



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

6 December 2018 *

(EU trade mark — Opposition proceedings — Application for EU figurative mark CCB — Earlier EU figurative mark CB — Relative ground for refusal — Likelihood of confusion — Similarity of the signs — Reputation and enhanced distinctiveness of the earlier mark — Article 8(1)(b) of Regulation (EC) No 207/2009 (now Article 8(1)(b) of Regulation (EU) 2017/1001) — Second sentence of Article 75 and Article 76(1) of Regulation No 207/2009 (now second sentence of Article 94(1) and Article 95(1) of Regulation 2017/1001))

In Case T-665/17,

China Construction Bank Corp., established in Beijing (China), represented by A. Carboni and J. Gibbs, Solicitors,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by J. Ivanauskas, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

Groupeement des cartes bancaires, established in Paris (France), represented by C. Herissay Ducamp, lawyer,

ACTION brought against the decision of the First Board of Appeal of EUIPO of 14 June 2017 (Case R 2265/2016-1), relating to opposition proceedings between Groupeement des cartes bancaires and China Construction Bank,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni (Rapporteur), President, L. Madise and R. da Silva Passos, Judges,

Registrar: R. Ūkelytė, Administrator,

having regard to the application lodged at the Court Registry on 27 September 2017,

having regard to the response of EUIPO lodged at the Court Registry on 28 November 2017,

* Language of the case: English.

having regard to the response of the intervener lodged at the Court Registry on 4 December 2017,
further to the hearing on 28 June 2018,
gives the following

Judgment

Background to the dispute

- 1 On 14 October 2014, the applicant, China Construction Bank Corp., filed an application for registration of an EU trade mark with the European Union Intellectual Property Office (EUIPO) pursuant to Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)).
- 2 Registration as a mark was sought for the following figurative sign



- 3 Following the restriction made during the proceedings before EUIPO, the services in respect of which registration was sought are covered by Class 36 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following description: 'Banking; financial evaluation (insurance, banking, real estate); financing services; credit card services; deposits of valuables; antique appraisal; brokerage; guarantees; fiduciary'.
- 4 On 7 May 2015, the intervener, Groupement des cartes bancaires, filed a notice of opposition under Article 41 of Regulation No 207/2009 (now Article 46 of Regulation 2017/1001) to registration of the trade mark applied for in respect of the services referred to in paragraph 3 above.
- 5 The opposition was based in particular on the earlier EU figurative mark registered on 12 November 1999 under number 269415, which is as follows:



- 6 The earlier mark was registered for, inter alia, the services covered by Class 36 corresponding to the following description: 'Insurance and finance, namely insurance underwriting, foreign exchange bureaux; issuing of travellers' cheques and letters of credit; financial affairs, monetary affairs, banking; savings banks; management of banking and monetary flow by electronic means; electronic purse

services; issuing of and services relating to prepayment cards, debit cards, credit cards, cash withdrawal cards, chip (integrated circuit) cards, magnetic cards and smart cards; issuing of bank cards, non-electronic; cash withdrawal using chip (integrated circuit) cards, electronic funds transfer; electronic payment; card payment services; prepaid card services; financial transactions by cardholders via automated teller machines; authentication and verification of parties involved; financial information via all means of telecommunication; authorisation and regulation of payments by card numbers; remote secure payment; financial information, namely remote collection of information and financial data’.

