



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2020-UNAT-1035

**Gergo Gelsei  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Jean-Francois Neven
Case No.:	2020-1350
Date:	26 June 2020
Registrar:	Weicheng Lin

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Counsel for Appellant:	Evelyn W Kamau, OSLA
Counsel for Respondent:	Francisca Lagos Pola

**JUDGE GRAEME COLGAN, PRESIDING.**

1. Gergo Gelsei (the Appellant) appeals the decision of the United Nations Dispute Tribunal (the UNDT or the Dispute Tribunal) dismissing his application challenging the lawfulness of disciplinary sanctions issued to him, on the grounds that the application was not receivable by the UNDT because it was filed late. The Dispute Tribunal also refused the Appellant's application to suspend, waive or extend the time limit for doing so. The Appellant accepts that his application was filed, by his OSLA (Office of Staff Legal Assistance) counsel, less than one day after the 90-day period allowed for doing so. The appeal is therefore essentially against the refusal to waive or extend the time limit to allow the application to be considered on its merits. This Judgment does not address the merits of Mr. Gelsei's challenge to the lawfulness of the warnings issued to him.

2. For reasons set out below, we conclude that the UNDT erred in fact and law in refusing the application for extension or enlargement of time, the appeal is allowed and the UNDT's Judgment at first instance is reversed.

**Facts and procedure relevant to the appeal**

3. Mr. Gelsei is employed by the United Nations High Commissioner for Refugees (UNHCR). On 6 June 2019 he received formal advice of the imposition of disciplinary sanctions imposed upon him. If he wished to challenge these, he had the period of the following 90 days to file in the UNDT. This period expired on 4 September.

4. On 13 July 2019 Mr. Gelsei sought the assistance of OSLA. He instructed counsel to file a challenge to his disciplinary sanctions, no doubt expecting that OSLA would do so, including within time. Mr. Gelsei's application to the UNDT's Geneva Registry was not received by it, however, until the following day, 5 September, about 12 hours after the expiry of the statutory deadline.

5. The Respondent applied for a summary judgment to dismiss the application on the grounds that it had been filed out of time. In reply, OSLA said that it had attempted to file electronically on 4 September but that, on the following day, it became aware that this attempt had failed through technological problems, of which it only became aware on 5 September. OSLA filed an application to suspend or waive the time limit, relying on these reasons for the default.

### **The Dispute Tribunal's Judgment**

6. The Dispute Tribunal recorded that it was agreed that the application had been filed out of time, and so concentrated on the application to extend the time, in effect by about 12 hours. It summarized the “exceptional circumstances” relied on by the Applicant as being that “technical challenges”<sup>1</sup> and “internal [we assume within OSLA] oversight”<sup>2</sup> were the cause of the delay in filing. The Tribunal said that the screen shot of the electronic record provided to OSLA, and supplied by it to the UNDT as evidence of the technological failure, did “not have a time stamp or any other element proving that there was an effective attempt to [timeously] file the Application”<sup>3</sup>. It added that “[t]he screen shot does not even refer to the name of the Applicant to allow the Tribunal to conclude that the ‘error message’ was related to a failed attempt to [timeously] file the application”<sup>4</sup>.

7. The UNDT concluded that the Applicant provided no proper and convincing explanation of either the “internal oversight” referred to by OSLA or otherwise about the sorts of problems OSLA had faced. In these circumstances, the UNDT concluded that the reasons provided did not support granting a time limit waiver. It distinguished several earlier judgments of the UNDT in which similar, but not identical issues, had been considered. The UNDT held that the Applicant and his counsel had failed to demonstrate the existence of the “exceptional circumstances” required to exercise its discretion to extend the time.

8. The UNDT then concluded, in dismissing the application to extend time and the Applicant's substantive application, at paragraphs 20 – 21 of its Judgment that:

... [T]he [United Nations Appeals Tribunal's] jurisprudence has consistently held that “whether a deadline is missed by several minutes, several hours or several days is irrelevant” (see, *Ruger* 2016-UNAT-693) and that the principle of legal certainty requires that deadlines must be respected (see, *Hijaz* 2010-UNAT-055, *Christensen* 2012-UNAT-218).

