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Legal 500 2017

March 2018

VBB on Belgian Business Law

Highlights

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Chambers Europe 2017

Topics covered in this issue

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COMMERCIAL LAW

Bill to Impose Maximum Payment Terms for Payments by Large Businesses to SMEs

On 2 March 2018, a Bill amending the Law of 2 August 2002 on combating late payment in commercial transactions was submitted to the Federal Chamber of Representatives (*Wetsvoorstel tot wijziging van de Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Proposition de Loi modifiant la Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the "Bill"). The Bill intends to protect small and medium sized enterprises ("SMEs") by imposing maximum payment terms for payments by non-SMEs to SMEs.

Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (the "Law of 2 August 2002"), and unless agreed differently, any payment for commercial transactions between businesses should take place within a period of 30 calendar days. This period of 30 days starts running from the date of (i) receipt of the invoice; (ii) receipt of the goods or services (if the date of receipt of the invoice is unclear or if the debtor receives the invoice earlier than the goods or services); or (iii) acceptance or verification of the conformity of the goods or services with the agreement (if a procedure for acceptance or verification is foreseen by law or in the agreement and if the debtor receives the invoice before the date of acceptance or verification). Unless agreed differently, the period for acceptance or verification cannot exceed 30 days starting from the date of receipt of the goods or services.

Under the current rules, the parties are entitled to agree on an extension of both the payment term and the acceptance or verification term. Additionally, the Law of 2 August 2002 provides explicitly that the contractually agreed payment term for invoices between businesses may even exceed 60 calendar days. Contractual provisions providing for longer terms may be revised by a judge if considered to be "grossly unfair" to the creditor.

The authors of the Bill note that many businesses, mainly SMEs, accept payment terms with which they do not feel comfortable. Debtors, and especially large businesses, often insist on long payment terms which, according to the authors of the Bill, are detrimental to the liquidity of SMEs and thereby the entire economy.

Therefore, taking inspiration from a recent amendment to the Dutch rules on payment terms in commercial transactions, the Bill provides for a twofold limitation on contractually agreed payment terms for contracts in which the creditor is an SME (defined by reference to the Companies Code) and the debtor a large business (defined as businesses which do not qualify as SMEs). The Bill provides that contracts between large businesses, acting as debtor, and SMEs, acting as creditor, cannot provide for (i) payment terms exceeding 60 calendar days; or (ii) acceptance or verification periods exceeding 30 calendar days. Contractual clauses in breach of these rules will be considered to be null and void.

Chamber of Representatives Adopts Bill on Reform of Business Law

On 29 March 2018, the Chamber of Representatives adopted the Bill on the reform of business law (*Wetsontwerp houdende hervorming van het ondernemingsrecht/ Projet de loi portant réforme du droit des entreprises* – the "Bill") which the Government had submitted on 7 December 2017.

The Bill marks a significant step in the modernisation of Belgian business law. It introduces a new, more inclusive, definition of the term "business" (*onderneming/entreprise*), which in turn affects the scope of application of many legislative texts. For an extensive discussion of the main novelties introduced by the Bill, we refer to the December 2017 edition of this Newsletter (*See, this Newsletter, Volume 2017, No. 12, pp. 3-4*).

The adopted Bill will now be signed by the King and published in the Belgian Official Journal (*Belgisch Staatsblad/ Moniteur belge*). It will enter into force on 1 November 2018, unless the King determines an earlier date of entry into force for specific provisions.

COMPETITION LAW

Belgian Competition Authorities clear Mediafin Acquisition by Roularta and Rossel

On 6 March 2018, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") cleared the acquisition of Mediafin NV ("Mediafin") by Roularta Media Group NV ("Roularta") and Rossel & Cie NV ("Rossel") from De Persgroep NV ("De Persgroep"). As a result of the acquisition, Roularta and Rossel & Cie will jointly control Mediafin, a publisher of business newspapers (such as *De Tijd* and *L'Echo*) and business magazines (such as *De Belegger* and *L'Investisseur*).

The BCA focused on the Belgian market for the sale of advertising space in Dutch and French magazines and held that the concentration would not significantly impair competition on the relevant markets.

This concentration cannot be viewed separately from another concentration which the BCA had already authorised on 22 December 2017 and which allowed De Persgroep to acquire sole control over Medialaan NV following the acquisition of the stake in Medialaan held by Roularta.

The BCA cleared the most recent transaction after a Phase I investigation.

