

# Belgium

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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?

There are no formal requirements for an arbitration agreement to be valid. Arbitration agreements can, for instance, result from an exchange of faxes or letters. They can also be included in general conditions, but it must be clear from the circumstances that the general conditions were accepted by the other party. An oral arbitration agreement is perfectly valid but if one of the parties denies the existence of such an agreement, the other party will have to prove the intention of the parties to submit the dispute to arbitration, which will usually require at least some sort of written proof.

Moreover, the arbitration agreement will only be binding if the substantial conditions for the validity of an agreement are met, such as the capacity of the parties and their valid consent to the agreement.

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

Although not required by law, it is a good idea to include the institution (if any), the method of appointment of the arbitrators, the number of arbitrators, the language and seat of the arbitration, as well as a choice of law clause.

In the event that the parties did not incorporate these elements in their arbitration agreement, they can fall back on the Belgian Code of Civil Procedure (hereinafter, the “*CCP*”) which provides for default rules on the conduct of the arbitration procedure.

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

As indicated under question 1.1, there are no formal requirements for an arbitration agreement to be valid.

The courts will, however, refuse the enforcement of an arbitration agreement on limited grounds, e.g. if the arbitration agreement is invalid or terminated, was entered into by parties which had no capacity to do so, relates to a type of dispute which is by law considered to fall outside the scope of arbitration (“non-arbitrability”) or if the agreement would be contrary to public policy.

## 2 Governing Legislation

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

The provisions governing arbitration are incorporated in the Belgian Code of Civil Procedure (Articles 1676–1722 CCP).

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

Yes, the same provisions govern both domestic and international arbitration proceedings.

However, in arbitrations in which all parties are non-Belgian, the parties can waive their right to initiate proceedings to set aside the award (Article 1718 CCP).

Also, while the absence of reasoning in the award will be considered a ground to set aside or to refuse enforcement of the award rendered in Belgium (Articles 1713.4, 1717.3 and 1721.1 CCP), this ground cannot be invoked to oppose enforcement of an award rendered in a foreign country where awards without reasoning are permitted (Article 1721.1 CCP).

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

The current Belgian arbitration law – adopted on 24 June 2013, which entered into force on 1 September 2013 and which is incorporated in the CPP – is largely based on and consistent with the UNCITRAL Model Law. The Belgian law transposed some of the major improvements of the 2006 version of the UNCITRAL Model Law on interim and conservatory measures ordered by arbitral tribunals and the limited grounds for setting aside arbitral awards.

There are still some minor differences between the Belgian law and the UNCITRAL Model Law, the most important ones being the exclusion of *ex parte* interim/conservatory measures, the impossibility for the tribunal to amend, suspend or terminate such interim measures *ex officio*, the fact that parties in an arbitration sited in Belgium cannot agree that the award would not contain any reasoning, and the fact that both the absence of reasons and the existence of fraud are additional grounds to set aside an award rendered in Belgium.

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

Although the Belgian arbitration law provides a flexible framework for conducting arbitration in Belgium, there are nevertheless some mandatory provisions with which the parties to an arbitration procedure with seat in Belgium would have to abide. These include the following:

- the arbitration agreement and the applicable procedural rules cannot breach the principle of equal treatment between parties and adversarial proceedings (Article 1699 CCP);
- arbitrators must be independent, impartial and uneven in number; and
- the arbitral award must be in writing, reasoned and signed by a majority of arbitrator(s), although only the absence of reasons can constitute a valid ground to set aside the award.

## 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”?

In principle, all claims of a pecuniary nature can be submitted to arbitration, as well as non-pecuniary claims on which parties are allowed to enter into a settlement agreement (Article 1676.1 CCP).

