusive distribution right. The court viewed this as independent of the fact that the claimant himself had later assisted in introducing a competing product to the market.

The decision demonstrates that structuring the mode of delivery in a software distributor relationship, in particular in exclusive distribution relationships, is decisive for the allocation of risk and any eventual exclusion of rights to withhold minimum turnover target payments.



Alexander Duisberg, Germany



Disclosure of documents under Dutch law

Since January 2002, the scope for disclosure of documents has been extended under Dutch law. Previously, Dutch law restricted disclosure to documents bearing a signature. However, clause 843a of the Code of Civil Procedure (the "Code") now provides for disclosure of documents in general (including movies, pictures, audio tapes, CD-ROMs and computer files). This new scheme makes The Netherlands a more attractive forum for both national and international parties to commence proceedings.

The new Dutch law does not permit 'fishing expeditions'. For instance, a claimant may not claim inspection of 'all correspondence' or 'all meeting reports', even where such claims are limited to certain periods. The law requires the claimant to describe the documents precisely and to specify exactly which document he is requesting. This is based on the idea

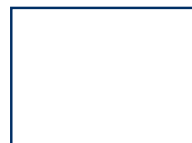
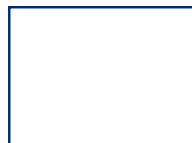
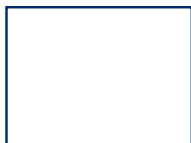
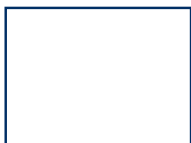
that a request for disclosure is only justified where the claimant knows of the existence but cannot get possession of the requested documents.

In addition, the claimant must have a justified interest in obtaining the documents. This implies that the statement the claimant wants to prove cannot easily be proven by other means, such as through examination of a witness. The evidence must also be necessary in connection with the proceedings. Where there is conflict about whether the document is necessary, the judge has discretion based on balancing advantage to the claimant in receiving the evidence against disadvantage incurred by the disclosing party.

The request for disclosure can be submitted during and prior to proceedings, but also by issuing "rogatory letters" (by which, parties can ask courts of other jurisdictions to examine evidence). Outside proceedings, a request for disclosure is submitted by issuing a writ of summons to the party holding the

documents. However, the claim will only be sustained by the court if the documents are relevant to the legal relationship between the parties. A contractual relationship will certainly be sufficient to claim inspection of all documents relevant to the relationship. The explanatory memorandum of clause 843a of the Code, also states that a relationship arising from a wrongful act can be sufficient. Despite this, the Dutch Supreme Court rejected a request for disclosure for bank accounts of third parties in connection with an alleged wrongful act by the bank on the grounds that the third parties had nothing to do with the relationship between the claimant and the bank.

Professionals, who may refuse to give evidence for professional reasons, are also entitled to refuse to disclose documents they possess. However, if the other party refuses to disclose information without good reason, the claimant could try to stipulate a penalty clause or try to attach the documents before judgment. Documents which can be legitimately refused include confidential



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documents, medical records and financial records. In case of conflict, the judge will on a case-by-case basis, balance the interests of the claimant against the interests of the refusing party.

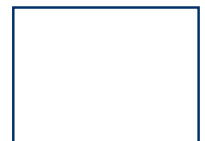
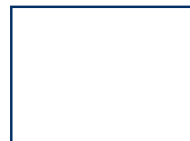
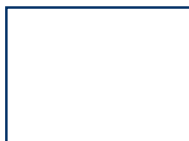
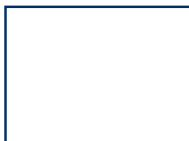
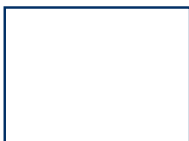
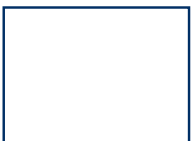
Furthermore, a judge can decide the way in which the documents are disclosed. For instance, the judge may order disclosure by way of a civil-law notary or a medical practitioner and the claimant pays any additional costs for specific disclosure.

The whole scheme provides broad possibilities for requesting disclosure of documents. The Dutch judges still have to get used to these new possibilities and the increasing growth of such claims. The appeal court of Amsterdam has recently stated that clause 843a could even provide a basis for a claim on Internet Service Providers to disclose the name, address and residence of an internet user. Unfortunately, the appeal court has not explored this possibility further.

The new possibilities under Dutch law for disclosure of documents, give both Dutch and international parties broad opportunities to secure evidence. Consequently, foreign parties may, within the limits of clause 843a, request disclosure of evidence held in The Netherlands by a party to the proceedings or a third party, both before and during the proceedings.



**Arine van der Steur,
The Netherlands**



Case study

A fair return

Jim Cobbe thought he had done a great deal. He had met the owner of an old block of flats situated in Knightsbridge, five minutes walk from Harrods. Over the telephone and sitting in her kitchen, Mr Cobbe came to an arrangement with her. She would get vacant possession and he would get planning permission. When both had been achieved, he would buy the property from her for several million pounds, develop it into 21st century luxury dwellings, sell them at top prices and they would share the sale proceeds. Nothing was put in writing but he trusted her.

Later he got a call from the owner saying she had arranged vacant possession. He immediately retained architects and an application for planning permission was made. After months of negotiation and adjustment of the plans, it was granted. Mr Cobbe had spent in the region of £200,000.

The day after planning permission was granted the owner telephoned Mr Cobbe and reneged on their agreement. Property prices had risen and she wanted more money.