Brussels Court of Appeal Annuls Decision to Lift Kinepolis Merger Conditions

On 28 February 2018, the Brussels Court of Appeal (the "Court") held that the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") to partially lift specific conditions imposed on Kinepolis was poorly reasoned and it therefore annulled the decision.

This judgment constitutes the latest episode in a long-running legal saga in the Belgian cinema sector. In November 1997, the former Belgian Competition Council (later replaced by the BCA) cleared the merger of the Claeys and Bert groups which gave rise to the Kinepolis group. The decision was subject to conditions, including the obligation on Kinepolis to obtain the approval from the competition authority prior to any form of growth, including organic growth (*i.e.*, any increase in the number of screens or seats operated by Kinepolis). The Competition Council imposed these conditions on Kinepolis for an indefinite period of time.

In 2010, after a four-year legal battle, Kinepolis only managed to have part of these conditions lifted (*See, this Newsletter, Volume 2010, No. 4*). In 2017, nearly twenty years after the merger, Kinepolis made a new attempt to have all the conditions removed. After analysing the necessity of the remaining conditions to prevent a restriction of competition in the prevailing market structure, the BCA decided in May 2017 to lift the restriction on organic growth, subject to a two-year transition period. It left the other remaining conditions in place. These were the conditions preventing Kinepolis from (i) growing through acquisition without prior approval from the BCA; (ii) obtaining exclusive or priority rights to distribute films; and (iii) concluding programming agreements with independent cinema owners (*See, this Newsletter, Volume 2017, No. 5*).

This decision was appealed by two competing cinema operators, Euroscoop and I-Magix, and gave rise to the most recent judgment of the Court. The appellants argued before the Court that the BCA's decision was insufficiently reasoned to justify that the condition regarding organic growth be lifted.

In its judgment of 28 February 2018, the Court examined the role of the BCA and its responsibility to reason its decisions. The Court held that the BCA, as an administrative authority, is required to reason its decisions adequately. Such an obligation is even more concrete and precise when the decision concerned derives from a proposal or an advice. This applies to the BCA, as its main decision-making body, the Competition College, adopts its decisions on the basis of a draft received from the College of Competition Prosecutors, the investigatory arm of the BCA.

The Court further considered the role of the Competition College, which it held to exercise a control function over the draft decisions proposed by the College of Competi-

tion Prosecutors. It then connected the Competition College's role with the obligation to reason its decisions. The Court stated that "[t]*his control does not preclude the Competition College from departing from the draft decision prepared by the College of Competition Prosecutors. The Competition College – in the framework of its control function – has to ensure that each modification to the draft decision of the College of Competition Prosecutors is complete and adequate, both in fact and in law.*"

The Court then compared the draft decision of the College of Competition Prosecutors and the final decision of the Competition College. In the Court's view, the Competition College provided insufficient reasoning to justify a departure from the draft decision. More specifically, according to the Court, the Competition College insufficiently reasoned why it lifted the condition preventing Kinepolis from growing organically in its entirety, while the College of Competition Prosecutors had limited its proposal to lifting the condition with respect to minor forms of organic growth only. The Court added that the Competition College insufficiently reasoned its decision to grant a two-year interim period.

The judgment is another setback for Kinepolis and underlines the importance of the draft decision prepared by the College of Competition Prosecutors as well as the obligation of the Competition College to justify any deviation from that draft decision.

CORPORATE LAW

Updated Administrative Filing Charges

On 14 February 2018, the updated fees for filing documents of legal persons with the registrar's office (*neerlegging ter griffie/dépôt au greffe*) were published in the Belgian Official Journal. As of 1 March 2018, the administrative costs of filing and publication are as follows (in EUR and inclusive of VAT):

- For companies

Incorporation		Modifications	
Paper filing	275.76	Paper and electronic filing	161.78
Electronic filing	222.76		

- For associations and foundations

Incorporation		Modifications	
Paper filing	190.94	Paper and electronic filing	129.35
Electronic filing	137.94		

DATA PROTECTION

Belgian Privacy Commission Updates Recommendation on Data Protection Impact Assessments

On 28 February 2018, the Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer/Commission de la protection de la vie privée* - "Privacy Commission") published its recommendation with regard to data protection impact assessments ("DPIAs") (the "Recommendation"). The Recommendation updates the Privacy Commission's draft recommendation on this topic of December 2016 (*See, this Newsletter, Volume 2017, No. 1, p. 15*).

The Recommendation first explains that DPIAs are an instrument intended to (i) describe the processing activity, (ii) assess the necessity and proportionality of the processing, (iii) assess the relevant risks for the rights and freedoms of the data subjects; and (iv) mitigate these risks. The Recommendation also provides more background on the terms provided for in Article 35(a) of the General Data Protection Regulation ("GDPR"), such as "risk" and "high risk".