However, the following disputes cannot be subject to arbitration (despite the fact that they are of a pecuniary nature or can be the subject of a settlement agreement) or can only be under certain conditions:

- Certain matters that fall within the jurisdiction of the labour courts, such as those relating to employment contracts, cannot be subject to an arbitration agreement entered into prior to the dispute (Article 1676.5 CCP). The same is true for disputes relating to certain insurance contracts. In both cases, the parties cannot agree to submit future disputes to arbitration. However, once a dispute has arisen, they may validly decide to subject it to arbitration.
- There is a long-standing controversy over the arbitrability of disputes relating to the termination of exclusive distributorship agreements of an indefinite duration that cover all or part of the Belgian territory. As a general rule, an arbitration clause in such agreement will only be valid and enforced if the arbitrators are contractually bound to apply Belgian law.
- There are some limited exceptions to the general rule of arbitrability for certain intellectual property disputes.
- In the field of consumer disputes, the European Court of Justice has decided that an arbitration agreement may be considered abusive (see e.g. ECJ 26 October 2006, Case C-168/05, *Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*).
- Public law entities may only enter into an arbitration agreement if the purpose thereof is to resolve disputes relating to an agreement that pertains to matters defined by law or royal decree (Article 1676.3 CCP).

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

Yes, the arbitral tribunal can rule on the question of its own jurisdiction, which also includes the competence to rule on the validity of the arbitration agreement (Article 1690.1 CCP). A plea that the arbitral tribunal does not have jurisdiction must be raised in the first written submission in the arbitration. A party is not precluded from raising such a plea by the mere fact that it has appointed an arbitrator (Article 1690.2 CCP).

Article 1690.1 CCP also stipulates that an arbitration agreement contained in a contract which is found null and void does not automatically become null itself (severability).

### 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?

The national courts will decline to hear a case brought in breach of an arbitration agreement, provided that the other party invokes the existence of a valid arbitration agreement *in limine litis*, i.e. before asserting any other defence (Article 1682.1 CCP).

Even if a party seizes a court to oppose the jurisdiction of an arbitral tribunal, the arbitral tribunal can proceed and hear the case (Article 1682.2 CCP).

### 3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal’s decision as to its own jurisdiction?

The general rule is that the arbitral tribunal has the power to decide on its own jurisdiction. Therefore, if a party brings a dispute that is subject to a valid arbitration agreement before the courts, the courts will decline jurisdiction at the request of a party that invokes the arbitration agreement (see question 3.3).

Yet, if the arbitral tribunal decides that it has jurisdiction, this decision can be challenged before the national courts in proceedings to set aside the arbitral award. This challenge can only be made at the end of the arbitral proceedings. By contrast, if the arbitral tribunal decides that it does not have jurisdiction over the dispute, this decision can immediately be challenged before the national courts (Article 1690.4 CCP).

The national courts can also address the issue of jurisdiction of the arbitral tribunal in the framework of opposition proceedings against an *exequatur* order (Article 1721.1 CCP)

The national courts will exercise full jurisdiction when reviewing the issue of the tribunal’s jurisdiction. Accordingly, courts are not bound by the decision of the arbitral tribunal in that respect.

### 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 arbitral tribunal will not assume jurisdiction over individuals or entities that are not themselves party to the arbitration agreement (issues of representation, assignment, change of control, etc. aside), unless the parties to the arbitration agreement and the third parties all agree that the latter would join the proceedings.

### 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?

In Belgium, the law of limitation is a matter of substantive law. An arbitral tribunal should apply the rules on limitation provided by Belgian law in case Belgian law governs the substance of the dispute.

The limitation period generally depends on the type of claim. For contract claims, it is generally ten years, and for tort claims, generally five years (Article 2262*bis* Civil Code), although specific laws can provide shorter limitation periods.

### 3.7 What is the effect in Belgium of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

In the event that a Belgian party to an ongoing arbitration proceeding becomes involved in insolvency proceedings, the arbitration proceedings can be continued with the insolvency administrator representing the insolvent party, albeit after a period during which the proceedings are stayed in order to assess the situation. In that respect, however, there is some controversy regarding the binding effect of an arbitration agreement upon the administrator.

## 4 Choice of Law Rules

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

The law applicable to the substance of the dispute is determined by the parties. In the absence of an express choice, the arbitral tribunal will determine the applicable substantive law on the basis of the relevant rules of private international law (e.g. those laid down in EU Regulation Rome I).

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

As indicated under question 2.4, the Belgian arbitration law provides some mandatory rules that are applicable to an arbitration with seat in Belgium.