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<sup>1</sup> Impugned Judgment, para. 5.c.

<sup>2</sup> *Ibid.*

<sup>3</sup> Impugned Judgment, para. 13.

<sup>4</sup> Impugned Judgment, para. 14.

## Submissions

### The Appellant's Appeal

9. First, the Appellant submits that the UNDT drew and then relied upon a wrong inference from five previous UNDT cases cited to it. He says that these cases were drawn to the Tribunal's attention in support of a contention that in the past errors relating to its ability to file on time which had been known to OSLA, had been drawn to the UNDT's attention. The Appellant says that the UNDT misinterpreted this submission as one providing examples of cases in which the UNDT had agreed to waive time limits so that it should have done likewise in this case. The Appellant submits that based upon this misinterpretation, the Tribunal concluded that Mr. Gelsei had failed to demonstrate exceptional circumstances. He says that had the UNDT considered the Appeals Tribunal judgments on these questions, the UNDT should have found, by analogy, the existence of exceptional circumstances. We will address these cases in deciding the point on appeal in which they are relied on by the Appellant in the next paragraphs.

10. Next, the Appellant submits that the UNDT erred in law by failing to take account of these relevant Appeals Tribunal judgments. This argument is directed at the Respondent's submission that an application for extension or waiver cannot be made after the time affected has already expired. As we have already noted, although the Respondent argued this point before the UNDT, the Tribunal did not appear to decide it one way or the other. It reached its decision against the Appellant without having to do so. The Appellant's argument, in which he points out that in a number of cases the Appeals Tribunal has allowed extensions of time which has already expired, is that the UNDT did not only not consider these cases, but indeed it disregarded the cases cited to it. In this regard, the Appellant relies particularly on three Appeals Tribunal judgments, *Dibs*<sup>5</sup>, *Al-Moued*<sup>6</sup>, and *Rolland*<sup>7</sup>.

11. Third, and finally, the Appellant alleges that the UNDT failed to exercise its jurisdiction in that it issued an erroneous judgment and in particular that it failed to explain why it did not consider and apply relevant Appeals Tribunal case authority.

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<sup>5</sup> *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Order No. 296 (2017).

<sup>6</sup> *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees*, Order No. 197 (2014).

<sup>7</sup> *Rolland v. Secretary-General of the United Nations*, Order No. 23 (2010).

12. The Appellant seeks as remedies, the vacation of the impugned Judgment of the UNDT, a finding that his application was receivable and that the case be remanded to the UNDT for determination on its merits.

### **The Respondent's Answer**

13. Because the Appellant concedes that his application to the UNDT was filed out of time, we will focus only on those submissions made by the Respondent addressing the application to extend or waive time. The first submission on this issue is that exceptional circumstances under Article 8(3) are required to meet a very high threshold. Relying on the Appeals Tribunal's judgment in the case of *Sylvester*<sup>8</sup>, the Secretary-General submits that this standard is met only where it is "absolutely impossible" that the filing can be undertaken within the statutory time.

14. Next, the Respondent submits that, as here, an error or oversight by a party's counsel does not constitute an exceptional circumstance to enable a waiver of time to be made. The Respondent cites the Appeals Tribunal judgment in *Powell*<sup>9</sup> as authority for this proposition. In that case counsel had miscalculated the date for filing. In this case the Respondent points out that OSLA did not explain at all what was the "internal oversight" upon which Mr. Gelsei relied so that the UNDT correctly concluded that the Appellant had not provided a "proper and compelling explanation"<sup>10</sup> of the problems allegedly faced by OSLA in being unable to file in time.

15. Turning to the argument of technical failure to file on 4 September, the Respondent reiterates the points made by the UNDT that the error message it provided to the UNDT was not dated or timed and contained no indication that it related to Mr. Gelsei's papers, including that there was no reference to his name on the error message electronic documentation. The submission is also that counsel could have e-mailed the Registry on 4 September if problems had emerged at that time and could have attached the application to such an e-mail. Such alternatives could have ensured that the proceedings were filed timeously.

