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Legal 500 2019

August 2021

VBB on Belgian Business Law

Highlights

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IFLR1000, 2019

Topics covered in this issue

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Table of contents

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COMMERCIAL LAW

Law Strengthening Payment Periods for Commercial Transactions to Enter into Effect on 1 February 2022

As reported in the previous issue of this Newsletter (*See*, this Newsletter, Volume 2021, No. 7, p. 6), the federal Chamber of Representatives adopted on 15 July 2021 a Law modifying the Law of 2 August 2002 on combating late payment in commercial transactions (*Wetsontwerp tot wijziging van de Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Projet de loi modifiant la Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the ***Law***).

The Law was published in the Belgian Official Journal on 30 August 2021. It will enter into force on 1 February 2022.

Liège Court of Appeal Offers Instructive Reminder of Rules on Defective Products

On 23 July 2021, the Liège Court of Appeal (the ***Court***) handed down an instructive judgment concerning the obligation to supply a product free from defects in a dispute relating to the delivery of a building affected by severe humidity issues (available here).

Background

The dispute at hand arose between a private person (***CN***) and a developer called Lotisud Invest SPRL (***Lotisud***) (together, the ***Parties***). CN had bought an apartment and a basement unit in a building renovated by Lotisud. She noticed humidity in the apartment and the associated basement. As a result, CN had to hire successive experts to determine the extent of the problem and then a contractor to carry out repair works. She subsequently sought damages for the costs incurred. On 28 January 2020, the court of first instance condemned Lotisud to pay CN damages in the amount of EUR 10,433.98. Lotisud appealed this judgment to the Court.

Legal Principles

The Court first explained the legal principles deriving from the obligation to supply a good free from defect:

- This obligation qualifies as an obligation of result that rests on the seller.
- If the parties have not specified the particular qualities of the product, the threshold is that of a "fair and merchantable" quality.
- The buyer bears the burden of proving the defective nature of the product.
- An apparent defect is one that can be detected through a careful but normal inspection of the product immediately after delivery and that makes it unfit for the use for which it is normally intended. In this regard, the thoroughness of the examination carried out by the buyer is assessed in light of the nature of the product and the competences of the buyer.
- A buyer who does not notify the existence of an apparent defect within a reasonable time period, which is defined as the time necessary to examine the product, is deemed to have accepted apparent defects and to have accepted the product as is.
- Acceptance is the legal act whereby the buyer acknowledges – either expressly or tacitly, but certainly – that the seller has correctly executed his obligation to deliver a product free from defects and waives the right to claim damages for this reason. Acceptance is tacit if it can be deduced from the absence of protest upon or within a reasonable time period after delivery. However, a silence does not suffice to find that the buyer has accepted the product.

Instead, such silence must be accompanied by a body of strong, precise and corroborating evidence to be interpreted as acceptance.

- The buyer must take appropriate measures to prove the defect and to limit his damage.

- If the seller has failed to satisfy his obligation to supply a product free from defects, the buyer may at his discretion claim the annulment of the sale or claim its execution and claim damages for the defect.

Findings of Court

The Court found that the various expert reports submitted sufficiently demonstrated that the newly renovated apartment bought by CN was unfit for the purpose for which it was intended, *i.e.*, habitation in decent conditions of hygiene and safety. Similarly, the water present in the basement unit made it highly difficult to store personal properties. As a result, the Court determined that Lotisud had not supplied CN with a good free from defect.

Moreover, the Court found that CN had informed Lotisud on multiple occasions of the humidity issues affecting the building. Therefore, the Court rejected Lotisud's claim that CN had accepted the product and waived her right to claim damages. Additionally, the Court found that, by commissioning expert reports, CN had taken appropriate measures to prove the humidity issues affecting the building and, by carrying out the necessary repair works, had limited her damage.

Finally, the Court considered whether Lotisud could validly invoke a liability waiver clause contained in the authentic deed, which provided that the buyer waived her right to any damages or price reduction for apparent defects. In this respect, the Court considered the quality of Lotisud as a real estate professional and determined that the Lotisud was aware of the defects affecting the building, which it nonetheless sold in bad faith as a normal product. As a result, Lotisud could not rely on the liability waiver clause.

In light of those findings, the Court decided to uphold the judgment of the court of first instance in its entirety.

