

CEW INTERNATIONAL NEWSLETTER

LEGAL AND TAX NEWS FROM BELGIUM



2008, N1

WELCOME TO THE CEW INTERNATIONAL NEWSLETTER

This is the first issue of the CEW international newsletter which will be distributed electronically four times a year to the clients and contacts of the firm around the world. The aim of the newsletter is to keep you informed of those legal and tax developments in Belgium which are likely to be of interest to companies and their advisers located in other countries but which are doing business in, or with, Belgium.

For those of you who do not already know us, CEW & PARTNERS is an independent Belgian law firm of 25 lawyers with offices in Brussels and Liège. Further details are available on our web site www.cew-law.be.

We trust that you will find the newsletter useful and interesting and we welcome your comments and suggestions as to how to make it as informative and as easy to read as possible. Charles Price



SUMMARY

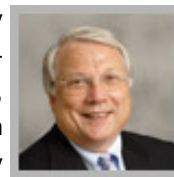
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LIABILITY OF COMPANY DIRECTORS FOR NON-PAYMENT OF COMPANY TAXES

In Belgium companies and other entities are obliged to withhold at source and pay over to the Tax Administration income taxes on the salaries paid to their employees. With effect from 28 July 2006 new rules have been introduced which provide, in certain circumstances, for a personal liability of the directors of the company in the event that that the company fails to satisfy this obligation. The first line liability lies with the director or manager in charge of the day to day operations of the company but other directors may also be liable if they can be shown to have been negligent or co-negligent. The personal liability is not automatic and requires the Tax Administration to introduce legal proceedings and demonstrate negligence on the part of the director concerned. Negligence will be established, for instance, where the company becomes insolvent but continues to trade or where the non-payment of taxes is used to finance the company. Negligence is however also presumed to be established where the non-payment of withholding taxes occurs at least three times in the course of the same year for taxes that are paid monthly or twice in the same year for taxes that are paid quarterly.

New provisions, which are identical to those described above for withholding taxes, have also been introduced in respect of the payment of VAT by the company.

Foreign resident directors of Belgian companies need to be aware of these provisions. In most cases the primary liability will lie with the person in charge of the day to day management of the Belgian company but, in certain circumstances, the liability may extend to other directors of the company, including those resident abroad. This will particularly be the case where the Belgian company continues to trade despite being insolvent or where the non-payment of taxes is used to finance a company that would be otherwise insolvent. *Maurice Eloy*



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NEW RULES ON RECOVERING LEGAL COSTS IN LITIGATION

The Belgian government has adopted new regulations which are expected to fundamentally change the rules on the recovery of legal costs in litigation before the Belgian courts. To date, the courts have had the power to award costs but only on the basis of a very antiquated scale which bore no relation to the actual costs paid by parties to their lawyers. Under the new rules, which will apply as of 1 January 2008, at the request of any party, the court will have the power to award costs on the basis of a new scale which allows for the award of much more realistic amounts. The scale is based on the amount claimed in the action and includes a number of tranches, with a base as well as a minimum and maximum amount of legal costs that can be awarded per tranche. Thus, for claims of more than €1.000.000 (\$1,485,900) the base amount is €15.000 (\$22,288) and the minimum and maximum amounts are respectively € 1.000 (\$1,485) and € 30.000 (\$44,527). The judge retains a large discretion in awarding costs within these limits and will take into account the financial resources of the losing party, the difficulty of the case and the degree of reasonableness of the conduct of the parties. The court has no power to award costs outside the limits provided for by the scale. Only time will tell how the courts will apply these rules in practice and it is possible that there will be variations from one court to another. Charles Price



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LAW ON MEDIATION

The Law of 21 February 2005 on mediation entered into force on 30 September 2005 and brings together in one act the general principles that are applicable, in all the various types of conflict concerned. Indeed mediation is available for any type of dispute that is capable of being formally settled, be it in the field of family, civil, commercial or social matters.



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The legislator's objective was to provide legal security for this form of alternative dispute resolution by guaranteeing to the parties the technical proficiency, the independence and the impartiality of the mediator. This explains why a Federal Mediation Commission, composed of representatives of all groups active in the area, including notably lawyers and notaries, has been created. *Inter alia*, this Commission is responsible for the training and accreditation of mediators. Only by recourse to an accredited mediator can the homologation of the mediation be obtained from the Court, via a simplified procedure. If needed, the parties may thus easily obtain a Court order for enforcement in the event that one or more of them fails to voluntarily perform the agreement that has been reached.

It is worth noting that the Justice Supervisory Council has decided that a judge may not act as a mediator.