Compared to its draft recommendation of December 2016, the Recommendation provides significant updates. It reproduces the criteria identified in the 2017 Article 29 Working Party Guidelines on Data Protection Impact Assessment (DPIA) (*See, this Newsletter, Volume 2017, No. 4, p. 9*) and gives some examples of situations where a DPIA is required, including the financial profiling of data subjects using external sources; hospital information systems exchanging health and genetic research data of patients between healthcare professionals; or the use of surveillance cameras by a railway operator.

Furthermore, the Recommendation updates the list of processing activities for which a DPIA is mandatory. This list will have to be formally adopted by the new Belgian data protection authority after 25 May 2018, but now includes:

- Large-scale or systematic processing of communications or meta-data which is not strictly necessary for providing the service contracted by the data subject; and
- Large-scale processing of personal data which monitors, collects, or influences the behaviour of individuals, including for advertising purposes.

The Recommendation is available in Dutch and in French.

Updated Rules regarding Surveillance Cameras for Enforcement Authorities and Private Sector

On 8 March 2018, the Chamber of Representatives of the Federal Parliament (*Kamer van volksvertegenwoordigers/Chambre des Représentants*) adopted a bill facilitating the use of cameras by both the police and private individuals, and regulating the terms under which intelligence and security services can access camera images (*Wetsontwerp tot wijziging van de wet op het politieambt om het gebruik van camera's door de politiediensten te regelen, en tot wijziging van de wet van 21 maart 2007 tot regeling van de plaatsing en het gebruik van bewakingscamera's, van de wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdiensten en van de wet van 2 oktober 2017 tot regeling van de private en bijzondere veiligheid / Projet de loi modifiant la loi sur la fonction de police, en vue de régler l'utilisation de caméras par les services de police, et modifiant la loi du 21 mars 2007 réglant l'installation et l'utilisation de caméras de surveillance, la loi du 30 novembre 1998 organique des services de renseignement et de sécurité et la loi du 2 octobre 2017 réglementant la sécurité privée et particulière*).

The bill updates the rules on the use of cameras by police forces and modifies the general use of surveillance cameras under the Surveillance Camera Law of 21 March 2007.

Use by Police Forces

The bill facilitates the use of various types of surveillance cameras, including covert and mobile cameras as well as bodycams, by police forces. The bill stipulates that the information and personal data that is gathered by means of surveillance cameras can be registered and stored for a maximum period of 12 months. Police forces can access this recorded data and images for one month after the data have been registered if relevant for the performance of their tasks. After the first month, access is restricted and is only permitted on the basis of a written and reasoned decision of the public prosecutor (*Procureur des Konings/Procureur du roi*). The bill further creates a national register of the locations of all fixed surveillance cameras used by the police forces to facilitate the use of such cameras during police investigations.

General Use

The bill contains provisions on the placement and use of security cameras in the private sector. The bill abolishes the obligation to notify surveillance cameras to the Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer/Commission de la protection de la vie privée*), but maintains the obligation to inform police authorities. In addition, the updated rules allow the use of intelligent and mobile cameras and provide more flexible rules on the locations where security cameras can be used and how long images can be stored.

The bill will be signed into law shortly and the new rules will enter into force on 25 May 2018. The bill also provides for a two year transition period to bring existing surveillance cameras in line with the new requirements.

FINANCIAL LAW

Frequently Asked Questions with Regard to Investment Services

In March 2018, the Belgian Financial Services and Markets Authority (*Autoriteit voor Financiële Markten en Diensten/ Autorité des Services et Marchés Financiers* - the "FSMA") released a FAQ (in both Dutch and French) relating to the Law of 25 October 2016 on the supply of investment services activities and the status of and supervision of portfolio management companies and investment advice (*Wet betreffende de toegang tot het beleggingsdienstenbedrijf en betreffende het statuut van en het toezicht op de vennootschappen voor vermogensbeheer en beleggingsadvies/ Loi relative à l'accès à l'activité de prestation de services d'investissement et au statut et au contrôle des sociétés de gestion de portefeuille et de conseil en investissement*).

The Law of 25 October 2016 implements Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("MiFID II") and sets forth the rules which apply to the provision of investment services, including the authorisation requirements and rules of conduct for investment firms.

The FSMA has already published a presentation providing a brief overview of the same rules .

