

INTELLECTUAL PROPERTY

PROTECTION OF THE “FUNCTIONAL” COMMUNITY DESIGN

Traditionally, one of the most hotly debated questions regarding the protection of industrial designs has been deciding whether designs of a purely functional nature could be protected or not. Although doctrine and jurisprudence on a European level have not been uniform, the criterion that appears to have been best received was the “multiplicity of forms”, according to which the design can be protected if when it is projected it was not the only possible one, with the possibility of having chosen another within a more or less wide range of possible forms, without this leading to its losing its functional characteristics. Fortunately, this appears to be the trend followed by the Courts Specialising in Community Design (with protection throughout the EU) as declared by Mercantile Court No. 1 of Alicante (acting as the Community Design Court) in its Court Order of 20 November 2007, which upholds the precautionary measures requested by the claimant who invoked the protection for the designs of a number of propellers and/or propeller parts (toy). In this Court Order, and despite the defendant pleading in their defence that these designs were invalid due to the application of Article 8 of the Community Design Regulation, according to which “*A drawing or community model may not be recognised that has the characteristics of appearance of a product for which rulings have been given exclusively according to their technical function*”, the Court has maintained that “*there is no significant proof that allows prima facie to conclude that the function of that product (blade/propeller), which is the one that enables the helicopter to take off into the air and its movement through that medium, cannot be carried out by means of a system of blades with a different formal configuration*”. In short, the Judge considers that the use of the term “exclusively” in Article 8 of the CDR confirms that outside these circumstances protection of the design is permitted, so if this technical function can be realised by different formal appearances, the functional model/drawing is likely to be protected, which means that the multiplicity of forms should be followed. Although an appeal has been lodged against this ruling and it is also subject to the ruling passed in the main proceedings, its importance lies in the fact that besides these specific circumstances it means recognition of the functional design is needed (whether it has other aesthetical qualities or not), which in turn **opens up a very important channel to enable companies which operate in technological sectors in which functional designs are frequently undertaken (types of propellers, turbines, etc.) to protect them via this channel, without prejudice to their being protected accumulatively by means of a patent or utility model.**

PANNONE LAW GROUP

To celebrate the 20th anniversary of the founding of the international lawyers’ group, Pannone Law Group, a meeting was held from 24 to 27 April at the Hotel Blau Porto Petro in the town of Porto Petro, Majorca, for over 250 PLG professionals from all over the world to facilitate the exchange of knowledge and experiences, as well as other leisure activities.

CIVIL

PUBLIC SECTOR CONTRACTS LAW

The Public Sector Contracts Law 30/2007, of 30 October 2007, came into effect on 1 May. The main new features of its contents in relation to the regulation immediately prior to this one (Public Administrations Contracts Law) affect the delimitation of its sphere of application, the singularisation of the rules that are derived directly from community law, the incorporation of new regulations on hiring introduced by Directive 2004/18/CE, the simplification and improvements of contractual administration, and the legal classification of a new figure, the collaboration contract between the public sector and the private sector.

TAX

Extension to the building renovation item in VAT

Among the tax measures adopted by Royal Decree Law 2/2008, of 21 April 2008, relating to measures to encourage economic activity, we would like to highlight the amendment to Section 22 of Article 20.1 of the VAT Law, which extends the building renovation works item. To encourage building activity and enable an increased number of renovation works to be liable for VAT, the land value exclusion is available for calculation purposes should the global cost of the works exceed 25% of the value of the property, in order for work to be classified as renovation. Similarly, in the interests of greater legal security, the moment when an assessment needs to be made to ascertain whether the legal renovation requirements have been fulfilled has been defined more precisely, establishing it as the works start date.

Creation of the right to deduct VAT import taxes

The final Provision Seven of the General State Budgets Act for 2008 repealed Article 98.2.ii of the VAT Act. This amendment is significant and involves an adaptation of community legislation in the regulation of the moment when the right to deduct VAT taxes borne by imports is created, which becomes the moment of its accrual and not that of its payment. Despite this significant change, the precept still applies which indicates that the document justifying the right to deduct VAT from the import is the one which accredits payment of the VAT. This contradiction has been resolved by the General Directorate for Taxes in the Binding Consultation of 13 March 2008, which has determined that, as of 1 January 2008, accrual of VAT occurs at the moment when the imported goods are dispatched, and the moment when the import rights are accrued and the right to deduct the VAT borne is created. The document which justifies the right to the deduction that will be admitted is the Single Administrative Document or SAD, issued by the Customs Administration.

