



# INTERNATIONAL BRIEF



**martineau**

**T:** 44(0)870 763 2000  
**F:** 44(0)870 763 2001  
**E:** [lawyers@martineau-uk.com](mailto:lawyers@martineau-uk.com)  
[www.martineau-uk.com](http://www.martineau-uk.com)

## INTERNATIONAL

**Our new Martineau look**

At Martineau we're changing. The things we do. The way we work. To reflect this change we've refreshed the firm's image with a new name, new logo and a renewed focus on how we do things. The rebrand heralds a new and exciting era in Martineau's growth.

Welcome to the second edition of international brief. This brief is intended to be an interesting and useful summary of

changes in law and practice in the United Kingdom, which will be of interest to international companies with operations in the UK and their professional advisers.

Martineau is one of the UK's leading independent law firms. We have 48 partners and over 100 other lawyers who focus on today's key market sectors. Based in Birmingham and London, Martineau has been working with overseas companies investing in the UK for over 100 years.

By way of example, we are working with Advantage West Midlands in Bridge2Growth,

a highly successful programme designed to encourage companies in North America, Scandinavia, France, Holland and Poland to invest in the West Midlands.

We also assist clients investing overseas, introducing appropriate local advisers and working alongside teams to achieve the client's objectives.

**Richard Wrigley, Partner**  
**T: 0870 763 1586**  
**E: [richard.wrigley@martineau-uk.com](mailto:richard.wrigley@martineau-uk.com)**





# OFT ALLEGES BID-RIGGING CARTEL IN THE CONSTRUCTION INDUSTRY

The Office of Fair Trading issued statements of objection in April 2008 against 112 construction companies alleging participation in a bid-rigging cartel. The OFT's statement of objections follows a three year industry investigation and will have wide-ranging consequences for the industry. For the 112 alleged participants the immediate concern will be to defend against these allegations and they will now be given the opportunity to respond to the OFT. More generally, any industry practices which may have led, or contributed, to the OFT's allegations will

where contractors agree that one of them will submit the lowest bid, that the others will enter higher bids and, in some cases, are then paid an amount as compensation. Bid rigging is engaged in by competitors and is seen as having serious anti-competitive effects. Consequently competition authorities will generally view it as a serious offence akin to price fixing or market sharing.

The actual effect of the conduct may be taken into account when setting the level of

turnover of the entire corporate group to which that business or company belongs. Whilst it is true that the OFT is generally tending to increase fines for cartel behaviour, a large number of the alleged participants have provided information and admitted participation in return for leniency. It appears therefore that the application of leniency and settlement procedures is likely to have a large impact on the level of any fines imposed in these matters.

## The possibility of damages actions

Infringements of competition law may also lead on to actions for damages by those affected by the anti-competitive behaviour. In this case those who commissioned buildings and works from the alleged participants may be in a position to bring claims. Historically such actions have been rare. However, given the high value of construction projects, the increasing awareness that damages may be available and the rapid progress that competition authorities are making in encouraging private enforcement of competition law, it seems likely that such actions will be seriously considered in this case.



need to be analysed with a fine tooth comb by all industry participants. This will ensure that there are no more skeletons waiting to be unearthed and that all future behaviour is unambiguously compliant with competition law.

## Bid rigging - an infringement of UK Competition Law

Bid rigging, if proven, is clearly caught by the Chapter I prohibition on restrictive agreements contained in the UK Competition Act 1998. In this case the OFT is alleging a variety of bid-rigging scenarios including what they term "cover pricing" which occurs

any fines, and it may be argued that the effect is minimal for various reasons. However, the simple fact of engaging in a bid-rigging cartel is, of itself, likely to be sufficient for an infringement finding.

## Fines of up to 10 per cent of turnover

The Competition Act 1998 provides that fines of up to 10 per cent of the annual worldwide turnover of each participant may be imposed for a breach of the Chapter I prohibition. Technically this 10 percent ceiling is calculated not just on the basis of the turnover of the individual business or company that is involved in the cartel, but the



### Possible criminal sanctions

In cases such as this, the UK Enterprise Act 2002 also provides for a criminal cartel offence which could be committed by individuals involved in cartel infringements. If convicted, the individual may be imprisoned for up to five years and subject to a potentially unlimited fine. The offence only covers a limited number of the most serious forms of cartel activity, although one of those covered is bid rigging. This offence is only committed if dishonesty is proved. Individuals who are, or may be, in this position would need to review their directors' and officers' liability insurance policy carefully to check what financial cover is in place. In addition, directors who are shown to have participated in a cartel may be subject to a disqualification order which would prevent them acting as a director of any company.

