

International Dispute Resolution

June 2006 - Issue 14

Welcome to the June edition of our International Dispute Resolution Newsletter.

This edition features articles on the interpretation of UK PPP contracts, the implementation of the European "enforcement" Directive N.48/2004 in Italy and radio rights broadcasting for soccer games in Germany.

Since the last newsletter, Bird & Bird has opened its 14th office in Lyon, France.

We are also delighted to report that Bird & Bird has made up eight new partners. The appointments, which have been made across the firm's international sector and practice groups, brings the total number of Bird & Bird partners to 133. Raquel Ballesteros (Life Sciences & Regulatory), Anna Duffus (IP), Romain Ferla (Competition), Jiri Jäger (Corporate), Raimondo Maggiore (Banking & Finance), Eutimio Monaco (Telecoms & Antitrust), Fabian Niemann (IT & Outsourcing) and Jörg Witting (Competition) were made partners with effect from 1 May 2006.

Jane Player

International Dispute Resolution Group

Damage compensation claims in cases of negligent patent infringement in Germany - an update

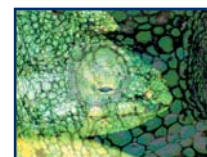
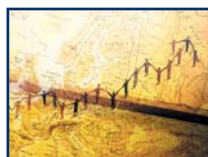
Under German patent law, a Claimant's remedies for patent infringement will include a "cease and desist" order, financial compensation (claims for damages and for unjust enrichment), an account of profits and destruction of the infringing products. This article considers a recent change in German law in relation to claims in damages.

Claims in damages require "fault" on the part of the Defendant: "fault" includes acts carried out deliberately and negligently. Deliberate infringement is usually difficult to

prove so Claimants tend to rely on negligence which is essentially a failure to observe a "duty of reasonable care" in patent matters.

So far, the German Courts have taken a strict approach when considering negligence of commercial undertakings such as producers and/or suppliers of patent infringing products. The Courts expected such undertakings to be aware of all relevant patents and patent applications so that any infringement of such rights was usually determined to be negligent.

There have been a few exceptions to this approach: for example, in the case of a warehouse selling a large variety of products including knitwear which was produced using a patented process. In this case, the Regional Court of Düsseldorf held that the warehouse company had not acted negligently and therefore was not liable for damages since it could rely only on the technical assessment of the German manufacturer from which it purchased the knitwear. Another exception was granted in favour of a supplier selling a minor



article outside its usual range of business.

In February 2006, the Higher Regional Court of Düsseldorf made a more generous exception. In this judgment, the Court held that suppliers cannot be required to keep abreast of potential patent infringement if the high costs of doing so would make the marketing of the respective product economically useless. This case concerned mobile phones. Contrary to the case-law, the Defendant in this case was not a warehouse selling thousands of different articles but a large communications company whose core business was the marketing of mobile phones which it purchased from renowned international mobile phone manufacturers. This represents a significant departure from the earlier established case law and is therefore a high watermark for patent law.

The Court considered that it was complex for the Defendant as a supplier to assess the product in all technical respects and with regard to whether its patented components were produced by the respective patentee or by one of its licensees. The Court therefore held that the Defendant was entitled to rely on the assessment of the respective renowned mobile phone manufacturers provided

that there was no clear indication of patent infringement.

The Higher Regional Court granted the Claimant leave to appeal so the Federal Supreme Court (Germany's highest Civil Court) will now have an opportunity to comment on this decision.



Matthias Meyer & Agnes Prechtel, Düsseldorf

Confidentiality in arbitration under UK law

English surveys have shown that the single most important feature of arbitration for the parties involved is the confidentiality that is generally viewed as being attached to the process.

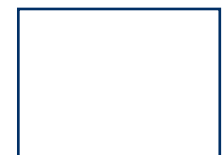
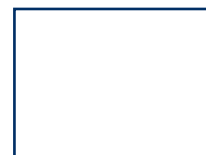
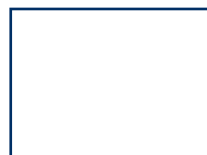
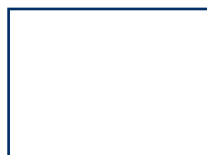
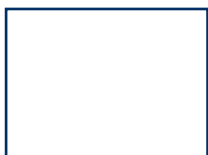
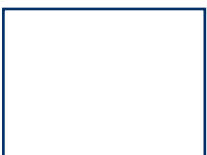
It will doubtless come as a surprise to many potential users of arbitration, therefore, that confidentiality is not always a "given" in an arbitration procedure. This article seeks to examine to what extent an arbitration process under the local laws of England and Wales can be said to be truly confidential.

