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BENELUX COURT OF JUSTICE

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A. Establishment and background

1 The Benelux Court of Justice ('BCJ') is – after the International Court of Justice, the European Court of Human Rights and the European Court of Justice ('ECJ')—one of the oldest international courts still in existence. Indeed, the Treaty establishing it (Treaty concerning the Establishment and the Statute of a Benelux Court of Justice [Treaty 1965]) came about as early as 31 March 1965 and entered into force between its three States Parties—the Netherlands, Belgium and Luxembourg—on 1 January 1974. Since then, the Court has produced a fairly significant amount of case law and a number of additional and modifying protocols have come to extend its jurisdiction, which makes it a particularly dynamic court.

2 While the establishment of the Court has to be understood in connection with the → *Benelux (Economic) Union*, it only explicitly became one of its institutions by means of the Organization's revised treaty adopted in 2008 (*Traité portant révision du traité instituant l'Union économique Benelux* [BU Treaty 2008]). The Court is therefore the Benelux Union's main judicial body. It is mostly in relation to the aims of the Benelux Economic Union of adopting common legislation for all three States that one finds the Court's *raison d'être*. The Explanatory Memorandum attached to the Treaty 1965 (*Exposé des motifs* to the Treaty 1965 [Explanatory Memorandum 1965]) makes explicit the Court's primary purpose: guaranteeing unity in the application of said legislation (para 2). In this respect, the Court's main jurisdiction consists in issuing preliminary rulings on the interpretation of Benelux law, upon referral from national courts and tribunals. Simultaneously, a jurisdiction similar to that of *international administrative tribunals* (→ *Administrative Boards, Commissions and Tribunals in International Organizations*) was conferred upon the Court: it is competent to hear certain Benelux Union's staff complaints. Interestingly, the Court is still evolving since a modifying protocol was adopted on 12 October 2012 (*Protocole de 2012 modifiant le Traité du 31 mars 1965 relatif à l'institution et au statut d'une Cour de Justice Benelux* [Protocol 2012]) with a view to extending its jurisdiction. Once in force, the Court will be competent to directly settle disputes relating to the application of Benelux legislation; mainly in trademark-related matters and, in the near or more distant future, in other Benelux-regulated issues. This broadened jurisdiction will also require some changes in the organization and composition of the Court.

B. Organization

1. Seat

3 The Treaty 1965 provides that the seat of the Court be located where the Benelux Union has its Secretariat (Art 2 (1)). It is accordingly set in Brussels. When the Protocol 2012 comes into force, it will establish the Court's seat in Luxembourg, making it a neighbour of the ECJ. It should also be noted that the president of the Court may decide to hold hearings in any other location situated on one of the States Parties' territories (Art 2 (2) Treaty 1965).

2. Composition

4 Unsurprisingly, the composition of the Court rests widely on the equality of all States Parties. As a consequence, all four categories of members (judges, advocates-general, deputy judges, deputy advocates-general) are appointed by the Benelux Union's Committee of Ministers, upon proposals made by the governments. This demonstrates the States' stranglehold over the appointment process. Additionally, the two most important categories of members--judges and advocates-general--are necessarily appointed in equal number for the three States Parties.

(a) Judges and deputy judges

5 The Statute of the Court provides that the Court's nine judges should be appointed from among the judges sitting in the States Parties' Supreme Courts (Art 3 (1) Treaty 1965). In this regard there is one subtlety. For the Netherlands and Belgium, judges are only to be chosen from within the Supreme Court that dominates the civil and criminal judicial order (respectively *Hoge Raad* and *Cour de cassation*). Luxembourg enjoys special treatment since its judges may be selected from among its two Supreme Courts (*Cour supérieure de Justice* and *Cour administrative*). At any rate, this preference for judges with such experience is easily understandable insofar as the Court's jurisdiction mostly concerns civil and criminal matters. Among those nine judges, the General Assembly of the Court elects the president of the Court, the first vice-president and the second vice-president. Those positions are held in rotation between the three States and for a three-year period (Art 3 (5) Treaty 1965). The president typically presides over the Court and enjoys broad powers regarding the administration of proceedings. They prescribe dates and time-limits for taking steps in proceedings, conduct the discussions during the hearings, deliver orally the Court's judgments, etc.

