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Legal 500 2017

December 2018

VBB on Belgian Business Law

Highlights

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Chambers Europe 2017

Topics covered in this issue

vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

COMMERCIAL LAW

Court of Justice of European Union Holds that Commercial Agents May Work from Principal's Business Premises and Perform Other Activities for Same Principal

On 21 November 2018, the Court of Justice of the European Union ("ECJ") delivered a judgment on a request for a preliminary ruling from the Liège Commercial Court (the "Commercial Court") regarding the interpretation of Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Directive") (ECJ, Case C-452/17, *Zako SPRL v. Sanidel SA*). The ECJ held that a person will not lose the legal status of a "commercial agent" if (s)he works from his/her principal's business premises and performs, for the same principal, other activities than the negotiation and conclusion of contracts for the sale or purchase of goods, on condition that these circumstances do not prevent him/her from performing his/her activities as a commercial agent in an independent manner.

The dispute at issue related to the termination by Sanidel SA ("Sanidel"), a company selling bathrooms and fitted kitchens, of its agreement with Zako SPRL ("Zako"). Zako had been responsible for the fitted kitchen department of Sanidel. In this capacity, Zako negotiated and concluded contracts with customers on behalf of Sanidel. Zako carried out this task exclusively from Sanidel's business premises, where it had a permanent work station with a direct telephone line and e-mail address. In addition, it also performed assignments other than the negotiation and conclusion of contracts on behalf of Sanidel, such as the management of staff in the fitted kitchens department, contacts with suppliers and contractors of Sanidel and the preparing of both purchase orders and plans and price quotes as well as the measurement of kitchens. Zako received a monthly lump sum and an annual commission, calculated for all services performed for Sanidel. No distinction was made between its activities as a commercial agent and its other activities. It was common ground that Zako performed all of its tasks completely autonomously.

Following the termination of its agreement with Sanidel, Zako claimed in court compensation and commission arrears from Sanidel. To rule on the claim, the court had to decide whether the agreement between Zako and Sanidel constituted a (i) contract for services as a sales representative (*handelsvertegenwoordigingsovereenkomst/contrat de représentant de commerce*); (ii) contract for work (*aannemingsovereenkomst/contrat d'entreprise*); or (iii) commercial agency contract (*handelsagentuurovereenkomst/contrat d'agence commerciale*).

The Commercial Court considered whether Zako could be qualified as a commercial agent within the meaning of Article 1(2) of the Directive. This provision defines the term "commercial agent" as "*a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person*, […] *the 'principal', or to negotiate and conclude such transactions on behalf of and in the name of that principal*".

The Commercial Court was uncertain whether Zako would fall under this definition, since Zako (i) performed its assignments from Sanidel's business premises; and (ii) carried out tasks other than the negotiation and conclusion of contracts on behalf of Sanidel. It therefore decided to stay the proceedings and question the ECJ on the interpretation of the term "commercial agent" within the meaning of Article 1(2) of the Directive.

The Commercial Court requested the ECJ to clarify whether Article 1(2) of the Directive must be interpreted as (i) requiring commercial agents to seek and visit customers or suppliers outside the business premises of the principal; and (ii) preventing commercial agents from carrying out tasks other than those listed in Article 1(2) of the Directive, *i.e.*, negotiating and concluding contracts for the sale or purchase of goods, and if not, whether these other tasks should be carried out only secondarily.

The ECJ held that a person may be a commercial agent within the meaning of Article 1(2) of the Directive even if (s)he performs his/her activities from the principal's business premises and even if (s)he also performs, whether subsidiarily or not, activities for the same principal other than the negotiation and conclusion of contracts for the sale or purchase of goods, on condition that these circumstances do not prevent that person from performing his/her activities as commercial agent in an independent manner.

In its response to both questions, the ECJ referred to both the text of Article 1(2) of the Directive and the objectives of the Directive. The ECJ explained that Article 1(2) of the Directive lays down three necessary and sufficient conditions for a person to be classified as a commercial agent: (i) the person must be a self-employed intermediary; (ii) the contractual relationship must have a continuing character; and (iii) the person must exercise, on behalf of and in the name of the principal, an activity which may consist either simply in being an intermediary for the sale or purchase of goods or in both acting as an intermediary and concluding sales or purchases of goods. The place of performance of the activities is irrelevant. Nor does it follow from these conditions that commercial agents would not be allowed to perform other tasks than those expressly referred to in Article 1(2) of the Directive as well.

