



IP, IT and E-Commerce Bulletin

Mediation – The New Nirvana

Over the last ten years, English lawyers, following a US mantra, have been making increasing use of alternative dispute resolution (or “ADR”) to resolve their increasingly complex and expensive litigation. Although there are a number of different forms of ADR in use, the most common by far is mediation. Finding its origins in the USA in the 1980s, mediation is by now so ingrained in the English system that woe betide any lawyers who do not at least give it due consideration.

In libel cases, it is now compulsory under the Defamation Pre-Action Protocol which defines the rules of engagement between lawyers in such actions to consider ADR. In all other actions, and especially IP litigation, the courts have made it clear that they expect parties to consider it and where appropriate, use mediation to settle their disputes.

Following a line of decisions beginning with *Dunnett -v- Rail Track* several years ago, the Court of Appeal has said that if a party unreasonably refuses an offer to mediate the dispute, that party may well not be awarded its costs if the matter goes on to trial and that party wins. Given that costs may often exceed the damages awarded, especially if the purpose of the litigation in the first place was to secure an injunction to stop the infringing behaviour, the litigation may become a very expensive option for the victor.

The English courts now give routine directions (or Orders) for proceedings to be stayed while mediation takes place. Indeed, the standard form of directions issued by the court has this direction printed on it at number 1!

This does not mean, of course, that mediation is appropriate for every case – the courts acknowledge this. There are cases where there is extreme urgency or the parties are so far apart in their expectation of the outcome that any form of negotiation is quite hopeless. The courts will not penalise parties in such circumstances.

The great selling point of mediation is that it is a totally confidential process. Both parties at the beginning of the mediation must sign a confidentiality agreement which is binding on them even after the mediation is concluded, whether successfully or not. This is the whole point of mediation – it gives the parties a sterile environment to try and negotiate a settlement. Nothing said in the mediation can ever be used in the dispute later. This leaves the parties free to be totally honest with the mediator and, indeed, to each other.

Further, the process allows the parties to explore options which would not be available to the court given that the court can only award damages, an injunction or make the usual orders for destruction or delivery-up. For example, the parties may wish to negotiate a licence agreement between them, or a distribution or agency agreement. The result can often be a win-win outcome for both sides.

However, the most important outcome may well be that following the non-combative and conciliatory atmosphere in a mediation, the parties can shake hands on their deal and part being able to maintain a workable commercial relationship for the future and having kept their dispute confidential and out of the glaring gaze of the media.

What many lawyers do not understand is that the mediator is independent – he will express no opinion to the parties on the merits or otherwise of their case. He is not an arbitrator – he is merely there to act as a catalyst to assist the parties in finding a solution. He will regard the problem as that of the parties rather than himself.

Most mediators will hold an initial joint meeting with the parties at the beginning of the mediation to allow them to make an opening statement to give them an opportunity to vent any anger or frustration which may later assist the mediation process.

Following this opening session, the mediator will then conduct private meetings with the parties on a basis of strict confidentiality. The mediator will not tell the other party anything which has been told to him unless expressly authorised to do so. By this process he can hold a mirror up to each side of their case – both its strengths and weaknesses and explore with them how they really see the dispute panning out if they do not settle. By doing so, it is the parties themselves who reach settlement rather than having it imposed upon them.

Mediators today are highly trained by a number of organisations (by way of example CEDR-Solve) who will supply resumes of potential mediators to parties for agreement upon request.

This is the future of litigation in England. Parties who do not use it will find themselves on the wrong end of a judicial wrath.

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Italian certified e-mails - what a mess!

Several years have passed since the Italian Cuneo Law Court (Final Decision No. 848/2003) considered the legal effect of e-mails, as compared to paper communications (facsimile and registered post).

In the early jurisprudence, the only requirement for equivalence with paper communications was that e-mails should contain a (so-called) "light" electronic signature. This signature only consisted of an e-mail header and the address of the sender. No information was required to certify the origin of the communication.

However, problems arose when courts tried to apply the same "light signature" principle to documents originating from the Public Administration.

Over the last few years, a multitude of overlapping of regulations in this field has produced an inordinate number of problems. The law currently in force (Presidential Decree No. 68/2005) was intended to create a new communication tool which would give broader legal guarantees when sending and receiving electronic mail; this was called "Certified Electronic Post" ("CEP"). Unfortunately, the new system imposed legal obligations on Certified Electronic Post before the system had been adopted as a standard.

