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Legal 500 2017

May 2018

# VBB on Belgian Business Law

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## COMMERCIAL LAW

### ***Supreme Court Clarifies Notion of “Impossible Condition”***

In a judgment of 12 April 2018, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) applied the notion of “impossible condition” as used in Article 1172 of the Civil Code (Supreme Court, judgment of 12 April 2018 in case C.17.0438.N, *L.B. and M.J. v. J.W. and D.V.*). This article provides that a contractual condition relative to an impossible event is null and void and causes an agreement which depends on it to be null as well.

The case before the Supreme Court concerned a contract for the sale of a property. As a condition precedent the contract provided for the securing of a mortgage loan by the buyers. The condition was deemed to be satisfied if the buyers did not demonstrate, within a period of three weeks from the signing of the contract, that they had been refused a loan by three banks.

The buyers requested the annulment of the sale on the basis of Article 1172 of the Civil Code. On appeal, the Antwerp Court of Appeal sided with the buyers and held that the condition precedent should be considered to be null and void. The Court of Appeal considered that the contractually agreed term was much too short and “*not realistically feasible*”. The Court of Appeal noted that, due to a holiday period, the buyers had only 12 days to complete all formalities. According to the Court of Appeal, as the buyers were young starting entrepreneurs, that period was not sufficient to secure a loan.

However, the Supreme Court annulled the judgment of the Court of Appeal, holding that the Court of Appeal had erroneously qualified a condition which is difficult to satisfy as an impossible condition within the meaning of Article 1172 of the Civil Code. According to the Supreme Court, for an impossible condition to exist, it should be established that, based on objective elements, the fulfilment of the condition is materially impossible. The Supreme Court referred the case to the Brussels Court of Appeal for a new review of the case.

### ***European Commission Proposes Legislation to Increase Fairness and Transparency on Online Platforms***

On 26 April 2018, the European Commission proposed a new Regulation on promoting fairness and transparency for business users of online intermediation services (the “Proposed Regulation”).

The Proposed Regulation aims to address business practices that are likely to be harmful to business users which use online platforms to sell goods and services to consumers. Under this legislation, online platform providers will be required to (i) update their terms and conditions; (ii) comply with a range of transparency requirements; and (iii) implement a dispute resolution mechanism. The Proposed Regulation forms a part of the Commission's Digital Single Market Strategy, which aims to remove obstacles to the free circulation of goods, services, capital and data from online marketplaces.

The Proposed Regulation does not define online platforms but has instead chosen to define services that rely on online platforms. Online Intermediation Services (“OIS”) are defined as services which (i) are “information society services” within the meaning of Directive 2015/1535 of 9 September 2015 “*laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services*”; (ii) allow businesses to offer goods and services to consumers with a view to facilitating direct transactions between those parties; and (iii) are provided on the basis of a contractual relationship between business users and service providers as well as between business users and consumers. Well known OIS providers include Amazon Marketplace, Apple App Store, eBay, Google Shopping and Skyscanner.

An online search engine (“OSE”) is for its part defined as “*a digital service that allows users to perform searches of, in principle, all websites [...] on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found*”.

The Proposed Regulation will have a broad geographical scope. Regardless of where OIS or OSE providers are established, they will be subject to the Proposed Regulation if they (i) provide services that are used by EU-based businesses; or (ii) offer goods and services to EU consumers.

#### *Terms and conditions*

OIS providers will be required to update their terms and conditions if they do not conform to specific minimum standards of clarity and transparency. In particular, terms and conditions must be drafted in clear and unambiguous language, and be easily available before, during and after the conclusion of the commercial relationship. In substance, terms and conditions must also set out the objective grounds on which the OIS provider may decide to suspend or terminate its relationship with business users. Any changes to terms and conditions must be communicated to business users in advance. The notice period should not be less than 15 days, unless waived by the business user.

Any terms and conditions which do not comply with the above requirements will not be binding on the business user concerned.

