COMMERCIAL

Rome I: Ministry of Justice Outlines Main Provisions

The United Kingdom’s Ministry of Justice (MoJ) has issued guidance on Regulation 593/2008/EC on the law applicable to contractual obligations, commonly referred to as Rome I, which came into force in the United Kingdom on 17 December 2009. The guidance is intended to provide a brief summary of the most important provisions of Rome I.

ARTICLE 3—FREEDOM TO CHOOSE A PARTICULAR LAW

Article 3 reflects the position under the Rome Convention (i.e., that a contract shall be governed by the law chosen by the parties), with the addition of two clarifications:

- A choice of law by the parties need not be made in express terms.
- When determining the question of whether or not a choice of law has been demonstrated, the courts will take into account the fact that the parties have conferred exclusive jurisdiction on a particular court or courts.

ARTICLE 4—APPLICABLE LAW IN THE ABSENCE OF CHOICE

Article 4 sets out the rules that apply where the parties have not chosen an applicable law under the contract. The MoJ guidance notes that, whilst the provision appears to differ widely from the equivalent rules in the Rome Convention, in practice its effect is not different significantly from the manner in which the UK courts have applied the Rome Convention.

ARTICLE 6—CONSUMER CONTRACTS

The provision of the Rome Convention relating to consumer contracts applied only to contracts for the supply of goods and services. Article 6 extends beyond this limitation and, as such, exceptions have been made for contracts of carriage and insurance contracts. Otherwise, the general rule is that consumer contracts are governed by the laws of the country in which the consumer has his habitual residence, provided that the business party either pursues his commercial activities in, or directs such activities to, that country.

A consumer contract may specify a different law to apply to the contract (again, provided that the business party pursues or directs his activities to the relevant country). However, this specification must not have the effect of depriving a consumer of protection which the business party would not be able to avoid contractually under the law that would have applied in the absence of a choice of law clause.

ARTICLE 22—STATES WITH MORE THAN ONE LEGAL SYSTEM

Article 22 leaves it up to Member States to decide which law applies if they have more than one internal legal system. It is therefore for the United Kingdom to determine the appropriate choice of law in respect of disputes that are connected to two or more of the jurisdictions of England and Wales, Scotland and Northern Ireland.

ARTICLE 28—APPLICATION IN TIME

Article 28 provides that Rome I will only apply to contracts concluded after 17 December 2009, the date on which it came into force.

Contract Construction: Admissibility of Without Prejudice Negotiations

Without prejudice negotiations are not normally admissible in proceedings to which they relate. There are exceptions and Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] EWCA Civ 79 tests their boundaries. Allowing an appeal from a decision of Mr Justice Smith, the Court of Appeal of England and Wales has held that the exceptions do not extend to allowing evidence of without prejudice negotiations to establish background facts known to the parties as an aid to the construction of a settlement agreement reached in the course of those without prejudice negotiations.

BACKGROUND

The dispute was between two shipping companies over one party's alleged failure to comply with a settlement agreement relating to a monthly payment to the other under a series of freight forward swap agreements (FFAs). The FFAs provided for monthly cash settlements of the net amounts due between the parties. The Defendant, TMT, failed to make a monthly payment and after some discussion between the parties a settlement agreement was reached. The Claimant, Oceanbulk, complained subsequently that TMT had failed to comply with the settlement agreement. During proceedings, Oceanbulk applied to strike out part of TMT’s pleading that it was entitled to rely on evidence of without prejudice negotiations prior to the settlement agreement.
At first instance, Smith J found for TMT. He said that the distinction between identifying the terms of an agreement and interpreting them is a fine one. He also considered that there was authority to support TMT's position in *Admiral Management Services Ltd v Para Protect Europe Ltd* [2002] 1 WLR 2722. The judge also considered that since evidence of without prejudice exchanges is admissible if there is a plea of rectification, it would be illogical not to admit it for the purpose of construction. Additionally, he considered that a court which is deprived of evidence of the background against which an agreement is made would be less well equipped to discern the parties' intentions and less likely to construe the contract in accordance with them. The judge held that evidence about that representation could be given. His reasons were based on: (i) the fineness of the distinction between identifying the terms of an agreement and interpreting them, and (ii) the interests of justice.

**COURT OF APPEAL DECISION**

The main issue on appeal therefore was whether without prejudice discussions can be given in evidence in support of arguments about construction if they establish a fact that is part of the background to, or the matrix of, the contractual arguments about construction if they establish a fact that is part of the background to, or the matrix of, the contractual agreement. Lord Justice Longmore noted that as a matter of policy, it was the case that the without prejudice rule applied to exclude all negotiations aimed genuinely at settlement and that parties should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings.

While the judge considered that the reasoning by which a court seeks to give effect to the parties' intentions could be classified either as an identification of an implied term or an exercise of construction, the courts did not often imply terms. Just because (in rare but obvious cases) that could happen, it did not, in Longmore LJ's view, mean one should be able to adduce evidence of what occurred in without prejudice negotiations.

TMT's strongest point was that the logic of the exception enabling parties to give evidence as to the terms of an agreement extended also to permissible relevant evidence of background if that was relevant to construction. Otherwise one could, in theory, have a term that would have one meaning if without prejudice material was excluded and another meaning if it was not excluded. In Longmore LJ's view, that danger was more forensic than real since very few disputes about interpretation were informed truly by evidence about preceding without prejudice oral discussions.

Longmore LJ concluded, in disagreement with the judge, that evidence of without prejudice communications was not admissible at trial in the current proceedings. The fact that such communications might reveal some background fact that could arguably be relevant to the construction of the settlement agreement did not suffice to fold the without prejudice umbrella.

**COMMENT**

Oceanbulk apparently intended to fall back at trial on the general rule that pre-contractual negotiations are not normally admissible for the purpose of determining the contractual meaning. But as Longmore LJ pointed out in his judgment, the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 held that the general exclusionary rule does not prevent evidence of negotiations from being admitted to establish a fact that may be relevant as background known to the parties.

