The European Arbitration Review

2019

Belgium

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The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Belgium

Johan Billiet
Billiet & Co

Summary

On 1 September 2013, a revised Chapter 6 of the Belgian Judicial Code (articles 1676–1722), comprising the Law on Arbitration (the 2013 Law on Arbitration),[1] came into force. This revised version replaced the Law on Arbitration adopted in 1972. This previous law was based on the Uniform Law on Arbitration attached to the 1966 Strasbourg Convention on Arbitration. Interestingly, Belgium was the only state to ratify the convention. For this reason, the arbitration regime established by the Belgian law was quite unique. Although the Belgian Law on Arbitration was amended twice (in 1985 and 1998), national idiosyncrasies were abundant up until 2013.

In 2013, Belgium made a revolutionary step towards harmonising its legislation on arbitration by adopting the UNCITRAL Model Law (the Model Law).

The *Travaux Préparatoires* mention that the inspiration for the new law was drawn from the national arbitration laws of Germany, Switzerland and France.[2] The 2013 Law on Arbitration brought the arbitration-related proceedings before the Belgian courts to a qualitatively new level. Previously, the role of the courts in such proceedings was heavily criticised. The 2013 Law on Arbitration aimed to align the arbitration-related proceedings in national courts with the contemporary arbitration-friendly international approach and to make it easier for foreign parties to understand it. The revised provisions on the setting aside of an award, challenges to arbitration proceedings and interim measures are the most notable developments. Another aim of the revisions was to reduce the overall duration of proceedings by, inter alia, excluding a possibility to appeal at the Court of Appeal in setting aside proceedings and allowing only 'cassation' at the Supreme Court.

The first question that parties commencing proceedings before Belgian courts should examine is which law (the previous Law on Arbitration (the Previous Law) or the 2013 Law on Arbitration) is applicable. The differences between these two laws are significant.

THE 2013 LAW ON ARBITRATION: IMPORTANT CHANGES

If the seat of arbitration is Belgium, the 2013 Law on Arbitration applies to domestic and international arbitration proceedings that commenced from 1 September 2013, irrespective of the parties' nationality.

There Are Fewer Grounds For Setting Aside An Award

When parties include an arbitration clause in a contract, they do it with the aim to provide for an expeditious and final dispute resolution method. If an award is challenged, it may take a long time before a party obtains the awarded relief. Generally, the more distinctive the regime for setting aside an award at the seat of arbitration is, the longer it will take to obtain the relief. Hence, businesses avoid jurisdictions where they risk drowning in protracted legal battles at national courts. The provisions of the Belgian law on setting aside proceedings traditionally differed from article 34 of the Model Law. More grounds for a challenge and a potential three-tier setting aside procedure were among unfortunate points of difference. Following the revision, provisions relating to a setting aside of an award underwent significant changes and became as much in line as possible with the UNCITRAL regime. According to the *Travaux Préparatoires*, German, Spanish and Austrian arbitration laws served as an inspiration for the amendment of provisions on setting aside proceedings.[3]

The following grounds for setting aside an award were excluded by the 2013 Law on Arbitration:

- if an award contains contradictory provisions (former article 1704.2 (j));
- if the formalities prescribed in article 1701.4 have not been fulfilled (former article 1704.2 (h)) (article 1701.4 required that an award be arranged in writing and signed by the arbitrators);
- if an award is based on false evidence (former article 1704.3 (b)); or
- if one of the parties withholds a crucial piece of evidence (former article 1704.3 (c)).

However, the legislator still included three grounds for setting aside an award in addition to those provided in the Model Law:

- if an award does not state the reasons (article 1717.3 (a)(iv) of the 2013 Law on Arbitration);
- if an arbitral tribunal has exceeded its powers (article 1717.3 (a)(vi) of the 2013 Law on Arbitration); and
- if an award was obtained by fraud (article 1717.3 (b)(iii) of the 2013 Law on Arbitration).

As in the Model Law, article 1717.2 of the 2013 Law on Arbitration specifies that the listed grounds for setting aside are exhaustive.

