

TO THE ARBITRATION TRIBUNAL

The Matter

A Statement of Defence concerning damages caused by a claimed breach of the Non-Disclosure Agreement and claimed infringements of the Claimant's trade mark and patent rights

The Claimant

Toukvas A/S

Legal Representative(s)

Kjosfossen Advokatfirma DA

The Defendant

Rope Twist, Inc

Legal Representative(s)

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Recital

Tougkvas A/S has filed a statement of claims in relation to the co-operation between Tougkvas A/S and Rope Twist, Inc. Tougkvas A/S has claimed misuse of Tougkvas A/S's confidential business information and thus a breach of a mutual Non-Disclosure Agreement (later: "NDA") and claimed infringement of Tougkvas A/S's patent and trade mark rights. The object of the dispute is a mountain climbing rope with a special kind of sheathing. Tougkvas A/S has filed amendments to the Danish patent application and international patent applications in order to remove the feature "polyester" from the patent claims.

Tougkvas A/S has filed a statement of claims to the Arbitration Court on 6th of October 2014 (later: "the Statement of Claim") to which Rope Twist, Inc answers with this Statement of Defence.

The Arbitration Court should now resolve, if the said amendment to the patent is valid and whether the trade mark is valid or not.¹

The Parties

The Defendant, Rope Twist, Inc is a known and well established American company that produces and designs mountain climbing ropes and other equipment. Rope Twist, Inc has a long experience with producing mountain climbing ropes and is also known to have a top-of-the-line mountain climbing rope production line.

The Claimant, Tougkvas A/S, is a Danish company that produces and designs mountain climbing ropes and other equipment.

The Claims

Rope Twist, Inc denies the grounds stated by Tougkvas A/S in their entirety and respectfully requests that the Arbitration Court shall:

1. dismiss the Claimant's claims as unfounded
2. order Tougkvas A/S to pay the reasonable legal costs of Rope Twist, Inc with interest in accordance with Nordic law. The invoice is presented later during the process
3. declare the amendment to the patent inadmissible, rendering the patent itself invalid²
4. declare the trade mark MOUNTAIN SAFE invalid³.

¹ The Arbitration Tribunal exercising the Rules of the International Chamber of Commerce in Oslo has jurisdiction on the matter because the parties have agreed to refer the dispute to arbitration according to the Rules of the International Chamber of Commerce.

² This claim is made on the presumption that the opposing party would have claimed that the Arbitration Court shall declare the amendment to the patent application valid.

³ This claim is made on the presumption that the opposing party would have claimed that the Arbitration Court shall declare the trade mark valid.

Summary

Rope Twist, Inc, a known rope manufacturer, has entered into negotiations proposed by Tougkvas A/S. The negotiations were not leading to any conclusion and Rope Twist, Inc decided to end the negotiations. Tougkvas A/S has consequently accused Rope Twist, Inc of using its confidential information and subsequent infringement of Tougkvas A/S's patent and trade mark rights. Rope Twist, Inc has neither infringed Tougkvas A/S's patent nor trade mark rights.

Rope Twist, Inc has not breached the NDA mainly because the use of nylon in the contested rope is not confidential information as defined in the NDA. The use of the specified words in Google's AdWords service is also not against any Nordic market act.

The Original Patent application filed by Tougkvas A/S does not cover a rope with nylon sheathings. The amendment to the patent application is also not valid, because the amendment would excessively broaden the scope of protection.

Tougkvas A/S's trade mark MOUNTAIN SAFE is not valid due to lack of distinctiveness.

In this Statement of Defence, the question regarding the claimed breach of the NDA and the Nordic market acts will be addressed first, and after that the questions relating to the claimed infringement of the patent and trade mark rights. The claim of 400 000 Euros and the obligation to pay for the opposing party's legal costs will be addressed last.

Justification

1 The Mutual Non-Disclosure Agreement Was not Breached

1.1 The Need for Confidentiality Was Mutual

Unlike Tougkvas A/S argues⁴, the reason to agree on a mutual non-disclosure agreement (NDA) is not entirely to exchange the trade secrets of Tougkvas A/S in negotiations, but also to ensure that Tougkvas A/S does not misuse confidential information on the production line of Rope Twist, Inc. It is important to Rope Twist, Inc that parties 'willing to negotiate on rope deliveries' do not just try to copy their unique production line to start competing with Rope Twist, Inc. Rope Twist, Inc does not have any interest to gain secret trade information, which other parties usually want to protect with a non-disclosure agreement, as it would be difficult to use such information in the limits of law.

1.2 Rope Twist, Inc Did not Negotiate Disloyally with Hagfjäll

Rope Twist, Inc has not been negotiating with Hagfjäll behind the back of Tougkvas A/S as it was claimed⁵. The fact that negotiating period

⁴ The Statement of Claim, Chapter 3.1.

⁵ The Statement of Claim, Chapter 3.2.

was short is due to that Rope Twist, Inc is capable in quick deliveries as it already has the equipment needed to produce rope. Because rope is produced by a high tech machine, a vast amount of rope can be produced every day and a delivery can be arranged only a few days after signing a contract.

Also, if Tougkvas A/S and Rope Twist, Inc had signed a delivery contract regarding the rope of Tougkvas A/S, it would have itself had negotiated in the same time span⁶ if it wanted to deliver rope to Hagfjäll on the same day.

Thereby, nothing indicates that Rope Twist, Inc would have negotiated on the delivery contract for Hagfjäll behind the back of Tougkvas A/S.

1.3 The Pattern for the Rope Was Public Knowledge

The Section 3 Subsection 1 of the NDA excludes public information from the restrictions of the confidentiality agreement. Both already known public knowledge and information that subsequently becomes public is excluded from the NDA and can be used in spite of the restrictions of the NDA.

The patent application of Tougkvas A/S became public on 5th December 2013 which is during the negotiations between Tougkvas A/S and Rope Twist, Inc. The patent application is thereby excluded from the NDA and can be used in spite of the restrictions of the NDA within the scope of law.

It is true that pending patents are protected by law as well⁷. As the patent application protects only ropes that are made of *polyester* fibres, it does not protect *nylon* based ropes. The chief executive officer of Tougkvas A/S, Mr Repschlager, did not argue that nylon would be compromised by the term polyester, and thereby a patent for polyester products does not protect nylon products. As the idea of rope design is public and the patent does not protect any other ropes than that are made of *polyester*, producing a similar rope of nylon does not breach the Section 2 of the NDA due to the exception in Section 3.

1.4 Rope Twist, Inc Was Already Familiar with Nylon

The Section 3 Subsection 2 of the NDA rules that information known prior to disclosing such information to the other party is an exception of the NDA. According to the named Section, the restriction in the NDA to use or disclose such information is not applied.