**ADVERTISING AND MARKETING**

**UK Advertising Codes: Still Ensuring Advertisements are Legal, Decent, Honest and Truthful**

Following the 2009 industry consultation, on 16 March 2010 the Committee of Advertising Practice (CAP) published the new CAP and Broadcasting Committee of Advertising Practice (BCAP) Advertising Codes and announced that they will go live on 1 September 2010. Although the Codes have been revised regularly, this is the first comprehensive review for the past eight years and the first time ever that the Codes have been reviewed by CAP itself rather than a statutory body.

**BACKGROUND**

CAP's stated aim of the review was to ensure that the Codes remain up to date and fit for purpose, providing adequate protection to children and vulnerable adults yet retaining an environment in which responsible advertising could flourish.

There have been few changes to the Codes following the consultation. What came out of the process was extensive clarification of the rules, the thinking behind them and the way in which CAP anticipates that they will be applied.

**THE MAIN CHANGES**

An effort has been made to increase consistency between the broadcast and non-broadcast advertising Codes, which now share many of the key rules, notably those on misleading advertising, harm and offence. The four existing broadcast advertising Codes (radio, television, teletext and scheduling rules) have been merged into a single broadcast advertising Code.

The protection of children is an important theme throughout the Code review and this includes tightening up the rules on data collection and exhorting children to buy products or persuade adults to buy them. New rules have been introduced to prevent the scheduling of advertisements for age-restricted games in proximity to programmes likely to appeal to children. The
rules have been updated to reflect new legislation on the advertisement of infant and follow-on formula.

Social and environmental responsibility takes on a new emphasis in the Codes, focusing particularly on environmental claims, with the introduction of a new rule preventing advertisers from exaggerating the environmental benefits of their products. The BCAP Code has a new section on environmental claims which mirrors that of the existing CAP Code.

CAP has taken the opportunity of the Code review to align its stance on health with European legislation. The new Codes reflect the main provisions of the EU Nutrition and Health Claims Regulation (1924/2006/EC), which prevents misleading claims about food products and their ingredients. In addition, the Codes incorporate the regulatory requirements set out in the Medicines (Traditional Herbal Medicinal Products for Human Use) Regulations 2005.

Consumer protection has been one of the fastest-changing areas of law in recent years and the Code review reflects this, including clarification on the use of the word "free". A requirement has been introduced requiring debt advice to comply with OFT guidelines.

**COMMENT**

The CAP Code covers paid-for advertisements and sales promotions on websites, but does not currently apply to a company's marketing communications on its own website. At the time of the Code review, the Advertising Association was conducting its own consultation on the possible extension of the CAP Code to cover such communications. This review has now been completed and the Advertising Association has recommended the extension of the Code to cover marketing communications on company websites. CAP is now assessing how to put this into practice, with the expectation that this will occur later this year.

**ENTERTAINMENT AND MEDIA**

**Privacy and Libel: Recommendations for Change**

On 9 February 2010, the House of Commons Culture, Media and Sport Select Committee published its Report on Press Standards, Privacy and Libel. The report contains wide-ranging recommendations on the balance between privacy and press freedom, the increased use of injunctions and super-injunctions, so-called "libel tourism", the costs of bringing libel actions, press standards and regulation of the press.

**PRIVACY**

*Section 12 of the Human Right Act (the Act)*

Section 12 of the Act seeks to set a higher standard when granting an injunction where the injunction might impact on the freedom of expression. The Committee recommended that a fast-track appeal system should be developed for interim injunctions in order to minimise delay and costs.

*Should parliament legislate on privacy?*

The Committee concluded that, given that the Act has only been in force for nine years and there are only a few judgments involving the balance between Articles 8 and 10, the law relating to privacy will become clearer as more cases are decided by the courts. It concluded that it is better for privacy matters to continue to be dealt with by the common law.

**LIBEL AND PRESS FREEDOM**

*Justification and the burden of proof*

The justification defence requires that the defendant prove that the words complained of are true, or substantially true.

On balance, the Committee decided that it should be up to the defendant to prove the truth of the allegations. However, the Committee expressed concern where the burden has become onerous and urged the Government to examine the matter carefully, including how the courts might better require claimants to make reasonable disclosures without increasing costs through expensive appeals.

*Fair comment*

The Committee heard evidence that the law is stifling debate in the scientific and medical community as writers and commentators are being sued for libel. It urged the Government to take account of these concerns, in particular the issue of fair comment in academic peer-reviewed publications.

*The "responsible journalism" defence*

The Committee endorsed the defence. However, it was concerned that it can be costly and therefore inaccessible to smaller publishers. It recognised the potential for putting it on a statutory footing and recommended that the Government launch a detailed consultation on the question.

*Corporations and defamation*

Companies can sue for defamation, but local authorities, trades unions and unincorporated bodies can not.

The Committee looked at whether companies should continue to have a right of action in libel when other countries, such as Australia, have passed legislation preventing corporations from pursuing libel cases for the reason that large companies can stifle legitimate public debate this way.

However, the Committee also heard evidence that companies need to be able to protect their reputations, which are, after all, important to their success or failure.

The Committee suggested that one way of addressing the issue might be to introduce a new category of tort entitled "corporate defamation", which would require a corporation to prove actual
damage to its business. Alternatively, companies could rely on the action of malicious falsehood where damage needs to be shown and malice or recklessness proved.

**Libel tourism**
The Committee addressed the issue of “forum shopping” in libel cases.

In conclusion, the Committee said that, in cases where neither party is domiciled nor has a place of business in the United Kingdom, the claimant should face additional hurdles before jurisdiction can be accepted by the UK courts. The Ministry of Justice should consider how procedure could be amended to introduce such hurdles.

**The internet and the “repeat publication” rule**
Because of the “repeat publication” law in the United Kingdom, each time an article is accessed over the internet—even if it is more than a year since it was first posted online (thus bypassing the Statute of Limitations one year rule)—that access constitutes a fresh publication on which the publisher can be sued for libel.

The Committee recognised that a balance must be struck between the Statute of Limitations and the repeat publication law and recommended that a one year limitation period be introduced in respect of publication on the internet, but that it should be possible to extend the period if the claimant can satisfy the courts that he or she could not reasonably have been aware of the article before.

