

The International Comparative Legal Guide to:

International Arbitration 2009

A practical insight to cross-border International Arbitration work



Published by Global Legal Group with contributions from:

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Belgium?

Article 1677 of the Judicial Code (hereinafter the ‘Code’) requires an arbitration agreement to be contained in a written document, signed by the parties or in other documents binding on them and showing their intention to refer their dispute to arbitration. The latter need not necessarily be signed by the parties. An exchange of letters, fax messages or general trade conditions is sufficient, provided the intent of the parties to resort to arbitration is clear.

The arbitration agreement should furthermore meet the general requirements of the applicable contract law, e.g. concerning a party’s consent and capacity. Since 1998, public authorities are also authorised to conclude an arbitration agreement but only if it relates to a dispute concerning the conclusion or performance of a contract, and subject to the same conditions as applied to the conclusion of such contract.

Article 1678 of the Code provides that an arbitration agreement is invalid if it grants one of the parties a privileged position with regard to the appointment of the arbitrator(s).

1.2 Are there any special requirements or formalities required if an individual person is a party to a commercial transaction which includes an arbitration agreement?

There are no specific requirements for arbitration agreements to which an individual person is a party. However, caution is in order when the individual person is a consumer, as the use of arbitration in consumer matters is severely restricted.

1.3 What other elements ought to be incorporated in an arbitration agreement?

Strictly speaking, no elements other than the parties’ will to refer to arbitration, are required in order for the arbitration agreement to be valid and enforceable. In fact, the Code contains default rules for the determination of the number of arbitrators, of the procedural rules and of the place of arbitration, as well as for the appointment of the arbitrators. In practice, however, it is advisable to include in the arbitration agreement the number of arbitrators, the place of arbitration, the applicable procedural rules and the language of the proceedings. A clear reference to the rules of an arbitration institution is also advisable when parties wish the arbitration proceedings to be conducted under these rules.

1.4 What has been the approach of the national courts to the enforcement of arbitration agreements?

Generally speaking, Belgian courts have adopted a neutral approach towards arbitration agreements: they have neither overtly favoured arbitration over other dispute resolution methods, nor shown a bias against arbitration. However, several Belgian courts have been jealously confirming their statutory jurisdiction for disputes relating to the unilateral termination of distribution agreements, considering themselves the guardians of the distributor’s right to termination indemnities in accordance with Belgian statutory law (see answer to question 3.1).

1.5 What has been the approach of the national courts to the enforcement of ADR agreements?

Provided they are valid, Belgian courts enforce ADR agreements and decline jurisdiction when so requested by one of the parties.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Belgium?

General rules on arbitration can be found in the Articles 1676 to 1723 of the Code, last amended in 1998. These rules incorporated in Belgian law the Model Law annexed to the European Convention on Arbitration signed in Strasbourg on 20 January 1966. Specific statutes exclude or limit the arbitrability of certain types of contracts, such as insurance contracts and employment contracts.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

No distinction is made between domestic and international arbitration, save that in the latter case, courts will apply the relevant international conventions ratified by Belgium. If none of the parties is a Belgian citizen, resident or corporation with its registered office or branch office in Belgium, Article 1717-4 of the Code allows the parties to exclude the right to apply for the setting-aside of the arbitral award.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

Although the UNCITRAL Model Law has not been fully incorporated in Belgian law, several provisions of the Model Law have inspired the most recent revision of the Code in 1998 (e.g. Article 20 regarding the seat of the arbitration and Article 33 regarding the correction and interpretation of arbitral awards). Significant differences remain between the Model Law and the provisions of the Code dealing with arbitration. Among others, the grounds available to set aside an award differ clearly in the two systems, with the Belgian rules being more elaborate in this respect than the Model Law. CEPANI, the major Belgian arbitration institution, is currently examining a possible revision of the Code's chapter on arbitration.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Belgium?

