

relationship with the new client that the requirements of article 305 ter are met, it becomes aware afterwards that the client may be using its services for receiving or channelling funds that may have a criminal source. Legislation is now being prepared to clarify that the reporting of such facts to the competent authorities does not constitute a violation of the duty of confidentiality, even if the disclosure does not lead to a prosecution of the client. It should, however, be observed that such "right to report" does not go as far as the "duty to report" now adopted in some European laws.

## United Kingdom\*

### I. Intellectual Property

At the end of September 1990 the Department of Trade and Industry issued a White Paper on the proposed reform of trademark law in the United Kingdom. At present, trademark law is still governed by the Trade Marks Act 1938 as amended by the Trade Marks (Amendment) Act 1984, when service marks became registrable in the United Kingdom.

The United Kingdom must adapt its national trademark law to comply with its international obligations under the EC Directive regarding the approximation of the laws of Member States relating to trademarks (adopted in December 1988, to be enforced by Member States by December 1991, with a possible extension until December 1992) and the Protocol to the Madrid Agreement (signed June 1989, but not yet ratified) concerning international trademark registration.

The proposed legislation should make trademark registration easier by creating a presumption that a trademark ought to be registered unless there is an objection to it based on one of the specific grounds set out in the EC Directive. A major, and welcome, change will be the abolition of the two-part system for UK Registration; the new, single test for registrability will be similar to the less onerous test presently used for Part B. As long as the mark is capable of distinguishing the goods or services of one undertaking from those of other undertakings, certain types of marks, for example, geographical names, laudatory words, or even colors, smells, or sounds, will not automatically be excluded, provided they can be depicted graphically.

The White Paper also clarifies some of the grey areas concerning the rights of a trademark owner. For example, the following will constitute a trademark infringement: (1) the use of a registered trademark in relation to goods or services

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\*Prepared by Clifford Chance, London.

that are similar to those for which the mark is registered; (2) the use of a registered trademark orally (as opposed to in writing) in selling goods or services without the prior permission of the trademark owner; (3) the use (in certain circumstances) of a registered trademark without permission in business papers or advertising, including comparative advertising; or (4) the use of a registered trademark without permission as the name of a business dealing in goods or services the same as, or similar to, those for which that mark is registered.

The new legislation introduces other changes which include: (1) permission for multi-class applications; (2) the abolition of "defensive" marks; (3) the repeal of the "trafficking" provision of the 1938 Act; (4) the facilitation of trademark licensing; and (5) the registration of "collective marks."

The new Act endorses the principle that once goods have been put on the market in the European Community by or with the consent of the proprietor, the rights of the proprietor are exhausted so that, with limited exceptions, a subsequent purchaser may deal in those goods without infringement.

The White Paper invited interested parties to submit comments to the Department of Trade and Industry by the end of 1990. Time has been set aside for the passage of this proposed legislation through Parliament during the 1990-91 Parliamentary year.

## II. Competition

Various changes have been made during 1990 to the UK merger control procedures under the Fair Trading Act 1973. The provisions of the Companies Act 1989 relating to merger control are now all in force. These make the following three major changes:

(a) They introduce a procedure for voluntary prenotification of proposed mergers by completion of a standard form merger notice. The main advantage of the new procedure is that if the merger is not referred to the Monopolies and Mergers Commission (MMC) for investigation within a fixed period of time (twenty working days, which may be extended by two further periods of, ten and fifteen working days, respectively), the proposed merger cannot be referred at a later date.

(b) They allow parties giving binding undertakings to divest a part or parts of the merged business in lieu of a merger reference.

(c) They place temporary restrictions on share dealings once a merger has been referred to the MMC for investigation.

In addition, effective October 1, 1990, fees for qualifying mergers must be paid to the Director General of Fair Trading. Fees range from £5,000 to £15,000.

Changes have also been made to U.K. merger procedures to accommodate the provisions of the new EEC Merger Regulation Number 4064/89. National merger authorities will have no control over mergers that fall within the jurisdiction of the EEC Commission under the new Regulation.

### III. The White Paper and the Environmental Protection Act 1990

The British Government released its White Paper on the environment entitled "This Common Inheritance: Britain's Environmental Strategy" at the end of September 1990. The White Paper sets out the government's approach to environmental issues within the United Kingdom, Europe, and the rest of the world. It includes policy on issues such as global warming, aid to developing nations for environmental projects, and the government's environmental priorities to be put to the European Community. The Environmental Protection Act (EPA) 1990, which received the Royal Assent on November 1, 1990, sets up a legislative framework to promulgate regulations to effect many of the White Paper's stated aims. The following represent some of the most important aspects of the legislation.