**COSTS**
The Committee recognised that the problem of excessive costs in defamation cases must be addressed urgently. It did not accept that one way of controlling costs is to encourage early settlement as this may preclude a defendant from obtaining justice.

The Committee welcomed the Civil Procedure Rules Committee's costs budgeting pilot for all defamation and malicious falsehood proceedings. The aim of this is to ensure that the court manages the costs in such a way that is proportional to the value of the claim. Parties must exchange costs estimates before each hearing and are required to monitor costs against budget.

The Committee did not agree that eligibility for conditional fee arrangements should be means tested as this would result in access to justice being limited to the extremely poor and the extremely rich. However, it questioned why the upper limit for success fees had to be set as high as 100 per cent and why success fees and after-the-event insurance premiums are normally recoverable in full from the losing party.

The Committee concluded that after-the-event insurance premiums should be irrecoverable. The Committee would support the recoverability of such fees from the losing party being limited to 10 per cent of costs leaving the balance to be agreed between solicitor and client.

**PRESS STANDARDS**
The Press Complaints Committee (PCC) Code of Conduct (the Code) sets out certain standards of reporting, but the Committee noted that the PCC had not taken action against breaches fast enough. The Committee also stated that custodial sentences should be introduced for breaches of Section 55 of the Data Protection Act 1998 (the unlawful obtaining of personal data).

**SELF REGULATION OF THE PRESS**
The Committee said that, in general terms, it retains the view that self-regulation is preferable to statutory regulation and should continue. However, the industry regulator, the PCC, must be given enhanced powers so that it can regulate effectively; it should be given the ability to impose a financial penalty where serious breaches of the Code have occurred. It should also have the ultimate power to order the suspension of printing of the offending publication for one issue.

**COMMUNICATIONS AND NEW MEDIA**

**Anti-Counterfeiting Trade Agreement**
On 21 February 2010, Peter Hustinx, the European Data Protection Supervisor (EDPS), issued an Opinion on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), in which he calls on the European Union, and in particular the European Commission, “to strike a right balance between demands for the protection of intellectual property rights [IPRs] and the privacy and data protection rights of individuals” when negotiating ACTA.

The European Commission is currently negotiating with Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States. The ACTA negotiations are aimed at adopting a new multilateral agreement designed to strengthen the enforcement of intellectual property rights and to combat counterfeiting and piracy of goods such as luxury brand clothing, music and films.

ACTA's goal of fighting piracy and counterfeiting will be pursued through three primary components: (i) international cooperation; (ii) enforcement practices; and (iii) definition of a legal framework for the enforcement of IPRs in several identified areas, in particular in the digital environment. Notably, ACTA will deal with legal procedures (such as injunctions and provisional measures), the role and responsibilities of internet service providers (ISPs) in deterring...
copyright infringement over the internet and multi-jurisdictional cooperation measures to prevent goods from crossing borders.

The EDPS raises the concern that even if the intended objective of ACTA is to pursue only large scale infringements of IPRs, the activities of ordinary citizens might be captured under ACTA, especially as enforcement measures take place in the digital environment. He stresses that this will require that appropriate guarantees are set forth to protect the fundamental rights of individuals.

The EDPS appears to question whether ACTA’s aims can be lawfully achieved with regard to the European Union’s current data protection regime. The Opinion cites reason after reason why large scale monitoring of the internet activities of individuals by copyright holders and collation by ISPs of IP addresses associated with allegedly infringing activity are basically unlawful. These arguments attack the legal foundation of any anti-piracy legislation based on a graduated or a “three strikes” response involving ISP monitoring of user activity and potential user disconnection from the internet.

The Opinion considers whether three strikes policies are necessary, as Article 8 of the European Convention on Human Rights refers expressly to the requirement that any interference or restriction must be “necessary in a democratic society”. According to the EDPS, three strikes policies like the French HADOPI scheme constitute a disproportionate measure and cannot be considered as a necessary measure. The Opinion identifies specific legal reasons why the three strikes approach is problematic from a data protection point of view, highlighting first the doubtful legal grounds for processing of individuals by copyright holders and collation by ISPs of IP addresses associated with allegedly infringing activity are basically unlawful. These arguments attack the legal foundation of any anti-piracy legislation based on a graduated or a “three strikes” response involving ISP monitoring of user activity and potential user disconnection from the internet.

The EDPS is not alone with these concerns. On 10 March 2010, the European Parliament announced its own concerns over ACTA and whilst these focus more on the lack of transparency in the negotiations of the agreement, Members of the European Parliament (MEPs) are also insisting "that data protection and privacy rights of citizens must be safeguarded". As the protracted debate over the "fundamental right" to internet access during the passage of the EU telecoms package demonstrated, MEPs will fiercely resist three strikes anti-piracy measures.

The kernel of Mr Hustinx's opposition to three strikes policies, however, is not so much the question of interference with a fundamental right to internet access but rather a question of invasion of privacy and interference with the data protection rights of individuals on a massive scale, which is out of proportion to harms such policies seek to curtail. This is a narrow but significant focus in the wider discussions surrounding the issues of on-line copyright infringement and digital piracy.

Keywords, Sponsored Links and Trade Mark Infringement

BACKGROUND

AdWords enables advertisements (sponsored links) to be displayed, in return for payment, alongside natural search results that appear in response to keywords. Keywords are words or terms that can be purchased by advertisers. When a keyword is entered into a search engine, a short advert is displayed in the "sponsored search" section of the engine’s webpage. The sponsored search section is separate from the natural search results section.

Three cases before the European Court of Justice (ECJ)—Google France & Google Inc v Louis Vuitton Malletier C-236/08, Google France v Viaticum & Luteciel C-237/08 and Google France v CNRRH, Pierre-Alexis Thonet, Bruno Raboin & Tiger, franchisée Uniciis C-238/08 23 March 2010 (unreported)—group together three references from the French Cour de Cassation. Case C-236/08 concerned the use of registered marks (Vuitton, Louis Vuitton and LV) as keywords without the consent of the proprietor, used to direct users to sites offering counterfeit products. Cases C-237/08 and C-238/08 concerned the use of registered marks (Bourse des Vols, Bourse des Voyages and BDV; and Eurochallenges) without the consent of the proprietor as keywords purchased by third parties to direct users to competitors of the trade mark proprietors.