INTELLECTUAL PROPERTY

Adidas Wins Battle Against Belgian Shoe Maker over Three Parallel Stripes Trade Mark

In its judgment of 1 March 2018 in case T-629/16, the General Court of the European Union (the "Court") dismissed the appeal brought by Shoe Branding Europe BVBA ("SB") against the decision of the European Union Intellectual Property Office ("EUIPO") to refuse registration for its trade mark following the opposition filed by Adidas AG ("Adidas").

On 1 July 2009, SB filed an application for registration for an EU trade mark consisting of two parallel lines positioned on the outside surface of the upper part of a shoe, to be registered for "Footwear". Adidas opposed the registration on the basis of Article 8(1) of Regulation No 207/2009 on the Community trade mark (the "TM Regulation"), now Regulation 2017/1001 on the European Union trade mark, *i.e.,* the likelihood of confusion between the trade marks, and of Article 8(5) of the TM Regulation, *i.e.,* SB's taking unfair advantage of the reputation of the Adidas trade marks.

What followed was a long series of appeals and referrals which brought the case before the General Court and the Court of Justice of the European Union (the "ECJ") in 2016. When the ECJ upheld the General Court's finding that the signs were confusingly similar, the case was referred back to the Second Board of Appeal of the EUIPO.

Following the ECJ judgment, the Board of Appeal of the EUIPO sided with Adidas and rejected SB's trade mark application. This time, SB appealed to the Court alleging that the EUIPO had made several errors of assessment as regards (i) the evidence of the reputation of the Adidas trade mark; (ii) the existence of damage to the reputation or distinctive character of the trade mark; and (iii) the absence of any due cause for the use of the trade mark applied for.

In its judgment, the Court rejected all arguments and therefore dismissed the appeal in its entirety.

Reputation of Adidas Trade Mark

Article 8(5) of the TM Regulation protects an earlier trade mark that enjoys a reputation in the European Union. SB argued that the evidence of the reputation of the Adidas trade mark was insufficient. In its assessment of SB's argument, the Court took into account (i) the high degree of awareness by the relevant public of the Adidas trade mark consisting of three parallel stripes (particularly when affixed to a shoe); (ii) the existence of several decisions of national courts noting the reputation of the Adidas trade mark; and (iii) the significant sponsorship activity undertaken by Adidas and the fact that many sport personalities wear footwear bearing the Adidas trade mark. In view of these factors, the Court held that Adidas had adequately demonstrated the reputation of its trade mark.

Injury to the Reputation or Distinctive Character of the Adidas Trade Mark

SB argued that its contested trade mark application did not take unfair advantage of or was detrimental to the distinctive character or the reputation of the Adidas trade mark. To that end, SB contended that Adidas had not shown evidence of injury. According to SB, its own two-stripe sign and the Adidas trade mark had coexisted "peacefully" for a great number of years. The Court disagreed and indicated that there had been no "peaceful coexistence" of the two trade marks as Adidas had already challenged the applicant's trade mark twice in the past. The Court also referred to the Board of Appeal's finding that the Adidas trade mark enjoyed a high, long-held and enduring reputation and that it benefitted from a power of attraction, linked to an image of quality and prestige, acquired after decades of investment, innovation and publicity. The Court added that the stronger the reputation of the trade mark, the more likely a subsequent trade mark is likely to take unfair advantage of it.

Furthermore, the Court noted that SB had clearly alluded to the Adidas trade mark in using the slogan "two stripes are enough" in a 2007 promotion campaign. By doing so, SB had clearly referred to the Adidas trade mark and had suggested that the goods which it sold under a two-striped trade mark had equal qualities to those sold by Adidas

under a three-striped trade mark. The Court therefore rejected SB's argument.

Due Cause of Use of SB's Trade Mark

Finally, the Court also held that there was no due cause for the use of SB's trade mark as such use did not satisfy the conditions set out in the Court's case law. In particular, the applicant did not show that it had used the trade mark throughout the European territory. Moreover, the two trade marks had not coexisted peacefully and the Court noted that SB was unlikely to use its trade mark in good faith considering the 2007 campaign. The Court therefore dismissed SB's appeal.

This ruling is an important victory for Adidas in its long-running dispute with SB. Nonetheless, the battle surrounding the Adidas three-stripes trade mark continues after the EUIPO declared the Adidas three-stripe trade mark invalid for lack of distinctive character in distinct proceedings initiated by SB. Adidas has appealed that decision to the General Court.

