

THE PRACTICE OF ARBITRATION

This book offers a series of commentaries on noteworthy arbitral awards and court decisions on arbitration. All contributions focus on the practice of arbitration. Influential authors with proven arbitration experience share their insights on celebrated and less well-known cases, drawn from various countries, various arbitration institutions and including both commercial and investment arbitration.

This collection of essays celebrates the work and scholarship of Hans van Houtte, who has been a professor of international commercial arbitration at the University of Leuven for more than 20 years. In addition to his widely-praised contribution to the theory of arbitration, Professor van Houtte has built a long career in the practice of arbitration, presiding over a vast array of arbitral tribunals and holding appointments to international tribunals, most recently as president of the Iran-US Claims Tribunal.

Hans van Houtte has always been concerned with the practical usefulness of scholarly writings, and this book respects this approach.

This volume will prove essential for all arbitration practitioners and will be of great interest also to academics and research students with an interest in international arbitration.

The Practice of Arbitration
Essays in Honour of
Hans van Houtte

Edited by
Patrick Wautelet
Thalia Kruger
and
Govert Coppens



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Preface

Professor Hans van Houtte has taught, researched and worked at the University of Leuven over a period of more than three decades (1978–2012). During this time, he has held various appointments, among which the last is the chair in international arbitration.

Although his leaving academia will not in any way signal the end of his professional activities, it seemed appropriate to mark the event by asking those who crossed his path to contribute to this collection of essays in his honour.

The initiative for this collection owes much to a group of lawyers who share one precious thing: although they come from different backgrounds and are today active in various professional settings, they have all made their first steps in professional life under the supervision of Professor van Houtte – who has been their academic chaperone, nurturing their first writings and guiding their steps, both in academia and in other professional circles. With the help of this impressive group, the editors have put together this book as a sign of recognition for his lasting influence on their careers and their views of the law.

This collection is entirely devoted to the world of arbitration. Although Professor van Houtte made a significant contribution in other fields, most notably public and private international law, his experience in and practice of arbitration proved decisive throughout his career. It therefore made sense for this book to focus on arbitration. While we realise that this choice does not reflect the breadth of Professor van Houtte's interests, we cherished his point of view that a book should not only excel by its content, but should also be user-friendly.

Both in his teaching and his scholarship, Hans van Houtte is an ardent believer in the law in action: theories in books should be tried and tested. This explains his continued interest in how courts and tribunals apply the law. Given this fundamental orientation, all contributors to this collection have taken as a starting point to their work a judgment or arbitral award in the field of *international arbitration* which is – generally or in the author's personal appreciation – considered to be significant, remarkable or interesting. The result is a collection that truly pays tribute to Hans van Houtte and his approach to the law: decisions from various parts of the world are included, discussing matters ranging from the neutrality of the arbitrator and the complexities of the arbitral procedure to investment issues and the current existential debate on the links between European civil procedure and arbitration.

We are confident that the result is a practical book written by leaders in the field, which will find its way into the libraries of every student and practitioner working on international arbitration.

The editors
Patrick Wautelet
Thalia Kruger
Govert Coppens

The Practice of Arbitration

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Professor Hans van Houtte: A Short Biographical Sketch

Professor Hans van Houtte, born in Leuven, completed his law studies *magna cum laude* at the University of Leuven Law School (KUL) in 1970. He then took the opportunity to pursue an LLM at Harvard Law School in 1971, together with his wife Vera, who has remained his companion in every endeavour and who shares his enthusiasm for the law. The Harvard experience would mark him and would resonate throughout his career.

Upon his return, he started his career as a PhD candidate and associate lecturer, again at the University of Leuven. While working on his PhD, which he obtained in 1977 with a thesis on the process whereby arbitrators determine the applicable law,¹ he also made his first steps at the Bar as a pupil of the late Georges van Hecke.