Worse still, the CEP conflicts with European Directives on the electronic signature issue. Directive No. 93/99 provides for two types of electronic signatures: simple and advanced. In Italy, by contrast, there are four different types of signature: electronic, qualified electronic, digital and advanced electronic.

This is evidence that the CEP may not be functioning due to the confusing hierarchy of legal authorities on the issue. Not only does this create domestic problems, but the non-standard electronic signature also prevents secure electronic communications between other European Member States and Italy.



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Finally, we should highlight that "civil telematic law suits" have existed in Italy since Presidential Decree 123/2001. In such proceedings, document transmission takes place using the advanced electronic signature, not by Certified Electronic Post.

Hopefully, future legislators will achieve technical uniformity by legislating to produce a single legal authority to govern this area.

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Advert wars - drugs, generics, and trade marks

On 26 March 2008 the commercial division of the Court of Cassation gave pharmaceutical companies the ruling they had been waiting for by quashing the May 2006 decision of the Paris Court of Appeal in *SARL Sandoz v Beecham Group PLC and Glaxosmithkline*. The Court of Appeal ruling, which was widely criticised, had been an obstacle to generic drug advertising.

The background facts are as follows:

In May 2003, following the publication of a press release in two specialised journals distributed to health professionals, a dispute arose between G.GAM, a generic drugs manufacturer, and Beecham Group PLC and Glaxosmithkline. The press release used a registered trade mark, Deroxat®, as follows, "Coming soon: LABORATOIRES G.GAM are proud to announce for the very first time the marketing of Paroxétine G.GAM (a generic drug for DEROXAT, published in the 01.11.2002 issue of the French Official Journal)". Deroxat® is an anti-depressant marketed in France by Glaxosmithkline. The Deroxat® trade mark is owned by Beecham Group PLC ("Beecham"), an English company.

Beecham and Glaxosmithkline took legal action against G.GAM at the Tribunal de Grande Instance in Paris on the grounds of trade mark infringement and unfair competition. They also petitioned for an injunction to prevent any use or reproduction of the Deroxat® trade mark by G.GAM in advertisements.

The judge dismissed the petition for an injunction (order of 5 December 2003). This decision was upheld by the Paris Court of Appeal (ruling of 16 June 2004), which accepted G.GAM's arguments in defence. G.GAM argued that using the Deroxat® trade mark in business advertising to promote its generic medicine, Paroxétine, was lawful on the grounds of:

- comparative advertising; and
- the necessity of referencing another person's trade mark.



Olivier Samyn

However, in the main infringement proceedings, the Tribunal de Grande Instance was not convinced and held that G.GAM was guilty of infringement. This decision was upheld by the Paris Court of Appeal in its ruling of 3 May 2006. Following this ruling, mentioning the trade mark of the brand-name drug in a business advertisement for a generic drug amounted to infringement.

Sandoz (subrogating the rights of G.GAM) then lodged an appeal with the Court of Cassation, which it won earlier this year.

On 26 March 2008, the commercial division of the Court of Cassation quashed the ruling of the Paris Court of Appeal, holding that citing the trade mark of the brand-name drug in a business advertisement for a generic drug is allowed as comparative advertising (appeal no. 06-18.366, *SARL Sandoz vs. Beecham Group PLC and Glaxosmithkline*).

The Court of Cassation held that, by citing the Deroxat® trade mark in the promotion for the generic medicine, G.GAM ensured that the advertisement's recipients were informed of the fact that Paroxétine shares the same composition and pharmaceutical form as the patented medicine. It demonstrated their bioequivalence, so that the advertisement implicitly compared essential, relevant, ascertainable, and representative characteristics of these drugs.

This ruling by the Court of Cassation is fully in line with European jurisprudence, according to which domestic rules on comparative advertising should be construed broadly in line with the Comparative Advertising Directive, and not in a way that hampers its implementation (*Lidl Belgium*, CJEC 19 September 2006, c-356/04).

G.GAM and Sandoz were represented throughout the whole proceedings by LMT Avocats.