- 7 The ground relied on in support of the opposition was, inter alia, that set out in Article 8(1)(b) of Regulation No 207/2009 (now Article 8(1)(b) of Regulation 2017/1001).
- 8 On 4 October 2016, the Opposition Division upheld the opposition on the ground that there was a likelihood of confusion and rejected the application for registration.
- 9 On 5 December 2016, the applicant filed a notice of appeal with EUIPO, pursuant to Articles 58 to 64 of Regulation No 207/2009 (now Articles 66 to 71 of Regulation 2017/1001), against the decision of the Opposition Division.
- 10 By decision of 14 June 2017 (‘the contested decision’), the First Board of Appeal of EUIPO dismissed the appeal.
- 11 In particular, the Board of Appeal took the view that the relevant territory for the assessment of the likelihood of confusion under Article 8(1)(b) of Regulation No 207/2009 was that of the European Union and that the relevant public was made up in part of professionals and in part of end consumers or the general public, whose level of attention would be high (paragraphs 19 and 20 of the contested decision). Then, under the heading ‘Reputation’ (paragraphs 22 to 25 of the contested decision), it found, on the basis of a number of elements provided by the intervener, that the relevant French public would identify the earlier mark as being the acronym ‘CB’, which describes the payment card of the Groupement des cartes bancaires and referred to the reputation of the word mark CB for services included in Class 36, as established by the Fourth Board of Appeal in its decision of 27 August 2014 concerning Case R 944/2013-4, CCB/CB (‘the CCB/CB decision of the Fourth Board of Appeal’).
- 12 As regards the comparison of the signs, the Board of Appeal took the view that, in spite of the highly stylised character of the earlier mark, the latter would be perceived as the group of capital letters ‘CB’ and that the figurative element of the mark applied for was secondary in relation to its dominant element, consisting of the group of capital letters ‘CCB’ (paragraphs 30 and 31 of the contested decision). It concluded, in essence, that there was some visual similarity between the marks at issue (paragraphs 32 and 33 of the contested decision). After finding that those marks were, on a phonetic level, of above-average similarity, in particular because the mark applied for contained the letters of the earlier mark, and that a conceptual comparison could not be made because the two signs had no meaning, the Board of Appeal agreed with the Opposition Division’s finding that the signs at issue were similar (paragraphs 34 to 36 of the contested decision).
- 13 Having noted that the identity of the services concerned was not contested, the Board of Appeal found that, in view of that identity, the reputation of the earlier mark in France and the similarity of the signs, the differences between those signs and the higher than average level of attention of the relevant public were not sufficient to rule out the likelihood of confusion on the part of the target public in France (paragraphs 39 and 40 of the contested decision). It added that the fact that the services referred to in the trade mark application are not regularly used by consumers increased the possibility that those consumers, even those with a high level of attention, could be misled by their imprecise recollection of the configuration of the marks (paragraph 41 of the contested decision).

Forms of order sought

- 14 Following withdrawals made at the hearing and recorded in the minutes of the hearing, the applicant claims that the Court should:
- annul the contested decision;
 - order EUIPO and the intervener to pay the costs.
- 15 EUIPO contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 16 The intervener contends, regard being had to the details provided at the hearing and recorded in the minutes of the hearing, that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Law

- 17 In support of its action, the applicant raises two pleas in law alleging, first, infringement of the second sentence of Article 75 and of the first sentence of Article 76(1) of Regulation No 207/2009 (now second sentence of Article 94(1) and first sentence of Article 95(1) of Regulation 2017/1001) and, second, infringement of Article 8(1)(b) of Regulation No 207/2009.

The plea in law alleging infringement of the second sentence of Article 75 and of the first sentence of Article 76(1) of Regulation No 207/2009

- 18 The applicant submits that the Board of Appeal infringed its obligation to base its decisions solely on reasons on which the parties have had an opportunity to present their comments (second sentence of Article 75 of Regulation No 207/2009) and also infringed its obligation to restrict its examination to the facts, evidence and arguments provided by the parties (first sentence of Article 76(1) of Regulation No 207/2009) by basing the contested decision on the CCB/CB decision of the Fourth Board of Appeal and on the absence of regular use of the services covered by Class 36, whereas that decision and that finding had neither been relied on nor produced or proven during the proceedings before EUIPO and the applicant had not had an opportunity to submit observations in relation to them.
- 19 It should be noted, in this regard, that under the first sentence of Article 76(1) of Regulation No 207/2009, in proceedings relating to relative grounds for refusal of registration, EUIPO is to be restricted in this examination to the facts, evidence and arguments provided by the parties and the relief sought.
- 20 That provision restricts the examination carried out by EUIPO in two ways. It relates, first, to the factual basis of decisions of EUIPO, that is, the facts and evidence on which those decisions may be validly based, and, second, to the legal basis of those decisions, that is, the provisions which the jurisdiction hearing the case is obliged to apply. Thus the Board of Appeal, when hearing an appeal against a decision terminating opposition proceedings, may base its decision only on the relative

grounds for refusal on which the party concerned has relied and on the related facts and evidence which it has presented (see judgment of 27 October 2005, *Éditions Albert René v OHIM — Orange (MOBILIX)*, T-336/03, EU:T:2005:379, paragraph 33 and the case-law cited).

