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VBB on Belgian Business Law

Highlights

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COMMERCIAL LAW

Publication of Law and Royal Decree Harmonising Concepts of “Electronic Signature” and “Durable Medium” and Promoting Conclusion of Contracts by Electronic Means

On 10 October 2018, a Law of 20 September 2018 (i) harmonising the concepts of “electronic signature” and “durable medium” as used in Belgian law; and (ii) removing obstacles to the conclusion of contracts by electronic means was published in the Belgian Official Journal (*Wet van 20 september 2018 tot harmonisatie van de begrippen elektronische handtekening en duurzame gegevensdrager en tot opheffing van de belemmeringen voor het sluiten van overeenkomsten langs elektronische weg/Loi du 20 septembre 2018 visant à harmoniser les concepts de signature électronique et de support durable et à lever des obstacles à la conclusion de contrats par voie électronique* – the “Law”). For a discussion of the Law’s main novelties, we refer to the July 2018 edition of this Newsletter (*See, this Newsletter, Volume 2018, No. 7, p. 3*).

Implementing the Law’s first objective, the Belgian Official Journal published on the same date a Royal Decree of 25 September 2018 harmonising the concepts of “electronic signature” and “durable medium” (*Koninklijk Besluit van 25 september 2018 tot harmonisatie van de begrippen elektronische handtekening en duurzame gegevensdrager/Arrêté royal du 25 septembre 2018 visant à harmoniser les concepts de signature électronique et de support durable* – the “Royal Decree”). The Royal Decree amends a wide variety of Royal Decrees to (i) align references to the concept of “electronic signature” with the terminology used in Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the “eIDAS Regulation”); and (ii) ensure the equivalence of paper and other durable media.

The Law and Royal Decree entered into force on 20 October 2018.

Entry into Force of Law on Reform of Business Law

On 1 November 2018, the Law of 15 April 2018 on the reform of business law (*Wet van 15 april 2018 houdende hervorming van het ondernemingsrecht/Loi du 15 avril 2018 portant réforme du droit des entreprises* – the “Law”) entered into force. The Law was published in the Belgian Official Journal on 27 April 2018, following its adoption by the Chamber of Representatives on 29 March 2018 (*See, this Newsletter, Volume 2018, No. 3, p. 3 and No. 4, p. 4*).

The Law 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. One of the more notable changes which it brings is that the commercial courts (*Rechtbanken van koophandel/Tribunaux de commerce*) will now be called business courts (*Ondernemingsrechtbanken/Tribunaux de l'entreprise*).

For a discussion of the main novelties introduced by the Law, we refer to the December 2017 edition of this Newsletter (*See, this Newsletter, Volume 2017, No. 12, pp. 3-4*).

COMPETITION LAW

Belgian Competition Authority Rejects Request to Suspend Participation Rules for Horse-Jumping Events

On 5 October 2018, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the Belgian Competition Authority ("BCA") rejected a request to suspend the participation rules for horse-jumping events organised by Global Champions Tour ("GCT").

Background

The decision by the BCA is the latest development in a legal saga surrounding the Belgian equestrian sector.

Following a complaint by Global Champions League ("GCL") to the BCA, alleging that the exclusivity clause included in the General Regulations of the *Fédération Equestre Internationale* ("FEI"), the governing body for horse-jumping, was anticompetitive, the BCA imposed interim measures temporarily suspending the exclusivity clause on 27 July 2015 (See, *this Newsletter, Volume 2015, No. 7, p. 4*). This decision was upheld by the Brussels Court of Appeal on 28 April 2016 (See, *this Newsletter, Volume 2016, No. 5, p. 4*).

In January 2017, GCL, GCT and FEI announced they had reached a settlement, materialised in a memorandum of understanding ("MoU"), pursuant to which FEI approved the GCL events, the parties agreed on participation rules to GCL and GCT events and GCL withdrew its complaint to the BCA.

On 13 November 2017, a Dutch horse rider based in Belgium and a horse stable established in Belgium lodged a new complaint with the BCA criticising that the new GCT participation rules, as laid down in the MoU, were anticompetitive.