The parties' express agreement

Arbitration is a consensual procedure. The first port of call will therefore always be to examine any express agreement between the parties. If privacy and confidentiality are of great importance to the parties, the best way to ensure this is achieved is to make specific provision in the arbitration agreement. Such a provision can, if necessary, be supported by an appropriate order of the Tribunal. Clarity is the key. Those drafting arbitration clauses need to clearly state who is bound by it (if third parties are to be bound they will have to enter into separate confidentiality agreements) and exactly what is to be treated as confidential. In the absence of such express obligation of confidentiality, the parties must look to the applicable law.

Confidentiality under Common Law

It is a commonly held view that arbitrations in England and Wales are private and confidential. Whilst there is no statutory provision in the Arbitration Act 1996 which deals with such issues, arbitration is generally considered by the English Courts to be



a private means of dispute resolution. English law recognises that it is an implied term of arbitration agreements that the proceedings are private and confidential. This broad position is, however, subject to a few notable exceptions discussed below.

Confidentiality attaching to documents

In the case of *Ali Shipping Corp v Shipyard Trogir*¹ the Court of Appeal considered the exceptions to the general rule of confidentiality. The court set out the following exceptions recognised under English law:

- Disclosure made with the express or implied consent of the party who originally produced the material;
- Where there is an order of the Court, for example where an order is made for disclosure of documents generated by an arbitration for the purposes of a later Court action;
- Where leave of the Court has been given. Potter LJ recognised here that difficulties would arise with the question of what grounds would give rise to such leave being given;
- Disclosure when and to the extent reasonably necessary for the

establishment or protection of an arbitrating party's legal rights vis-à-vis a third party; and

- Disclosure required in the public interest.

This principle of confidentiality attaching to documents created for or disclosed in an arbitration was taken a step further by the Court in the 2005 case of *Glidepath BV and Others v John Thompson and Others*². In that case, a third party applied for copies of certain documents under the English Procedural Rules. The agreement in dispute between the parties contained an arbitration clause and the proceedings were stayed by the Court in favour of arbitration under section 9 of the Arbitration Act 1996. Before the proceedings were stayed, a Claim Form and Particulars of Claim had been served and the Claimants had made applications for freezing injunctions. The third party sought access to these documents on the Court file, on the basis that they were necessary to assist in establishing a separate claim.

The Court considered and applied *Ali Shipping Corp v Shipyard Trogir*³ and

held that arbitration proceedings and materials produced were treated as confidential to the parties and the arbitrator, subject to certain exceptions. Even at the stages before the Court ordered a stay, the private and confidential nature of proceedings ancillary to the arbitration process ought to be protected. The permission of the Court to a third party, i.e. a stranger to the arbitration and to the proceedings in which the stay had been ordered, to inspect the documents on the Court file should not be granted unless all the parties to the arbitration consented or there was an overriding reason in the interests of justice.

Confidentiality attaching to the award

Under English law, whilst the duty of confidentiality extends to the award itself, there is an important exception which must be borne in mind, namely the disclosure of the arbitral award in separate proceedings to enforce or protect the legal rights of a party to the arbitration agreement.

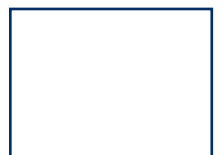
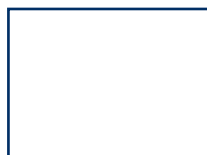
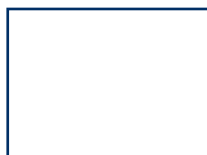
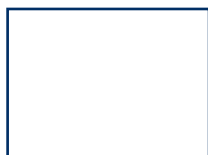
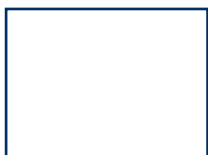
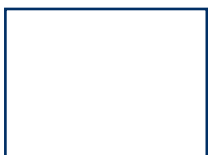
In the case of *Hassneh Insurance Co. of Israel and others v Mew*⁴, the Court

¹ [1999] 1 WLR 314

² [2005] EWHC 818 (Comm)

³ [1999] 1 WLR 314

⁴ [1993] 2 Lloyd's Rep 243



had to decide whether a party to an arbitration could disclose an arbitral award in separate court proceedings against a third party in order to justify its claim against that third party. In the event, the Court decided that the award could be disclosed (setting aside the general duty of confidentiality) in circumstances where the disclosure was reasonably necessary to establish or protect a party's legal rights against a third party.

The Court held that unlike other documents used in an arbitration, an award determines the parties' rights and obligations and is also potentially a public document in the context of supervision or enforcement by the Court. This decision was considered and applied by the Court in the later case of *Insurance Co. v Lloyd's Syndicate*⁵.

This issue of the extent of confidentiality attaching to an award was considered further by the Privy Council in the 2003 case of *Associated Electric and Gas Insurance Services Ltd ("Aegis") v European Reinsurance Co. of Zurich*⁶. In this case the issue was raised as to whether an express confidentiality agreement relating to an earlier arbitration between two parties prevented one of those parties

referring to the earlier award in a later arbitration between them. The Privy Council considered that the rationale for the duty of confidentiality was to determine disputes between parties to the arbitration in a manner that did not involve the disclosure of information to parties with interests adverse to those involved in the arbitration. The Privy Council held that the use of the earlier award in a later arbitration between the same parties would not give rise to this danger. Their Lordships went on to hold that to prohibit any disclosure of the award would frustrate a fundamental purpose of the arbitration by preventing enforcement of the award.