Rope Twist, Inc is a professional rope producer as it has technical capabilities to produce rope and it also negotiates with other parties in the rope industry. Rope Twist, Inc has produced rope for a long time, which might be the reason why Tougkvas A/S approached it in the first place. Also, the professional character of Rope Twist, Inc is undisputed since the Statement of Claim confirms it⁸. Thus, Rope Twist, Inc has professional knowledge of producing rope. The claim that Rope Twist,

⁶ If the contract between Rope Twist, Inc and Tougkvas A/S had been signed on 20/12/2013, Tougkvas A/S would still have had to bid for the Hagfjäll contract within the same period as Rope Twist, Inc did to have delivery on 15/1/2014.

⁷ See e.g. the Finnish Patents Act Section 60 or the Norwegian Patents Act Section 60.

⁸ Statement of Claim, Chapter 3.4 – Rope Twist, Inc has been described as ‘a competitor’ of the rope producer Tougkvas A/S.

Inc would not have enough skill to develop mountain climbing ropes is conflicting with the fact that it is a professional rope producer with expensive equipments to produce complex rope designs which Tougkvas A/S sees as a competitor.

It is a known fact that nylon is a common material in the rope industry⁹. As a professional rope producer, Rope Twist, Inc has known the fact for a long time and way before any kind of negotiations with Tougkvas A/S were started, meaning that the knowhow to use nylon was lawfully in the possession of Rope Twist, Inc.

The pattern for *polyester rope* is *public knowledge* and thus under the Section 3 Subsection 1 of the NDA. The fact that nylon is a common material for ropes is already lawfully in possession of Rope Twist, Inc which is an exception of the NDA according to the Section 3 Subsection 2. Thus, the restriction of the Section 2 of the NDA to use or disclose confidential information is not applied to the named *nylon* rope. Thereby, Rope Twist, Inc may freely negotiate on, produce or otherwise disclose products made of nylon without breaching the restriction of the NDA.

1.5 Rope Twist, Inc Has not Caused Damages

Unlike Tougkvas A/S states, it is not undisputed that ‘the Claimant would have got the deal with Hagfjäll if the Defendant had not used the confidential information in their negotiations’. As it is stated, Rope Twist, Inc has not breached the NDA in any way. The truth is that Rope Twist, Inc did state that ‘Tougkvas A/S would *probably* have got the contract if *Rope Twist had not got it*’. It is uncertain that Tougkvas A/S would have got the contract in any case, it is just a *possibility*. Tougkvas A/S has not considered that Rope Twist, Inc has been in the rope business for a long time and thus can have reliable deliveries and Rope Twist was cheaper than Tougkvas A/S¹⁰, and these are the true reasons why Rope Twist, Inc won the contract bid of Hagfjäll.

It is undisputed that Tougkvas A/S would have had a profit of 100 000 Euros if they had won the bid. Still, nothing indicates that a loss of profit was caused by the actions of Rope Twist, Inc and nothing indicates that the NDA would have been breached. Even if the NDA had been breached¹¹, the breach itself would not result in damages because it does not mean that Tougkvas A/S would not have won the bid for Hagfjäll.¹²

⁹ Nylon is a common material for climbing ropes, see e.g. Sterling Rope: Guide to Rope Engineering, Design, and Use Volume 1 (<http://www.sterlingrope.com/media/document/techmanual.pdf> cited 29/10/2014) – ‘Climbing and life safety ropes are made primarily with either nylon 6 or nylon 6,6.’ and ‘Nylon is the superior yarn to use in recreational climbing ropes because of this impact absorption. There is no better product for that purpose at this time’.

¹⁰ It is only stated that Tougkvas A/S would have got 100 000 Euros if it had won the bid, it is undisclosed how much Rope Twist, Inc had profited.

¹¹ Which has *not* been breached as stated above.

¹² The question is further evaluated in Chapter 5.

2 Claimed breach of Nordic Market Acts Did not Occur

2.1 One Can Opt-Out from Signing a Contract

According to the principles of contract law, one can choose the terms of contract they are willing to sign. One can also choose not to sign a contract if the terms are unprofitable. Tougkvas A/S and Rope Twist, Inc were negotiating on a rope delivery contract from October to December 2013. As it became clear that such contract could not be signed with a reasonable profit for Rope Twist, Inc, it withdrew from the negotiations on 5/12/2013. Withdrawal was based on the freedom not to sign a contract and it is lawful.

2.2 Competition Among Similar Products Is Lawful

Nordic legislation prohibits marketing actions that are against good business practice¹³. The term is quite indefinite, but copying a product of someone else is not usually against the prohibition due to the principle of allowing competition. The report of the Finnish Ministry of Employment and the Economics states that straight copying of a product is allowed and not against the good business practice if the product is neither protected by an intellectual property right nor cause a confusion of its origin¹⁴.

As it is stated above in the Chapter 1 of Justification in this Statement of Defence, the confidential trade secrets of Tougkvas A/S have not been misused. In the Chapters 3 and 4 will be proven that the nylon rope of Rope Twist, Inc does not violate any intellectual property right. Thereby, producing nylon rope is not against good business practice when it does not cause a confusion of its origin.

2.3 The Origin of the Product of Rope Twist, Inc Is not Confusing

The rope that Rope Twist, Inc produces is similar to the rope that Tougkvas A/S intends to produce. Nevertheless, Tougkvas A/S started to build a production line of its own after the negotiations with Rope Twist, Inc were ended and it took at least three months. It is uncertain that Tougkvas A/S would even have a product on the market that could be confused with the product of Rope Twist, Inc.

Rope Twist, Inc does not market its rope in a manner that would cause a confusion with other products. Rope Twist, Inc does not violate intellectual property rights¹⁵. Also, Rope Twist, Inc markets the rope on its own name in the Internet. It is true that Rope Twist, Inc uses the AdWords service of Google but using certain words as index words is not confusing marketing. The advertisement itself does not have anything that could confuse a consumer since it only has a hyperlink to the webpage of Rope Twist, Inc, which has a clear description of the origin of the product. Even the Statement of Claim states that using certain phrases in the advertisement might not cause a confusion¹⁶, but

¹³ See e.g. the Finnish Unfair Business Practices Act Section 1 or the Norwegian Act No. 2 of 9 January 2009 relating to the Control of Marketing and Contract Terms and Conditions, etc. (the Marketing Control Act) Section 25.

¹⁴ TEM raportteja 2/2011: 'Laki sopimattomasta menettelystä elinkeinotoiminnassa – käytännöstä ja muutostarpeista' (https://www.tem.fi/files/28952/TEM_raportteja_2_2011.pdf cited 29/10/2014) pp. 14–15.

¹⁵ As described in the Chapters 3 and 4 of this Statement of Defence.

¹⁶ The Statement of Claim Chapter 6.2 p. 17 – 'Using certain signs and/or phrases associated with a competitor might not cause sufficient confusion'.

as the phrases have not been used in the advertisement itself, there cannot be such confusion.