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Distance selling in Quebec - a new game plan

On December 15, 2007, new distance selling regulations took effect in the province of Quebec. The new provisions regulate internet sales to consumers as well as distance selling via catalogue, phone or TV. The provisions are based upon the "Internet Sales Contract Harmonization Template", which is already in force in five provinces of Canada. For online sales, the provisions apply to any purchase by Quebec consumers, irrespective of the jurisdiction of the merchant's website. Foreign merchants should therefore be aware of the new regulations.

The new provisions require mandatory information to be included in the merchant's offer, otherwise the consumer may cancel their purchase by simple notice.

In order to comply, the merchant's offer must contain the merchant's address details, a detailed description of the goods and services, a description of all charges and additional fees that may apply to the contract, the date when the goods are to be delivered (or the services are to begin), and all applicable cancellation, exchange or refund policies. These items must be brought "expressly to the consumer's attention", a subjective requirement that may require a website redesign to ensure legal compliance. Within 15 days of entering the online transaction, the merchant must send a copy of the contract containing the consumer's name and address and all of the mandatory information above.

Foreign merchants should also be aware that purchases completed solely using the consumer's e-mail address are now invalid in the province of Quebec. Moreover the standard confirmation e-mail, listing the purchased items will not be enough to comply with the new requirements. In fact, the merchant's subsequent message to the consumer is now considered to be the true and sole contract between the parties and must repeat all the terms of the offer previously



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displayed on the website. Consequently, merchants are well advised to repeat all cancellation, exchange or refund policies in this communication; this happens rarely in practice.

Should the merchant fail to comply with the information provisions or fail to display the required information prominently on their website, the consumer may cancel the online sale within 7 days of the contract delivery (or 7 days from the date of the transaction itself if the merchant fails to send the contract in time).

For contracts for services, the consumer may cancel its online purchase if the merchant fails to perform its main obligation within 30 days of the specified date in the contract (or the date of the transaction if no date is specified).

A simple notice of cancellation from the consumer to the merchant is sufficient to cancel the online purchase. Upon cancellation, the merchant is obliged not only to refund the purchase price but also to bear the reasonable costs of restitution of the purchased goods or services. The consumer must return the goods (in their original state) within 15 days of the cancellation notice. The merchant has 15 days to refund the consumer after which the consumer can formally request a chargeback on their credit card. The bank's fees for the chargeback will increase the merchant's costs.

With these new requirements in force, it is imperative for online merchants doing business with Quebec consumers (and most Canadian consumers) to check their compliance. Businesses should review their website design and their online transactional process to avoid potential cancellations and undesirable additional charges.

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Functional designs in Spain - protection at last?

Arguably the most debated question concerning registered designs is whether protection is available for industrial designs whose character is merely functional. Despite differences between European-level doctrine and case law, the most widely accepted test concerns the 'multiplicity of shapes'. According to this test, the design can be protected in Spain if it is not the only design possible; i.e. another could have been chosen without losing the design's functional characteristics.

This seems to be the trend followed by Community Design Courts (which have jurisdiction in the whole EU). Commercial Court No. 1 of Alicante (acting as a Community Design Court) took this view in its decision dated November 20, 2007.



Juan Luis Gracia

In that case, the plaintiff in an injunction petition sought to enforce its protected designs for toy helicopter rotors against another toy manufacturer. The defendant alleged that the designs were null and void, pursuant to Article 8 of The Community Design Regulations (the "CDR"). Article 8 states that 'A *Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function*' (emphasis added).

In spite of this, the Court decided that 'there [was] no categorical evidence allowing [the Court], *prima facie*, to conclude that the function of [the rotor] (allowing the helicopter to elevate and move in the air) could not be performed by means of a blade system with a different shape'. The Court found that the inclusion of the word 'solely' in Article 8 of the CDR served to limit narrowly the restriction on the registration of functional designs.

Following this decision, if the same technical function can be performed by different shapes, the functional design is capable of protection. This opens a new route via which technological companies can protect their functional designs, whether or not they are protected by patents or by other means.

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Software patents - a change of heart in the UK

After several years of significant disparities between the positions adopted by the European Patent Office (EPO) and the UK Intellectual Property Office (UK IPO) concerning applications for the patenting of computer software, a more harmonised approach may be in sight following a recent High Court ruling.

The approaches taken by the EPO and the UK IPO to software applications had been inconsistent, despite the fact that the position of both bodies derives from the European Patent Convention (EPC), which was implemented in the UK by the Patents Act 1977.