Consequently, the BCA imposed interim measures on GCL, GCT and FEI on 20 December 2017 (See, *this Newsletter, Volume 2017, No. 12, p. 5*) and penalty payments on 13 April 2018 (See, *this Newsletter, Volume 2018, No. 4, p. 5*). However, on 27 June 2018 the Brussels Court of Appeal annulled the decision of the BCA of 20 December 2017 due to inappropriate reasoning and then held on 7 August

2018 that the members of the Competition College who had adopted the annulled decision could not reassess the case (See, *this Newsletter, Volume 2018, No. 8, p. 3*).

Decision

Following the annulment by the Brussels Court of Appeal, the case was sent back to the BCA now acting, as required by the Court, through a differently composed Competition College. The BCA reassessed the request for interim measures and adopted a new decision on 5 October 2018, which differs from its initial findings. In particular, the BCA carried out a fresh *prima facie* analysis of the evidence to consider whether interim measures were warranted. While not excluding the possibility that the GCT participation rules as included in the MoU are anticompetitive, the BCA rejected the request on the grounds that there was insufficient evidence at this stage of the proceedings to justify interim measures.

A decision by the BCA to reject a request for interim measures is without prejudice to the merits of the case.

Belgian Competition Authority Requests Referral of Telenet's Acquisition of De Vijver Media and Joint Venture with Mediahuis

On 3 October 2018, the European Commission received the notification of a concentration whereby Telenet Group Holding NV (controlled by Liberty Global Plc - "Telenet") would acquire De Vijver Media NV ("De Vijver") from Mediahuis NV ("Mediahuis") and Waterman&Waterman. As a result of the acquisition, Telenet would solely control De Vijver, a holding company active in television and media and owning television production company *Woestijnvis* and Belgian television channels (such as *Vier* and *Vijf*). At present, Telenet exercises joint control over De Vijver with Mediahuis and Waterman&Waterman.

In addition, Telenet and Mediahuis would acquire joint control over a newly created joint venture dedicated to

video advertisement sales with the ability to design and sell cross-media campaigns.

On 17 October 2018, the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - "BCA") requested a referral of the case from the European Commission. The European Commission must now consider that request and either decide to refer the concentration to the BCA or review the case itself.

This concentration follows another transaction which reshaped the Belgian audio-visual and print media sectors earlier this year, pursuant to which De Persgroep NV divested its interest in Mediafin NV and sold it to Rossel & Cie NV and Roularta Media Group NV ("Roularta"). At the same time De Persgroep acquired sole control over Mediaaan NV from Roularta (*See, this Newsletter, Volume 2018, No. 3, p. 4*).

CONSUMER LAW

Belgian Advertising Council Publishes Guidelines for Online Influencers

On 8 October 2018, the Belgian Advertising Council (*Raad voor de Reclame/Conseil de la Publicité*) published Recommendations for Online Influencers (*Aanbevelingen van de Raad voor de Reclame inzake online influencers/Recommandations du Conseil de la Publicité en matière d'influenceurs en ligne* – the “Recommendations”). The Recommendations should enhance consumer protection by ensuring that consumers always know whether a post on social media constitutes an opinion or a form of publicity. They also increase legal certainty for both influencers and advertisers.

However, the Recommendations only apply when two conditions are satisfied. First, the online influencer must receive compensation and, second, the advertiser must have significant control over the communication. If, for example, an online influencer receives a product for free and is not bound by contract to give it a positive review, then the communication does not constitute social media marketing.

The Recommendations lay out two ground rules.

First, any commercial communication should be clearly identifiable as such. Hence, online influencers should clarify their relationship with the brand, by using disclaimers such as “*advertising*”, “*sponsoring*”, “*promotion*”, “*sponsored by*” or “*in collaboration with*”. Alternatively, they may use such hashtags as: “*#spon*”, “*#pub*”, “*#prom*”, “*#ad*” or “*#sample*”. In addition, online influencers should adapt the language of the disclaimer to their followers. Finally, those words should not be hidden to the average consumer who should be able to see them upon a normal consultation of the communication (e.g., no need to click on “*Read more*”).

Second, any commercial communication should be loyal. In other words, the online communication must not contain incorrect or misleading information, nor should it incentivise children to convince their parents or other adults to buy products for them.

