JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 September 2010 *

In Case T-472/08,

Companhia Muller de Bebidas, established in Pirassununga (Brazil), represented by G. Da Cunha Ferreira and I. Bairrão, lawyers,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. Folliard-Monguiral, acting as Agent,

defendant,

* Language of the case: English.

the other party to the proceedings before the Board of Appeal of OHIM being

Missiato Industria e Comercio Ltda, established in Santa Rita Do Passa Quatro (Brazil),

ACTION brought against the decision of the First Board of Appeal of OHIM of 4 July 2008 (Case R 1687/2007-1) relating to opposition proceedings between Companhia Muller de Bebidas and Missiato Industria e Comercio Ltda,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: E. Coulon,

having regard to the application lodged at the Court Registry on 22 October 2008,

having regard to the response lodged at the Court Registry on 9 March 2009,

having regard to the reply lodged at the Court Registry on 12 May 2009,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedure, and having therefore decided, acting upon a report of the Judge-Rapporteur and pursuant to Article 135a of the Rules of Procedure of the Court, to give a ruling without an oral procedure,

having regard to the reopening of the written procedure,

having regard to the written questions put to the parties by the Court,

having regard to the observations lodged by the parties at the Court Registry on 1 and 10 March 2010,

gives the following

Judgment

Background to the dispute

1 On 2 December 2003, Missiato Industria e Comercio Ltda filed an application for registration of a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), pursuant to Council Regulation (EC)

No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1)).

2 The trade mark in respect of which registration was sought ('the mark applied for') is the figurative sign reproduced below:

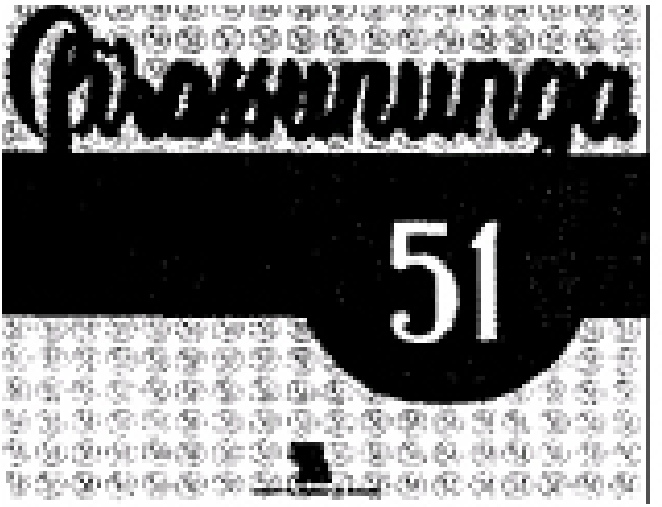


3 The goods in respect of which registration was sought are in Class 33 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Alcoholic beverages (except beers)'.

4 On 27 September 2004, the application for registration was published in *Community Trade Marks Bulletin* No 39/2004.

5 On 27 December 2004, the applicant, Companhia Muller de Bebidas, filed a notice of opposition under Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009) to registration of the trade mark applied for in respect of the goods covered in the application for registration. That opposition was based, inter alia, on the following earlier rights ('the earlier marks'):

— the Portuguese figurative mark, filed on 19 April 1991 and registered on 30 March 1993, under number 273105, in respect of 'alcoholic beverages' in Class 33 of the Nice Agreement, reproduced below:



— the Portuguese figurative mark, filed on 10 August 1998 and registered on 21 August 2001, under number 331952, in respect of 'alcoholic beverages' in Class 33 of the Nice Agreement, reproduced below:



— the Danish figurative mark, filed on 30 June 1995 and registered on 10 November 1998, under the reference VR 199803649, in respect of 'liqueur made of sugar cane' in Class 33 of the Nice Agreement, reproduced below:



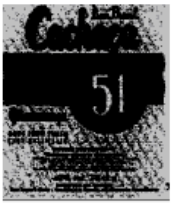
— the series of United Kingdom figurative marks, filed and registered on 11 October 2000, under number 2248316, in respect of 'alcoholic beverages made of sugar cane' in Class 33 of the Nice Agreement, reproduced below:



— the Spanish figurative mark, registered on 22 October 2001, under number 2354943, in respect of 'alcoholic beverages (except beers) made of sugar cane' in Class 33 of the Nice Agreement, reproduced below:



— the Austrian figurative mark, filed on 29 June 1995 and registered on 18 December 1995, under number 161564, in respect of 'alcoholic beverages made from distilled sugar cane' in Class 33 of the Nice Agreement, reproduced below:



— the well-known figurative mark in Portugal in respect of 'alcoholic beverages' in Class 33 of the Nice Agreement, reproduced below:



— the well-known word mark in Portugal CACHAÇA 51, in respect of 'alcoholic beverages' in Class 33 of the Nice Agreement.

6 Before the Opposition Division, the applicant claimed that there was a likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009), between the marks at issue. The applicant also relied on its two alleged well-known marks, within the meaning of Article 8(2)(c) of Regulation No 40/94 (now Article 8(2)(c) of Regulation No 207/2009), in Portugal.

7 By decision of 4 September 2007, the Opposition Division rejected the opposition in its entirety. That decision was the subject of an appeal to OHIM, which was brought by the applicant on 29 October 2007 pursuant to Articles 57 to 62 of Regulation No 40/94 (now Articles 58 to 64 of Regulation No 207/2009).

8 By decision of 4 July 2008 ('the contested decision'), the First Board of Appeal of OHIM dismissed that appeal. It concurred with the reasoning of the Opposition Division and found that the differences between the marks at issue precluded any likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

Forms of order sought

9 The applicant claims that the Court should:

— annul the contested decision inasmuch as it upheld the decision of the Opposition Division authorising the registration of the mark applied for;

— order OHIM to pay the costs.

10 By letter filed at the Court Registry on 10 March 2010, the applicant withdrew its heads of claim seeking to have the contested decision altered and seeking a declaration that the registration of the mark applied for was invalid.

11 OHIM contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Admissibility of the documents produced for the first time before the Court

12 In Annexes 9 to 11 to its application, the applicant enclosed documents which contain sworn declarations supporting the claim that the earlier word and figurative marks CACHAÇA 51 and Cachaça 51 were well known in Portugal (see paragraph 5 above).

13 OHIM submits that, if those documents were taken into account, they would change the subject-matter of the proceedings before the Board of Appeal.

14 The documents in Annexes 9 to 11 to the application, which were produced for the first time before the Court, cannot be taken into consideration. The purpose of actions before the Court is to review the legality of decisions of the Boards of Appeal of OHIM for the purposes of Article 63 of Regulation No 40/94 (now Article 65 of

Regulation No 207/2009), so it is not the Court's function to review the facts in the light of documents produced for the first time before it. Accordingly, the abovementioned documents must be excluded and it is not necessary to assess their probative value (see, to that effect, Case T-346/04 *Sadas* v *OHIM - LTJ Diffusion (ARTHUR ET FELICIE)* [2005] ECR II-4891, paragraph 19 and the case-law cited).