### PR issues

Increasingly, cartel infringements have serious public relations implications. Participants found to have been in a cartel will need to work hard to resuscitate their market reputations both during and after an investigation by the competition authorities. Further, if large fines are imposed, there could be a significant impact on share prices. One notable characteristic of the construction industry is that there are a large number of public sector buyers that are subject to the European Union public procurement rules when selecting contractors. Under these rules, public bodies have the ability to exclude tenders on good grounds and it is conceivable that some may try to apply these provisions to cartel participants. In any event, whether or not such an approach were successful, it is likely that public bodies may well request evidence of compliance with competition laws in the future.

### How we can help

Martineau provides a full range of competition law advice including cartel advice both to alleged participants and to those damaged by such activities. We have extensive experience of dealing with the competition authorities during the investigative procedures leading to a decision, ensuring that clients' rights of defence are respected and advising on the possible mitigation of fines and leniency applications. We also provide advice on cartel associated legal issues raised by cartels such as compliance audits, compliance training and assisting individuals implicated in cartel behaviour.

#### For more information please contact

**James Dilley on:**

**T: 44(0)870 763 2000 or**

**E: [james.dilley@martineau-uk.com](mailto:james.dilley@martineau-uk.com)**





# RENEWABLE ENERGY - INVESTMENT OPPORTUNITIES IN THE UK

On 26 June 2008 BERR published the 283 page Renewable Energy Strategy Consultation (the "Consultation"), seeking views on the measures that should be adopted in the Renewable Energy Strategy ("RES"). The RES will be published in early 2009 and will outline the steps needed to enable the UK to meet its share of the EU 20% by 2020 renewable energy target. It will also address security of supply issues.

The UK's obligation is likely to be to achieve 15% of the UK's energy consumption from renewables, compared to our current 1.5%, by 2020. Energy consumption for these purposes comprises electricity generation, heat production and transport. The Government is looking to the private sector to deliver on this challenging commitment. Given the low potential for renewables within the heat and transport sectors, a 15% commitment means that 30-35% of UK electricity will have to be derived from renewable sources.

The RES will supplement measures already progressing, including the Transmission Access Review, the Climate Change Bill, the Energy Bill, the Marine Bill, the Planning Bill and the proposals on carbon capture and storage. Alongside the RES will run the nuclear programme and continued investment in low carbon conventional power stations, any new ones having to be at least "carbon capture ready".

To encourage the take up of renewables, a number of incentive mechanisms are already in place. These include the NFFO (now abolished but with existing arrangements continuing in force until their expiry) and the

regime for exemption from the Climate Change Levy. The main mechanism, however, is the Renewables Obligation, which requires electricity suppliers to source an increasing percentage of supplies from renewable sources and acts as a stimulus for the purchase of renewable obligation certificates from renewable generators.

As mentioned, the Consultation focuses on the three primary uses of energy - heat, electricity and transport. The Government is not saying how much of the 15% should come from each of these uses, but is looking to the markets to determine this. With such a reliance on the private sector, it is crucial that the Government gets its incentive mechanisms right to enable the private sector to adequately assess the risks and rewards.

Can we be confident that the legislative and regulatory framework is sufficiently stable for the private sector to invest? Already, the 10% by 2020 biofuels target looks likely to be watered down, and agreement of sustainability criteria is proving challenging.

Not only will the introduction of renewable energy sources help to save the planet from the effects of global warming, it will also be a massive boost for the currently flagging UK economy. It is estimated that up to 160,000 jobs could be created in the renewable industries and that total investment of £100bn will be required.



## The Key Provisions:

### Saving Energy

The obvious starting point for reducing carbon emissions from energy usage is to reduce energy demand and to make more efficient use of energy. Since the renewable target is a percentage of the energy we use, reducing consumption will make it easier to achieve the target.