#### A. POLLUTION CONTROL

The EPA provides the machinery for what is termed Integrated Pollution Control (IPC), whereby Her Majesty's Inspectorate of Pollution (HMIP) will regulate releases from the most polluting industrial processes to air, land, and water in order to achieve the best practicable option for the environment as a whole. The regulation of pollution from other sources will be controlled by the National Rivers Authority (NRA) (for water) and by local authorities (for air and land).

In order to carry on almost any industrial process operators will require authorizations for which charges will be levied. Operating without authorization or outside conditions laid down in an authorization will be a criminal offense. Enforcement authorities have the power to remedy any harm caused thereby and to recover the cost from any person or company convicted of such an offense. The EPA has increased the maximum fine that the Magistrates Court may impose for such offenses from £2,000 to £20,000. More serious offenses are likely to be tried in the Crown Court, where fines have no limit. The enforcement authorities may also go to the High Court to obtain injunctions to prevent the operators of processes from exceeding authorized limits.

In order to obtain and maintain the necessary authorization, operators will be required to use the best available techniques not entailing excessive cost (BATNEEC) to control releases in a manner best for the environment as a whole. HMIP is issuing detailed regulations and guidance on how BATNEEC is to apply, but the onus remains on operators to keep abreast of technological improvements and developments concerning the environment.

#### B. WASTE ON LAND

The EPA creates new waste regulation authorities, separate from waste disposal companies, responsible for licensing and enforcement and makes provisions for increasing emphasis on recycling. It imposes for the first time a duty of care on producers of waste and any other person involved in the waste disposal

chain to ensure that waste is disposed of safely. Breach of the duty of care will be a criminal offense. A Code of Practice to provide practical guidance on how the duty of care can be discharged will be issued. The EPA also provides for a cause of action in damages for unauthorized depositing, treatment, or disposal of waste.

#### C. PUBLIC ACCESS TO INFORMATION

Regulatory authorities must maintain public registers of information about authorized industrial processes and waste disposal sites provided to them by operators. Further, local authorities must maintain public registers of land potentially contaminated by hazardous substances. Such registers will be a source of information for local residents, national pressure groups, industrial competitors, land owners, developers, and vendors and purchasers of land.

#### D. GENETICALLY MODIFIED ORGANISMS

The EPA introduces measures to prevent or minimize damage to the environment from the escape or release of genetically modified matter. It imposes risk assessment, notification, and consent requirements, in prescribed cases, on persons importing, acquiring, keeping, releasing, or marketing genetically modified organisms. It also provides for the recovery of the costs of remedying harm caused to the environment by any release of genetically modified organisms which amounts to a criminal offense under the EPA.

#### E. LIABILITY

The White Paper anticipates a greater number of prosecutions of polluters than heretofore. Companies and their officers may be found guilty of offenses under the EPA. Successful criminal prosecutions, together with public availability of information regarding pollution and polluters through public registers and the collection and dissemination of data, may spur a greater number of civil actions. However, the White Paper does not envisage the introduction of strict liability for environmental damage. The current position remains, whereby an injured party must in most cases prove damage to health or property attributable to negligence or nuisance. The EC, on the other hand, is moving towards a strict liability regime. Its draft Directive on Civil Liability for Waste will introduce strict liability for generators of waste and all those involved in its subsequent disposal. It is expected the EC will introduce strict liability for other forms of environmental damage in the future.

### IV. EC Law and English Law

The House of Lords has made a landmark decision<sup>1</sup> in granting interim injunctive relief from the effects of an Act of Parliament before the ultimate

1. Regina v. Secretary of State for Transport, *ex parte* Factortame Ltd. & Others (No. 2), [1990] 2 W.L.R. 818.

determination of whether the English law contravenes Community law. The circumstances that gave rise to the decision concerned the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988. The applicants' ninety-five vessels had been registered as British under the previous regime, but then failed to satisfy the necessary conditions for registration as British fishing vessels under the new Act and Regulations by reason of being managed and controlled from Spain or by Spanish nationals or by reason of the proportion of the beneficial ownership of the shares in the applicant companies in Spanish hands. The applicants then sought to challenge the legality of the relevant provisions of the Act and Regulations on the ground that they contravene the provisions of the EEC Treaty and other rules of law given effect thereunder by the European Communities Act 1972. The applicants sought interim relief from enforcement of the Act and Regulations to allow the existing registrations of the vessels to continue.

The House of Lords held as a matter of English law it had no power to grant such injunctive relief and referred the matter to the European Court of Justice. The European Court held that on a matter of Community law, if a national court considered the only obstacle precluding it from granting such relief was a rule of national law, it must set that rule aside.