16. Addressing the Appellant's particular submissions, the Respondent says first that no errors of fact were committed by the UNDT when it considered the five UNDT cases of late filings by OSLA. Irrespective of whether the Tribunal misunderstood the purpose for which these cases were referred to by the Appellant, they show, and the UNDT was entitled to take notice of the fact, that

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<sup>8</sup> *Sylvester v. International Civil Aviation Organisation*, Judgment No. 2018-UNAT-872, para. 36.

<sup>9</sup> *Powell v. Secretary-General of the United Nations*, Order No. 96 (2012), para. 9.

<sup>10</sup> Impugned Judgment, para. 15.

OSLA has acted more diligently in the past than it did on this occasion. On all those occasions OSLA in fact filed its documents within time, despite having technical difficulties of a similar nature to those that were alleged to have affected Mr. Gelsei's proceedings. In any event, any misunderstanding by the UNDT about the significance of the five cited cases is immaterial as its decision did not turn on them and, if anything, they showed that OSLA was aware of the deadlines and their significance. This was not an error of fact.

17. Turning to the Appellant's allegation of error of law by the UNDT in failing to consider the Appeals Tribunal's relevant jurisprudence on the granting of waivers after the expiry of time deadlines, the Secretary-General says that the UNDT is not obliged to address every argument put to it in such cases, especially where such claims have no merit. There is no requirement to even explain why such a conclusion of lack of merit may have been reached by the UNDT. Mr. Gelsei's case is, in any event, clearly distinguishable from those cases cited by him which were time extension cases relating to the Appeals Tribunal rather than issues of filing in the UNDT. In any event, such cases are fact-specific and not following one does not amount to an error of law.

18. The Respondent asks this Tribunal to affirm the UNDT's Judgment and dismiss the appeal.

### **Considerations**

19. We start with the statutory provisions governing this appeal. Article 8(1)(d)(i) of the UNDT Statute provides the 90-day time limit for applications such as the Appellant made to the Dispute Tribunal. It is common ground that this was not met. Next, Article 8(3) of the Statute allows the Tribunal to suspend or waive this time limit in "exceptional circumstances". Article 8(4) allows, in effect, a period of up to three years from receipt of an administrative decision in which such an extension or waiver can be made before no further extension is permissible, so there is a relatively long period during which such an extension or waiver can be applied for or made.

20. We should refer here to a statement in the UNDT's Judgment at paragraph 6 outlining the Respondent's grounds for opposing the Applicant's application in that forum. The Secretary-General submitted that the UNDT cannot exercise its powers under Article 8(3) if a written application for extension or waiver is filed after the statutory time limit has elapsed. As we have noted, the UNDT did not address that submission directly in its Judgment, but we doubt very much that it is sustainable. If correct, it would, for example, not allow for a

technological failure as occurred here, however assiduous the applicant's representative was to ensure its transmission and arrival in time and however well and comprehensively that was explained to the Tribunal. Further, and even more fundamentally, the Statute (and the UNDT's Rules of Procedure which must and do follow it), make no reference to such a restriction on the power expressly provided. Finally, the words of the Statute tend strongly to suggest that an application to extend time which has already expired, was indeed contemplated and allowed for. Article 8(3) uses the alternative words "suspend" and "waive" in relation to allowing an out-of-time application. Suspension contemplates an expiry that is to happen in the future while a waiver contemplates an expiry that has already occurred. We note also that Article 7(5) of the Dispute Tribunal's Rules of Procedure adopts, but also adds to these statutory words, by creating a third activity descriptor, an "extension" of time. It is unnecessary for us to consider this third class of order except to say that its existence tends also to contemplate a broad range, rather than a narrow one, of the circumstances in, and the time at, which such an application can be brought.