Measures introduced already to reduce demand include the EU Emission Trading Scheme, the Climate Change Levy, the Carbon Emissions Reduction Target and the zero carbon buildings initiative. Furthermore, in 2010, the Carbon Reduction Commitment will come into force, and in 2011 it is proposed that a "Suppliers Obligation" (an incentive mechanism to develop 'energy services' markets) will be imposed.

Energy efficiency is the subject of a separate Bulletin in this series, please [click here](#).

### Centralised Electricity

As mentioned, it is expected that electricity will be the major contributor to meeting the UK's 15% target, with as much as a third of UK electricity expected to come from renewable sources by 2020 - a tall order when currently only around 5% is generated from renewable sources.

Wind power is expected to be the key growth area, both offshore and onshore. Biomass, hydro and tidal, including possibly a Seven barrage, are also expected to make a major

contribution.

The Consultation sets out the key barriers to the development of renewable generation, including planning and grid access issues. Planning difficulties are being addressed through the Planning Bill and the Marine Bill, with numerous other initiatives also underway. Grid access is being addressed through BERR and Ofgem's work on the enduring access regime, as reported in the Transmission Access Review Final Report, please [click here](#). In addition, the draft EU Renewable Energy Directive obliges Member States to ensure that network owners give priority access to renewables projects, a measure which the UK is resisting, arguing that other measures being put in place make such an obligation unnecessary.

### Heat

Heat currently accounts for 49% of the UK's energy demand and 47% of our carbon emissions. The Consultation is seeking views on the potential measures to increase renewable heat generation in the UK and to facilitate the market for renewable heating technologies and fuel. At the present time renewable heat in the UK accounts for only 0.6% of demand. In particular, the Government is considering a "Renewable Heat Incentive", designed to provide a direct financial support to those installing renewable heat schemes (similar to a feed-in tariff). A "Renewable Heat Obligation", imposing an obligation on fuel suppliers to source a proportion of their supplies from renewables, is also under consideration.

Renewable heat is the subject of a separate Bulletin in this series, please [click here](#).

### Distributed Energy ("DE")

DE is heat and power which is produced locally to where it is consumed. This includes site specific generation where a plant supplies, for example, a university campus or a housing or industrial estate, and microgeneration such as small scale wind turbines, solar and heat pumps.

DE is seen as a major potential contributor to the renewable energy target if utilised for community schemes, although the contribution at the current time is very low.

Not only could DE lead to a degree of energy independence within a community, home, university campus or business park, it could also bring the potential to generate income by supplying excess electricity into the grid and through the revenue generated by renewable obligation certificates.

However, further measures will be needed to make DE an attractive and cost effective alternative. At the householder level this could include further changes to permitted development rights under the planning regime, and grants aimed particularly at the fuel poor.

DE is also a simple way to get across the message about energy efficiency and renewable energy. A wind turbine, solar panels or biomass heaters in schools will drive home the climate change message in a very direct way.

As with all new technologies, the financial incentives for DE, and microgeneration generally, are crucial to increased take up. In relation to renewable heat, two options are being considered: a Renewable Heat Incentive and a Renewable Heat Obligation, as mentioned above.

In relation to microgenerated electricity, the Renewables Obligation is the key incentive

mechanism. However, this has not led to a significant take up of microgeneration and, in particular, is not a major consideration for householders. Recognising this, the Government, in its consultation on the reform of the Renewables Obligation, has proposed to double the level of the Renewables Obligation for microgeneration from April 2009. However, it seems likely that, to encourage more households and smaller community projects to invest in microgeneration, further financial support mechanisms will be needed, and thought is being given to what these may be.

In the planning arena, the Planning Policy Statement on climate change expects planning authorities to set targets for decentralised renewable or low-carbon energy in new developments.

DE is the subject of a separate Bulletin in this series, please [click here](#).

### Transport

It is clear that the transport sector is key in any policy framework for a sustainable policy on renewable energy.

Currently, the main source of renewable energy for transport is biofuels. However, the EU target of achieving 10% of transport fuel from renewable sources by 2020 is beset by difficulties, particularly agreement of sustainability criteria.

Transport is the subject of a separate Bulletin in this series, please [click here](#).

### Bioenergy

Bioenergy is energy produced from the direct or indirect combustion of biomass material such as energy crops, wood and waste, and biogas. According to BERR's



analysis, the least cost delivery of the 2020 renewable energy goals might require approximately 30% of the UK's renewable energy to come from bioenergy across the heat and electricity sectors.