It is a known fact that mountain climbing is very risky sport and causes numerous fatalities annually¹⁷. Thereby, it is unlikely that someone would buy mountain climbing rope without knowledge or expert help because the life of the climber may depend on the climbing rope. Since expertise is needed to buy a rope for climbing, it is unlikely that a consumer would confuse on the origin of the product.

The Norwegian Marketing Control Act Section 7 prohibits some misleading acts and Tougkvas A/S claimed that Rope Twist, Inc would have violated the Section¹⁸. Rope Twist, Inc has not used the trade marks in its advertisements¹⁹ nor offered any false information on its products or their origins. Thus, the Section has not been violated.

2.4 Rope Twist, Inc Obeys Good Business Practice

Rope Twist, Inc denies the accusations that it would have violated good business practice in the relations to Hagfjäll. The reason for fast advance in the contract negotiations between Rope Twist, Inc and Hagfjäll is that Rope Twist, Inc has the equipment needed to produce high-quality rope fast and Rope Twist, Inc is a reliable deliverer of rope. Hagfjäll is one of the biggest mountain climbing gear producers in Europe and thereby well-known operator on the markets. Because Hagfjäll is a well-known company, Rope Twist, Inc has seen profitable to engage into business relations with it even before the negotiations with Tougkvas A/S.

Rope Twist, Inc also denies misusing the goodwill of Tougkvas A/S. When it is unsure if Tougkvas A/S even produces mountain climbing rope, it would be an absurd idea that a company with previous rope producing experience could abuse the goodwill of a company which did not even have rope producing equipment when the claimed breach took place.

3 Tougkvas A/S's Patent Application and the Amendment to the Said Application

3.1 The Original Patent Application

Tougkvas A/S's Danish patent application, filed 5/6/2012, claimed protection for a rope with a special kind of sheathing made of *polyester*.²⁰ Tougkvas A/S filed a similar international patent application according to the PCT on 4/6/2013.

¹⁷ See e.g. a graph of American mountain climbing accidents https://1e5b58fb-a-61376916-s-sites.googlegroups.com/a/stephabegg.com/website/home/projects/accidentstats/graph_accidentspop.png (cited 29/10/2014) and the numerous deaths in the Himalayas are not even included.

¹⁸ The Claimant also claimed that Rope Twist, Inc would have violated the Section 12 of the named Act which would have been 'The right to opt out of marketing by telephone or addressed mail'. Rope Twist, Inc cannot see the relevance and denies the accusation as unfounded.

¹⁹ Rope Twist, Inc also states that the trade mark is invalid. See Chapter 4 of this Statement of Defence.

²⁰ Claim 1 of the patent application: 'Rope, comprising a core of parallel or braided core strings, and a braided sheathing of sheathing elements characterized in that in that the sheathing elements (1) are *ribbons of substantially parallel polyester fibres* woven together with transverse threads.'

The Danish patent application was made public on 5/12/2013 according to Section 22 of the Danish Patents Act.

3.1.1 Provisional Protection Does not Cover Nylon Ribbons

It is widely recognized that while evaluating patents, the patent claims determine the scope of protection.²¹ The evaluation is mainly based on how an average professional in the trade understands the patent claims.²²

According to Nordic patent law, the invention described in the patent application has the similar protection from infringements as a granted patent. This protection is referred to as “provisional protection” in Nordic judicial literature. The provisional protection has certain restrictions compared to the protection of a granted patent. Firstly, the patent must be later granted. Secondly, the scope of protection only extends to subject-matter disclosed in the claims as worded at the time when the application was made available to the public.²³

If a patent application is amended after the said application is made public, the provisional protection covers only the patent as it was when made public. If the patent is later granted, the provisional protection has a retroactive effect. If wrongly admitted, the amendments may provide cause for revocation.²⁴

The wording of the original patent application described the invention to be a special kind of sheathing made using *polyester* ribbons. Contrary to Tougkvas A/S’s claims, due to the strict evaluation of the provisional protection, the rope with a nylon sheathing is not covered by the protection of the patent application. The Claim 1 of the application clearly states that the material used is polyester: ‘ribbons of substantially parallel polyester fibres’.

3.1.2 The Doctrine of Equivalent

The doctrine of equivalents should not be referred to, because it is not in the scope of the Arbitration Tribunal’s competence. Therefore, the claimant’s claim based on the doctrine of equivalents should be dismissed.

In addition, Tougkvas A/S’s CEO Rasmus Repschlager²⁵ has stated himself that nylon is not comprised by the term “polyester”, neither literally nor under the doctrine of equivalents.

3.1.3 The Original Patent Applications Do not Cover Nylon Ribbons

Due to the facts stated above, Tougkvas A/S’s original patent applications filed on 5/6/2012 and 4/6/2013 do not cover nylon ribbons and Rope Twist, Inc has therefore not infringed Tougkvas A/S’s patent rights. There is thus no grounds for prohibitive actions such as withdrawal from the market etc.²⁶

²¹ Norrgård: Patent in loukkaus, Helsinki 2008, p. 119.

²² Norrgård: Patent in loukkaus, Helsinki 2008, p. 164.

²³ See e.g. The Danish Consolidate Patents Act Section 60.

²⁴ Cornish – Llewellyn – Aplin: Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, 8th edition, 2013, Chapter 4, p. 30.

²⁵ Repschlager is comparable to an average professional in the trade.

²⁶ See e.g. the Finnish Patents Act Section 59 or the Danish Consolidate Patents Act Section 59.

3.2 The Amendment to the Patent Application Is Invalid

Toukvas A/S's purpose is to amend its Danish patent and international patent application filed in accordance with the Patent Cooperation Treaty (later: "PCT") in such a way that the word "polyester" is removed from Claim 1.

3.2.1 Nordic Patent Law on Patent Application Amendments

The Patent amendment is in a phase which the PCT Article 28 is applied to. Article 28(2) PCT states that the amendments shall not go beyond the disclosure in the international application as filed. Article 28(3) PCT also states that the amendments shall be in accordance with the national law of the designated State in all respects not provided for in this Treaty and the Regulations.

Nordic patent law has it, that an application for a patent may not be amended in such a way that the patent is applied for in respect of subject-matter which was not disclosed in the application as filed.²⁷ In other words, a patent application cannot be amended so that the scope of protection would be *broader* than in the original application. The scope of protection can only be slightly altered, it is a requirement that the amended claim still has support in the application as a whole.

3.2.2 The EPO Three-Phased-Test

The European Patent Office has developed a three-phased test or the "is it essential?" test in its judicial practice in accordance with the European Patent Convention. The test evaluates i.a. when a feature can be removed from a patent application.²⁸

In its judicial practice EPO confirmed that, where the replacement or removal of a feature from a claim is concerned, a feature consistently presented as an essential feature of the invention may not be deleted from an independent claim, since this would add subject-matter.²⁹

In addition, EPO has stated that if a feature is referred to in the application numerous times and constantly, the feature cannot be removed from the claim despite being non-essential.³⁰

In Toukvas A/S's patent application, the feature polyester is essential, because it has certain features required for the invention to work. Unlike the claimant states, the material of the sheathing is clearly essential, because the invention would not work similarly with other materials. The feature polyester is also constantly and in regularity referred to in the application. Due to this, the feature cannot be removed from the application based on EPO's judicial practice.