A further exception exists under English law to the general duty of confidentiality of the Award. If an application is made which seeks to invoke the Court's supervisory powers in relation to the arbitration, or if the Court's assistance is sought with regard to the enforcement of the award, a party may put the award and any reasons before the Court. In relation to the judgment itself, the Court held that in cases where publication of the Court's judgment could result in the

disclosure of sensitive or confidential information and/or where one of the parties can show that it will be prejudiced by the publication, the Court may order that its judgment should be released only to the parties involved or the Court may frame its judgment in a way so as to ensure no confidentiality is lost.

Summary and conclusion

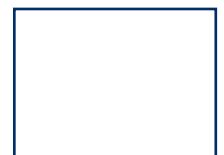
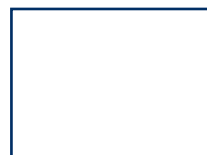
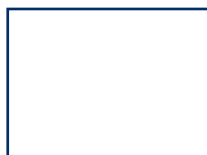
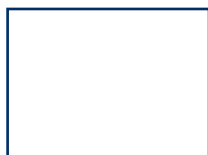
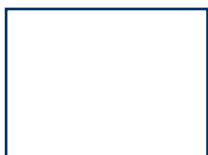
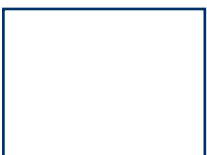
English law recognises an implied term in arbitration agreements that proceedings are confidential which also gives rise to an obligation not to disclose or use documents obtained in arbitration for any other purpose. In addition, arbitral awards are also considered confidential, though there is an important exception to this where disclosure of the award in separate proceedings is required to enforce or protect legal rights. The safest course of action, therefore, for parties wishing to arbitrate any dispute in an entirely confidential manner is to ensure that a suitable confidentiality provision is specifically inserted into any arbitration agreement.



Sharon Gerbi, London

⁵ (1994) CLC 1303

⁶ [2003] 1 WLR 1041



UK PPP contracts – some practical experiences

The Dispute Resolution Group in London has recently been engaged in a number of disputes arising from the practical application of a Public Private Partnership contract. The nature of these disputes, and the attitudes taken by the parties, have shed an interesting light on the difference between what might have been expected of the PPP Contract and what has actually happened in practice. Our experience is that there is a wide gap.

When the PPP Contract was drafted the assumption seems to have been that this would indeed be a partnership, with both parties, the public body employer and the private business contractor, working together amicably in a spirit of co-operation. There is a Dispute Resolution Agreement within the PPP Contract but it is not helpful in resolving disputes quickly or amicably. Possibly the draftsman thought it would rarely if ever be used and/or because he or she had no practical experience of dispute resolution.

Instead of amicable co-operation, a tension has developed between the parties. Their different objectives might have been designed to keep them in a constant state of dispute.

On the one hand the public body wants the public to be provided with the best service possible. It demands that the latest technology be used, that the highest standards be kept. It treats the PPP Contract as an opportunity to fulfil all the dreams it had when it was a public authority starved of investment.

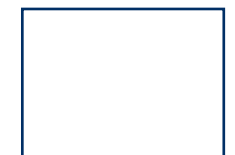
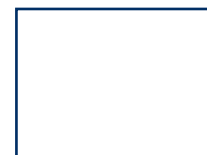
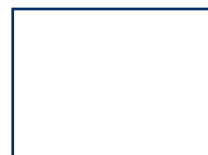
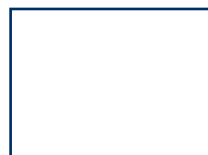
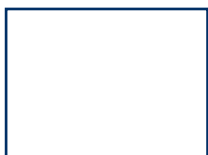
On the other hand the private business contractor wants to keep costs down and profits up, irrespective of the result on the service as a whole. It will comply with the precise terms of the contract to avoid claims of breach of contract – because those cost money – but its overriding motive is profit. Other considerations, if they figure at all, are a long way behind profit in its list of priorities.

In some cases, this attitude of private businesses is a result of the “colonial” approach. A company based in another country, with national contracts with its own government to supply public services, will enter into PPP Contracts in the UK to provide similar services. These UK contracts are intended to act as sources of cash to improve and

subsidise the services it is providing at home.

This tension between the parties’ objectives leads to a nit-picking approach to the wording of the contract with little or no goodwill or willingness to compromise. For example, we dealt with a dispute which focused on the single word “renew”. The public body insisted that this meant “bring up to date” so that it included modernising old components and, in some cases, providing new components where there had been none before. To the private business contractor the word “renew” meant little more than “clean”. The matter was fought every inch of the way through the entire Dispute Resolution procedure.