TRADE MARKINFRINGEMENT

The ECJ addressed the issue of infringement under Article 5(1)(a) of the Trade Marks Directive (89/104/EEC) and Article 9(1)(a) of the Community Trade Mark Regulation (40/94/EC), which apply where there is identity of marks and goods and services. The judgment considered the essential “badge of origin” function of the trade mark and the secondary functions of communication, investment or most importantly for the purposes of these disputes, advertising.

“Use” of the mark

The Court concluded that as the referencing service provider only creates the technical conditions necessary for the use of the sign, although it is paid for this service, it does not offer the service or goods itself, and is therefore not involved in the use of the mark in the course of trade.

The Court did find, however, that advertisers who purchase trade marks as keywords can be liable in certain circumstances for trade mark infringement.

Adverse effect on the essential function of indicating origin

The function of indicating the origin of the mark would be affected adversely if the advert did not enable normally
informed and reasonably attentive internet users, or enabled them only with difficulty, to ascertain whether the goods or services referred to by the advert originated from the proprietor of the trade mark or an undertaking connected economically to it or, on the contrary, originated from a third party.

Adverse effect on the advertising function of the mark
The Court stated that this function was not affected adversely by the display of a third party's sponsored link and related advert triggered by the proprietor's mark. The Court recognised that even if the proprietor of a mark bought its own mark as a keyword, the price paid for the keyword would not ensure that the proprietor's sponsored link and advert would appear above those of its competitors (other purchasers of the keyword). Such factors alone, did not, in the Court's view, have an adverse effect on the advertising function of the mark. Moreover, in the Court's view, the proprietor of the mark would appear in the list of the natural results, usually in one of the highest positions on that list, such that the visibility to internet users of the goods or services of the proprietor of the trade mark was guaranteed, irrespective of whether or not that proprietor was successful in also securing the display, in one of the highest positions, of an advert under the heading "sponsored links".

THE E-COMMERCE DIRECTIVE
In relation to the hosting defence, the Court found that the referencing service provider could be liable if its activities were other than neutral, "in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores". Such activities would have to be assessed on their facts, although it is clear that if the referencing service drafted the contents of the sponsored link advert, it would be liable. Further, if the referencing provider failed expeditiously to take down an unlawful sponsored link advert on becoming aware of its unlawful nature, it would also be liable.

COMMENT
It appears that the Court has found a middle ground that protects the role of "referencing service providers" in allowing customers to use the internet to find relevant goods and services whilst penalising advertisers who attempt to mislead consumers by using a mark that is not their own.

CONFIDENTIALITY

Breach of Confidence: Entitlement to Account of Profits
In relation to Vercoe v Rutland Fund Management Ltd [2010] EWCH 424 (Ch), Mr Justice Sales has made it clear that a successful claimant in an action based on breach of obligations of confidentiality, does not have complete discretion to choose between claiming an award of damages based on the notional fee the defendant should have paid to be released from those obligations and claiming an account of profits. The case relates to a venture capital company being found to have breached confidentiality agreements by using confidential information provided by the Claimants to proceed with a management buy-in without the Claimants' involvement.

BACKGROUND
The claim was brought by two individuals in respect of a management buy-in transaction in relation to a pawn broking company. The Claimants identified an opportunity to purchase shares in the company. It appears that the Court has found a middle ground that protects the role of "referencing service providers" in allowing customers to use the internet to find relevant goods and services whilst penalising advertisers who attempt to mislead consumers by using a mark that is not their own.

DECISION
Except for the fiduciary duty claim, Sales J found for the Claimants. In the Claimants’ claim based on breach of obligations of confidentiality, the Claimants submitted that they had complete discretion to choose between claiming compensation and claiming an account of profits. It is clear that if an account of profits were ordered, the Claimants would receive more damages than the sums paid as damages for breach of contract.

In rejecting that submission, Sales J said that it had long been recognised that in relation to a claim based on breach of confidence there were circumstances in which the claimant would not be allowed to choose a remedy in the form of an account of profits and might be confined to an award of damages. This was normally to be assessed by reference to the value of a notional reasonable agreement to buy release from the claimant's rights as in relation to the breach of contract claim. The test was whether the claimant’s interest in performance of the obligation in question made it just and equitable that the defendant should retain no benefit from his breach of that obligation.

The judge accepted that in some situations, where the rights of the claimant were of a particularly powerful kind and his interest in full performance was recognised as being particularly strong, there might well be a tendency to recognise that a claimant should be entitled to a choice of remedy.
In light of case law, Sales J's view was that where one was not dealing with infringement of a right that was clearly proprietary in nature, such as a patent, and there was nothing exceptional to indicate that the Defendant should never have been entitled to adopt a commercial approach in deciding how to behave in relation to that right, the appropriate remedy was likely to be an award of damages.

In this case, Sales J considered that an award of an account of profits would not be an appropriate remedy.

COMMENT
The judgement provides a picture of the principles governing the availability of the remedy of an account of profits and the higher protection it affords claimants. The judge draws the distinction between the lesser protections available in an ordinary commercial context and the greater protection where there is a fiduciary relationship.

DESIGNS

Novelty: Overall Impression

In its first ruling on the Community registered design, Grupo Promer Mon Graphic SA v The Office of Harmonization for the Internal Market T-9/07 18 March 2010 (unreported), the General Court of the European Union has overturned the Third Board of Appeal's decision that a design registered by Pepsico Inc for “promotional items for games” produced a different overall impression to an earlier design registered by a Spanish company, Grupo Promer Mon Graphic SA. The General Court upheld the Board's narrow definition of the category of designs in question, but decided that Pepsico's design did not produce a different overall impression to Grupo Promer's earlier design.