The Consultation looks at biomass for electricity and heat, and summarises current policies to develop more reliable sources of biomass and to increase sustainable supply. Consideration is also given to the use of waste in a more effective manner, and how to facilitate the production and use of biogas. Since the Consultation was published, Joan Ruddock, the Waste Minister, has described anaerobic digestion as "extremely attractive" following a visit to a plant in Ludlow, Shropshire which converts food waste to heat and electricity.

Further development of biomass technologies will be encouraged by the banding of the Renewables Obligation.

### **Innovation**

Unless innovation is encouraged, then the renewables targets are unlikely to be met. The Consultation seeks views on how

continued research into, and development of, new technologies can be further encouraged. Principal amongst the measures being utilised is the Renewables Obligation, and it is hoped that the new banding arrangements will reward innovation and investment and bring to market as yet unproven technologies.

However, innovation in this new area creates challenges for business. Owners of new technologies are likely to be subject to UK and EU competition law as, being new, there are unlikely to be comparable competitors and so automatically they may be in a dominant position. The administrative burdens this imposes, together with the restrictions on licensing, make such technologies more difficult to exploit than would otherwise be the case. In the US this has been recognised, and SMEs with unique disruptive technologies are not subject to the restrictions imposed by equivalent US competition law.

### **Business Benefits**

The move from high carbon fossil fuels to low carbon and renewable energy creates



huge opportunities for business, and the Government is committed to maximising these opportunities for UK industry.

As mentioned at the beginning of this Bulletin, an estimated 160,000 jobs will be created in the UK in the renewable sector, and total investment of around £100 billion will be required to meet our targets.

### **Delivery**

These days, Government sees itself very much as a facilitator and procurer rather than a deliverer. Consistent with this approach, the Government is of the view that its role is to set the policy framework, put in place the incentive mechanisms and lead by example but that it is the market that must provide the necessary investment.

**For more information please contact**

**Catherine Burke on:**

**T: 0870 763 1552**

**E: [catherine.burke@martineau-uk.com](mailto:catherine.burke@martineau-uk.com)**

**or**

**Andrew Whitehead on:**

**T: 0870 763 1528**

**E: [andrew.whitehead@martineau-uk.com](mailto:andrew.whitehead@martineau-uk.com)**



**The major challenges, but probably also the major rewards, lie in the following areas:**

1. Renewable heat and biomass, where the UK is starting from a very low base.
2. Wind power, because of the sheer scale of the investment needed to hit the targets. Wind generation capacity needs to increase by a factor of 10 over what it is today within the next 12 years.
3. Energy efficiency and reduced energy use, particularly at the domestic level where cheap electricity and gas has for many years made us immune as individuals to the cost of our consumption.
4. Encouraging innovation and making it easy and beneficial to export expertise

**So, what could scupper our good intentions?**

1. Lack of funds and/or financial incentives for commercial investment and R&D, which is why the reform of the Renewables Obligation and, in the area of renewable heat, the introduction of new incentives, are crucial.
2. Planning - being tackled through the provisions of the Planning Bill, the Marine Bill and the recent Memorandum of Understanding signed by BERR, BWEA, the CAA, and the MOD (amongst others).
3. Grid access - being addressed through the follow on work to the Transmission Access Review, please [click here](#) to view the bulletin
4. In relation to microgeneration, a lack of information and advice for consumers.
5. In relation to transport, consumer appetite for electric, hydrogen and dual fuel vehicles and agreement of biofuels sustainability criteria.
6. Lack of knowledge of, and access to, the various funding schemes and grant programmes.
7. In relation to wind energy, particularly offshore, supply chain issues ranging from shortages of turbines to shortages of barges

**Measures and initiatives linked to renewable energy:**

1. Energy Bill - which, amongst other measures, will introduce a regulatory framework for carbon capture and storage projects, strengthen the Renewables Obligation, and introduce measures to implement a new regulatory framework for offshore electricity transmission networks
2. Climate Change Bill - which, amongst other measures, will set legally binding targets for the reduction of UK carbon emissions
3. Marine Bill - which will introduce, amongst other measures, a simpler licensing regime for offshore windfarms
4. Transmission Access Review
5. Renewable Obligation - which requires electricity suppliers to source a specified and increasing proportion of their electricity from renewable sources or pay a buy-out price
6. Review of the Renewables Obligation - announced in the 2007 Energy White Paper and now being consulted upon (this will be the subject of a future Bulletin)
7. Renewable Transport Fuel Obligation - which mandates the increased use of biofuels in the transport sector
8. Offshore wind - a third round of offshore site licensing announced in June 2008
9. Study into Seven barrage
10. Draft EU Renewable Energy Directive