#### *Transparency*

The Commission identified transparency concerns in relation to page rankings and algorithms. In this regard, the Proposed Regulation acknowledges that the ranking of websites by OSE providers has an important impact on consumer choice and the commercial success of business users.

Pursuant to the Proposed Regulation, OIS and OSE providers will be required to set out clearly the main parameters used to determine the rankings of business users and corporate websites. While it is not unlawful to alter rankings for payment, OIS and OSE providers must explain their policy if they do so.

OIS providers must include this information as part of their terms and conditions. OSE providers must provide this information in an easily-accessible, publicly-available manner. While this information must allow users to understand the main parameters of the ranking system, OIS and OSE providers will not be required to disclose trade secrets.

The Proposed Regulation also requires a description of any differentiated treatment given to goods and services offered by OIS providers, or by business users which they control, in usage terms and conditions.

#### *Dispute Resolution Mechanisms*

OIS providers will be asked to implement a dispute resolution mechanism based on the handling of complaints and mediation. An internal complaint handling system will be mandatory. Business users will be entitled to submit complaints on compliance with the Proposed Regulation, non-negligible technological issues, and the conduct of the OIS provider. However, this section of the Proposed Regulation will not apply to smaller OIS providers.

In addition, OIS providers must commit to mediation as a form of alternative dispute resolution. The Proposed Regulation will oblige providers to identify a suitable mediator (normally an EU-based practitioner), to engage with the mediation process in good faith and to bear at least half the costs of mediation.

Pursuant to the Proposed Regulation, associations representing businesses will be granted the right to bring court proceedings on behalf of businesses to enforce the new transparency and dispute settlement rules.

For its part, the Commission will review and evaluate the Proposed Regulation every three years and will encourage OIS and OSE providers to establish codes of conduct. The Commission also published a Decision setting up an Observatory on the Online Platform Economy. This body will bring together industry experts and Commission officials to advise on upcoming legislation.

#### *Next Steps*

The Commission is currently inviting feedback on its proposal. The Proposed Regulation is available [here](#), and observations may be submitted [here](#) before 23 June 2018. The final text will then be sent to the European Parliament and the Council for their input and approval.

## COMPETITION LAW

### ***Benelux Publishes Study on Territorial Supply Restrictions***

In March 2018, the Belgian Pricing Observatory (*Prijzenobservatorium/Observatoire des prix*) published its yearly analysis on the prices of goods in Belgium (the "Analysis"). The Analysis shows that for both food and non-food consumer goods, the Belgian consumer significantly outspent his/her Dutch, French and German counterparts. The Analysis also indicates a growing average price difference between Belgium and its neighbouring countries.

According to the Analysis, these price differences are explained by a number of factors, including territorial supply restrictions ("TSRs") on buyers applied by suppliers. The Analysis refers in this respect to a study into TSRs carried out by the secretariat-general of the Benelux organisation, assisted by the Ministries of Economic Affairs of the Benelux countries, between October 2016 and April 2017. The study was published on 22 May 2018 (the "TSR Study").

66 companies participated in the TSR Study, supposedly representing a broad spectrum of retail operators. It appears that 89% of the participating companies had experienced TSRs.

The reasons put forward by suppliers to justify TSRs include the following:

- Logistical optimisation of the distribution of the products involved;
- Higher costs in a given market, including employment, transport or advertising costs;
- Differences in demand in the market, due to, for instance, consumer preferences, different standards of living, market position of the brand; and
- Differences in taxation.

In 30% of the cases, the suppliers did not present any justification for the TSRs.

The companies participating in the inquiry claimed that the TSRs had the following results:

- Higher consumer prices, with a median increase ranging between 12.5% in Belgium and the Netherlands and 14.5% in Luxembourg;
- Lower profit margins;
- A more limited offer of goods and lower product quality;
- Increased supply terms;
- Discrepancies between consumer preferences and product properties.