He took up the chair in International Law and European Law at the University of Leuven shortly after obtaining his PhD. In the meantime, he had obtained ‘cum laude’ the diploma granted by the Hague Academy for International Law. He would teach public international law for ten years, in Leuven and also on invitation at the Notre Dame Law School (USA) and in Paris (Paris I and Paris II). He soon developed a keen interest for the law of international economic relations. His scholarship was strongly focused on the involvement of states in commercial matters.² Close collaboration with internationally renowned scholars started in those years, which led to notable publications with Schermers³ and Sarcevic.⁴ A very popular teacher, he invested much time in preparing students for prestigious international moot courts.⁵

During these years, he remained deeply committed to his work in practice, growing with the firm he had joined, which soon became one of the major players in the Belgian market and beyond. His work as a practitioner allowed him to touch upon all aspects of the arbitration process: retained as counsel in (ad hoc and institutional) arbitrations, he was soon appointed party-appointed arbitrator, sole arbitrator and chairman in proceedings

¹ ‘Het Recht van Toepassing bij Transnationale Arbitrage’ (‘The Law applicable in transnational arbitration’) (PhD thesis, University of Leuven, 1977).

² eg ‘Treaties and Economic Sanctions’ (1984) 17 *Revue belge de droit international* 36–56; ‘Treaty Protection Against Economic Sanctions’ (1985) 18 *Revue belge de droit international* 376 ff; ‘Towards an Attachment of Embassy Bank Accounts’ (1986) 19 *Revue belge de droit international* 70–79; ‘The Impact of Trade Prohibitions on Transnational Contracts’ (1988) 25 *Intl Bus LJ* 141–54; ‘Trade Sanctions and Arbitration’ (1997) 25 *International Business Lawyer* 166–70.

³ Henry G Schermers and Hans van Houtte, *Internationaal en Europees Recht*, 1st edn (The Hague, Kluwer, 1985; 2nd edn 1987).

⁴ Petar Sarcevic and Hans van Houtte (eds), *Legal Issues in International Trade* (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1990).

⁵ For its first participation, the team coached by Hans van Houtte placed second out of 268 teams at the 1987 Jessup Competition.

conducted under the rules of all the major arbitration institutions. His arbitration experience put him in a position to cover classic commercial disputes involving international sales, agency and distribution, share evaluations and mergers and acquisitions. Unsurprisingly, given his growing reputation as an expert in international law, his arbitration caseload also included a great deal of international work, with disputes involving state contracts, investment contracts, economic sanctions and even rescheduling of sovereign debt. He also published widely on arbitration, introducing a generation of lawyers in Belgium to a field of law which had until that point remained somewhat neglected.

In 1990, he took up the chair in Private International Law at the University of Leuven, which he would hold until his retirement from academia. This is a remarkable turn of events, as it gave him the opportunity to straddle the growing divide between the twin fields of international law, a divide which he insisted should not be over-emphasised. His scholarship continued to grow, with what were now the familial features of his work: a sparing use of words and a preference for practical usefulness over verbose and theoretical accounts of the law.⁶ He is at his best with short pieces focusing on well-defined problems, in which he distils clear opinions that often stirred up the debate.⁷ He followed with much interest the development of European private international law,⁸ while turning his research to new territories – the well-received collection of essays he edited on the law of cross-border securities transactions stands out, as it preceded the substantial developments in this field in the first decade of the new millennium.⁹ During those years, he undertook with a few colleagues to draft the blueprint for what later became the Belgian Code of Private International Law.¹⁰ At the same time, he remained committed to international commercial law, following closely the practical application by courts of the Vienna Sales Convention.¹¹

In the meantime, he pursued his career at the Bar, remaining a partner in one of the major law firms in Brussels during much of the 1990s. As his reputation in the arbitration community continued to grow, he became involved in various international professional bodies. After chairing the International Sales Committee of the International Bar Association (IBA), he was elected a member of the arbitration committee of the International Law Association (ILA). He also joined the very active Committee on International Civil Litigation set up within the ILA. He was later elected Vice-President of CEPANI, the Belgian Arbitration Institution. Inspired in part by his long experience in dispute settlement, he also trained as a mediator.¹²

Among the works he published during those years, his book on *The Law of International Trade*¹³ stands out: it represents a unique blend of scholarship, focusing on problems inspired by his rich practical experience, with answers borrowed from various fields of law,

⁶ See eg 'May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?' (1997) 13 *Arbitration International* 85–92.