Benelux Countries Update Trade Mark Law

On 11 December 2017, top representatives of the Benelux countries signed a protocol (the "Protocol") amending the Benelux Convention on Intellectual Property (Trade marks and Designs) (the "BCIP") as regards the implementation of Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks (the "Directive") (*See, this Newsletter, Volume 2015, No. 12, p. 16*). The Directive covers both the substantive and procedural aspects of trade mark law and aims to modernise and simplify trade mark registration systems.

The Protocol contains almost exclusively provisions the implementation of which is mandatory under the Directive. The most significant elements of the Protocol are the following:

- The absolute and relative grounds for refusal or invalidity are grouped together in two new provisions (Articles 2.2bis and 2.2ter BCIP);
- The requirement of graphic representation is replaced by a more flexible requirement allowing the representation of trade marks of a less conventional type (like sound and colour marks);
- Specific grounds for exclusion of three-dimensional trade marks were added;
- The provisions on the coexistence of trade marks with protected designations of origin and geographical indications are broadened and specific provisions are introduced on traditional indications for wine, traditional specialties guaranteed and names of plant varieties;
- The rights of trade mark owners are reinforced on various points: action may be taken against the use of a trade mark as (part of) a trade name or corporate name or in comparative advertisements in a manner contrary to Directive 2006/114/EC concerning misleading and comparative advertising, and the possibilities to take action against counterfeit goods in transit are strengthened;
- To counterbalance the reinforcement of the rights conferred on trade mark owners, the limitations and means of defence are extended;
- Possibilities for exclusive licensees to take action against infringement are strengthened;
- Provisions are made on trade marks as property (incl. the applicable law since three legal systems coexist within the Benelux);
- Introduction of a specific regime for certification marks (*i.e.*, trade marks capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, from goods and services which are not so certified);
- The main procedural rules are aligned with the trade mark systems applied in the EU in order to make trade mark registration and its management easier.

The new updated BCIP will enter into force as soon as it will have been approved by the parliaments of the Benelux countries. The Directive must be transposed by 14 January 2019 at the latest.

European Commission Communication on Tackling Illegal Content Online

The European Commission published at the end of September 2017 principles for online market platforms to tackle illegal content online. These principles focused on hatred, violence and terrorism but also concerned violations of intellectual property rights.

On 1 March 2018, the Commission followed up on this initiative by publishing a set of recommended operational measures and accompanying safeguards addressed to both private firms and Member States. The Commission will wait and see how these measures pan out before deciding on possible legislation. The recommendations cover the following issues:

- "notice and action" procedures;
- use of efficient tools and technologies;
- safeguards to preserve fundamental rights;
- role of small companies with limited resources and expertise; and
- closer cooperation with law enforcement authorities.

Specifically as regards intellectual property, firms and Member States will be required to submit to the Commission information regarding the removal of illegal content by the end of September 2018. The Commission will also continue to work on the creation of memoranda of understanding with different intermediaries to facilitate the removal of counterfeit goods online.

LABOUR LAW

Adoption of "Cash for Cars" Scheme

On 15 March 2018, the federal Parliament adopted the draft bill introducing a mobility allowance or "cash for cars" scheme which will apply retroactively as of 1 January 2018 (*Wetsontwerp van 15 maart 2018 betreffende de invoering van een mobiliteitsvergoeding/ Projet de loi du 15 mars 2018 concernant l'instauration d'une allocation de mobilité*).

This regime allows employees to exchange their company car for a cash mobility allowance for the purpose of arranging a more eco-friendly method of commuting.

The employer should take the initiative to introduce the mobility allowance. It is possible to establish the regime for the entire company, a specific division of the company or a specific category of employees.

If an employee were to file a specific request to exchange his or her company car for a mobility allowance, the employer is not obliged to honour such a request. It can for example refuse if a company car is regarded as necessary for the performance of the employee's work.

The implementation of a mobility allowance is possible for employers who have been providing company cars to their employees for a minimum period of at least 3 years. An exception applies to start-up companies.

In addition, employees who request the switch from a company car to a mobility allowance must have been provided with a company car (i) for 3 consecutive months prior to requesting a mobility allowance; and (ii) for an uninterrupted period of at least 12 months during a period of 36 months preceding the request.

The cash amount which employees will receive as compensation will be determined by taking into account the catalogue value of their most recent company car. Moreover, for employees who also have a fuel card, the mobility allowance will be increased by 20%.

As is currently the case for the benefit-in-kind of a company car, no employee social security contributions will be due by employees who receive a mobility allowance. Nonetheless, a specific employers' contribution amounting to 33% will apply.