An Award Must Contain Reasons But Contradictory Provisions In An Award Are No Longer Grounds For Setting Aside

The duty to state reasons is a part of the jurisdictional mission of Belgian judges. The same rule applies to arbitrators. An arbitral award rendered in Belgium may be challenged if it fails to state the reasons on which it is based. This ground distinguishes Belgian arbitration law from the Model Law. In the *Travaux Préparatoires*, the legislator explains that the reasoning of an award is a requirement of domestic public policy. However, the law does not prevent the recognition of an award without reasons in Belgium if the reasoning is not required under the law applicable to the proceedings.[4] Additionally, according to the UNCITRAL 2012 Digest of Case Law on the Model Law (the Digest), 'court decisions differ as to whether the failure to provide reasons constitutes or not, on its own, a ground for setting aside (or refusing to enforce) an award.'[5] At the same time, the Digest explains that, in general, 'courts have rejected the view that the reasons given in an award must meet the standard applicable to court judgments.'[6] Thus, generally, a lower threshold prevails: 'the arbitral tribunal should state the facts and explain succinctly why, on the basis of such facts, the decision was rendered.'[7] For a Belgian legislator, the failure to state reasons is also related to another commonly recognised ground for a setting aside: if an arbitral tribunal exceeds its powers. The Digest explains that relation as: 'the failure of the arbitral tribunal to give any reasons seriously hampers a party's ability to determine if the award dealt with a dispute beyond the terms of submission.'[8] However, according to a 2015 decision of the Court of First Instance (Brussels), the requirement for an arbitral award to contain reasons is still a formal requirement and not a substantive one.[9] When deciding in setting aside proceedings, it is not within the judge's competence to evaluate the reasoning of an arbitral award.

An important change is that the 2013 Law on Arbitration abolished a ground that was a subject of controversy for a long time. Under the Previous Law, an arbitral award could also be set aside if it contained contradictory provisions. The common rationale for setting aside in such cases was that a contradictory award is not reasoned. This is because contradictory

reasons are equivalent to no reasons at all. However, it was largely debated whether it includes the entire reasoning or only the operative part of the award. In 2011, the Belgian Supreme Court in ***Havas & Euro RSCG Worldwide v Dentu Inc*** (C.10.0302.F/1) ruled that a contradiction in the award's reasoning might constitute a basis for the setting aside of an award. Moreover, according to the Supreme Court, in such cases a judge is not required to check whether the decision is otherwise justified. Pursuant to the 2013 Law on Arbitration, the presence of contradictory provisions in an award is no longer a ground for setting aside. This put an end to the ongoing debate. Courts in other jurisdictions have also rejected the notion that awards may be set aside because they are internally inconsistent (eg, courts in France, Sweden and the United States).

Remission

Article 1717.6 of the 2013 Law on Arbitration corresponds to article 34(4) of the Model Law and provides for a possibility to 'save' an award (ie, the Court of First Instance may remit the award to the arbitral tribunal, so that the tribunal eliminate the ground for setting aside). According to the Belgian legislator, the interests of efficiency dictate such course of action and the setting aside of an award should remain the last remedy. If an irregularity can be corrected by a new intervention of the arbitral tribunal, it is preferable to use this procedure.-[10]

The Possibility To Appeal Twice The Court's Decision In Setting Aside Proceedings Is Removed

The overall duration of the setting aside proceedings under the Previous Law was heavily criticised. The possibility to appeal a court's decision on a setting aside claim often led to protracting proceedings for several years. The 2013 Law on Arbitration abolished this possibility. Pursuant to article 1717.2 of the 2013 Law on Arbitration, setting aside proceedings are to be conducted before the court of first instance, with no possibility to go to the court of appeal. The only way to contest the decision of the court of first instance is to go to the Supreme Court.

The Possibility To Exclude In Advance The Recourse For Setting Aside An Arbitral Award

Like under the Previous Law, according to article 1718 of the 2013 Law on Arbitration, non-Belgian parties without any link to Belgium may exclude by an explicit declaration the possibility to set aside an award rendered in Belgium. The Model Law does not contain any similar provision. Equivalent provisions, however, may be found in article 192(1) of the Swiss Federal Act on Private International Law and in article 51 of the Swedish Arbitration Act of 1999. Interestingly, between 1985 and 1998, Belgium had a provision that automatically excluded setting aside proceedings for awards made in Belgium where none of the parties to the arbitration were Belgian. This rule was met with scepticism. In 1998, the law was amended and the waiver became optional.