Furthermore, the ECJ considered that making the classification of "commercial agent" subject to any additional conditions would jeopardise the achievement of the objective pursued by the Directive, *i.e.*, to protect commercial agents in their relations with their principals. As regards the first question, the ECJ specifically pointed out that any interpretation to the contrary would deprive of the benefit of the Directive persons who perform, from the principal's business premises and with the help of modern technology, tasks comparable to those performed by commercial agents who travel around, in particular, for the purposes of client acquisition and direct marketing. As regards the second question, the ECJ noted that a contrary interpretation would allow the principal to circumvent the mandatory provisions of the Directive by providing in the contract for tasks other than those related to the activities of commercial agents.

However, the ECJ emphasised that the fact that the commercial agent performs his/her activities from the principal's business premises or performs, for the same person, his/her activities as a commercial agent together with activities of another nature must not prevent the agent from performing his/her activities as a commercial agent in an independent manner.

As regards the commercial agent's presence at the principal's business premises, the ECJ explained that the commercial agent's status as independent intermediary may be affected if his/her close proximity to the principal makes the agent subject to the principal's instructions or if the material advantages resulting from working at the principal's business premises, such as the provision of a work station or access to the organisational facilities of that establishment, prevent the agent from pursuing his/her activities independently, whether as regards the organisation of his/her activities or with respect to the economic risks associated with it.

As regards the combination of activities as commercial agent and other activities, the ECJ held that the Commercial Court, in its assessment of the independence of the commercial agent, must take account of all circumstances of the case, including the nature of the tasks performed, the manner in which they are carried out, the proportion those tasks represent with regard to the overall activities of the person concerned, the method of calculating the remuneration and the reality of the financial risk incurred.

On the facts of the case, it was common ground that Zako performed all of its tasks in complete independence. It therefore seems likely that the Commercial Court will confirm Zako's status as a "commercial agent". Such a qualification would be beneficial to Zako since the rules on commercial agency agreements provide for specific indemnities if the agreement is terminated. No such protective rules exist with respect to contracts for work.

COMPETITION LAW

Brussels Court of Appeal Annuls Once More Decision to Lift in Part Kinepolis Merger Commitments

On 21 November 2018, the Brussels Court of Appeal (the "Court") held that the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") to lift partially specific merger commitments imposed on Kinepolis was unlawfully taken and therefore annulled the decision.

It is for the second time in 2018 that a decision of the BCA is annulled in the never-ending legal saga in the Belgian cinema sector. On 28 February 2018, the Court had already annulled BCA's earlier decision to lift partially specific commitments imposed on Kinepolis holding that the decision was ill-reasoned (*See, this Newsletter, Volume 2018, No. 3, pp. 4-5*).

The case started in November 1997, when the former Belgian Competition Council (later replaced by the BCA) cleared the concentration between the Claeys and Bert groups to establish the Kinepolis group. The decision was conditional upon several commitments, for an indefinite period of time, including the obligation on Kinepolis to obtain the prior approval from the BCA concerning any form of growth, including organic growth (*i.e.*, any increase in the number of screens or seats operated by Kinepolis).

In 2010, following a four-year legal battle, Kinepolis succeeded at having the commitments partially lifted (*See, this Newsletter, Volume 2010, No. 4*). On 31 March 2017, nearly twenty years after the adoption of the merger decision, Kinepolis tried to have all commitments removed. After analysing the necessity of the remaining commitments which were aimed at preventing a restriction of competition in the prevailing market structure at the time, the BCA decided on 31 May 2017 to lift the restriction on organic growth, subject to a two-year transition period, leaving however the other remaining commitments in place, *i.e.*, those preventing Kinepolis from (i) growing through acquisition without prior approval from the BCA; (ii) obtaining exclusive or priority rights to distribute films; and (iii) concluding programming agreements with independent cinema owners (*See, this Newsletter, Volume 2017, No. 5, pp. 7-8*).

This decision was appealed by two competing cinema companies, Euroscoop and I-Magix. In its judgment of 28 February 2018, the Court found that the Competition College had provided insufficient reasons as to why it fully lifted the commitment preventing Kinepolis from growing organically, whereas the College of Competition Prosecutors had limited its proposal to lifting the commitment with respect to small organic growth only. The Competition College also insufficiently reasoned its decision to create a two-year transition period (*See, this Newsletter, Volume 2018, No. 3, pp. 4-5*).

Following the Court's annulment of the 31 May 2017 decision, the BCA reopened the case and adopted a new decision on 26 April 2018. This decision was again appealed by competing cinema company Euroscoop and again annulled by the Court.