So far none of the disputes we have dealt with have got to court, although the Dispute Resolution Agreement does permit this. However, others in the same situation have not been so lucky as the recent case of *London Bus Services Ltd v Tramtrack Croydon Ltd* ((2006) QBD (Comm) (Tomlinson J) 17/3/2006, shows. The tram service provided by the private business contractor was so popular that passenger numbers increased so the trams were crowded. A dispute then



arose about whether the private business contractor was obliged to expand capacity, on what terms and at whose cost. The contract was strictly interpreted – in favour of the private business.

All this leads to some suggestions for anyone involved in drafting or negotiating a PPP Contract:

- Expect the contract to be subject to minute scrutiny by those who have to perform it, and their lawyers, and draft as clearly and unambiguously as possible;
- Put in guidelines for interpretation, not just a definitions clause. Consider some general provisions such as *"Where there is any ambiguity this will be interpreted in such a way as to promote the aims of the contract as set out in the preamble"*.
- When drafting a Dispute Resolution Agreement, consult a litigator who has practical experience of how such agreements work in practice – and who might have to implement it when the first dispute comes along.



Peter Emanuel, London

Spanish case law on the "saisis-contrefaçon" actions

This article considers a Court Order issued on 26 October 2005 by the Commercial Court of Madrid (No. 2) (AC 2006\66) in relation to a claim filed by a pharmaceutical laboratory under the so-called "diligencias de comprobación de hechos" (similar to the French "saisis-contrefaçon").

These types of claim are special features of the Unfair Competition Act ("UCA"), the Patents Act and the Trademarks Act in Spain. For example, in the "saisis-contrefaçon" set out in the UCA, a Claimant can ask the Court to issue a Court Order entitling him to check those facts which are in the prospective Defendant's control provided that these facts are essential to file the claim.

The "saisis-contrefaçon" claim and its application to unfair competition proceedings

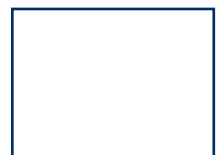
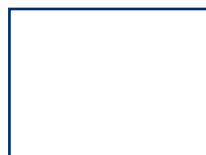
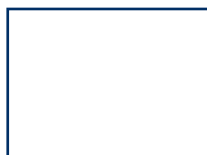
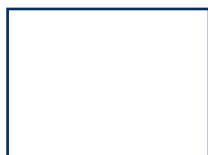
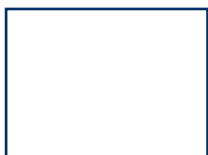
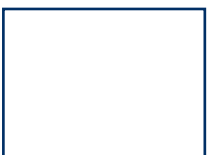
The Spanish Commercial Courts were introduced by the second paragraph of the new article 86 *ter* of the Judicial Power Act. The latest changes to this

Act state that these Commercial Courts will have jurisdiction to deal with unfair competition claims.

Article 24 of the UCA entitles a Claimant bringing an unfair competition action in Spain to apply for a preliminary injunction in order to check the facts which are essential to bringing a full action.

The UCA provides that the procedure which must be followed is the one established under the Spanish Patents Act ("SPA") for the "saisis-contrefaçon" claims. Crucially, this enables the Claimant to inspect the Defendant's premises in order to provide the Court with the evidence required to support a prospective civil claim for infringement. According to the SPA, there are three preconditions to this injunctive relief:-

- (i) the Claimant must be entitled to file the claim i.e. he must be the holder of the patent or the registered licensee;
- (ii) there must be some evidence from which one can infer that an infringement is taking place; and
- (iii) the Claimant must be prepared to provide a bond to cover any damage which may ensue to the



Defendant as a result of the injunctive relief.

The Claimant then has to file the claim within two months from the date the injunction is granted if he is to be entitled to use the evidence gathered whilst the injunction is in place.

Notwithstanding the above, the reality is that the procedural requirements for Article 24 of the Spanish UCA do differ from the ones established by the SPA in that the Claimant must prove that the facts he is seeking to verify are "essential" to prepare the future claim. This is important because of the potential impact of these measures on the Defendant's confidential data and commercial secrets. The Court Order we refer to above is a case in point. It was issued by the Commercial Court of Madrid in *Italfármaco, S.A./ Farmalider, S.A.*

Court Order of 26th of October, 2005 issued by the Commercial Court of Madrid (No. 2) (AC 2006\66).

Italfármaco made an application for a preliminary injunction against Farmalider, which had developed a drug for Italfármaco (subsequently marketed under the name of "Folidoce").

Italfármaco had become aware that Farmalider had been asked by a third party (Laboratorios Stada, S.L ("Stada")) to develop a drug with essentially the same compounds as Folidoce save that it included iodine. Italfármaco alleged that Farmalider had taken advantage of the work done in the development of "Folidoce" in the development of a similar drug for Stada.