Recognition And Enforcement Of Arbitral Awards

Apart from incorporating all Model Law grounds for refusing recognition or enforcement, the 2013 Law on Arbitration kept two additional grounds: lack of reasoning on which an award is based, and the excess of power by an arbitral tribunal. Important clarification was added to the former ground. Article 1721.1(a)(iv) of the 2013 Law on Arbitration expressly provides that the court will refuse to grant the recognition or enforcement of an award if it is not reasoned when such reasons are prescribed by the rules of law applicable to the arbitral proceedings under which the award is rendered. It is expected that this will put an end to the

unfortunate application of that ground like in the case where the Court of First Instance of Brussels refused to recognise and enforce a US arbitral award that lacked reasoning, invoking a violation of Belgian international public policy.[11]

It is worth noting that when enforcing an award in Belgium, whether foreign or domestic, a registration duty of 3 per cent should be paid. The duty is payable by both parties jointly.[12]

Importantly, article 1722 of the 2013 Law on Arbitration provides that an arbitral award may be enforced for a period of 10 years as of the communication of the arbitral award.

Challenges Of Arbitrators

Inspired by article 13 of the Model Law, the legislator has made a number of important amendments to provisions regulating challenges of arbitrators. Many practitioners criticised challenge proceedings against an arbitrator for their duration and inconsistent case law. The most notorious example is the case ***Republic of Poland v Eureko and Stephen M Schwebel***, in which arbitration was suspended for two years because the Republic of Poland challenged an arbitrator.[13]

The Previous Law did not provide for summary proceedings in case of a challenge against an arbitrator. However, what it provided for was the setting aside procedure with the Court of First Instance, the outcome of which could further be appealed at the Court of Appeal. This contributed even further to the delays. This system applied even to institutional arbitration.-[14] It was not at the discretion of the institution to examine the challenge against an arbitrator, but it was reserved to the competence of a state court. Article 1687 of the 2013 Law on Arbitration expressly provides that the parties are free to agree on the procedure applicable to the challenge of arbitrators. For example, parties may agree on the application of certain arbitration rules.

Article 1687.2(b) of the 2013 Law on Arbitration also states that, in the absence of the parties' agreement on the procedure for a challenge against an arbitrator, the president of the Court of First Instance should decide on a challenge acting as in summary proceedings. The president's decision cannot be appealed. While the challenge is pending, the arbitration may continue and the tribunal may even render an arbitral award. The legislator explains that the rationale of that provision is to prevent the abuse of the challenge against an arbitrator as a dilatory tactic and to ensure efficiency of arbitration. Additionally, the president has the jurisdiction to decide issues on the appointment or replacement of an arbitrator, to set a time limit for the arbitrator to render the arbitral award and to take necessary measures for collecting evidence (article 1680.2 of the 2013 Law on Arbitration).

Interim Measures

Pursuant to article 1691, the arbitral tribunal may order any interim or conservatory measures it deems necessary, except for attachment orders, which remain within the exclusive jurisdiction of the state courts. Also, parties may agree to exclude or limit the possibility for arbitrators to decide on interim or protective measures. The 2013 Law on Arbitration aimed to bring the regulation of interim measures in line with the relevant part of the Model Law as amended in 2006. However, the 2013 Law on Arbitration still differs from the Model Law in some respects. For example, it does not provide a general definition of interim measures or set out the detailed conditions for granting interim measures, leaving this to the discretion of the arbitral tribunal. As the ***Travaux Préparatoires*** explain, the incorporation of the list of conservatory measures and the conditions for granting them was considered too rigid.

The legislator was concerned that it would restrict current flexibility and impede the work of arbitrators.[15] Thus, for the sake of flexibility and efficiency, it was deemed necessary to keep the traditional Belgian approach and give the tribunal wide discretion in these matters.-[16]

In addition, unlike the Model Law, the 2013 Law on Arbitration does not empower an arbitral tribunal to render attachment orders ex parte. The Belgian legislator explained that it is more effective to request this measure from the president of the Court of First Instance according to article 584.3 of the Belgian Judicial Code (BJC) since the implementation of such orders rendered by arbitrators may be problematic. Also, the ***Travaux Préparatoires*** point out that, if an arbitrator is given such powers, it might appear inconsistent with the consensual nature of arbitration. It may also jeopardise the independence of an arbitrator and the right of defence.-[17]

On the other hand, articles 1692 to 1695 of the 2013 Law on Arbitration correspond to articles 17D–G of the Model Law. The key principles and rules contained in these provisions have already existed under the Belgian law, although they were not specific to arbitration. Thus, the legislator explains that the inclusion of such provisions adds valuable clarification to foreign colleagues and plays an educational role.