In its judgment of 21 November 2018, the Court examined the consequences of its annulment of BCA's decision of 31 May 2017. The Court stated that, following the annulment, "[f]*or the Competition College of the BCA to take a (new) decision, it is indispensable that the full procedural framework, as prescribed in Book IV of the* [Code of Economic Law], *should be adhered to. It cannot be the case that the Competition College of the BCA, in identical composition, limits itself to take some sort of "amending decision", i.e., a decision that attempts to reason slightly better an annulled decision – which was annulled due to its lack of reasoning -, which means that] the Competition College of the BCA cannot maintain its decision by essentially complementing the reasoning of the annulled decision (to remedy the lack of reasoning and to leave the decision otherwise unchanged).*"

The Court continued that, following BCA's reopening of the case, the president of the Competition College had not composed the Competition College differently and the proceedings had not resumed as prescribed by law. This deprived Euroscoop of its right to object to the composition of the Competition College, which comprised the same individuals who had adopted the previously annulled decision of 31 May 2017.

The latest Court judgment constitutes yet another setback for Kinepolis. The BCA will have to examine again, *ab initio* this time, its request of March 2017 for the full lifting of the 1997 merger commitments and a differently composed Competition College, will have to take, for the third time, a decision on this request. Notices indicating that such a new procedure had started were published in the Belgian Official Journal on 7 January 2019 and on 10 January 2019.

DATA PROTECTION

Belgian Data Protection Authority Issues Report on Application of General Data Protection Regulation

On 23 November 2018, the Belgian Data Protection Authority (the "DPA") issued its report covering six months of application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the "GDPR").

The DPA observed a considerable increase in requests for opinions/information and complaints. Since 25 May 2018, there have been 137 requests for opinions (against 44 in 2017), 3,599 requests for information (against 2,145 in 2017) and 148 complaints (against 76 in 2017). It also underlined that firms have been adapting their data protection policy and, where applicable, have appointed Data Protection Officers ("DPOs"). There are now 3,540 registered DPOs, 2,551 of whom have been registered since the entry into force of the GDPR.

In addition, the DPA noted a high number of reported data breaches (317 since 25 May 2018, against 13 in 2017). According to the DPA, this large difference is attributable to an extension of the obligation to notify breaches. Previously, that obligation only applied to the telecommunications sector. In its report, the DPA specifies that data breaches are most often reported in the healthcare, insurance, public administration and defence, telecommunications and financial services sectors.

European Data Protection Board Guidelines on Accreditation of Certification Bodies

On 4 December 2018, the European Data Protection Board ("EDPB") adopted Guidelines 4/2018 on the accreditation of certification bodies under Article 43 of the General Data Protection Regulation 2016/679 – the "GDPR".

While the GDPR contains a range of binding measures, the GDPR also promotes voluntary measures, such as codes of conduct and certification mechanisms. Article 42 of the GDPR thus encourages the establishment of data protection certification mechanisms and of data protection seals and marks. These are intended to demonstrate data protection compliance and generate trust.

The certificates can either be granted by the competent supervisory authority or the national accreditation bodies. The EDPB guidelines describe the conditions that must be met and the procedures to appoint accreditation bodies.

Member States can decide whether accreditation is reserved only to supervisory authorities, to national accreditation bodies, or to both. Along with the Guidelines, the EDPB published an annex which sets out the requirements for accreditation. This guidance is mainly addressed to national legislators who must now establish the relevant framework in their national law and other stakeholders such as prospective certification bodies or certification scheme owners providing for certification criteria and procedures.

When data protection certificates, marks and seals will become available on a larger scale, they may provide a useful tool for companies to demonstrate compliance with the GDPR to customers and consumers.

Second Annual Review EU-US Privacy Shield Demands Permanent US Ombudsperson

On 19 December 2018, the European Commission published its second annual report on the functioning of the EU-US Privacy Shield (the "Privacy Shield"). The Privacy Shield is a self-certification scheme requiring certified U.S. companies to implement measures protecting personal data that are transferred to them from the EU. More than 3,850 US companies have been certified to date. The European Commission reviews the adequacy of the level of protection annually.

In its report, the European Commission recognises that the steps taken by the US authorities in response to the recommendations made by the Commission in the first annual report have improved the functioning of the framework. For example, the Department of Commerce has strength-

ened its certification process and its proactive oversight over the framework. For its part, the Federal Trade Commission has also demonstrated a more proactive approach to enforcement by monitoring the principles of the Privacy Shield.

The European Commission noted that it expects the US authorities to nominate a permanent Ombudsperson by 28 February 2019, adding that the Ombudsperson is an important body to ensure that complaints concerning access to personal data by US authorities are being addressed.