The design of Pepsico’s application was registered for “promotional item[s] for games” and was represented as follows:

Grupo Promer's design was registered for “metal plate[s] for games” and was represented as follows:

The Board had adopted a narrow definition of promotional items covered by both designs, “tazos” (in Spanish), “rappers” or “pogs” (in English). These are essentially small discs made of plastic or metal with images printed on the top surface which, if pressed, produce a sound and which are used to promote other goods, in this case, biscuits or potato snacks. The Court found that although Pepsico's design was registered for the broad category of "promotional items for games", an analysis of the actual design showed that it belonged to a specific category within the promotional items category. Therefore, the designs were in the same category of specific goods, i.e., pogs.

The Court observed that the informed user in this case is particularly observant and has some awareness of the state of the prior art. Since the goods in question were promotional items used to sell the company's products, rather than the actual products themselves, the informed user could be a marketing manager. It was also noted and not disputed that the informed user could also be a child aged between five and ten years old. The important point was that both categories of person were familiar with the concept of pogs.

Taking the freedom of the designer (which the Court had already found to be severely restricted) into account, the Court found that there was one particular feature of the designs that was the same, but which did not need to be the same. In particular, both designs had a concentric circle approximately one third of the way from the edge to the centre. The Court held that that circle was not necessary to the design, because a shape other than a circle, such as a triangle, square, oval or a hexagon, could in fact have been used to delineate the central part of the design. Pepsico had, therefore, been free to develop that particular element of the design. Therefore, the Court agreed with Grupo Promer's argument that the designs did not produce a different overall impression on the informed user.

TRADE MARKS AND PASSING OFF

MG X POWER Struggle

In Nanjing Automobile (Group) Corporation, Nanjing Automobile Corporation (UK) Ltd v MG Motor UK Ltd v MG Sports & Racing Europe Ltd and William James Riley [2010] EWHC 270 (Ch), Sir William Blackburne (sitting as England and Wales High Court judge) decided in favour of Nanjing Automobile for registered trade mark infringement and passing off.

BACKGROUND
In July 2005, Nanjing entered into an agreement with MG Rover and through its administrator acquired most of MG Rover's assets and trade marks, including a large number of Community and UK trade marks consisting of the MG marks
and the octagonal logo. It was agreed that very substantial goodwill and reputation subsisted in the marks in question.

In 2007, MG Sports and the second Defendant, (its majority shareholder and managing director) made and sold cars depicting the letters MG and MG X POWER. Nanjing sued for trade mark infringement and passing off, seeking injunctive relief and orders that MG Sports cease the use of the letters MG in its company name and domain name.

MG Sports’ defence was that it was entitled to use the mark pursuant to an agreement dated 27 June 2007 under which it acquired certain assets from MG Rover including the MG X POWER-branded business. MG Sports claimed that the MG X POWER UK and Community trade marks had not been assigned to Nanjing under the 2005 agreement, but had been assigned to MG Sports under the 2007 agreement. MG Sports counterclaimed for revocation of 32 MG registrations in Nanjing’s name.

DECISION

Sir William Blackbourne held in favour of Nanjing and granted an injunction to restrain MG Sports from passing off and from trade mark infringement. His view is summarised as follows:

- On the proper construction, the 2005 agreement transferred the right to the MG X POWER marks to Nanjing.
- The 2005 agreement has a very wide definition of “intellectual property” and hence all MG Rover’s trade marks passed to Nanjing in 2005.
- Since Nanjing was the rightful owner of the MG marks, MG Sports could not have acquired them in 2007 from MG Rover as that company did not own them.
- The Court also found the second Defendant jointly liable with his company as his conduct in relation to MG Sport’s activities, “went far beyond his purely constitutional role in the governance of the company”.
- The revocation actions failed and MG Sports was ordered to change its name and to transfer to Nanjing any domain names comprising the MG mark.
- As MG Sports was never the registered proprietor of either the MG or the MG X POWER trade marks, it could not avail itself to the defence of “use of one's own trade mark” defence under the Trade Marks Act 1994, Section 11(1).

Descriptiveness: Specific Characteristics of the Market

In O2 (Germany) GmbH & Co OHG v The Office of Harmonization for the Internal Market T-344/07 10 February 2010 (unreported), the General Court of the European Union annulled a Board of Appeal decision that had ruled that O2’s Community trade mark application for HOMEZONE in respect of various goods and services, including telecommunication services, should be refused registration on the absolute grounds of refusal set out in Article 7(1)(b) and (c) and Article 7(2) of the Community Trade Mark Regulation (40/94/EC).

BACKGROUND

In October 2005, O2 Germany applied to register the composite word mark HOMEZONE as a Community trade mark (CTM) in respect of goods and services in Class 9, Class 38 and Class 42.

The examiner rejected the application pursuant to Articles 7(1)(b) and (c) of the Regulation. O2 appealed to the Board of Appeal, which upheld the examiner's decision, finding that: (i) the mark breached Article 7(1)(c) since it designated the characteristics of the goods and services in question and was therefore descriptive; and (ii) that the mark was not capable of distinguishing the goods and services concerned according to their commercial origin and that, as such, the mark was devoid of any distinctive character under Article 7(1)(b).

APPLICATION TO THE GENERAL COURT

Applying to the General Court to annul the Board's decision, O2 argued that the Board had misapplied Article 7(1)(c) since it had not established that the HOMEZONE mark designated the goods and services concerned. As regards Article 7(1)(b), O2 argued that since the Board's finding of descriptiveness had been wrong it had been wrong to infer from that finding that the mark also lacked distinctive character.

DECISION

Article 7(1)(c)

For the mark to be caught by Article 7(1)(c), there must be a sufficiently direct and specific link to the goods or services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods or services in question or of one of their characteristics.

The Court held that the Board of Appeal’s decision that HOMEZONE was descriptive of services in Class 38 or of the goods and services in Classes 9 and 42 had been based solely on the ground that such services were associated with "telecommunications" offering reduced tariff services. However, HOMEZONE did not include any reference to reduced tariffs and the provision of services relating either to online telephone services or to any of the goods or services in Classes 9 and 42.