²⁷ See e.g. the Finnish Patents Act Section 13.

²⁸ Although the EPC is not directly applied in the case at hand because the process is in accordance with the PCT, the judicial practice of the EPO can be taken into account as secondary judicial source for interpretation.

²⁹ European Patent Office: Case Law of the Boards of Appeal, Chapter II. Patent application and amendments, subsection 1.7.2 The "is it essential?" test.

(http://www.epo.org/law-practice/legal-texts/html/caselaw/2013/e/clr_ji_e_1_7_2.htm cited on 27th of October 2014).

³⁰ In EPO Case T-415/91 the board refused to allow the deletion of the feature "three-phase" alternating current. It argued that the low and high AC voltages were consistently referred to in the description and claims as being three-phase. Therefore, the skilled person reading the application as originally filed would not necessarily have regarded the numerous references to "three-phase" as being purely by way of examples. Although it was possible that upon reflection, and using his imagination, it might occur to him that it was not essential to use three phases, this would be his own idea, resulting from his own thinking. It was not part of the content of the application as originally filed.

3.2.3 The Contested Amendment to the Patent Application

In March 2014 Tougkvas A/S sent amendments to the Danish and international patent applications in order to remove the word “polyester” from Claim 1.

The removal of the feature “polyester” would mean that the patent application’s scope of protection would broaden excessively and cover *all kinds of materials* if accepted. This is naturally not acceptable, and in regard to said requirements, the amended claim would no longer have support in the application as a whole. The Claimant has referred to European Patent Office’s judicial custom in order to claim the opposite, but the mentioned cases are not comparable to the case at hand.³¹ In addition, the requirements of the test mentioned by the claimant are not met while the feature “polyester” is essential to the invention and is also referred to in regularity.

Therefore, the amendment to the patent application is not in accordance with nordic patent law and should be declared as invalid.

3.3 The Claimant’s Claim for Compensation Based on Patent Infringement

3.3.1 Rope Twist, Inc Is not Obligated to Pay Compensation

A Right for Compensation is justified for a patent infringement when the patent rights are violated with intention or in negligence. If the requirements stated in Nordic patent law³² are not met, entitlement for compensation is not justified.

According to Nordic patent law, the same rules are applied with certain restrictions and additional conditions when a patent right described in a pending patent application is infringed.³³

Rope Twist, Inc states that according to the Chapter 3.1 above, Rope Twist, Inc has not violated Tougkvas A/S's patent rights in a way that would be grounds for a compensation. The fact that Rope Twist, Inc has produced a rope with nylon sheathings does not violate Tougkvas A/S's patent rights as described in Tougkvas A/S's pending patent application. The Danish and international patent applications filed on 5/6/2012 and 4/6/2013 do not cover ropes with *nylon* sheathing.

The aforementioned amendment to the Tougkvas A/S's said patent applications is not valid due to justification stated above in Chapter 3.2. Thus, Rope Twist, Inc will also not infringe Tougkvas A/S's patent rights after the grant of the patent.

Secondly, if the Arbitration Court should, against the well-founded view of the Defendant, state Rope Twist, Inc guilty of violating Tougkvas A/S's patent rights, the reasonable amount of compensation is no more than 7 % worth of hypothetical license fees, based on justifications stated hereinafter in the next Chapter.

³¹ For example in the EPO Case T 331/87 HOUDAILLE/Machine tool, the contested amendment was about a slight adjustment to the structure of a complicated industrial machine.

³² E.g. the Danish Consolidated Patents Act Sections 58-59.

³³ E.g. the Finnish Patents Act Section 60.

3.3.2 The Reasonable Level of Compensation

Toukvas A/S has not justified or reasoned the amount stated in the Statement of Claim in any way.

The compensation for infringement in patent law is a separate phenomenon to general damages law. In Nordic judicial custom, the burden of proof concerning the reasonable amount of compensation is on the claimant. If the claimant does not present adequate proof of the amount of damages and reasonable compensation, the court of justice should determine the compensation to be rather too small than too large.³⁴ In Nordic judicial practice the reasonable amount of compensation and damages has usually been set to around 10 % of the amount demanded by the claimant.³⁵ The compensation is determined using the hypothetical amount of licensing fees or royalties if the patent was licensed to the infringing party. It must also be borne in mind that the principle of full relief also contains the principle of unjust enrichment.

In Nordic judicial practice concerning compensation for patent infringements, the reasonable level of compensation has been set equivalent to the hypothetical royalty of 7-10 %.³⁶ The level of reasonable compensation depends on the cover of the patent, extent of competition and amount of usual profit margins in the trade.³⁷ If there is substantial amount of competition, the patent cover is not encompassing and if the profit margins are not especially high, the level of compensation should be less than 10 %.³⁸

In the case at hand, the profit of the contract that Rope Twist, Inc made with Hagfjäll in order to provide the contested ropes is around 100 000 Euros. The level of hypothetical royalties would therefore be a little less³⁹, because the trade is very competed, the patent is not very encompassing⁴⁰ and the profit margins are not exceptionally substantial.

The Claimant has not demanded that Rope Twist, Inc should pay for *damages* due to patent infringement in the statement of claims. Toukvas A/S has only demanded that Rope Twist, Inc should pay fair *compensation* for the claimed patent infringement. In addition, Toukvas A/S has not justified the amount of compensation at all. Thus, because compensation in patent law is separate from damages caused by an infringement, Rope Twist, Inc would be obligated to pay only the said 7 % worth of hypothetical licensing fees of fair compensation to Toukvas A/S, *if the Arbitration Court should state Rope Twist, Inc guilty of a patent infringement.*

³⁴ See Halila, Jouko 1961, p. 298.

³⁵ See e.g. Eskildsen, Olaf: Erstatningsberegning i immaterialretlige tvister, In the writing Levin, Marianne (red.): Vennebog til Mogens Koktvedgaard (Stockholm 1993, pages 363–382), p. 363.

³⁶ See e.g. SveaHovR 19.12.1980 (NIR 1982, page 156) and Helsinki Court of Appeal case S 00/2238, 21.5.2002.

³⁷ See e.g. Justifications of Helsinki District Court case 98/12054, 9.6.2000 and the authority statement of Castrén 3.2.2000, page 7.

³⁸ See previous citation.

³⁹ In evaluating the reasonable level of license fees or royalties, one must assess how much the violating party would have been obligated to pay for licensing fees if the patent would have been licensed properly beforehand. It is quite clear that licensing fees are substantially lower than the expected profit, because otherwise it would not be economically reasonable to engage in licence agreements.