Some of the provisions of the Code dealing with arbitration are mandatory and their violation would allow a national court to set aside the award. These rules are enumerated in Article 1704 of the Code (see question 10.1). However if none of the parties is either a Belgian citizen or resident, or has its head office or a branch office in Belgium, parties are allowed to exclude the right to apply for setting-aside of the award. Regarding the arbitral procedure, the parties are free to determine the procedural rules which will apply to the arbitration, subject to some limits set forth in Article 1694 of the Code, which guarantees that the due process principles are respected (see question 6.1).

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Belgium? What is the general approach used in determining whether or not a dispute is "arbitrable"?

According to Article 1676-1 of the Code, any dispute which can be the subject of a settlement, may be referred to arbitration. Thus, disputes relating to a person's status, such as divorce proceedings or the civil status of a person, tax disputes or criminal matters are excluded from arbitration. Arbitration clauses for matters belonging to the jurisdiction of the labour courts are null if concluded before the dispute arises (Article 1678-2 of the Code), except for employment contracts of high level or management employees (Article 69 of the Act on Employment contracts of 3rd July 1978). In some cases, it is necessary to distinguish between different aspects of the same subject matter: even if a criminal dispute cannot be referred to arbitration, an arbitral tribunal may well rule upon the civil claim for damages resulting from a criminal offence.

The law applicable to the merits of the case determines whether a dispute may be referred to arbitration. However, Belgian courts have in some cases also applied Belgian law in order to assess whether a dispute is arbitrable, no matter what law governs the contract. This is the case in disputes relating to the termination of an exclusive distributor operating in whole or part of the Belgian territory: courts have often decided that if the distribution agreement is governed by foreign law and provides for arbitration, such a dispute may not be referred to arbitration. The issue is not yet completely settled, though.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Article 1697-1 of the Code confirms the principle of *Kompetenz-Kompetenz* by empowering the arbitral tribunal to rule on its own jurisdiction. The same provision further provides that a finding that the contract is null and void does not automatically entail the nullity of the arbitration agreement that it contains. In order to prevent dilatory challenges, a decision by the arbitral tribunal on its own jurisdiction may only be challenged together with the award on the merits (Article 1697-3 of the Code).

3.3 What is the approach of the national courts in Belgium towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Courts do not decline jurisdiction and refer the parties to arbitration *ex officio*, but if a party objects to the court's jurisdiction on the basis of a valid arbitration agreement, the court is obliged, under Article 1679 of the Code to decline jurisdiction and refer the parties to arbitration. Courts will verify on that occasion whether the arbitration agreement is valid or has ceased to exist. No cases are known yet where a party was condemned to pay damages for breaching a valid arbitration agreement by having the case brought before a state court.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

Courts may address the issue of the jurisdiction provided the defendant objects against the court's jurisdiction *in limine litis*. In that case, courts will examine whether the arbitration agreement is valid and enforceable before referring parties to arbitration. The review will not so much focus on the jurisdiction of the arbitral tribunal, but will rather focus on the existence and validity of the arbitration agreement. Courts may also review the jurisdiction of the arbitral tribunal when dealing with a request to set aside or enforce an award.

3.5 Under what, if any, circumstances does the national law of Belgium allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

In principle an arbitration agreement is not binding upon third parties, which can therefore not be forced to participate in arbitration proceedings. However, parties who did not agree to the original arbitration agreement may nevertheless be held bound by the agreement following assignment of the original contract, a take-over of the business of the original party or the effect of a third party stipulation. Belgian courts have not yet accepted that a company can be bound by an arbitration agreement entered into by another company of the same corporate group.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Belgium and what is the typical length of such periods? Do the national courts of Belgium consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The rules on limitation periods for the commencement of arbitrations are the same as the rules on limitation periods for the commencement

of any claim before the Belgian courts. The typical length is ten years for a claim based on a contract and five years for a claim in tort (starting from the appearance of the damage, with a maximum length of twenty years starting from the date the tort was committed) (Article 2262 bis of the Civil Code). There are several exceptions to these typical limitation periods. These rules are substantive, governed by the law applicable to the substance of the dispute.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