Apart from those rules, the Code of Civil Procedure does not expressly stipulate in which circumstances mandatory laws or laws of public policy of Belgium or of another jurisdiction will prevail over the law chosen by the parties. However, since the arbitral tribunal has an implied duty to render an award that is enforceable, the tribunal will have to take due account of any mandatory laws applicable in the country where the arbitration is sited or in the State where enforcement will be sought, in order to avoid or reduce the risk that the award will be set aside or that enforcement thereof will be refused.

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

As a principle, the Belgian law rules described under questions 4.1 and 4.2 will apply to an arbitration sited in Belgium.

Belgian case law decided that if a court must assess whether the dispute is arbitrable, it should apply not only the law chosen by the parties to govern their contract, but also the mandatory laws of the country where the arbitration is sited.

## 5 Selection of Arbitral Tribunal

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

In principle, the parties are free to select the arbitrators of their choice, as long as the general requirements of independence and impartiality are respected and the arbitral tribunal consists of an uneven number of arbitrators (Article 1684.1 CCP).

An arbitration agreement that provides for an even number of arbitrators is not automatically invalid. In that case, an additional arbitrator will need to be appointed to make the number uneven (Article 1684.2 CCP). If the parties did not provide the number of arbitrators in the arbitration agreement, and they cannot agree on the number at a later stage, the arbitral tribunal will consist of three arbitrators (Article 1683.3 CCP).

The parties can also designate a third party, for instance an arbitration institution, to appoint the arbitrators (1685.2 CCP).

Finally, except if otherwise agreed, arbitrators cannot be excluded or challenged by reason of their nationality (Article 1685.1 CCP). Nationality is a valid criterion to designate/challenge (an) arbitrator(s) only if it was agreed to between parties for objective reasons.

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

The law provides default procedures for the selection of arbitrators. Such procedures are applicable in the event that the method chosen by the parties fails or in the event that the parties have not specified the method of appointment in their arbitration agreement.

In the event that the arbitration agreement does not specify the method of appointment and/or the parties cannot agree on the method, each party will appoint one arbitrator and the two appointed arbitrators will appoint a third one (Article 1685.3 CCP).

The method chosen by the parties can fail, for instance, if the institution designated by the parties fails to appoint an arbitrator, if a party refuses to appoint an arbitrator or if the arbitrators who have to appoint an additional arbitrator cannot reach an agreement. In each of these situations, any party can turn to the President of the competent Court of First Instance to request the appointment or replacement of an arbitrator (Articles 1685.3 and 1685.4 CCP). There is no appeal possible against such decision by the President of the Court of First Instance.

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

If the parties or the arbitrators cannot agree on the appointment of an arbitrator or if they fail to appoint an arbitrator, each party can turn to the President of the Court of First Instance and request the appointment of an arbitrator by the President of the Court.

#### 5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Belgium?

Arbitrators must be independent and impartial. If there are circumstances that cast justifiable doubt on the arbitrator's impartiality and independence, the arbitrator can be removed at the request of a party (Article 1686.2 CCP).

Belgian law obliges arbitrators to disclose any circumstances likely to give rise to justifiable doubts as to their independence and/or impartiality, both at the time of the tribunal's constitution and during the proceedings (if new circumstances arise; Article 1686.1 CCP). As a consequence, a party may only request the removal of an arbitrator during the proceedings on grounds that were not known to that party before the appointment of the arbitrator (Article 1686.2 CCP).

## 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?

As a matter of principle, the parties are free to determine the rules governing the arbitral proceedings (Article 1700.1 CCP). They can, for instance, agree to apply the procedural rules of an arbitration institution (e.g. the rules of procedure of CEPANI, the Belgian arbitration institution).

The only safeguard provided by law is that the proceedings must be consistent with the requirements of due process and equal treatment of the parties (Article 1699 CCP).

The rules governing arbitral procedure in the Belgian Code of Civil Procedure will apply to all arbitrations sited in Belgium absent a valid agreement of the parties to the contrary.

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

Procedural steps (e.g. initiating the procedure, filing the answer to the request for arbitration, terms of reference, exchange of submissions, etc.), will be decided upon by the parties or will be governed by the rules of the arbitral institution which the parties have chosen, always subject, however, to the principles of due process and equal treatment. Absent a choice by the parties, the rules of the CCP will apply.