⁷ See eg 'Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration' (2004) 20 *Arbitration International* 85–95; 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21 *Arbitration International* 509–21.

⁸ Hans van Houtte and Marta Pertegás Sender (eds) *Europese IPR-Verdragen* (Leuven, Acco, 1996); Hans van Houtte and Marta Pertegás Sender, *Het nieuwe Europese IPR: van verdrag naar verordening* (Antwerp, Intersentia, 2001).

⁹ *The Law of Cross-Border Securities Transactions* (London, Sweet & Maxwell, 1999).

¹⁰ See eg 'Updating Private International Law? The Belgian Experiment' in J Erauw, V Tomljenović and P Volken (eds), *Liber Memorialis Petar Sarcevic. Universalism, Tradition and the Individual* (Munich, Sellier, 2006) 65–73.

¹¹ See eg *Het Weens Koopverdrag* (Antwerp, Intersentia, 1997).

¹² See eg *Mediatie van handelsgeschillen (Mediation of Commercial Disputes)* (Leuven, Acco, 2000) and 'ADR Discussed' (1996) *ICC Bulletin* 77–82.

¹³ 2nd edn (London, Sweet & Maxwell, 2001).

viewed from a comparative perspective, without consideration for the rigid barriers which tend to burden much academic work.

In 1996, he was elected to work as a commissioner in the Real Property Claims Commission set up by the Dayton Agreement to settle property claims in Bosnia. This new challenge, which would keep him busy until 2003, would mark the start of a new era in his career. His work in Sarajevo would be followed by a mandate as member of the United Nations Compensation Commission (1998–2001) and as arbitrator and senior judge at the Claims Resolution Tribunal for Dormant Bank Accounts (1998–2002). He later became President of the Claims Commission set up in 2001 to arbitrate disputes between Eritrea and Ethiopia. This new turn into international collective settlement processes allowed him to draw on his unique expertise in private and public international law and arbitration procedure.¹⁴ The strong credentials he built up in this field have proved useful in his current assignment as President of the Iran-United States Claims Tribunal.

In 2009, he put an end to his career as a full-time professor at the University of Leuven. Unsurprisingly, the one academic duty he kept after this early retirement was the course on arbitration he has taught for many years. Since then, he has continued his work in investment disputes, alongside his chairmanship the Iran-United States Claims Tribunal.¹⁵

In pursuing this remarkable path, Hans van Houtte has inspired many. It is fair to assume that he will continue to show the same drive and excellence in the years to come.

The editors
Patrick Wautelet
Thalia Kruger
Govert Coppens

¹⁴ eg 'Evidence before the Commission for Real Property Claims in Bosnia and Herzegovina' (1999) 1 *Intl L Forum* 225–27; 'Mass Property Claims Resolution in a Post-War Society – The Commission for Real Property Claims in Bosnia and Herzegovina (CRPC)' (1999) 48 *Intl Comp LQ* 625–38; 'The Eritrea-Ethiopia Claims Commissions and International Humanitarian Law' in S Bariatti and G Venturini (eds), *Liber Fausto Pocar – Individual Rights and International Justice* (Milano, Giuffrè, 2009) 383–98. See also *Post-War Restoration of Property Rights under International Law*, 2 vols (Cambridge, Cambridge University Press, 2008, with Hans Das, Bart Delmartino and Iasson Yi).

¹⁵ Most notably as chairman of the following ICSID panels: *CSOB v Slovak Republic* (ICSID Case No 97/4); *Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12); *Mobil Investments Canada Inc and Murphy Oil Corporation v Canada* (ICSID Case No ARB(AF)/07/4); *Nova Scotia Power Incorporated v Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/11/1).

Luke, the Lucky Teaching and Research Assistant

This is the story of Luke, the University of Leuven's Kaleidoscope Express. Luke is the lucky assistant, sometimes to a magician, sometimes to an overburdened writer, sometimes to a fond teacher. Luke is a fictitious figure, representing all of us. All these kaleidoscope experiences could never be lived by one person, but for the purposes of our story, they are.