European Data Protection Board Publishes Draft Guidelines on Territorial Scope of General Data Protection Regulation

On 16 November 2018, the European Data Protection Board ("EDPB") published draft guidelines on the territorial scope of the EU General Data Protection Regulation ("GDPR") (the "Draft Guidelines").

Article 3 of the GDPR provides the GDPR with a broad territorial scope on the basis of two main criteria: the "establishment" criterion (Article 3(1)) and the "targeting" criterion (Article 3(2)). The EDPB notes that, as a general principle, where the processing of personal data falls within the territorial scope of the GDPR, all provisions of the Regulation apply to such processing. However, the Guidelines discuss the various possible scenarios.

First, the EDPB examines the application of the establishment criterion in Article 3 of the GDPR and recommends a three-pronged approach in determining whether or not the processing of personal data falls within the scope of the GDPR. In sum, it should be determined (a) who is the controller or processor for a given processing activity; and (b) whether the processing is carried out "in the context of the activities" of an establishment. Under the establishment criterion, the EDPB points out that (c) the actual place of processing is not relevant in determining whether or not the processing carried out in the context of the activities of an establishment falls within the scope of the GDPR.

Second, in relation to the application of the targeting criterion, the EDPB recommends a two-pronged approach in which (a) the assessment of whether the data subject is located in the European Union must be assessed at the moment when the relevant trigger takes place; and (b) whether the offering of goods or services is directed at a person in the Union or, cumulatively, the behaviour monitored relates to a data subject in the European Union and the monitored behaviour takes place within the European Union.

Third, in relation to processing in a place where Member State law applies by virtue of public international law (Article 3(3), GDPR), the EDPB considers that diplomatic missions and consular posts of a European Union member and ships registered within the European Union fall within the territorial scope of the GDPR.

Fourth, the EDPB provides more guidance on the obligation for data controllers or processors subject to the GDPR to designate a representative in the Union. It also discusses the exemptions from this obligation and the obligations and responsibilities of the representative.

The draft Guidelines can be found here.

INTELLECTUAL PROPERTY

European Commission Publishes Counterfeit and Piracy Watch List

The European Commission published on 7 December 2018 its first Counterfeit and Piracy Watch List (the "Watch List"). The Watch List contains examples of reported marketplaces or service providers whose operators or owners are allegedly resident outside the European Union and reportedly engage in, facilitate, or benefit from counterfeiting and piracy. The aim of the Watch List is to encourage all involved, including enforcement authorities, to take the necessary actions and measures to reduce the availability of goods and services which infringe intellectual property rights on these markets. The Watch List also seeks to raise consumer awareness concerning the environmental, product safety and other risks of purchasing from problematic marketplaces.

The Watch List is part of the measures adopted by the European Union to step up the fight against counterfeiting and piracy (see, European Commission Communication entitled "A balanced IP enforcement system responding to today's societal challenges" (COM (2017) 707 final of 29 November 2017, referred to in *this Newsletter, Volume 2017, No. 11, pp. 8-9*, the "Balanced IP Communication").

Four chapters of the Watch List cover (i) online marketplaces offering content protected by copyright; (ii) e-commerce platforms; (iii) online pharmacies; and (iv) physical marketplaces.

The first of these chapters – dedicated to online marketplaces offering content protected by copyright and services providers that facilitate access to such content – includes names such as Sci-hub.tw/#about, ThePirateBay.org, Torrentz2.eu, Popcorn Time and the hosting provider CloudFlare.

The second chapter discussing offending marketplaces targets e-commerce platforms and lists Bukalapak, EVO Company Group (Tiu.ru, Prom.ua, Bigl.ua, Deal.by, and Satu.kz), Lazada, Snapdeal, Xxjcy.com, and China-telecommunications.com. By contrast, Alibaba platforms (Aliexpress, Tmall, Taobao and 1688), Amazon and eBay are not mentioned, even though those platforms are associated with counterfeit goods. However, these platforms have the reputation of being open to cooperation, apply proactive measures to remove infringing content and are signatories of the Memorandum of Understanding on the sale of counterfeit goods via the internet, first signed in 2011 and updated in 2016 (which is also discussed in the Balanced IP Communication).

The third chapter focuses on online pharmacies and lists the domain registrars CJSC Registrar 101, EP1K Inc and ZhuHai NaiSiNike Information Technology Co.

Finally, the fourth chapter of the Watch List enumerates offending physical marketplaces located in Argentina, Canada, China, India, Indonesia, Korea, Malaysia, Mexico, Russia, Thailand, Turkey, Ukraine, United Arab Emirates and Vietnam.