Online influencers are liable for any violation of the Recommendations. In addition, any company or advertiser which has placed products or services online through the influencer may be held liable for the violation of the Recommendations. The Jury of Ethical Advertising (*Jury voor Ethische Praktijken inzake Reclame/Jury d'Ethique Publicitaire*) is competent to handle complaints related to social influence marketing and make determinations in accordance with the rules available on www.jep.be. Should it decide to modify or end a marketing campaign, advertising agencies, their clients and the social media are expected to comply with its decisions voluntarily.

The Recommendations are available [here](#) (Dutch version) and [here](#) (French version).

DATA PROTECTION

Policy Note on Privacy and Data Protection

On 17 October 2018, the Secretary of State for Combating Social Fraud, Privacy Protection and the North Sea (*Staatssecretaris voor Bestrijding van de Sociale Fraude, Privacy en Noordzee/Secrétaire d'état pour la lutte contre la fraude sociale, protection de la vie privée et Mer du Nord*) published his policy note, reviewing past measures and describing ongoing projects (the "Policy Note"). As regards privacy and data protection, the Policy Note discusses (i) the implementation of the European Regulation and Directive on the protection of personal data; (ii) ongoing projects on national security; (iii) privacy in relation to public authorities; (iv) the use of big data and open data projects; (v) privacy in the context of new media; and (vi) cyber security.

As regards the implementation of the EU General Data Protection Regulation (*Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*) and the Law Enforcement Directive (*Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*), the Policy Note indicates that the national implementation of these EU instruments facilitates the use of personal data for scientific research, and provides a framework under national law for enforcement authorities (for more information, see *Van Bael & Bellis Client Alert of 5 September 2018* [here](#)).

The Policy Note further discusses the new initiatives to use personal data for national security purposes. The Secretary of State indicates that security and privacy must go hand in hand in such initiatives and security agencies must be bound by strict procedures and other safeguards to prevent abuse.

The Secretary of State also intends to enhance protection of personal data used in the public sector by increasing transparency. In particular, the government plans a "privacy passport" allowing Belgian citizens to consult which

personal data each public authority holds on them. In addition, a "privacy guide" will allow citizens to track transfers of personal data between public authorities.

As regards "open data" or "big data" projects, the Policy Note underlines the benefits of such technology for, for instance, mobility planning or research on medicinal products and strategy planning in public health. At the same time, the Policy Note indicates that such projects must apply sufficient safeguards for the protection of personal data. In particular, such projects may require anonymisation of data and must apply privacy by design.

The Policy Note further discusses the role of social media and the need for education to raise awareness on the protection of privacy.

Finally, the Policy Note mentions a shared initiative with the Prime Minister, who is responsible for cyber security policy, to establish notification requirements and procedures for following up on data breaches. However, the Policy Note does not offer much detail and is unclear as to whether it refers to the notification obligation for personal data breaches to the Data Protection Authority under the GDPR, or to the implementation of the NIS Directive (*Directive 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union*).

INTELLECTUAL PROPERTY

Presumption of Liability for Owners of Internet Connections Used to Infringe Copyright

On 18 October 2018, the Court of Justice of the European Union (the "ECJ") held in case C-149/17, *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*, that national legislation cannot shield an owner of an internet connection that was used for copyright infringement from liability merely because that owner can name at least one other family member who might have had access to the internet connection.

The case resulted from a reference for a preliminary ruling from the Landgericht München I which asked the ECJ to find an appropriate balance between two conflicting rights, both of which are protected under the Charter of Fundamental Rights of the European Union (the "Charter"): (i) the right to copyright protection, which incorporates the need for effective enforcement; and (ii) the right to the protection of family life.

The main proceedings involved Bastei Lübbe, the owner of copyright in an audio book, and Michael Strotzer, the owner of an internet connection through which the audio book had been illegally shared with an unlimited number of users of a peer-to-peer internet exchange. Mr. Strotzer denied that he committed the copyright infringement, but also maintained that his internet connection was sufficiently secure. He furthermore asserted that his parents had access to the internet connection but that he did not know whether they had committed the infringement.

