

# ARBITRATION IN BELGIUM

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## 1. Historical background and legislative framework

- 1.1.1 The Belgian legislation on arbitration dates from 1972. It is contained in Articles 1676–1723 of the *Code Judiciaire/Gerechtelijk Wetboek* (**Judicial Code**). It is based on the model law annexed to the European Convention providing a Uniform Law on Arbitration (Strasbourg Convention) signed by Belgium on 20 January 1966.
- 1.1.2 The Belgian legislation on arbitration has been amended twice:
- (i) by the Law of 27 March 1985 concerning the annulment of awards, which provided that Belgian courts could hear applications to set aside an award only if one of the parties to the dispute was either: an individual with Belgian nationality or having a residence in Belgium; or a legal entity incorporated in Belgium or having a branch or place of business there; and
  - (ii) by the Law of 19 May 1998, which replaced the amendments introduced by the Law of 27 March 1985 in relation to proceedings for the setting aside of an award with a system of opting-out. It also introduced a number of amendments to the existing legislation, several of which were derived from the Model Law (1985),<sup>1</sup> as well as from Dutch, French and Swiss arbitration laws, in order to make the legislation more flexible, to improve its efficiency and, generally speaking, to adapt it in line with the evolution of international arbitration.
- 1.1.3 The Belgian legislation on arbitration also reflects the provisions of certain international conventions to which Belgium is party. For example, the New York Convention<sup>2</sup> and the 1927 Geneva Convention were implemented in Belgian legislation. Belgium has also signed bilateral agreements on the recognition and enforcement of awards with France, the Netherlands, Germany, Switzerland and Austria.
- 1.1.4 Arbitration in Belgium may be conducted on an ad hoc basis or under the auspices of arbitral institutions. The main Belgian arbitral institution is the Belgian Centre for Arbitration and Mediation (**CEPANI**).<sup>3</sup>

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<sup>1</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>2</sup> *Ibid*, appendix 1.1.

<sup>3</sup> See the CEPANI website [[www.cepani.be](http://www.cepani.be)] (accessed 15 December 2011).

## 2. Scope of application and general provisions of the judicial code

### 2.1 Scope of application

2.1.1 The Belgian legislation on arbitration does not contain any provisions concerning its scope of application. In accordance with general principles of Belgian law, Belgium procedural rules normally apply to all arbitral proceedings taking place in Belgium, unless the parties have expressly or impliedly excluded the application of all or part of such rules (e.g. by making reference to institutional arbitration rules). However, if the arbitration has its seat in Belgium, the exclusion of Belgian procedural rules will only be valid to the extent that the excluded provisions are not of mandatory provisions.

### 2.2 General rules

2.2.1 The Belgian legislation on arbitration is founded on the following principles:

- equality of the parties and due process;
- party autonomy;
- non-intervention by local courts;
- the parties' freedom to determine the arbitral procedure;
- confidentiality; and
- flexibility.

## 3. The arbitration agreement

### 3.1 Formal requirements

3.1.1 In accordance with Article 1677 of the Judicial Code (and in addition to the necessary conditions for any contracts, such as valid consent of the parties and the power and capacity to contract), an arbitration agreement shall be either in writing and signed by the parties or contained in other documents which are binding on the parties and evidence their intention to refer their disputes to arbitration. Article 1677 of the Judicial Code has been construed by the courts, however, as a rule *ad probationem* and non *ad validatem*, (i.e. it is a rule of evidence and the parties' failure to fulfil these formal requirements does not affect the validity of the arbitration agreement). In other words, subject to the more stringent requirements of Article II(2) of the New York Convention<sup>4</sup> (where applicable), an oral arbitration agreement is perfectly valid under Belgian law, although its existence may be difficult to prove if one of the parties denies having entered into the agreement.

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<sup>4</sup> See CMS Guide to Arbitration, vol II, appendix 1.1.

### 3.2 Other requirements

- 3.2.1 An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator(s).<sup>5</sup>

### 3.3 Arbitrability

- 3.3.1 Like most legal systems, Belgian law contains provisions which restrict, to a limited extent, the possibility for the parties to arbitrate certain types of disputes (objective arbitrability) or for the State or public legal entities to enter into an arbitration agreement (subjective arbitrability).

#### *Objective arbitrability*

- 3.3.2 The arbitrability of commercial disputes is widely recognised in Belgium. Any dispute which has arisen or may arise out of a legal relationship, which is capable of settlement by arbitration, may be the subject of an arbitration agreement.<sup>6</sup>
- 3.3.3 Subject to certain restrictions and limitations, which are generally recognised in most European countries, reserving exclusive competence over certain issues to the ECJ or national courts or authorities, even antitrust, intellectual property and bankruptcy disputes are arbitrable.
- 3.3.4 Specific legislation restricts the arbitrability of disputes in certain areas of law, such as:
- labour law;<sup>7</sup>
  - insurance law;<sup>8</sup> or
  - patents law (i.e. disputes relating to mandatory licences are excluded from arbitration).<sup>9</sup>
- 3.3.5 The legal position is not, however, always entirely clear. For example, there is some debate as to the arbitrability of disputes arising from: the termination of exclusive distribution agreements of indefinite duration.<sup>10</sup> Similarly, there is some debate in relation to the Law of 13 April 1995 on commercial agents, although in this case the overwhelming majority of legal commentators seem to consider that such disputes are arbitrable.

