

or personal injury, Can.\$1 million; (b) in respect of any other claims (i.e. property), Can.\$500,000. Under the current regime, the calculations are in the range of Can.\$120,000 and Can.\$40,000 respectively.

Oil pollution liability and compensation

The amendments to the Canada Shipping Act with respect to oil pollution liability and compensation include changes which will increase the maximum compensation available to claimants in an oil pollution incident from about Can.\$120 million to Can.\$270 million. Compensation would be made available for oil pollution damage caused by empty tankers on the voyage immediately after the voyage with a cargo of persistent oil. Costs for preventative measures taken in anticipation of a spill from a tanker now would be recoverable under the Canadian regime.

A significant clarification is the new section 679.1 which sets out that the maximum liability of an owner of a ship other than a Convention ship with a tonnage less than 300 tonnes is an amount determined according to section 578 (see limitation of liability above). In the case of ships with a tonnage exceeding 300 tonnes, the amount is determined in accordance with Article 6 of the Limitation of Liability Convention 1976.

The amendments provide that where oil pollution damage from a ship results in impairment to the environment, the ship owner would be liable for the costs of reasonable measures of reinstatement. The new regime extends the right of action in Canada for pollution damage beyond the territorial sea to the 200 nautical mile exclusive economic zone (EEZ).

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Germany

ENERGY LAW New legislation

Energy Law Reform Bill passes Cabinet

On 23 October 1996, the German Cabinet decided to introduce in Parliament the Energy Law Reform Bill prepared by the Ministry of Economic Affairs. Strong opposition from municipal politicians within the CDU ruling party had prevented an earlier decision of the Cabinet. The bill, which has now been approved in the form as proposed by the Economics Minister in May¹ will break up the closed supply territories of the utilities which dominate in the German electricity industry. Instead of introducing an express right to third party access, the Bill abolishes the exemption from the general rules of German cartel law, which the energy industry had until now.

The Bill will now be first discussed in the Chamber of Federal States (Bundesrat) which provides for a period of six weeks for deliberation. Thereafter, it will be referred to the lower Chamber of Parliament (Bundestag). During committee proceedings, a public hearing may be held in spring next year.

According to constitutional sharing of powers, the Bundesrat will have to consent to the Bill. As the government parties are in a minority position there, it is far from certain that the Bill will pass Parliament at all. At least some extended negotiation process between the chambers, as well as substantial changes, can be expected.

¹ See [1996] 6 OGLTR D-63.

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UNFAIR TRADE PRACTICES Comparative advertising

Failure to provide accurate comparison of overall costs

German Federal Supreme Court
1 February 1996
IZR 50/94

Facts: The plaintiff is a public utility engaged in the distribution of gas in Bavaria. It supplies some 50,000 customers. The defendant is a private association for the promotion of the distribution of heating oil. Its purpose is to inform the general public about the advantages of heating with oil. In 1992 the defendant published in the press circulars which contained comparisons of the prices of heating oil and natural gas without directly mentioning the plaintiff. One of the headlines was: 'Fixed day - check: natural gas on average 45% more expensive than heating oil'. Another headline said: 'Your heating oil may rise to these prices before it is more expensive than natural gas'.

The plaintiff alleged *inter alia* that the promotion campaign violated Article 1 of the German Act Against Unfair Trade Practices, which contains a general clause: 'Whoever commits acts in the business trade for purposes of competition which violate *bonos mores* will be liable for an injunction and damages'. The plaintiff asserted that a fair comparison of prices should not only include the purchase prices. It would be reasonable to include the full costs, which should also relate to the cost of the heating facilities. He applied for an injunction to restrain the defendant from publishing the advertisements and claimed damages which were caused by the publications. The plaintiff also claimed that the defendant should supply him with information about the distribution of the advertisements, in particular the circulation. The First

Instance Court and the Provincial Court rendered judgments by and large in favour of the plaintiff. The defendant appealed to the Federal Supreme Court.

Held: An unlawful comparative advertising campaign presupposes that it relates to one or several competitors who need not be mentioned but who must be recognisable by the persons to which the advertisements are addressed. Since public utilities engaged in the supply of gas are dependent on fixed mains and enjoy a territorial monopoly, the customer has no choice between several public utilities engaged in the supply of gas. This fact is sufficient for assuming that the plaintiff is affected by the defendant's advertising.

The comparison with prices of a competitor is prohibited, even if it relates to similar goods (energy carriers) like heating oil and natural gas. However, exceptionally, a true and factually correct comparative advertisement is lawful, if the compared goods, services or systems are objectively comparable and if there is a relevant justifiable reason and, if the indications are limited to this, what is necessary according to the type and scope and if there is a true and technically accurate discussion.

With regard to the effect caused by the different contributions of the defendant's publications, there is no question of a comparison of the goods heating oil and natural gas, but a comparison of heating oil or natural gas systems. An exceptional admissibility of the comparison of systems is not in consideration, because the whole costs were compared misleadingly since reference was made to only one of several cost factors of the heating systems.

German jurisprudence bases the prohibition of comparative advertising on Article 1 of the Act Against Unfair Trade Practices. The Federal Supreme Court indicated that exceptions to the general prohibition of comparative advertising can be made in cases where a justified reason exists. It may be assumed that such a justified reason may lie in the protection of consumers in cases where the use of the goods, services or systems of the advertising undertaking offers real advantages over those of a competitor.

The defendant was not able to rely on a justifying reason for his campaign. The Court observed that not only should the purchase prices of the heating oil and natural gas have been compared, but that a fair comparison should have included also the costs arising from the purchase, installation and maintenance of the different types of heating. A comparison of the different heating systems would have made it evident to the reader that the purchase price of the heating oil was only one factor of the relevant heating system, and that additional costs, such as those arising from the purchase and installation of the heating equipment, the oil tank and the maintenance, would have to be added if a fair comparison were to be made with the costs of the natural gas heating system.

Since the comparable costs arising from the purchase, installation and maintenance of the natural gas heating system are much lower than those of the heating oil system, a comparison of the full costs of the two heating systems would have given the reader a different impression of the relevant costs than that which the advertising campaign had caused in the mind of the public. It appears that the comparison of prices by the defendant would also not be admissible according to the proposal for a European Parliament and Council Directive Concerning Comparative Advertising and Amending the Directive concerning Misleading Advertising. Article 3a of the proposed directive suggests that comparative advertising shall only be allowed provided that, amongst other things, it objectively compares the material, relevant, verifiable, fairly chosen and representative features of competing goods and services.

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India

ENERGY SECTOR

Summary of recent developments

Power

The Minister of State for Power has announced that the privatisation of transmission and distribution activities in the power sector will be initiated through the presentation of a draft amendment to the Electricity (Supply) Act before the winter session of the Parliament. Several multinationals and domestic companies have shown interest in activities other than generation, which is an encouraging step towards meeting the increasing demand for power in the country. India expects to produce an additional 100,000 MW of power over the next ten years, and this requires an investment of Rs60,000 crore (£1.1 billion) in the transmission sector alone.

The Government has allowed the Railway Ministry to impose strict conditions on power utilities for the prompt advance payment of freight charges for coal haulage from pitheads to power plants. A system of optional advance payment is already in place, but being optional, it has not always been strictly observed.