- 21 Pursuant to the second sentence of Article 75 of Regulation No 207/2009, decisions of EUIPO are to be based only on reasons or evidence on which the parties concerned have had an opportunity to present their comments.
- 22 It is apparent from the case-law that, although the right to be heard, as enshrined in the second sentence of Article 75 of Regulation No 207/2009, extends to all the elements of fact or law and the evidence that forms the basis of the decision, it does not, however, apply to the final position which the administration intends to adopt. Accordingly, the Board of Appeal is not obliged to hear an applicant with regard to a factual assessment which forms part of its final decision. It is also apparent from the case-law that the fact that a party has not been able to comment on statements which are not an independent reason for the contested decision, but which form part of the Board of Appeal's reasoning with regard to the global assessment of the likelihood of confusion, when that party has had an opportunity to present its comments on the reasons relating to the comparison of the signs upon which the decision is based, does not constitute an infringement of Article 75 of Regulation No 207/2009 (see judgment of 23 January 2008, *Demp v OHIM — Bau How (BAU HOW)*, T-106/06, not published, EU:T:2008:14, paragraph 17 and the case-law cited).
- 23 In the present case, as regards, in the first place, the CCB/CB decision of the Fourth Board of Appeal, it should be noted, as EUIPO and the intervener argue, that the intervener relied on and presented that decision in support of its opposition (observations of 10 November 2015 in support of the opposition), and subsequently in response to the appeal brought by the applicant against the decision of the Opposition Division (observations of 17 February 2017).
- 24 It follows that, in the present case, the Board of Appeal validly took into account that information relied on by a party to the dispute. It should be added that, in so far as only the CCB/CB decision of the Fourth Board of Appeal itself was relied on and not all of the evidence presented during the proceedings which gave rise to that decision, the Board of Appeal was correct simply to refer to the conclusion of the assessment carried out in that decision in support of its own assessment of the reputation of the earlier mark.
- 25 It also and necessarily follows that the applicant was placed in a position, both in its observations on the opposition and in its appeal brought before the Board of Appeal against the decision of the Opposition Division, the grounds of which refer to the CCB/CB decision of the Fourth Board of Appeal, effectively to make known its views on that latter decision. It should be stated, in this regard, that the applicant was particularly in a position to present informed comments on the CCB/CB decision of the Fourth Board of Appeal, including all of the elements which were taken into account in that decision, because it was a party to the proceedings which led to the adoption of that decision.
- 26 It may be added that, even if those possibilities to present comments on the CCB/CB decision of the Fourth Board of Appeal were not regarded as sufficient to respect the applicant's right to be heard, the contested decision would still not be vitiated on that ground (see, to that effect, judgment of 15 July 2015, *Australian Gold v OHIM — Effect Management & Holding (HOT)*, T-611/13, EU:T:2015:492, paragraph 18 and the case-law cited). As it will be established in paragraph 47 hereinafter that the findings of the Board of Appeal relating to the reputation of the earlier mark in France are based independently of the assessment of the CCB/CB decision of the Fourth Board of Appeal, the administrative procedure at issue could not have led to a different result if the applicant had had the opportunity to present comments on that decision following the intervener's observations in response to its appeal before the Board of Appeal.

- 27 As regards, in the second place, the finding that there was no regular use of the services applied for in Class 36, it may, admittedly, be acknowledged that, as the applicant argued, that finding was neither invoked as such before the Board of Appeal nor established by evidence during the proceedings which gave rise to the contested decision.
- 28 It must, nevertheless, be noted that the finding at issue constitutes neither the ‘factual basis’ of the contested decision, within the meaning of the case-law referred to in paragraph 20 above, nor an ‘independent reason’ for the contested decision within the meaning of the case-law referred to in paragraph 22 above. As EUIPO rightly observes, that finding that there was no regular use of the services at issue is linked, in the present case, to the Board of Appeal’s finding that the relevant public retains an imperfect image of the marks at issue, a finding which, it should also be noted, is based on the rare possibilities, generally acknowledged, of making a direct comparison between the marks and is only further confirmed in the present case by the irregular use of the services concerned (see, to that effect, judgments of 23 October 2002, *Oberhauser v OHIM — Petit Liberto (Fifties)*, T-104/01, EU:T:2002:262, paragraph 28, and of 17 September 2008, *FVB v OHIM — FVD (FVB)*, T-10/07, not published, EU:T:2008:380, paragraphs 29 and 56).
- 29 It follows that, in relying on the absence of regular use of the services at issue, the Board of Appeal, first, did not exceed the limits of the factual basis of its examination and, second, was not under an obligation to hear the applicant on the finding at issue.
- 30 It follows from all of the foregoing that the plea in law alleging infringement of the second sentence of Article 75 and of the first sentence of Article 76(1) of Regulation No 207/2009 must, in any event, be rejected.