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<sup>5</sup> Judicial Code, art 1678(1).

<sup>6</sup> *Ibid*, art 1676(1).

<sup>7</sup> See Law of 3 July 1976 on employment contracts, art 13; and Judicial Code, art 1678.2 (pursuant to which an agreement to arbitrate labour disputes falling within the competence of the Labour Courts, as determined by Articles 578–583 of the Judicial Code, may only be concluded after the dispute has arisen).

<sup>8</sup> See Law of 25 June 1992 on insurance contracts, art 36.

<sup>9</sup> See Law of 28 March 1984.

<sup>10</sup> See Law of 27 July 1961.

### *Subjective arbitrability*

- 3.3.6 According to Article 1676.2 of the Judicial Code: “Anyone who has the capacity or power to contract may conclude an arbitration agreement”.
- 3.3.7 Hence, the right to conclude an arbitration agreement is bound to the capacity and power to contract. However, some exceptions may be stipulated by law. For example, Belgian public legal entities may not, in principle, conclude arbitration agreements. However, the Judicial Code stipulates two exceptions, as follows:
- (i) public legal entities are authorised to conclude an arbitration agreement, provided that it relates to the settlement of disputes arising out of the formation or the performance of a contract. The validity of an arbitration agreement is determined in accordance with the same conditions as the underlying agreement, whose formation or performance forms the subject matter of the arbitration agreement; and
  - (ii) public legal entities may be authorised to conclude an arbitration agreement in respect of any matter, provided that the authorisation is derived from law or a Royal Decree deliberated by the Council of Ministers.<sup>11</sup>

## **3.4 Separability**

- 3.4.1 According to Belgian law, an arbitration clause is entirely autonomous from the underlying contract. Therefore, unless the arbitration clause itself is avoided, it remains valid even if the underlying contract is null, void or has been terminated. Article 1697.2 of the Judicial Code provides that “[a] ruling that a contract is invalid shall not *ipso jure* entail the nullity of the arbitration agreement contained in it.”<sup>12</sup> In other words, the validity of the arbitration clause has to be determined separately from the validity of the main agreement.

## **3.5 Legal consequences of a binding arbitration agreement**

- 3.5.1 The arbitration agreement obliges the parties to comply with the agreement and prevents the courts from hearing disputes submitted to arbitration, provided that objection is raised in *limine litis* (i.e. in the first written submissions) by one of the involved parties.

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<sup>11</sup> See Judicial Code, art 1676.2 (new).

<sup>12</sup> (Emphasis added).



## 4. Composition of the arbitral tribunal

### 4.1 Constitution of the arbitral tribunal

- 4.1.1 The arbitral tribunal must be composed of a sole arbitrator or another uneven number of arbitrators.<sup>13</sup>
- 4.1.2 The arbitrator or arbitrators are appointed by the parties themselves or by an arbitral institution as provided by the parties in their arbitration agreement.<sup>14</sup>

### 4.2 Procedure for challenging and substituting arbitrators

- 4.2.1 Arbitrators may be challenged when circumstances exist that give rise to justifiable doubts as to their impartiality or independence.<sup>15</sup> However, an arbitrator appointed by a party may be challenged by the appointing party only for reasons the appointing party discovered after making such appointment.<sup>16</sup> When institutional arbitration rules apply, the challenge is normally governed by the procedures contained in these arbitration rules. In an ad hoc arbitration, Article 1691.2 of the Judicial Code provides for notification of the challenge to the arbitrator concerned. If the arbitrator does not resign, the issue must be brought before the Court of First Instance (*Tribunal de Première Instance*) by the party bringing the challenge. The decision of the court may be appealed.
- 4.2.2 If the arbitrator resigns, or if the challenge is allowed by the court, the arbitrator shall be replaced according to the same rules as those pursuant to which the arbitrator was appointed. However, if the arbitrator is named in the arbitration agreement, the arbitration agreement shall be terminated *ipso jure*, unless the parties have provided otherwise.<sup>17</sup>

### 4.3 Arbitration fees and expenses

- 4.3.1 There is no specific provision in Belgian arbitration law which deals with the issue of arbitrators' fees and expenses. It is, therefore, up to the parties to determine in their arbitration agreement how the fees and expenses will be advanced by and finally allocated between the parties. If the arbitration agreement does not address this issue, it is generally accepted that the arbitrators have the power to determine the amount of their fees<sup>18</sup> as well as the party or parties who will

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<sup>13</sup> Judicial Code, art 1681.