Under applicable German law if it is shown that an internet connection was used to infringe copyright, the owner of that internet connection is presumed to have committed the infringement. However, this presumption can be rebutted by the owner if he or she can show that other persons had independent access to the internet connection and were therefore capable of committing the infringement. Further, if a family member of that owner had access to the internet connection, the owner can, on the basis of the right to the protection of family life, escape liability merely by naming a family member without being required to provide further details as to how and when the internet connection was used by that family member.

The ECJ was asked to consider whether this regime is compatible with the requirements of Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive") and Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights (the "Enforcement Directive").

In reaching its verdict, the ECJ referred to the statements in the Charter which provide that any limitation on the exercise of rights recognised by the Charter must respect the essence of those rights. The ECJ also noted that the case law established that a measure which resulted in a serious infringement of a right protected by the Charter was to be regarded as not respecting the requirement that a fair balance be achieved between the rights that must be reconciled.

On this basis, the ECJ held that a national law which makes it impossible to prove who was responsible for a copyright infringement does not achieve a fair balance between the two conflicting rights. The ECJ stated that such a law almost guaranteed an absolute protection for family members of an owner of internet connection through which copyright infringements were committed, whilst rendering copyright enforcement ineffective. Accordingly, the ECJ held that in such circumstances the rights of the copyright holder to an effective remedy were seriously compromised. Hence, the ECJ found that the German law infringed both the InfoSoc Directive and the Enforcement Directive.

Warehouse Storage of Copyright-infringing Products Amounts to Act of Distribution

On 3 October 2018, advocate general Campos ("AG Campos" or the "AG") delivered an opinion in case C-572/17, *Riksåklagaren v. Imran Syed*, on the extent of the control of the copyright holder in relation to the storage of counterfeit goods in a warehouse.

The issue arose after Mr. Syed had been found by the Court of First Instance in Stockholm to have infringed the copyright and trade marks of various right holders through, on the one hand, the sale of clothing and accessories with rock music themed motifs in a store and, on the other hand, the storage of these same goods in warehouses (adjacent to the store and in another district) pending their sale. However, the Court of First Instance also held that there was no trade mark or copyright infringement for the goods which had only been found in the warehouses but did not correspond to any goods sold in the store, as these had not been offered for sale and there had been no attempt or preparation for trade mark or copyright infringement.

On appeal against this judgment, the Patent Court of Appeal in Stockholm partially upheld Mr Syed's appeal with regard to the goods stored in the warehouses that were identical to those sold in the store. It held that while Mr. Syed stored the goods for the purpose of selling them in the store, the goods had not yet been offered for sale or distributed to the public in any other way. Hence, the Patent Court of Appeal concluded that the storage of goods in warehouses does not constitute an attempt or preparation of a trade mark or copyright infringement.

Following an appeal from the Attorney General, the Swedish Supreme Court referred the following questions to the Court of Justice of the European Union (the "ECJ") for a preliminary ruling:

1. Where goods on which protected motifs are affixed are unlawfully offered for sale in a store, can there also be an infringement of the author's exclusive right of distribution to the public provided for in Article 4 (1) of Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive") in respect of goods which are stored in warehouses by the person offering the goods for sale?
2. Is the fact that the goods are stored in a warehouse adjacent to the shop or in another place of importance?

To examine these questions, AG Campos referred to the *Dimensione Direct Sales* case (C-516/13) which addressed the advertising for sale of copyright protected works (See, *this Newsletter, Volume 2015, No. 5, p. 11*). In this case, the

ECJ held that the concept of distribution to the public within the meaning of Article 4 (1) of the InfoSoc Directive covered the preparatory acts for the sale of the object, including offering for sale and advertising. According to the ECJ, advertising a product may constitute a form of distribution insofar that it invites consumers to purchase a good, irrespective of whether or not such advertising was actually followed by the transfer of ownership of the protected work to the purchaser. For the ECJ, a purchase is not necessary for the finding of an infringement of the right of distribution.

Similar to advertising, AG Campos found that the storage in warehouses of clothing identical to items offered for sale in a store is an activity that belongs to the chain of operations intended for the marketing of these goods to end consumers, and hence falls under the concept of distribution to the public as provided for by Article 4 (1) of the InfoSoc Directive. For the AG, the offer to sell is not limited to products exposed in a specific commercial establishment, but also applies to identical products that are provisionally stored in a warehouse of the seller to replace products once exhausted. The products in the store represent all the products available for sale, whether in the store or in a warehouse.