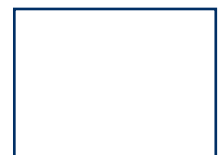
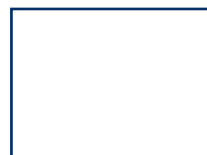
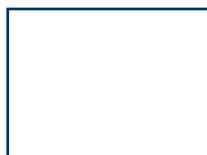
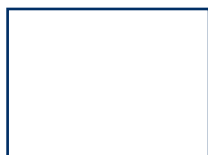
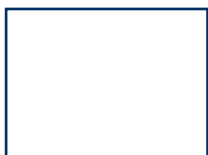
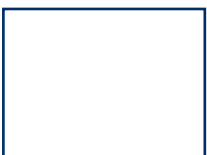
At the time of the application under Article 24, Italfármaco knew that Farmalider had technical knowledge of the composition of Folidoce and that Farmalider was developing a similar drug for Stada. Italfármaco was also in possession of an expert's report concluding that it would be possible to re-use the technical knowledge of Folidoce to develop the Farmalider drug.

In its decision dated 26 October 2005, the Commercial Court rejected the "saisis-contrefaçon" claim on the grounds that it was very difficult to exclude the risk that confidential data belonging to the Defendant could be leaked and that Italfármaco knew that Farmalider was in possession of the so-called "Folidoce Technical Knowledge" and that it was developing a similar drug for Stada. Accordingly, the only

fact to be verified by the Court was that Farmalider's "Technical Knowledge" could be re-used so as to save time and money in the development of the drug for Stada. The Court concluded that this issue could not be the basis of a "saisis-contrefaçon claim" because it was not a fact necessary to enable the Claimant to file his claim: on the contrary, it was the "gordian knot" of the claim.

In conclusion, it appears that the injunctive relief provided for by the UCA will be granted solely when the Claimant cannot, without the Court's assistance, obtain the information necessary to bring an action. The rationale is that the UCA should not operate either to protect the lazy Claimant who has not been concerned about properly documenting his claim or to enable a Claimant essentially to test the strength of his claim prior to filing it.

 **Beatriz Díaz de Escauriaza & Ana Berenguer Giménez, Madrid**



The implementation of the European "enforcement" Directive N.48/2004 in Italy

This article considers the recent implementation of the "Enforcement Directive" 48/2004 ("the Directive").

The Directive came into force on 22 April 2006 and it affects the Italian Copyright Law (Law no. 633/1941) ("ICL") and the Italian Intellectual Property Code ("IIPC").

The primary aim of the Directive is to curtail the ever growing problem of intellectual property infringement and piracy. The most radical reforms relate to the means by which evidence is obtained, precautionary measures, damages and video piracy or "camcording".

Evidence

The Judge is now allowed to obtain information in relation to the origin and the distribution of the infringing goods or services through the cross-examination of not only of the alleged infringing party, but also of third parties (found to be in possession of,

using or supplying the infringing goods or services).

A failure properly to comply with the evidential process can lead to the imposition of criminal sanctions.

The reform has also made an express provision in the CL (Article 156) for the delivery-up of banking and financial documentation in relation to any large scale commercial infringement.

Precautionary Measures

The new Article 162 *ter* of CL provides for seizure of the infringing goods and freezing of the infringer's banking accounts (all on a preventative basis).

The Judge can also order the withdrawal of the goods from the market on a temporary or a permanent basis. In the event that the Judge makes a withdrawal order on a temporary basis, he must also order appropriate changes to the infringing products to protect the intellectual property rights in question.

Damages

The Directive enables the claimant to claim moral damages in addition to economic damages. In relation to the

IIPC, a claim for lost profit shall not be less than the amount which would have been payable by way of royalty pursuant to a legitimate license.

Video Piracy

The Directive also addresses the problem of video piracy or so-called "camcording" which is the illegal recording of movies in cinemas. It is now prohibited to introduce, install or use unlawfully in public places devices allowing the recording, reproduction or transmission of any original works shown there. Furthermore, the public cinemas, theatres, etc are obliged to give notice of the prohibition to the public.

It is clear that the Directive will contribute, in no small way, to the protection of intellectual property rights in Italy.

 Evelina Marchesoni, Milan



Radio broadcasting rights for soccer games in Germany

Introduction

Professional soccer in Germany is financed largely by the licensing of broadcasting rights to soccer games. Profits from soccer are derived principally through the exploitation of media and marketing rights.

The exploitation of these rights raises a potential conflict: the owner of the rights is concerned with securing the most profitable terms whereas public interest is concerned with ensuring that the soccer games should be as widely seen as possible. This conflict has come to a head in recent discussions regarding the proposed so-called "public-screening" of the world-championship 2006 on big screens in German cities.

The German Federal Court of Justice has considered whether the organiser of a sports event has the right to grant a radio broadcaster access to, and radio coverage outside of, a sports stadium for monetary consideration. Judgment was given on 8 November 2005.