<sup>14</sup> *Ibid*, art 1682.

<sup>15</sup> *Ibid*, art 1690.1.

<sup>16</sup> *Ibid*, art 1690.2.

<sup>17</sup> *Ibid*, art 1691.3.

<sup>18</sup> According to custom, the arbitrators have to be moderate and rational when fixing the amount of their fees. This power is subject to court review.

finally bear them. In practice, the general rule is that “costs follow the event” (i.e. the losing party pays).

- 4.3.2 In arbitrations conducted under the rules of an arbitral institution, the matter will generally be dealt with by the rules of the relevant arbitral institution.

#### **4.4 Arbitrator immunity**

- 4.4.1 There is no general immunity protecting arbitrators from claims by the parties. Arbitrators may be liable in cases of wrongful performance of their duties (e.g. non-compliance with certain deadlines, refusal to file the original copy of the award with the Court of First Instance, failure to decide certain issues and non-observance of certain mandatory provisions relating to the award). As in any other case of wrongful performance, the claimant will have to prove the existence of a default committed by the arbitrator, the existence of damage and the causal link between the default and the damage. The arbitrator’s liability is not limited but it is worth noting that a wrong decision or a mistake in law cannot engage the liability of an arbitrator, except in cases of fraud or gross negligence equivalent to fraud.

## **5. Jurisdiction of the arbitral tribunal**

### **5.1 Competence to rule on jurisdiction**

- 5.1.1 Pursuant to Article 1697.1 of the Judicial Code, “[t]he arbitral tribunal may rule on its own jurisdiction and may, for this purpose, examine the validity of the arbitration agreement”.
- 5.1.2 Article 1697.3 further provides that “[t]he decision by which the arbitral tribunal declares that it has jurisdiction may only be challenged ... together with the final award and by the same procedure ...”. Arbitrators, therefore, have competence to rule on their own jurisdiction (principle of *competence-competence*). However, such a ruling is subject to judicial control.<sup>19</sup>

### **5.2 Power to order interim measures**

- 5.2.1 Upon request of a party, arbitrators have the power to order interim or protective measures, with the exception of attachment orders (which remain within the exclusive jurisdiction of the courts).<sup>20</sup> These orders are enforceable under the same conditions as the final award.<sup>21</sup>

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<sup>19</sup> See paragraph 8.3.1 below.

<sup>20</sup> Judicial Code (inserted into the Judicial Code by the Law of 19 May 1998), art 1696.1.

<sup>21</sup> See section 10 below.

5.2.2 However, this provision does not bar the parties from introducing an action for interim or protective measures before the State courts, provided that the parties did not waive this right.<sup>22</sup> Where parties have waived this right they will, therefore, only be able to apply to the arbitral tribunal for any interim protective measures they may require. This could potentially result in delay of enforcement of such measures, if a party were to choose not to voluntarily comply with the arbitral tribunal's interim measure. In such cases, the party seeking enforcement would have to apply for the *exequatur* (a formal authorisation of enforcement) of the order which can take time.

## 6. Conduct of proceedings

### 6.1 Commencing an arbitration

6.1.1 A party that wishes to initiate arbitral proceedings must give notice to the other party.<sup>23</sup> The notification, which will take the form of a request (*requête*), must refer to the arbitration agreement and specify the subject matter of the dispute.

6.1.2 Where more than one arbitrator has to be appointed by the parties, the notification must also specify the name(s) of the arbitrator(s) to be appointed by the claimant. It must also contain an invitation for the respondent to nominate the arbitrator(s) he or she intends to appoint.<sup>24</sup> If the arbitral tribunal is to be appointed by a third party (e.g. an arbitral institution, the court or another appointing body) that third party should also be notified and invited to make the required appointment(s).

6.1.3 The appointment of an arbitrator may not be withdrawn once notification has been given.<sup>25</sup> The notification must be in writing and sent by registered post.<sup>26</sup> It has the effect of setting the arbitral proceedings in motion.

### 6.2 General procedural principles and the seat of arbitration

6.2.1 Article 1693.1 of the Judicial Code provides that “[w]ithout prejudice to the provisions of Article 1694, the parties may determine the rules of the arbitral procedure and the place of arbitration”. The parties and the arbitral tribunal are free to organise the arbitral procedure as they see fit, as long as the procedure

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<sup>22</sup> Judicial Code, art 1679.2.

<sup>23</sup> *Ibid*, art 1683.1.

<sup>24</sup> *Ibid*, art 1683.2.

<sup>25</sup> *Ibid*, art 1683.4.