The Law distinguishes court initiated mediation (which can be proposed to the parties by the judge, at any stage of the proceedings, but only at the joint request of the parties or at the initiative of the judge provided all the parties agree), voluntary or party agreed mediation (which can be proposed by one party to another independently of any legal or arbitration proceedings and thus before, during or after such proceedings) and free mediation (also by agreement but where no accredited

mediator is involved and where the formalities required by the Law are not observed and thus with no possibility of having recourse to the procedure of simplified homologation by the Court).

An essential characteristic of mediation, as it is organized in Belgium, is that the process remains essentially voluntary: it requires the agreement of the parties on the principle of recourse to mediation, including court initiated mediation, as well as at all stages of the mediation up to the signature of the agreement.

The confidential nature of the process is of course organized by the new law: confidentiality represents a legal and contractual requirement for the parties, whereas, as far as concerns the mediator, it is a matter of professional secrecy that is subject to statutory penalties.

As everyone knows, mediation allows for the settlement of disputes quicker and at less cost and without the need for a judgment that is imposed on the parties. Mediation is of course available, and is particularly well suited, to settle trans-national disputes or to settle disputes that are pending between the parties before courts in different countries. *Marc Wagemans*

PUBLIC PRIVATE PARTNERSHIPS - MADE TO MEASURE SOLUTIONS

In Belgium there is no special form for public private partnerships (PPP's) and the term is applied in a general manner to describe a functional relationship involving cooperation between the public and private sectors in the achievement of an objective in the public interest.

The mechanism allows the public sector to obtain private sector funding and the use of private sector management techniques. A distinction is drawn between "contractual" and "participatory" PPP's. The former involves the signature of an agreement regulating the relationship between the public and the private sector partners whereas the latter implies the creation of a special purpose joint venture company to manage the project.

PPP's are frequently involved in government procurement and government contracts as well as concessions. The particular legal mechanism varies according to the precise needs of the project. In this respect CEW & PARTNERS has been involved in the development of different models.

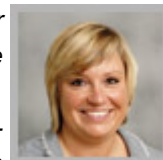
Prime amongst the matters to be taken into account are the tax considerations. In particular there is generally a need to develop a solution that allows for the chosen vehicle to be VAT registered and thus have the possibility of crediting VAT on incoming invoices. This is particularly important because in principle public authorities may not register for VAT purposes. CEW & PARTNERS has advised the Walloon Region on the setting-up of various so-called "mixed economy" companies, where the involvement of the private sector was essential for the achievement of a public interest objective and where the entitlement to credit VAT was critical.

Registration taxes are another area where close analysis is required, given the exemptions from tax that are available to the public sector.

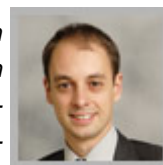
*As far as concerns corporate income taxes, most PPP's are created with a view to earning a profit which is therefore subject to Belgian corporate income tax. However when the PPP can be put in place without the creation of a new special purpose vehicle the public sector can retain its immunity from corporate income taxation. *Maurice Eloy, Marie-Pierre Donéa and Jean Laurent**



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SOCIAL ELECTIONS IN 2008

The next round of social elections will take place between 5 and 18 May 2008. These elections are organized every four years and are designed to provide for the election of employee delegates to the employee participation bodies, being, on the one hand, the Work's Council and, on the other hand, the Prevention and Safety Protection Committee.



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All companies that normally employ on average at least 100 employees must have both a Work's Council and a Prevention and Safety Protection Committee. Companies that employ an average of at least 50 employees must have a Prevention and Safety Protection Committee.

The number of employee representatives on the two bodies depends on the number of employees, the minimum being 4 members (plus 4 alternate members) for companies that employ at least 100 persons.

All the members of the two bodies, including the alternates, enjoy special protection against redundancy. Thus, they may only be fired (a) for a serious cause which has been previously recognized by the Employment Court or (b) for economic or technical reasons that have been previously acknowledged by the appropriate Joint Bargaining Committee.

The Work's Council deals with economic and financial but also social questions whereas the Prevention and Safety Protection Committee handles matters related to health and safety at work. Both bodies are primarily designed to receive information and are there for consultation purposes and only rarely have any decision-making powers. The law requires the company to put at their disposal the facilities necessary for their activities (special room, time off for meetings, etc.).

The social elections procedure is long – it already started on 7 December for companies organizing their elections on 5 May 2008 – and is often very complex.

Only recognized trade unions may present candidates for election, meaning that the unions effectively have a monopoly over the choice of candidates.

Olivier Scheuer

CEW NEWS

Three lawyers from CEW & PARTNERS, Jean Cruyplants, Michel Gonda and Marc Wagemans, are the authors of a reference book of more than 400 pages entitled "Law and Practice of Mediation" that has just been published by Editions Bruylant. The book deals with both the legal and technical aspects of this original form of dispute resolution that is increasingly popular and that was introduced into the Belgian Judicial Code by the Law of 21 February 2005. www.bruylant.be