Court of Justice of European Union Departs from Opinion AG Campos to Hold that Warehouse Storage of Copyright-infringing Products Does Not Always Amount to Act of Distribution

On 19 December 2018, the Court of Justice of the European Union (the "ECJ") handed down its judgment in case C-572/17, *Riksåklagaren v. Imran Syed* on the interpretation of the notion of distribution contained in Article 4(1) of Directive 2001/29 of 22 May 2001 on harmonisation of specific aspects of copyright and related rights in the information society (the "InfoSoc Directive"). The ECJ departs from the Opinion of AG Campos of 3 October 2018 which was previously discussed in this Newsletter and where a full overview of the facts can be found (*See, this Newsletter, Volume 2018, No. 10, p. 8*).

Briefly, Mr. Syed ran a retail shop in Stockholm (Sweden) in which he sold copyright infringing clothes and accessories with rock music motifs. In addition to offering the items for sale in that shop, Mr. Syed stored identical goods in a storage facility adjacent to the shop and in another storage facility located in Bandhagen (Sweden), in a suburb of Stockholm. Having been prosecuted for the sale

of copyright infringing goods, those in the shop as well as the stored goods, Mr. Syed's case made its way through the national court system and reached the Högsta domstolen (Supreme Court) which stayed the proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. When goods bearing protected motifs are unlawfully offered for sale in a shop, can there also be an infringement of the author's exclusive right of distribution under Article 4(1) of the InfoSoc Directive as regards goods with identical motifs, which are held in storage by the person offering the goods for sale?

2. Is it relevant whether the goods are held in a storage facility adjacent to the shop or in another location?

In examining these questions, the ECJ confirmed AG Campos' opinion that EU legislation must be interpreted in a manner that is consistent with international law, in particular if its provisions are intended specifically to give effect to an international agreement concluded by the European Union. It follows that the notion of "distribution to the public by sale" in Article 4 (1) of the InfoSoc Directive should have the same meaning as the expression "making available to the public… through sale" in Article 6(1) of the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

Similarly to AG Campos, the ECJ recalled that distribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. The words "at the very least" used by the ECJ indicate that it is not excluded that the acts or steps preceding the conclusion of a contract of sale may also fall within the concept of "distribution" and be reserved, exclusively, to the holders of copyright, as previously found in case 516/13 *Dimensione Direct Sales* (*See, this Newsletter, Volume 2015, No. 05, p. 11*).

Therefore, an act prior to the actual sale of a work or a copy thereof protected by copyright, which takes place without the right holder's consent and with the objective of making such a sale, may infringe the distribution right as defined in Article 4(1) of the InfoSoc Directive. The ECJ emphasised that although carrying out the sale is not a necessary element for the purpose of establishing an infringement of the right of distribution, it must nonetheless be proven that the goods concerned are actually intended to be distributed to the public without the right holder's consent, *inter alia* by their being offered for sale in a Member State where the work at issue is protected.

In essence, the ECJ had to establish whether warehouse storage can be considered to be an act prior to a sale which may constitute an infringement of the exclusive distribution right, as defined in Article 4(1) of the InfoSoc Directive. Unlike AG Campos who answered the question in the positive, the ECJ provided a more nuanced reasoning in holding that the storage of goods bearing copyrighted motifs may be considered such an act if it is established that those goods are actually intended to be sold to the public without the right holder's authorisation.

In this respect, the fact that a person stores copyright infringing goods which are identical to those which he sells in a shop may be an indication that the stored goods are also intended to be sold in that shop. Accordingly, that storage may constitute an act prior to a sale being made, which is liable to infringe that right holder's distribution right.

However, according to the ECJ, it cannot be inferred from the mere fact that the stored goods and the goods sold in the person's shop are identical that the storage constitutes an act carried out with the aim of making a sale on the territory of the Member State in which those goods are protected by copyright.

The ECJ explained that it cannot be ruled out that all or part of the goods stored in circumstances such as those in the main proceedings are not intended to be sold on the territory of the Member State in which the motif displayed on the goods is protected, even if those goods are identical to those which are offered for sale in the retailer's shop.

In explaining its position, the ECJ observed that a different interpretation (like the view embraced by AG Campos) would result in extending the protection conferred by the exclusive distribution right beyond the framework established by EU law. According to the ECJ, inferring distribution from the mere fact of storing identical copyright infringing goods would lead to ignoring the actual purpose of the goods at issue and treating all the stored goods identically, although they may, in principle, be intended for different purposes.