The plea in law alleging infringement of Article 8(1)(b) of Regulation No 207/2009

- 31 Under Article 8(1)(b) of Regulation No 207/2009, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for is not to be registered if, because of its identity with, or similarity to, an 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. Furthermore, under Article 8(2)(a)(i) of Regulation No 207/2009 (now Article 8(2)(a)(i) of Regulation 2017/1001), the term ‘earlier trade marks’ means EU trade marks with a date of application for registration which is earlier than the date of application for registration of the EU trade mark.
- 32 According to settled case-law, the risk that the public might 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 that 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 in question and taking into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the signs and that of the goods or services covered (see judgment of 9 July 2003, *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO BEVERLY HILLS)*, T-162/01, EU:T:2003:199, paragraphs 30 to 33 and the case-law cited).
- 33 For the purposes of applying Article 8(1)(b) of Regulation No 207/2009, a likelihood of confusion presupposes that the marks at issue are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see judgment of 22 January 2009, *Commercy v OHIM — easyGroup IP Licensing (easyHotel)*, T-316/07, EU:T:2009:14, paragraph 42 and the case-law cited).

- 34 The perception of marks in the mind of the average consumer of the category of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion (see judgment of 12 June 2007, *OHIM v Shaker*, C-334/05 P, EU:C:2007:333, paragraph 35 and the case-law cited).
- 35 In the present case, the applicant does not contest the Board of Appeal's finding that the relevant public consists of professionals and the general public, whose level of attention will be high (paragraph 19 of the contested decision). That finding must be confirmed, particularly in view of the nature of the services at issue (see, to that effect, judgment of 10 June 2015, *AgriCapital v OHIM — agri.capital (AGRI.CAPITAL)*, T-514/13, EU:T:2015:372, paragraph 28 and the case-law cited).
- 36 The applicant also does not contest the Board of Appeal's definition of the relevant territory for the assessment of the likelihood of confusion in the present case (paragraph 20 of the contested decision), namely the territory of the European Union, it being borne in mind that it suffices that a relative ground for refusal exists in part of the European Union (see judgment of 14 December 2006, *Mast-Jägermeister v OHIM - Licorera Zacapaneca (VENADO with frame and others)*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 76 and the case-law cited).
- 37 By contrast, the applicant contests the Board of Appeal's assessment of the distinctive character of the earlier mark, its assessment of the similarity of the signs at issue and the global assessment of the likelihood of confusion in the present case.