**Future consultations:**

**Enhanced energy efficiency policies - Autumn 2008**



## PUBLIC CONTRACTS - POWERS OF AMENDMENT THAT ARE TOO WIDE

A recent dispute between the Law Society and the Legal Services Commission ("LSC") concerning the new legal services contract has given rise to some interesting points on the extent to which public contracts awarded in accordance with the EC public procurement rules can be subject to amendment. The contract in question was made between solicitors and the LSC to set out the terms on which solicitors would engage in publicly funded work. The contract included very wide powers of variation intended to give the LSC the ability to vary the contract unilaterally, including the technical specification, to take account of planned reforms to the legal aid system.

The main issue in the case concerned the question of whether the amendment provisions satisfied the obligation of transparency, implied by the general European law principles of equal treatment and non discrimination as set out in the EC Treaty and the EC procurement rules and implemented in Member States. It is these principles that underpin, inter alia, the requirements to advertise contracts, tender contracts in a fair manner and award public contracts impartially.

The court of first instance considered that as the possibility of amendment was made clear in the contract, and the parameters for reform of the legal aid system had been set out in publicly available documents, the obligation of transparency had been met. However, the Court of Appeal disagreed and found that these actions were not sufficient to justify a power of amendment as wide as the one in question. Consequently it concluded that the



obligation of transparency had not been met.

The Court of Appeal found that the contract could not satisfy the principle of transparency simply on the basis that a power of amendment was included in the contract. The fact that the parameters of the possible reforms to the Legal Aid system were set out in publicly available documentation did not alter the Court's view. The Court noted that transparency would be achieved only where there was sufficient certainty in the definition of the subject matter and terms of the contract. In this case the Court determined that the power of amendment was too wide for the contract to be sufficiently certain.

The Court noted in conclusion on this point that the "power of amendment is so wide in this case that it amounts to a power to rewrite the contract."

The Court of Appeal accepted that some changes may be necessary during the life of the contract and that the contracting authority might need to reserve the power to amend the terms. Not all changes will give rise to a problem and it will be a question of fact in each case. Although this case will be of general application, it is worth noting that legal services are "Part B" services under the Public Contracts Regulations 2006 and therefore subject only to a light touch regulation. It seems likely therefore that provisions permitting amendment of a contract fully subject to the 2006 Regulations might run into other problems.

**For more information please contact  
James Dilley on:  
T: 44(0)870 763 2000  
E: [james.dilley@martineau-uk.com](mailto:james.dilley@martineau-uk.com)**

# COPORATE SOCIAL RESPONSIBILITY

## GIVING TO OTHERS

First of all, what do we mean by “Corporate Social Responsibility”? Too often the concept is derided as an exercise in political correctness and token gesture. At Martineau we consider that in fact CSR is both a philosophy and a method about what it means to be a well-run, profitable firm that does business fairly, treats its staff well and makes a significant and distinctive contribution to the wider community. So you will see that the CSR outlook influences all the key aspects of the firm; marketing and business development, staff relations, purchasing policy, charitable giving and engagement with community and civic bodies.

We are a business with a strong grounding in Charities and Education law. A significant number of our staff currently serve as governors of schools and colleges, trustees of charities and directors of not for profit businesses. So one would expect us to develop an imaginative CSR policy; which is what we have done.