The Benelux organisation admitted that its findings are likely to be statistically insignificant and that its results mainly gauge the perceptions of the participating companies. Nevertheless, the TSR Study concludes that in all Benelux countries, a broad spectrum of small, medium and large size retail businesses have to grapple with TSRs which have an adverse influence on consumer prices, supply and quality of products and services, profit margins and product quality, supply terms and properties.

The Analysis and the TSR Study received a lot of political attention and are therefore likely to result in renewed competition enforcement activities.

## CONSUMER LAW

### ***Court of Justice of European Union Confirms That National Courts Should Assess Of Their Own Motion Whether Contractual Terms Are Unfair Under Unfair Terms Directive***

On 17 May 2018, the Court of Justice of the European Union (the "ECJ") delivered a judgment in response to a request for a preliminary ruling from the Antwerp Magistrates' Court (*Vrederegerecht Antwerpen/Justice de paix d'Anvers* – the "Court") concerning the interpretation of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (the "Directive") (ECJ, 17 May 2018, case C-147/16, *Karel de Grote–Hogeschool Katholieke Hogeschool Antwerpen VZW v. Susan Romy Jozef Kuijpers*).

The case concerned a contract between Ms. Kuijpers and a Belgian educational establishment, the Karel de Grote–Hogeschool ("KdG"). Ms. Kuijpers, a student at KdG, was unable to pay both her registration fees and the costs of a study trip and, therefore, concluded a contract for an interest-free plan for repayment by instalments. In accordance with that contract, the "assistance for students" department advanced Ms. Kuijpers the amount that she needed and she was required to pay that department the sum of EUR 200 per month for seven months. In addition, the contract provided for interest of 10% per annum in the event of default (without formal notice) and an indemnity to cover debt collection costs. Despite receiving a letter of formal notice, Ms. Kuijpers remained in default of her repayments.

In 2015, KdG issued a writ of summons against Ms. Kuijpers before the Court seeking to obtain the principal sum together with a default interest of 10%. Ms. Kuijpers did not appear and was not represented before the court. The Court was required pursuant to Article 806 of the Belgian Judicial Code to uphold KdG's claim, unless the action was in breach of public policy.

Against this background, the Court decided to stay the proceedings and refer three questions to the ECJ for a preliminary ruling.

The first question was whether, before giving a judgment in default, the national court may examine of its own motion whether the contract falls within the scope of the Directive.

The ECJ recalled that in view of the nature and importance of the public interest underlying the protection which the Directive confers on consumers, Article 6, which provides that unfair terms are not binding on the consumer, must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. Accordingly, if the national court has the power, under internal procedural rules, to examine of its own motion whether a claim is contrary to national rules of public policy, it must also exercise that power for the purposes of assessing of its own motion whether the disputed term on which the claim is based and the contract containing that term come within the scope of the Directive and, if so, whether that term is unfair.

The second and third questions were whether KdG constitutes an "undertaking" within the meaning of EU law and whether it is a seller or supplier within the meaning of the Directive. The ECJ first clarified that the Directive does not apply to contracts between an "undertaking" and a consumer, but to those between a "seller or supplier" and a consumer and that although the Belgian implementing provisions of the Directive refer to the notion of "undertaking", that term must be interpreted by the national court consistently with that of "seller or supplier" within the meaning of the Directive.

The ECJ then recalled that a broad definition must be given to the notion of "seller or supplier" and that it is a functional concept, requiring determination of whether the contractual relationship is amongst the activities that a person provides in the course of their trade, business or profession. Furthermore, it was confirmed that the notion covers all professional activity, regardless of whether it is exercised by a publicly or privately owned firm. Entities that pursue a task in the public interest or are governed by public law may therefore be regarded as suppliers or sellers.

Turning to KdG, the ECJ was of the opinion, subject to verification by the referring court, the case did not directly concern KdG's educational activity but rather a complementary and ancillary service, namely that of offering, through a contract, an interest-free, instalment repayment plan in respect of sums due to it by a student, essentially a con-

tract for credit. Therefore, in providing this service, KdG was acting as a "seller or supplier" within the meaning of the Directive. The ECJ recalled the protective purpose of the Directive which supports its conclusion. It noted that, in the present case, there was an inequality between the educational establishment and the student owing to the asymmetry of information and expertise between the parties.