Brussels Labour Court Holds that Consequences of Cancer Constitute Disability on Work Floor Requiring Further Measures from Employer

On 20 February 2018 the Brussels Labour Court handed down an important judgment holding that consequences of cancer should be considered as a disability on the work floor.

Facts and Regulatory Framework

A full-time employee informed her employer that she had been diagnosed with cancer. This resulted in a period of incapacity for work. Almost two years later, when her condition improved, the employee's physician and the medical officer of the health insurance fund authorised the patient to resume work gradually.

Subsequently, the employee filed a request with her employer to adapt her working schedule, but the employer terminated her employment contract. The employee disputed her dismissal by invoking discrimination based on a lack of implementation of reasonable working measures by the employer.

Under anti-discrimination legislation, the refusal to make reasonable adjustments in favour of disabled persons constitutes discrimination. The anti-discrimination rules specify that reasonable adjustments should be interpreted as appropriate measures that enable a person with disabilities to have access to, participate in and advance on the labour market, unless these measures constitute a disproportionate burden on the party supposed to take these measures.

Merits: Consequences of Cancer Should Be Regarded as Disability

In assessing the merits of the case, the Labour Court held that there was a disability at stake, taking into account the

long-term absence of the employee and the obstructive effects of the cancer on her work performance.

Based on, among other matters, the employer's obligations in the context of welfare legislation, the Labour Court held that the employee could expect reasonable adjustments to her work, such as an adapted work schedule and training, to deal with the negative consequences of the disability.

The employer who had dismissed and replaced the employee argued that the working methods had changed and that he did not have sufficient work for more than one person. However, the Labour Court rejected this argument.

The Labour Court held that the dismissal was discriminatory and ordered the employer to pay compensation amounting to six months' gross salary.

LITIGATION

ECJ Rules on Validity of Investor-State Dispute Settlement Clauses in Intra-EU Bilateral Investment Treaty

On 6 March 2018, the Court of Justice of the European Union (the "ECJ") delivered its long-awaited judgment in case C-284/16, *Slovak Republic v. Achmea*, on whether an arbitration clause in a bilateral investment treaty concluded between two EU Member States (intra-EU BIT) is compatible with European Union (EU) law and, in particular, the autonomy of the EU legal order. Unlike the Opinion of Advocate General Wathelet delivered on 19 September 2017 (*See, this Newsletter, Volume 2017, No. 9, p. 21*), the ECJ's response to that question was negative. The ECJ held that Articles 267 and 344 of the Treaty on the Functioning of the European Union (the "TFEU") preclude an arbitral clause such as that found in the 1991 BIT between the former Czechoslovakia and the Netherlands (the "Czechoslovakia-Netherlands BIT").

The case at hand concerned Achmea, a Dutch insurance company which had established a subsidiary in Slovakia in order to market and sell private health insurance products. Achmea initiated investor-State arbitral proceedings against Slovakia following the adoption of new regulations governing the insurance sector. The proceedings were initiated on the basis of the Czechoslovakia-Netherlands BIT. In 2012, the arbitral tribunal ruled in favour of Achmea and ordered Slovakia to pay Achmea damages of approximately EUR 22 million.

Subsequently, Slovakia sought the annulment of that award before a German court (the place of arbitration was Germany) on the grounds that the arbitration clause in the Czechoslovakia-Netherlands BIT was contrary to:

- Article 344 TFEU which prohibits EU Member States from submitting a dispute concerning the interpretation or application of EU law to any method of settlement other than those for which the EU Treaties provide.

- Article 267 TFEU which provides for a preliminary ruling mechanism that ensures that only the ECJ gives a final legally binding interpretation on EU law issues.

- Article 18 TFEU which prohibits discrimination on grounds of nationality.

The German court stayed the proceedings and referred these questions to the ECJ for a preliminary ruling.

In the light of a combined reading of Articles 267 and 344, the ECJ applied a three-step analysis in order to establish whether an arbitral clause such as that found in the Czechoslovakia-Netherlands BIT undermines the European Union's autonomy.

- *First step: arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT may need to apply and interpret EU law*

The ECJ first examined whether an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT may need to resolve disputes that are liable to involve the interpretation or application of EU law.

Although the ECJ recognised that the jurisdiction of such a tribunal is limited to making findings on infringements of the Czechoslovakia-Netherlands BIT, it focused on the provision in that treaty (*i.e.*, Article 8.6 of the Czechoslovakia-Netherlands BIT) laying down the law to be applied by an arbitral tribunal in resolving an investor-State dispute.