#### 6.3 Are there any particular rules that govern the conduct of counsel from Belgium in arbitral proceedings sited in Belgium? If so: (i) do those same rules also govern the conduct of counsel from Belgium in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than Belgium in arbitral proceedings sited in Belgium?

For the rest, Belgian lawyers are bound by their ethical bar rules when acting in arbitrations, be they sited in Belgium or elsewhere. They are allowed to examine and cross-examine witnesses and to prepare witnesses before arbitral hearings. Foreign lawyers in arbitrations sited in Belgium are not bound by the Belgian bar rules.

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

The arbitrators' key duty is to hear the case brought before them and to render a reasoned award on the case, in accordance with their mission.

Arbitrators also have certain secondary duties that are considered inherent to their mission or are imposed by the rules of the institution governing the arbitration, such as the duty to remain impartial and independent from the parties, or to organise the arbitral proceedings in a manner consistent with the principle of due process.

Arbitrators are entrusted with certain powers in order to allow them to conduct arbitration proceedings in a successful manner. In particular, arbitrators can issue interim measures, require a party to provide appropriate security, hear witnesses and experts and order penalty payments ("*astreinte*" / "*dwangsom*"). These powers are similar to the powers bestowed upon the regular courts, but are often more limited. For example, arbitrators cannot order attachments or rule on an alleged forged document, which are typically decisions requiring the judicial courts' *imperium*.

#### 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?

Any restrictions existing under Belgian law on the appearance of lawyers from other jurisdictions before the Belgian courts do not apply to arbitration proceedings.

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

Belgian law does not provide for arbitrator immunity. However, certain arbitral institutions, such as CEPANI and ICC, provide for the limitation of liability of arbitrators (Article 37 of the CEPANI Rules, Article 40 of the ICC Rules).

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

As a general rule, procedural issues are dealt with by the arbitrators. However, the national courts do have jurisdiction over certain procedural issues, namely, granting interim measures, forcing the appearance of witnesses, forcing the production of evidence, deciding on a challenge of an arbitrator if no institution has been appointed or if the institution is inactive.

## 7 Preliminary Relief and Interim Measures

#### 7.1 Is an arbitrator in Belgium 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?

Unless excluded contractually, an arbitrator is allowed to award preliminary or interim relief at the request of a party. Any type of interim or conservatory relief can be awarded, except for attachments or garnishments (Article 1691 CCP).

The party obtaining an interim measure shall be liable for any costs and damages caused to the other party as a consequence of the

execution of said measure if the arbitral tribunal would later decide that the measure should not have been ordered (Article 1695 CCP).

The arbitral tribunal can suspend, amend or terminate an interim or conservatory measure at the request of a party, but not *ex officio* (Article 1692 CCP).

To ensure compliance with the interim award, the arbitral tribunal can impose penalty payments (“*astreinte*”/“*dwangsom*”).

An award ordering interim or conservatory measures will be enforced by the competent Court of First Instance, except for limited grounds (Article 1697 CCP).

### 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?

In principle, an arbitration agreement will not prevent the parties from turning to the national courts to obtain preliminary or interim relief (Article 1683 CCP). The presidents of the courts have the jurisdiction to grant provisional measures in urgent matters. The three traditional prerequisites for obtaining such measures in summary proceedings are: (i) urgency; (ii) the president must refrain from issuing judgements that either contain a declaration of rights or cause a change in the legal position of the parties; and (iii) the president should determine whether there is a *fumus boni iuris*, i.e. whether a case on the merits has any chance of success, and then issue a judgement in accordance with the probable rights of the parties.

A party’s request to a court for preliminary or interim relief cannot be interpreted as a renunciation of arbitration (Article 1683 CCP). In other words, the request to a court for interim relief has no effect on the jurisdiction of the arbitral tribunal.

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

Since the law explicitly provides that parties can request interim relief from the courts even if the dispute is subject to arbitration (Articles 1683 and 1691 CCP), courts are not especially reluctant to grant interim relief prior or during arbitration proceedings. However, interim relief can only be granted under the circumstances indicated above under question 7.2.