The ECJ ultimately left it to the referring court to determine, in the light of the evidence available to it, whether all of the stored goods identical to those sold in the shop at issue, or only some of them, were intended to be sold in that shop.

In assessing the intention of the seller, the ECJ offered guidance to the national court. The ECJ indicated that account should be taken of all the factors which may demonstrate that the goods concerned are stored with a view to being sold. Although the distance between the storage facility and the place of sale may constitute evidence that can be used in seeking to establish that the goods concerned are intended to be sold in that place of sale, that evidence cannot, on its own, be decisive. The proximity of the storage facility may only be considered in a concrete analysis of all the factors likely to be relevant, such as, for example, the regular restocking of the shop with goods from the storage facilities at issue, accounting elements, the volume of sales and orders as compared with the volume of stored goods, and current contracts of sale.

LABOUR LAW

Little Book of Belgian Employment Law

Ensuring compliance with Belgian employment law remains a challenge for employers. Companies must act quickly to adapt to new employment regulations and must identify potential human resources issues when hiring, employing and firing employees. Van Bael & Bellis' employment law department prepared the Little Book of Belgian Employment Law setting forth the essential obligations and formalities which employers may want to keep in mind in their daily practice.

The Little Book can be consulted here:

https://www.vbb.com/media/Insights_News/A6_master_book_B-FINAL.pdf.

Hard copies are available on request.

Single Permit – Combining Work and Residence Authorisation in Belgium

Background of New Regulatory Framework

Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and to work in the territory of a Member State and on a common set of rights for third-country employees legally residing in a Member State (the "Single Permit Directive"), requires each Member State to adopt a single application procedure and a common set of rights in order to entitle third-country nationals to reside and to work in a EU Member State on the basis of a single permit. In Belgium, the single permit would replace the system of separate residence and work permits.

The implementation of the Single Permit Directive was in Belgium a burdensome process due to the division of competencies over the employment of foreign employees between the federal government, the Regions and the German-speaking Community. On 2 February 2018, a cooperation agreement was signed between the Federal State, the Walloon Region, the Flemish Region, the Brussels-Capital Region and the German-speaking Community (the "Cooperation Agreement") which provides for a partial implementation of the Single Permit Directive.

This Cooperation Agreement entered into force on 24 December 2018, i.e., the date of publication of the Federal Consent Law (*Wet van 12 november 2018 houdende instemming met het samenwerkingsakkoord tussen de Federale Staat, het Waals Gewest, het Vlaams Gewest, het Brussels-Hoofdstedelijk Gewest en de Duitstalige Gemeenschap met betrekking tot de coördinatie tussen het beleid inzake de toelatingen tot arbeid en het beleid inzake de verblijfsvergunningen en inzake de normen betreffende de tewerkstelling en het verblijf van buitenlandse arbeidskrachten/ Loi du 12 novembre 2018 portant assentiment à l'accord de coopération entre l'Etat fédéral, la Région wallonne, la Région flamande, la Région de Bruxelles-Capitale et la Communauté germanophone portant sur la coordination des politiques d'octroi d'autorisations de travail et d'octroi du permis de séjour, ainsi que les normes relatives à l'emploi et au séjour des travailleurs étrangers*).

Novelties in Procedure to Apply for Work and Residence Permits

The new application procedure became operational on 1 January 2019 and contains the following key points:

- The single permit procedure starts with the submission of a complete application file, including supporting documents related to both employment and residency, to the competent regional employment authority. This procedure only applies to third-country nationals seeking to work and reside in Belgium for longer than 90 days.

- The application must be made by the employer if the period of employment on the Belgian territory is limited in time.

- Specific rules determine the competent Region where one should apply for the single permit. This can be (i) the Region where the employee mainly works; (ii) the

Region where the employer has its operational seat; (iii) the Region where the employee exercises his/her activities; or (iv) the Region where the employee has his/her official residence.

- The application must contain the documents that the competent region imposes with regard to the employment in Belgium and which the federal government imposes with regard to residency in Belgium.

- After receiving the application file, the regional employment authority will verify the completeness and the admissibility of the application. If the application file is not complete, the applicant will have 15 days to provide the missing information. If this period is not observed, the application will be considered as inadmissible. The regional employment authority will send the application to the Immigration Office (*Dienst Vreemdelingenzaken/Office des Etrangers*) no later than 15 days after the admission of the application.

- The decision to grant the single permit must be taken within four months of notification to the employer that the application is complete, although this period may be extended in exceptional circumstances. If no decision is taken within the (extended) period, the combined permit is considered to have been granted.