The distinctive character of the earlier mark

- 38 The applicant criticises the Board of Appeal for having based its assessment of the distinctive character of the earlier mark on the findings concerning reputation, as set out in the CCB/CB decision of the Fourth Board of Appeal, whereas, inter alia, a mark differing from the earlier mark was at issue in that decision. It also criticises the Board of Appeal on the ground that it did not identify the services in respect of which it considered that the earlier mark had a reputation and submits that the evidence adduced did not make it possible for a reputation to be established for all of the services covered by the earlier mark. Finally, the applicant criticises the Board of Appeal for relying on the reputation of the earlier mark, whereas, according to the applicant, only the determination of its enhanced distinctive character is relevant for the assessment of the likelihood of confusion.
- 39 It should be noted, as a preliminary point, as EUIPO rightly states, that the concepts of 'reputation' and 'enhanced distinctiveness' are closely related. It is apparent from settled case-law that the reputation of an earlier mark may contribute to its enhanced distinctiveness and, therefore, increase the likelihood of confusion between that mark and a mark applied for (judgments of 4 November 2003, *Díaz v OHIM — Granjas Castelló (CASTILLO)*, T-85/02, EU:T:2003:288, paragraph 44, and of 27 March 2012, *Armani v OHIM — Del Prete (AJ AMICI JUNIOR)*, T-420/10, not published, EU:T:2012:156, paragraph 33). The enhanced distinctiveness of a trade mark has thus been acknowledged as a result of its reputation (see, to that effect, judgments of 19 May 2011, *PJ Hungary v OHIM — Pepekillo (PEPEQUILLO)*, T-580/08, EU:T:2011:227, paragraph 91, and of 7 October 2015, *Panrico v OHIM — HDN Development (Krispy Kreme DOUGHNUTS)*, T-534/13, not published, EU:T:2015:751, paragraph 60).
- 40 It is also apparent from the case-law that there is a difference of emphasis between the reputation and the enhanced distinctiveness of a trade mark, more than a difference in nature. It has been held, first, that the existence of an unusually high level of distinctive character, as a result of the public's recognition of a mark on the market, necessarily presupposes that at least a significant part of the relevant public is familiar with it, without its necessarily having to have a reputation within the meaning of Article 8(5) of Regulation No 207/2009 (now Article 8(5) of Regulation 2017/1001) (see judgment of 12 July 2006, *Vitakraft-Werke Wührmann v OHIM — Johnson's Veterinary Products (VITACOAAT)*, T-277/04, EU:T:2006:202, paragraph 34 and the case-law cited). It has been held, second, that, with reference to the judgment of 14 September 1999, *General Motors (C-375/97*,

EU:C:1999:408, paragraphs 26 and 27), in which there was a ruling on reputation, that the relevant factors for assessing the acquisition of enhanced distinctiveness by use were the same as those relevant for assessing reputation, namely, in particular, the market share held by the mark, how intensive, geographically widespread and long-standing use of the mark has been, and the amount invested by the undertaking in its promotion (judgment of 12 July 2006, *VITACOAT*, T-277/04, EU:T:2006:202, paragraph 35).

- 41 It follows that, for the purposes of assessing whether the earlier mark had enhanced distinctiveness, the Board of Appeal properly relied on the elements put forward by the intervener in order to establish its reputation.
- 42 It is apparent from the contested decision, and accepted by the parties, that the Board of Appeal based its finding on the reputation of the earlier mark in France both on the evidence which the intervener provided to establish that reputation, set out and analysed in paragraphs 22 to 24 of the contested decision, and on the CCB/CB decision of the Fourth Board of Appeal, referred to in paragraph 25 of the contested decision.
- 43 The applicant contests those two bases for the assessment of the reputation of the earlier mark.
- 44 As regards the assessment of the evidence seeking to establish the reputation of the earlier mark in France, it is necessary to clarify that the applicant does not dispute the fact that that evidence enabled such reputation to be established for some of the services in Class 36. The applicant's criticism is limited to the submission that the relevant services in Class 36 were not identified and thus that the enhanced distinctiveness of the earlier mark was not established in respect of all of those services.
- 45 It should be noted, in this regard, that the assessment of the distinctive character of the earlier mark must be carried out having regard to the goods or services which it covers and which are the source of a likelihood of confusion with the mark applied for as a result of their being identical or similar to the goods or services covered by that mark. In the present case, it is apparent from paragraph 7 of the contested decision, which sets out the decision of the Opposition Division in this regard, that the services covered by the trade mark application were considered identical to the services 'financial affairs, monetary affairs, banking' covered by the earlier mark (see also paragraphs 37 and 39 of the contested decision), a finding which must be upheld. The Board of Appeal was not therefore obliged to assess whether the earlier mark had enhanced distinctiveness in respect of all of the services in Class 36 covered by that mark. The Board of Appeal therefore, as is apparent from the contested decision (paragraphs 4, 22 and 23 of the contested decision) and as EUIPO confirmed at the hearing, correctly examined the reputation of the earlier mark in relation to 'financial affairs, monetary affairs, banking'.
- 46 Furthermore, the applicant merely submits that the evidence provided during the opposition proceedings did not demonstrate the use of the earlier mark in respect of the services 'financial affairs, monetary affairs, banking' and, to that end, merely refers, without further details, to the intervener's observations in support of its opposition. Such elements, however, do not make it possible to cast doubt on the information provided by the intervener relating to the number of bank cards in use which bear the earlier figurative sign (more than 62 million in 2014), relating to the number of transactions carried out with those cards (more than 10 billion in 2014) and relating to the essential role of the intervener (referred to in certain documents as the 'Groupement des cartes bancaires CB') in the French payments system and in transactions carried out by bank card in France, from which the Board of Appeal properly deduced the intensity of the use of the earlier mark in respect of the abovementioned services and the required degree of awareness on the part of the relevant French public and, therefore, its reputation in France (paragraphs 22 to 24 of the contested decision) (see also paragraph 40 above).