6 Six deputy judges are also appointed; two for each State. Beyond this requirement, the Committee of Ministers may also appoint up to three additional deputy judges by State but not necessarily in equal number (Art 3 (2) Treaty 1965). Where necessary, deputy judges replace judges in their functions (Art 6 (1) *Règlement d'ordre intérieur* ['Internal Rules']).

(b) Advocates-general and deputy advocates-general

7 It is worth mentioning that the Court provides for the position of advocates-general, which is uncommon to most international courts and tribunals. The three advocates-general are chosen from among the public prosecution at the States Parties' civil and criminal Supreme Courts, namely: the Dutch *Hoge Raad*, the Belgian *Cour de cassation* and the Luxembourgish *Cour supérieure de Justice* (Art 3 (1) Treaty 1965). As is to be expected, the advocates-general's main role, in each proceeding, is to deliver their legal opinion on the case at hand (Art 11 Internal Rules). More broadly, the advocates-general participate actively in the administration of proceedings in close collaboration with the president or judges on the bench. The position of first advocate-general is assigned in rotation and for a three-year period. Their tasks are mainly of an organizational nature (Art 3 (6) Treaty 1965). The Committee of Ministers has the option to appoint up to one deputy advocate-general for each State to replace incumbent advocates-general in their tasks if the need arises (Art 3 (2) Treaty 1965).

(c) New composition under the Protocol 2012

8 The Protocol 2012 will greatly change the current organization of the Court. Besides judges and advocates-general, the Court will include a third category of members: justices (*conseillers*). They will constitute the highest rank of members and will therefore be appointed from among the domestic judges sitting at the States Parties' Supreme Courts (Art 3 Protocol 2012). Consequently, the category of judges will no longer be selected from among them and will be chosen from within lower courts, directly below Supreme Courts, namely: the Dutch *Gerechtshoven*, the Belgian *Cours d'appel* and the Luxembourgish *Cour d'appel* (Art 3 Protocol 2012). Appointing justices and judges from among members from two different categories of national courts is particularly needed since they will have distinct jurisdictional mandates. More importantly, certain decisions rendered by judges will be appealable before justices, which will make a clear distinction between both positions particularly necessary (para 7 *Exposé des motifs* to the Protocol 2012 ['Explanatory Memorandum 2012']).

3. Status of the members

9 Interestingly enough, members of the Court, once appointed, continue to serve in their respective domestic courts. This quite unique feature--and the fact that they are selected from the States' Supreme Courts--originates from the idea that the Court should be the 'emanation' of the States' highest courts and allow for cooperation at the highest level (para 5 Explanatory Memorandum 1965). Additionally, it would also seem that being a judge at the Court was originally not considered to be a full-time occupation, hence their entitlement to retain their national occupation. One might reason that this argument--which appeared in the Explanatory Memorandum 1965--may currently not be so compelling since the Court has had to deal, on average, with five cases a year since its foundation. Furthermore, the amount of cases may very well increase with the Court's extended jurisdiction as contemplated by the upcoming Protocol 2012.

10 This specific status may pose a threat to the Court's independence. One element might yet mitigate concerns. Beyond the mere fact that the Treaty 1965 calls upon the Court's members to perform their duties in an impartial and independent fashion (Art 4 (1) Treaty 1965), they enjoy security of tenure (Art 5 (3) Treaty 1965). As a consequence, once appointed, no member of the Court may be ousted; they may remain in office, till the age of seventy, as long as they fulfil the conditions governing the exercise of their domestic functions (Art 3 (2) Treaty 1965). While security of tenure may have a positive impact on the independence of judges and advocates-general, it can also have the pernicious disadvantage of hampering the needed renewal of the Court's composition. Still, in practice and due to resignations, turnover inside the Court is relatively common; members seldom hold office for more than a decade.

11 By virtue of the Treaty 1965, judges and advocates-general are typically immune from prosecution and inquiry for any action and oral or written statement made in the performance of their functions (Art 4 quater (1) Treaty 1965). However, when in force, the Protocol 2012 will bring this unlimited irresponsibility to an end by providing the Court with the possibility to waive the immunity of its members.