The judgment provides a useful and methodical overview of the rules applicable to the sale of defective products, in particular the steps that the buyer of a defective product should take towards obtaining legal remedies.

Book 3 of New Civil Code Modernising Property Law Entered into Force on 1 September 2021

On 1 September 2021, the Law of 4 February 2020 inserting Book 3 on "Goods" in the new Civil Code entered into force (*Wet van 4 februari 2020 houdende boek 3 "Goederen" van het Burgerlijk Wetboek / Loi du 4 février 2020 portant le livre 3 "Les biens" du Code civil* - the ***Book on Property Law***). For a discussion of the Book on Property Law, please see the March 2020 issue of this Newsletter (*See*, this Newsletter, Volume 2020, No. 3, p. 3).

Importantly, and unless parties decide otherwise, the Book on Property Law applies neither to future effects of legal acts or facts which came into existence before 1 September 2021, nor to legal acts or facts which originate after 1 September 2021 but relate to real rights that already existed before that date.

COMPETITION LAW

European Commission Approves Belgian Capacity Mechanism in Electricity Market Pursuant to EU State Aid Rules

On 27 August 2021, the European Commission (the ***Commission***) approved under EU State aid rules Belgium's capacity mechanism (***CM***), which aims to ensure the security of electricity supply following Belgium's decision to phase out all nuclear capacity by 2025.

The approval follows the opening of an in-depth investigation on 21 September 2020 in which the Commission assessed the CM for its compatibility with the EU State aid rules (*See*, this Newsletter, Volume 2020, No. 9, p. 3-4). Initially, the Commission had doubts as to whether the need for a capacity mechanism in the Belgian electricity market had been properly demonstrated and quantified, and whether the capacity mechanism would not go beyond what is necessary to address possible issues of resource adequacy. The Commission also wanted to ensure that the measure would not discriminate against specific technologies such as renewable energy or unfairly limit the contributions of cross-border capacity. Lastly, the Commission was concerned that the "congestion revenues" earned by Elia, the Transmission System Operator, from the allocation of cross-border access rights for foreign capacity providers to participate in the capacity mechanism would reduce Elia's incentives to invest in interconnection capacity between Belgium and neighbouring countries.

The Commission's investigation showed that Belgium had improved its resource adequacy assessment and had properly estimated the expected level of security of supply over a ten-year horizon. The Commission was particularly pleased with Belgium's decision to establish specific sustainability requirements for the new fossil fuel installations that will take part in the capacity mechanism. Additionally, the Commission was able to ascertain that renewable technologies or cross-border capacity would not be put at a disadvantage. Finally, the Commission's investigation confirmed that the measure would not reduce incentives for Elia to invest in interconnection capacity.

On this basis, the Commission concluded that the Belgian capacity mechanism complies with EU State aid rules, in particular with the 2014 Guidelines on State aid for environmental protection and energy, and with Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity.

AG Bobek Proposes Unified Triple Conditions for Ne Bis In Idem Principle in bpost Case

On 2 September 2021, Advocate General (AG) Bobek delivered his opinion in case C-117/20, *bpost SA v. Autorité belge de la Concurrence*, on the conditions of application of the *ne bis in idem* principle, pursuant to which one cannot be tried or punished for an infringement for which one has already been convicted or acquitted (prohibition of double jeopardy).

Factual Background and Procedure

The opinion of AG Bobek is the latest step in a long-standing legal battle between Belgian incumbent postal company bpost and the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) concerning bpost's quantitative rebate scheme on so-called "consolidators", *i.e.*, intermediaries offering postal services such as preparing, processing and transporting mail to bpost's distribution points.

From January 2010 until July 2011, bpost had applied a "model per sender" rebate system, which awarded rebates to large clients based on the volume of the mail or the degree of preparation of the mail for further treatment. bpost's discount applied to both senders and consolidators but was calculated on the basis of the turnover generated by each sender individually. As a result, this rebate system did not allow consolidators to aggregate all the mail they processed for different senders. In practice, a sender which provided a large volume of mailings to bpost benefited from a higher rebate than that obtained by a consolidator which handed over an equivalent volume of mail on behalf of several senders (the ***Rebate Scheme***).