The AG therefore concluded that the right to oppose the distribution of copyrighted reproductions extends to the goods stored in the seller's warehouses that are identical to those sold in the store.

According to the AG, this interpretation is in line with the exclusive right provided for in Article 6 (1) of the WIPO Copyright Treaty, which includes preparatory acts for sale, and with the objective of the InfoSoc Directive to offer a high level of protection of intellectual property rights.

The AG also pointed out that this interpretation ensures the effectiveness of Article 4 (1) of the InfoSoc Directive, which aims to prevent the marketing of goods manufactured in violation of a copyright, and thus enables a preventive control of the distribution of protected works. If such control could only be exercised once the sale is concluded, the effective protection of the distribution right would be compromised, given the difficulties in verifying where and when items are sold.

In this context – and this answers the second preliminary question of the Swedish Supreme Court – AG Campos found that the distance or proximity of the warehouses to the store is irrelevant. Indeed, if the size or colour requested by a customer were to be unavailable in the warehouse attached to the store, Mr. Syed would be quick to fetch the desired product from the warehouse located in the other district. Such act would also be part of the chain of operations undertaken to achieve the sale of the required item.

Bill on Intellectual Property Rights in Audiovisual Sector

On 4 October 2018, the Government submitted a bill modifying Book I “Definitions” and Book XI “Intellectual Property” of the Code of Economic Law relating to the audiovisual sector (the “Bill”).

The Bill has two objectives: providing a similar remuneration for authors and performers, and introducing a clear legal regime applicable to the process of ‘direct injection’.

Similar Remuneration for Authorised Performers

As regards the first objective, Belgian law currently provides for a differentiated form of remuneration for authors of audiovisual works and performers of movies. The Bill seeks to guarantee equal treatment of authors and performers of audiovisual works for the same mode of exploitation. By treating authors and performers of audiovisual works in the same way with regard to broadcasting and public performance, the Bill aims to allow upstream negotiation of the full range of rights relating to the authorisation for the broadcasting or public performance of audiovisual works, and hence to create from the outset legal and economic certainty for all stakeholders in the creation, production and distribution chain, while safeguarding the rights of authors and performers.

Direct Injection

Under the second objective, the Bill seeks to remedy the legal and economic uncertainty as regards the copyright and related rights aspects of direct injection, i.e., a technique for the transmission of programmes by a broadcasting organisation. In order to provide a clear legal regime, the Bill first provides a definition of direct injection, which it draws from the judgment of the Court of Justice of the

European Union (the “ECJ”) in *SBS v. SABAM* (See, *this Newsletter, Volume 2015, No. 11, p. 14*). Direct injection is understood as “a two-step process in which the broadcasting organisation transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during, or as a result of, that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes”. As direct injunction was found by the ECJ to be a single act of communication to the public, the Bill sets out a straightforward liability regime and fair remuneration system for all the parties involved. It also entrusts the collection of the fees to a copyright administration society.

LABOUR LAW

Constitutional Court Adopts Position regarding Validity of Contractual Notice Clauses

On 18 October 2018, the Constitutional Court (*Grondwettelijk Hof/Cour Constitutionnelle* - the "Constitutional Court") handed down an important judgment regarding the validity of contractual notice clauses included in employment contracts with higher paid white-collar employees entered into before 1 January 2014 (Judgment n°. 140/2018 - <http://www.const-court.be/>). The Constitutional Court held that contractual notice clauses in such contracts remain enforceable and must therefore be taken into account when calculating the part of the notice period applicable for the work performances prior to that date.

Unified Status Law and Related Controversy

As from 1 January 2014, the Law of 26 December 2013 concerning the introduction of a unified status for blue-collar and white-collar employees with regard to notice periods (the "Unified Status Law") entered into force, introducing unified notice periods for both white and blue-collar employees.

This implies that, as from 1 January 2014, a transitional regime applies to the dismissal of an employee whose employment contract commenced before 1 January 2014. Under that regime, the notice period to be observed by the employer must be determined in accordance with a two-step-calculation.