⁴⁰ The patent does not cover e.g. nylon sheathings or any other material than polyester as stated in Chapter 3.1 of this Statement of Defence.

4 The Question about Trade Mark Rights

4.1 The Trade Mark of Toukgvas A/S Is not Valid

4.1.1 Legislation

The parties have agreed to apply the Trade Mark Directive⁴¹ and Nordic trade mark legislation. Trade mark laws in Nordic countries are based on the implementation of Trade Mark Directive and the laws have been originally prepared cooperatively by Nordic countries⁴².

When evaluating the possibility to register a trade mark, the Articles 3 and 4 of the trade mark directive are applied. The Article 4 will not be evaluated because it covers the relative grounds of refusal, to which must be appealed by a third party who believes that the mark infringes its exclusive rights to its own mark. OHIM does not take the relative grounds of refusal into account *ex officio*⁴³. In Denmark, the authority actually examines these but it does not have an effect to the registration⁴⁴.

Every obstacle of registration is independent and they must be evaluated separately⁴⁵. The common good behind the registration obstacles must be taken into account when evaluating them⁴⁶.

Article 3 contains the absolute grounds of refusal, which are taken into account *ex officio* by the trade mark register authority. It contains the demand of the distinctive character of the mark, which means that the mark has to be able to distinguish the products of the applicant from other similar products⁴⁷. The most essential rule is in the Article 3 (c) which contains criteria of descriptive nature⁴⁸.

The distinctive character of the trade mark is based on its appearance, pronunciation and/or meaning⁴⁹. The general impression combined with the goods for which the registration is applied, probable consumers' level of consciousness, the securing of the competitors' interest for preventing unreasonable harm and all other possible affecting factors must be taken into account when evaluating the possibility of the registration.⁵⁰

The trade mark with distinctive character is an invented name for a product or a service or another sign, which has original and special characteristics. According to legal praxis of The European Court of Justice (later on ECJ) a trade mark has no distinctive character if it is not imaginative or if it is imaginative to less extent.⁵¹

⁴¹ DIRECTIVE 2008/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2008 to approximate the laws of the Member States relating to trade marks.

⁴² Pirkko Liisa Haarman: *Immateriaalioikeus* (2012) p. 303.

⁴³ Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p. 143.

⁴⁴ Taija Pihlajarinne, Essi Pokela and Kirsi Ruuhonen: *Tavaramerkki ja toiminimi* (2010) pp. 24-25.

⁴⁵ C-53/01-C55/01 (Linde and others), Paragraph 67.

⁴⁶ C-299/99 (Philips), Paragraph 77.

⁴⁷ Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p.141.

⁴⁸ Article 3 (1) (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services.

⁴⁹ Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p. 149.

⁵⁰ OHIM the Board of Appeal R 20/1997-1 (XTRA), Paragraph 18.

⁵¹ C-64/02P, Paragraph 50.

Trade marks that lack distinctive character are especially those marks that are commonly used in commercial activity to describe those products according to the target group's opinion.⁵² A word mark that describes the characteristics of the products lacks distinctive character.⁵³

ECJ has stated in *Poskantoor* case that mere combination of the parts each of which describes kind and quality, is as a rule self descriptive.⁵⁴ In the highly criticized⁵⁵ *Baby-dry* case ECJ evaluated that grammar errors of the mark that were done on purpose can constitute the distinctive nature for the mark. The *Baby-dry* case has gradually lost its influence and nowadays any kind of difference between a word mark and its terminology, which is commonly used by consumers when describing goods or their essential characteristics, is not considered to automatically lead to distinctive character of the trade mark.⁵⁶ The Section 13 of the Finnish Trade Mark Act contains the phrase "with petty modifications or additions".⁵⁷

The weakest forms of the distinctive character are suggestive and descriptive marks.⁵⁸

4.1.2 Argumentation

The Claimant has stated that its trade mark MOUNTAIN SAFE has distinctive character. The trade mark consisted of two words, which both have very descriptive nature. The word MOUNTAIN describes a place where products covered by the mark are used. The word SAFE describes a feeling of no danger or risk of death or injury. The guarantee of safety is one of the main purposes of use for mountain ropes. When evaluating the whole mark it is clear that the trade mark is not very imaginative so it cannot acquire distinctiveness by that way.

When searching with the word combination MOUNTAIN SAFE, the first result was a site called <http://mountainsafe.co.uk>⁵⁹ which represents a cooperation of organizations that want to assure the safety of climbing in Snowdonia, in Wales. The rest results were usually companies which sell similar products compared to the Claimant's product. Thus, it is clear that the trade mark is not very original.

The Claimant has argued that the mark is written incorrectly on purpose and that it is contextually incorrect. However, the trade mark holder has not given any logical or legal reasoning for this argument.

⁵² Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p. 150.

⁵³ C-304/06 P (EUROHYPO v. SMHV) Paragraphs 58-59.

⁵⁴ See e.g. C-363/99 (*Postkantoor*) Paragraphs 42 and 98-99.

⁵⁵ It was criticized a lot in the legal literature, because it established too vast and open doctrine, see e.g. Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p. 173.

⁵⁶ Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008), p. 174.

⁵⁷ E.g. The Finnish Trade Mark Act Section 13.

⁵⁸ Salmi, Häkkänen, Oesch and Tommila: *Tavaramerkki* (2008) p. 151.

⁵⁹ Cited 30/10/2014.

4.2 The Trade Mark Infringement Has not Occurred

4.2.1 Legislation

According to the Trade Mark Directive and Nordic trade mark laws, it is not possible to have protection for the part of mark which is in common use.⁶⁰

The trade mark is supposed to become public at the registration day.⁶¹ An exclusive right is born on its application day.⁶² If the mark is not registered or it is considered invalid, there is no exclusive right.

4.2.2 Argumentation

Toukgvas A/S has stated that the Defendant has chosen to phrase their marketing in a way that makes it unlawfully similar to Toukgvas A/S's trade marked phrase, "MOUNTAIN SAFE". Toukgvas A/S has stated that the Defendant has been associating themselves with Toukgvas A/S's trade mark, by using the main elements of the trade mark with only minor, insignificant changes.

However, mountaineering is another term for rock climbing, and it is commonly used among the mountaineers and can be found in the dictionary⁶³. In addition, the words mountaineering and mountain do not have the same meaning and they differ enough from each other when examining the structure of the words.

It is clear that Toukgvas A/S has no right to prohibit Rope Twist Inc for using the word mountaineering which is a commonly used term for this sport activity. It is highly likely that the target group only understands that the defendant's marketing is performed with a commonly used term in mountaineering retail business.

4.3 There Is no Risk of Confusion Between Toukgvas A/S's and the Defendant's Products

4.3.1 Legislation

In the case "Google France and Google" ECJ formed the fundamental base of the evaluation of the use of keywords. The problem in the case was the interpretation of the Article 5(1) of Trade Mark Directive.⁶⁴ The ECJ formed in the aforementioned case the so called "Google France

⁶⁰ Article 3 (1) (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade, for the Nordic legislation.