The judgment confirms the ECJ's case-law that (i) national courts are required to assess of their own motion whether contractual terms are unfair; and (ii) the notion of "seller or supplier" should be interpreted broadly and in a functional manner.

## CORPORATE LAW

### ***Adoption of Fifth Anti-Money Laundering Directive***

On 14 May 2018, the European Parliament and the Council adopted the fifth anti-money laundering directive amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (the "Directive").

The Directive includes rules that broaden access to the information on beneficial ownership, making the national registers on ultimate beneficial ownership ("UBO-registers") publicly available.

Specific matters falling within the scope of the Directive (e.g. the setting up of the UBO-registers), must be implemented by the Member States within 18 months from its entry into force. Specific other matters (e.g. the interconnectivity of these UBO-registers through the European Central Platform), will only have to be implemented within 32 months after the entry into force of the Directive.

### ***Mandatory Registration for Company Service Providers***

On 2 May 2018, the Law of 29 March 2018 concerning the registration of company service providers (the "Law") was published in the Belgian Official Journal. The Law imposes on company service providers (being physical persons or companies) the obligation to register with the Federal Public Service Economy, SMEs, Self-Employed and Energy in order to provide the specific services that fall within the scope of the Law:

- Involvement in the purchase or sale of shares in non-listed companies;
- Providing a registered office to a company, legal entity or similar legal construction; and
- Providing a commercial, correspondence or administrative address or other services related to companies to a company, legal entity or similar legal construction.

In order to register, the service provider will have to satisfy specific conditions set forth in the Law.

The Law will enter into force at the latest on 1 September 2018.



## DATA PROTECTION

### **General Data Protection Regulation Now Applies Across European Union**

Since 25 May 2018, the General Data Protection Regulation 679/2016 (the "GDPR") is directly applicable across Europe in all 28 Member States and will replace the national laws implementing Directive 95/46/EC of 24 October 1995.

The GDPR will introduce considerable changes to (i) strengthen the rights of the data subjects; (ii) impose new obligations and elaborate on existing obligations for companies; and (iii) enhance the enforcement of data protection rules across the EU. The GDPR also extends the territorial scope of EU Data Protection Rules to non-EU data controllers targeting EU citizens (see, *this Newsletter, Volume 2015, No. 12, p. 12 – 13*).

From a business perspective, the main benefits of the GDPR are: (i) a uniform law across Europe; (ii) a one-stop-shop with regard to supervisory authorities; and (iii) the same rules for all companies, including companies that are not established in the EU but that offer goods or services within the EU. Moreover, the GDPR abolishes a number of formalities, including notifications and prior authorisations for processing of personal data. Conversely, under the "principle of accountability", companies must be able to demonstrate their compliance with the GDPR at the request of supervisory authorities.

Businesses will also need to respect a number of data subject rights, including the right to erasure (also known as the "right to be forgotten") and the right to data portability.

In a press release on the entry into application of the GDPR, Commissioner for Justice, Consumers and Gender Equality Jourová and Vice-President Ansip stressed that the GDPR is based on a risk-based approach: "*Companies that have been making money from our data have more responsibilities. They should also give something back to the consumers; at least the security of their data. Companies which do not process data as their core business activity have less obligations and mainly have to make sure that the data they process are secure and used legally*". However, the European Commission also warns companies about the risk of non-compliance: "*they will also be rules with teeth. Every-*

*one, especially those companies that monetise our personal data, will have an interest to play by the rules.*"

The full press release on the entry into application of the GDPR can be found [here](#).