<sup>26</sup> *Ibid*, art 32.

respects the principle of equality between the parties, the right of defence and the right to a fair hearing.

- 6.2.2 In an institutional arbitration, the procedure will be determined by the arbitration rules of the relevant institution such as CEPANI.
- 6.2.3 The terms of reference agreed upon by the parties will often provide that, for any matters which are not covered by the chosen institutional rules, the procedure will be determined by the arbitral tribunal after consultation with the parties. In this case, the procedural rules at the seat of the arbitration will only be of subsidiary relevance and will apply only to the extent that they are mandatory.
- 6.2.4 In ad hoc arbitral proceedings, the parties may refer to the rules of arbitration procedure contained in the sixth part of the Judicial Code, the UNCITRAL Rules (1976)<sup>27</sup> or UNCITRAL Rules (2010).<sup>28</sup>
- 6.2.5 Failing such an agreement between the parties within the time limits fixed by the arbitral tribunal, the arbitral procedure and the seat of arbitration are determined by the arbitrators. If an award is rendered following arbitral proceedings in which the seat of arbitration was never formally determined by the parties or the arbitrators, the place stated in the award shall be deemed to be the seat of arbitration.<sup>29</sup>
- 6.2.6 Unless the parties have agreed otherwise, the arbitral tribunal may, after consultation with the parties, hold hearings and meetings at any other place which seems appropriate.<sup>30</sup>
- 6.2.7 The chair of the arbitral tribunal presides at the hearings and conducts the proceedings.<sup>31</sup>
- 6.2.8 The arbitral tribunal shall "give each party an opportunity to substantiate its claims and to present its case."<sup>32</sup> Each party may appear in person or be represented by a lawyer or any person of his choice, approved by the arbitral tribunal.<sup>33</sup>

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<sup>27</sup> See CMS Guide to Arbitration, vol II, appendix 3.1.

<sup>28</sup> *Ibid*, appendix 3.2.

<sup>29</sup> Judicial Code, art 1693.1.

<sup>30</sup> *Ibid*, art 1693.2.

<sup>31</sup> *Ibid*, art 1693.3.

<sup>32</sup> *Ibid*, art 1694.1.

<sup>33</sup> *Ibid*, art 1694.4.

### 6.3 Language of the arbitration

6.3.1 The language of the arbitration is determined by the parties. In the absence of agreement between the parties, the arbitral tribunal decides the applicable language, taking into consideration all the circumstances of the case (e.g. language of the file, knowledge of languages by the parties, etc). It is quite common in Belgium to have arbitral proceedings conducted in more than one language (e.g. French and English).

### 6.4 Multi-party issues

6.4.1 Any affected third party may, upon written request addressed to the arbitral tribunal, intervene in the arbitral proceedings. The arbitral tribunal shall communicate the request to the parties.<sup>34</sup> A party may also serve a notice of intervention on a third party.<sup>35</sup>

6.4.2 In order to be admitted, the intervention or joinder of a third party requires an arbitration agreement between the third party and the original parties to the dispute. Furthermore, it is subject to the unanimous consent of the arbitral tribunal.

6.4.3 As far as multi-party arbitrations and consolidation of proceedings are concerned, the CEPANI Arbitration Rules provide as follows:

When several contracts containing the CEPANI arbitration clause give rise to disputes that are closely related or indivisible, the Appointments Committee or the Chairman of CEPANI shall be empowered to order the consolidation of the arbitration proceedings. This decision shall be taken, either at the request of the arbitrator or arbitrators, or, prior to any other measure, at the request of the parties or of the earliest petitioner, or even on CEPANI's own motion.

If the request is granted, the Appointments Committee or the Chairman of CEPANI shall appoint the arbitrator or arbitrators who shall decide the consolidated disputes. If necessary, the said Committee or said Chairman shall increase the number of arbitrators to a maximum of five.

The Appointments Committee or the Chairman of CEPANI shall make their decision after having summoned the parties and, if need be, the arbitrators already appointed.

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<sup>34</sup> *Ibid*, art 1696 bis.1.

<sup>35</sup> *Ibid*, art 1696 bis.2.

They may not order the consolidation of disputes in which an interim award, or an award on admissibility, or an award on the merits of the claim has already been rendered.<sup>36</sup>

## **6.5 Oral hearings and written proceedings**

6.5.1 The arbitral tribunal shall give each party an opportunity to substantiate its claims and to present its case.<sup>37</sup> It will usually render its award after holding an oral hearing. However, the proceedings may be in writing where the parties have so agreed or if they have waived the requirement for an oral hearing.

## **6.6 Default by one of the parties**

6.6.1 Default proceedings are dealt with in Article 1695 of the Judicial Code, which provides that if, without legitimate cause, a party properly summoned does not appear, or does not present its case at the date determined for the hearing, the arbitral tribunal may proceed and render an award, unless the other party requests a postponement. The arbitral tribunal has discretion to decide whether to grant a postponement. In exercising its discretion, the arbitral tribunal has to take account of all of the circumstances of the proceedings.