Another notable clarification is article 1696.1 stating that interim measures issued by an arbitral tribunal shall be recognised as binding and shall be enforced by the Court of First Instance. In Belgium, unlike in some other countries, it is recognised that interim measures ordered by an arbitral tribunal are enforceable. Thus, the express provision regarding the recognition and enforcement of interim measures provides useful information to foreign practitioners and to those unfamiliar with the Belgian law.

Arbitrability

Article 1676 of the Previous Law was often considered ambiguous with regard to the disputes that can be submitted to arbitration. Although the 2013 Law on Arbitration still does not provide a list of non-arbitrable disputes, it introduces a revised criterion of arbitrability. Pursuant to article 1676 of the 2013 Law on Arbitration, any dispute of a pecuniary nature may be submitted to arbitration. Non-pecuniary claims may also be submitted to arbitral proceedings if it is legally permissible to settle in their respect. As the ***Travaux Préparatoires*** explain, the Belgian legislator followed in this matter the example of the Swiss law (article 177(1) PILA) and the German law (article 1030(1) ZPO).[18] For instance, article 177(1) of the PILA provides: 'any dispute of financial interest may be the subject of an arbitration.' The Swiss Federal Court has interpreted 'financial interest' very broadly as involving all claims that present, at least for one party, an interest that can be assessed in monetary terms.

Restrictions on the arbitrability of certain types of disputes are set out in specific legislation. Pursuant to article 1676.5 of the 2013 Law on Arbitration, arbitration agreements in respect of the disputes belonging to the jurisdiction of the labour courts, without prejudice to the exceptions provided by law, are automatically null and void if concluded prior to the moment the dispute arises. Within the area of intellectual property, the Act on Patents of 28 March 1984, excludes disputes relating to mandatory licences from arbitration. Article 577.4 of the Belgium Civil Code on the mandatory co-ownership of buildings or groups of buildings regards any clauses in the regulations of the building that empower one or more arbitrators to resolve disputes regarding application of that section as void.

Under article 4 of the Belgian Law dated 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration (the Law of 1961), if an exclusive distributor has suffered damage further to the unilateral termination of a distributorship agreement effective within all or part of Belgian territory, he or she may always initiate legal proceedings before the courts of Belgium. In such cases, the courts must apply Belgian law exclusively. Article 6 of the Law of 1961 adds that the provisions of the Law will prevail over any contrary stipulations of the parties, agreed upon prior to contract termination.

On 3 November 2011, the Belgian Supreme Court upheld the decision of the Brussels Court of Appeal. The Court of Appeal found the arbitration provision in the commercial agency agreement providing for the resolution of all disputes under Quebec law null and void because the protection of commercial agents under the chosen law was not equivalent to the provisions contained in the Belgian law. In particular, it contradicted the provisions of the Council Directive of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents (86/653/EEC), implemented by Belgium in 1995.

Evidentiary Rules

Unlike article 27 of the Model Law, article 1708 of the 2013 Law on Arbitration does not permit an arbitral tribunal to request a state court to assist in taking of evidence. According to the Belgian law, only a party may file such a request.

Pursuant to article 1680.4 of the 2013 Law on Arbitration, the president of the Court of First Instance is competent to take all necessary measures for the taking of evidence and this decision cannot be appealed.

No Writing Requirement For A Valid Arbitration Agreement

Previously, article 1677 provided that an arbitration agreement must be in writing. Article 1681 of the 2013 Law on Arbitration mirrors the second option of article 7 of the Model Law, which defines the arbitration agreement in a manner that omits any formal requirement. Hence, an arbitration agreement does not have to be concluded in writing in order to be valid under Belgian law. That means that an oral arbitration agreement is valid as long as it can be proven. The ***Travaux Préparatoires*** provide that witness testimonies can serve as a proof.[19]

Amendments To The 2013 Arbitration Law Introduced By The Potpourri IV Act

On 9 January 2017, amendments to the 2013 Law on Arbitration introduced by the Potpourri IV act came into force. These amendments include that:

- it is no longer necessary to indicate the place where the award is rendered, it suffices to mention the place of arbitration;
- the party who opposes the enforcement order and who also wishes to move to set aside the award must lodge its motion to set aside the award within the same proceedings; and
- the award must no longer be lodged to the clerk of the court, except in the enforcement proceedings.