Therefore, the Court upheld O2's plea under Article 7(1)(b) as regards all of the goods and services for which it sought registration of the HOMEZONE mark.
Article 7(1)(b)
The Court added that the Board of Appeal had erred as it had not considered the public interest aspect underlying Article 7(1)(b), which is to ensure the essential function of a trade mark, i.e., to guarantee the origin of the goods and services in question through the mark’s capacity to distinguish such goods and services from other providers.

O2’s appeal was thus upheld in full and the Board of Appeal’s decision annulled.

COMMENT
The Board of Appeal’s decision does not involve any objective analysis of the mark as related to the specified goods and services on an independent basis, irrespective of what was already on the market: as an analysis of the descriptiveness of a mark in this context does not depend on its actual use. All of the Board of Appeal’s decisions were based on the initial premise that HOMEZONE referred to reduced tariffs for mobile phone users. Thus, when the General Court found this to be incorrect, the rest of the Board of Appeal’s decision unravelled.

PATENTS
Cosmetic Treatment Not Excluded as Treatment by Surgery
In Virulite Distribution Ltd (IPO) BL O/058/10 12 February 2010, Virulite Distribution Ltd sought to patent a method of treating skin cosmetically to remove wrinkles using light at a very specific wavelength. The United Kingdom Intellectual Property Office (IPO) examiner objected that the invention was unpatentable as a method of treatment by surgery under Section 4A(1) of the Patents Act 1977 (the Act). The IPO hearing officer held that this cosmetic treatment was neither surgery nor therapy, as defined by previous European Patent Office (EPO) decisions, and hence fell outside the exclusion under Section 4A(1) of the Act.

BACKGROUND
A few years prior to the patent application in consideration, Virulite invented and patented a phototherapy system for treating cold sores by irradiating skin with a very specific wavelength of light. Virulite then sought to patent a method of treating skin cosmetically to remove wrinkles using light at the same wavelength.

The patent examiner rejected the application on the grounds that the method was excluded from patentability under Section 4A(1) of the Act and did not involve an inventive step in light of the previous patent granted to Virulite.

Virulite did not accept the examiner’s objections and applied to the hearing officer.

DECISION
The hearing officer dismissed the objections and remitted the case back to the examiner. His reasoning was as follows.

Treatment by surgery
To address the objection under Section 4A(1) of the Act, the hearing officer relied on the decisions of the EPO Board of Appeal in Thermage T 1172/03 and General Hospital T 383/03. Both cases considered the circumstances in which surgery for cosmetic purposes may fall outside the exclusion, notwithstanding the fact that it is a method of treatment by surgery.

According to the hearing officer

- To be excluded as surgery the method must both involve a significant physical intervention and be therapeutic and that neither requirement was met in this case.
- To determine whether the method is excluded as a treatment by therapy, the definition of “therapy” as used by the EPO in Salminen T 58/87 [1989] EPOR 125 did not apply in this case.

Virulite had submitted in evidence an email from the Medical and Healthcare Products Regulatory Agency which stated that it did not regard a device for treating wrinkles as a medical device.

Other objections
Concerning the lack of inventive step, the earlier Virulite patent relating to the treatment of cold sores disclosed the apparatus that could be used to perform the method described in the new patent.

However, the hearing officer held that the patent was non-obvious because the duration and frequency of treatment for treating wrinkles were not the same as those for treating cold sores and a degree of invention would be required to use the apparatus to treat wrinkles. Additionally, given that the exposure to light (sun) is one of the causes of wrinkles, using light to remove wrinkles was counter-intuitive.

COMMENT
This decision by the IPO attempts to delimit the exclusions under Section 4A(1). However, it should be borne in mind that a cosmetic treatment that also had a therapeutic effect would be caught by the exclusion.

Divergences in Industrial Applicability Between The United Kingdom And the European Patent Office
Rejecting an appeal by Human Genome Sciences Inc (HGS), the Court of Appeal of England and Wales in Eli Lilly and Co v Human Genome Sciences Inc [2010] EWCA Civ 33 upheld the finding that HGS’ patent (as amended) was invalid for lack of industrial applicability. Although consistent with first instance
decisions of both the High Court and, in concurrent opposition proceedings, the European Patent Office (EPO), the Court of Appeal's decision was inconsistent with that of the EPO's Technical Board of Appeal (TBA), which had found the amended patent valid. Giving the lead judgment, Jacob LJ stated that on the basis that the assessment of industrial applicability was necessarily a fact-dependent exercise, there was no reason for the higher level of scrutiny in the English system to defer to the EPO. Nonetheless, the principles were the same and, in reviewing the relevant EPO case law, Jacob LJ stressed that the industrial applicability must be plausible and sufficiently precise and that merely stating something has a use as a pharmaceutical without specifying what that use might be was not enough.

THE TECHNOLOGY
HGS elucidated the nucleotide sequence of a previously unknown protein, "neutrokine-α". This protein seemed to be part of a known family (the TNF family) of proteins, a group of proteins known to affect the immune system. HGS obtained a patent for neutrokine-α, which was subsequently challenged by Eli Lilly on a number of grounds, including that the patent lacked an industrial applicability.

THE LAW ON INDUSTRIAL APPLICABILITY
In order to be patentable, an invention must be new, involve an inventive step and be capable of industrial applicability (Section 1(1) of the Patents Act 1977, Article 52(1) of the European Patents Convention (EPC)). An invention shall be considered as capable of industrial application "if it can be made or used in any kind of industry, including agriculture" (Section 4 of the 1977 Act; Article 57 EPC), so the requirement for industrial applicability is assessed broadly. Further, the Biotech Directive (Directive 98/44/EC on the legal protection of biotechnological inventions) requires that "The industrial application of sequence or a partial sequence of a gene must be disclosed in order to meet this requirement of industrial applicability, the patent to meet the requirement of industrial applicability, the application or profitable use can be envisaged (T 0898/05). This is assessed as of the filing date of the patent (T 0898/05) and is considered in light of the common general knowledge (T 0604/04).

THE DECISION
The HGS patent disclosed that neutrokine-α could be used to treat a very large number of specific diseases; in some cases these treatments were contradictory in nature. An irony of the case is that HGS has gone on to develop a product based on neutrokine-α for the treatment of lupus, one of the few diseases not mentioned in the patent.