The House of Lords then determined the criteria for the exercise of this novel jurisdiction. They held that the Court could not restrain a public authority by an interim injunction preventing the enforcement of an apparently valid law unless the Court was satisfied that, given the circumstances, the challenge to the law's validity was so firmly based as to justify such exceptional relief. In this case the House of Lords, having regard for the decisions of the European Court, held that the applicant's case was *prima facie* a strong one and that the detriment to the public interest, should the applicants ultimately fail in their challenge, did not outweigh the obvious and immediate damage that would be caused to the applicants should relief not be granted and they were ultimately successful. Hence interim relief was granted.

Although the decision is significant, Lord Bridge noted that there is nothing in any way novel in according supremacy to rules of Community law in those areas where they apply. Also, under the terms of the European Communities Act 1972, it has always been clear that it is the duty of a U.K. court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.

## **V. The 1980 Rome Convention on the Law Applicable to Contractual Obligations**

The Contracts (Applicable Law) Act 1990 (the Act), which gives effect to the 1980 Rome Convention (the Convention) on the law applicable to contractual obligations, has now received the Royal Assent. The Convention lays down a set of uniform rules for identifying the governing law of contracts, which are to be

applied by the courts of all member states of the Community who are parties to the Convention. The Act is expected to come into force early in 1991.

#### A. APPLICATION OF THE CONVENTION

The Convention applies to contractual obligations in any situation involving a choice of laws between different countries. The Act also applies to conflicts between the laws of different parts of the United Kingdom. Thus, an English court will have to apply the Convention rules when faced with a choice between English Law and Scots Law.

Application of the Convention is subject to a number of important exclusions. Some of the more important of these are as follows:

- (a) questions involving the status or (subject to article 11) legal capacity of natural persons;
- (b) contracts relating to succession, matrimonial property, or obligations under family law;
- (c) certain obligations arising under bills of exchange and other negotiable instruments;
- (d) arbitration agreements and jurisdiction clauses;
- (e) issues governed by company law;
- (f) whether an agent can bind a principal;
- (g) trusts;
- (h) evidence and procedure (but not including the burden of proof and the like under article 14); and
- (i) contracts of insurance that cover risks situated in the territories of Member States of the EEC, excluding contracts of reinsurance.

#### B. THE BASIC RULE—FREEDOM OF CHOICE

A contract will be governed by the law chosen by the parties. No formalities are required, but "the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or circumstances of the case."<sup>2</sup> The parties' freedom to choose in the case of certain consumer and employment contracts is limited. Further, a number of complex provisions relate to what the Convention calls "mandatory rules" of any particular country, those rules that, under the law of that country, cannot be derogated from by contract. However, the Act provides that the most confusing of these provisions is excluded in relation to the United Kingdom.

#### C. ABSENCE OF CHOICE

If the parties have not chosen a law, expressly or impliedly, the contract shall be governed by the law of the country with which it is most closely connected.

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2. Rome Convention art. 3(1), which forms Schedule 1 to the Contracts (Applicable Law) Act 1990.

First, it will be presumed that the contract is most closely connected with the country "where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration."<sup>3</sup> Second, the Convention provides that "to the extent that the subject matter of a contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated."<sup>4</sup> Nevertheless, these presumptions are subject to a number of exceptions.

There is, as yet, no collection of precedents of the European Court in relation to the 1980 Rome Convention. The Act does, however, entitle the English courts to regard the report by Professor Mario Giuliano and Professor Paul Lagarde, published in the Official Journal of the European Communities on October 31, 1980, in order to assist in ascertaining the Act's meaning and effect.

## VI. Developments in the Law of Negligence

There have been significant developments in the law of negligence. In *Murphy v. Brentwood District Council*<sup>5</sup> the House of Lords overruled its previous decision in *Anns v. Merton Borough Council*.<sup>6</sup> It criticized Lord Wilberforce's two-stage test for establishing a duty of care, preferring a pragmatic case-by-case approach. The decision significantly limits the right to recover in negligence for pure economic loss. The plaintiff sued the local authority for negligently approving plans to build a house on a defective foundation, which then cracked, causing extensive damage to the walls and pipes of the house. The plaintiff claimed the diminution in value of the house and the expenses incurred as a result of the damage.

The House of Lords found for the local authority. It held that to recover in negligence for pure economic loss it is not sufficient that the defendant could have reasonably foreseen the damage that occurred. There must exist between the plaintiff and the defendant a special relationship of "proximity" to impose on the latter a duty to take care to avoid or prevent the loss sustained. Such proximity exists in *Hedley Byrne*<sup>7</sup> negligent misstatement cases and could exist in other circumstances.