Substance

15 In support of its action for annulment of the contested decision, the applicant relies on a single plea in law, which is in two parts. The first part alleges infringement of Article 8(1)(b) of Regulation No 40/94, while the second part alleges infringement of Article 52(1)(a) of Regulation No 40/94 (now Article 53(1)(a) of Regulation No 207/2009).

1. *The second part of the single plea in law for annulment of the contested decision: infringement of Article 52(1)(a) of Regulation No 40/94*

16 As OHIM rightly observes, the second part of the single plea in law for annulment of the contested decision alleging infringement of Article 52(1)(a) of Regulation No 40/94 is devoid of purpose. That provision lists the relative grounds for invalidity of a Community trade mark that has already been registered, which was not the case in respect of the mark applied for.

17 The Court must therefore dismiss as unfounded the second part of the single plea in law for annulment of the contested decision.

2. *The first part of the single plea in law for annulment of the contested decision: infringement of Article 8(1)(b) of Regulation No 40/94*

18 By the first part of the single plea in law for annulment of the contested decision, alleging infringement of Article 8(1)(b) of Regulation No 40/94, the applicant complains that the Board of Appeal was wrong to find that the differences between the signs at issue were sufficient to prevent a likelihood of confusion on the part of the relevant public in the relevant territories, including Portugal, where the applicant had claimed that the earlier word and figurative marks CACHAÇA 51 and Cachaça 51 were well known.

Arguments of the parties

19 In support of the first part of its single plea in law for annulment alleging infringement of Article 8(1)(b) of Regulation No 40/94, the applicant essentially puts forward seven complaints, to the effect that the Board of Appeal misinterpreted that provision and settled case-law according to which the global assessment of the marks at issue must be carried out in the light of their distinctive and dominant elements and that, therefore, its analysis is vitiated by several errors.

20 By its first complaint, the applicant maintains that the Board of Appeal erred in not assessing the likelihood of confusion in the light of the real relevant public and, in particular, in finding that the relevant consumer was the general public.

21 By the second complaint, the applicant essentially claims that the Board of Appeal erred in finding that the dominant and distinctive elements of the earlier marks were 'cachaça' and '51'.

22 By the third complaint, the applicant asserts that the Board of Appeal erred in finding that the visual impression conveyed by the marks at issue was not similar.

23 By the fourth complaint, the applicant asserts that the Board of Appeal erred in finding that the phonetic impression conveyed by the marks at issue was not highly similar.

24 In the fifth complaint, the applicant asserts that the Board of Appeal erred in concluding that there was no conceptual similarity between the marks at issue.

25 By its sixth complaint, the applicant submits in essence that those errors had an effect on the contested decision inasmuch as they led the Board of Appeal to conclude, wrongly, that there was no likelihood of confusion on the part of the relevant public.

26 Lastly, by the seventh complaint, the applicant submits that the documents that it produced were sufficient to establish that the earlier word and figurative marks CACHAÇA 51 and Cachaça 51 were well known in Portugal or, at the very least, that they had a high level of overall distinctiveness in that country. The Board of Appeal was wrong to consider that the mark whose well-known character was to be evidenced was the number 51 and that it had not been established that that mark was well known.

27 OHIM contends that the action should be dismissed on the ground that the Board of Appeal was entitled to find that, in the present case, there was no likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

Findings of the Court

28 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered where because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected. The likelihood of confusion includes the likelihood of association with the earlier trade mark.

29 According to settled case-law, the risk that the public may believe that the goods or services in question come from the same undertaking or from economically-linked undertakings constitutes a likelihood of confusion. According to the same case-law, the likelihood of confusion must be assessed globally, according to the relevant public's perception of the signs and goods or services concerned, and taking into account

all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs concerned and that of the goods or services designated (see Case T-162/01 *Laboratorios RTB* v *OHIM - Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)* [2003] ECR II-2821, paragraphs 30 to 33 and the case-law cited).

30 For the purposes of applying Article 8(1)(b) of Regulation No 40/94, a likelihood of confusion presupposes both that the two marks are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see Case T-316/07 *Commercy* v *OHIM - easyGroup IP Licensing (easyHotel)* [2009] ECR II-43, paragraph 42 and the case-law cited).

31 It is appropriate to examine the first part of the single plea in law for annulment, alleging infringement of Article 8(1)(b) of Regulation No 40/94, in the light of the principles set out in paragraphs 28 to 30 above.

The relevant public

32 According to case-law, in the global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of goods or services concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see Case

T-256/04 *Mundipharma* v *OHIM - Altana Pharma (RESPICUR)* [2007] ECR II-449, paragraph 42 and the case-law cited).

33 In paragraph 20 of the contested decision, the Board of Appeal found that the relevant public was the general public, which consisted of the average Portuguese, Spanish, United Kingdom, Austrian or Danish consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect.

34 In the first place, as regards the territories to take into account in order to assess the likelihood of confusion, the Court notes that, as the Board of Appeal rightly observed in paragraph 20 of the contested decision and this has not been disputed, since the earlier marks are national marks, the territories in question are those of the Member States in which those marks are protected, namely Portugal, Spain, the United Kingdom, Austria and Denmark.

35 In the second place, as regards the consumers constituting the relevant public, the applicant claims, by its first complaint, that the contested decision is vitiated by an error inasmuch as the consumers in question are not part of the 'public at large', but are solely young and middle-aged consumers. In that regard, the applicant observes that it established, during the procedure before OHIM, that the beverage cachaça is consumed by a young and middle-aged public, and not by children and elderly persons.

36 In the present case, the goods covered by the mark applied for and by the earlier marks are in Class 33 of the Nice Agreement, which includes 'alcoholic beverages (except beers)'. The earlier Danish, United Kingdom, Spanish and Austrian marks were

registered solely in respect of 'liqueur made of sugar cane', 'alcoholic beverages made from distilled sugar cane' or 'alcoholic beverages made of sugar cane'.

37 The applicant observes, in essence, that it uses the earlier marks exclusively to market a specific type of alcoholic beverage or liqueur made of sugar cane manufactured in Brazil, namely cachaça, and that there is every reason to think that Missiato Industria e Comercio will also market cachaça under the mark applied for, in view of the fact that it already markets that type of product under that mark.

38 However, it should be pointed out that the rights conferred or capable of being conferred by the marks at issue extend to each category of goods or services in respect of which those marks are protected or to each category of goods covered by the application for registration. The commercial choices made or which may be made by the proprietors of the marks at issue are factors which must be distinguished from the rights derived from those marks and may change, since they depend solely on the will of the proprietors of those marks. So long as the list of the goods covered by the marks at issue has not been amended, such factors cannot affect the relevant public to be taken into account when assessing whether there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see, to that effect, the judgment of 13 April 2005 in Case T-286/03 *Gillette* v *OHIM — Wilkinson Sword (RIGHT GUARD XTREME sport)*, not published in the ECR, paragraph 33).