In particular, the UK IPO had taken a more restrictive approach in its interpretation of Article 52 of the EPC, which, amongst other things, excludes programs for computers from protection. Article 52 provides that applications to patent programs for computers and other excluded items "as such" should be rejected unless the program has a further technical effect beyond the normal physical effects which would result from the running of any program. Whereas the UK IPO had interpreted this provision restrictively, the EPO took a more liberal approach to its interpretation of the "as such" provision, resulting in inconsistent decisions.

The recent High Court decision of *Astron Clinica Limited and others v Comptroller General of Patents and Trademarks* ([2008] EWHC (Pat)) concerned an appeal from the UK IPO's decision to refuse to grant six separate software patent applications. The decision of the High Court should begin to reconcile the approaches taken.

In *Astron Clinica* it was claimed that the UK IPO's interpretation of the Court of Appeal case of *Aerotel Limited v Telco Holdings Limited and others; Macrossan's Application* ([2006] EWCA Civ 1371), had effectively meant that while there was no formal prohibition against the grant of software



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patent applications, it had been usual practice for such applications to be refused.

Mr Justice Kitchen clarified the position and confirmed that the decision in *Aerotel* did not mean that all computer programs were automatically excluded from protection by reason of Article 52. The correct procedure was for all applications to be considered in the light of the criteria set by the Court of Appeal in the *Aerotel* case. As a result, he allowed the appeals and ordered that the six cases be remitted to the UK IPO for further consideration in the light of his clarification of the *Aerotel* decision.

The *Astron Clinica* decision confirms that the principles set out in *Aerotel* remain valid and suggests that the UK IPO's interpretation of the Court of Appeal's 2006 decision was incorrect. As a result, properly drafted software patent applications would now appear to stand a much greater chance of success. The decision should lead to significantly more applications being made and the adoption of a more consistent approach by the EPO and the UK IPO in the interpretation of those applications.

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Digitising works and the Dutch Copyright Act

Scientists and the general public in Holland are calling for the creation of a digital library, so that all sorts of books and magazines can be consulted online. However, digitising works from (for example) the Dutch National Library is very difficult due to the strict requirements of the Dutch Copyright Act (the "Act").

The Act requires that permission is obtained from the rightsholder prior to any reuse of the material up to 70 years after the author's death. Tracing the rightsholder is often complex, slow and expensive.

Two directors of the Dutch National Library, Martin Bossenbroek (Collections & Services director) and Hans Jansen (E-Strategy director) are pleading for an amendment to the Act, to allow an exception for non-commercial use on the internet. In other words, when users want to obtain information through the internet for non-commercial use, they should not be obliged to obtain the permission of the rightsholder.

Bossenbroek suggests an 'opt out' regulation in which the author must explicitly object to the digital use. In this way, rightsholders can retain their right to royalties for reuse. He also suggests arranging the system through a collective law organization, which can take over the financial risks.

There are several arguments against this suggestion. Firstly, digitizing works is not an aim of the Dutch Copyright Act. Secondly, rightsholders argue that an increasing appetite for online information is not a good reason to restrict the rights of the authors. Indeed, copyright law exists to encourage authors to create works by offering protection for their works. Thirdly, if the rightsholders are unknown or cannot be found, that does not imply that works are abandoned. Finally, an 'opt out' system may not work in practice as it will limit the parties' ability to negotiate on fees for the use of the work.

Many countries have already passed amendments in order to make digital filing and publication possible. The United States have submitted a bill which allows the non-commercial use of an abandoned work, subject to objections. Canada has an independent commission which can give permission to use works where the rightsholders are unknown.

The Dutch Minister of Justice, Mr. Hirsch Ballin, is currently investigating this issue. His findings are expected soon.

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German courts close in on eBay

eBay allows users to list items for sale at auction and to publish their own descriptions for the items. Unsurprisingly, some users of the eBay platform break the law, whether in good or bad faith. Over the past four years, the German Federal Court of Justice has been asked several times to decide whether eBay can be held liable in Germany for losses incurred, and to what extent they have a duty to prevent their users' illegal activity. The most recent of its decisions may have negative consequences for eBay that extend beyond the scope of these questions.