Belgian Law Against 'vulture Funds'

On 1 July 2015, Parliament adopted new legislation in a fight against 'vulture funds' – investment companies buying sovereign defaulted debts for bargain prices in order to sue

the indebted countries for full repayment.[20] The law is directed against the enforcement of these claims on the territory of Belgium with the main purpose of preventing these funds from seizing any property of countries in peril. One of the cases that gave rise to this legal initiative was ***NML Capital Management v The Argentine Republic***,[21] in which the company demanded Argentinian accounts to be frozen in Belgium.

The new law sets out the framework of how to identify a 'vulture fund' or, using the wording of the law, 'illegitimate advantages' of a creditor. The judge has to identify 'a manifest disproportion between the amount claimed by the creditor and national face value of the debt'. If a judge is confronted with a vulture fund, which intends to receive the full value of the bonds it acquired, the maximum that it receives is the discounted amount the company actually paid for the bonds. Belgium is not the first country to adopt a clear anti-vulture fund position. In 2010, the United Kingdom also adopted new legislation on this matter. Nevertheless, although Belgium and the United Kingdom clarified their positions via their legislation, a multilateral initiative towards curtailing the harmful functioning of vulture funds seems to be needed.

INSTITUTIONAL ARBITRATION RULES

Various Belgian arbitration institutes changed their arbitration rules, following the 2013 Law on Arbitration.

2018 Standard Dispute Rules Adopted By The Institute Of Arbitration

The Institute of Arbitration (the Institute) is a neutral and independent non-governmental organisation. One of its distinguishing features is that an arbitral award can be appealed within the Institute before another arbitral tribunal. Following article 6 of the 2018 Standard Dispute Rules (SDR),[22] the arbitral tribunal is expressly given powers to propose mediation. This provision aims to open a door for Arb-Med-Arb proceedings. Article 9 of the SDR also explicitly mentions that the settlement agreement is included in the award. This contributes even further to the promotion of mediation and demonstrates the modern approach towards alternative dispute resolution taken by the Institute. Part IV.3 specifies that the 'cost for arbitration is reduced to half of the already paid provisions' if arbitration ends in first instance before the parties are notified about the composition of the Arbitral Tribunal.

Chapter V provides that in ad hoc arbitration parties can entrust the Institute with the tasks of the clerk's office and the appeal level. Article III.3 allows to request the Institute to arrange for the translation of the award to the language of the country of enforcement. The official version of the SDR is available in eight languages.

CEPANI 2013 Arbitration And Mediation Rules

The most recent Arbitration and Mediation Rules (the Rules) of the Belgian Centre for Mediation and Arbitration (CEPANI) came into force on 1 January 2013.[23] The Rules underwent substantial revision and were inspired to a large extent by the 2012 ICC Arbitration Rules. The most significant innovations relate to the inclusion of provisions on multiparty and multi-contract arbitration, joinder and consolidation. Provisions on interim and conservatory measures as well as the liability of CEPANI and the arbitrators were also reviewed.

The 2013 Rules provide that an arbitration can take place between more than two parties and claims arising out of various contracts can be brought in a single arbitration (articles 9 and 10). Intervention of a third party is also possible if the arbitral tribunal has not yet been

appointed or confirmed (article 11). When multiple arbitrations are related or indivisible, the parties or the arbitral tribunal can request CEPANI to order consolidation (article 13).

Furthermore, according to article 26 of the 2013 Rules, it became possible to request interim and conservatory measures before the tribunal is constituted. CEPANI will appoint an emergency arbitrator within two days after the request and this arbitrator will render a decision within 15 days. The emergency arbitrator cannot be appointed as arbitrator in the proceedings on the merits and the award on the interim and conservatory measures will not bind the tribunal.

Additionally, article 37 of the 2013 Rules provides for a limitation of the liability of an arbitrator. Liability is excluded for an act or omission when a tribunal is carrying out its functions of ruling on a dispute (with the exception of fraud). For any other act or omission by the arbitrator or the CEPANI, liability can arise in cases of gross negligence or fraud.