39 Given that the goods in respect of which the earlier marks are protected and the goods covered by the application for registration of the mark applied for are everyday consumer goods, namely not intended for a specialised public, the Board of Appeal

was right to observe, in paragraph 20 of the contested decision, that the relevant public is the average Portuguese, Spanish, United Kingdom, Austrian or Danish consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect.

40 Even if the alcoholic beverages, including those made of sugar cane, are sold in restaurants or bars, in particular in the form of cocktails such as caipirinha, and if certain advertising campaigns relating to those beverages are targeted more specifically at young and middle-aged adults, the fact remains that those beverages are usually widely distributed and that they are also sold not only in specialist shops, but in large shopping centres as well, and are therefore accessible to the general public (see, to that effect, Joined Cases T-81/03, T-82/03 and T-103/03 *Mast-Jägermeister* v *OHIM - Licorera Zacapaneca (VENADO with frame and others)* [2006] ECR II-5409, paragraph 82). Moreover, it is apparent from Appendixes Nos 1 and 2 produced by the applicant before OHIM, which are cited in paragraph 41 of the contested decision, that the goods bearing the earlier Portuguese marks are distributed in food retailers, in particular in supermarkets.

41 As regards the applicant's argument that the Board of Appeal did not explicitly state, in the contested decision, that the relevant public consisted exclusively of adult consumers, it is sufficient to observe that, for reasons of public interest, the sale of alcoholic beverages to children is generally prohibited and that therefore, solely by operation of law, the public concerned by those goods is limited to adult consumers. In the contested decision, there is nothing to suggest that the Board of Appeal failed to take account of the legal restrictions on the age of the average consumer in each Member State by reference to whom it assessed the likelihood of confusion and that its assessment was influenced by such a failure.

42 Accordingly, the Court must reject the applicant's first complaint, alleging an error by Board of Appeal in the light of the definition of the relevant public set out in paragraph 20 of the contested decision.

The similarity of the goods

43 According to settled case-law, in order to assess the similarity of the goods or services concerned, all the relevant factors relating to those goods or services should be taken into account. Those factors include, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary. Other factors may also be taken into account such as the distribution channels of the goods concerned (see Case T-443/05 *El Corte Inglés* v *OHIM - Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR II-2579, paragraph 37 and the case-law cited).

44 Where the goods in respect of which an earlier mark is protected include the goods covered by an application for registration, those goods are considered to be identical (see *ARTHUR ET FELICIE*, paragraph 14 above, paragraph 34 and the case-law cited).

45 The applicant concurs with the Board of Appeal's assessment, in paragraphs 22 and 36 of the contested decision, that the goods in respect of which the earlier marks are protected are identical to those covered by the application for registration, given that those latter goods 'include (or are included in) those covered by the earlier marks'. In

accordance with the case-law cited in paragraph 44 above, it is necessary to confirm the Board of Appeal's assessment.

The similarity of the signs

— The distinctive and dominant elements

46 The global assessment of the likelihood of confusion must, as far as concerns the visual, phonetic or conceptual similarity of the signs at issue, be based on the overall impression given by the signs, bearing in mind, in particular, their distinctive and dominant elements. The perception of marks by the average consumer of the goods or services in question plays a decisive role in the global assessment of that likelihood. In that regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see Case C-334/05 P *OHIM* v *Shaker* [2007] ECR I-4529, paragraph 35 and the case-law cited).

47 For the purpose of assessing the distinctive character of an element of a mark, an assessment must be made of the greater or lesser capacity of that element to identify the goods for which the mark was registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings. In making that assessment, it is necessary to take into account, in particular, the inherent characteristics of that element and to ask whether it is at all descriptive of the goods for which the mark has been registered (see Case T-153/03 *Inex* v *OHIM - Wiseman (Representation of a cowhide)* [2006] ECR II-1677, paragraph 35 and the case-law cited, and the judgment of 13 December 2007 in Case T-242/06 *Cabrera Sánchez* v

OHIM — Industrias Cárnicas Valle (el charcutero artesano), not published in the ECR, paragraph 51).

48 The assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. The comparison must be made by examining each of the marks in question as a whole, but that does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *OHIM* v *Shaker*, paragraph 46 above, paragraph 41 and the case-law cited). It is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (*OHIM* v *Shaker*, paragraph 46 above, paragraph 42, and judgment of 20 September 2007 in Case C-193/06 P *Nestlé* v *OHIM*, not published in the ECR, paragraph 42). That may be the case, in particular, where that component is likely by itself to dominate the image of that mark recollected by the relevant public, with the result that the other components of the mark are negligible in the overall impression created by the mark (*Nestlé* v *OHIM*, paragraph 43). The Court of Justice has made clear that the fact that an element is not negligible does not mean that it is dominant, just as the fact that an element is not dominant by no means implies that it is negligible (*Nestlé* v *OHIM*, paragraph 44).

49 Where some elements of a trade mark are descriptive of the goods and services in respect of which that mark is protected or the goods and services covered by the application for registration, those elements are recognised as having only a low, or even very low, distinctive character (see, to that effect, Case T-363/04 *Koipe* v *OHIM - Aceites del Sur (La Española)* [2007] ECR II-3355, paragraph 92, and *el charcutero artesano*, paragraph 47 above, paragraph 52 and the case-law cited). Most often, it will be possible to recognise those elements as having distinctive character only because of their combination with the other elements of the mark. Owing to their low, or even very low, distinctive character, descriptive elements of a trade mark are not generally regarded by the public as being dominant in the overall impression conveyed by that

mark, unless, particularly because of their position or their size, they appear likely to make an impression on consumers and to be remembered by them (see, to that effect, *el charcutero artesano*, paragraph 47 above, paragraph 53 and the case-law cited, and Case T-7/04 *Shaker* v *OHIM - Limiñana y Botella (Limoncello della Costiera Amalfitana shaker)* [2008] ECR II-3085, paragraph 44 and the case-law cited). That does not mean, however, that the descriptive elements of a mark are necessarily negligible in the overall impression conveyed by that mark. It is necessary, in particular, to examine whether other elements of the mark are likely to dominate, by themselves, the relevant public's recollection of that mark (see paragraph 48 above).

50 It should also be recalled that there is nothing to prevent any visual similarity between a word mark and a figurative mark being determined, since both types of mark have graphic form capable of creating a visual impression (see Case T-359/02 *Chum* v *OHIM - Star TV (STAR TV)* [2005] ECR II-1515, paragraph 43 and the case-law cited).

51 In paragraph 24 of the contested decision, the Board of Appeal found that the dominant element of the earlier Portuguese word mark was the word 'cachaça', since it was in the first position and since, according to the case-law, the first part of a sign normally has a greater impact on the consumer than the final part.