By way of reminder, our CSR activities generally fall into one or more of four areas:

- Pro bono
- Charities
- Community projects
- Environment

### Pro Bono

We continue to be a signatory to the Joint Protocol for Pro Bono Legal Work, under which we are committed to certain core values when providing free advice or

representation. Over the year, our pro bono work has supported a variety of organisations, including:

- United Kingdom Council for Access and Equality (UKCAE) - this is a not for profit organisation set up from within the private sector to provide assistance to business in meeting their obligations under equality legislation. We are proud to be a founder member of UKCAE, and Jane Byford serves on the organisation’s Governing Body of Directors. As part of our commitment as founder member, we undertake to provide a substantial amount of free legal advice each year. This is an important commitment by the firm, and underlies our enthusiasm for access and equality in our own business.
- Simon Coghlan is the Chairman of the Board of Directors for Fireside Day Centre.
- David Gwyther is a Council member of the Swedish Chamber of Commerce.
- Hugh Carslake does work for various diocese and churches, is a trustee of the Fenny Trust which is a charity supporting art and open places in Birmingham, President of the City of Birmingham Choir and is the Chairman of the Barber institute at Birmingham University.

### Charities

The firm’s charitable trust, which is funded by the partners, continues to provide financial assistance to a variety of good causes, often supporting charitable activities of staff members.

Andrew Whitehead, Clive Read, Hugh Carslake and Roger Blears serve as trustees of the trust, and are ably and enthusiastically supported by Alice Mineyko and Jennie Seymour. All applications for funding are considered and assessed, against specific criteria. Currently the trust tries to help causes which have a local element (to Martineau’s Birmingham or London offices) and/or which may alleviate or assist in relation to disability. Although the criteria are reviewed annually, the aim is to make three distributions per financial year, in early September, January and April.

Recipients of recent grants have included:

- City of Birmingham Symphony Orchestra
- Association for Spina Bifida and Hydrocephalus
- Birmingham Foundation
- Sense
- Listening Books
- Walsall DIAL
- Macmillan Cancer Support
- International Mission Support
- NSPCC
- The MS Society
- Education & Research Fund - The Primrose Appeal
- Terrence Higgins Trust



||| Barnardo's

In addition, the firm has always been keen to support members of staff with their charitable activities in 2007:

- ||| Pat Quarrie, Ciscelia Seivewright and Karen True completed an aqua aerobic challenge for the NSPCC.
- ||| Ben Thornber ran the Hambury Marathon for The MCS Society.
- ||| Nicola Cardenas Blanco ran the Great North Run for Kith and Kids
- ||| Liz Grice, Alison Ashwell, Debbie Waters and Karen Edwards in the Race for Life.

In March 2008 we supported Sport Relief and raised £1,000 by

- ||| Sponsored mile walk
- ||| Sports Relief Quiz
- ||| Dress down in sportswear
- ||| Sweepstake

The firm was instrumental in setting up the VCT Charitable Trust, which draws its funding from the venture capital industry, and aims to support projects which advance the education and training of young people in the UK and overseas. In his capacity as trustee and legal adviser to the charity, Roger Blears helped identify worthy causes which benefited from over 20 donations in the past year, ranging in size from £500 to £10,000.

**Community projects**

The firm is a member of Business in the Community. Business in the Community inspires, engages, supports and challenges companies to continually improve the impact

they have on society and the environment through their responsible business programme. There are four streams to Business in the Community: Environment, Marketplace, Community and Workplace.

Over the past year, we have continued to support St Basil's, notably by funding the entry of two Martineau teams into a 28 mile walk.

For the second year running in December we supported Fireside Day Centre by collecting gifts from members of the firm and donating them to the Charity. Fireside offers an open-door day centre providing a welcoming and supportive environment for the homeless and those in need of support. It encourages positive change by providing individuals with professional and practical support.

**Environment**

Responsibility for the environment is an integral part of good business practice, and we have worked over the past 12 months to bring up to date our Environmental Policy. The Policy, and its implementation, is overseen by our Environment Committee.

One of the Committee's recent key initiatives was the introduction of waste recycling in our 'break-out' areas. Staff are all encouraged to continue using dedicated bins for disposal of all cans, bottles, plastics and cardboard. These days, environmental good practice entails monitoring and minimising carbon emissions. We encourage you to visit our dedicated Climate Change Portal. ([www.climatechange-forum.co.uk](http://www.climatechange-forum.co.uk)) which we launched in 2007. This contains an excellent guide to climate change - the science as well as the legal and policy initiatives both here in the UK and internationally - and also gives a

broad overview of how climate change mitigation initiatives are impacting on all of our practice areas.