As from 17th December 2009, the law applicable to the merits of the dispute in contractual matters is determined in Belgium according to the rules laid down in the EC Regulation 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligations (Rome I). Article 3.1 of the Regulation provides that a contract is governed by the law chosen by the parties. If the parties have not determined the applicable law, the law governing the contract is determined according to the rules of Article 4 of the Regulation.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Specific Belgian mandatory laws aiming at the protection of public policy (such as Competition Law, Tax Law etc.) or protecting the weaker contract party (such as employees, consumers or exclusive distributors) prevail over the substantive law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Arbitration agreements are excluded from the scope of the EC Regulation 593/2008 on the law applicable to contractual obligations (Rome I). Belgian law recognises the autonomy of the parties in the choice of the law applicable to the arbitration agreement. Given the principle of the separability of the arbitration agreement, the law applicable to the arbitration agreement can be different from the law applicable to the merits of the case. In the absence of choice, the courts have held that the law chosen to govern the merits of the case also applies to the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

As long as neither party has any advantage over the other in the choice of arbitrators (Article 1678-1 of the Code), parties are free to determine the number of arbitrators and to select them. They can do so in the arbitration agreement or after a dispute has arisen. The parties are explicitly authorised to limit their own freedom of choice, e.g. by excluding in the arbitration agreement the choice of an arbitrator belonging to a certain group of persons. Once a party has appointed an arbitrator, it cannot withdraw the appointment. Article 1681-1 of the Code requires that, if the dispute is to be submitted to more than one arbitrator, it be referred to an odd number of arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Article 1682 of the Code provides that the parties may appoint the arbitrator(s) or request that a third party (such as an arbitral institution) makes that appointment. Where the parties have neither appointed the arbitrators nor agreed on the method of their appointment, each party shall appoint its own arbitrator.

If a party fails to appoint an arbitrator within the one month period prescribed by the Code, the other party may request the President of the Court of First Instance to make the appointment under Article 1684 of the Code.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The President of the Court of First Instance may be called to intervene in the selection of arbitrators in a number of cases: first of all, when a party fails to appoint an arbitrator within the period of one month prescribed by the Code (Article 1684 Code); second, when the arbitrators appointed by each party fail to reach an agreement on the President of the tribunal (Article 1685 of the Code) and finally, when an arbitrator dies or is unable to carry out his mission and parties cannot agree on a replacement (Article 1687 of the Code).

It must be noted that these decisions of the President of the Court of First Instance cannot be appealed or challenged in any way (Article 1686 of the Code).

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality?

Under Article 1690 of the Code, arbitrators may be challenged when circumstances arise which cause legitimate doubts regarding their impartiality or independence.

5.5 Are there rules or guidelines for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Belgium?

CEPANI has enacted a set of Rules of Good Conduct, which apply to any arbitrator appointed under the CEPANI Rules of Arbitration. Article 3 of these Rules of Good Conduct provides that the prospective arbitrator shall accept his appointment only if he is independent of the parties and of their counsel; there is also a duty to immediately inform the Secretariat of CEPANI if any event subsequently occurs that is likely to call into question this independence in his own mind or in the minds of the parties.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Belgium? If so, do those laws or rules apply to all arbitral proceedings sited in Belgium?

Arbitration proceedings should respect the fundamental principle of non-discrimination between the parties who must be granted the same possibility to assert their rights and put forth their arguments (Article 1694-1 of the Code). Beyond this basic principle, which cannot be waived by parties, it is up to the parties to determine the rules of the arbitral proceedings, including the seat of the arbitration (Article 1693 of the Code). Failing agreement between parties, the arbitral tribunal is entitled to determine the rules of procedure.

Article 1695 of the Code allows an arbitral tribunal to conduct proceedings by default if a party fails to appear or present its arguments.

These rules apply to all arbitration proceedings conducted in Belgium, as Belgian law does not distinguish between domestic and international proceedings.

6.2 In arbitration proceedings conducted in Belgium, are there any particular procedural steps that are required by law?

The Code leaves the widest freedom to parties to design their own procedural rules and find an agreement on the various procedural steps of the arbitration process. Parties may, for example, decide that the proceedings will be conducted on a document-only basis. The use of terms of reference is not mandatory under Belgian law, although it is required by the rules of CEPANI.