Indexation of Salary Limits Contained in Law regarding Employment Contracts of 3 July 1978

Every year the salary limits contained in the Law regarding Employment Contracts of 3 July 1978 are subject to indexation.

The amounts that apply from 1 January 2019 onwards were adjusted on the basis of the general index of the conventional wages for white-collar employees (*Aanpassing op 1 januari 2019 van de loonbedragen bepaald bij de wet van 3 juli 1978 betreffende de arbeidsovereenkomsten aan het algemene indexcijfer van de conventionele lonen voor bedienden (artikel 131)/Adaptation au 1er janvier 2019 des montants de rémunération prévus par la loi du 3 juillet 1978 relative aux contrats de travail à l'indice général des salaires conventionnels pour employés (article 131)*). For the year 2019, the amounts of EUR 34,180 and EUR 68,361 are increased to EUR 34,819 and EUR 69,639 respectively.

These salary thresholds have an impact on the validity of the non-compete clause, the schooling clause and the arbitration clause in employment contracts.

LITIGATION

Parliament Amends Bill Establishing Brussels International Business Court

On 10 December 2018, the Committee for Legal Affairs of the federal Chamber of Representatives adopted a draft bill (the "Bill") for the creation of the Brussels International Business Court (the "BIBC"). The Belgian government had already approved a first draft in October 2017 and submitted it to Parliament in May 2018 (*See, this Newsletter, Volume 2018, No. 5, p, 14*). The Bill now reflects the opinions given by the Council of State (*Raad van Staat/Conseil d'Etat*) and of the High Council of Justice (*Hoge Raad voor de Justitie/Conseil supérieur de la Justice*), as well as some of the amendments put forward by members of Parliament. However, the key features of the BIBC remain largely unchanged.

The BIBC will have jurisdiction to hear international disputes arising between enterprises and for which other courts do not have exclusive jurisdiction. The jurisdiction of the BIBC will be based on the consent of all parties involved. This consent will have to be expressed in a contract, a judgment delivered by a Belgian, foreign or international court, or by an arbitral tribunal which refers the dispute to the BIBC.

According to the Bill, a dispute will be considered to be "*international*" if (i) the parties to the dispute are established or have their usual residence in different States; or if (ii) a substantial part of the obligations arising out of the commercial relationship between the parties in dispute, or the place with which the dispute has the closest relationship, are not in the same State as the establishments or the usual residences of the parties; or (iii) elements of foreign law are necessary to determine the dispute.

However, while the original Bill included a provision according to which the parties would have been able to agree that their dispute possessed links with more than one State (which would have been sufficient to trigger the jurisdiction of the BIBC), that provision has now been removed. The deletion follows the Council of State's remarks that such a dispute would not be objectively international. In addition, the Bill formerly obliged the parties to demonstrate that a language other than Dutch, French or German was commonly used in the context of the relationship which gave rise to the dispute. This condition has now also been removed.

The BIBC's rules of procedure will be based on the UNCITRAL Model Law. By way of illustration, the BIBC may order interim measures and issue preliminary injunctions under conditions inspired by those provided for in the UNCITRAL Model Law. However, unlike the latter, the Bill does not impose that the parties' agreement submitting their disputes to the jurisdiction of the BIBC should be in writing. Interestingly, the Bill also borrows foundational notions of international arbitration law. It distinguishes the seat of the BIBC (*i.e.*, Brussels) from the actual location of the proceedings, including the deliberation, the hearing of witnesses, experts and/or parties, as well as the inspection of evidence or merchandise (*i.e.*, any place that is deemed appropriate by the members of the BIBC). The Bill also allows the BIBC to rule on its jurisdiction (*i.e.*, *kompetenz/kompetenz* principle) and also introduces the principle of separability (*i.e.*, the principle according to which a jurisdictional clause in a contract is independent from the main contract and can thus be enforced notwithstanding the unenforceability or invalidity of the underlying contract).

The working language of the BIBC will be English. However, appeals on points of law to the Supreme Court (see below) and requests for preliminary rulings to the Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*) will be made in either Dutch or French. In addition, third-party interventions may be made in either Dutch, French or German. In such a case, the submissions and pleadings will be translated to English.

Judgments delivered by the BIBC will not be subject to appeal, with the exception of appeals on points of law before the Supreme Court (*Hof van Cassatie/Cour de Cassation*). However, on 18 December 2018, a member of parliament submitted a proposed amendment providing that judgments of the BIBC should not be subject to review by

the Supreme Court. The amendment was justified by the Supreme Court's inability to exert control over points of foreign law. In addition, the possibility of appeals to the Supreme Court would be counterproductive, considering that the creation of the BIBC aimed to speed up proceedings. Finally, the proposed amendment emphasises that translation-related issues are likely to arise, since the working language of the BIBC will be English, while the working languages of the Supreme Court are Dutch and French.

