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Belgium's Supreme Court Overturns Decades-Old Precedent and Allows Disputes About the Termination of Exclusive Distribution Agreements to Be Settled by Arbitration

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In a decision rendered on 7 April 2023 in the *Thibelo* case, the Belgian Supreme Court (*Cour de Cassation/Hof van Cassatie*) ruled that disputes about the termination of exclusive distribution agreements can be settled through arbitration, even where such an agreement is governed by foreign substantive law, regardless of whether such foreign law offers similar protection than Belgian law. In doing so, the Supreme Court overturned its own decades-old jurisprudence on the arbitrability of disputes concerning the termination of exclusive distribution agreements. This post provides a succinct analysis of this landmark case.

Belgian Law on Distribution Agreements

Belgium is not only famous for its beers and chocolates, but also for its law protecting exclusive distributors carrying out their activities on all or part of the Belgian territory. Dating back to 1961, this law is nowadays incorporated into the [Belgian Code of Economic Law](#) (“BCEL”) as its Articles X.35 to X.40. This protection requires suppliers wishing to terminate distribution agreements entered into for an indefinite term to (i) give a reasonable advance notice (which courts have held can sometimes extend to more than two years) or pay a compensation in lieu thereof, and (ii) pay a termination indemnity mainly in respect of the goodwill created by the distributor.

According to Article X.39 BCEL, Belgian courts enjoy exclusive jurisdiction on disputes about the termination of such distribution agreements and must apply Belgian law, regardless of any choice of jurisdiction or choice of law made by the parties.

Belgian Supreme Court's Former Classic Protectionist Stance

In its landmark 1979 *Audi-NSU v. Adelin Petit* decision (28 June 1979), the Belgian Supreme Court, referring to this legal provision, had ruled that disputes pertaining to the termination of distribution agreements carried out on whole or part of the Belgian territory could not be settled by arbitration agreed upon before the termination, if arbitration had as its object and effect the application of a foreign law.

Such case law, which was met with some resistance by certain lower courts and not unanimously approved by legal scholars, was nevertheless repeated over time and also expanded to disputes about commercial agency agreements (governed by another statute providing for a similar rule giving jurisdiction to Belgian courts where the agent has its principal place of business in Belgium), which the Belgian Supreme Court had held to be non-arbitrable unless the arbitrators were bound to apply Belgian substantive law or the law of another country providing for a similar substantive protection for the commercial agent (see e.g. the *Air Transat* case, 24 November 2011).

A Criticized Approach

The criticism against the protectionist stance of the Belgian Supreme Court increased in recent years, due to two different but converging grounds.

On the one hand, with the 2013 revision of the Belgian arbitration law ([previously discussed on the Blog](#)), the general criterion of arbitrability of disputes set by [Article 1676 of the Belgian Judicial Code](#) (“BJC”) was relaxed: any dispute involving an economic interest (thus ultimately involving a right that can be ascribed a monetary value) became arbitrable unless expressly provided otherwise in a particular law. As the existing limitation to the arbitrability of disputes concerning the termination of distribution agreement was not expressly stated in the law but arose from the interpretation thereof in the above-mentioned 1979 judgment of the Belgian Supreme Court, some scholars and lower courts opined in favor of unrestricted arbitrability of such disputes.

On the other hand, still in 2013, the Court of Justice of the European Union (“ECJ”) issued its ruling in the *Unamar* case (a dispute between a Belgian commercial agent and a Bulgarian principal), stating the conditions under which a choice of law made in accordance with the [Rome Convention on the Law Applicable to Contractual Obligations](#) (the “Convention”) (the predecessor of the [Rome I Regulation No 593/2008 on the Law Applicable to Contractual Obligations](#) (the “Rome I Regulation”)), could be derogated from to give effect to overriding mandatory provisions (“lois de police”) of another law.

The ECJ stressed that the parties’ autonomy in designating the law applicable to their contractual relationship was the cornerstone of the Convention (and therefore also of the Rome I Regulation) and that the derogation thereto in favor of another “loi de police” susceptible to apply to the situation in dispute should be *restrictively* considered. The ECJ stressed in particular the definition of overriding mandatory provisions in Article 9.1 of the Rome I Regulation, which are:

“provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation”.