Opponents of such "radio-broadcasting" rights argue that in radio coverage, the performance of the reporter is the most important factor whereas in television broadcasting, the viewer regards the picture as the most important part of the coverage. The two methods of broadcasting cannot therefore be compared. It has also been argued that radio coverage relies on the tension of the direct coverage and on the live atmosphere, with the reporter's manner of speaking and articulation being affected by the mood of the stadium. Television and radio broadcasting are, however, similar in that in both cases there is a close temporal and textual connection with the game. Press coverage does not have the same connection.

Central marketing of media rights

The majority of media-rights for the society and joint stock companies of the first and second German soccer leagues are centrally marketed. The Ligaverband e.V. and its 100% owned subsidiary the Deutsche Fußball-Liga GmbH (DFL) (which conducts the operative business), were founded especially for this purpose. Recently, almost exclusive rights were awarded to Arena, a subsidiary of the Cable-TV company Unity Media. Media rights are

marketed after a predetermined procedure dictated by the European Cartel Authority. This follows a commitment to collective marketing of media rights for the German soccer league made by the Ligaverband.

Judgment of the Federal Court of Justice of 11/08/2005 – Circumstance and Conclusion

The facts of the case are as follows: The Claimant was a private radio station in Hamburg. The Defendants were two well-known Hamburg soccer clubs HSV and FC St. Pauli (Defendants no. 2 and 4), and DFL (Defendant no. 3), to which Ligaverband had assigned the "media marketing rights" for soccer league games. In the past, the Claimant reported regularly on the home matches of HSV and FC St. Pauli in the football leagues, either with short live-reports or with updated summaries of the game, broadcasted from the stadium. After the first dispute regarding the existence and the possibility of licensing "radio broadcasting rights" during the football season 2000/01, the DFL requested compensation for the right to broadcast during that season

The Claimant sought a declaration that the Defendants had no rights to live or



other radio coverage for the home matches of the Defendants no. 2 and 4, in the first or second soccer league. In the first subsidiary motion, the Claimant requested a declaration that Defendants no. 2 and 4 were obliged to grant the Claimant compensation for costs, access to games (press seats), participation in press conferences and access to mixed-areas.

In an additional subsidiary motion, the Claimant sought a declaration that it had a claim against the Defendants to free live or other coverage outside of the stadium for the German Soccer League home matches of Defendants no. 2 and 4. The Claimant argued that the broadcasting coverage of these events should be cost-free, except for appropriate compensation for costs, and should last up to five minutes per game.

The Federal Court of Justice dismissed the claim, finding that the Claimant had no right to free access to the stadium for the purpose of radio broadcasting. The Federal Court of Justice held that the Defendants should pay compensation for radio broadcasting rights, a condition to the access to the German Soccer League home matches.

Legal issues arising from the decision of the Federal Court of Justice

The decision of the Federal Court of Justice regarding the "radio broadcasting rights" is noteworthy in relation to the following legal issues:

Domestic authority of the organiser

The BGH makes clear that the domestic authority that derives from §§858 ff., 1004 BGB supports the Defendants no. 2 and 4, as they are (co-)organisers of the home matches. This right establishes a sufficient basis to grant radio broadcasters access to the stadium, but only on payment of a fee.

The Federal Court of Justice held that at present there is no "radio broadcasting right", in terms of an exclusive authority to report by radio outside of the locality, which is connected with the domestic authority, and is based on title to land.

Market dominating companies - §§19, 20 GWB

A market-dominating company can only require payment of a fee in return for the right to radio broadcasting, if it does not adversely obstruct other companies. It may not treat one

company differently to another, without having an objective reason for doing so (§20 I GWB). The conditions for access must not differ from those that, in all likelihood, would have resulted from effective competition (§ 19 I and IV Nr. 2 GWB).

As a result, the Federal Court of Justice in this case found that there had not been an infringement of relevant antitrust law. In its view, the demand for a fee to access the stadium for the purpose of radio broadcasting, does not give rise to a ground for action.

Art. 5 I 2 GG as civil rights/ basic constitutional rights barrier

The Federal Court of Justice also had regard to the constitutional protection given to the Claimant, as a radio broadcaster, under the freedom of TV and radio broadcasting pursuant to Art. 5 I 2 GG.

In the Court's view, the role of the broadcaster to inform the public, can extend beyond political reporting to include outstanding sports events, on the basis that such events fulfils an important social role.

The protection of Art. 12 I GG extends to the economic exploitation of 'occupational (made) performance'. The economic value of a sports event lies in exploiting the interest of the



audience (whether it is done visually or aurally).

The Federal Court of Justice also drew a parallel with TV broadcasting, where payment of fees has been long accepted. This argument seems fair taking into account the organisational effort and operating expenses, and the risk and costs that arise for the organiser of German Soccer League matches. The organiser should have the certainty of knowing that he does not give permission to broadcast outside of the stadium when he sells a ticket to the sporting event.