C. Jurisdiction

1. Interpretation of common rules

12 As mentioned above, the Court was first and foremost founded to guarantee the harmonious interpretation and application of rules common to the Benelux Union's three Member States. The Treaty 1965 indicates those rules which the Court has jurisdiction to interpret (Art 1). In this respect, any Benelux common legal instruments (treaty, protocol or agreement provisions; model laws; Committee of Ministers' decisions or recommendations) can potentially be interpreted by the Court, provided that a treaty or a decision by the Committee of Ministers explicitly designates them.

13 In the early 1980s, this jurisdiction was further extended *ratione materiae* in virtue of a modifying protocol (Protocol amending article 1 of the Treaty concerning the establishment and the statute of a Benelux Court of Justice ['Protocol 1981']) to encompass rules referred to in a tripartite treaty, but which for the time being is in force in only two States. This reform occurred following a case where the Court was requested by a Dutch district court to deliver a preliminary ruling on the interpretation of the Benelux Convention containing a uniform law relating to penal sums (1973). The issue dealt with the fact that said treaty, at that time, had only been ratified by the Netherlands and Luxembourg. Logically, the Benelux Court ruled that it lacked jurisdiction to interpret the relevant provisions for Belgium had not yet ratified the treaty (BCJ, *Van der Graaf v Agio*, 1979). The rationale behind this amendment to the Court's jurisdiction is set out in the Explanatory Memorandum appended to the Protocol 1981 (*Exposé des motifs* to the Protocol 1981). Essentially, the drafters' main concern was to prevent the establishment of case law in one of the States Parties without the Court having had the opportunity to intervene.

14 When the Court is called upon to exercise its jurisdiction to interpret, it sits as a full court; all nine judges participate in the proceedings. Three categories of entity are entitled to refer to it.

(a) Referral from national courts and tribunals

15 This mechanism is the most frequently used and it generates the vast majority of the Court's rulings. This type of referral consists in a request for a preliminary ruling introduced by domestic courts and tribunals in the event of a dispute pending before them. In that sense, it is very much similar, in its functioning, to the ECJ's archetypal mechanism (→ *Preliminary ruling (CJEU)* [EiPro]; → *European Union, Court of Justice and General Court*). The Explanatory Memorandum 1965 itself states the extent to which the procedure is closely modelled on the ECJ's experience.

16 Referral to the Court may be made where a difficulty arises for a national court in interpreting a common rule as defined above, and if this is critical to the settlement of the case at hand (Art 6 (1) (2) Treaty 1965). When such a situation occurs, as in the ECJ's procedure, some courts and tribunals have the possibility to refer to the Court while others are obliged to do so (Art 6 (3) Treaty 1965). This distinction is logically dependent on the nature of the potential rulings given by the domestic courts in question. In this respect, where the legal action brought before a domestic court entails a final judgment, the judge must refer to the Benelux Court; conversely, where the national court's decision may later be challenged, there is no such obligation.

(b) Referral from governments

17 Unlike the above-mentioned proceedings, which bring about a binding decision by the Court (Art 7 (2) Treaty 1965), governmental reference to the Court follows an advisory procedure (Art 10 (1) Treaty 1965).

18 Requests for interpretation made to the Court through governmental initiative are virtually non-existent. In 1987, a joint referral from the three States Parties was lodged to the Court for an interpretation of two provisions of the Convention on the transfer of control of persons to the external frontiers of Benelux territory (1960). Nevertheless, the proceedings did not run their full course and the request was removed from the Court's register (BCJ, *Opinion, Transfert du contrôle des personnes vers les frontières extérieures du territoire Benelux*, 1988). Indeed, the governments withdrew their request since a Dutch court, which was to apply said Convention in a case pending before it, requested a preliminary ruling from the Benelux Court on the interpretation of the same provisions (BCJ, *Karim v B.Z.* 20, 1988). To date, no other referral from governments for the interpretation of common rules was made to the Court. It may be argued that, in light of past experience and considering the nature of the request,

there might be little point in retaining this type of referral. Nevertheless, in the Protocol 2012, the choice has been made to maintain this possibility.

(c) Referral from the College of Arbitrators

19 The College of Arbitrators (*Collège arbitral*) was an organ established under the former Benelux Economic Union Treaty (Treaty instituting the Benelux Economic Union [‘1958 BEU Treaty’]) as one of the Organization’s institutions (Art 15). Its purpose was to settle any dispute between two States Parties with regard to the application of the 1958 BEU Treaty (Art 41). When ruling on such a dispute, the College of Arbitrators – by virtue of the Treaty 1965 – was required to refer to the Court under similar conditions as domestic courts.