bpost was successively fined by (i) the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* - the ***BIPT***), which found the Rebate Scheme discriminatory and thus incompatible with postal regulations; and (ii) the BCA, which decided that the rebate scheme was discriminatory and amounted to an abuse of a dominant position prohibited under EU and national competition law (*See*, this Newsletter, Volume 2012, No. 12, p. 3-4).

bpost sought the annulment of both decisions. Following a preliminary ruling of the Court of Justice of the European Union (the ***CJEU***) on the interpretation of the principle of non-discrimination provided for in the postal rules (*See*, this Newsletter, Volume 2015, No. 2, pp. 3-4), the Brussels Court of Appeal (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*) found no discrimination and annulled the BIPT's decision on 10 March 2016. Eight months later, the Brussels Court of Appeal found that the BCA's decision infringed the *ne bis in idem* principle as the BIPT had already fined bpost for the same acts as those at issue in the proceedings before the BCA. Therefore, on 10 November 2016, the Brussels Court of Appeal also annulled the BCA's decision (*See*, this Newsletter, Volume 2016, No. 12, p. 5).

The BCA further appealed this second judgment to the Belgian Supreme Court (*Hof van Cassatie / Cour de cassation*), which held on 22 November 2018 that the *ne bis in idem* principle had not been infringed. As a result, the case went back to the Brussels Court of Appeal, acting in a different composition. In February 2020, the Brussels Court of Appeal decided to refer a request for a preliminary ruling to the CJEU, asking it to clarify the criteria of application of the principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union (the Charter) (*See*, this Newsletter, Volume 2020, No. 2, p. 5-6).

Advocate General's Opinion

The AG found this case to constitute a unique opportunity for the CJEU to clarify the currently fragmented case law on the *ne bis in idem* principle which should, according to the AG, be interpreted and applied similarly in all areas of European Union law. The AG referred to the *Nordzucker* case (case C-151/20), involving cartel proceedings largely pursuing the same conduct in different Member States, in which he delivered an opinion on the same day.

First, the AG examined the meaning of the term "offence" used in Article 50 of the Charter, which provides that the same person cannot be tried or punished twice in criminal proceedings for the same criminal offence. According to the AG, offences should be distinguished from acts since the former cover not only relevant factual elements but also the negative effects of a conduct on protected legal interests. The concept of protected legal interest is thus a central element in determining why the same or similar acts are pursued in parallel or subsequent proceedings. Therefore, the AG proposed to include the protected legal interests within the assessment of the ne bis in idem principle, which should be based on a test relying on a threefold identity:

1. identity of the offender;

2. identity of the relevant facts:– what is required is that the relevant facts of the two cases are identical; a mere similarity does not suffice; and

3. identity of the protected legal interests, understood as the societal good or social value that a law aims to protect.

In this case, the AG noted that the two sets of proceedings before the BIPT and the BCA appear to be criminal in nature, although the Brussels Court of Appeal should verify whether that is indeed the case for the proceedings before the BIPT. Moreover, the AG indicated that the identity of the offender, bpost, seems to be established and that it is for the Brussels Court of Appeal to determine whether the two sets of proceedings involve the same factual elements.

However, the AG took the view that, subject to verification by the referring court, the proceedings before the BIPT and the BCA appear to relate to the protection of different legal interests and involve laws pursuing different objectives. In particular, the proceedings before the BIPT concerned national legislation imposing obligations of non-discrimination, initially aimed at achieving the liberalisation of the market for postal services, which follows a different logic than the ongoing protection of competition. By contrast, through the prohibition of an abuse of dominant position, competition law rules seek to prevent the distortion of economic competition upstream or downstream by dominant companies.

Consequently, the AG proposed to reply to the Brussels Court of Appeal that the *ne bis in idem* principle does not preclude an administrative authority from imposing a fine for a violation of the competition rules if the same entity was previously acquitted in proceedings before another administrative authority for the same or similar facts, provided that the two sets of proceedings differ with respect to the identity of the offender, of the relevant facts, or of the protected legal interests pursued by the applicable laws.

The AG's opinion can be found here and is not binding on the CJEU.

INTELLECTUAL PROPERTY

General Court Provides Guidance on Bad Faith Trade Mark Registration

On 9 June 2021, the General Court (***GC***) upheld a decision of the European Intellectual Property Office (***EUIPO***) in T-396/20 *Aeroporto di Villanova d'Albenga SpA v. EUIPO* concerning the bad faith registration of a trade mark. The GC confirmed that all relevant circumstances must be examined to determine whether the trade mark registration was made in bad faith. However, it reached the conclusion that the registration had not been effected in bad faith.

Factual Background and Procedure

In 2017, Aéroports de la Côte d'Azur (the ***Trade Mark Owner***) filed an application for a trade mark registration with the EUIPO in accordance with Regulation 2017/1001 on the European Union Trade Mark (***Regulation 2017/1001***). The registration was for a figurative sign which included the words "Riviera Airports".

Aeroporto di Villanova d'Albenga SpA contested the registration before the EUIPO's Opposition Division. It had also changed its name to Riviera Airport (***Riviera Airport***). After its opposition was rejected, Riviera Airport appealed to the EUIPO's Boards of Appeal (***BoA***) and then further appealed to the GC.

Riviera Airport claimed that it had presented a plan for a "Riviera Airport Project" in the context of an earlier cooperation with an affiliate of the Trade Mark Owner. According to Riviera Airport, the Trade Mark Owner therefore had a fiduciary duty preventing it from seeking trade mark registration for a sign incorporating "Riviera Airports". The Riviera Airport added that the Trade Mark Owner had not used the trade mark prior to registration.

GC's Reasoning

The GC first pointed out that the notion of bad faith is not defined in any rules. All the factual circumstances must be examined to assess whether the owner actually acted in bad faith. Bad faith can arise from an intention to undermine the interests of a third party or to obtain an exclusive right for purposes other than those falling within the functions of a trade mark, such as indicating origin.

The GC then held that the Trade Mark Owner's geographical location was not sufficient to rule out that it had acted in bad faith. However, the GC added that the BoA had been correct in finding that the Trade Mark Owner was still within the five-year period to start using the sign. Furthermore, the fact that Riviera Airport had presented its modernisation plan (under the name "Riviera Airport Project") to the Trade Mark Owner before it filed its application did not necessarily imply that the Trade Mark Owner had acted in bad faith.

The GC's judgment can be found here.

Antwerp Court of Appeal Accepts Copyright in Packaging Which Results From Free and Creative Choices

On 6 July 2021, the Antwerp Court of Appeal (*Hof van Beroep te Antwerpen / Cour d'appel d'Anvers* - the ***Court***) held that natural persons are entitled to copyright protection on a product's packaging which results from free and creative choices.

Factual Background and Procedure

Smart NV (***Smart***), a toy manufacturer, brought an action for copyright infringement against Aldi Inkoop NV (***Aldi***) and 2 Original BV (***2 Original***) before the Antwerp Enterprise Court (*Ondernemingsrechtbank / Tribunal de l'entreprise*). Smart sells an educational toy named SMARTMAX.

Smartmax Packaging and Image of Dog Figure Featuring in Instruction Manual

In 2019, Smart found out that Aldi was advertising the product MAGIC PARK with a similar packaging. Both sets of packaging had the name of the product written in white on a red background, a white central area displayed a child playing with the toy, and the box's content on the right side.

Magic Park as Advertised in Aldi's Folder

Smart claimed that Aldi had infringed its copyright in the SMARTMAX packaging, instruction manual, portrait rights, and that it had engaged in unfair market practices. Smart sent a letter of formal notice to Aldi, which immediately stopped the sale of MAGIC PARK. The Antwerp Enterprise Court dismissed Smart's claim because Aldi complied immediately with the letter of formal notice. Smart appealed against that judgment to the Court.

Court Reasoning

The Court first considered that natural persons can rely on the legal presumption of Article XI.170 of the Code of Economic Law. Based on this presumption, any person identified on the work, a reproduction of it or in a communication to the public is deemed to be the author of the work. Smart can thus rely on the presumption that it is the copyright holder as it is identified on the packaging and in the manual.

The Court then explained that as soon as the work is expressed in an original form, it benefits from copyright protection. The element of novelty is irrelevant here, as Smart's argument is based on copyright and not on a patent. Smart's packaging displayed a personal and creative choice in design and layout. It is not required that each element on the packaging be original, the creative choice lies in the combination of those elements. However, the constructions or shapes made with the toy such as the dog displayed on the packaging cannot be protected by copyright.