52 In paragraph 25 of the contested decision, the Board of Appeal considered that the dominant elements of the earlier figurative marks were the central figurative element that consists of the number 51 written in white within a circle that is partially within a wide band that crosses the sign from one side to the other and the word written over this figurative element, which is always 'cachaça' apart from in Portuguese trade mark registration No 273105 where this word is 'pirassununga'. According to the Board of

Appeal, the dominant character of these elements is due to their position and the fact that they are larger than the other elements in the marks at issue.

53 In paragraphs 26 and 27 of the contested decision, the Board of Appeal found that the word 'cachaça' was a distinctive element of the earlier Spanish, United Kingdom, Austrian and Danish marks since Spanish, United Kingdom, Austrian and Danish consumers will consider that word to be fanciful. According to the Board of Appeal, in all those territories, that word is even the most distinctive element of the signs in question since, first, as a word element, it has a stronger impact on the consumer than the accompanying figurative one, because the public does not tend to analyse signs and refers most readily to a sign by its verbal element and, second, the distinctive character per se of numbers is limited, as they 'usually refer to quantities, periods, an order, etc. of the products and consequently, consumers are not used to perceiv[ing] them as trade marks'. Moreover, two-digit numbers are commonly used to indicate certain characteristics of 'alcoholic beverages', such as alcohol by volume or the time required for the maturation process.

54 Furthermore, in paragraphs 26 to 28 of the contested decision, the Board of Appeal found that the words 'cachaça' and 'pirassununga' were devoid of distinctive character in Portugal, where they are perceived by the average consumer as words which are descriptive of the type of goods covered by the marks at issue and a 'place in Brazil' corresponding to its place of production, respectively.

55 In paragraphs 28 and 29 of the contested decision, the Board of Appeal found that the dominant and most distinctive element of the earlier Spanish, United Kingdom, Austrian and Danish trade marks was the element 'cachaça' whereas, in view of both the descriptive meaning of the words 'cachaça' or 'pirassununga' for a Portuguese

consumer and the limited distinctive character of two-digit numbers in relation to alcoholic beverages, the distinctiveness of the earlier Portuguese word and figurative trade marks lay in the combination 'of their elements' or in their 'most dominant elements', namely 'cachaça 51' or 'Pirassununga 51'.

56 By its second complaint, the applicant claims, in essence, that the Board of Appeal erred in finding that the element 'cachaça' was a dominant and distinctive element in the earlier marks. According to the applicant, the word 'cachaça' is devoid of distinctive character per se since it is descriptive, both for Portuguese consumers and for Spanish, United Kingdom, Austrian and Danish consumers. The likelihood of confusion must be assessed in the light of the elements '51' and '61' alone, elements which are or may be associated with cachaça.

57 Accordingly, the comparison of the marks at issue must be conducted by identifying any dominant or negligible elements first in respect of each of the earlier marks, and then in respect of the mark applied for.

58 The Court notes that the earlier Portuguese word mark is formed by the combination of two elements, the first being the word 'cachaça' and the second '51'.

59 It is not disputed that the word 'cachaça' is perceived by the average Portuguese consumer as a word which is purely descriptive of an alcoholic beverage, namely a spirit made of sugar cane.

60 For its part, the number 51 is an arbitrary number within the earlier Portuguese word mark. It is true that, in paragraph 27 of the contested decision, the Board of Appeal found that the distinctive character per se of numbers, in particular two-digit numbers, was limited since such numbers are commonly used to designate certain characteristics of goods, in particular of alcoholic beverages, and that consumers were not used to perceiving them as trade marks. However, it failed to take account of the fact that, as the applicant rightly observes, the number 51 is not capable of being perceived immediately by the relevant public as descriptive of a particular characteristic of the goods concerned, since it is not associated, in the earlier Portuguese word mark, with any of the units commonly used to measure a specific characteristic of alcoholic beverages, such as alcohol by volume, quantity or the time required for the maturation process. Indeed, OHIM observes in its response that 'the value to which the numerals [51 and 61] refer is an unknown'.

61 Although it is true that, in paragraph 24 of the contested decision, the Board of Appeal categorised the word 'cachaça' as the dominant element of the earlier Portuguese word mark, while observing, in paragraphs 26 to 28 of that decision, that that word was devoid of distinctive character per se in Portugal, where it was perceived as descriptive of the type of goods concerned, the Board none the less found, in paragraphs 28 and 29 of the contested decision, that the element '51' was not negligible in the overall impression created by that mark, its distinctiveness residing in the combination of its elements 'cachaça' and '51'.

62 It cannot therefore be argued that the Board of Appeal failed to take account of the element '51' of the earlier Portuguese word mark in the analysis of whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. In addition, the Board of Appeal cannot be criticised for having also taken account of the element 'cachaça' in that analysis. Although that element is perceived as being descriptive of the type of goods in question by the average Portuguese consumer, it none the less remains, within the earlier Portuguese word mark, independent of the

element '51', and retains some residual distinctiveness, which results from its combination with the element '51' and from the fact that, as the first part of the earlier Portuguese word mark, it tends to have a greater visual and phonetic impact on the consumer than the final part (see, to that effect, Joined Cases T-183/02 and T-184/02 *El Corte Inglés* v *OHIM - González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraphs 81 and 83).

63 It follows that, in the case of the earlier Portuguese word mark, the Board of Appeal did not err in taking account of the elements 'cachaça' and '51' when analysing whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

64 As regards the earlier figurative marks, it should be noted that they are formed by the combination of a number of word and figurative elements.

65 It is not disputed that the elements which make up those marks, other than the element 'cachaça' or 'pirassununga' and the element '51', written in white within a circle that is partially within a wide band that crosses the sign from one side to the other, are negligible in the overall impression created by those marks and that they can therefore be disregarded for the purposes of the analysis of whether there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

66 As regards the earlier Portuguese figurative marks, it is not disputed that, in those marks, the words 'cachaça' and 'pirassununga' are perceived by the average Portuguese consumer as elements which are purely descriptive of the type of goods covered by the marks at issue, namely a spirit made of sugar cane, and of its place of production, namely a place in Brazil.

67 For the same reasons as those set out in paragraph 60 above, the number 51 must be regarded as an arbitrary element in the earlier Portuguese figurative marks.

68 The Board of Appeal found, in paragraphs 25 and 29 of the contested decision, that the overall impression created by those marks was dominated by the elements 'cachaça' or 'pirassununga' and '51' and that their distinctiveness lay in the combination of those elements.

69 It cannot therefore be validly argued that the Board of Appeal failed to take account of the element '51', written in white within a circle that is partially within a wide band that crosses the sign from one side to the other, in the earlier Portuguese figurative marks when analysing whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. Furthermore, the Board of Appeal cannot be criticised for having taken account, in that analysis, of the element 'cachaça' or 'pirassununga'. Although that element is perceived by the average Portuguese consumer as being descriptive of the type of goods in question or of its place of manufacture, it none the less remains, within the earlier Portuguese figurative marks, independent of the element '51' and retains some residual distinctiveness as a result of its combination with the element '51' and the fact that the word 'cachaça' or 'pirassununga' occupies a position in the signs which is at least equivalent to that of the element '51'. At least visually, it cannot therefore be regarded as negligible in relation to the element '51'.