In a previous landmark decision, the German Federal Court of Justice (the "BGH") had held that eBay is liable for obvious trade mark infringement where it had been made aware of the infringement in advance (BGH reference: I ZR 35/04, 19 April 2004). Once it has been put on notice, eBay is not only obliged to delete the specific listing, but must also prevent similar infringements, using all technical and reasonable means available.

In a subsequent decision, this same principle was extended to aspects of unfair competition; once it has been put on notice, eBay is obliged to protect its users from unfair competition, so far as technical and reasonable measures are available to prevent it (BGH reference: I ZR 18/04, 12 July 2007).

In the case recently decided by the BGH (reference: I ZR 227/05, 10 April 2008), the plaintiff was repeatedly contacted by eBay users to send purchased goods that he had not listed for sale or even been aware of. A third party had used the plaintiff's personal data to open eBay accounts and had used those for illegal sales. Despite informing eBay, the malpractice continued, whereupon the plaintiff sued eBay, demanding the implementation of effective measures to prevent future misuse of his personal data.

Based on the principle that eBay is obliged to take all reasonable and viable measures to



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prevent such practice, the BGH has now ruled that eBay must specify its technical capabilities in order to determine whether it was negligent. As a consequence, eBay will certainly have to disclose substantial technical features of its systems. No doubt eBay's competitors and admirers will be looking on with interest to see what comes out of this exercise.

Irrespective of the final outcome in this case, it is clear that German courts are steadily tightening their grip on eBay. Rightsholders are certain to benefit from this trend.

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One-hour trade marks in Portugal

Until 2005, the incorporation process in Portugal presented various bureaucratic obstacles to investment, leading to wasted time and money. In order to remove all significant obstacles to foreign investment in Portugal, the Portuguese Government has been promoting a variety of initiatives, aiming to improve relations between citizens, companies and the judicial system. By exploiting advances in technology and communication, some procedures have been abolished and some simplified and costs have been reduced.

A good example of this reform is the One Hour Trade Mark Service or "Marca na Hora". Traditionally, the process to register a trade mark required a personal visit to an industrial property office, the completion of numerous forms and a twelve month wait for confirmation of the registration.

Together with the On the Spot Firm or "Empresa na Hora" scheme, it is now possible to incorporate and register a single-member or limited liability company including the registration of the company's trade mark in a single visit to any Companies Registry, Company Formalities Centre or National Registry of Corporate Persons.

In about fifty minutes, it is possible for any natural or legal person established or domiciled in Portugal (or via a representative) to obtain pre-approved trade mark immediately, pre-registered in the name of the State. The procedure starts with the choice of the trade mark (from a list of 200 pre-granted trade marks) and ends with the delivery of the trade mark property title.

Although this procedure revolutionises the old fashioned process of trade mark registration, the registrations are restricted to a certain number of Nice classes.



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Hence, the One Hour Trade Mark Service is only available for classes:

- 25 (Clothing, footwear and headgear)
- 33 (Alcoholic drinks (except beers))
- 35 (Advertising; Business management; Business administration; Office functions; Sales promotions; retail and wholesale)
- 36 (Insurance; Financial affairs; Monetary affairs; Real estate affairs; Property administration; Asset management; Mediation services for the buying and selling of property)
- 37 (Construction; Repairs; Installation services)
- 41 (Education; Training; Entertainment; Sporting and cultural activities)
- 43 (Restaurant services (food); temporary accommodation).

These classes represent those in most demand in Portugal.

The benefits of the One Hour Trade Mark Service are evident: the process is simpler (with just one visit to a single office and a single fee), faster (with the immediate acquisition of the registered trade mark) and more efficient. Through this system, entrepreneurs can form companies and acquire trade marks with full legal guarantees, ready to be launched into the market. It has also been possible since 2007 to register online for any trade mark in any class.

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TO OUR READERS

This Bulletin is intended to introduce and explain on a regular basis areas of European, North and South American Intellectual Property, IT and E-Commerce law of general interest to all of our clients. It is jointly written and produced by PLG's IP, IT and E-Commerce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in our Bulletin. Further information is available on all topics but nothing in the PLG IP, IT and E-Commerce Bulletin is to be regarded as a definitive statement of the law or as specific legal advice. Reliance should only be placed on specific advice obtained directly from the relevant practitioners after consideration of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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