In practice, parties will more likely request interim relief from the national courts where the arbitral tribunal has not yet been constituted or where the measure cannot (or not easily) be obtained from the arbitrators (e.g. attachment, measure involving a third party).

### 7.4 Under what circumstances will a national court of Belgium issue an anti-suit injunction in aid of an arbitration?

It is not possible to obtain an anti-suit injunction from a Belgian court, as such type of relief falls outside the scope of the jurisdiction of Belgian courts.

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

Absent any express provision in this respect in the Belgian law, an arbitral tribunal could decide to order security for costs if this is justified under the circumstances of the case.

## 8 Evidentiary Matters

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

The parties are free to determine the rules of evidence that will apply. The default rule is that the arbitrators are not bound by any rules of evidence. They freely determine the admissibility, relevance and probative value of the evidence submitted to them (Article 1700.3 CCP).

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

Unless the parties agree otherwise, the arbitral tribunal can order the disclosure of documents held by a party (Article 1700.4 CCP). The Belgian rules governing discovery in arbitral proceedings are the same rules that are applicable in regular court proceedings. These rules do not allow for broad discovery. Production of a document can only be ordered if there are “*serious, precise and concurring indications*” that the other party is in possession of a document containing proof of a relevant fact (Article 877 CCP). Yet, the parties may extend the conditions for obtaining such an order, e.g. by agreeing to apply the IBA Rules on the Taking of Evidence in International Arbitration.

Due to the contractual nature of arbitration, the arbitral tribunal cannot force the production of evidence from third parties.

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

Upon request of a party, the President of the Court of First Instance – acting as in summary proceedings – can order all measures that are necessary for parties to bring relevant evidence, including forcing the production of a document or ensuring that vital evidence is preserved.

Parties can also turn to the President of the Court of First Instance to ensure compliance with the decisions of the arbitral tribunal concerning disclosure and production of evidence or appearance of witnesses (Articles 1680.4 and 1708 CCP).

In practice, however, parties rarely ask for court intervention to obtain a document held by another party or to force appearance of a witness. If the arbitral tribunal orders disclosure, the parties usually comply. If a party refuses to produce the document or to bring a witness, the arbitral tribunal can draw an adverse inference from this refusal.

### 8.4 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 or is cross-examination allowed?

The parties are free to determine how witness and expert testimony will be dealt with. There is no obligation for witnesses to be sworn in before the tribunal. Cross-examination of witnesses and experts is allowed.

If no rules are agreed upon between the parties, the arbitral tribunal will decide. In practice, the examination of witnesses is increasingly conducted in accordance with Anglo Saxon legal principles, with direct examination, followed by cross-examination and redirect examination.

### 8.5 What is the scope of the privilege rules under the law of Belgium? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are no rules which specifically address this point in arbitration matters. However, it is common for the arbitral tribunal to examine this question under the law of the nationality of the parties concerned. All communication between a party and his outside counsel is in principle privileged and cannot be produced in court or before an arbitral tribunal, except if the communication expressly indicates the opposite. In principle, communication between the party and in-house counsel in Belgium is also privileged.

## 9 Making an Award

### 9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of Belgium that the Award contain reasons or that the arbitrators sign every page?

When more than one arbitrator is appointed, the award shall be signed by at least the majority of the tribunal and the reasons for the absence of signature of the other arbitrator(s) must be mentioned (Article 1713.3 CCP).

The arbitral tribunal must render a reasoned award in writing after deliberation (Articles 1713.3 and 1713.4 CCP). In addition, the award must contain the names and addresses of the arbitrators and parties, as well as the date on which it was rendered, the place where the proceedings were held and the place where the award was rendered. The award must also contain a description of the subject matter of the dispute (Article 1713.5 CCP).

Not every page of the award needs to be signed by the arbitrators in order to be valid.

## 10 Challenge of an Award

### 10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in Belgium?

Unless the parties agree otherwise, arbitral awards are final and not open for appeal. The parties cannot request a court or arbitral tribunal to determine the merits of the case for a second time (Article 1716 CCP).

Usually, the parties do not provide for the option of an appeal, which means that the only way for the losing party to challenge the award will be to initiate proceedings to set aside the award before the judicial courts.