⁶¹ Tavaramerkki (2008) p. 107.

⁶² Tavaramerkki (2008) p. 106.

⁶³ <http://www.oxforddictionaries.com/definition/english/mountaineering> (cited 25/10/2014).

⁶⁴ The court evaluated the phrase of the Article "use in the course of trade" in the following way:

50 The use of a sign identical with a trade mark constitutes use in the course of trade where it occurs in the context of commercial activity with a view to economic advantage and not as a private matter

51 With regard, firstly, to the advertiser purchasing the referencing service and choosing as a keyword a sign identical with another's trade mark, it must be held that that advertiser is using that sign within the meaning of that case-law. The expression 'in relation to goods or services' identical with those for which the trade mark is registered, which features in Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, relates, in principle, to goods or services of third parties who use a sign identical with the mark

84. The function of indicating the origin of the mark is adversely affected [in keyword advertising] if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

Consumer Confusion Standard".⁶⁵ ECJ states that the third party which wants to use another party's trade mark as a keyword, must inform the consumer in the advertisement whether the third party has any economic connections to the trade mark holder or not, and this must be done in a sufficiently clear manner.⁶⁶

In contrast to the ECJ's traditional praxis in the trade mark cases, aforementioned group of "normally informed and reasonably attentive internet users" is based upon internet users in general, as opposed to a more limited group of relevant consumers in the given field of commerce.

According to legal praxis of the ECJ the possible special group has different qualifications than the normal average consumer -doctrine. The special group which can be, for instance the professionals of the field, is consisted of sophisticated, attentive and careful people.⁶⁷

When the products are bought more seldom than the average consuming products the awareness of the consumers can be higher.

4.3.2 Argumentation

Toukgvas A/S has also stated that the Defendant's marketing is likely to cause the average consumer to confuse and/or associate the Defendant or its products with Toukgvas A/S's trade mark.

There is no chance for consumers to be mistaken between the Toukgvas A/S's and the defendant's products. The mountaineers are their own professional special group, which members are often aware of the importance of quality of the climbing gear. They will likely pay attention to details of the ropes and can distinct products. Besides, there are no mentions in the Rope Twist, Inc's site of the trade mark MOUNTAIN SAFE or Toukgvas or any economical connections to them.

The main method of Google's AdWords service is that when an internet user searches with a word or words, the search engine will randomly pick related ads, which are shown at the top and the bottom of the results page. Toukgvas A/S's claim that the search engine always shows the ad is false. When the daily ad budget for advertisement clicks is exceeded, the ad is not shown anymore.

There is a word Advertisement in user's language on bright orange background and the ad is separated from actual search results with grey lines. So, it is easy for the average internet user to distinct the ad from actual results. In this case the defendant has not used Toukgvas A/S's trade mark or company name in the text of the ad.

⁶⁵ Lassi Jyrkiö: "BUT STILL I HAVEN'T FOUND WHAT I'M LOOKING FOR" – THE ECJ AND THE USE OFCOMPETITOR'S TRADEMARK IN SEARCH ENGINE KEYWORD ADVERTISING (2011).

⁶⁶ 89. *In the case where a third party's ad suggests that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.*

90. *In the case where the ad, while not suggesting the existence of an economic link, is vague to such an extent on the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine, on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the proprietor of the trade mark or, on the contrary, economically linked to that proprietor, the conclusion must also be that there is an adverse effect on that function of the trade mark.*

⁶⁷ See e.g. T-34/00.

Toukgvas A/S has stated that the Defendant is marketing identical goods as Toukgvas A/S is producing. According to what is aforementioned about the patent dispute it is clear that the goods are not identical.

The trade mark MOUNTAIN SAFE is registered for a rope product, which patent application became public on fifth of December 2013 and on 20th of December 2013 negotiations between the parties ended without agreement. The trade mark application was filed late December 2013 and the trade mark was registered in Nordic countries between June and August 2014. This means that there has been only a half year between an application and registration and eight months until the Statement of Claim was filed.

Toukgvas A/S has not presented any sole evidence that the mark has become distinct by institutionalization before the application day, which means that it has not gained distinctive character and thus it has not gotten any protection before the application day.

According to aforementioned grounds it is clear that there has not been enough time for consumers to get to know the mark and the product it covers. The building of the production line for the product, the introduction campaigns and the marketing of the new product takes time and it is clear that the mark has not become well-known to consumers in the time period and there are few so called loyal customers. The rope is a vital piece of the climbing gears because the life of mountaineers depend on it and its life is quite long – the rope will last in average use from five to ten years.⁶⁸ Therefore it is essential for the mountaineer to evaluate different ropes for a reasonable amount of time before making the final decision of buying the product.

4.4 There Is no Basis for the Damages that Toukgvas A/S Is Demanding

4.4.1 Legislation

The basis of the evaluation of the possible damages is based on the Article 13 of the directive on enforcement of intellectual property rights⁶⁹. This directive is implemented in Nordic trade mark acts. It contains the criteria for evaluating the amount of the compensation:

the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

The Section 38 of the Finnish Trade Mark Act contains the requirements of when the compensation should be ordered to be paid. The amount of compensation is "reasonable".⁷⁰ In the preliminary work of the Finnish trade mark act the criteria of the Article 13 are mentioned.

⁶⁸ <http://www.rollglobal.org/2010/11/ropereplacement> (cited 30/10/2014).

⁶⁹ DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights.

⁷⁰ E.g. the Section 38 of the Finnish Trade Mark Act: If someone on purpose or carelessly infringes the right for the distinctive feature, is liable to pay to infringements reasonable compensation for the use of the mark and compensation of the all damage, which is cause by the infringement. If carelessness is only mild, the compensation for the damage can be arbitrated.

4.4.2 Argumentation

Toukvas A/S has not argued clearly which part of the damages demand covers the claimed damages from the trade mark infringement.

These legal doctrines require that there is an actual exclusive right of the mark which to appeal to. In this case it is undeniable that there is no such right. The mark registration is not competent so the claimed infringement could not have happened. Therefore, Toukvas A/S has no right for a compensation according to the Nordic trade mark acts.

If the court would accept against Rope Twist's arguments that Rope Twist shall pay the compensation, Rope Twist states that the amount of compensation is unreasonable. Rope Twist has not intentionally tried to benefit of the holder's trade mark so it has not gained any unfair profit. Rope Twist Inc is a known rope producer so it is well-known enough by its own merits and thus does not need coverage by using a mark which is not even known.

According to the Chapter 2.4 above, it is clear that the holder mark has not gained much goodwill. The mark has not been in use for such a long time that the holder would gain much profit from selling the goods covered by the mark. The setting up of the production line is costly so it takes some time before the product will make profit.