The law of negligent misstatement is also currently subject to review by the courts. In *Caparo Industries Plc v. Dickman*<sup>8</sup> the plaintiff had made a successful takeover bid relying on the annual accounts prepared by the defendant account-

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3. *Id.* art. 4(2).

4. *Id.* art. 4(3).

5. [1990] 2 All E.R. 908.

6. [1977] 2 All E.R. 492.

7. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465.

8. [1990] 1 All. E.R. 568.

tants. The plaintiff claimed that the accounts were inaccurate and misleading. The House of Lords held that there was not sufficient proximity between the auditors and the plaintiff investors, either as members of the public or as individual shareholders investing in the company, to give rise to a duty of care on which the action could be founded. Lord Oliver stated that

the necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts on reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.<sup>9</sup>

The Lords emphasized that the purpose of the annual accounts was to hold the directors of the company accountable to the body of shareholders and not to advise individual shareholders on investments.

In contrast to *Caparo*, the contemporaneous cases of *Smith v. Eric S. Bush*; *Harris v. Wyre Forest District Council*<sup>10</sup> found that a valuer who had been instructed by a prospective mortgagee to carry out a valuation of a house owed a duty of care to the prospective mortgagor if the valuer was aware that the mortgagor would probably purchase the house in reliance on the valuation without an independent survey.

In *Morgan Crucible Co. v. Hill Samuel Bank Ltd. and Others*<sup>11</sup> the Court of Appeal held that where directors, auditors, and financial advisers of a company, the subject of a takeover bid, were aware that bidders would rely on their representations for the purpose of deciding whether to make an increased bid and intended that they should, it was arguable that the necessary proximity existed to find a duty of care.

## VII. Courts and Legal Services Act 1990

The Courts and Legal Services Act 1990 (the Courts Act) received the Royal Assent on November 1, 1990. The White Paper and the Bill which formed the

9. [1964] A.C. 465, 589.

10. [1989] 2 All E.R. 514.

11. [1991] 1 All E.R. 148.

basis for the Courts Act were reviewed in previous issues of *The International Lawyer*.<sup>12</sup>

The "cab rank rule" has been incorporated into the Courts Act. The effect of this is to extend that rule, previously applicable to barristers only, to solicitors acting as advocates. Correspondingly, barristers' immunity from suit is extended to solicitor advocates.

The proposed change in limitation of actions law has not been incorporated into the Courts Act. The law remains that originating process must be issued within the limitation period, but service need not be achieved before the expiry of that time as long as the process is served within the period of its validity.

The Courts Act provides for multinational practices between solicitors and foreign lawyers. A register of foreign lawyers is to be maintained by the Law Society, which may extend to such lawyers its professional rules.

### **VIII. Harmonization of Corporate Taxes in the Community**

The latest developments in this long running saga are summarized below.

Following the agreement in June, the confirmation in July, and the adoption on August 20, 1990, the three formal proposals have now appeared, and subject to, certain exceptions for certain member states, they should be implemented by January 1, 1992. (As far as the United Kingdom is concerned, in the absence of any prior major financial or fiscal legislation, the necessary provisions for implementation will be included in the Finance Bill 1991). The measures are in the form of two directives and a convention (the latter relating to reconciliation of transfer pricing disputes) and are likely to have far-reaching consequences for the business community, both within and outside the EC, in relation to investment in, and reorganizations of, companies within the EC.

The first directive provides for the abolition of withholding tax on dividends paid by a subsidiary to a parent (the parent/subsidiary relationship being established by a holding of 25 percent or more of the capital of the company in question). It provides exceptions for Greece, Germany, and Portugal. The directive also provides that the state of the parent company must either exempt the distributed profits from tax or give credit against local tax for the corporate tax of the subsidiary relating to the distributed profits.

The second directive provides rules relating to mergers, divisions, and share exchanges. The rules apply where the arrangement in question does not have tax avoidance or tax evasion as its principal or one of its principal objectives. In broad terms the rules provide for exchanges of shares and securities or transfer

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12. See e.g., *Regional Developments: United Kingdom*, 24 INT'L LAW. 280 (1990).

of assets and liabilities in exchange for shares or securities to be effected on a tax-free basis for the disponent and the shareholder. Gains arising to a company on cancellation of its shares on the liquidation of a company in which it holds shares will be exempt from tax. A tax loss carry forward will be available on the transfer of a business by a company to a permanent establishment in the same jurisdiction on the same basis as would apply in the case of a transfer between two companies with tax residence in the same jurisdiction. Further agreement for harmonization of rules on carry forward or carry back of tax losses, with respect to abolition of withholding tax on royalties of interest and for offsetting the results of foreign subsidiary agreements with domestic parent companies is expected.