Before looking at the grounds on which an award can be set aside, the Court of First Instance must first verify whether the award can no longer be contested before the arbitrators.

The Court of First Instance can set aside the award only if:

- there was no valid arbitration agreement, including if one of the parties did not have the legal capacity to enter into the arbitration agreement (Article 1717.3a.i CCP);
- due process requirements were not respected (Article 1717.3a.ii CCP);
- the award deals with a dispute not falling within the terms of the arbitration agreement (Article 1717.3a.iii CCP);

- the award does not contain the reasoning of the arbitrators (Article 1717.3a.iv CCP);
- the arbitral tribunal was irregularly constituted (Article 1717.3a.v CCP);
- the arbitral tribunal has exceeded its jurisdiction or powers (Article 1717.3a.vi CCP);
- the underlying dispute is not arbitrable (Article 1717.3b.i CCP);
- the award is contrary to public policy (Article 1717.3b.ii CCP) and
- the award was obtained by fraud (Article 1717.3b.iii CCP).

The grounds mentioned under a), b), c) and e) above can no longer be invoked to request the setting aside of the award if the party was aware of them during the arbitration proceedings, but failed to raise them at that point.

The grounds mentioned under g), h), and i) are the only ones that can be raised *ex officio* by the court.

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

If all parties are non-Belgian, they can waive their right to initiate proceedings to set aside the award, before or after the dispute arose (Article 1718 CCP). This waiver must expressly refer to setting aside proceedings; a general waiver to invoke “any legal recourse” will not be sufficient in that respect.

This option is not open to Belgian parties (Belgian nationals or companies with registered seat or principal establishment in Belgium).

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

Parties cannot validly expand the scope of the judicial review beyond the grounds for annulment which are provided under Article 1717 CCP. However, the parties are free to provide for an appeal against the arbitral award and, accordingly, to submit the award to a full review by an appellate arbitral tribunal.

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

The proceedings to set aside an arbitral award must be initiated within three months as from the notification of the award to the parties (Article 1717.4 CCP).

The arbitral tribunal’s decision that it has jurisdiction may only be contested in setting aside proceedings against the final award (Article 1690.4 CCP).

If a request is made under Article 1715 CCP to correct errors in the award or to ask the arbitral tribunal for an interpretation of it, the deadline to enter into setting aside proceedings starts to run as from the date on which the party seeking to have the award set aside received the arbitral tribunal’s decision on the requested corrections/interpretation.

Setting aside proceedings have to be brought before the Court of First Instance located at the seat of the Court of Appeal in whose jurisdiction the seat of arbitration is situated. A judgment on setting aside cannot be appealed before a court of appeal. It can only be subject to recourse before the Belgian Supreme Court and is limited to points of law (Article 1680.5 CCP).

## 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 signed and ratified the New York Convention. The Convention is directly applicable in the Belgian legal order. Therefore, there is no legislation specifically implementing the Convention. It entered into force in Belgium on 16 November 1975.

Belgium entered a reservation of reciprocity which provides that it will only apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State.

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

Belgium is a party to Geneva Convention on international commercial arbitration of 1961. Belgium has also concluded bilateral treaties on the enforcement of arbitral awards with France, the Netherlands, Germany, Switzerland and Austria.

### 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?

Courts will generally enforce arbitral awards. Concepts such as “public policy” are narrowly construed. As a result, there are very few precedents in which courts have refused enforcement of an award on the grounds that it was contrary to public policy.

In order to enforce an arbitral award in Belgium, the enforcing party will first have to obtain an *exequatur* order from the Court of First Instance (located where enforcement is sought). The Court will typically review the application for obtaining the *exequatur* in the framework of *ex parte* proceedings. Only once the *exequatur* has been granted will the opposing party have the opportunity to challenge the decision before the Court in contradictory proceedings.

The Court ruling on an application for obtaining the *exequatur* will apply the rules laid down in Articles 1719 to 1721 CCP if the application relates to the enforcement of a Belgian arbitral award. If the application concerns the enforcement of a foreign award, the Court will apply the rules of the New York Convention or any other applicable treaty, and, if these treaties are not applicable, the default rules stipulated in Articles 1719 to 1721 CCP.