The only mandatory step is that the party requesting the arbitration must notify the other party of its intention. In the notification, this party should refer to the arbitration agreement, set out the object of the dispute and, when appropriate, appoint the arbitrator (Article 1683 of the Code).

6.3 Are there any rules that govern the conduct of an arbitration hearing?

Except for the fundamental principles of due process and non-discrimination, Belgian law does not impose specific rules for the conduct of arbitration hearings.

6.4 What powers and duties does the national law of Belgium impose upon arbitrators?

The power of arbitrators, although broadly comparable to that of court judges, is limited by the scope of the arbitration agreement and any specific duty imposed herein.

Arbitrators are vested with the power to issue interim measures, with the sole exception of attachment orders (Article 1696 of the Code).

Although the arbitral tribunal may call witnesses, it cannot force them to appear. When a witness fails to appear or refuses to testify, relief must be sought from the Court of First Instance, which has exclusive jurisdiction to compel a party to appear and testify. The arbitral tribunal may likewise not rule on the authenticity of documents.

In order to ensure that their award will be duly respected by parties, arbitrators may also order a party to pay a daily penalty fine ('*astreinte*' / '*dwangsom*') (Article 1709 bis of the Code).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Belgium and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Belgium?

The existing restrictions on appearance of foreign lawyers (less strict for EU lawyers) do not apply to arbitration proceedings, where the parties can be represented by any representative, who can be a lawyer from any other jurisdiction. The lawyers' monopoly to act before Belgian courts does not extend to arbitration proceedings.

6.6 To what extent are there laws or rules in Belgium providing for arbitrator immunity?

Arbitrators are not protected by the immunity granted to court

magistrates. They may be held contractually liable for any fault or negligence committed in their function. They may also be held liable in case of denial of justice. However, it is generally considered that there is an arbitrator immunity when the alleged negligence relates to the exercise of the strictly jurisdictional function. For other acts or omissions of a non-jurisdictional nature, the arbitrator may be liable. The common rules of contractual professional liability are then applicable.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Courts have jurisdiction under the relevant legal provisions to deal with incidental issues such as the appointment of an arbitrator when a party fails to proceed, the challenge of an arbitrator, the verification of the authenticity of documents, claims for interim and provisional measures or the calling and hearing of witnesses who do not appear voluntarily before the arbitral tribunal.

6.8 Are there any special considerations for conducting multiparty arbitrations in Belgium (including in the appointment of arbitrators)? Under what circumstances, if any, can multiple arbitrations (either arising under the same agreement or different agreements) be consolidated in one proceeding? Under what circumstances, if any, can third parties intervene in or join an arbitration proceeding?

No specific legal rules exist with regard to the conduct of multiparty arbitrations. However, extra attention should be given in multiparty arbitration to ensure that no party is discriminated and that each of them has a due process.

There are no specific legal rules on consolidation of multiple arbitration proceedings. Such consolidation may therefore only occur if all parties involved agree thereto.

Third parties may intervene in existing arbitration proceedings by submitting a request to the arbitral tribunal which informs the parties thereof (Article 1696 bis of the Code). A third party may also be called by one of the parties to intervene in the proceedings. Each intervention requires the conclusion of an arbitration agreement between the third party and the other parties. Moreover, the arbitral tribunal must consent unanimously to the intervention.

6.9 What is the approach of the national courts in Belgium towards *ex parte* procedures in the context of international arbitration?

Until now, courts in Belgium have not yet been confronted with *ex parte* arbitration procedures arising in the context of international arbitration.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Article 1696 of the Code specifically grants arbitrators the power to award preliminary or interim relief. This power is not otherwise limited, save for the fact that parties must resort to courts if an attachment order is required.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

As the law presently stands, the courts and the arbitral tribunal have parallel jurisdiction for summary proceedings in case of urgency. Hence a party may seek such relief from the courts notwithstanding the agreement to submit disputes to arbitration. Article 1679-2 of the Code specifically provides that a claim for conservatory or provisional measures that is brought before a court is not inconsistent with the arbitration agreement. Bringing such a request before a court will not be deemed to be a waiver of the arbitration agreement.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

In practice, courts have been found willing to assist the arbitration proceedings by granting the provisional or protective measures needed to protect the integrity of the arbitration proceedings. Courts have repeatedly stated that requests for such provisional relief do not imply a waiver of the arbitration agreement.