ADMINISTRATOR LIABILITY

OBJECTIVE JURISDICTION FOR HEARING ADMINISTRATOR LIABILITY

The creation of Mercantile Courts has raised a serious problem regarding the legal security of company creditors. Until that time, Civil Courts of First Instance had the jurisdiction to hear during the proceedings the action for payment made against a company and the administrators' liability action. With the appearance of the Mercantile Courts, which have been granted the jurisdiction for hearing the proceedings on company administrator liability, our Courts have adopted three different postures: some maintain that claims against the company and against the administrators should be heard by the Civil Courts; others consider that it should be the Mercantile Courts; and, finally, others, maintain that it is not right that these actions be tried jointly, whereby the Civil will hear the claim against the company due to its non-fulfilment and damages caused to the creditor, and the Mercantile will hear the administrator liability. The Madrid County Court (Section 28) in its Court Order no. 95 of 6 March 2008 assumes the latter thesis which poses few problems: how can the liability of an administrator be determined without stating in the proceedings the non-fulfilment by the company and its scope (the damages suffered by the creditor)? Does the creditor have to meet the financial and time costs derived from being obliged to file two lawsuits? Do they have to assume the risk of the administrator's liability expiring (4 years) during the time needed to prove before another Court non-fulfilment by the company and the damages caused to the creditor so that a claim can later be lodged against the administrator? The Madrid County Court (in its Court Order no. 95 of 6 March 2008) upholds that the Mercantile Courts can hear the non-fulfilment by the company and the damages to the claimant creditor but only in pre-trial manner, in order to determine whether a claim for liability can be lodged against the administrator of that company. The problem of expiry could be avoided by submitting the two lawsuits at the same time, or applying for precautionary measures. Given this posture, the first ruling by the Mercantile Court of Madrid (specifically no. 4 in the Court Order of 26 March 2008), has deviated from this doctrine, admitting the joint trying of actions against the ruling of the Court, so favouring creditor interest. This is, of course, a serious problem for company creditors who, to exercise their rights, have to adhere to the criterion of the different Courts which, even in the same city, vary.

ACCOUNTANCY

CERTAIN ASPECTS OF THE NEW GENERAL ACCOUNTING PLAN

The fundamental criterion on which the old Accounting Plan was based, the prevalence of the legal over the economic background, has changed radically, with the latter being the main criterion used to carry out accounting on transactions. The preference is for background over form. Asset accounting will be conducted in line with their purpose. Consequently, a property may be accounted for in several accounts, depending on the ultimate purpose that we will give it. It may be as Constructions affected by the activity, Property Investments or Stocks. The same occurs with Financial Investments. In both cases, depending on the accounting that we carry out, the company results may be affected. Another point to bear in mind is the related parties. Apart from those set out in Article 42 of the Commercial Code (Company Groups) of a vertical structure, the definition of horizontal structure of "connected parties" is also given. A party is considered connected to another when one of them exercises or has the possibility of directly or indirectly exercising control or a significant influence in the other party's decision making process. This new definition of being connected mainly affects family groups. It does not oblige the consolidation of balance sheets, but it does oblige that their information be included in the Annual Accounts, and transactions carried out between them at the transfer prices. Accounting criteria and valuation rules, defined within the item framework, have varied significantly. An example of which would be that certain goods and rights are amortised and the goods and rights depreciate. The seasonal differences in the financial year result become known as temporary differences. The structure of the financial year results include both the operating results and the equity variations, which is why the accounting of the assets and liabilities and how they affect the financial year results is very important.

PINTÓ RUIZ & DEL VALLE

NEW PERSONNEL

Lawyer Ricardo Morte Ferrer, a member of the Balearic Islands Bar Association, the Spanish-German Lawyers' Association and of the Spanish Sports Law Association, specialising in New Technology Law and Sports Law, has joined our Palma office. He speaks Spanish, Catalan, English and German.

BARCELONA

Beethoven 13,7º
08021 Barcelona
Tel: 34 93 241 3020
Fax: 34 93 414 3885 / 1157
bcn@pintoruzdelvalle.com
www.pintoruzdelvalle.com

MADRID

Velázquez 146, 1º Dcha
28002 Madrid
Tel: 34 91 563 8678
Fax: 34 91 563 3229
ma@pintoruzdelvalle.com
www.pintoruzdelvalle.com

PALMA

Sindicato, 69-7º
Edificio Banco Santander
07002 Palmade Mallorca
Tel: 34 971 71 6029
Fax: 34 971 71 9075
palma@pintoruzdelvalle.com

ALICANTE

César Elguezábal 39, ppl dcha
03001 Alicante
Tel: 34 96 514 5969
Fax: 34 96 514 5353
ali@pintoruzdelvalle.com
www.pintoruzdelvalle.com

Member of PANNONE LAW GROUP / A.E.I.E.

Alicante, Andorra, Beijing, Barcelona, Berlin, Bruxelles, Buenos Aires, Dili (Democratic Republic of Timor - Leste), Düsseldorf, Frankfurt am Main, Genève, Lisboa, London, Lyon, Madrid, Manchester, Milano, Montevideo, Montreal, München, Nicosia, Palma de Mallorca, Paris, Québec, Roma, Rotterdam, San José de Costa Rica, Santiago de Chile, Sao Paulo, Shanghai, Tel-Aviv, Warsaw and Wien.

© June 2008 Pintó Ruiz & Del Valle