### **Belgian Privacy Commission Becomes 'Data Protection Authority'**

Following the entry into force of the General Data Protection Regulation 679/2016 (the "GDPR"), the Belgian supervisory authority, the Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer/Commission de la protection de la vie privée*) was replaced by the Data Protection Authority (Gegevensbeschermingsautoriteit/Autorité de protection des données - the "DPA"). The DPA was set up by Law of 3 December 2017 (see, for a discussion of the organisation and the powers of the DPA: *this Newsletter, Volume 2017, No. 9, p. 9*).

However, until the executive committee of the DPA is appointed, the Privacy Commission will provisionally oversee the application of the GDPR.

The website of the DPA is available in English <https://www.dataprotectionauthority.be/>, Dutch: <https://www.gegevensbeschermingsautoriteit.be/> and French: <https://www.autoriteprotectiondonnees.be/>.

## INTELLECTUAL PROPERTY

### ***General Court Confirms Validity of Trade Mark HP***

On 24 April 2018, the General Court of the European Union (the "General Court") handed down a judgment in case T-208/17 *Senetic S.A. v European Union Intellectual Property Office (EUIPO)* concerning an action for annulment of a decision of the EUIPO to confirm the registration of the trade mark "HP".

HP Hewlett Packard Group LLC ("HP") first registered the word sign HP in 1996. In 2015, Senetic filed an application for a declaration of invalidity of the registration. EUIPO dismissed the application and Senetic then proceeded to bring an action before the General Court seeking the annulment of EUIPO's decision.

Senetic puts forward three pleas in law to challenge the registration.

First, relying on Article 7(1)(c) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark (the "Regulation"), Senetic claimed that the contested mark, being composed of two letters without any graphic elements, was invalid as it was descriptive of the technological goods and services in question. The General Court first recalled that, in order to fall within the absolute ground for invalidity laid down in Article 7(1)(c) of the Regulation, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned to perceive immediately, without further thought, a description of the goods and services at issue or one of their characteristics. The General Court found that it cannot be generally asserted that a mark is descriptive simply because it consists of one or two letters, without examining the specific relationship between the sign and the goods and services in question. The General Court then held that Senetic had failed to adduce evidence to establish a sufficiently direct and specific relationship between the HP sign and the goods and services to which it relates.

Second, Senetic argued that the contested mark lacked distinctive character contrary to Article 7(1)(b) of the Regulation. The General Court recalled that distinctiveness is not subject to a finding of a specific level of linguistic or

artistic creativity, but rather to the capability of the sign to distinguish the goods or services offered by the trade mark applicant from goods and services offered by competitors. Bearing this in mind, the General Court found that the combination of the two letters constituting the contested marks is not commonly used or simply perceived as an indication lacking any distinctive character, particularly as the HP sign can be understood by the relevant public as a reference to the names Hewlett and Packard, the surnames of the company founders.

Finally, Senetic contended that HP acted in bad faith when it filed the application for the trade mark with a view to preventing other economic operators from using a similar sign on the market. It hence sought the invalidity of the contested mark on the basis of Article 52(1)(b) of the Regulation. The General Court noted that it is for the party alleging bad faith to prove the circumstances which show that the trade mark proprietor was acting in bad faith when it filed the application for registration of the mark in question. In this regard, the General Court found that Senetic provided no evidence establishing that HP knew that some of the goods and services concerned were marketed by Senetic or by other third parties under a similar or identical sign. Furthermore, it was apparent from the file that Senetic failed to show that, at the time of filing, a third party was actually using a similar or identical sign in marketing its goods or services. The General Court also rejected the claim that evidence of bad faith was easier to establish owing to the descriptive character of the contested mark as such a character was not proven.

In conclusion, the General Court dismissed the action brought by Senetic and confirmed that HP can maintain its trade mark.

### ***General Court Permits Lionel Messi to Register 'MESSI' Trade Mark***

On 26 April 2018, the General Court of the European Union (the "General Court") gave judgment in a case concerning an EU trade mark registered by Lionel Messi, arguably the best football player in the world, which had previously been invalidated by the European Union Intellectual Property Office ("EUIPO").