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Under Belgian law, courts may require a foreign plaintiff to put security for costs in order to cover the costs and damages that could follow on from the proceedings (Article 851 of the Code). However, this requirement is waived in a number of international treaties.

Although there is no express provision allowing an arbitral tribunal to order a party to put security for costs, this possibility exists provided it has not been excluded by parties. When assessing whether to order security for costs, the arbitral tribunal will examine whether the situation of the plaintiff justifies such order, without being bound by the criteria developed by courts.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Belgium?

According to Article 1696-2 of the Code, the arbitral tribunal has a discretionary authority to assess the admissibility and weight of the evidence submitted by the parties. Unless the parties agreed differently, the arbitral tribunal is not bound by the rules of evidence applicable in court proceedings.

The tribunal may order the hearing of witnesses, appoint its own expert, order the personal presence of the parties or the production of documents. Especially when appointing an expert, the tribunal shall hear the parties before proceeding.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

The arbitral tribunal may order a party to disclose documents. However, this power is limited by the same strict rules applicable in court proceedings. This means that disclosure orders are only possible if there is a serious reason to believe that the documents are

held by a party and contain evidence concerning a fact which is both material and relevant for the outcome of the proceedings. Arbitrators should also take into account possible legal privileges which may restrict the production of certain documents.

The arbitral tribunal has no jurisdiction to order disclosure of documents or any other type of discovery by third parties. The parties should seek relief from the courts if it appears that such disclosure is necessary to support their case.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

In principle, there is no need for court interventions in the process of disclosure, as arbitral tribunals are vested with the same powers as courts. However, arbitrators have no power over third parties. Hence, court intervention may be needed to compel a third party to produce documents or otherwise disclose information.

8.4 What is the general practice for disclosure / discovery in international arbitration proceedings?

Discovery does not exist under Belgian law and disclosure is often a tribunal-steered process.

In arbitration proceedings with seat in Belgium, reference is often made in the Terms of Reference to generally accepted rules such as the IBA Rules of Evidence. These rules will then mostly be used as mere guidelines for the (limited) disclosure process.

8.5 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Parties are free to agree on the rules applicable to the production of evidence and of oral witness testimony in particular. If parties provide that witnesses should be sworn in, Article 1696 of the Code allows the arbitral tribunal to administer the oath.

If the parties do not agree on specific issues for hearing witnesses, it is possible that in a domestic arbitration the tribunal would be guided by the rules on witness hearings applicable in state courts, where the judge, rather than the parties, puts questions to the witnesses and where the witnesses are sworn in by the judge.

Cross-examination of witnesses may be agreed upon by parties, who can determine freely how such examination should be carried out.

Belgian professional rules for lawyers prohibit the preparation of witnesses but are deemed not to apply in international arbitration when the opposing counsel is not subject to the same prohibition.

8.6 Under what circumstances does the law of Belgium treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Whether or not a specific document is subject to a legal privilege depends in the first place on the capacity of the party who is called upon to disclose the said document. Members of certain professions are bound by secrecy obligations (and documents held by them are often protected by privilege), the violation of which can lead to criminal sanctions. This applies to attorneys, physicians, pharmacists, midwives, accountants and other professions (Article 458 of the Belgian Criminal Code).

Their professional secrecy obligation may be waived in certain circumstances, e.g. when they are called to testify before a court of law. It is not clear whether these professions are similarly exonerated from their secrecy obligations when called to testify before arbitral tribunals.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

The first requirement is that the award must give reasons. This does not imply that the arbitrators should discuss all arguments put forward by the parties or appraise all evidence produced.