The ECJ noted that the applicable law included the domestic law of the Member State concerned and other relevant agreements between the parties to the treaty. It followed that EU law (in particular, the fundamental freedoms), which forms part of the national laws of the Member States, may be part of the applicable law. As a result, an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT may be required to interpret and apply EU law.

Since the application and interpretation of EU law by such an arbitral tribunal could affect the autonomy of the EU legal order, it was therefore necessary for the ECJ to turn to the second step of the analysis, namely whether such an arbitral tribunal could request a preliminary ruling from the ECJ.

- *Second step: arbitral tribunals established pursuant to the Czechoslovakia-Netherlands BIT are not allowed to refer preliminary questions to the ECJ*

If a tribunal is part of the judicial system of the European Union and qualifies as a court or tribunal of a Member State within the meaning of Article 267 TFEU, then it is allowed to ask the ECJ for a preliminary ruling on the interpretation of EU law. In that manner, the autonomy of the EU legal order is preserved.

Unlike Advocate General Wathelet, however, the ECJ found that an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT does not qualify as a "*court or tribunal of a Member State*". Such an arbitral tribunal is therefore precluded from referring preliminary questions to the ECJ. A specific feature of an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT was to be distinct from the courts of the Member States which are parties to that BIT. Therefore, such an arbitral tribunal is not allowed to refer preliminary questions to the ECJ.

- *Third step: judicial review of awards rendered pursuant to the Czechoslovakia-Netherlands BIT does not guarantee the autonomy of the EU legal order*

Despite the answer to the second question, the ECJ recognised that the autonomy of EU law may nonetheless be preserved, in the context of a review of an arbitral award rendered under the Czechoslovakia-Netherlands BIT, in the event that a court of a Member State submits questions of interpretation of EU law to the ECJ by means of a reference for a preliminary ruling.

In this context, the ECJ considered it relevant that an arbitral award (such as that for which the Czechoslovakia-Netherlands BIT provides), is subject to judicial review only to the extent that the law of the place of arbitration permits. In the specific case at issue, the national law was German law and provided only for limited review. According to well-established case-law relating to commercial arbitration (Case C-126/97 *Eco Swiss* and Case C-168/05 *Mostaza Claro*), limited review of arbitral awards before the courts of the Member States is justified provided that such a review covers also fundamental provisions of EU law and that, if necessary, such questions of EU law can be referred to the ECJ.

However, according to the ECJ, this case-law cannot be transposed to the Czechoslovakia-Netherlands BIT which could prevent the resolution of disputes that concern the interpretation or application of EU law in a manner that ensures the full effectiveness of EU law.

In consequence, the ECJ concluded that Articles 267 and 344 TFEU preclude Member States from concluding agreements that contain a provision on arbitration such as Article 8 of the Czechoslovakia-Netherlands BIT. It was therefore not necessary to examine whether such a clause might also be discriminatory because investors of other Member States were precluded from having recourse to arbitration against Slovakia.

Court of Justice of European Union Rules on Validity of Jurisdiction Clauses in General Terms & Conditions

On 8 March 2018, the Court of Justice of the European Union (the "ECJ") handed down its judgment in Case C-64/17, *Saey Home & Garden NV/SA v. Lusavouga-Máquinas e Acessórios Industriais SA*, on the validity of jurisdiction clauses in general terms and conditions.

In that case, Lusavouga-Máquinas e Acessórios Industriais SA ("Lusavouga"), a Portuguese company, concluded an oral commercial concession agreement with Saey Home & Garden, a company with its registered office in Belgium, for the exclusive promotion and distribution of goods in Spain. Shortly after the conclusion of the agreement, Saey Home & Garden terminated the contractual relationship and Lusavouga brought an action before a Portuguese court seeking compensation for the premature and unexpected termination of the contract. Saey Home & Garden, however, argued that the Portuguese courts lacked jurisdiction. More particularly, it argued that its general terms and conditions referred to in its invoices contained a jurisdiction clause providing that commercial disputes initiated against it would be decided by the courts of Kortrijk (Belgium). Saey Home & Garden therefore argued that only the courts of Kortrijk had jurisdiction to hear this dispute since, pursuant to Article 25 of EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I*bis* Regulation"), when a jurisdiction clause is agreed by the parties, the jurisdiction of the court designated in that clause becomes exclusive.

The Portuguese District Court disagreed with Saey Home & Garden.

It held that, pursuant to Article 7(1) of the Brussels Ibis Regulation, disputes arising out of a contract fall under the jurisdiction of the courts of the place of the performance of the obligation in question. According to the Portuguese District Court, Portuguese courts could validly assert jurisdiction.