Another local initiative which we have chosen to support is the University of Birmingham's Hydrogen Project, where we are co-sponsor of a zero emission hydrogen hybrid canal boat, a prototype of which has been launched. For more details, click here <http://www.hydrogen.bham.ac.uk/protim.htm>

Our sponsorship of the hydrogen hybrid canal boat is a good example of how we aim to play our part in meeting the challenge presented by climate change. It is also consistent with the firm's business strategy to focus on the education and energy sectors. In a similar vein, we also helped Birmingham City Council in 2007 in the development of its Climate Change Strategic Framework which aims to deliver carbon emission reduction savings across Birmingham of 60% by 2030.

**For more information please contact Jane Byford on:  
T: 44(0)870 763 1378  
E: [jane.byford@martineau-uk.com](mailto:jane.byford@martineau-uk.com)**





## BREAKING CHINA

There is no doubt that the emergence of China is a great opportunity for business. However there are risks which are over and above those normally associated with international trade. This article looks at two of those risks in particular: protecting your brand and minimising the likelihood of disputes.

### **Brand and reputation**

One step that should be taken if you intend to promote your brand in China is to register a trade mark. In the UK, you can rely on your unregistered rights if someone was to use your marks. In contrast the present law in China does not afford much protection to those with unregistered rights. When this is combined with the general difficulties experienced in enforcing your rights abroad, (even more so in China), it is preferable to avoid these problems by applying for a trade mark.

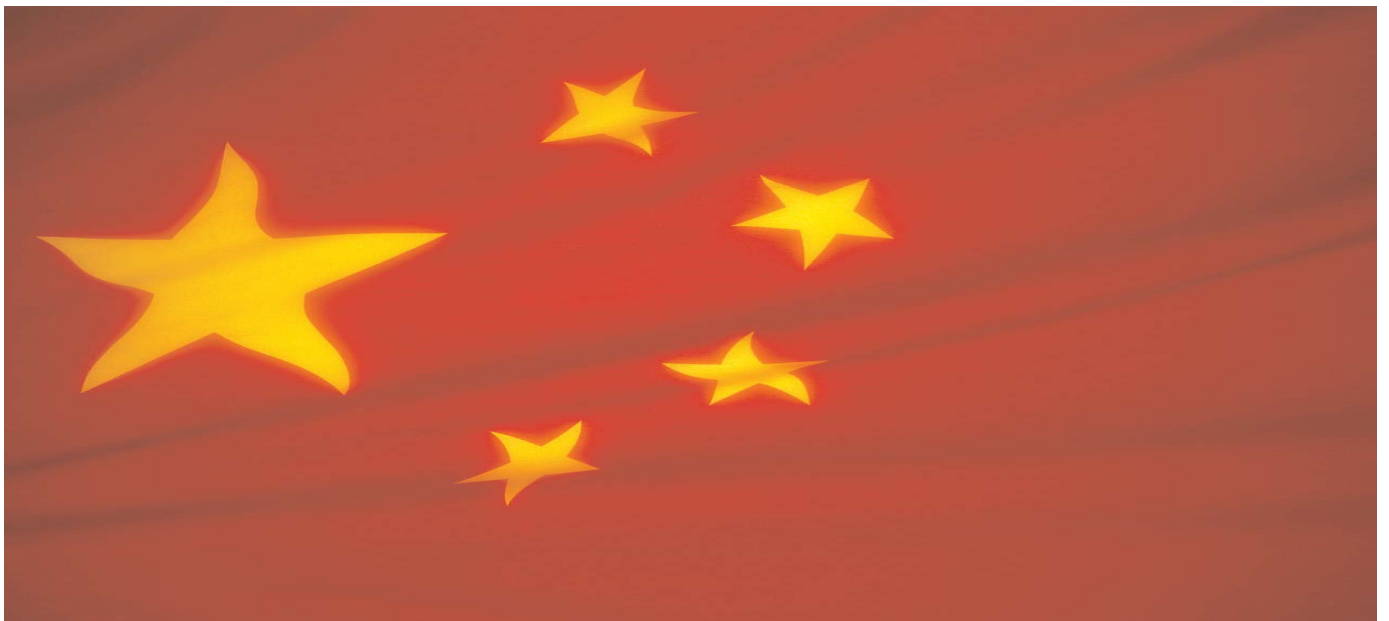
The Chinese Trade Mark Office operates a "first to file" system, rather than a "first to use" system, i.e. the first person to file an application for a mark has the right to use it, rather than the first person to use the mark in the territory. This means that applications need to be made early to stop others from registering your mark. If this does happen, it can be a long and difficult process to recover your mark.

