

Belgian Court Confirms Arbitrability of Exclusive Distribution Agreements Governed by Foreign Law



On 19 May 2020, the Leuven (Belgium) Enterprise Court (the **Leuven Court**) ruled that, following the reform of the Belgian arbitration rules in 2013, arbitration clauses in exclusive distribution agreements were valid, even if these agreements were governed by foreign law (judgment of 19 May 2020 in case A/20/00034, *Akron NV v. Amphenol (Maryland) Inc.*).

The judgment was given in the context of a dispute between a U.S. supplier and its former Belgian distributor following the supplier's decision to unilaterally terminate the distributor's distribution agreement dated 1 April 2018 for serious misconduct. While the distribution agreement contained an arbitration clause pursuant to which any dispute had to be settled by arbitration proceedings in the USA in accordance with the Commercial Arbitration Rules of the American Arbitration Association, the distributor initiated proceedings before the Leuven Court and claimed damages based on Title 3 of Book X of the Code of Economic Law (**CEL**), *i.e.*, the Belgian mandatory rules on the unilateral termination of exclusive or

quasi-exclusive distribution agreements of indefinite duration.

Article X.39 CEL provides that “[t]he distributor may, upon termination of a distribution agreement effective within the entire Belgian territory or a part thereof, in any event summon the supplier, either before the court of his own domicile, or before the court of the domicile or registered office of the supplier” and that “[i]n case the dispute is brought before a Belgian court, this court shall exclusively apply Belgian law“. According to the established case law of the Belgian Supreme Court, it follows from this provision that arbitration clauses in distribution agreements of indefinite duration are not valid if they have been agreed upon before the date of termination of the distribution agreement or if the arbitral tribunal would apply foreign law. However, this case law dates from before the entry into force on 1 September 2013 of the Law of 24 June 2013 “amending part six of the Judicial Code on arbitration” (the **New Arbitration Law**).

The U.S. supplier raised a jurisdiction defence, claiming that the Leuven Court had no jurisdiction to hear the case. Without examining all of the supplier’s arguments (in particular the argument that the distribution agreement of 1 April 2018 was not a distribution agreement within the meaning of Title 3 of Book X, CEL – this argument was considered to relate to the merits of the case), the Leuven Court confirmed that it lacked jurisdiction. It reached this conclusion based on the following considerations.

First, it noted that, since the entry into force of the New Arbitration Law in 2013, Article 1676, §1 of the Belgian Judicial Code provides that any dispute of a pecuniary nature can be submitted to arbitration. Article 1676, §4 of the Belgian Judicial Code adds that this rule is “without prejudice to the exceptions provided by law“. However, as the legislative preparatory works of the New Arbitration Law propagate a broad interpretation of the arbitrability

criterion, the Leuven Court concluded that Article X.39 CEL does not qualify as such an exception since this provision does not expressly exclude disputes in relation to the termination of distribution agreements from arbitration. Moreover, such disputes are indisputably of a pecuniary nature.

Second, the Leuven Court stressed that also the requirements of international trade mandate a broad interpretation of the arbitrability criterion. Attentive to the legitimate expectations of foreign suppliers, it held that Belgian distributors should not be allowed to escape from validly agreed arbitration clauses based on internal Belgian legislation and case law.

The judgment is to be welcomed. By expanding the arbitrability of disputes regarding the termination of exclusive or quasi-exclusive distribution agreements, it increases legal certainty for foreign suppliers who, in the past, could be faced with claims under Belgian law before Belgian courts despite their distribution agreement providing for arbitration and the application of foreign law. This is not without practical importance considering that the Belgian rules on the unilateral termination of exclusive or quasi-exclusive distribution agreements of indefinite duration are particularly advantageous and protective to distributors. The new case law only applies to distribution agreements that are entered into on or after 1 September 2013.

Amphenol (Maryland) Inc. was represented by Koen T'Syen (counsel at Van Bael & Bellis; ktsyen@vbb.com) and Tom Van Isacker (associate at Van Bael & Bellis; tvanisacker@vbb.com)

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