In August 2011, Lionel Messi requested EUIPO to register a European trade mark for a number of categories of items, including clothes and other articles for sports and gymnastics (Classes 9, 25 and 28 of the Nice Classification). The proposed trade mark consisted of the word 'MESSI' beneath a stylised letter "M".



His application was opposed by JM-EV e hijos SRL, a Spanish company, which claimed a likelihood of confusion with the "MASSI" EU word mark registered for articles including clothing, shoes, bicycle helmets, protective helmets and gloves. On 12 June 2013, EUIPO upheld the objection. Leonel Messi then appealed this decision. That appeal was dismissed as unfounded by EUIPO on 23 April 2014. Leonel Messi further appealed to the General Court to have that decision annulled.

The General Court upheld the appeal. First, the General Court acknowledged that both marks had an "average" degree of visual similarity and a "high" degree of phonetic similarity. The General Court then assessed the conceptual similarity of the marks. While both marks have Italian connotations or appearances, they are not devoid of meaning to the wider public. Indeed, the General Court held that EUIPO was wrong to consider that the reputation enjoyed by Lionel Messi concerned only the part of the public which is interested in football and sport in general. Lionel Messi's media profile is such that he would be well-known to a significant part of the relevant public, regardless of their interest in football or other sports.

Therefore, the General Court held that EUIPO should have examined whether a significant part of the relevant public was unlikely to make a conceptual association between the word "Messi" and the identity of the footballer. The General Court took into account the fact that the goods for which the marks at issue were sought were all sports

equipment and clothing (though not necessarily restricted to football). According to the General Court, it was unlikely that a consumer of such goods would not directly associate the word "Messi" with the name of the famous footballer. As a result, the General Court held that a reasonably attentive and informed consumer of sports clothing would be aware of a conceptual difference between Messi- and Massi-branded articles.

The General Court therefore concluded that, despite a certain level of visual and phonetic similarities between the two marks, there is a corresponding or "neutralising" level of conceptual difference between them. In other words, taken as a whole, there is insufficient similarity between the two marks such that a significant part of the relevant public would believe them to belong to the same or linked companies.

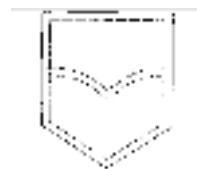
**Hema Found to Infringe Levi's Jeans Pocket Pattern**

On 14 May 2018, the French-language Commercial Court of Brussels (the "Court") ruled in a dispute between Levi Strauss & Co ("Levi's") and BV Hema and Hema Belgie SPRL ("Hema").

The dispute arose after Levi's noticed that retail chain Hema sold jeans with back pockets displaying signs almost identical to the trade mark "Arcuate" which it had registered on 1 March 1981 in the Benelux and on 4 July 2001 in the European Union.



Hema's jeans back pockets



Levi's' trade mark Levi's brought an *ex parte* action before the President of the Court seeking seizure of the products concerned, which was granted on 30 October 2015.

Subsequently, Levi's brought an action before the Court seeking (i) damages for the unlawful use by Hema of signs almost identical to its trade marks; and (ii) an order prohibiting Hema from further use of the signs in question. Levi's based its claims on Article 2.20, first indent, a), b) and c) of the Benelux Convention on Intellectual Property ("BCIP") which allows trade mark holders to prohibit the use by any third party of signs identical or similar to their trade mark.

The Court first recalled that, contrary to what Hema argued, the use of the contested signs as "decorative" elements and not as a trade mark or distinctive sign is irrelevant since the decorative use of a sign does not preclude a potential trade mark infringement.

Second, the Court examined whether Hema used signs identical to those registered by Levi's. The Court found what it called "significant" disparities between the two signs: Levi's trade mark was constituted of two curved lines meeting in the middle of the pocket whereas the Hema's signs represented three curved lines meeting slightly left from the middle of the pocket. The Court thus concluded that the signs were not identical but similar.

The Court then went on to analyse whether there was a likelihood of confusion between the signs in question. In line with established case-law, the Court based its analysis on (i) the degree of similarity between the signs; (ii) the degree of similarity between the products; and (iii) whether the trade mark in question is well-known on the relevant market.