Finally, another important initiative of CEPANI is the launch of ***b-Arbitra*** in May 2013. ***b-Arbitra*** is the Belgian Review of Arbitration that welcomes contributions in English, as well as in Belgium's three official languages: Dutch, French and German. It aims, inter alia, to provide a dynamic forum for the exchange of information on a European scale.

Brussels International Business Court

Following the proposition by the Minister of Justice, the Council of Ministers approved in the second reading the draft law establishing the Brussels International Business Court (BIBC) where proceedings are conducted in English. The law was submitted to Parliament on 15 May 2018. The BIBC is being created in order to strengthen the role played by Brussels as the hub of political, business and international life in Europe.

BIBC judges will consist of career judges invited on an ad hoc basis from the Belgian courts and tribunals, as well as lay judges. The cases will be heard by ad hoc panels of three judges: one professional and two lay judges assisted by the Registrar of the Court of Appeal. As the judges will comprise of eminent specialists in international commercial law, the BIBC shall act as a court of first and last resort without any possibility of appeal. One can still go to the Court of Cassation but the scope of issues that can be referred to this court is limited and the proceedings then will need to be conducted in one of the official languages of Belgium rather than English. As the BIBC is to be self-financed, the parties shall pay a registration fee that is expected to cover the fees of the lay judges and the administrative personnel made available to the BIBC.

As for the procedure, the draft law is based on the UNCITRAL Model Law on international commercial arbitration. The parties will only be able to resolve their disputes at the BIBC if they all agree to its jurisdiction either before or after the dispute arises. Although the BIBC model and arbitration share many features such as specialised decision makers, choice of procedure and no possibility of appeal, the BIBC is a state court. The parties cannot choose their judges like they would in arbitration and there is no option of confidentiality available to the parties. Unlike awards rendered in arbitration, judgments given by the BIBC will not benefit from the New York convention's recognition and enforcement mechanism. The Belgian government intends to ensure the entry into force of the law on the BIBC in January 2020 at the latest.

RECENT CASE LAW

The following arbitration related decisions of Belgian courts rendered in 2016–2017 appear to be the most interesting:

Constitutional Court

- On 16 February 2017, the Constitutional Court found that the application of article 1122 of the BJC to civil and criminal proceedings but not to arbitration is discriminatory. Article 1122 specifies that third-party opposition is an extraordinary recourse that may be filed by the third party who is prejudiced by a judgment. According to the Constitutional Court similar possibility should be provided to third parties who are prejudiced by an arbitral award.
- On 27 April 2017, the Constitutional Court generally upheld the new law of 23 August 2015 regarding the seizure of goods belonging to foreign states or to international organisations. Following this new law, article 1412-quinquies was added to the BJC. This article provides that assets that are the property of a foreign state and that are located on the territory of Belgium are not subject to seizure. A seizure of assets is possible only if one of the conditions of article 1412-quinquies section 2 is satisfied, such as when the foreign power explicitly and specifically consents to the seizure or when the judge of the seizure allows such a seizure. It is possible that article 1412-quinquies was added to the BJC in the aftermath of the enforcement proceedings in *Yukos Universal Limited (Isle of Man) v The Russian Federation* case to avoid further diplomatic incidents with the Russian Federation and other countries. The new law is of high importance due to the fact that many countries have their assets on the territory of Belgium. Belgium is also the seat of many international organisations.

Decisions Related To Investment Arbitration Cases Against The Russian Federation, Moldova And Romania

- On 8 June 2017, Brussels Court of First Instance lifted the freezing order on the assets of the Russian Federation in Belgium. This happened following the setting aside in April 2016 of the Permanent Court of Arbitration award by The Hague District Court. Brussels Court of First Instance lifted the freezing order because, in its view, the ground for the existence of the enforcement order (a valid arbitral award) ceased to exist.
- The Republic of Moldova with its air traffic security company MoldATSA successfully resisted the enforcement of the arbitral award in Belgium. The arbitral award in *Komstroy (Ukraine) v the Republic of Moldova* was rendered on 25 October 2013 in Paris pursuant to the UNCITRAL Arbitration Rules. Komstroy sought the enforcement of the award in Belgium. Relying on the award, Brussels Court of First Instance issued an enforcement order on 17 February 2015. However, following the setting aside of the award by the Court of Appeal of Paris on 12 April 2016, Brussels Court of First Instance annulled the leave to enforce the award on 22 June 2016. As a consequence, the judge of the seizure ruled on 28 July 2016 that Komstroy (formerly Energoalliance Ltd) could not enforce the award and the seizure of Moldova's assets was to be lifted with the immediate effect. The Court of Appeal of Brussels upheld that decision on 13 December 2016.
- On 27 January 2016, Brussels Court of First Instance found that the ICSID award rendered against ROMATSA and Romania could not be enforced in Belgium because