Article 1701 of the Code provides further that the arbitral award should be rendered in writing and signed by the arbitrators. Should one or more of the arbitrator(s) be unable to sign the award or refuse to do so, this should be mentioned in the award.

In addition, the award should mention the names and domiciles of the arbitrators and of the parties, the object of the dispute, the date on which it is rendered and the seat of the arbitration.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

According to Article 1703-2 of the Code, arbitral awards may only be appealed if the parties have expressly provided for such a possibility in the arbitration agreement. In practice, arbitral agreements rarely provide for such possibility. An appeal must be lodged before another arbitral tribunal, and is not admissible before a court. Unless the parties agreed otherwise, the appeal is to be lodged within one month following the notification of the award by bailiff to the other party.

Arbitral awards may be subject to setting aside proceedings before Belgian courts. An application to set aside an arbitral award may only be made in specific circumstances, which are enumerated in Article 1704 of the Code:

- (a) if the award is contrary to public policy;
- (b) if the dispute was not arbitrable;
- (c) if there was no valid arbitration agreement;
- (d) if the arbitral tribunal exceeded its jurisdiction or its powers;
- (e) if the arbitral tribunal omitted to rule upon one or more issues in dispute between parties, which cannot be separated from the issues in respect of which an award has been made;
- (f) if the arbitral tribunal was irregularly constituted;
- (g) if the arbitral tribunal has breached the principle of due process;
- (h) if the award has not been made in writing or has not been signed by the arbitrators;
- (i) if the award does not state the reasons for the decision reached by the arbitrators;
- (j) if the award contains conflicting provisions;
- (k) if the award was obtained by fraud;
- (l) if the award is based on evidence that has been declared false by a court decision; and
- (m) if after the award was made, a document or any other evidence has been discovered which would have had a decisive influence on the award and was withheld by one of the parties.

A party is estopped from relying on the grounds mentioned under c, d and f above if it has learned about their existence during the arbitration proceedings without raising them at that time before the arbitral tribunal.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

Parties are assumed to have excluded the possibility to appeal the arbitral award, unless they explicitly provided in the arbitration agreement the right to appeal.

On the other hand, parties may not exclude the possibility to set aside an award. Nor may they modify the grounds on which a request to set aside an award may be filed. However, once an award has been issued by the tribunal, they may agree to exclude the grounds for setting aside proceedings that do not relate to public policy.

However, if none of the parties is either a Belgian citizen or resident (when the parties are natural persons) or has its head office or a branch office in Belgium (when the parties are corporate bodies), Article 1717 § 4 of the Code allows the parties to exclude the right to apply for setting aside of the award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties may not extend the scope of review of arbitral awards by courts in the framework of setting aside proceedings. However, the parties may agree to allow an arbitral award to be appealed.

10.4 What is the procedure for appealing an arbitral award in Belgium?

Setting aside proceedings must be brought within 3 months after the award has been notified to parties. Such proceedings are brought before the Court of First Instance. The writ of summons must detail the grounds on which the plaintiff intends to rely. It is not possible to add new grounds during the course of the proceedings (Article 1706 of the Code). It is unlikely that such proceedings will be handled during the introductory hearing. Rather, the court will instruct the parties to lodge written briefs detailing their arguments before hearing the case. The court must examine on its own motion whether the award is contrary to public policy and whether the dispute was arbitrable.

11 Enforcement of an Award

11.1 Has Belgium signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Belgium has ratified the New York Convention, which entered into force in Belgium on 16th November 1975. Upon ratification, Belgium has declared that it will only apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State.

Enforcement of awards must be refused if the award or its enforcement is contrary to public policy or if the dispute was not arbitrable. If the award is foreign, its enforcement must also be

refused if one of the grounds for setting aside an award exists. The relevant provisions for enforcement of foreign awards can be found in the Articles 1719 to 1723 of the Code.

11.2 Has Belgium signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Belgium has entered into five bilateral conventions which can be used to obtain the enforcement of a foreign award: with France (1899); the Netherlands (1925); Germany (1958); Switzerland (1962); and Austria (1959). Furthermore, Belgium has also ratified the 1961 Geneva Convention.