20 Yet, the College of Arbitrators never had the opportunity to exercise its primary jurisdiction, naturally preventing it from referring to the Court for an interpretation issue. In any case, the current provision of the Treaty 1965 (Art 11) granting the College the power to refer to the Court is *de facto* no longer applicable since this inoperative organ has been disposed of through the adoption of the new BU Treaty 2008. The Protocol 2012 amending the Treaty 1965 will eventually obliterate this textual discrepancy.

2. Settlement of civil service disputes

21 Like many courts attached to international organizations, the Benelux Court of Justice has jurisdiction to hear certain complaints from Benelux Union’s staff. To carry out this role, the Court sits in a reduced formation consisting of three judges, one of each State Party’s nationality. This particular chamber is commonly referred to as the Chamber for civil service disputes (*Chambre du contentieux des fonctionnaires*). It should be noted that this competence was not primarily set out in the Treaty 1965, but was granted to the Court very early on and progressively extended *ratione personae*.

22 On 29 April 1969, a first protocol was adopted to grant judicial protection to persons in the service of the Benelux Economic Union (Additional Protocol relating to the jurisdictional protection of persons in the service of the Benelux Economic Union [‘Protocol 1969’]). The Protocol 1969 and the Treaty 1965 establishing the Court came into effect concomitantly, namely on 1 November 1974. Prior to the institution of this judicial remedy, Benelux Economic Union’s civil servants held the right to file certain complaints before a Board of Appeal (*Chambre de recours*). However, this organ could only issue an opinion on the complaint, following which the Committee of Ministers

would render a final decision (para 2 *Exposé des motifs* to the Protocol 1969 [‘Explanatory Memorandum 1969’]). By virtue of the Protocol 1969, any individual who is or was at the service of one of the Union’s institutions may refer to the Court, as well as certain persons with derivative rights. Admissible claims—depending on the quality of the claimant—may concern general or individual decisions on matters ranging from remuneration, pensions and social benefits to termination of employment.

23 On 11 May 1974, a second protocol was signed to extend the possibility for other individuals to challenge administrative decisions before the Court (Protocol concerning the jurisdictional protection of persons in the service of the Benelux Trade Marks Bureau and the Benelux Designs or Models Bureau [‘Protocol 1974’]). This right is granted to staff working at the Benelux Trade Marks Bureau (set up in 1971) and the Benelux Designs or Models Bureau (set up in 1975). A specific protocol was needed because those two offices were established outside the Benelux Economic Union and could not be considered as its institutions or organs. The Protocol 1969 was consequently not applicable. In any case, under the Protocol 1974, the legal regime applicable to this category of civil servants is *mutatis mutandis* similar to the one instituted by the first Protocol. In 2005, an institutional change saw the establishment of the Benelux Organization for Intellectual Property to replace the two existing above-mentioned offices. This required the adoption of a new protocol (*Protocole additionnel concernant la protection juridictionnelle des personnes au service de l’Organisation Benelux de la Propriété Intellectuelle* [‘Protocol 2008’]). Albeit minor, the modifications allow for greater protection to the individuals covered by the instrument.

3. New jurisdiction under the Protocol 2012

25 The Protocol 2012, when in force, will establish a rather unique jurisdiction. The new competence granted to the Court will contribute to the same objective as the Court’s main procedure: achieving uniformity in the application of Benelux legislation.

26 The governments of the Netherlands, Belgium and Luxembourg considered that the existing mechanism of issuing preliminary rulings on the interpretation of relevant rules—although there is no denying its success—could not achieve the objective of unity in all circumstances (para 2 Explanatory Memorandum 2012). Indeed, because of its very nature, such procedure is only incidental and mostly performed *in abstracto*. In the future, one of the Court’s formations will therefore be able to hear direct actions and rule on the merits of the case. These judgments will be subject to appeal to another chamber, but only on points of law (Art 16 Protocol 2012). The Protocol provides that the Court shall exercise said jurisdiction for trademark-related disputes;

a branch of Benelux law which is already particularly unified. More interestingly, the new instrument contemplates the possibility for this jurisdiction to be exercised in other areas of law. No amendment to the Court's Statute will be necessary since such competence will be granted on a case-by-case basis in future conventions through jurisdictional clauses (para 3 Explanatory Memorandum 2012).