21. We should refer also to the UNDT's conclusion, quoted earlier in this Judgment, that: "[T]he Appeals Tribunal's jurisprudence has consistently held that 'whether a deadline is missed by several minutes, several hours or several days is irrelevant'."<sup>11</sup> While the essential principles expressed there are undoubted, they cannot be, and are not, as absolute and irremediable as the passage relied upon by the UNDT might suggest. The following review of the jurisprudence confirms this assessment of the position.

22. Lateness is lateness because a specified deadline has been passed. But the degree of lateness is not irrelevant for the purpose of determining an application to suspend or waive (or extend) that time limit. For example, a short delay will probably mean that any prejudice to the other party will be minimised, while a very long delay (bearing in mind that such can be up to three years) is likely to mean that others have altered their positions in reliance on the absence of an appeal being brought. Those are relevant factors to the exercise of a discretion under Article 8(3). Here the delay was about as short as is likely to occur after expiry of the time limit. We agree also that, generally, certainty in litigation requires adherence to time limits. But the existence of a statutory mechanism to suspend or waive or extend them recognises that this aspiration cannot be absolute. Anyone with experience of these things knows that however well one plans, events sometimes conspire or come unseen from the

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<sup>11</sup> Impugned Judgment, para. 20.

proverbial “left field”, to mean that deadlines are missed by even the most experienced and assiduous practitioners. Despite the aspiration of certainty and finality that underpin adherence to time limits, the law is sufficiently flexible to ensure justice is able to be done between parties in appropriate cases.

23. The relevant circumstances in which such an extension or waiver should be allowed by the UNDT are variable and highly fact-dependent, so long as they are “exceptional”. Only limited advantage and guidance are to be gained by comparing the facts of other past cases in which the particular circumstances in which time ran out, are quite different.

24. There is a further consideration that must be taken into account. The power under Article 8(3), after the establishment of exceptional circumstances, is discretionary. We consider that the interests of justice are the paramount factor in the exercise of this discretion and that involves a balancing of the rights and interests of the parties. Considerations of whether either will be prejudiced by the grant or refusal of an order, and if so the extent and effect of such prejudice, will be a relevant consideration. So too is the length of any delay relevant, and where the responsibility for the delay lies. There may be other similar considerations applicable to the exercise of a judicial discretion, especially one that can have the effect of denying a party consideration of his or her grievance on its merits.

25. Because of the reliance, especially by the UNDT and the Respondent, on previous case authority, it is necessary to address these earlier judgments and orders. We do so in chronological order.

26. In *Christensen*,<sup>12</sup> the Appeals Tribunal dealt with an appeal against a refusal by the UNDT to waive a time limit for review of a management evaluation decision. The Appellant claimed that the delay of about 14 months was attributable to a combination of her ignorance of her entitlement to appeal, and her illness. The Tribunal emphasised the importance of the observation of time limits, that it was a staff member’s responsibility to be aware of these, and that ignorance of these could not be an excuse for their breach. Notwithstanding her illness, the Appeals Tribunal determined that exceptional circumstances had not been shown, and the appeal was not receivable.

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<sup>12</sup> *Christensen v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-218.



27. *Powell*<sup>13</sup> was a case of a staff member respondent to an appeal brought by the Secretary-General against a judgment of the UNDT. The breach was due to the miscalculation of the times by the staff member's representative. Although the Secretary-General did not oppose the making of an order for extension and abided the decision of the Tribunal, it nevertheless found the application for extension to be without merit. Erroneous oversight by counsel did not constitute grounds for waiver and the Appeals Tribunal held that it should enforce strictly its statutory time limits. There was, however, no reference made to the exceptional circumstances test. In a subsequent application by Mr. Powell to revise its previous order, the Respondent again took no position on the application. The Tribunal, assuming that it was empowered to revise orders as well as judgments, concluded that no new facts had been shown to have come to notice and dismissed the motion for revision.