Lastly, the BIBC will be staffed by both professional judges and legal experts from domestic and foreign jurisdictions.

While the BIBC was initially expected to start operations on 1 January 2020, that timing is now in doubt because of the current governmental crisis.

MARKET PRACTICES

December 2018 Judgment Marks Latest Development in Uber Saga

On 18 December 2018, the President of the Dutch-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) clarified the judgment of 23 September 2015 ordering Uber to terminate its UberPOP service in Brussels. The 2015 judgment was given in cease-and-desist proceedings initiated by Taxi Radio Bruxellois NV ("TRB"), which operates under the business name of "Taxis Verts", against various companies of the Uber group (President of the Dutch-language Brussels Commercial Court, 23 September 2015, *Uber Belgium BVBA, Uber BV, Uber International BV and Rasier Operations BV v. Taxi Radio Bruxellois NV, in the presence of Brussels Hoofdstedelijk Gewest, Belgische Federatie van Taxis en Nationale Groepering van Ondernemingen met Taxi- en Locatievoertuigen met Chauffeur VZW* – the "Initial Judgment") (*See, this Newsletter, Volume 2015, No. 10*).

The Initial Judgment found that when the remuneration of UberPOP drivers exceeds their actual costs, UberPOP amounts to a "taxi service" within the meaning of Article 2, 1° of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle location services with driver (*Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/ Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur* – the "Ordinance"). Article 3 of the Ordinance contains a prohibition on operating taxi services without a "taxi" licence granted by the Brussels-Capital Region.

Accordingly, the President held in the Initial Judgment that the Dutch Uber entities Uber B.V., Uber International B.V. and Rasier Operations B.V. (collectively "Uber Netherlands"), which were responsible for putting drivers in contact with customers, had committed an unfair market practice within the meaning of Article VI.104 of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*) (this provision prohibits any act contrary to fair market practices by which a company harms or may harm the professional interests of one or more companies). The unfair market practice consisted of transmitting requests for paid taxi services from customers to unlicenced UberPOP drivers. The President ordered Uber Netherlands to cease and desist from these practices, subject to a penalty of EUR 10,000 per infringement and per party (*See, this Newsletter, Volume 2015, No. 10, p. 18*). On 14 October 2015, Uber suspended its UberPOP services in Brussels following the President's ruling but continued to provide the UberX services. While the UberPOP services were provided by non-professional drivers, according to Uber, the services offered by UberX qualify as "vehicle location services with driver" within the meaning of Article 2, 2° of the Ordinance. Article 16 requires that operators of such services should hold a "limousine" licence, which is different from a "taxi" licence, granted by the Brussels-Capital Region.

TRB sought to enforce the Initial Judgment against Uber Netherlands on account of 29 alleged infringement cases and sought the payment of the penalty of EUR 290,000 before the attachment judge of the Brussels Court of First Instance (*Rechtbank van Eerste Aanleg/Tribunal de Première Instance*). However, Uber Netherlands objected, claiming that (i) the Initial Judgment only concerned UberPOP services which it had terminated on 14 October 2015; whereas (ii) the 29 alleged infringements involved UberX services. On 24 February 2017, the Brussels attachment judge ruled in favour of Uber Netherlands and held that the Initial Judgment of 23 September 2015 does not concern UberX services.

TRB subsequently appealed the judgment of 24 February 2017 to the Brussels Court of Appeal. By judgment of 9 January 2018, the Court of Appeal held that it was up to the initial judge to clarify the scope of the Initial Judgment pursuant to Article 793 of the Judicial Code. More specifically, the initial judge had to shed light on whether the Initial Judgment applied only to UberPOP services or whether its scope should be extended to include any remunerated taxi services provided by drivers not in the possession of a "taxi" licence within the meaning of Article 3 of the Ordinance. On 18 December 2018, the President of the Brussels

Enterprise Court clarified that his Initial Judgment targets all "taxi services" operated by drivers who are not in the possession of a "taxi" licence as referred to in Article 3 of the Ordinance.

It is now for the Brussels Court of Appeal to decide whether Uber Netherlands actually infringed the Initial Judgment by providing UberX services. The key question in this respect is whether UberX services qualify as "taxi services" (in which case they fall within the scope of the Initial Judgment and, hence, are prohibited) or, instead, as "vehicle location services with driver" subject to a "limousine" licence (in which case they fall outside the scope of the Initial Judgment).

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com