Hans van Houtte has taught Luke many things and Luke has become wiser, at times more thoughtful and at times more practical.

In the early years, Hans took Luke along to Washington for the Jessup Moot Court Competition. There he showed Luke how to get rid of those stubborn wrinkles in a jet-lagged shirt: of course, one hangs the shirt in an overheated, steamy bathroom in the hotel. Whether such hotel bathrooms are readily available at all times and in all places remains a problem Luke has to this day not solved.

But the results of the competition were great, thanks to hard work and thorough mentoring.

Many years later, Luke and a few colleagues painted the secretary's office, by way of birthday present for the irreplaceable Viviane. Seeing the result, Hans showed Luke how painting a room is the perfect analogy for writing a PhD: start on one side of the room and go about the task in a systematic way. On many occasions, when reviewing and commenting on texts Luke wrote for publication, Hans turned from a brilliant law professor to a master communicator, showing Luke how the message he was trying to convey was only as convincing as the packaging he designed. A good lesson learned: a good text is only worth the credit the reader is willing to pay to it. Luke has since then tried never to forget that texts should be written to be read, not just to be published.

Training with Hans had a number of specific advantages for Luke. For one, it was probably the best way to avoid a multiple personality disorder, or at least pretend you are immune to it. Seeing the professor/UN missionary/arbitrator/counsel successfully juggle a constant stream of parallel assignments and manage various agendas, deadlines and assistants made a lasting impression on Luke. It incited every participant in the scheme to be very efficient in organising his or her contribution and get creative in obtaining some face or voice time with Hans. Before the days of the Internet and tracking devices, Luke and his colleagues were able to develop an intelligent network across Hans' various 'hot spots' to signal where he would pop up next and arrange for faxes to be handed to him or calls to be set up. It also forced Luke to get his world geography straight, stick pins in a world map in locations he had never heard of and memorise impressive numbers of country codes for international calls and faxes.

Another constant ambition was to stay fit, not just mentally, but also physically. In the early years, Luke (female this time) regularly followed aerobics classes with instructor Viviane and Hans was a keen participant. Even during the most frantic week of ICC arbitration hearings (this was in Cyprus), Hans insisted on two daily jogs. Being an enthusiastic jogger himself, Luke happily went along. The real trick obviously was not just to shape up, but to get seen by the arbitrators out on their morning walk or, even better, by opposing counsel having their breakfast on the terrace of his lavish hotel suite. When they teasingly questioned ‘How impressive, two jogs a day?’, Hans confidently flashed back: ‘The easier the case, the more jogs!’ So Luke came to understand the psychological warfare in arbitration.

When Luke started off his career as a young attorney, he realised the importance of learning the *métier*. And learning the *métier* has got nothing to do with knowing the law in the books. It’s about the tricks of the trade, getting to know your way in and around the court and how to deal with clients and opponents, sniffing out a case and picking up the scent of the winning strategy. You typically acquire and hone these skills by watching others do it, by getting on-the-job training. This requires a skilled mentor, a coach. For a young attorney wanting to find his way around in the world of international arbitration, there is hardly a better mentor to be found than Hans van Houtte, Luke said.

Luke has learned to first listen and make an accurate assessment of the situation, then mediate or, if necessary, arbitrate. Luke has learned that law is a tool to solve real-life problems; it is not a philosophy in itself. Luke realises that the skills he acquired during those early years are applicable far beyond the legal field. Luke listens more, asks more questions and places himself in the shoes of the client or customer to consider different viewpoints.

Now, settled in his own career, Luke thanks Hans for the mentor he was, for his trust in Luke’s capabilities and for the patience he had when training him. Luke tries to portray Hans’ diligence in managing his own team. Today Luke lives in a world where careers have been taken over by the Internet and the challenges of the new technologies. However, the skills Luke acquired remain useful. Luke still sometimes writes the first version on paper, in order to rewrite it, then burn it and start all over again – this time, we must admit, on computer.

For all of this Luke would like to thank Professor van Houtte.

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