At present, applying for a trade mark in China is a long process and requires the instruction of local agents to deal with the Chinese Trade Mark Office. It can take between three and four years for a mark to reach registration. Another complication is that China is a single class system. This means that, unlike in the UK, you need to file a separate application for each class of goods or services for which you require protection. If you require protection in a large number of classes, the cost can be high. While it can take a long time for the

Chinese Trade Mark Office to examine your application, if it determines that there is a problem with the application, the deadlines set for dealing with this can be very short. This means that any required information (such as use of the mark in China) has to be made available quickly.

Changes have been proposed to try and reduce the amount of time that applications take to reach registration. Until these are implemented the process of registering a mark in China is likely to remain lengthy, particularly as the rush of applications shows no sign of slowing.

The administrative problems aside, if expansion into China is a possibility it is definitely worth filing an application to register your mark sooner rather than later. If someone else files to register your mark first, or something similar, this could block your application.



## Dispute resolution

The core problem faced by a UK institution is negotiating an agreement with a Chinese partner that sufficiently protects your own interests. Your partner is likely to be a relatively unknown institution, operating within a legal and cultural system very different to that in UK.

The Chinese Government are permitting Chinese institutions to enter into foreign partnerships, but only with the Chinese institution very much in control. Joint ventures must allow a minimum of 50% control to the Chinese partner and the president must also be Chinese.

Legally, the Chinese commonly enter loosely worded agreements, allowing flexibility in interpretation. This uncertainty can be compounded by the fact that it is common to have very broadly worded legislation, coupled with a large discretion in the application of Chinese law generally.

Having the agreement governed by English law and courts can ease some of the potential uncertainty. However, it may be appropriate to have non-exclusive jurisdiction for the English courts as property and intellectual property right disputes may need to be decided by the court in the country of registration.

From a practical perspective, you should develop a good understanding of your partner's ethos and culture before agreements are entered into. You should be prepared to identify and deal with difficult issues at the outset. Differences in interpretation of common terms can often create confusion - ensure that central terms are mutually understood. Do not allow government relations to be wholly handled

by your overseas partner. Whilst this may seem the simplest option at the outset, it may mean that you do not receive information first hand and would not have any direct contacts with officials should a dispute arise between you and your partner institution.

If problems do arise, although you may wish to assert your rights in the local courts, this may not necessarily be the best approach. Negotiation and discussion of the issues or the use of mediation may have a far less disruptive effect on the relationship.

### For more information please contact:

**Zoe Robertson on T: 44(0)870 763 1378**

**E: zoe.robertson@martineau-uk.com**

**Or**

**Andrew Holden on T: 0870 763 1661**

**E: andrew.holden@martineau-uk.com**



**The articles in this brief contains summaries of complex legal issues and should not be relied upon in relation to**

**specific matters. You are advised to take legal advice on specific matters.**

**For more information on how Martineau can assist in this regard or should you wish to discuss any issues regarding International Law, please contact us on the details below**

**William Barker, Managing Partner**

**T: 44(0) 870 763 1632**

**E: william.barker@martineau-uk.com**

**Roger Blears, Senior Partner**

**T: 44(0) 870 763 1555**

**E: roger.blears@martineau-uk.com**

**James Dilley, Partner**

**Competition Procurement**

**T: 44(0) 870 763 1208**

**E: james.dilley@martineau-uk.com**

**Helen Driscoll, Partner**

**Intellectual property**

**T: 44(0) 870 763 1635**

**E: helen.driscoll@martineau-uk.com**

**David Gwyther, Partner**

**Litigation/Mediation**

**T: 44(0) 870 763 1414**

**E: david.gwyther@martineau-uk.com**

**Peter Manford, Partner**

**Commerce**

**T: 44(0) 870 763 1390**

**E: peter.manford@martineau-uk.com**

**Andrew Whitehead, Partner**

**Energy**

**T: 44(0) 870 763 1528**

**E: andrew.whitehead@martineau-uk.com**

**Richard Wrigley, Partner**

**Corporate**

**T: 44(0) 870 763 1586**

**E: richard.wrigley@martineau-uk.com**