5 The Claimed Compensation of 400 000 Euros

Whilst evaluating the Claimant's claim for compensation one must bear in mind the structure of damages and compensation in patent and trade mark law. According to Nordic law, a party guilty of infringing the patent or trade mark rights of the opposing side is obligated to pay (a) compensation corresponding to a reasonable licence fee for the exploitation and (b) damages for any loss resulting from the infringement that would not have arisen in connection with licensing.⁷¹ In connection to a breach of a Non-Disclosure Agreement, one must only pay for the damages caused by the breach. Thus, the relevant hypothetical licensing fees in accordance with Nordic patents and trade mark law must be estimated, and secondly the possible damages must be evaluated. Due to the prohibition of unjust enrichment the damages must be assessed on the whole.

According to Nordic procedural law and the principle of disposition, the burden of proof concerning the amount and grounds for damages or compensation in patent law is on the claimant.

5.1 The Reasonable Amount of Hypothetical Licensing Fees i.e. Compensation

Toukvas A/S has not justified the amount of 400 000 Euros in its Statement of Claims. As stated in Chapter 3.3.2 above, in light of the patent infringement the reasonable compensation would be no more than 7 % worth of hypothetical licensing fees. Nevertheless, it is clear that Rope Twist, Inc has not infringed Toukvas A/S's patent rights and is not obligated to pay any kind of compensation or damages. The

⁷¹ See e.g. the Norwegian Patents Act Section 60 and the Finnish Trade Mark Act Section 38.

same applies to the trade mark aspect as stated in Section 4 of this Statement of Defence.

5.2 The Damages Caused by Rope Twist, Inc's Actions

To justify the obligation to pay for damages the claimant should establish to the court of justice the amount of damages and the causal connection between the damages and the actions of the defendant. As said above, the burden of proof is on the claimant.

As presented above in the Chapters 1 and 2, Rope Twist, Inc has gotten the deal with Hagfjäll, providing Rope Twist, Inc with a profit of 100 000 Euros. Tougkvas A/S has claimed that this profit must be compensated to him as damages caused by Rope Twist, Inc's action. Tougkvas A/S has not justified the legal grounds, why Rope Twist, Inc should be liable to pay for the claimed damages to Tougkvas A/S. It is therefore obvious that the causal connection has not been established.

5.3 Rope Twist, Inc Is not Liable for Damages or Obligated to Pay Compensation

Consequently to the facts stated in this Chapter and in Chapters 1–4, the whole claim is ill-founded and the Defendant respectively pleads that the Arbitration Court should dismiss the claim in its entirety.

6 Legal Costs

6.1 Relevant Legislation

Due to Nordic process law, the losing party must pay for the opposing party's legal costs in civil non-mandatory cases.⁷² The losing party can also be ordered to pay for interests occurred after the judgement. E.g., according to the Finnish Interest Act (20.8.1982/633) Section 4

"In case the payment of a debt is delayed, the debtor must pay annual interest for late payment for the delayed amount. The amount of the interest is seven percentage points higher than the reference rate referred to in Section 12 in force at the time in question."

6.2 Rope Twist, Inc's Obligation to Cover Tougkvas A/S's Legal Costs

The Arbitration Court shall order Tougkvas A/S to pay Rope Twist, Inc.'s reasonable legal costs with interest running a month after the judgement in accordance with Nordic law. The invoice will be presented later during the process.

⁷² See for example the Finnish Code of Judicial Procedure (4/1734) Chapter 21 Section 1: "The party who loses the case is liable for all reasonable legal costs incurred by the necessary measures of the opposing party, unless otherwise provided by an Act." See also The Finnish Arbitration Act 23.10.1992/967, Section 49: "Unless otherwise agreed by the parties, the arbitral tribunal may, in its award or in any other decision concerning the termination of the arbitral proceedings, order a party to compensate, in whole or in part, the other party for his normal legal costs, in accordance with the provisions of the Code of Judicial Procedure on the compensation for legal costs, where applicable".

Conclusion

- Rope Twist, Inc has not breached the NDA
- Rope Twist, Inc has not violated Nordic market control acts
- Rope Twist, Inc has not infringed Tougkvas A/S's patent rights
- The amendments to the patent applications are invalid due to excessive broadening of the scope of the patent
- Tougkvas A/S's claim for prohibition of the use of the rope is unjustified and should be dismissed
- The trade mark MOUNTAIN SAFE is invalid due to lack of distinctiveness
- Tougkvas A/S's claim for compensation is unfounded and should be dismissed
- Tougkvas A/S should pay for Rope Twist, Inc's reasonable legal costs

Presentation of Evidence

a) Documentary Evidence

D1: The original patent application, dated 5/6/2012

Theme of evidence: The phrasing of the patent application and Claim 1.

D2: The mutual Non Disclosure Agreement between the Claimant and the Defendant, signed on 12th of October 2013

Theme of evidence: The NDA was agreed on, and Rope Twist, Inc. breached the obligations set in the agreement.

D3: The Google search result for the word 'hotel'

Theme of evidence: The Google search page clearly separates advertisements from actual search results as described in the Chapter 4.3.2.

b) Oral Evidence

1: Hearing of the CEO of Tougkvas A/S in argumentation purpose

Theme of evidence: Rope Twist, Inc has not misused Tougkvas A/S's trade secrets.

Helsinki 3rd of November 2014



Eetu Ahonen



Atte Andersin



Jutta Kastinen

On behalf of Rope Twist, Inc

Appendices

Appendix 1: The original patent application, dated 5/6/2012

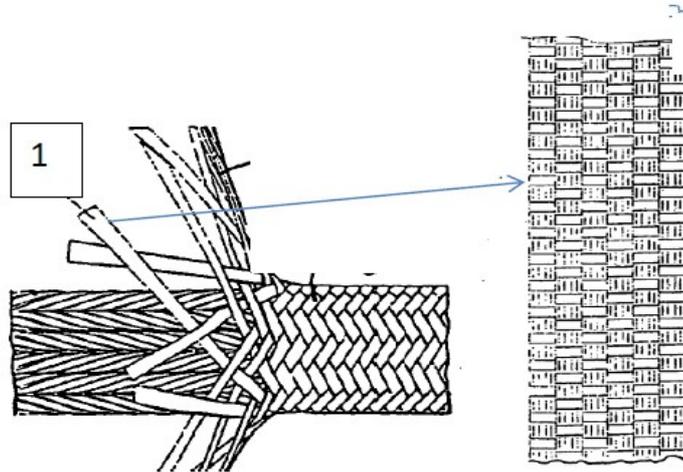
Appendix 2: The mutual Non-Disclosure Agreement between the Claimant and the Defendant, signed on 12th of October 2013

Appendix 3: The Google search result for the word 'hotel'

Appendix 1: Specifications of the Patent Application

The rest of the original patent application can be seen in the Patent Office

Description:



The main object of the invention is to provide ropes with a solid and wear resistant sheathing for demanding application purposes, both at sea and at land. In particular it is an object to create a sheathing with a surface so dense that the penetration of contaminants, such as sand, or the risk of hooking a foreign body (such as sharp rocks) is considerably reduced.