taking into account new circumstances of the case, the enforcement order would fail to meet the requirements of legality and regularity. The reason for this court's finding was the earlier decision of the European Commission that the payment of damages by ROMATSA and Romania to Mr Micula pursuant to the ICSID award would constitute illegal state aid and Romania should not proceed with this payment.

Other Cases

- On 12 July 2017, the judge of the seizure at Brussels Court of First Instance rendered one of the first decisions on remission. The judge started by observing that article 1717.6 of the BJC allowed the judge in setting aside proceedings to suspend these proceedings to give the arbitral tribunal an opportunity to take action to eliminate the grounds for setting aside an award. Following this observation and taking into account the balance of interests of the parties involved in the proceedings, the judge of the seizure decided, however, not to suspend the enforcement of the award. According to the judge, the creditor could enforce the award at his own risk as it was clear that the creditor would be able to reimburse all damages to the debtor in case the award is set aside by the judge in setting aside proceedings.
- On 9 June 2017, Brussels Court of First Instance set aside a CEPANI arbitral award in ***Strube v Sesvanderhave***. The court found that the tribunal acted ultra petita in awarding a remedy that none of the parties had requested in the arbitral proceedings. In particular, the arbitral tribunal's decision led to the annulment of the disputed cooperation agreement, although none of the parties ever sought this. The court applied the 2013 Law on Arbitration but neither commented nor made use of the possibility to send the award back to the tribunal to eliminate the ground for setting aside, as provided under article 1717.6 of the 2013 Law on Arbitration.
- Under the BJC, an award can be set aside on grounds of the invalidity of the arbitration agreement. The Court of First Instance in Brussels specified that the aforementioned ground can only be used when the arbitrator declares him or herself competent (Brussels Court of First Instance, 11 March 2016).

Notes

[1] Document 005, Texte Adopte, dated 16 May 2013, available at www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=53&dossierID=2743. English translation available at www.cepani.be/en/arbitration/belgian-judicial-code-provisions.

[2] Document 003 (No. 53-2743/003), Rapport fait au nom de la commission', Stefaan De Clerck, dated 8 May 2013, p 8, available at www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=53&dossierID=2743.

[3] Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 40, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

[4] Ibid.

[5] The UNCITRAL 2012 Digest of Case Law on the Model Law, p 154, available at www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

[6] Ibid, p 158.

[7] Ibid.

[8] Ibid, p 154.

[9] Decision of the Brussels Court of First Instance, dated 28 January 2015, Judgment No. 35, 4 Chamber, AR/2014/7806/A.

[10] Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 41, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

[11] Decision of the Brussels Court of First Instance dated 30 March 2011, RDC, 2012/2, pp 186–189. See also C Verbruggen, 'Le refus d'exequatur d'une sentence arbitrale étrangère dépourvue de motivation', RDC, 2012/2, p 189 et seq.

[12] See more in Yves Hendrix, 'Droits d'enregistrement et sentence arbitrales', b-Arbitra, 2013/2, examining the situation where the winning party, who had had to pay the registration duty, sought recovery of such duty against the debtor.

Court of Appeal of Brussels, 29 October 2007, RG 2007/AR/70.

[13] Court of Appeal of Brussels, 21 June 2005, RG 2004/AR/3106, unreported.

[14] Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 24, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

[15] 'prendre toute mesure provisoire ou conservatoire qu'il juge nécessaire en ce qui concerne l'objet du différend', ibid.

[16] Ibid, pp 24–25.

[17] Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 9, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

[18] Ibid, p 15.

[19] Document 005 (No. 54-1057/005) Dépôt, dated 1 July 2015, available at www.lachambre.be/FLWB/PDF/54/1057/54K1057005.pdf.

[20] ***NML Capital, Ltd v Republic of Argentina***, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014).

[21] Available at www.euro-arbitration.org/resources/en/sdren.pdf.

[22] Available at www.cepani.be/en/rules.

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Billiet & Co

Johan Billiet johan.billiet@billiet-co.be