As a first step, the Unified Status Law makes a distinction between lower paid and higher paid white-collar employees. For the first category, the notice period is calculated in accordance with the statutory or contractual rules that were in force on 31 December 2013 in order to preserve the accrued rights of the employees concerned. By contrast, for the second category, the Unified Status Law determines a notice period of one month per commenced year of service as of 31 December 2013, subject to a minimum of three months.

As a second step, the fixed notice periods determined by the Unified Status Law must be applied for the service accrued as from 1 January 2014.

The above rule of one month notice per commenced year of service has given rise to several court cases in relation to the validity of deviating notice clauses. Under prevailing dismissal legislation prior to 2014, it was possible for parties to provide for a notice clause in the employment contract of higher paid white-collar employees, often referring to the so-called "Claeys" grid (since no fixed notice periods applied). Until recently, the courts handed down diverging judgments. Most courts refused any further application of contractual notice clauses, holding that the Unified Status Law was clear (one month notice per commenced year of service) and that no further interpretation was necessary.

The Constitutional Court has now held that the difference in treatment between the lower paid and higher paid employees violates the principle of equality, as it does not allow for valid contractual notice clauses to be enforced for higher paid employees in the calculation of the first step of their notice period. The Constitutional Court also took into account the principle of legitimate expectations on the part of the contract parties.

Consequences

Based on this judgment, the contractual notice clauses that form part of employment contracts concluded before 1 January 2014 should be taken into account in the first-step-calculation of the applicable notice period. However, it remains at this stage unclear (i) whether such contractual notice clauses have an impact on the second-step-calculation of the applicable notice period (*i.e.*, for the work performed as from 1 January 2014); and (ii) whether the contractual notice clauses should also apply to situations which offer less favourable compensation to the employee than the one month per commenced year of service rule.

LITIGATION

Supreme Court Rules on Validity of North Atlantic Treaty Organisation's Arbitration Clause in Light of Article 6 European Convention on Human Rights

On 27 September 2018, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) handed down a judgment regarding the validity of an arbitration clause contained in a service agreement concluded between the North-Atlantic Treaty Organisation ("NATO") and one of its gardeners ("Mr. P") in 2007.

The arbitration clause at issue provided that any arbitrator appointed to hear a dispute between NATO and Mr. P had to be a national of one of NATO's Member States.

In 2010, NATO terminated the service agreement and Mr. P then brought an action for damages before the Belgian courts.

NATO challenged the jurisdiction of the Belgian court on the basis of (i) the arbitration clause contained in the gardening agreement; and (ii) Article V of the *Agreement of 20 September 1951 on the status of the North Atlantic Treaty Organisation, National Representatives and International Staff*, which provides that NATO enjoys immunity from legal proceedings.

Mr. P disputed NATO's jurisdictional challenge and argued that NATO could only invoke its jurisdictional immunity if it offered a suitable alternative forum to hear the dispute. However, in the case at hand, Mr. P argued that arbitration was not a suitable alternative forum since the arbitration clause violated Article 6 European Convention on Human Rights (the "ECHR") (read in combination with Article 1685, paragraph 1 of the Belgian Civil Procedure Code which provides that, "*unless otherwise agreed by the parties, no one can be precluded from being appointed as an arbitrator by reason of its nationality*").

Mr. P argued that by preventing nationals from non-NATO countries from being appointed arbitrators, the arbitration clause at issue favored NATO and was therefore in breach of the fundamental principle according to which parties to arbitration proceedings had to be placed on an equal

footing when it comes to the constitution of the arbitral tribunal.

Although the first instance court followed Mr. P's reasoning and ordered NATO to pay Mr. P EUR 14.751 in damages, that judgment was overturned on appeal.

Mr. P then appealed to the Supreme Court, but that appeal was dismissed on the following grounds:

- Article 1685 of the Code of Civil Procedure did not apply to the case at hand since that provision was only inserted in the Code of Civil Procedure in 2013 (*i.e.*, after the initiation of the dispute at hand).
- The right to a fair trial enshrined in Article 6 ECHR is not absolute and is subject to limitations insofar as these limitations do not affect the very substance of the right to a fair trial. In the case at hand, the Supreme Court found that the arbitration clause offered a suitable alternative forum to hear the dispute between NATO and Mr. P and that it did not affect the arbitrators' neutrality and independence.

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