70 It follows that, in the case of the earlier Portuguese figurative marks, the Board of Appeal did not err in taking account of both the element 'cachaça' or 'pirassununga' and the element '51', written in white within a circle that is partially within a wide band that crosses the sign from one side to the other, and of the impression produced by their combination, in order to analyse whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

71 As regards the earlier Spanish, United Kingdom, Austrian and Danish marks, the Board of Appeal found, in paragraphs 27 and 29 of the contested decision, that 'cachaça' was their dominant and most distinctive element, in view of its verbal and fanciful nature for Spanish, United Kingdom, Austrian and Danish consumers, and of the limited distinctive character of two-digit numbers in relation to alcoholic beverages. It did not however find, thereafter in the contested decision, that the element '51' was negligible in the overall impression created by those marks but took due account of that element when analysing whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. In paragraph 31 of the contested decision, the Board of Appeal observed inter alia that, '[p]honetically, the earlier marks will be referred to as "cachaça" or "cachaça 51" in Spain, Denmark, the [United Kingdom] and Austria, as they are their dominant and distinctive elements'.

72 It cannot therefore be argued that the Board of Appeal failed to take account of the element '51', written in white within a circle that is partially within a wide band that crosses the sign from one side to the other, of the earlier Spanish, United Kingdom, Austrian and Danish marks when analysing whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. Furthermore, the Board of Appeal cannot be criticised for having also taken account of the element 'cachaça' in that analysis. Even if, as the applicant submits, that element could be perceived by the whole of the relevant public in Spain, Denmark, the United Kingdom and Austria, or by a significant portion of that relevant public, as a generic or necessary name for designating the type of goods covered by the marks concerned, it would none the less remain, within each of those marks, independent of the element '51', and would retain some residual distinctiveness as a result of its combination with the element '51' and from the fact that, since the word 'cachaça' occupies a position in the sign which is at least equivalent to that of the element '51', it cannot — at least visually — be regarded as negligible in relation to the element '51'.

73 The applicant is therefore not justified in claiming that, in the case of the earlier Spanish, United Kingdom, Austrian and Danish marks, the Board of Appeal erred in taking account of both the element 'cachaça' and the element '51', written in white within

a circle that is partially within a wide band that crosses the sign from one side to the other, and of the impression resulting from their combination, in order to analyse whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

74 In view of all the foregoing considerations, the applicant is not justified in claiming that the Board of Appeal erred in taking account, in respect of all the earlier marks, of both the element 'cachaça' or 'pirassununga' and the element '51' in order to analyse whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94, and the second complaint must therefore be rejected in its entirety.

75 As regards the mark applied for, the Board of Appeal found, in paragraph 30 of the contested decision, that its distinctive and dominant element was the central numerical and figurative element '61', in view, first, of its central position, which is highlighted by the two sugar cane plants at each side that frame it and, second, that the other elements will be perceived as ornamental and secondary, either because of their descriptiveness (the barrel or the two sugar cane plants) or because of their small size (the expression 'a nossa alegria' written on a ribbon, which will be recognised as an 'ornamental legend'). However, it is apparent from the contested decision that the Board of Appeal did not consider that the figurative elements consisting of the barrel and the two sugar cane plants and the word element composed of the expression 'a nossa alegria' were negligible elements in the overall impression created by that mark. When analysing whether there was any phonetic similarity between the marks at issue, the Board of Appeal observed, in paragraph 31 of the contested decision, that '[it was not possible] to disregard the possibility of [the mark applied for] being referred to as "a nossa alegria" due to the fact that it is the only verbal element of the sign'. Similarly, in paragraph 34 of the contested decision, it took account of the fact that 'the figure "61" in the [mark] applied for identifies a barrel, which is an element

that does not form part of any of the earlier marks', when analysing whether there was any conceptual similarity between the marks at issue.

76 In these proceedings, the applicant submits that the analysis of whether there is a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 must be carried out in relation to the element '61' alone, which dominates the overall impression created by the mark applied for. Whilst contending that the action should be dismissed, OHIM submits that that analysis must take account of both the element '61' and the figurative elements consisting of the barrel and the two sugar cane plants, as well as the word element composed of the expression 'a nossa alegria', which are not negligible in the overall impression created by the mark applied for.

77 The Board of Appeal cannot be criticised for having taken account of the expression 'a nossa alegria' of the mark applied for in order to analyse whether there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94. That expression, which is the only one to appear in the mark applied for, is of importance for the pronunciation of that mark and, therefore, cannot be regarded as negligible in the overall impression created by it. Similarly, the Board of Appeal was right to take account of certain figurative elements of the mark applied for, such as the drawing of a barrel. Although highly suggestive of an alcoholic beverage made of sugar cane which might be aged in oak casks and, as such, having a very low degree of distinctiveness in relation to such goods, the barrel and the two sugar cane plants remain independent in the mark applied for, and retain some residual distinctiveness as a result of their combination with the element '61' and the fact that they have, in that mark, a position at least equivalent to that of the element '61'. Accordingly, OHIM is right to maintain in these proceedings that those elements cannot be regarded, at least visually, as negligible in relation to the element '61'.

78 In view of the foregoing, and of the case-law cited in paragraph 46 above, the similarity between the earlier Portuguese word mark and the mark applied for must therefore

be assessed in the light of the overall impression created by the combination of the element 'cachaça' and the element '51', on the one hand, and of that created by the combination of the element '61', written in white in a central position, the elements consisting of a barrel framed on each side by two sugar cane plants and the element consisting of a ribbon displaying the expression 'a nossa alegria', on the other. Likewise, similarity between the earlier figurative marks and the mark applied for must be assessed on the basis of the overall impression created by the combination of the element 'cachaça' or 'pirassununga' and the element '51', written in white within a circle that is partially within a wide band that crosses the sign from one side to the other, on the one hand, and of that created by the combination of the element '61', written in white in a central position, the elements consisting of a barrel framed on each side by two sugar cane plants and the element consisting of a ribbon displaying the expression 'a nossa alegria', on the other.

— Visual similarity

79 As regards the visual similarity between the marks at issue, the Board of Appeal found, in paragraphs 32 and 33 of the contested decision, that those marks coincided only in the representation of the digit 1. According to the Board of Appeal, the 'visual relative similarities' between the digits 5 and 6, written in a fairly standard style, cannot be taken into account since the relevant public is accustomed to seeing those digits and is used to distinguishing their differentiating details. The fact that the marks at issue coincide in the representation of the digit 1 is not enough to provide the marks with a similar overall visual impression in view of their different nature, structure and composition.