11.3 What is the approach of the national courts in Belgium towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

By and large, courts adopt a hands off approach to requests for enforcement of foreign awards, strictly limiting themselves to a review of the grounds for refusal of enforcement without examining the award in detail. There is, however, little guidance from the Supreme Court on how these grounds for refusal should be construed.

An application to obtain the enforcement of a foreign award must be brought before the president of the Court of First Instance of the district in which the party against whom enforcement is sought, has its domicile. In principle, the request is examined *ex parte*, without the defendant being heard by the court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Belgium? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

As soon as the arbitral award has been notified to the parties and is no longer applicable, it enjoys, according to Article 1703 of the Code, a *res judicata* effect, provided the award is not contrary to public policy and the subject matter of the dispute was arbitrable.

12 Confidentiality

12.1 Are arbitral proceedings sited in Belgium confidential? What, if any, law governs confidentiality?

The law does not expressly impose a duty of confidentiality on the parties involved in arbitration proceedings. Parties and arbitrators will in practice frequently be bound by a duty of confidentiality as such a duty will be included in the terms of reference or the rules of the institution applicable to the proceedings. The CEPANI rules do not contain an explicit duty of confidentiality, but the rules of good conduct that arbitrators appointed under CEPANI rules are required to sign, do.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

If the parties agreed on confidentiality of the first arbitral proceedings, information disclosed to them may not be disclosed in subsequent proceedings. Such a contractually agreed confidentiality may, however, conflict with a duty of disclosure imposed by a tribunal, and certainly a court in later proceedings.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

If the parties wish confidentiality, they should explicitly require it in the arbitral agreement.

Information relating to arbitration proceedings will not be protected by confidentiality if parties call upon a state court to intervene during the proceedings, either to appoint an arbitrator, to order provisional relief or to enforce or set aside an award. Court proceedings are not confidential and information used during such proceedings will hence be available to the public.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Belgian law does not limit in any way the type of relief or remedies that an arbitral tribunal may award. It is therefore up to parties to agree upon such limitations. Absent such limitations, the arbitrators may take into account limitations imposed by the law of the country where the award must be enforced. It must be noted that courts in Belgium may be reluctant to enforce an award granting punitive or other multiple damages.

13.2 What, if any, interest is available, and how is the rate of interest determined?

No specific limitation is imposed by Belgian law on the type of interests that arbitrators may award, except for compound interests which, if Belgian law applies to them, are due only in specific circumstances and following compliance with certain formalities: compound interests may be awarded only if interests have accrued during at least one year and provided they are claimed in a formal request.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Parties may freely agree on what basis fees and costs can be recovered. This also includes attorneys' fees.

In general, arbitrators will award costs to the party whose claim has been granted. However, arbitrators retain a large freedom to limit the fee shifting rule.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

As such no tax is levied on arbitral awards. However, a registration tax will be levied if enforcement of the award is sought through legal proceedings. In that case, a registration tax (3% to be calculated on the total amount which a debtor is ordered to pay) is due, if the sum of money which the debtor is ordered to pay exceeds EUR 12,500. The debtor and the creditor are jointly liable for the payment of the registration tax, it being understood that the creditor's liability is limited to a maximum amount equal to half of the amount actually recovered from the debtor. Exemptions from such registration tax may be applicable under an international agreement in force in Belgium.

14 Investor State Arbitrations

14.1 Has Belgium signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

The Kingdom of Belgium has ratified the ICSID Convention on 27th August 1970. It came into force on 26th September 1970.

14.2 Is Belgium party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)?

Belgium has signed about 70 Bilateral Investment Treaties with countries in all continents. Most of these treaties provide that disputes between an investor and one of the Contracting States may be referred to arbitration either under the ICSID Convention or to an ad hoc arbitral tribunal established under the UNICTRAL Arbitration Rules. Belgium is also a party to the Energy Charter Treaty.

14.3 Does Belgium have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

The terms used in the dispute resolution clause inserted in BITs tend to vary. However, the majority of BITs provide that disputes shall be settled by ICSID arbitration according to the 1965 Washington Convention.