The Court held that, despite the differences highlighted above, the signs in question indisputably had significant similarities that were significant for the relevant public. The Court added that the relevant products (*i.e.*, jeans and pants for children) were highly similar as well. Hence, it rejected Hema's defence that Levi's was selling childrens-wear on a "very limited" basis. Furthermore, the Court recognised the indisputable well-known character of Levi's trade mark in Belgium. Based on the foregoing, the Court concluded that a likelihood of confusion was plausible between Hema's signs and Levi's' trade mark.

As a consequence, the Court agreed with Levi's' and prohibited Hema from using the signs in question. Given the price of the products, the profit margin made by Hema, the importance of Hema's store network and the quanti-

ties which it sold, the Court reduced the penalty payment claimed by Levi's (*i.e.*, EUR 10,000) to EUR 100 per product with a cap of EUR 4 million.

As regards the claim for damages, the Court acknowledged that Hema's behaviour damaged the trade mark reputation of Levi's and impaired the original Levi's products. Still, the Court also stressed Hema's collaboration with Levi's once aware of the possibility of a trade mark infringement. Therefore, the Court granted Levi's damages amounting to EUR 20 per product (instead of the EUR 50 requested by Levi's). This amount represents approximately twice the selling price of the products in question and ten times the profit made by Hema on the sales. It also takes into account the "millions" that Levi's claims to spend in marketing efforts every year. Given the high number of counterfeit goods, the total amount owed to Levi's is EUR 4,432,060.

Finally, the Court refused to order Hema to transfer to Levi's all profits resulting from the use of the signs at issue and to provide all accounts in this regard as Levi's failed to provide evidence of Hema's bad faith.

## LABOUR LAW

### ***Publication in Belgian Official Journal of Bill Introducing Mobility Allowance or “Cash for Cars”***

On 30 March 2018, the federal Parliament adopted a bill introducing a mobility allowance or “cash for cars” scheme.

On 7 May 2018, this bill was published in the Belgian Official Journal as a law allowing employers to provide a mobility allowance to their employees in exchange for their company car retroactively as of 1 January 2018 (see, *this Newsletter*, Volume 2018, No. 3, p. 13).

### ***Supreme Court Requires All Circumstances To Be Considered for Determination of Specific Facts Justifying Dismissal for Serious Cause Attributable to Employee***

On 16 April 2018, the Supreme Court held that courts should take all relevant circumstances into account when assessing whether an employment contract was lawfully terminated for serious cause attributable to the employee, even if such circumstances were not explicitly mentioned in the dismissal letter.

#### *Regulatory Framework*

Under Belgian law, each party to the employment contract has the right to terminate the contract without a notice period or an indemnity in lieu of notice if there is a serious cause which is defined in the Law of 3 July 1978 on Employment Contracts as a material fault which renders any further professional cooperation between the parties immediately and permanently impossible.

Facts that could justify a dismissal for serious cause attributable to the employee include fraud, theft, consistent non-compliance with company procedures, recurring insubordination, etc.

In case of a termination for serious cause attributable to the employee, the employer has to observe the following formalities:

- The employer must dismiss the employee within 3 working days following the day on which the person who has the power within the company to dismiss the employee, became sufficiently aware of the facts justifying the dismissal for serious cause.
- Subsequently, within another 3 working days as from the dismissal, the employer must inform the employee by registered letter or by writ served by a bailiff or by a letter duly countersigned for receipt by the employee of the grounds for the dismissal for serious cause. The reasons for the dismissal for serious cause should be included in detailed fashion in the notification letter.

#### *Merits of Case*

In its judgment of 16 April 2018, the Supreme Court has now held that all factual circumstances should be considered in the assessment of the validity of a dismissal for serious cause, even if not all of these elements were included in the notification letter. This judgment actually confirms earlier case law of the Supreme Court.