28. The question was addressed in a judgment of the Appeals Tribunal in *Rüger*.<sup>14</sup> Pertinently for this case, the test was the same, whether there were exceptional circumstances shown to the UNDT. It had found that there were none. The Appeals Tribunal held that the UNDT had decided correctly that only circumstances beyond a party's control preventing that party from exercising a right of appeal in a timely manner could constitute exceptional circumstances for the purpose of extending time limits to appeal. In that case the failure to adhere to the time limit was occasioned either by negligence or by a combination of negligence and confusion about whether the Appellant had approved the appeal. Negligence was held to be an insufficient excuse for failure to meet the time limit. The Appeals Tribunal also opined that the delay of 14 hours in that case was "not minimal" and that the length of the delay was irrelevant to a finding of whether there were exceptional circumstances. It said: "Whether a deadline is missed by several minutes, several hours or several days is irrelevant."<sup>15</sup> Unsurprisingly, this pithy statement is often cited by opponents to applications such as this. We understand that apparently unequivocal statement to relate the Tribunal's immediately preceding statement that the duration of any delay is irrelevant to the preliminary question whether there are exceptional circumstances. We agree with that statement as so interpreted. If exceptional circumstances are established, however, the length of a delay may then become a relevant factor, among others, in deciding whether to exercise the Tribunal's discretion to

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<sup>13</sup> *Powell v. Secretary-General of the United Nations*, Orders No. 96 (2012) and 104 (2012).

<sup>14</sup> *Rüger v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-693.

<sup>15</sup> *Ibid.*, para. 18.

waive the breach and the particular nature of that waiver, for example how long the party has then to file.

29. The next case is *Dibs*<sup>16</sup> in which the lateness in filing a reply to an appeal arose. The delay was of about six weeks. The excuse for the lateness was that there had been an internal oversight. Despite the significant delay, the Appeals Tribunal granted the extension because it was in the interests of justice<sup>17</sup> that the reply be considered, and the Appellant would not be prejudiced. The Judge, however, signalled that this excuse proffered by the Respondent would not be received so sympathetically in future.

30. We end this analysis of the jurisprudence with the Judgment of this Tribunal in *Sylvester*<sup>18</sup>. The test for allowing a putative litigant to appeal by waiving the relevant expired time limit (albeit under an independent agency's Rules), was that the delay was brought about by "exceptional circumstances". It was not disputed in that case that the applicant's lack of knowledge of the relevant rules was not an excuse for the delay. The delay in that case was of at least 6 weeks after the expiry of a 60-day period. The Appeals Tribunal concluded that exceptional circumstances had not been established by the Appellant. It said that the applicant for waiver bore the burden of proof to establish "any circumstances beyond his control that would have the effect of preventing him from acting within the statutory time limits".<sup>19</sup>

31. Moving to our decision of the appeal, we consider first whether the circumstances in which Mr. Gelsei came to apply to waive the approximately 12-hour delay, were "exceptional". The UNDT relied, in finding they were not, on what it considered was the inadequacy of proof of what happened and, therefore, whether what occurred was exceptional. The documentary evidence shows that at 1237 hours on 5 September (it is unclear whether this was the time and date in New York where the OSLA office is situated, or in Geneva where the documents were to be filed but this may not matter for present purposes), OSLA e-mailed the UNDT Registry referring to attempting to file Mr. Gelsei's application on the previous day. The e-mail said that an error message relating to this attempted filing had been discovered on the morning of 5 September. It said that the documents for filing had then been successfully re-uploaded and

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<sup>16</sup> *Dibs v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Order No. 296 (2017).

<sup>17</sup> It should be noted that this is not the test at issue in this case, namely whether the circumstances are "exceptional". It is, nevertheless, an associated issue of failure to meet a time deadline.

<sup>18</sup> *Sylvester v. International Civil Aviation Organization*, Judgment No. 2018-UNAT-872.

<sup>19</sup> *Ibid.*, para. 36.

were being re-sent to the Registry. The e-mail attached a screen shot of the error message. That screen shot shows at least three overlapping screens so that it is unclear what all but the uppermost one (the error message) said. But it is clear that it related to the UNDT's electronic filing system and OSLA's attempts to file a number of documents at UNDT Registries including Geneva. It is a strong inference that there had been an operational failure of OSLA's electronic filing system on 4 September, that was discovered on 5 September.