## **6.7 Taking of evidence**

6.7.1 While it is not common to call witnesses in court proceedings in Belgium, this is becoming increasingly common in arbitral proceedings, especially if the parties have elected to adopt common law style proceedings.

6.7.2 The new Article 1696.2 of the Judicial Code provides that “[u]nless the parties have agreed otherwise, the arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight”, allowing maximum flexibility in the organisation of the arbitral procedure.

## **6.8 Procedural powers of the arbitral tribunal**

6.8.1 The arbitral tribunal is free to determine the admissibility of evidence and its evidentiary weight, unless the parties have agreed otherwise.<sup>38</sup> It may order the hearing of witnesses, appointment of experts, a site visit or the appearance of parties in person.<sup>39</sup> It may also accept an oath as being decisive or may request a supplementary oath. Finally, it may order the production of documents held by a party in accordance with the conditions provided in Article 877 of the Judicial

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<sup>36</sup> CEPANI Arbitration Rules, art 12.

<sup>37</sup> Judicial Code, art 1694.1.

<sup>38</sup> *Ibid*, art 1696.2.

<sup>39</sup> *Ibid*, art 1696.3.

Code (i.e. where there are serious, accurate and concordant presumptions that a party or a third party holds a document containing proof of a relevant fact).

- 6.8.2 The arbitral tribunal may not, however, order the verification of signatures or order the production of documents held by a third party. In these cases, the arbitral tribunal will leave it to the parties to take the matter to the Court of First Instance for a ruling and the arbitration will *ipso jure* be suspended until the date on which the arbitral tribunal receives notification of the final decision on the matter.
- 6.8.3 Finally, Article 1709 *bis* of the Judicial Code authorises the arbitrators to impose a fine (*astreinte*) on a party which does not comply with its decisions or orders. This unusual feature of the Belgian legislation has proven very effective in persuading parties to comply with decisions/orders by arbitral tribunals. In the event of non-compliance, the fine has to be paid to the party concerned. Fines may not be imposed, however, to ensure compliance with decisions ordering the payment of sums of money.

## 7. Making of the award and termination of proceedings

### 7.1 Choice of law

- 7.1.1 Unless the parties have agreed otherwise, the arbitrators shall decide a dispute in accordance with the chosen rules of law.<sup>40</sup> The section on arbitration in the Judicial Code does not contain any rules regarding the method of how to choose the law applicable to the substance of the dispute. This issue is governed by the general conflict of law rules under Belgian law. If the parties have agreed to submit their dispute to a specific law, this choice will be upheld by the arbitral tribunal. However, the arbitrators may not apply a provision which derogates from Belgian public policy.
- 7.1.2 The parties may agree in the arbitration agreement that the arbitrators will settle the dispute as "*amiable compositeur*". The possibility for the arbitral tribunal to sit as *amiable compositeur* is no longer restricted,<sup>41</sup> except when a public legal entity is a party to the arbitration agreement. In that case, the arbitrator must apply strict rules of law (except if a law expressly authorises the arbitral tribunal to sit as *amiable compositeur*).

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<sup>40</sup> *Ibid*, art 1700.

<sup>41</sup> Under the former Article 1700 of the Judicial Code, a provision stating that the arbitrators would decide the case as *amiables compositeurs* was valid only if agreed upon after the dispute had arisen.

7.1.3 In the absence of a choice of law by the parties, the arbitral tribunal will determine the applicable law, according to the Judicial Code.<sup>42</sup>

## **7.2 Decision making by the arbitral tribunal**

7.2.1 The parties may set out in their arbitration agreement the rules to be followed by the arbitral tribunal in order to reach a decision. In the absence of such an agreement the following rules apply:

- all the arbitrators must participate in the deliberations;
- the decision must be made by an absolute majority of votes except if otherwise agreed by the parties;
- in situations where the parties agree on a higher majority threshold, the chair of the arbitral tribunal shall have the casting vote; and
- in monetary matters, if a majority cannot agree on a specific amount, the votes expressed for the highest amount shall be counted as votes for the next lowest sum, until a majority is obtained.<sup>43</sup>

7.2.2 In addition, it is important to note that dissenting opinions are not authorised in Belgium and that the deliberations of the arbitral tribunal are confidential.

## **7.3 Form, content, notification and effect of the award**

7.3.1 An award must be in writing and must be signed by the arbitrators or at least by a majority of them. If an arbitrator is unable or unwilling to sign the award, that fact must be recorded in the award (no reasons are necessary).

7.3.2 In addition to the operative part, the award must contain the following information:

- the name(s) and address(es) of the arbitrator(s);
- the names and addresses of the parties;
- a description of the subject matter of the dispute;
- the date on which the award was made; and
- the seat of arbitration as well as the place where the award was made.<sup>44</sup>

7.3.3 The reasons for the award must be stated,<sup>45</sup> even where the arbitrators act as *amiables compositeurs*. The parties may not discharge the arbitrators from this obligation.

7.3.4 The chair of the arbitral tribunal must notify the parties of the award (by sending them a signed copy of the award) and deposit the original award with the registrar

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<sup>42</sup> *Ibid*, art. 1700.1

<sup>43</sup> *Ibid*, art 1701.1–1701.3.

<sup>44</sup> *Ibid*, art 1701.5.

<sup>45</sup> *Ibid*, art 1701.6.



of the Court of First Instance at the seat of the arbitration.<sup>46</sup> The parties may waive this latter requirement.

- 7.3.5 Unless the award is contrary to public policy, or the dispute was not capable of settlement by arbitration, an award has the force of *res judicata* once it has been notified to the parties and may no longer be contested before the arbitrators.<sup>47</sup>
- 7.3.6 Even in the event that the parties have agreed in their arbitration agreement that an award can be appealed, the award may still be provisionally enforced, notwithstanding the existence of any appeal, if the arbitrators have so ordered. The arbitral tribunal may also order that the provisional enforcement of the award shall be subject to provision of a guarantee.<sup>48</sup>

#### **7.4 Settlement**

- 7.4.1 The parties may settle their dispute at any time. At their request, the arbitral tribunal may record their settlement in a consent award. The parties should include in their settlement a provision for the final allocation of the costs of the arbitration between them.

#### **7.5 Termination of the proceedings**

- 7.5.1 The arbitrators' appointment comes to an end when the final award terminating the proceedings has been notified to the parties and deposited with the registrar of the Court of First Instance (save where the parties have waived this latter requirement).<sup>49</sup>
- 7.5.2 Besides this, the mandate of the arbitrators may come to an end by several events either linked to the arbitration agreement (e.g. the end of the arbitration clause gives rise to the end of the mandate and the parties have to launch a judicial procedure), to the parties (e.g. termination or waiver of the arbitration) or to the arbitrators (death, impediment, refusal, default, renunciation or successful challenge).

#### **7.6 Power to award costs**

- 7.6.1 The Judicial Code does not deal with the issue of the costs of the arbitration. It is up to the parties to provide for the allocation of costs in their arbitration agreement. If there is no such provision, the final allocation of costs of the arbitration will be decided by the arbitrators. In practice, the general rule is that "costs follow the event" (i.e. the losing party pays).

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<sup>46</sup> *Ibid*, art 1702.

<sup>47</sup> *Ibid*, art 1703.1.

<sup>48</sup> *Ibid*, art 1709.

<sup>49</sup> *Ibid*, art 1702.3.

## 7.7 Correction and interpretation of the award

- 7.7.1 Any party may, within 30 days of notification of the award (unless the parties have agreed another time limit), request the arbitral tribunal to correct any clerical error, error in computation, typographical error or any other error of a similar nature in the award. If so agreed by the parties, a party may request that the arbitral tribunal give an interpretation of a specific point or part of the award. In all cases, the request must be notified to the other party.<sup>50</sup>
- 7.7.2 If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request (or within such other period of time as decided by the arbitral tribunal). The arbitral tribunal's decision is deemed to be a part of the award.
- 7.7.3 The arbitral tribunal may also, within 30 days of the award, correct the award on its own initiative.<sup>51</sup>
- 7.7.4 When it is no longer possible to bring together the arbitrators, a request for correction or interpretation of the award shall be made to the President of the Court of First Instance (**President**) who has jurisdiction to grant the *exequatur* (a formal authorisation of enforcement) in accordance with the provisions of the Judicial Code.<sup>52</sup>

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

- 8.1.1 The court designated in the arbitration agreement or in a later agreement, concluded before the parties have chosen the seat of arbitration, is competent to apply the arbitration provisions of the Judicial Code. In the absence of such an agreement between the parties, the court which has jurisdiction is the court at the seat of the arbitration.<sup>53</sup> If the parties have not chosen a seat of arbitration, jurisdiction lies with the court which would have been competent to decide the dispute had it not been submitted to arbitration.<sup>54</sup>

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<sup>50</sup> *Ibid*, art 1702 bis.1.

<sup>51</sup> *Ibid*, art 1702 bis.2.

<sup>52</sup> *Ibid*, art 1702 bis.5. See also section 10 below.

<sup>53</sup> *Ibid*, art 1717.

<sup>54</sup> *Ibid*, art 1717.2.

- 8.1.2 Various provisions of the Judicial Code give jurisdiction to local courts to deal with specific issues upon application by one of the parties, including:
- appointment of an arbitrator;<sup>55</sup>
  - challenge of an arbitrator;<sup>56</sup>
  - refusal of a witness to appear;<sup>57</sup>
  - verification of signatures and objections relating to the production of documents or the alleged falseness of documents;<sup>58</sup> and
  - determination of the time period within which the award must be rendered.<sup>59</sup>

## 8.2 Stay of court proceedings

8.2.1 A court “seized of a dispute which is the subject of an arbitration agreement shall, at the request of a party, declare that it has no jurisdiction, unless, in relation to the dispute, the agreement is not valid or has come to an end”.<sup>60</sup> Such a request must be made in *limine litis* (i.e. in the first written submissions).

8.2.2 A party to a valid arbitration agreement may, therefore, invoke lack of jurisdiction if the other party starts court proceedings in relation to a matter which is the subject of an arbitration agreement. This is in line with the provision of Article II of the New York Convention.<sup>61</sup>

## 8.3 Preliminary rulings on jurisdiction

8.3.1 As already mentioned above,<sup>62</sup> the arbitral tribunal is competent to determine its jurisdiction to decide a dispute, subject to judicial review in the context of the procedure for setting aside an award.

## 8.4 Interim protective measures

8.4.1 An application to the court for conservatory or provisional (interim) measures is not incompatible with an arbitration agreement and shall not imply a waiver of the agreement.<sup>63</sup> Such an application can also be made in the course of arbitral proceedings.<sup>64</sup>

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<sup>55</sup> *Ibid.*, art 1684.

<sup>56</sup> *Ibid.*, art 1691.

<sup>57</sup> *Ibid.*, art 1696.4.

<sup>58</sup> *Ibid.*, art 1696.5.

<sup>59</sup> *Ibid.*, art 1698.

<sup>60</sup> *Ibid.*, art 1679.1.

<sup>61</sup> See CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>62</sup> See section 5.1.

<sup>63</sup> Judicial Code, art 1679.2.

<sup>64</sup> See section 5.

## 8.5 Obtaining evidence and other court assistance

- 8.5.1 When the arbitral tribunal has ordered a hearing and the witnesses do not appear voluntarily, or refuse to take the oath or to testify, the arbitral tribunal will authorise the parties, or one of them, to request the Court of First Instance to appoint a *juge-commissaire* who will be in charge of hearing the testimony.<sup>65</sup> It is also possible, albeit unusual, for a party to the arbitral proceedings to apply to the local courts to obtain an order for the production of documents, including from a third party.

# 9. Challenging and appealing an award through the courts

## 9.1 Appeals

- 9.1.1 An appeal against an award may only be made if the parties have expressly provided for such possibility in the arbitration agreement and provided that such appeal is to be submitted to arbitration.<sup>66</sup> Such provisions are unusual except in some industry-specific arbitrations.

## 9.2 Applications to set aside an award

- 9.2.1 Article 1717.4 of the Judicial Code provides that: “The parties may, by an express statement in the arbitration agreement, or by a subsequent agreement, exclude any right to apply for an award to be set aside when none of the parties is an individual having Belgian citizenship or who resides in Belgium, or a legal person having its principal place of business or a branch there.”
- 9.2.2 The notion of an “express statement” in Article 1717.4 is strictly interpreted: a reference by the parties in the arbitration agreement or in the terms of reference to arbitration rules which provide for a waiver of any right of recourse does not amount to such an “express statement”. Parties wanting to waive all rights to challenge the award should, therefore, expressly state that they waive all rights to apply to have the award set aside, either in the arbitration agreement or in the terms of reference.
- 9.2.3 Assuming that the parties have not waived their right to challenge the award, they may launch such a challenge only in the circumstances mentioned in Article 1704 of the Judicial Code, which provides for the following circumstances:

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<sup>65</sup> Judicial Code, art 1696.4.

<sup>66</sup> *Ibid*, art 1703.2.

- the award is contrary to public policy;
- the non-arbitrability of the dispute;
- the non-existence of a valid arbitration agreement;
- the arbitral tribunal exceeded its jurisdiction;
- the arbitral tribunal failed to decide one or more of the issues in dispute;
- irregularity in the constitution of the arbitral tribunal;
- the arbitral tribunal failed to observe a mandatory rule of arbitral procedure;
- the arbitral tribunal disregarded the formalities set out in Article 1701.4 of the Judicial Code (which provides that an award shall be in writing and signed by the arbitrators, that if one or more arbitrators are unable or unwilling to sign, this must be recorded in the award and that the number of signatures on the award must at least represent a majority of the arbitrators);
- an absence of reasons or contradictions in the reasons; or
- the award was obtained by fraud.

9.2.4 Applications to set aside an award are, however, very rare. Those applications which are made are rarely successful.

9.2.5 Proceedings for setting aside an award are commenced by way of request (*requête*) before the Court of First Instance. The decision of the Court of First Instance is subject to appeal before the Court of Appeal.

## 10. Recognition and enforcement of awards

### 10.1 Domestic awards

10.1.1 In order to be enforceable, a domestic award<sup>67</sup> must be granted *exequatur* (a formal authorisation of enforcement) by the President at the seat of the arbitration,<sup>68</sup> acting upon the request of one of the parties. At this stage, the party against whom enforcement is sought is not a party to the application.

10.1.2 The petitioner must submit the original award and the original arbitration agreement, or certified copies thereof, as well as sworn translations in the language of the relevant region (depending on the circumstances, French, Flemish or German) if it is in a language other than that used in the courts of that region.

10.1.3 The President will grant the *exequatur* when the award is no longer open to appeal before the arbitrators or if the latter have made an order granting provisional

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<sup>67</sup> See *ibid*, art 1710–1718 (governing the enforcement of domestic awards).

<sup>68</sup> As defined in paragraph 7.7.1 above.

enforcement notwithstanding an appeal. The President's decision is enforceable notwithstanding the existence of any appeal.

- 10.1.4 The President shall dismiss the request if the award or its enforcement is contrary to public policy or if the dispute was not capable of settlement by arbitration. If the request is dismissed, the petitioner may (within one month of the notification of the dismissal of the request) lodge an appeal against the decision before the Court of Appeal. The party against whom enforcement is sought receives notification of the appeal and the proceedings thereafter continue *inter partes*.
- 10.1.5 If the President grants the *exequatur*, his decision must be served on the party against whom enforcement is sought. The latter has one month from the date of such service to oppose the decision (**Opposition**). The Opposition is heard by the Court of First Instance. Its decision is subject to appeal by the losing party to the Court of Appeal.

## 10.2 Foreign awards

- 10.2.1 Belgium has ratified the New York Convention and the 1961 European Convention.
- 10.2.2 In relation to awards originating from countries which have not ratified the New York Convention, the enforcement procedure is set out in Articles 1719–1723 of the Judicial Code, which provisions are to a large extent similar to those applicable to the enforcement of domestic awards. A party seeking enforcement of a foreign award may always base its request on these provisions, in accordance with Article VII of the New York Convention,<sup>69</sup> even if the latter would apply, if it considers that the above rules are more favourable than those contained in the New York Convention.
- 10.2.3 The request for *exequatur* must be submitted to the President at the place where the party against whom enforcement is sought has its domicile or residence or, if it has no domicile or residence in Belgium, the place where the award will be enforced. In the latter case, the petitioner has to elect domicile within the Judicial Arrondissement of the place where the award will be enforced.
- 10.2.4 The petitioner must submit the original award and the original arbitration agreement, or certified copies thereof, as well as sworn translations of the said documents where required.
- 10.2.5 Unlike in the procedure for the enforcement of domestic awards, the President may call the parties to make submissions on the request. However, even in the

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<sup>69</sup> See CMS Guide to Arbitration, vol II, appendix 1.1.

unusual event that the President takes this step, the procedure remains *ex parte* at this stage.

10.2.6 The President can refuse to grant *exequatur* if:

- (i) the award is still open to appeal before the arbitrators and if the arbitrators have not ordered provisional enforcement notwithstanding any such appeal;
- (ii) the award or its enforcement is contrary to international public policy;
- (iii) the dispute was not capable of settlement by arbitration; or
- (iv) the ground for setting aside the award as provided for in Article 1704 is met.<sup>70</sup>

10.2.7 Unlike the first three causes of refusal, the fourth is only examined by the judge if one of the parties requests it.

10.2.8 If the application is refused, the petitioner may (within one month of the notification of the dismissal of the request) lodge an appeal against the decision at the Court of Appeal. The appeal has to be notified to the party against whom enforcement is sought and the proceedings thereafter continue *inter partes*.

10.2.9 If the President grants *exequatur*, his decision must be served on the party against whom enforcement is sought. The latter has one month from the date of service to oppose the decision. The opposition will be heard by the Court of First Instance. Its decision is subject to appeal to the Court of Appeal.

10.2.10 All decisions of the Court of Appeal are subject to review by the Supreme Court (*Cour de Cassation*) in a very limited number of cases (e.g. violation of a point of law or of substantial legal formalities).

## 11. Concluding thoughts and themes

11.1.1 The Belgian law on arbitration may be characterised as modern and flexible. It gives the parties wide discretion as to the arbitral procedure to be followed.

11.1.2 There is no tradition in Belgium of intervention by local courts in arbitral proceedings. Moreover, the courts' attitude in proceedings for the setting aside or enforcement of awards is invariably inclined in *favorem arbitrandum*. This probably explains why Brussels is frequently chosen as the seat of major international arbitrations.

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<sup>70</sup> Judicial Code, Article 1723. See also paragraph 9.2.3 above.

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