However, under Article VII of the New York Convention, a party seeking to enforce a foreign arbitral award can opt for the application of national laws (Articles 1719 to 1721 CCP) if they are more favourable to the recognition and enforcement of the award. Belgian case law considers that such choice must be made “*in globo*”, which prevents the party from using a combination of the Belgian rules on enforcement and the New York Convention.

### 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?

Article 1713.9 CCP stipulates that the award shall have the same effect as a court decision on the relationship between the parties. Therefore, it has *res judicata* effect from the time the parties are notified and provided that it can no longer be challenged before the arbitrators.

### 11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The enforcement of a foreign arbitral award may be refused if it is contrary to public policy. One generally accepts that this relates to the concept of Belgian “international public policy”, which is narrower than mere public policy.

A foreign award will be considered to be contrary to international public policy when it is contrary to a principle that is essential to the moral, political or economic order of Belgium. The violation of international public policy can follow from the substantive assessment of the case by the arbitral tribunal or from the infringement of certain procedural rules (e.g. the lack of reasoning).

## 12 Confidentiality

### 12.1 Are arbitral proceedings sited in Belgium confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Belgian arbitration law does not contain any explicit rules on confidentiality of arbitration proceedings. However, arbitral proceedings will typically be conducted behind closed doors. The CEPANI rules of arbitration, to the contrary, provide that the arbitrations conducted under its rules are confidential, except if otherwise agreed (Article 25 of the CEPANI Rules).

In the event that the parties wish to guarantee that their arbitration remains confidential and if they did not choose for institutional rules providing for it, it is advisable that they include a confidentiality clause in the arbitration agreement or in the terms of reference.

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

There is no specific legal provision that prohibits parties from relying upon documents submitted in arbitral proceedings in the course of subsequent court proceedings.

The parties can, however, explicitly agree to keep information and documents exchanged in the arbitration confidential. Yet, in that case and to the extent necessary, the parties will nevertheless be entitled to refer to or rely on the information or documents disclosed in the arbitration if the follow-on court proceedings concern the arbitration or the arbitral award (e.g. in court proceedings for setting aside the award, enforcement proceedings, interim measures proceedings, etc.).

### 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)?

The arbitral tribunal must decide on the issues that are presented by the parties and may issue one or several awards in that respect (Article 1713.1 CCP).

With respect to damages, the arbitral tribunal will award damages according to the law applicable to the dispute. If Belgian law is applicable, compensatory damages and liquidated damages can be awarded. Punitive damages cannot be awarded under Belgian law.

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

The arbitral tribunal will award interest according to the law applicable to the dispute.

Under Belgian law, unless otherwise agreed by the parties, amounts that are due but remain unpaid will generate interest (the current legal interest rate, applicable as from 1 January 2015, is 2.5%). Interest starts accruing from the date the defaulting party is formally given notice. Compounded interest is allowed, but is subject to the specific rules stipulated in Article 1154 of the Civil Code. In the event of late payments in commercial transactions, interest will in principle be due automatically at a more favourable rate provided for by the Law of 2 August 2002 against late payment in commercial transactions.

Moreover, once the award is rendered, judicial interests (at the legal interest rate) can be due as from the notification of the award.

#### 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?

The parties can agree on the allocation of the costs and fees in the arbitration agreement or in the terms of reference. The rules of the arbitral institution can also provide for guidelines on the allocation of fees and costs between the parties.

Absent any specific rules in this respect, the arbitrators can freely determine, in the award, how the parties will bear the arbitration costs, including the parties' legal fees and all other expenses arising from the arbitral proceedings (Article 1713.6 CCP).

In general, arbitrators are inclined to decide that the unsuccessful party has to pay the prevailing party's costs or part thereof, unless the behaviour of the prevailing party would justify another solution.

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

The award itself is not subject to any tax. However, it cannot be excluded that a tax (of 3% on the total amount at stake) might be due in the event of certain court proceedings relating to the enforcement of the award.

#### 13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of Belgium? Are contingency fees legal under the law of Belgium? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no rules preventing third parties from funding claims. However, such third-party funders should be cautious of the application of Article 1699 of the Civil Code in case the funding entails the assignment of the claim to them. Article 1699 stipulates that the debtor can validly free himself from his obligation by simply paying to the funder the price (together with costs and interest) which he paid to the original creditor for the assignment of the claim (irrespective of the value of the claim), provided that the claim is pending in court.

