

Belgian Supreme Court Rules on Validity of NATO's Arbitration Clause in Light of Article 6 ECHR



On 27 September 2018, the Belgian Supreme Court handed down a judgment regarding the validity, in light of Article 6, paragraph 1 (right to a fair trial) of the European Convention on Human Rights (the *ECHR*), of an arbitration clause contained in a service agreement concluded between the North-Atlantic Treaty Organization (*NATO*) and one of its gardeners (*Mr. P*) in 2007.

The arbitration clause at issue provided, in particular, 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 agreement between the parties and Mr. P. then initiated 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 Organization, National Representatives and International Staff, which provided that NATO enjoyed immunity from legal process.

Mr. P disputed NATO's jurisdictional challenge and argued that NATO could only invoke its jurisdictional immunity if it offered an alternative suitable forum to hear the dispute. However, in the case at hand, arbitration was not a suitable alternative forum since the arbitration clause violated Article 6 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, in particular, 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 came 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 initiated proceedings before the Belgian Supreme Court. However, the Supreme Court dismissed Mr. P's claim on the following grounds:

- Article 1685 of the Belgian Civil Procedure Code was inapplicable to the case at hand since that Article was only inserted in the Belgian Civil Procedure Code in 2013 (*i.e.*, after the initiation of the dispute at hand);
- That the right to a fair trial enshrined in Article 6 ECHR was not absolute and that it could be subject to limitations insofar as those limitations did 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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