80 By its third complaint, the applicant claims that the Board of Appeal erred in finding that the visual impression conveyed by the marks at issue was not similar. In the applicant's submission, the elements '51' and '61' are visually similar inasmuch as they

contain two digits, one of which is identical, they are of comparable length, they are both written in white on a dark background in the shape of a circle, and the digits 5 and 6 also have strong graphic resemblances. In addition, the word elements of the mark applied for, which are written in Portuguese, suggest that the type of goods covered by that mark come from a Portuguese-speaking country, thereby increasing the likelihood of confusion.

81 OHIM contends, in essence, that the third complaint should be rejected. It claims that the marks at issue are, overall, dissimilar visually. Even the numbers 51 and 61 are differentiated visually given the different configuration of the digits 5 and 6.

82 In the overall impression created by the mark applied for, the most distinctive elements are the element '61' and the ornamental figurative elements consisting of the barrel and the two sugar cane plants. The element 'a nossa alegria', to which the applicant refers, will have only a very low visual impact, in view of its small size, its position at the bottom of the sign and its commonplace graphic aspect. In the earlier marks, the overall visual impression is dominated or, in the earlier Portuguese word mark, may be dominated, depending on its graphic representation, by the elements 'cachaça' or 'pirassununga' and '51' and, in the earlier figurative marks, by the ornamental figurative element consisting of a wide band that crosses the sign from one side to the other.

83 The marks at issue differ visually in their word elements 'a nossa alegria', 'cachaça' and 'pirassununga' and, as the case may be, in their ornamental figurative elements, which are represented in a simple and relatively commonplace manner. On the other hand, those marks coincide visually in the representation of a number comprising two digits, the second of which, namely the digit 1, is identical. Furthermore, although the way in which the digit 5 is written differs in certain details from the way in which

the digit 6 is written, the graphic differences between those two digits are less pronounced than the graphic differences between each of those digits and other digits. Moreover, in the figurative marks at issue, the two-digit number, namely 51 in the earlier figurative marks and 61 in the mark applied for, is represented in a similar fashion in large characters, which are positioned centrally and whose white colour contrasts with a dark background. In addition, the shape of that background is relatively similar, namely a round shape in the earlier figurative marks and an oval shape, corresponding to the outline of the barrel, in the mark applied for.

84 Even if the visual similarity between the marks at issue appears to be low in terms of the overall visual impression created by those marks, it is sufficiently marked to be perceived by the whole of the relevant public. The Court therefore finds that the Board of Appeal erred in concluding, in essence, that there was no visual similarity between the marks at issue and upholds, to that extent, the applicant's third complaint.

— Phonetic similarity

85 As regards the phonetic similarity between the marks at issue, the Board of Appeal considered, in paragraph 31 of the contested decision, that the earlier marks were referred to as 'cachaça', 'cachaça 51' or 'pirassununga 51', whereas the mark applied for would probably be referred to as '61', although it could not be ruled out that it would be referred to as 'a nossa alegria'. According to the Board of Appeal, the coincidence of pronunciation only in the digit '1' is insufficient for the marks at issue to be considered phonetically similar.

86 By the fourth complaint, the applicant asserts that the Board of Appeal erred in finding that the phonetic impression conveyed by the marks at issue was not highly similar. In the applicant's submission, given that the relevant public is used to ordering orally the goods covered by the earlier marks in bars and restaurants and that the first word 'cachaça' is and could still be used in the future by Missiato Industria e Comercio to identify its goods, the marks at issue will be ordered as 'cachaça 51' or 'cachaça 61'. In the applicant's submission, the phonetic similarity between the marks is greatest in languages such as Portuguese and Spanish, in which the digits 5 and 6 are pronounced with the same initial and final letters, 's' and 'enta', respectively. Portuguese and Spanish consumers pronounce the numbers 51 and 61 in almost the same way: 'sin-cu-enta y um' and 'se-senta y um' as regards Portuguese consumers and almost likewise as regards Spanish consumers: 'sin-cuenta e uno' and 'se-senta e uno'. The sole difference between the signs, as regards Spanish and Portuguese consumers respectively, is the presence of the letters 'incu' and 'ess' in the middle of the numbers, as pronounced by that public. The phonetic difference between certain elements of the marks at issue is of lower importance in view of the ornamental or descriptive function of those elements in the signs at issue.

87 OHIM contends, in essence, that the fourth complaint should be rejected. Even if one were to take account only of the numbers 51 and 61 in the marks at issue, the phonetic differences between them would remain audible. In Spain, the phonetic differences between 'cincuenta y uno' and 'sesenta y uno' would not pass unnoticed. The differences are even more notable, in English, between 'fifty one' and 'sixty one', in German, between 'einundfünfzig' and 'einundsechzig', and in Danish, between 'enoghalvtreds' et 'enogtres', because the beginnings of the words '50' and '60' have a radically different speech sound. The phonetic differences between the marks at issue are even more accentuated if, as OHIM considers necessary, account were taken, in Spain, the United Kingdom, Austria and Denmark, of the word 'cachaça', whose meaning is not perceived by the relevant public, and, in Spain, of the expression 'a nossa alegria', the

meaning of which might be understood by the relevant public. At best, the phonetic similarity between the signs at issue is low, or even minimal, in Spain and even lower in the United Kingdom, Austria and Denmark. In Portugal, the phonetic similarity between the marks at issue is low, or even minimal, since the phonetic differences between 'sincuenta y um' and 'sesenta y um' would not pass unnoticed and it is possible that the expression 'a nossa alegria' would also be pronounced.

88 The Court takes the view that the relevant public will refer orally to the marks at issue by pronouncing, most probably, the combination formed by those of their word elements which are not negligible in the overall impression they create. The earlier marks will therefore be referred to as 'cachaça 51' or 'pirassununga 51', whereas the mark applied for will be referred to as '61' or, possibly, '61 a nossa alegria'.

89 The marks at issue differ phonetically in their word elements 'a nossa alegria', 'cachaça' and 'pirassununga'. However, those marks coincide partially in the pronunciation of their numerical element. As a preliminary point, it should be noted that, in all the languages concerned, the words corresponding to the numbers 51 and 61 express the addition of one unit to the numbers 50 and 60. The phonemes which express the addition of that unit to the numbers 50 and 60 are pronounced, in each of the languages concerned, separately and in the same way in 51 and 61. The phonemes corresponding to 'einund' and 'enog' will even be the first to be pronounced in German and Danish respectively, in the words 'einundfünfzig' and 'einundsechzig' or 'enoghalvtreds' and 'enogtres'. However, contrary to what the applicant submits, the marks at issue do differ phonetically in the pronunciation of the phonemes corresponding to the number of tens, namely 50 or 60. In Portuguese and Spanish, the respective differences of pronunciation between the phonemes corresponding to 'cinquenta' and 'sessenta', on the one hand, and to 'cincuenta' and 'sesenta', on the other, are significant and will not pass unnoticed by the relevant public. Contrary to what the applicant submits, even the phonemes corresponding to the letters 'c' and 's', in Portugal and in the majority

of Spain, do not coincide in the words in question. As OHIM rightly observes, the differences are even more audible in English ('fifty' and 'sixty'), in German ('fünfzig' and 'sechzig') and in Danish ('halvtreds' and 'tres'), because the beginnings of the numbers 50 and 60 have a radically different pronunciation.