According to the invention, the sheathing should be made of ribbons of substantially parallel fibres woven together with transverse threads. If the thread should burst, the construction of the sheathing will prevent it from loosening. Polyester fibres are very useful.

Claim 1:

Rope, comprising a core of parallel or braided core strings, and a braided sheathing of sheathing elements **characterized in that** in that the sheathing elements (1) are ribbons of substantially parallel polyester fibres woven together with transverse threads.

Appendix 2: The Mutual Non-Disclosure Agreement Between the Claimant and the Defendant **Confidentiality Agreement**

This confidentiality agreement (the «Agreement») is entered into between:

1. Tougkvas A/S, a company organized and existing under the laws of Denmark
2. Rope Twist, Inc, a company organized and existing under the laws of the state of Delawere

1 Background

The parties are entering into business discussions of a sensitive nature regarding a possible future business co-operation (“the Project”).

In this Agreement “Confidential Information” means financial, technical, operational, commercial, management and other information, experience and expertise of whatever kind relating to the parties or the Project.

2 Confidentiality Undertaking

Each of us undertakes to the other that we will not without prior written consent of the other party:

- 1) Copy, distribute or disclose any Confidential Information to any other person other than employees as mentioned in article 4
- 2) Use any Confidential Information for any purpose other than in relation to our assessment of the Project

3 Exceptions from Confidentiality

The restrictions on use and disclosure set out in paragraph 2 above shall not apply to any information which:

- 1) At the date of its disclosure is public knowledge or which subsequently becomes public knowledge other than by any breach of this Agreement by the recipient hereunder,
- 2) Was lawfully in the recipient’s possession prior to such information having been disclosed or made available to the recipient by or on behalf of the other,
- 3) Is at any time after the date of this Agreement, acquired by the recipient from a source other than the other party hereunder, provided such source has not acted in breach of an existing obligation of confidentiality or secrecy, or
- 4) Is required to be disclosed by applicable law or regulation or order of a court of competent jurisdiction or government agency, provided, to the extent permitted by law, the recipient consult with the other party prior to such disclosure.

4 Further undertakings

Each of us further undertake to the other:

- 1) To limit access to Confidential Information to those employees who require the information for the purpose referred to in article 2. (2) (“need to know”)
- 2) To return to the other party immediately upon request all Confidential Information and copies thereof received pursuant to this Agreement and to delete it from its computer records

5 No representations or warranties

We acknowledge and agree that neither we nor any other member of our group of companies nor any of our officers, employees or advisors are making any representation or warranty whatsoever in relation to the Confidential Information and none will have any liability for use the other of the Confidential Information.

6 Governing law and dispute resolution

This Agreement shall be governed by and construed in accordance with basic principles of Nordic law.

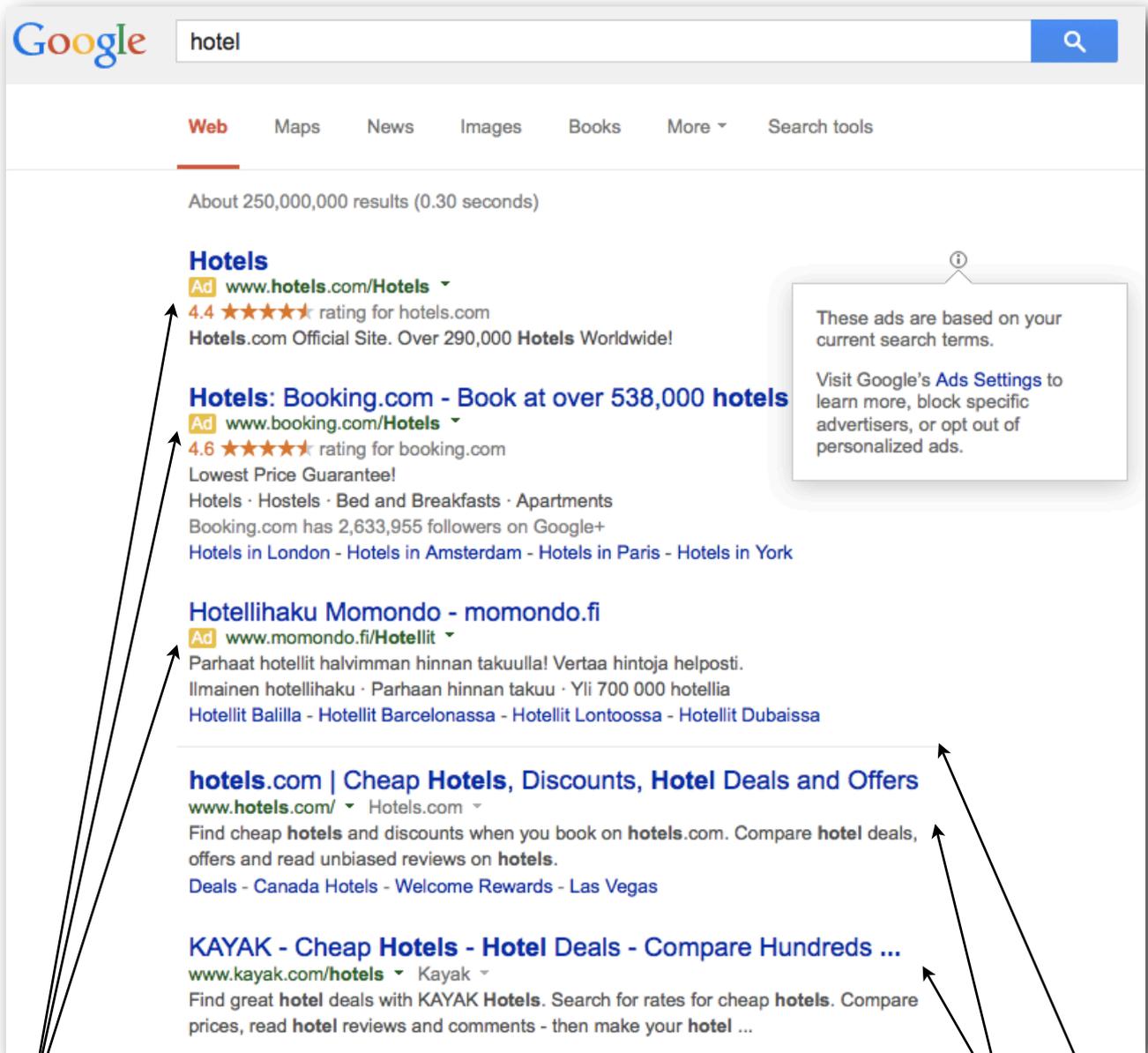
Any Controversy or claim arising from this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those Rules.

12 October 2013

Tougkvas A/S

Rope Twist, Inc

Appendix 3: The Google Search Result for the Word 'Hotel'



Clearly marked advertisements

Actual search results below the grey line