- 47 Thus, in so far as those grounds of the contested decision are, by themselves, capable of justifying the Board of Appeal's conclusion on the reputation of the earlier mark in France, the errors which might taint the ground of the contested decision based on the CCB/CB decision of the Fourth Board of Appeal do not, in any event, affect that finding. All of the arguments by which the applicant criticises the grounds of the contested decision and which refer to that decision must, therefore, and in any event, be rejected as ineffective.
- 48 It follows from all of the foregoing that the Board of Appeal correctly assessed the distinctive character of the earlier mark in the contested decision and, in particular, that the arguments put forward by the applicant in support of the present complaint do not make it possible to challenge the finding that the earlier mark enjoyed a reputation in France.

The similarity of the signs

- 49 The applicant submits that the Board of Appeal erred in finding that there is some visual similarity between the signs at issue, by wrongly taking account of the reputation of the earlier mark in its assessment of that similarity, by analysing that earlier mark as if it were the word mark CB and by focusing its examination of the mark applied for on its verbal element 'ccb', without taking account of its figurative element. It also contends that the Board of Appeal erred in finding that the signs were phonetically similar to an above-average degree because, in the case of such short signs, the difference resulting from the addition of one letter will immediately be perceived as significant. Consequently, according to the applicant, given that the conceptual similarity has no impact on the global assessment of similarity, and given the importance of visual similarity in the comparison of figurative marks, the Board of Appeal should, in this case, have concluded that there was, at most, a very low degree of similarity between the signs.
- 50 It should be recalled that it follows from settled case-law that the global assessment of the likelihood of confusion, as far as concerns the visual, phonetic or conceptual similarity of the signs at issue, must be based on the overall impression given by those signs, bearing in mind, inter alia, their distinctive and dominant components (see judgment of 14 October 2003, *Phillips-Van Heusen v OHIM — Pash Textilvertrieb und Einzelhandel (BASS)*, T-292/01, EU:T:2003:264, paragraph 47 and the case-law cited).
- 51 As the applicant correctly argues, it is true that a distinction should be made between the assessment of the distinctive character of an element of a composite mark, which relates to the ability of that element to dominate the overall impression produced by the mark, and the analysis of the distinctive character of the earlier mark, which is linked to the scope of the protection afforded to such a mark. The distinctive character of an element of a composite mark is examined at the stage of assessing the similarity of the signs and the degree of distinctive character of the earlier mark is one of the elements to be taken into consideration as part of the global assessment of the likelihood of confusion (see, to that effect, order of 27 April 2006, *L'Oréal v OHIM*, C-235/05 P, not published, EU:C:2006:271, point 43, and judgment of 24 March 2011, *Ferrero v OHIM*, C-552/09 P, EU:C:2011:177, paragraph 58). Furthermore, where a mark has distinctive character, that distinctive character must be ascribed to that mark as a whole and not automatically to all the elements of which it is composed (see, to that effect, judgments of 3 December 2014, *Max Mara Fashion Group v OHIM — Mackays Stores (M&Co.)*, T-272/13, not published, EU:T:2014:1020, paragraph 61, and of 14 July 2017, *Certified Angus Beef v EUIPO — Certified Australian Angus Beef (CERTIFIED AUSTRALIAN ANGUS BEEF)*, T-55/15, not published, EU:T:2017:499, paragraph 22).
- 52 However, it still cannot be ruled out that the enhanced distinctiveness of a mark may be taken into consideration for the purposes of establishing, by means of a detailed analysis, the distinctive character of one of the elements of that mark. The enhanced distinctiveness and especially the reputation of a sign can play a role in determining the distinctive character of an element forming

part of the sign at issue, in so far as the extensive awareness of the link established by that sign between the goods or services covered and a specific undertaking may influence the perception of the connections between the various elements making up the sign at issue, in particular the more distinctive character of some rather than others.