In assessing whether this disclosure was sufficient for HGS' patent to meet the requirement of industrial applicability, the Court of Appeal was first faced with the fact that the TBA had already found the patent valid. Jacob LJ, giving the leading judgment in the case, noted that the UK courts would follow any principle of law clearly set out by the EPO, unless it was clear that "the commodore is steering the fleet on to the rocks". However, the application of those principles to a particular case would often be a question of degree. Where the issue is a matter of degree, courts will disagree, and the English Court could differ legitimately from a decision of the EPO.

In addition, the assessment of industrial applicability was necessarily a fact-dependent exercise and the facts before the different tribunals may well differ. Whereas the English courts adopted an intense fact-finding process, this was not the case in the EPO, where there is generally no disclosure and no cross-examination of witnesses. Again, Jacob LJ saw no reason for the higher level of scrutiny in the English system to defer to that of the EPO.

In reviewing EPO case law to determine those relevant principles, Jacob LJ held that the disclosed industrial applicability must be plausible. This was described as meaning "having a significant degree of likelihood to be true", "having some real reason for supposing the statement is true" and being "reasonably credible", meaning something more than merely not incredible. Jacob LJ also held that the industrial applicability must be sufficiently precise that it would not be enough to state merely that something has a use as a pharmaceutical without doing more to specify what that pharmaceutical use might be.

The Court of Appeal was required to apply these principles to the facts as found by the first instance judge, which included that, the inventors had no idea as to the activity of neutrokine-α, and that it was hard to believe, on the basis of no experimental data, that neutrokine-α could treat such a diverse range of conditions. The first instance judge further found that the skilled person would have known not only that TNF proteins were involved in immune regulation and an extensive range of diseases, but also that TNF proteins had a wide range of different actions, with there being no disease related to all TNF proteins; and in reality, one was faced with a research programme to see which of the possible uses was real. In light of these findings the Court of Appeal therefore held that there was no disclosure of an industrial applicability which was both specific and plausible. Consequently, the ruling that the patent was invalid for lack of an industrial applicability was upheld.
COMMENT
This is the first case in the United Kingdom to address properly the question of industrial applicability. In doing so, the English courts have adopted the principles drawn from EPO case law; Jacob LJ referred to the need for an industrial application to be specific and plausible, similar to the requirements of the EPO that the industrial applicability not be vague and be more than speculative.

Nevertheless, even though the principles applied were the same, the Court of Appeal reached a different conclusion from that of the EPO. Whilst this might be explained by the different facts placed before the tribunals, Jacob LJ nevertheless commented that he found the finding of the TBA surprising even on the facts as the TBA found them. It therefore seems that even though the United Kingdom and the EPO are applying the same principles, the manner in which they apply them can and sometimes will differ, at least with regard to industrial applicability.

“Pozzoli/Windsurfing” Tests and Problem-and-Solution Approaches to Obviousness
In Actavis UK Ltd v Novartis AG [2010] EWCA Civ 82, the Court of Appeal of England and Wales upheld the decision of Mr Justice Warren that Novartis’ European Patent for a sustained release version of a drug was invalid for obviousness over an immediate release formulation.

BACKGROUND
Fluvastatin is a cholesterol reducing drug patented in the 1980s. The drug was first marketed in 1994 in an immediate release formulation.

The Novartis patent (having a priority date of 1996) related to a sustained release formulation of a sodium salt of fluvastatin. In the patent description, Novartis cited the benefits of a sustained release formulation over an immediate release formulation as improved therapeutic effects, reduced side effects and increased patient compliance as a result of simplified dosage regime.

The patent stated that "the drug release from sustained release formulations is related to the drug solubility". Consequently, there were special challenges when developing a sustained release formulation of a water soluble drug.

It further noted that fluvastatin sodium is highly water soluble so a fast release rate of the drug can be expected. The patent went on to state that, surprisingly, it was found that fluvastatin sodium also exhibits characteristics favourable to developing a sustained release formulation.

Actavis sought to revoke the patent on grounds of obviousness and insufficiency.

Novartis's case was that given the high solubility of fluvastatin sodium, a skilled person would not have had a sufficient expectation of success to attempt to develop the formulation.

FIRST INSTANCE
At first instance Warren J rejected this argument and the invention was held to be obvious. Warren J stated that the physicochemical characteristics of fluvastatin sodium, including its solubility, were not so undesirable that a skilled team would not have considered it as a candidate for a sustained release formulation.

The judge also held that the purported benefits of improved therapeutic effects and reduced side effects were not supported by the evidence provided.

COURT OF APPEAL DECISION
On appeal, Novartis submitted that the judge had defined success erroneously in terms of the patent to mean improved therapeutic effects and reduced side effects. Instead, it was simply whether a sustained release formulation of fluvastatin sodium would be expected to work.

In order to determine obviousness, Lord Justice Jacob applied two tests: the Pozzoli/Windsurfing test and the problem-and-solution approach (PSA).

Applying the Pozzoli/Windsurfing test, Jacob LJ concluded that "the only difference between the prior art and the claim is the idea of making a sustained release formulation".

Applying the PSA test, Jacob LJ concluded that the "objective technical problem" was to develop a sustained-release formulation of fluvastatin. Novartis claimed that, given the high solubility of fluvastatin sodium, a skilled person would not have had a sufficient expectation of success to attempt a sustained release formulation of the drug. Jacob LJ pointed out that this was not the case; the solubility was not so high as to discourage a skilled person from attempting such a formulation. Thus, the technical problem that the patent claimed to solve was nonexistent. Using both Pozzoli/Windsurfing and PSA, only one conclusion could be reached: the skilled person would expect that a sustained release formulation of fluvastatin would work. Furthermore, the benefit of improved patient compliance was enough motivation to attempt to develop such a formulation.

Consequently, the invention was held to be obvious.

COMMENT
This decision highlights the importance of the nature of the “problem” in assessing obviousness. In this case, the immediate release version of the drug was known, there were found to be obvious advantages in formulating a sustained release version and the evidence proved that there would be an
expectation of success and that there was no reason, technical or otherwise, not to attempt such a formulation.