A part of the doctrine expressed the opinion that the holding of the ECJ’s *Unamar* decision could potentially lead to an evolution of the strict doctrine of the Belgian Supreme Court. In an article authored in 2014 by the first undersigned (P. Hollander, *L’arrêt UNAMAR de la Cour de justice : une bombe atomique sur le droit belge de la distribution commerciale ?*, J.T., 2014, pp. 297-301),

the *Unamar* decision had been dubbed a potential “*atomic bomb*” on the Belgian commercial distribution laws, as it was foreseen that its holding could apply not only to disputes about the termination of commercial agency agreements but also to exclusive distribution agreements and, if followed by the Belgian Supreme Court, it would mean the end of the restricted arbitrability of such disputes.

The *Thibelo* Case: A Shift Away From the Protectionist Stance

These are precisely the two grounds on which the Belgian Supreme Court relied in its judgment issued on 7 April 2023 in the *Thibelo* case.

The underlying case concerned a dispute between a Belgian distributor and an Austrian principal in relation to the immediate termination in 2018 of an Exclusive Distribution Agreement concluded in 2015 (“EDA”). While the EDA provided for Austrian law to apply to the merits and dispute resolution through arbitration, the Belgian distributor summoned the principal before the Belgian courts, claiming compensation on the basis of the BCEL. While the court of first instance had accepted jurisdiction, in line with the 1979 decision of the Supreme Court, this decision was reversed on appeal by the Court of Appeal of Antwerp which upheld the arbitration clause. The distributor subsequently brought a recourse before the Belgian Supreme Court, claiming a violation of Article X.39 of the BCEL and Articles 1676, §1 and 4 of the BJC.

The Belgian Supreme Court rejected this recourse. After extensively quoting the *Unamar* decision, the Court decided that:

- disputes about the termination of distribution agreements involve an economic interest and may thus in principle be settled by arbitration pursuant to Article 1676, § 1 of the BJC;
- Articles X.35 to X.40 of the BCEL aim at protecting private interests and therefore do not qualify as “overriding mandatory provision” (“*lois de police*”) under Article 9.1 of the Rome I Regulation; and
- therefore, a Belgian court may not make the arbitrability of a dispute about the termination of an exclusive distribution agreement, to which the Rome I Regulation applies, depend on whether Belgian law (or a law offering a similar protection to the distributor) applies or not.

Key to the Belgian Supreme Court’s finding was the following consideration:

It follows [...] from the principle of the primacy of European Union law over national law that the Belgian court seized with a dispute over the termination of an exclusive distribution agreement to which the Rome I Regulation applies, notwithstanding the provisions of Article X.39 Code of Economic Law, cannot override the foreign law chosen by the parties to apply the aforementioned Belgian provisions.

It also follows that the Belgian court may not make the arbitrability of a dispute concerning the termination of a concession of exclusive distribution to which the Rome I Regulation applies subject to the condition that the arbitrators will apply the aforementioned Belgian provisions or a foreign law offering equivalent protection.
(informal translation)

Given that (i) the Rome I Regulation applies to all contracts entered into after its entering into force on 17 December 2009; and (ii) the holding of the *Unamar* decision relied upon by the Belgian Supreme Court was about the Convention that came into force in 1991, it can be said that the Belgian Supreme Court's decision of 7 April 2023 in *Thibelo* concerns all agreements entered into since 1991. Moreover, it should be noted that, for the agreements entered into prior to 1991, 98 of the [Belgian Code of Private International Law](#) refers to the rules of the Rome I Regulation.

Conclusion

With this judgment, the Belgian Supreme Court has thus widely opened the door to the arbitration of disputes pertaining to the termination of distribution agreements carried out in whole or in part in Belgium, regardless of the substantive law chosen by the parties to apply thereto and regardless of the time when the agreement was entered into. Moreover, the general nature of the reasoning of the Court allows to assume that its holding will also apply to disputes about commercial agency agreements carried out in Belgium. It can therefore be expected that, going forward, Belgian courts will uphold arbitration clauses in exclusive distribution and commercial agency agreements carried out in Belgium, regardless of the law chosen by the parties to govern their contract.

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