Parallel to TV Broadcasting - §5 Rundfunkstaatsvertrag

The second subsidiary motion that applied to short coverage (up to 5 minutes) was dismissed by the Federal Court of Justice.

In the first instance decision of LG Hamburg of 04/26/2002, the Court held that short radio broadcasts cannot be compared to short reports on television, on the basis that the Claimant is not interested primarily in the spread of information, but in coverage beyond this.

Ban on restraint by "program-concerning/related conditions"

The Federal Court of Justice made clear that the marketing of "radio broadcasting rights" should not result in restrictions being placed upon the broadcaster, such as an obligation to broadcast certain editorial contributions, which would limit its ability to present its programme freely.

Summary

The Federal Court of Justice has affirmed the existence and the applicability of "radio broadcasting rights" and brought the legal uncertainty surrounding this issue to an end, for the time being at least.



Joseph Fesenmair &
Markus Körner, Düsseldorf

The prohibition of punitive damages under French law

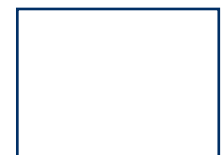
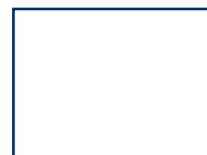
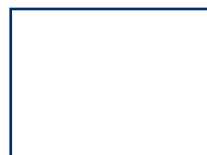
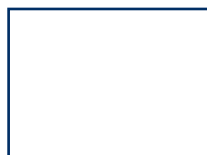
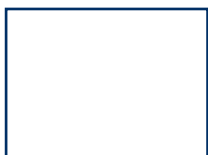
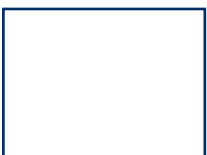
Punitive damages are defined in Black's UK law dictionary (7th ed) as "*damages awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit*" which are "*intended to punish and thereby deter blameworthy conduct*" (idem). Such damages do not currently exist in French law as they contradict the well-established rules governing compensation.

Distinction between compensation and penalty

The existence of an actual loss is required for a victim to claim for compensation since compensation is, as its name suggests, designed to "make good" that loss. It is therefore distinguishable from punitive damages.

Traditionally, under French law, the aim of civil law is to compensate and the aim of criminal law is to punish.

However, some acts (although they do not constitute criminal offences) may require "penalties" to be paid in



addition to compensation. For example, **administrative penalties** (ordered by administrative courts) to punish anti-competitive acts: companies may be required to pay 10% of their global turnover by the Competition Council and civil penalties (ordered by judicial courts) for, for example, the unlawful demolition of a building.

The main difference between penalties and compensation, under French law, is that penalties are paid to the State and not the victim. Acts punishable by penalties and the levels of those penalties are defined by statute.

The principle of integral compensation (réparation intégrale)

Compensation aims at putting the victim in the same situation as he would have been in had the damage not occurred and the general rule is that the person who is found liable for the damage has to compensate the victim for his "whole but sole" loss. The seriousness of the misconduct or the attitude of the wrongdoer is not therefore taken into account when the level of compensation is being determined.

The French Supreme Court takes a very strict line on this and this principle is reiterated in case-law. For example, in 1964, the French Supreme Court stated that:-

"The indemnity required to compensate the damage incurred shall be calculated based on the amount of the damage, without any influence of the seriousness of the misconduct on the amount of the said indemnity" (Civ. 2e, 08/05/1964)

And in 2000, the Court of Appeal in Versailles stated that *"the indemnity is awarded to compensate the incurred damage regardless of the seriousness of the misconduct or of the indemnity's dissuasive powers"*.

Punitive damages are therefore very clearly and strictly prohibited by French courts.

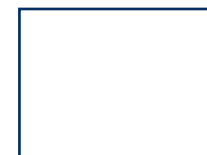
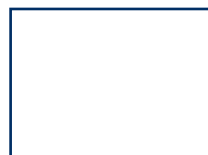
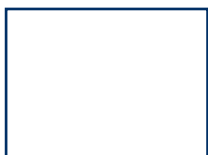
The absence of a duty for the victim to mitigate damages

However, the effect of this is that there is no duty for the victim to mitigate his loss. The victim's conduct can be taken into consideration when liability is determined but the amount of the damages awarded to the victim cannot

be reduced on the grounds that the victim failed to mitigate his loss.

This principle of integral compensation which excludes the application of punitive damages and mitigation is unchallenged in the French courts, but it would be interesting to see how the French courts would treat a foreign judgment awarding punitive damages. This issue has not yet been addressed by the French courts although the French Supreme Court has ruled that the principle of integral compensation does not constitute a fundamental principle under the French International Public Order (Cass. Crim. 16/06/1993: when deciding whether the limitation of compensation provided by an international convention was infringing the French International Public Order). This could suggest that the French courts might treat a decision awarding punitive damages as enforceable in France.