Saey Home & Garden appealed against that judgment and argued that the place of the performance of the obligation was actually Spain as the contract provided for the supply of services in that country.

The Portuguese Court of Appeal decided to stay the proceedings and referred a number of questions to the ECJ in order to determine whether the Portuguese, Belgian or Spanish courts had jurisdiction over the dispute at hand.

The ECJ first ruled on the validity of the jurisdiction clause contained in the terms and conditions. In reaching its decision, the ECJ recalled that a jurisdiction clause must clearly demonstrate in writing the consensus between the parties. More importantly, when such a jurisdiction clause is laid down in general terms and conditions, the contract signed by both parties must expressly refer to these general terms and conditions. In the present dispute, however, the ECJ noted that there was no written agreement between the parties and that the jurisdiction clause at issue had only been mentioned in the general terms and conditions which were referred to in the invoices of Saey Home & Garden. The ECJ therefore found that that clause did not meet the requirements of Article 25(1) of the Brussels I*bis* Regulation.

Having declared the jurisdiction clause invalid, the ECJ then looked at the interpretation of Article 7 of the Brussels I*bis* Regulation which provides that disputes arising out of a contract fall under the jurisdiction of the courts of the "*place of the performance of the obligation*" in question. The ECJ first recalled that the answer to the question of where a commercial concession agreement has to be performed depends on whether this is a contract for the sale of goods (in which case the place of performance of the obligation is the place where the goods were delivered) or whether it is a contract for the supply of services (in which case the place of performance of the obligation is the place where the services were provided).

The ECJ then referred to its case-law according to which concession agreements should qualify as contracts for the supply of services.

It added that the concession agreement at issue qualified as a contract for the supply of services (which is a question that will need to be addressed by the Portuguese courts) and further recalled that, if a contract for the supply of services provides for several places of performance, then the "*place of performance of the obligation*" within the meaning of Article 7(1) of the Brussels I*bis* Regulation must be understood as the place of the main supply of services, as is clear from the provisions of the contract. In the absence of such provisions, the "*place of performance of the obligation*" should be the place where the intermediary is domiciled.

PUBLIC PROCUREMENT

Charter to Facilitate Access of SMEs to Public Procurement Procedures

On 14 February 2018, the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) published a Charter on the Access of Small and Medium-sized Enterprises ("SMEs") to Public Procurement Procedures (*Charter 'Toegang van kmo's tot overheidsopdrachten'/Charte 'Accès des PME aux marchés publics*' - the "Charter").

The Charter was adopted in January 2018 by the Federal Public Service Economy, SMEs, Self-employed and Energy (*Federale Overheidsdienst Economie, KMO, Middenstand en Energie/Service public fédéral Economie, PME, Classes moyennes et Energie*). The Charter is addressed to federal public authorities, which should apply its principles when awarding public contracts.

The key goal of the Charter is to increase the number of SMEs that participate in tenders organised by federal contracting authorities. Noting that SMEs face many practical hurdles when it comes to participating in public tender procedures (including significant participation costs and a lack of knowledge of the regulatory framework and requirements), the Charter puts forward 13 principles to facilitate access of SMEs to public tender procedures.

The Charter calls on contracting authorities to:

1. consider subdividing contracts into lots and limit the number of lots that can be awarded to the same tenderer;

2. ensure that contract notices are published in a timely fashion so that SMEs have sufficient time to prepare for possible participation;

3. ensure effective competition in the case of negotiated procedures without prior publication;

4. establish appropriate contract award criteria which guarantee effective competition;

5. encourage tenderers to submit variants so as to enable them to propose alternative solutions;

6. provide for an adequate and effective protection of intellectual property rights of innovative SMEs;

7. optimise the use of electronic communications to increase competition and transparency and reduce the administrative costs of both contracting authorities and tenderers;

8. provide candidates who are not selected and tenderers whose offer is not chosen with adequate and timely feedback;

9. impose proportionate and reasonable minimum requirements in the technical specifications;

10. be reasonable and observe the principle of proportionality when defining the selection criteria, expected financial guarantees and payment terms;

11. resort to negotiated procedures or procedures with a dialogue to enable SMEs to propose proficient and innovative solutions;

12. whenever possible, resort to simple procedures, such as the accepted invoice (*aanvaarde factuur/facture acceptée*), to limit costs and the administrative burden on tenderers; and

13. establish both quantified objectives as regards access of SMEs to tender procedures and an annual monitoring system.

The Charter is available here (Dutch version) and here (French version).

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