Contingency fees are illegal in Belgium. However, it is permitted to agree a success fee for the lawyer.

There are a number of professional litigation and arbitration funders active in the Belgian market.

### 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) (otherwise known as "ICSID")?

Yes. Belgium ratified the ICSID Convention on 27 August 1970. The Convention entered into force in Belgium on 26 September 1970.

#### 14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is Belgium party to?

Belgium has concluded approximately 70 BITs. These BITs provide for arbitration as a dispute resolution mechanism for investors from outside Belgium, either within the framework of ICSID, or through *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

Belgium is also a party to the Energy Charter Treaty.

Furthermore, with the European Union having acquired more competences in the field of concluding investment treaties, it can be expected that new multilateral investment treaties between the EU and third-party States will be entered into in the near future. In this context, negotiations for an investment treaty between the EU and China started in January 2014.

#### 14.3 Does Belgium have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Most of the BITs entered into by Belgium feature a broad description of the term "investment" (usually all kinds of assets, including IP rights, etc.) and are concluded jointly with Luxembourg. The substantive provisions contained in such BITs usually do not deviate from the language stipulated in model BITs concluded by other EU countries.



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

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With respect to foreign States, Belgian courts will generally recognise immunity regarding jurisdiction and execution, which is based on an international custom. However, this immunity can be challenged, in particular if the State has waived its immunity or entered into purely commercial transactions.

In respect of execution against the Belgian State, Article 1412*bis* CCP provides for partial immunity.

## 15 General

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### 15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in Belgium (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

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International arbitration is well developed in Belgium, be it institutional (especially ICC and CEPANI) or *ad hoc*. It is commonly used, especially for all kinds of commercial disputes. In recent years, there has been a marked increase in arbitration proceedings which have arisen out of the financial crisis. In particular, there has been a surge in disputes originating from a desire of one of the parties to “walk away” from their contract.

In Belgium, arbitration occurs mainly in English, Dutch or French, i.e. languages that are generally spoken and understood in the Belgian legal community. Belgium is also home to many excellent arbitrators with a worldwide reputation, who intervene as arbitrators in the case of arbitration sited in Belgium or anywhere else.

The current law on arbitration of 24 June 2013 (which amended Articles 1676 to 1722 CPP, which form the Sixth Part of the CCP) entered into force on 1 September 2013. This law aligned to a large extent the Belgium rules with the UNCITRAL Model Law, clarified legal uncertainties and increased the efficiency of arbitration in Belgium.

Among other things, the law removed the possibility of an appeal against judgments on setting aside, which, due to the delays before judicial courts, previously handicapped arbitration proceedings in Belgium. Moreover, the law empowers the President of the Court of First Instance to intervene, as in summary proceedings (meaning in urgency), during the arbitration proceedings (sited in Belgium) when no institution has been appointed or when the institution is inactive, in order to decide on issues in relation to the appointment, replacement and challenge of arbitrators or to take necessary measures for collecting evidence and order attachments.

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### 15.2 What, if any, recent steps have institutions in Belgium taken to address current issues in arbitration (such as time and costs)?

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As indicated under question 15.1, the current arbitration law, adopted on 24 June 2013, increased the efficiency of arbitration proceedings in Belgium.

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Joost Verlinden specialises in domestic and cross-border litigation and national and international arbitration. He has significant experience in all forms of commercial litigation: accountants' liability, banking litigation, construction cases, contractual disputes, corporate litigation (including post-acquisition claims and shareholder disputes), insolvency disputes, product liability, sovereign debt issues and white collar crime. He represents clients before all Belgian courts and acts as counsel and arbitrator in CEPANI, Belgian Federation of Diamond Bourses, ICC, SCC, UNCITRAL and ad hoc arbitrations.

Joost is the author of numerous articles on arbitration, class actions, civil procedure, corporate litigation, insolvency law and product liability. He is constantly recommended as a leading attorney for dispute resolution in Belgium by Chambers and by Legal 500. He has been a litigation partner since 1998.

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