- 53 It is true that, in the judgment of 12 November 2015, *CEDC International v OHIM — Fabryka Wódek Polmos Łańcut (WISENT)* (T-449/13, not published, EU:T:2015:839, paragraph 65), relied on by the applicant in its written pleadings and at the hearing, the Court noted that the distinctive character or reputation of the earlier mark were actually and, as such, relevant factors for assessing the likelihood of confusion (see also paragraph 51 above). However, it cannot be inferred from that judgment that the enhanced distinctiveness or the reputation of the earlier mark cannot be taken into account in order to determine the distinctive character of the elements of which it consists, a determination which is for the purposes of assessing the similarity of the signs (see paragraph 50 above). That is all the more the case because, in the judgment of 12 November 2015, *WISENT* (T-449/13, not published, EU:T:2015:839, paragraph 66), the Court itself left open the possibility that the enhanced distinctiveness or the reputation of the earlier mark could be taken into account, because it simply stated that EUIPO was not under an obligation, in the circumstances of that case, to take into consideration the enhanced distinctiveness or the reputation of the earlier mark when comparing the signs.
- 54 Thus, in the present case, the Board of Appeal was able, without erring in law, to rely on the reputation of the earlier mark in France and, therefore, to rely on the significance of the awareness of the link which that mark establishes with the bank cards of the Groupement des cartes bancaires defined by the acronym CB, in order correctly to deduce from this that the relevant public, in that Member State, will perceive the earlier mark as being the word element consisting of the acronym ‘CB’ (paragraph 30 of the contested decision).
- 55 It is therefore irrelevant, in any event, that, in a previous decision (decision of 15 November 2004 in Case R 149/2004-1), the First Board of Appeal, on the basis of a relevant territory not including France and without taking into consideration the reputation of the earlier mark, which was the subject matter of the trade mark application in the case at issue, took the view that the relevant public would not perceive that mark as representing the capital letters ‘C’ and ‘B’.
- 56 It is also necessary to note that, by inferring from the reputation of the earlier mark in France that the relevant public in that Member State would perceive it as being the acronym CB, the Board of Appeal made that finding as a supplementary point, as is made clear by the use of the term ‘furthermore’, after having explained how the stylisation of that mark could be perceived as forming the word element ‘cb’ (paragraph 30 of the contested decision).
- 57 Apart from an argument relating to the decision mentioned in paragraph 55 above and discounted in that same paragraph, the applicant has not put forward any argument capable of challenging that latter analysis.
- 58 It follows that the Board of Appeal acted correctly in conducting the comparison of the signs at issue by relying mainly on the word element ‘cb’ of the earlier mark.
- 59 The Board of Appeal likewise acted correctly in taking the view, and without relying on the case-law according to which the word element of a mark is in principle more distinctive than the figurative element in the case where a mark consists of word elements and figurative elements, which the applicant criticised, that, within the mark applied for, the distinctive and dominant element, which primarily had to be compared with the earlier mark, consisted of the word element ‘ccb’.