32. There is nothing that suggests that OSLA's was a false or misleading account of what had happened. Indeed, it would be a startling and reprehensible situation if OSLA and its lawyers had attempted to mislead deliberately both the UNDT and the Secretary-General by creating fraudulent evidence in an attempt to cover up a short time delay for which there was the ability to seek an extension. The Tribunal did not, of course, find that this had occurred or even suggest it, but it nevertheless did not accept OSLA's account of the circumstances of the delay saying that more, albeit unspecified, evidence was needed if it was to be persuaded of the truth of that account.

33. The Secretary-General in his submissions opposing the time extension application, did not suggest that OSLA's account should be doubted. Rather, it was the Tribunal itself which considered that it failed for want to proof. The UNDT was extremely assiduous in concluding that Mr. Gelsei had not proved the electronic system's failure to a high standard, even when this explanation for the breach had not been challenged by the Respondent. In retrospect, we agree that OSLA could have established the relevant events more thoroughly. However, in the absence of challenge to its account of them, we consider the Tribunal ought to have accepted the credibility of OSLA's account on its face, focussed on whether the circumstances were exceptional and, if so, whether it should exercise its discretion for or against the application. The UNDT erred in law and fact in not doing so. Its errors caused its decision to be manifestly unreasonable.

34. We find that all the relevant circumstances were exceptional. It is very unusual for even proverbial 11<sup>th</sup> hour attempts to file applications with the UNDT to fail for technical reasons. There is no suggestion that this is a common failing in this process. The circumstances meet more than adequately the test of untypicality or unusualness. This statutory test was met in our assessment.

35. On the exercise of the UNDT's discretion against Mr. Gelsei, we conclude that this should have been exercised in his favour. Balancing the parties' rights and interests, there is nothing to suggest, nor could it be suggested seriously, that the Respondent would have been prejudiced by a delay of about 12 hours in filing. Indeed, it is unlikely that the Respondent would have known about the application any earlier than he did, had it been filed before midnight on 4 September as the applicant was entitled (and attempted) to do. On the other hand, Mr. Gelsei is subjected to serious sanctions in his employment which he disputes but which rejection of his application to the UNDT means he cannot have decided on their merits. The delay was relatively short, indeed about as short as is realistically possible, which counts in the Appellant's favour.

36. Responsibility for the delay lies entirely beyond Mr. Gelsei's control. At worst, it may be an OSLA responsibility, but more probably is attributable to a communication system's error beyond any reasonable human control. Using the test most recently expressed by this Tribunal in *Sylvester*, we conclude that circumstances beyond Mr. Gelsei's control prevented him from acting to file his appeal within time. Put another way, had the electronic filing system not failed as it apparently did, Mr. Gelsei's appeal would have been filed in timely fashion. It would be unjust to visit upon Mr. Gelsei the consequences of an error for which he, and his representative, had no responsibility.

37. Finally, we think the discretion should have been exercised in Mr. Gelsei's favour because it affects access to justice in which there is a presumption that this should not be denied at the outset without compelling reasons, which we consider are absent here.

38. For the foregoing reasons we conclude that the UNDT erred in fact and in law (resulting in a manifestly unreasonable decision), and its decision must be set aside. Time is waived or extended under Article 8(3) of the UNDT's Statute and the application disputing the disciplinary sanctions imposed on Mr. Gelsei is deemed to have been filed in time. This will allow the UNDT to hear and decide those claims on their merits.

**Judgment**

39. The appeal is allowed, Judgment No. UNDT/2019/165 is reversed and we remand Mr. Gelsei's case to the UNDT for decision on its merits.

Original and Authoritative Version: English

Dated this 27<sup>th</sup> day of June 2020 in New York, United States.

*(Signed)*

Judge Colgan, Presiding  
Auckland, New Zealand

*(Signed)*

Judge Raikos  
Athens, Greece

*(Signed)*

Judge Neven  
Brussels, Belgium

Entered in the Register on this 11<sup>th</sup> day of August 2020 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar