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**International
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Belgium





Belgium

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A. Legislation and rules

A.1 Legislation

Domestic and international arbitration in Belgium continues to be governed by Part VI of the Judicial Code, which is largely based on the UNCITRAL Model Law.

A.1.1 Some minor legislative adjustments of Belgian arbitration law

The law of 25 December 2016 brought some (non-substantial) adjustments to Belgian arbitration law, which entered into force (for the most part) on 9 January 2017. The law makes it clear that:

- (a) Belgian provisions on arbitration fully apply and the Belgian courts have jurisdiction either when the seat of the arbitration is located in Belgium or when the parties have agreed on this.
- (b) The recognition and enforcement of interim measures ordered by an arbitral tribunal is sought by way of an *ex parte* request, not by way of a writ of summons.
- (c) Only the court of first instance that has jurisdiction over the recognition and enforcement of the arbitral award in a given case has jurisdiction to rule on the recognition and enforcement of interim measures.
- (d) Arbitration proceedings start when the claimant files its request for arbitration rather than at the time the respondent receives such request.

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- (e) The party who opposes an enforcement order and who also wishes to set aside the award must lodge its motion to set aside the award within the same proceedings.

A.1.2 Brussels International Business Court

On 27 October 2017, the government approved a draft bill for the creation of a Brussels International Business Court (the “BIBC”), having jurisdiction to deal with international business and commercial disputes between corporations. Although this is strictly speaking not about arbitration, it is not entirely unrelated. Indeed, the BIBC will be composed of professional judges and legal experts (ie, non-professional judges) from domestic and foreign jurisdictions and its jurisdiction will be based on consent between the parties. The judgments of the BIBC will not be subject to appeal, with the exception of an appeal on points of law before the Belgian Court of Cassation. The rules of procedure will be based on the UNCITRAL Model Law, and the working language of the BIBC will be English, a novelty in Belgium.

The government will first submit the draft bill to the Belgian Council of State (*Raad van State/Conseil d’État*) for advice and then to parliament for discussion and approval.

A.2 Institutions, rules and infrastructure

Most Belgian institutional arbitrations take place under the Belgian Centre for Arbitration and Mediation (“CEPANI”) Arbitration Rules or the ICC Rules.

CEPANI is the largest and most well-known arbitration and mediation institution in Belgium.

There are also regional or industry-focused arbitration centers and there is also still a reasonable share of ad hoc arbitration.



B. Cases

B.1 Constitutional Court allows third-party opposition against arbitral awards

Following a request for a preliminary ruling from the Brussels Court of First Instance (“CFI”), the Constitutional Court (“CC”) held in a judgment of 16 February 2017 that third parties should be entitled to lodge third-party opposition against arbitral awards, but they should not be able to rely on the limited grounds of annulment against arbitral awards to challenge arbitral awards directly.

A company that was not a party to an arbitration proceeding, but nevertheless felt aggrieved by an arbitral award given in 2012, initiated third-party opposition proceedings before the CFI seeking the annulment of the arbitral award. The CFI stayed the proceedings and referred two questions to the CC for a preliminary ruling.

In its first question to the CC, the CFI asked whether Article 1122 of the Judicial Code (which allows third parties to challenge the validity of judgments given by a civil or a criminal court by means of third-party opposition) violates the provisions of the Belgian Constitution on equality and non-discrimination, as it does not offer the same possibility to third parties to arbitral proceedings. In its second question, the CFI asked whether Article 1717 of the Judicial Code (which lists the requirements for challenging an arbitral award by the parties) violates the same constitutional provisions on equality and non-discrimination, as it does not offer this possibility to third parties.

In response to the first question, the CC found that the difference in treatment between third parties to arbitral proceedings and third parties to judicial proceedings is based on an objective criterion (ie, the nature of the court: judicial court versus arbitral court), but it is not reasonably justified in the light of the purpose of the measure; first, because court judgments and arbitral awards have the same effects towards third parties; and second, because the choice to refer a case to arbitration is made by the parties to a dispute, while third parties have

no influence on this choice. The CC concluded that Article 1122 of the Judicial Code violates the Belgian Constitution and third-party opposition against arbitral awards should therefore be admissible.

In replying to the second question, the CC found that Article 1717 of the Judicial Code, which only allows parties to arbitral proceedings to challenge an arbitral award, was justified and was therefore not discriminatory. The CC relied on a judgment of the Supreme Court of 29 January 1993 which had found that third parties to arbitration proceedings were excluded from the scope of Article 1717 of the Judicial Code unless those third parties are able to demonstrate that the arbitration was brought for the purpose of undermining their rights (eg, in the case of fraud). In the light of this judgment, the CC made clear that an action for annulment brought against an arbitral award cannot be likened to an appeal. It added that a challenge against an arbitral award is a procedure which is unique to arbitral proceedings and is primarily intended for the parties to the arbitral proceedings to contest an award because of specific irregularities affecting either the award itself or the arbitral proceedings, whereas third parties are only concerned with the enforceability of the award, not by the flaws of the award or the arbitral proceedings, so that they cannot challenge arbitral awards directly.

B.2 Arbitrability of Distribution Agreements

In a case brought by a Belgian distributor seeking compensation from his Swedish distributor for wrongful termination of an exclusive distribution agreement, the Commercial Court in Tournai had to rule on the arbitrability of distribution agreement.

The Belgian distributor had decided to initiate legal proceedings before the Commercial Court against his Swedish distributor despite the existence of an arbitration clause in their exclusive distribution agreement. The distributor argued that the Judicial Code precluded cases raising issues of public policy from being submitted to arbitration, and that distribution agreements have always been considered matters of public policy and are therefore excluded from



the scope of arbitration. The Swedish principal argued that the Commercial Court had no jurisdiction to hear this case.

While the old version of Article 1676 of the Judicial Code did explicitly exclude cases raising public policy issues from the scope of arbitration, the Commercial Court found that the new version of Article 1676 (introduced by the Act of 24 June 2013 amending the provisions of the Judicial Code on arbitration) now provided that any dispute involving a pecuniary claim may be submitted to arbitration. As a result, the public policy exception no longer applied. Since the dispute between the parties concerned a pecuniary claim, the Commercial Court concluded in its judgment of 21 December 2016 that it had no jurisdiction to hear this dispute.

B.3 Enforcement of ICSID awards and EU member states' obligations

On 27 January 2016, the court of attachments in Brussels refused execution of the final award in the Micula ICSID arbitration³ on grounds of illegality under EU law.⁴

The court based its judgment on an earlier decision of the European Commission that the payment of the ICSID award would constitute illegal state aid.

As a reminder, an ICSID award is final and binding, and immune from appeal or annulment, other than as provided for in the ICSID Convention. ICSID awards must be recognized and enforced in the same manner as a final judgment in the domestic state. The authority of a domestic court during recognition and enforcement is limited simply to verifying that the award is authentic.

In other words, the court faced a dilemma: whilst it had the international obligation to enforce ICSID awards without review, this

³ ICSID Case No. ARB/05/20.

⁴ The case is currently pending.

enforcement conflicted with Belgian primary and secondary EU law obligations.

The case therefore illustrates the troubled relationship between EU law and intra-EU investment arbitration, and the resulting challenge for foreign investors to enforce ICSID awards within the EU, solely on the basis of EU law (and without applying ICSID or investment law principles), for example when the payment of an award is qualified as unlawful state aid.

In this respect, a few preliminary questions are pending with the CJEU.

C. Funding in international arbitration

C.1 Introduction

Third-party funding in Belgium is not regulated by any laws or guidelines, and there is no data presently available about its existence, frequency or status. It has not yet caught the attention of the legislature nor the bar authorities, but only rather limited scholarly comments.

Contingency fee arrangements between the lawyer and client whereby the lawyer's fees exclusively depend on the result of the case are prohibited in Belgium. Conditional fee arrangements whereby additional fees (ie, success fees) are paid in the event of a positive outcome are permitted.

While the exact legal nature of third-party funding is not yet established, the mechanism itself does not appear to be contrary to Belgian law. It will undoubtedly raise issues concerning confidentiality, conflicts of interest and the lawyer-client relationship, but the general assessment seems to be that already a lot of these issues can be managed by a mindful application of the existing core professional obligations.



C.2 Conflicts of Interest

The conflicts of interest rules protect clients against the risk that their interests will be harmed because of the lawyer's relationship with a (former or existing) client or a third party.

Third-party funding may entail the risk of creating conflicts of interest if the lawyer him/herself also has a relationship with the funder that may interfere with his/her obligation to provide impartial advice to the client, for example, where the funder pays the lawyer a referral fee for clients who use the funder's services, or where the structure of the funding agreement provides other incentives for the lawyer to act in ways that are not in the client's best interests.

In the event that the lawyer's involvement in the funding process significantly limits the lawyer's capacity to carry out these professional obligations, the lawyer must fully disclose the nature of this limitation, explain the risks and benefits of the proposed course of action and obtain the client's prior informed consent.

Conflicts may also exist on the side of the arbitrator, for example, if the latter is affiliated with the funder (eg, as a member of its board of directors, as a shareholder, or as an advisor to the funder) or is repeatedly appointed in cases involving the same funder.

The small number of funders and the relationship between funders and the law firms actively involved in international arbitration is a factor that has added to the concern of potential conflict scenarios.

With a view to avoiding any unchecked conflicts of interest with the arbitrators, it is, therefore, highly recommended that the parties promptly disclose the existence of a third-party funder, as well as its complete qualification.

C.3 Independent Professional Judgment

The presence of third-party funding has the potential to interfere with the lawyer's independence in representing a client.

To protect its investments and to maximize the expected value of the claim, a funder may seek to interfere with the conduct of the proceedings or exercise control or influence over the litigation strategy or the decision to continue or to accept a settlement. If the terms of the funding agreement allow, a funder might even withdraw funding on limited notice, leaving the party unable to continue the arbitration.

Therefore, a lawyer must ensure that the funding agreement does not compromise his/her independent professional judgment, and that the funder does not have excessive control and may not unreasonably withdraw funding.

C.4 Privilege

A funder may require a right to inspect documents and to require the lawyer to provide regular information and assessments regarding the litigation.

Sharing of privileged communications with the funder is a voluntary disclosure that may effect a waiver of the attorney-client privilege. It is therefore highly recommended to enter into a well-drafted non-disclosure agreement at an early stage.

In any event, the lawyer should obtain the consent of the client before transmitting any information to the funder.