90 It follows that even if the phonetic similarity between the marks at issue is low in terms of the overall phonetic impression created by those marks, it is none the less sufficiently marked to be perceived by the whole of the relevant public. The Court therefore finds that the Board of Appeal erred in concluding, in essence, that there was no phonetic similarity between the marks at issue and upholds, to that extent, the applicant's fourth complaint.

— Conceptual similarity

91 As regards the conceptual similarity between the marks at issue, the Board of Appeal stated, in paragraph 34 of the contested decision, that that similarity can, in any event, result only from the representation, in each of those marks, of a two-digit number. However, according to the Board of Appeal, since those figures are radically different due to their different absolute value, and since the number 61 identifies a barrel in the mark applied for, the marks at issue are conceptually different.

92 In the fifth complaint, the applicant asserts that the Board of Appeal erred in concluding that there was no conceptual similarity between the marks at issue. In the applicant's submission, the distinctive element of those marks consists in a two-digit number, the second of which is identical, which is associated with the same type of

goods, namely a spirit made of sugar cane, manufactured in Brazil, and with word elements written in the same language, namely Portuguese. In addition, the numbers in question are or may be preceded by the term 'cachaca'. Thus, conceptually, the marks at issue are not fundamentally different.

93 OHIM contends, in essence, that the fifth complaint should be rejected. It objects that, overall, the marks at issue are conceptually dissimilar. In its submission, since the value to which the numbers 51 and 61 refer is an unknown, those numbers can hardly contribute to a conceptual similarity or dissimilarity between the marks at issue. By contrast, the figurative element of the mark applied for, namely the barrel framed by two sugar cane plants, is conceptually rich, especially as there is nothing in the file to indicate that many operators would use such graphic elements, whatever their stylisation, in the trade of alcoholic beverages. The figurative element in the mark applied for therefore plays a role in distinguishing the marks at issue conceptually. The expression 'a nossa alegria' induces a further element of conceptual difference between the marks at issue, especially in Spain. The semantic content of this expression is likely to be remembered especially because it is the only element of the mark applied for to have a clear semantic content. In Portugal, the expression 'a nossa alegria' and the words 'cachaça' and 'pirassununga' induce further elements of conceptual differentiation.

94 The Court is of the view that, in the overall conceptual impression created by the mark applied for, the most distinctive element is the element '61', on account of its arbitrary nature in relation to the type of goods in question. The ornamental figurative elements consisting of the barrel and the two sugar cane plants, just like the expression 'a nossa alegria', will themselves be conceptually distinctive only to a low degree since they are highly suggestive of the type of goods in question, of its place of origin (namely a Portuguese-speaking country) or of certain of its characteristics

or properties and they therefore serve only to trigger, for the relevant public, associations between a type of goods, its place of origin, its characteristics or properties and the most distinctive elements of the mark applied for. In the earlier marks, the element '51' is the most distinctive on account of its arbitrary nature in relation to the type of goods in question (see paragraphs 60 and 67 above). The ornamental figurative element consisting of a wide band that crosses the sign from one side to the other in the earlier figurative marks underlines, from a conceptual point of view, the association of the number 51 with the type of goods covered by those marks. That element therefore appears secondary in the overall impression created by those marks. The elements 'cachaça' or 'pirassununga' in the earlier Portuguese marks are conceptually distinctive only to a low degree since they are highly suggestive of the type of goods in question or of its place of production and they therefore serve only to trigger, for the relevant public, associations between a type of goods or its place of production and the most distinctive elements of the marks concerned. However, and on the assumption that, as the Board of Appeal considered, in paragraph 26 of the contested decision, the word 'cachaça' were in fact perceived as fanciful by the majority of the relevant public in Spain, Denmark, the United Kingdom and Austria — which the applicant disputes (paragraph 72 above) — the element 'cachaça' could be regarded, with the element '51', as one of the most distinctive elements of the earlier Spanish, United Kingdom, Austrian and Danish figurative marks.

95 The marks at issue differ conceptually in their word elements 'a nossa alegria', 'cachaça' and 'pirassununga' and, as the case may be, in their ornamental figurative elements. However, those marks coincide partially in the case of their numerical elements '51' and '61'. There can hardly be any doubt that those elements will be immediately perceived by the relevant public as numbers, which serve to evaluate and compare quantities or ratios or to arrange elements by a numbering system. For the reasons already set out in paragraph 60 above, the view cannot however be taken, in the circumstances of the present case, that the numbers in question will be immediately perceived by the relevant public as applying to certain clearly determined characteristics of the type of goods covered by the marks at issue, such as alcohol by volume, the quantity or the time required for the maturation process. It follows that the relevant public will perceive those numbers as concepts in themselves, without being able to

ascribe to them a specific, clear and determined meaning in relation to the goods in question, as OHIM itself acknowledged (see paragraphs 60 and 93 above).

96 As numbers, the elements '51' and '61' have certain conceptual similarities. Both are two-digit whole, natural, odd numbers whose second digit, namely the digit 1 of the units, is identical. However, the numbers in question are distinguishable from one another by their number of tens, namely 5 in the earlier marks and 6 in the mark applied for. None the less, the conceptual dissimilarity between the marks at issue which stems from the difference in their number of tens is attenuated by the fact that, in ascending order of tens, the number 50, which corresponds to '5' tens, is immediately below the number 60, which corresponds to '6' tens, and that, accordingly, the value of '50' is perceived as relatively close to that of '60'.

97 Between the earlier Spanish, United Kingdom, Austrian and Danish figurative marks, on the one hand, and the mark applied for, on the other, the degree of conceptual similarity between the elements '51' and '61' might however be attenuated to a small extent if, as OHIM submits, the element 'cachaça' is in fact perceived by the majority of the relevant public, in Spain, Denmark, the United Kingdom and Austria as a fanciful term and if, therefore, it constitutes, with the number 51, one of the most distinctive elements in the earlier Spanish, United Kingdom, Austrian and Danish figurative marks.

98 In the light of the foregoing considerations, there is a degree of conceptual similarity which, overall, may be categorised as average between the earlier Portuguese marks and the mark applied for and, depending on the assumptions made, as average to low between the earlier Spanish, United Kingdom, Austrian and Danish figurative marks, on the one hand, and the mark applied for, on the other. The Court therefore finds that the Board of Appeal erred in concluding, in essence, that there were was

no conceptual similarity between the marks at issue and upholds, to that extent, the applicant's fifth complaint.

Likelihood of confusion

99 A global assessment of the likelihood of confusion implies some interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and that of the goods or services covered (see paragraph 29 above). Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 17, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 19; *VENADO with frame and others*, paragraph 40 above, paragraph 74).