D. Procedural aspects

1. Proceedings upon referral from domestic courts for interpretation of common rules

27 It is again worth mentioning that the procedure is similar to that of the ECJ. Accordingly, procedural rules are conceived with the same purpose of reducing as far as possible the length of proceedings before the Court in order for the domestic judge to resume examination of the pending case.

28 Procedural rules governing these proceedings consist of a written stage and, where required, an oral phase. An oral hearing may be organised at the request of the parties to the main proceedings and/or any of the Ministers of Justice who participated in the written stage (Art 4 (1) *Règlement de procédure* ['Rules of Procedure']). The Court may also *proprio motu* order that such hearing be held (Art 4 (3) Rules of Procedure). When a request for a preliminary ruling is made to the Court by a national judge, the registry shall serve the request on the parties and the three States Parties' Ministers of Justice (Art 1 Rules of Procedure). Both the parties and the Ministers of Justice are entitled to provide written observations in relation to the referring judge's request (Art 3 (1) (2) Rules of Procedure). Where such right is exercised, those observations are necessarily notified to all participants to the proceedings (Art 3 (3) Rules of Procedure). The latter may request the Court's permission to lodge responses which, if authorised, are again notified to all (Art 3 (4) (6) Rules of Procedure). Following the exchanges of submissions, the advocate-general delivers their opinion. When a hearing is held, it is to be delivered during it, unless the Court decides otherwise. In the opinion, the advocate-general puts forward the legal solution recommended and must necessarily state reasons (Art 8 (1) (2) Rules of Procedure). It is to be noted that, wherever possible, the advocate-general to a case should have the same nationality as the State in which the case is pending (Art 5 (1) Treaty 1965; Art 6 (4) Internal Rules). This provision is hardly surprising given the tasks attached to the position. It necessarily requires a thorough knowledge of the domestic law relevant to the main case.

29 In practice, although not provided for in the texts, it is generally accepted that a judge-rapporteur—usually of the same nationality as the case at hand—be designated.

This judge is expected to prepare a draft judgment with the aid of two judges of the other States Parties' nationality. The draft judgment is then submitted for discussion to the nine-judge chamber. In this context, each judge should be heard and state their opinion and reasons (Art 17 (2) Internal Rules). Subsequently, the decision of the Court is reached by the majority of the judges (Art 17 (3) Internal Rules) and deliberations leading to it should remain secret (Art 12 (6) Treaty 1965). A distinctive feature is shared with the ECJ: no possibility for expressing individual opinions is provided for. The final judgment is delivered in open court (Art 12 (6) Treaty 1965; Art 10 (1) Rules of Procedure). Afterwards, a copy of the judgment is transmitted to the referring domestic court by the registry.

2. Proceedings upon referral for settlement of civil service disputes

30 When called upon to rule on such matters, the Court's function is very much different since it is expected to directly settle a dispute. This specificity is necessarily reflected in the very procedural framework applicable to such cases. In this regard, there is no urgency that would require exceptional promptness in the administration of proceedings. Furthermore, because of the nature of the dispute, which has a fundamental bearing on the claimant's legal situation, procedural rules will consequently have more of an *inter partes* and investigative dimension (Paras 11-12 Explanatory Memorandum 1969). Therefore, the written stage is necessarily followed by an oral phase and the Court has the authority to order measures of inquiry (Art 21 Protocol 1969).

31 Prior to any action being brought against the contested decision before the Court, potential claimants must lodge an internal appeal (*recours interne*) before the authority issuing the decision (Art 7 Protocol 1969). The latter will rule on the appeal by reasoned decision, after an opinion on the matter has been given by an Advisory Committee (*Commission consultative*) (Art 9 Protocol 1969). If the claimant is unsuccessful in their internal appeal—condition which constitutes an admissibility criterion—they may challenge the tacit or explicit decision of rejection before the Court within two months (Art 17 Protocol 1969).