14.4 In practice, have disputes involving Belgium been resolved by means of ICSID arbitration and, if so, what has the approach of national courts in Belgium been to the enforcement of ICSID awards and how has the government of Belgium responded to any adverse awards?

Until now, no proceedings have been brought under the ICSID convention against the Kingdom of Belgium. It is worth noting, however, that several investors established in Belgium have brought proceedings against foreign states, such as Burundi (*Antoine Goetz and others v. Republic of Burundi*, case n° ARB/95/3).

In one instance, courts in Belgium have been asked to attach assets to secure enforcement of a future ICSID award. The request was denied on the ground that under Article 26 of the ICSID Convention, consent to ICSID arbitration precludes any other remedy (Court of First Instance of Antwerp, 27 September 1985, *Republic of Guinea v. Marine International Nominees Establishment*, ICSID Reports vol.4, at p.32)

14.5 What is the approach of the national courts in Belgium towards the defence of state immunity regarding jurisdiction and execution?

Although there is no statutory provision on immunity from jurisdiction and execution, courts have since long accepted that foreign sovereigns enjoy such immunities. However, immunity of jurisdiction is only granted when the dispute closely relates to an act or a decision of a sovereign acting in its capacity as a sovereign. In recent years, claims for immunity from jurisdiction by international organizations have been challenged on the ground of violation of Article 6 of the European Convention on Human Rights.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Belgium? Are certain disputes commonly being referred to arbitration?

The review of the Arbitration Act in 1998 has confirmed the parties' and arbitrators' freedom to develop arbitration as a flexible tool for dispute settlement which present day commercial relations require. Belgium appears to attract more international arbitrations recently and the share of English language arbitration is increasing steadily. It is still too early to know whether the 21st January 2005 Act on mediation will have any notable impact on arbitration practice in Belgium. The most renowned Belgian arbitration institution, CEPANI, reports an average duration for arbitration of 20 months. Finally, CEPANI has created a workgroup that is currently examining a possible revision of the arbitration chapter of the Belgian Judicial Code. A draft text should be available for public consultation shortly.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Belgium, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

For years, there has been uncertainty on the possibility to refer disputes relating to the unilateral termination of distribution agreements to arbitration. The Supreme Court held, in 2004 and again in 2006, that in principle, such disputes may not be referred to arbitration if there is reason to believe that the arbitral tribunal will not apply mandatory Belgian law, whatever the parties' choice of law. However, this issue is not yet finally settled.



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Vera Van Houtte concentrates on real estate and construction law as well as energy law. A major part of her activities consists of sitting as an arbitrator in international proceedings (ICC, LCIA, Uncitral, *ad hoc* etc.), involving disputes in these fields as well as in other fields (*i.a.* investment arbitration). She is a member of the board of the American Arbitration Association (AAA) and is also a vice-president of the ICC Court of Arbitration.

Vera Van Houtte is a regular speaker at conferences, both in Belgium and abroad. From 1995 to 2002, she was a lecturer on European public procurement and environmental law in the Post Graduate Legal Education Program ('Pallas') of the Law Faculty of Nijmegen in The Netherlands.

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Stibbe is a leading full-service law firm with 140 lawyers in its Brussels office, 28 of whom are partners.

Stibbe has well reputed arbitration practitioners, who advise on the appropriate arbitration clauses for international commercial agreements in terms of:

- place of arbitration;
- language of the proceedings;
- applicable law;
- number of arbitrators; and
- administered arbitration or *ad hoc*.

Our lawyers regularly act as counsel in both national and international arbitration proceedings concerning all types of disputes concerning *i.a.* construction, distribution, IT, energy, sales, share purchase agreements, investments.

Some of our arbitration practitioners sit regularly as arbitrators appointed by either the parties or various arbitration institutions (ICC, Cepani, LCIA). Acting as an arbitrator provides insight in the decision making process of arbitral tribunals and familiarity with other arbitrators which in turn enhances our role as counsel in arbitration.