The Supreme Court added that previous facts should be taken into account as well. In other words, it is possible that the grievance invoked by the employer is not in itself a serious cause, but became a serious cause in the light of previous facts that serve as an aggravating circumstance.

It is therefore recommended that employers keep all relevant information about their employees in an employee personnel file and carefully document any violations or wrongdoings of the employees.

## LITIGATION

### **Bill to Establish Brussels International Business Court**

On 15 May 2018, the Belgian government submitted to Parliament a bill (the "Bill") for the creation of the Brussels International Business Court (the "BIBC") (*Wetsontwerp houdende oprichting van het Brussels International Business Court/Projet de loi instaurant la Brussels International Business Court*). As its name suggests, the BIBC will have jurisdiction to deal with international commercial disputes between corporations.

The establishment of the BIBC reflects a global trend that sees jurisdictions from around the world compete to attract litigation. In addition to Brussels, the cities of Amsterdam, Dublin, Frankfurt and Paris have, over the last couple of months, announced or implemented plans to establish English-speaking courts that will have jurisdiction to handle international commercial disputes. The common objective of these initiatives is to prepare for Brexit by capturing some of the international business litigation currently located in London which is expected to move elsewhere. One of the reasons for such a move is the uncertainty as to whether, following Brexit, judgments given in the United Kingdom will continue to be easily enforceable in EU jurisdictions.

Although the High Council of Justice and the Belgian Council of State both reviewed the bill and raised comments and concerns regarding the BIBC, the key features of the BIBC remain largely unchanged from the initial version of the draft Bill adopted by the Belgian government in October 2017 (see, *this Newsletter, Volume 2017, No. 10, p. 20*):

- The working language of the BIBC will be English (meaning that written submissions, oral arguments and judgments will be in that language). The choice of English as the operational language constitutes a novelty in Belgian judicial law, as only the three official Belgian languages (Dutch, French and German) are currently in use in court;
- The BIBC will be staffed with both professional judges and legal experts (i.e., non-professional judges) from domestic and foreign jurisdictions;
- Jurisdiction of the BIBC will be based on mutual consent between the parties;
- The judgments handed down by the BIBC will not be subject to appeal, with the exception of an appeal on points of law before the Belgian Supreme Court;
- The BIBC's rules of procedure will be based on the UNCITRAL Model Law on International Commercial Arbitration;
- The BIBC will be self-financing (meaning that the court fees will be higher than the fees currently applied by the regular Belgian courts).

Pursuant to the Bill, the BIBC is expected to be operational by 1 January 2020.

## REAL ESTATE

### ***New Royal Decree Regarding Regulated Real Estate Companies***

On 17 May 2018, the Royal Decree of 23 April 2018 amending the Royal Decree of 13 July 2014 regarding regulated real estate companies was published in the Belgian Official Journal (*Koninklijk Besluit tot wijziging van het Koninklijk Besluit van 13 juli 2014 met betrekking tot gereguleerde vastgoedvennootschappen/Arrêté royal portant modification de l'arrêté royal du 13 juillet 2014 relatif aux sociétés immobilières réglementées*) (the "Royal Decree"). The purpose of this Royal Decree is to bring the Royal Decree of 13 July 2014 in line with the changes brought about by the Law of 22 October 2017 amending the Law of 12 May 2014 regarding regulated real estate companies (*Wet van 22 oktober 2017 tot wijziging van de wet van 12 mei 2014 betreffende de gereguleerde vastgoedvennootschappen/Loi du 22 octobre 2017 modifiant la loi du 12 mai 2014 relative aux sociétés immobilières réglementées*) (the "Amending Law").

The Royal Decree implements several of the changes introduced by the Amending Law, including the creation of a new chapter governing regulated real estate companies with a social purpose. In addition, the Royal Decree specifies who may become the shareholders of institutional regulated real estate companies. It provides for the possibility for private individuals to acquire securities in institutional real estate companies, subject to specific threshold requirements. Finally, the Royal Decree also introduces new provisions relating to internal control and compliance.

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