Will an Understaffed Brussels Enterprise Court Incite Parties to Call upon Arbitration?

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Background

The Dutch-speaking division of the Brussels Enterprise Court has been understaffed in recent years. On 5 February 2019, the Court's president issued a press release (here) revealing rather troublesome news that, imminently, the Court will comprise only six full time judges and hearings will be delayed by some two years.

The Brussels Enterprise Court is in charge of commercial disputes and is solely competent in Belgium to rule on specific matters such as disputes related to, *inter alia*, patents, European trademarks and designs, and class actions.

To ensure efficient functioning, the Court should have at least 16 full-time judges. Some judges have been on extended sick-leave and seem not to have recovered quickly. Other judges will take on new positions in other courts. The problem is not so much that judges are poorly paid or undervalued – although the job is financially unattractive to many lawyers. Rather, there is simply no call being made for additional suitably qualified applicants.

A standing panel of six judges is insufficient to handle the approximate 10,000 cases that are initiated on a yearly basis. Therefore, in new cases, hearings will be scheduled at the earliest 24 months following their initiation. The Court's president has stated that, as a consequence, standard commercial disputes will not be handled by priority. Contrarily, the Court will prioritize specific proceedings such as summary proceedings and bankruptcy proceedings, which might lead to an increase in the number of requests for summary proceedings.

The Logical Solution: The Appointment of Additional Judges

1. No appointments are expected in the near future

There has been a repeated call for additional financial resources to remedy the above situation and to correct decades of neglect. One should, indeed, wonder why one of the three major powers of the Belgian State has been mistreated by the other two upon which it financially depends constitutionally. This shows the inherent imbalance between the three constitutional powers and has an indisputable impact on the quality of the Belgian rule of law.

The current crisis is unlikely to change in the foreseeable future. Following the Government's

resignation in December 2018, Belgium is currently led by a caretaker government, which is expected to stay until after the general elections in May 2019. The Minister of Justice has no budget with which to appoint new judges.

The situation is remarkable as a special criminal court is currently handling a highly public trial which costs millions of euros.

2. A long-term solution

A more permanent solution will need to be found by a new government with the support of the new parliament. To this day, a reform of the Special Financing Act has proven to be impossible and may even have fostered regional tensions. The Sixth reform of the Belgian State in 2011 and the Special Financing Act of 2014 resulted in an overall decrease of the budget available to the federal government and a limitation of resources for several departments, including the Department of Justice, the Department of External Affairs, and the Department of Internal Affairs.

Due to the urgency of the situation, the next government will promptly need to adopt measures – even temporary ones – so as to avoid the crisis from escalating even further. The budget for the Justice department will need to be substantially increased and distributed more evenly between criminal and private/commercial cases.

3. Intermediary solutions

In any event, an escalation of the judicial backlog seems unavoidable in the near future and requires creative solutions.

The Enterprise Court could be allowed to call upon lawyers and invite them to act as deputy judges on a case-by-case basis or, potentially, more permanently.

Within the current framework, the Enterprise Court already calls upon lawyers to act as so-called substitutes or deputy judges on a case-by-case basis. Enhancing the existing deputy judges' involvement is a first option. However, working with deputy judges requires quite some planning and administration. Agendas must be aligned with lawyers who typically have fluctuating time schedules. Also, it is well-known that this approach is not well perceived by the legal community as peers question the independence of lawyers acting as judges and judges themselves may perceive them to be too much of an outsider.

A more systematic solution may be more effective. In the past, the Belgian Government has appointed deputy judges in the Brussels Court of Appeal to special-purpose chambers for several years. The Constitutional Court considered that the use of special-purpose chambers was justified insofar as it remained a temporary measure, even if they were in place for several years. However, it found that these chambers should not be systemic. Therefore, to respond to the current shortage of judges, the Brussels Enterprise Court might benefit from the introduction of new temporary special-purpose chambers.

Alternative Solutions

1. Forum Shopping

Parties could opt to initiate proceedings before other Enterprise Courts of the country but strict rules on competence and exclusive competences attributed to the Brussels Enterprise Court for the entire country (such as with regard to patent disputes, European Trademarks and designs, and class actions) would limit the parties' ability to engage in so-called forum shopping.

2. Alternative Dispute Resolution

Clearly, litigants should not wait for the Belgian Government to work out a permanent solution to resolve the judicial backlog. In the author's view, business entities that intend to initiate standard proceedings, *inter alia*, related to the unfair termination of an exclusive distributorship agreement, the ill-performance of a software development contract, the termination of long lease disputes, breach of contract in construction agreements – should consider an alternative – alternative dispute resolution mechanisms in general, and mediation and arbitration in particular.

The current climate calls for a rise of alternative resolution mechanisms to resolve commercial disputes. Legal counsels have a duty of information to their clients and may be required to demonstrate solution-driven initiatives like cease and desist letters and even mediation attempts to avoid that, later on, in proceedings on the merits, judges rule that parties and counsel have been insufficiently seeking solutions out of court.

3. Arbitration

Arbitration can assist in reducing the workload of traditional courts and offer parties a more efficient resolution of their disputes. It would unquestionably be recommended for disputes between contracting parties, even if they had not previously agreed on an arbitration clause. Also, in a non-contractual context, parties may have an interest in negotiating arbitration agreements. Admittedly, it is not always easy to convince defendants that they have no interest in postponing dispute resolution and that protracted disputes are a risk to a company's financial position.

The current climate should stir up a sense of realism. As key players in the judiciary system, legal counsels have an undeniable societal duty to seek an efficient and effective administration of justice.

In Belgium, commercial disputes can be brought before the local arbitration centre (CEPANI), which has an excellent reputation, and boasts a network of experienced arbitrators, specialized in different aspects of commercial law. CEPANI can also take on urgent cases and appoint an emergency arbitrator who can grant interim and conservatory measures prior to the appointment of the arbitral tribunal.

Alternatively, and especially in complex international disputes, parties can agree to ask the ICC to administrate proceedings and have the arbitration governed by Belgian law and choose Belgium as the place of arbitration. Belgium has a modern arbitration law that was updated in 2013 bringing it largely in tune with the UNCITRAL Model Law. Belgium is also arbitration-friendly jurisdiction. Provisional measures in support of arbitration proceedings or incidents that arise during arbitration proceedings are dealt with by the Courts of First Instance and not the Enterprise Courts. Currently, these courts are not understaffed.

Parties who elect to have their dispute decided by an arbitral tribunal may value the autonomy and flexibility offered by arbitration in Belgium. Especially in cases involving documents drafted in different languages or when the parties speak different languages, parties are likely to find efficiencies in arbitration proceedings that are not available in traditional court proceedings. Courts are bound by rigid laws requiring the mandatory use of languages and that submit the use of foreign languages to strict conditions. In contrast, in arbitration proceedings, parties are free to decide on procedural issues and they can agree to use specific technologies to facilitate the management of the case.

While it is unfortunate that Belgian traditional courts are lacking the capacity to serve litigants in an acceptable timeframe, the current situation offers opportunities for parties to agree on alternative

forms of dispute resolution and to regain control over their legal dispute. Importantly, the understaffing of the Enterprise Court does not impact proceedings on the annulment and enforcement of arbitral awards, as these matters are within the exclusive competence of the Courts of First Instance.

This situation may help businesses and counsels to realize that arbitration truly has become the new normal for resolving commercial disputes.