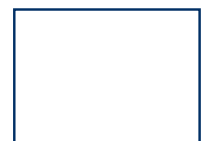
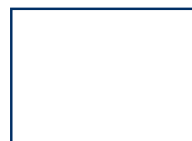
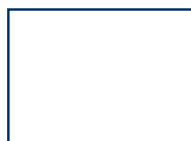
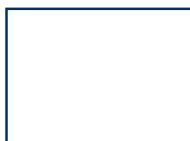
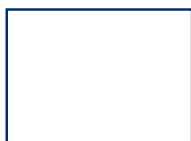
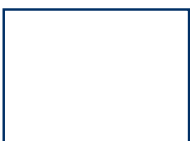
Represented by Bird & Bird, Mr Cobbe took legal action against the owner. He could not claim for breach of contract. Any arrangement involving the disposition of land is unenforceable in English law unless it is in writing. In spite of this, the High Court awarded him a lien, or charge over the property for an amount equal to half the increase in the value of the property as a consequence of the grant of the planning permission.

Through their equitable jurisdiction, the English courts have always been ready to impose what they consider a just resolution to any dispute, even when the strict letter of the law appears to offer no remedy. Here, the court found that the owner had acted unconscionably towards Mr Cobbe, and would not allow her to go back on her word without penalty. Through invoking the doctrine of proprietary estoppel the court was able to right the wrong which it felt Mr Cobbe had suffered.

The owner has appealed against the decision. We will keep you posted!



Peter Emanuel, UK



Events

Bird & Bird symposium on International Commercial Arbitration - 17 March 2005

We were delighted with the success of our recent arbitration symposium in Paris which was entitled "Arbitration through Europe - addressing aspects of institutional arbitration".

With the following distinguished panellists, Anne Marie Whitesell (Secretary General of the ICC), Ulf Franke (Secretary General of the SCC), Stefano Azzali (Secretary General of the Chamber of National and International Arbitration of Milan) and Daniel Hochstrasser (Member of the Special Committee of the Swiss Chambers of Commerce and Industry), we explored various aspects of arbitration with specific reference to the rules of the institutions represented.

During the symposium, which was held at the impressive Maison du Barreau, a large amount of information, knowledge and experience was communicated in an interesting, entertaining and at times amusing way to a lively and involved audience. In particular, the problem of "pathological" arbitration clauses, the need for independent and impartial arbitrators and the relationship between arbitration and mediation provoked considerable debate and the tempo was sustained throughout the morning.

We are planning to make this an annual event. Accordingly, whether you attended our symposium or not, we would be very grateful to receive any thoughts as to topics that could be considered so we can hopefully tailor any subsequent event to your arbitration concerns and tax the institutions further with thought provoking challenges!

If you have any comments for us, we would love to hear from you by post or email (duncan.quinan@twobirds.com or marion.barbier@twobirds.com).

Events

Bird & Bird regularly hosts seminars for its clients and contacts. Please refer to the list below for details of these events.

Our lawyers also speak at leading legal and industry events across the world. Please refer to our website at www.twobirds.com for details of these events.

Commercial principles for government ICT projects

14 June

Bird & Bird, London

Group insurance and the law surrounding complementary pensions

16 June

Brussels

Patent seminar

27/28 June

Bird & Bird, Munich

International outsourcing

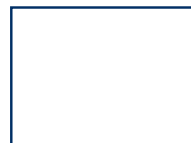
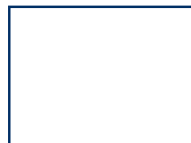
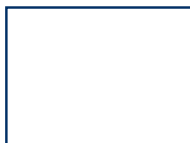
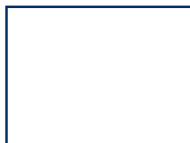
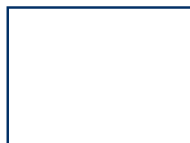
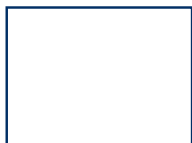
5 July

Bird & Bird, London

Employment law seminar - "recent cases of interest"

12 July

The Lincoln Centre, London



Events

Recent trade mark issues

7 September

TBC

European patent litigation seminar (in conjunction with FORUM)

21 September

Bird & Bird, London

Employment law seminar - TUPE

Regulations

22 September

The Lincoln Centre, London

Outsourcing in South Africa breakfast briefing

26 September

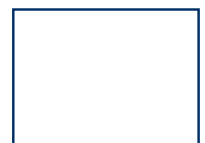
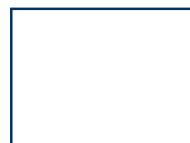
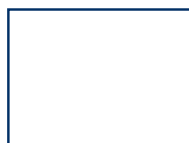
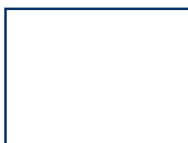
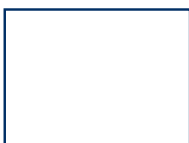
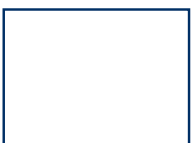
South Africa House, London

Sports law seminar

September

Munich

If you would like further information regarding any of these events, please contact Christina Vizareli by email at christina.vizareli@twobirds.com or phone on +44 (0)20 7415 6082.



Paul Hermant (Belgium)
Edward Alder (China and Hong Kong)
Marion Barbier (France)
Klaus-Jürgen Michaeli (Germany)
Massimiliano Mostardini (Italy)
Wouter Pors (The Netherlands)
Michael Frie (Sweden)
Jane Player (UK)

Sarah Bishop (Editor)

We appreciate your views and feedback, so please do let us know if there is something that you would like to see in the next edition of the newsletter. You can email our editor at dispute.resolution@twobirds.com.

Nothing in this Update constitutes legal advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for information contained in this Update and disclaims all liability in respect of such information.

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