DOMIAN NAMES

Reserved Short Domains

Nominet, the .uk top level domain registry, has published a Consultation on the release of two letter, one character and other reserved .uk domain names.

BACKGROUND

Nominet's rules of domain name registration currently prevent registration of the following domain names in .uk:

- One character domains at the third level (e.g., a.co.uk), see Rule 5.5.
- Two letter domains in the third level of co.uk, me.uk, org.uk and net.uk (e.g., aa.co.uk). It does however allow one letter, one number e.g., a1.co.uk, see Rule 5.6.
- A third level registration in co.uk, me.uk, org.uk and net.uk that is identical to an existing .uk second level domain (e.g., ac.co.uk, co.org.uk, etc), see Rule 5.8.
- A third level registration in co.uk, me.uk, org.uk and net.uk that is identical to an existing top level domain (e.g., com.co.uk, gov.org.uk, edu.me.uk etc), see Rule 5.9. In practice this is not enforced for new generic top level domains, where in general there is already an existing third level registration.

There are potential domain names that would break one or more of these rules. For example, co.co.uk would breach Rule 5.6 (the third level being two levels), Rule 5.8 (the third level already being an existing second level) and Rule 5.9 (co being the country code top level domain for Columbia).

POLICY ADVISORY BOARD RECOMMENDATIONS

Nominet's Policy Advisory Board (PAB) has recommended to the Nominet Board that two letter domains ought to be made available for registration in the co.uk and org.uk sub-domains via a staged "sunrise" mechanism for rights holders. The plan therefore is that all two letter domains not already registered should be released. In addition, PAB concluded that the release of one character domains should also be considered, subject to further consultation.

SUNRISE MECHANISM

PAB has recommended a two phase sunrise release mechanism. In phase one, applications will be accepted from holders of registered trade marks recognised and enforceable in the United Kingdom where they are identical to the two letter combination applied for. In phase two, domain names not taken up in the first round would then be open to holders of unregistered rights. For the sake of consistency, the same approach will be applied to one character domains and other short domains.

PAB recommended a cut off date for qualifying rights, with 1996 and 2002 being suggested as possibilities. The consultation invites views on the suitable qualifying cut off date.

Nominet is proposing that charities and not-for-profit organisations should have priority for org.uk domains and that commercial organisations should have priority for co.uk domains. By definition, me.uk domains can only be registered by individuals. Nominet says that it is inclined towards a sealed bid auction for cases where there are competing rights holders of the same business type and for any domain names that are not taken up by rights holders. For me.uk domains being released, Nominet is also considering a Dutch auction similar to the sunrise release of the .me.uk second-level domain in January 2002, i.e., a decreasing registration price over time.

COMMENT

Organisations that are known to any degree by a short abbreviation should consider the implications of the relaxation of the restrictions on all two letter domains. Problems, however, could arise for organisations that may be known only to a certain degree by a two letter acronym and that do not hold a trade mark registration in the two letter combination. Notably, the spirit of liberalisation has not extended to a clear recommendation that domains that use a second level domain at the third level, such as sch.org.uk, should also be released. As a result, the use of second level domains will continue to be blocked at the third level for the time being, although this may be subject to further consultation at a later date.

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## Office Locations

<table>
<thead>
<tr>
<th>Location</th>
<th>Address</th>
<th>City, State, Country</th>
<th>Phone</th>
<th>Fax</th>
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<tr>
<td>Boston</td>
<td>28 State Street, Boston, MA 02109</td>
<td>USA</td>
<td>+1 617 535 4000</td>
<td>+1 617 535 3800</td>
</tr>
<tr>
<td>Düsseldorf</td>
<td>Stadtor 1, 40219 Düsseldorf, Germany</td>
<td>Germany</td>
<td>+49 211 30211 0</td>
<td>+49 211 30211 555</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>2049 Century Park East, 38th Floor, Los Angeles, CA 90067, U.S.A.</td>
<td>Los Angeles, CA 90067</td>
<td>+1 310 277 4110</td>
<td>+1 310 277 4730</td>
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<tr>
<td>Munich</td>
<td>Nymphenburger Str. 3, 80335 Munich, Germany</td>
<td>Germany</td>
<td>+49 89 12 7 12 0</td>
<td>+49 89 12 7 12 111</td>
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<tr>
<td>Rome</td>
<td>Via A. Ristori, 38, 00197 Rome, Italy</td>
<td>Italy</td>
<td>+39 06 4620241</td>
<td>+39 0648906285</td>
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<tr>
<td>Silicon Valley</td>
<td>275 Middlefield Road, Suite 100, Menlo Park, CA 94025</td>
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<td>+1 650 813 5000</td>
<td>+1 650 813 5100</td>
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<tr>
<td>New York</td>
<td>340 Madison Avenue, New York, NY 10173</td>
<td>USA</td>
<td>+1 212 547 5400</td>
<td>+1 212 547 5444</td>
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<tr>
<td>Orange County</td>
<td>18191 Von Karman Avenue, Suite 500, Irvine, CA 92612, USA</td>
<td>Irvine, CA 92612</td>
<td>+1 949 851 0633</td>
<td>+1 949 851 9348</td>
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<tr>
<td>Milan</td>
<td>Via A. Albricci, 9, 20122 Milan, Italy</td>
<td>Italy</td>
<td>+39 02 89096073</td>
<td>+39 02 72095111</td>
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<tr>
<td>San Diego</td>
<td>11682 El Camino Real, Ste. 400, San Diego, CA 92130, USA</td>
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<td>+1 858 720 3300</td>
<td>+1 858 720 7800</td>
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<tr>
<td>Brussels</td>
<td>Rue Père Eudore Devroye 245, 1150 Brussels, Belgium</td>
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<td>Chicago</td>
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<tr>
<td>Houston</td>
<td>1000 Louisiana Street, Suite 1300, Houston, TX 77002, USA</td>
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<td>+1 713 653 1700</td>
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<td>Miami</td>
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<td>Shanghai</td>
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<td>MWE China Law Offices, Strategic alliance with MWE China Law Offices</td>
<td>+86 21 6105 0500</td>
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