32 The proceedings begin with the filing at the Court's registry of the claimant's request. The application is forwarded to the respondent, generally and as the case may be: the Secretary-General of the Benelux Union (Art 14 Protocol 1969) or the Director-General of the Benelux Organization for Intellectual Property (Art 3 (1) Protocol 2008). The respondent is subsequently entitled to submit a response (Art 18 Protocol 1969). It is worth mentioning that the procedural rules do not provide for the potential

submissions of a reply or a rejoinder. Following the exchanges of all written submissions and documents, as in some other international judicial bodies exercising similar jurisdiction, the Court may order measures of inquiry, which are usually conducted during the oral phase. These measures include but are not limited to: personal appearance of the parties, witness testimony, commissioning of experts, etc. (Art 36 (1) (2) Rules of Procedure). Throughout the whole of the proceedings, the advocate-general again plays a significant part. In addition to being able to question witnesses (Art 40 (1) Rules of Procedure), they present the Court with the legal solution they deem appropriate (Art 46 Rules of Procedure).

33 Perhaps more notably in this context, the Court exercises unlimited jurisdiction. If the Court finds in favour of the claimant, not only may it annul the contested decision, but it may also act in place of the administrative authority by amending the decision or substituting a new one. The Court may further order the defendant to pay damages (Arts 28-30 Protocol 1969). Procedural rules for deliberations and the issuing of judgments do not differ from those applicable to the Court's main jurisdiction.

E. Relations with the European Union and the Court of Justice of the European Union

34 It has been marginally mentioned that the Benelux Court shares, to a certain extent, some organizational, jurisdictional and procedural features with the ECJ. These similarities are evidently not fortuitous and are part of a broader scheme of cross-fertilisation between the system of the Benelux Union and the system of the European Union ('EU').

35 On one hand, it must be acknowledged that some integration policies previously implemented in the framework of the Benelux Union have later been taken up by the EU. For instance, the Netherlands, Belgium and Luxembourg had already implemented a customs union by 1948 and, notably, the free movement of their populations by 1960, long before the entry into force of the Schengen Convention. The Benelux Union's pioneering and inspiring role for the EU is even referred to in the preamble to the BU Treaty 2008. Similarly, the EU's instruments formally recognise the Benelux Union's specificity as a deeply integrated regional union through an enabling clause (Art 350 Treaty on the Functioning of the EU).

36 On the other hand, dialogue has also been established at the more practical judicial level. While it might reflect a certain form of deference, the Benelux Court, on one occasion, did not hesitate to request the ECJ for a preliminary ruling (BCJ, *Campina Melkunie B.V. v Bureau Benelux des Marques*, 2000). In this case, the Benelux Court of

Justice was asked to interpret the *Loi uniforme Benelux sur les marques*, which was in fact a transposition of EU directive 89/104 on trademarks. The Benelux Court accordingly referred to the ECJ even though there was no legal obligation to do so, nor was this possibility set out in the texts. The ECJ issued a preliminary ruling (ECJ, *Campina Melkunie BV v Benelux-Merkenbureau*, 2004) following which the Benelux Court resumed the proceedings and issued a judgment in accordance with the ECJ's decision (BCJ, *Campina Melkunie B.V. v Bureau Benelux des Marques*, 2004). Similarly, it is furthermore not uncommon for the advocate-general to deliver their opinion taking due account of EU law to prevent any conflict of interpretation (BCJ, *O.M. v F.T.A. Metzelaar*, Opinion of Advocate General Langemeijer, 2007).

F. Evaluation

37 While the considerations immediately above-mentioned show that there are some similarities in the functioning and purpose of both courts, differences should not be overlooked. Chiefly, the Benelux Court itself acknowledges that it should not be considered as a supranational court and that cooperation at the level of the Benelux Union has an intergovernmental dimension (BCJ, *Karim v B.Z.*, 1988).

38 One might also assume, in this regard, that the relations between both systems have always been imbued with a spirit of healthy competition. Indeed, prior to the establishment of the Benelux Court, the question had been raised whether or not its purported jurisdiction should be conferred to the already existing ECJ. Similarly, as the level of integration within the EU develops and becomes in some areas as integrated as within the Benelux Union, the Benelux Court of Justice is mechanically deprived of parts of its jurisdiction. Nevertheless, the Benelux Union has always been able to adapt by exercising its prerogatives on matters which are not completely *communitised* such as trademarks and patents, sustainable development and environment, justice etc. For that reason, one might argue that, given the current context at EU level and the upcoming Protocol 2012, the Benelux Court is set for a bright future.

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