100 For the purposes of the global assessment of the likelihood of confusion, it should be recalled that, according to the case-law, the average consumer of the category of goods concerned only rarely has the chance to make a direct comparison between the different marks but must rely on his imperfect recollection of them (*Lloyd Schuhfabrik Meyer*, paragraph 99 above, paragraph 26).

101 In the context of that global assessment, the visual, phonetic or conceptual aspects of the signs at issue do not always have the same weight and it is appropriate to examine the objective conditions under which the marks may be present on the market (see, to that effect, Case T-129/01 *Alejandro* v *OHIM - Anheuser-Busch (BUDMEN)* [2003] ECR II-2251, paragraph 57, and Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look* v *OHIM — Naulover (NLSPORT, NLJEANS, NLACTIVE and NLCollection)* [2004] ECR II-3471, paragraph 49).

102 Thus, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (Case T-292/01 *Phillips-Van Heusen* v *OHIM - Pash Textilvertrieb und Einzelhandel (BASS)* [2003] ECR II-4335, paragraph 55, and Case T-301/03 *Canali Ireland* v *OHIM — Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55).

103 The Board of Appeal's conclusion in the contested decision that there was no likelihood of confusion between the marks at issue was based on the conclusion that, overall, they were visually, phonetically and conceptually dissimilar.

104 However, as was already found in paragraphs 84, 90 and 98 above, the contested decision is vitiated by errors in so far as it concludes that there are no phonetic, visual and conceptual similarities between the marks at issue. For the consumers concerned, the marks at issue will convey a visual impression and a phonetic impression which are similar to a low degree and a conceptual impression which is similar to an average or low degree.

105 By its sixth complaint, the applicant observes in essence that those errors had an effect on the contested decision inasmuch as they led the Board of Appeal to conclude, wrongly, that there was no likelihood of confusion on the part of the relevant public. In the applicant's submission, young and middle-aged adults who are used to buying cocktails in bars, restaurants or in private will remember the phonetic similarity of the elements '61' and '51', preceded by the word 'cachaca', and the figurative element of the mark applied for will not form part of the imperfect picture of the marks recollected by those consumers. Even if the relevant public were able to distinguish the marks at issue, the phonetic, visual and conceptual similarity between them may lead

that public to believe that the goods covered by those marks come from the same undertaking.

106 The Court would point out that, although, as OHIM mentions, preponderant importance has sometimes been accorded to the phonetic perception of marks in relation to beverages (Case T-99/01 *Mystery Drinks* v *OHIM - Karlsberg Brauerei (MYSTERY)* [2003] ECR II-43, paragraph 48), that cannot be the case here. As was found in paragraph 40 above, the goods in question are usually widely distributed and are also sold not only in specialist shops, but in large shopping centres as well. Moreover, the applicant claims, and OHIM does not dispute, that, where the alcoholic beverages or liqueurs made of sugar cane covered by the marks at issue are consumed in bars or restaurants, they are generally consumed as an ingredient of certain cocktails, such as caipirinha. It follows that those beverages are normally ordered orally under the name of those cocktails and not under their own name.

107 In the circumstances of the present case, only secondary importance should therefore be accorded to the phonetic perception of the marks at issue in the overall impression created by them. By contrast, the visual and conceptual perceptions are preponderant in that overall impression.

108 Account should be taken of the fact that the marks at issue are based, visually and conceptually, on the association of alcoholic beverages or liqueurs made of sugar cane and, more specifically, in the case of the earlier Portuguese marks, cachaça, with a particular number, namely 51 in the earlier marks and 61 in the mark applied for, which do not or will not immediately call to mind, on the part of the relevant public, a given characteristic of the type of goods in question. That number is, in an identical fashion in the marks at issue, a two-digit whole, natural, odd number, whose second digit, namely the unit, is 1. Moreover, the visual and conceptual dissimilarities between the marks at issue as a result of the graphic and value differences between the numbers 50 and 60 are attenuated by the fact that, first, the way in which the digit 5

is written is closer to the way in which the digit 6 is written than to the way in which other digits are written, and vice versa, and that, second, in ascending order of tens, the number 50 is immediately below the number 60, so that the relevant public, which is reasonably well informed and reasonably observant and circumspect, will attach a relatively close value to those numbers.

109 Moreover, the earlier marks and the mark applied for have, or, in the case specifically of the earlier Portuguese word mark, may have in common, from a visual point of view, the representation of their numbers in a large size, in a central position in the sign, in simple white characters, which stand out on a dark background.

110 As regards the figurative elements of the figurative marks at issue, they do not have a specific conceptual concept and, visually, appear, like the word elements 'cachaça', 'pirassununga' or 'a nossa alegria' for Portuguese consumers, as elements designed to reinforce the impact of the numerical element, namely the number 51 or the number 61, in association with the type of goods in question, namely alcoholic beverages or liqueurs made of sugar cane manufactured in a Portuguese-speaking country, in this case Brazil. In addition, the figurative marks at issue coincide in some of their figurative elements, in particular the round or oval shape, corresponding to the outline of the barrel, on which the number 51 or the number 61 is displayed in the earlier figurative marks or in the mark applied for. Accordingly, those figurative elements, like the word elements for the Portuguese public, are not, in themselves, capable of distinguishing sufficiently the earlier figurative marks and the mark applied for and to rule out any likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94.

111 Lastly, the phonetic dissimilarities between the marks at issue, however evident, are, in the present case, relatively secondary, for the reasons already set out in paragraphs 106 and 107 above.

112 Even if the relevant public were capable of perceiving certain dissimilarities between the marks at issue, there is a real likelihood that it would establish a link between those marks, in view of all the foregoing considerations, and of the identity of the goods covered by those marks. Ultimately, those dissimilarities do not appear, in the present case, sufficient to rule out any likelihood that the relevant public or, at the very least, the average Portuguese consumer of alcoholic beverages displaying an average level of attention might believe, relying on his imperfect overall recollection of those marks, that the goods covered by them come from the same undertaking or from economically-linked undertakings.

113 Accordingly, the Court finds that the Board of Appeal erred in concluding that there was no likelihood of confusion, within the meaning of Article 8(1)(b) of Regulation No 40/94, between the marks at issue and upholds, to that extent, the applicant's sixth complaint.

114 Accordingly, and without there being any need to examine the merits of the seventh complaint, which alleges an error in the assessment of the items of evidence relating to whether the earlier word and figurative marks CACHAÇA 51 and Cachaça 51 were well known in Portugal or, at the very least, had a high level of overall distinctiveness in that country, the Court upholds the single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94 and therefore annuls the contested decision.

Costs

115 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since OHIM has been unsuccessful and the applicant has applied for costs, OHIM must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) of 4 July 2008 (Case R 1687/2007-1);**

2. **Orders OHIM to pay the costs.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 3 September 2010.

[Signatures]

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