The Court further indicated that Aldi's copyright infringements must be based on points of similarity rather than the differences of the packaging. The key element is the general impression of the average consumer. Here, the average consumer would not be able to distinguish between both sets of packaging, as they are almost identical.

Finally, copying a competitor's work is not, as such, an unfair market practice under Articles VI.104 and VI.97 of the Code of Economic Law. However, the practice becomes unfair if there is an infringement of intellectual property rights. Here, Aldi and 2 Original infringed Smart's copyright. Moreover, the average consumer would assume that MAGIC PARK originates from Smart. Consequently, Aldi and 2 Original were also found liable of misleading practices.

LABOUR LAW

Maximum Margin for Wage Cost Evolution for 2021 and 2022 Set at 0.4%

Based on a Royal Decree of 30 July 2021 that was published in the Belgian Official Journal on 9 August 2021, the maximum margin for the wage cost evolution, the so-called wage norm, was set at 0.4% for 2021 and 2022 (*Koninklijk Besluit van 30 juli 2021 tot uitvoering van de artikelen 7,§1, van de wet van 26 juli 1996 tot bevordering van de werkgelegenheid en tot preventieve vrijwaring van het concurrentievermogen* / *Arrêté royal du 30 juillet 2021 portant exécution des articles 7, § 1er de la loi du 26 juillet 1996 relative à la promotion de l'emploi et à la sauvegarde préventive de la compétitivité*).

The wage norm expressed by this percentage determines the extent to which the average salary cost of a firm may increase over a two-year period and aims to safeguard Belgium's competitiveness in comparison with neighbouring countries.

This implies that the average salary cost within a firm may increase with maximum 0.4% as from 1 January 2021 up to and including 31 December 2022. The social stakeholders at industry level will now determine how the wage norm of 0.4% will be implemented per industry (*e.g.*, through an increase of the monthly salary, through the grant of a mandatory annual premium, etc.).

Wage scale increases on the basis of seniority and salary increases resulting from mandatory indexation are not caught by the maximum margin of 0.4%.

The grant of a Corona premium (*See*, this Newsletter, Volume 2021, No. 7, p. 21) and all other Covid-19 related temporary and exceptional measures which include a wage cost increasing element and which were agreed before 12 April 2021 are not considered for calculating the wage norm.

LITIGATION

Supreme Court Rules on Exclusion of Unlawfully Obtained Evidence in Civil and Commercial Proceedings

On 14 June 2021, the Supreme Court (*Cour de Cassation / Hof van Cassatie* – the ***Supreme Court***) handed down a judgment in which it held that unlawfully obtained evidence in civil proceedings should only be dismissed from a case when the irregularity affecting such evidence undermines the credibility of the evidence or jeopardises the right to a fair trial (*Cass. 14 June 2021, nr. C.20.0418.N*).

The proceedings before the Supreme Court pitted the seller of a vehicle against its purchaser over the price of that vehicle. According to the plaintiff (who was the seller of the vehicle), the order form erroneously referred to a sale price of EUR 43,500 while the parties had orally agreed on a sale price amounting to EUR 53,500. To substantiate his claim, the plaintiff submitted as evidence a recording of a telephone conversation between himself and the defendant (*i.e.*, the purchaser) referring to a sale price of EUR 53,500. The defendant in turn argued that the recording had been unlawfully obtained and that it could therefore not be used as evidence.

Upholding the defendant's argument, the Court of Appeal initially decided that the recording had to be rejected, considering that (i) it had been made secretly; (ii) it clearly appeared from the recording that the plaintiff had made specific statements for use against the defendant in court proceedings; and (iii) the claim could also be proved by other lawful means.

The Supreme Court overruled the Court of Appeal's judgement and decided that the recording could be accepted in the proceedings, even if unlawfully obtained, except if this were to affect the credibility of the evidence or the right to a fair trial.

The Supreme Court thus confirmed that the Antigone case-law applies equally to criminal and civil matters. That case law originates from a judgment of 10 March 2008 in a criminal matter in which the Supreme Court held that a piece of evidence obtained illegally or through irregular means could only be discarded by the court if (i) the evidence violates specific formalities subject to absolute nullity; (ii) the irregularity of the evidence affects its credibility; or (iii) the use of the evidence undermines the right of a fair trial.

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