■ ■ Marie Bresson, Paris



The Stockholm Chamber of Commerce Arbitration Institute appoints world leading arbitration authorities to its Board

The Stockholm Chamber of Commerce Arbitration Institute ("the SCC Institute") was established in 1917 and provides dispute resolution services to over forty countries. Over the past few decades the SCC Institute has emerged as one of the leading arbitration institutions in the world with an impressive network of international arbitrators.

The Board of the SCC Institute has traditionally consisted of renowned Swedish lawyers with special knowledge in matters related to international arbitration. In order to increase the international network of the SCC Institute and to improve services to parties to international arbitral proceedings even further, the number of Board Members has

recently been increased to include six new foreign members⁷ (all of them leading international authorities on arbitration).

Dr Mohamed Aboul-Enein, Egypt
Director of the Cairo Regional Centre for International Commercial Arbitration. Secretary General of the Arab Union of International Arbitration.

Dr. Pierre A. Karrer, Switzerland, Vice Chairman
Honorary President of the Swiss Arbitration Association, Court Member of ICC Court of Arbitration. Mr Karrer has practiced as a full-time arbitrator since 2005.

Professor Alexander S. Komarov, Russia
President of the Moscow International Commercial Arbitration Court. Law Chair at the Academy of Foreign Trade. Member of the Russian President Council on Civil Legislation and on Judicial Reform.

David W. Rivkin, USA
Board Member of the American Arbitration Association.

V.V. Veeder QC, England
Appointed to the London Court of International Arbitration (LCIA) in 1989. Vice President of the LCIA until 2003.

Dr. Wang Sheng Chang, China
Vice President and Secretary General of China International Economic and Trade Arbitration Commission (CIETAC). Member of the ICCA and the LCIA.

The Board of the SCC Institute also includes the six Swedish Board Members namely Mr Johan Gernandt (Chairman), Mr Jan-Mikael Bexhed, Professor Dr Kaj Hobér (Vice Chairman), Mr Ulf Jonsson, Mr Einar Lundgren and Dr Patricia Shaughnessy.

Further information on the SCC Institute can be found at www.sccinstitute.com.



**Anders Midby &
Hanna Larsson, Stockholm**

⁷ The list of appointments is not exhaustive in each case.



Events

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

27 June
Indictment of Legal Entities
Paris

27 June
OGC Models
London

29 June
Cutting Edge Business Sectors Demand
Cutting Edge Solutions - Can
Arbitration Keep Pace?
London (in association with Chartered
Institute of Arbitrators)

29 June
Webcast: Recent Developments in
European M&A and Securities Law
Presented by ACC's Corporate &
Securities Law Committee and
sponsored by Bird & Bird

29 June
Instant Messaging Seminar (Organised
by Dicis)
Brussels

4 July
Employment Law
Frankfurt

11 July
Legal Briefing FOIA Update
London (Hosted by NCC)

21 July
Age Discrimination: The Countdown -
Are You Ready?
London (co-hosted with REC)

14 September
Outsourcing Seminar
Frankfurt

25 September
Private Enforcement Seminar
Paris

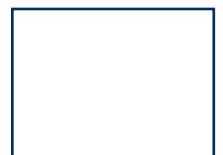
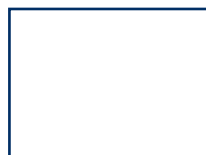
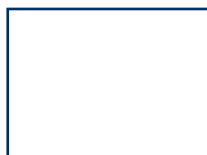
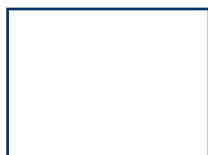
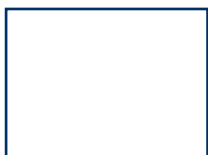
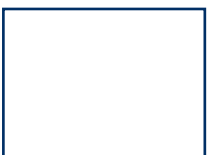
27 September
Patent Seminar
London

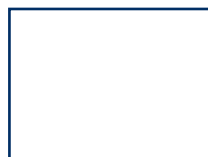
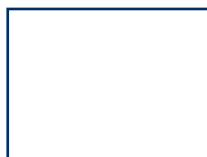
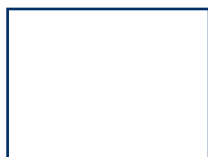
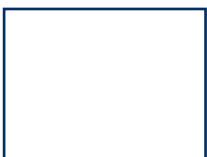
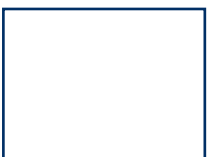
12 October
Mediation Awareness
Stockholm (together with The SCC
Mediation Institute)

31 October
Hong Kong In House Congress
IT Law
Hong Kong

16 November
Shanghai In House Congress
IT Law
Hong Kong

If you would like further information regarding any of these events, please contact Michelle Prior by email at evens@twobirds.com or phone on +44 (0)20 7415 6000.





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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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