- 60 Contrary to what the applicant essentially claims, the figurative element of the mark applied for is neither the dominant element nor the distinctive element of that mark. First, it dominates the mark applied for neither by its size, equivalent to that of the word element, nor by its position within the mark. On the contrary, as the Board of Appeal rightly noted in paragraph 31 of the contested decision, because of its position above the second capital letter 'C' of the word element, it emphasises that letter, especially because it may be perceived as a stylised letter 'c'. Second, in view of the relevant public in the present case and as EUIPO noted, the figurative element of the mark applied for cannot be understood as indicating the Chinese expression which it allegedly symbolises. It will rather be perceived, in the light of the simple geometric shapes of which it consists, namely a square inside a circle, as decorating the word element 'CCB', in respect of which it may be observed that it is formed of the initials of the applicant's name and that it thus establishes the origin of the services indicated for the undertaking in question, which is a characteristic of the concept of distinctive character.
- 61 It follows that, on a visual level, the Board of Appeal was correct to find that there is some similarity between the signs at issue. In view of the distinctive elements of the signs, as identified in paragraphs 54 and 60 above, the view must be taken that the elements of similarity linked to the common group of capital letters 'CB' are not offset by the differences resulting from the addition of the capital letter 'C' in the mark applied for and from the different figurative elements of the two signs.
- 62 Similarly, on a phonetic level, the Board of Appeal was fully entitled to find that there was a high degree of similarity between the signs at issue. In view also of the distinctive elements of the signs and their pronunciation letter by letter, acknowledged by the applicant, it must be considered that both signs are pronounced in a very similar manner, with only the letter 'c' being repeated in the pronunciation of the word element of the mark applied for. Contrary to the applicant's submission, such a repetition prevents the present case from being compared to a case in which a third letter is added that differs from the two letters common to the signs at issue. Furthermore, it should be stated, also contrary to the applicant's contentions, that the Board of Appeal did not in any way base itself on the reputation of the earlier mark in order to take the view that the repetition of the letter 'c' in the mark applied for might be perceived as a pronunciation error (paragraph 34 of the contested decision).
- 63 It follows, in view also of the fact that a conceptual comparison cannot be made, which is not disputed by the applicant, that the Board of Appeal was correct to find that the signs at issue are similar.
- 64 The same would be true, contrary to what the applicant argues, in the event that greater weight should have been attached to the visual comparison, since it is clear from paragraph 61 above that the Board of Appeal was fully entitled to find that there was some visual similarity between the signs at issue.

Global assessment of the likelihood of confusion

- 65 The applicant submits that the Board of Appeal, in view of its errors in the assessment of the distinctive character of the earlier mark and in the comparison of the signs at issue, incorrectly found that there was a likelihood of confusion in this case. The applicant adds that the Board of Appeal, first, was incorrect to approach the global assessment of the likelihood of confusion by starting from the assumption that there was a likelihood of confusion and, second, wrongly took into account the finding that there was no regular use of the services covered by Class 36.
- 66 It is necessary to recall that, according to settled case-law, a global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services covered. 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 (judgments of 29 September 1998, *Canon*, C-39/97, EU:C:1998:442, paragraph 17, and of 14 December 2006, *VENADO with frame and others*, T-81/03, T-82/03 and T-103/03, EU:T:2006:397, paragraph 74).

- 67 In the present case, the Board of Appeal, in view of the foregoing (see, in particular, paragraphs 48 and 63 above), correctly concluded that there was a likelihood of confusion by reason of the identity of the services concerned, a fact not disputed by the applicant, the reputation of the earlier mark in France, and the similarity of the signs at issue (paragraphs 39 and 40 of the contested decision).
- 68 It is necessary to add that that conclusion cannot be challenged by criticism of the Board of Appeal's finding that there was no regular use of the services covered by Class 36. Even if, as the applicant argues, the Board of Appeal erred in finding that those services are not regularly used and wrongly took into account that absence of regular use, it should be noted that that finding merely corroborates, as a supplementary ground, the general consideration that the relevant public retains an imperfect image of the trade marks (see paragraph 28 above), a matter which the applicant, moreover, does not dispute.
- 69 Furthermore, contrary to what is claimed by the applicant, the Board of Appeal did not reach the conclusion that there is a likelihood of confusion by proceeding upon the assumption that use of the mark applied for would almost automatically lead to a likelihood of confusion which could have been excluded only by greater differences between the signs and the services or by a weaker distinctive character of the earlier mark. That argument is based on an incorrect reading of paragraph 39 of the contested decision. By stating in that paragraph that the differences between the signs and the level of attention of the relevant public could not dispel the likelihood of confusion resulting from the identity of the services, the reputation of the earlier mark, and the similarity of the signs, the Board of Appeal did not proceed on the basis of such an assumption, but simply carried out a global assessment of the likelihood of confusion, meaning that significantly similar factors are offset, or not, by less similar factors or dissimilar factors (see paragraph 66 above).
- 70 Consequently, the plea in law alleging infringement of Article 8(1)(b) of Regulation No 207/2009 must be rejected and the action must consequently be dismissed in its entirety.

Costs

- 71 Under Article 134(1) 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 the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders China Construction Bank Corp. to pay the costs.**

Gervasoni

Madise

da Silva Passos

Delivered in open court in Luxembourg on 6 December 2018.

E. Coulon
Registrar

S. Gervasoni
President