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A. Legislation and rules

A.1 Legislation

In 2013, Belgium made a revolutionary step toward harmonizing its legislation on arbitration with the new Arbitration Act,[3] which amended Chapter 6 of the Judicial Code (Articles 1676 to 1722) and adopted the most recent version of the UNCITRAL Model Law. The new Arbitration Act brought arbitration-related proceedings before the Belgian courts to a qualitatively new level.

The new Arbitration Act entered into force on 1 September 2013, for arbitration proceedings commenced as from that date, where the seat of the arbitration is in Belgium, irrespective of the parties' nationality. Arbitration proceedings already pending at that date, and all court proceedings initiated with regard to such arbitrations, continued to be governed by the former Arbitration Act, which was initially adopted in 1972 and was based on the European Convention providing a Uniform Law on Arbitration of 1966. Belgium was the only Member State to ratify the Convention.[4] The result was a rather isolated regime, up until 2013 when the new Arbitration Act was adopted.

The main goals of the reform were to clarify a number of legal uncertainties, to increase efficiency in arbitration proceedings, and to enhance Belgium's attractiveness as a forum for arbitration. In particular, the new Arbitration Act aimed to align arbitration-related

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[3] Act of June 24, 2013, *Belgian Official Gazette* of June 28, 2013.
[4] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056/signatures?p_auth=2SHIxrC6

proceedings in national courts with an arbitration-friendly international approach, and to make it easier to understand and use for foreign parties.

The most noticeable developments were the revisions regarding challenges to arbitrators' proceedings, interim measures and the setting aside of awards. The purpose of these revisions was to shorten the overall duration of proceedings by, *inter alia*, allowing only *cassation* to the Supreme Court and removing the possibility of an appeal against judgments on setting aside, which negatively impacted on arbitration proceedings in Belgium due to the delays before the national courts. In addition, the law empowered the president of the Court of First Instance, presiding "as in summary proceedings" (in urgency), to decide on issues in relation to the appointment, replacement and challenge of arbitrators, to take necessary measures for collecting evidence, and/or to order a physical seizure of goods.

A.2 Institutions, rules and infrastructure

In early 2013, a similar revolution also took place at the Belgian Centre for Mediation and Arbitration (CEPANI/CEPINA), the main arbitration institution in Belgium, which adopted new Arbitration Rules and new Mediation Rules. The 2013 Rules on Arbitration and Mediation have undergone substantial revisions and were inspired by the 2012 ICC Arbitration Rules. The two most notable changes are:

1) Multiparty arbitration: Subject to the agreement of the parties, a single arbitration procedure can take place between more than two parties and with respect to claims arising out of various contracts and out of different arbitration agreements. The intervention of a third party is also possible if the arbitral tribunal has not yet been confirmed. When multiple arbitrations are related or indivisible, the parties or the arbitral tribunal can request CEPANI to order consolidation.

2) Interim and conservatory measures prior to the constitution of the arbitral tribunal: It is possible to request interim and

conservatory measures before the arbitral tribunal is constituted. CEPANI will appoint an emergency arbitrator within 2 days of the request, and the arbitrator will render an award 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 is not binding upon the arbitral tribunal deciding upon the merits of the case.

B. Cases

B.1 Denial of due process invalidates an award irrespective of its influence on the arbitral decision, and fundamental human rights prevail over rules of due process.

Under Article 1704(2)(g) of the Belgian Judicial Code, an arbitral award may be set aside if the parties did not have the opportunity to present their case and express their views, or if any compelling rule of the arbitral proceedings was violated, insofar as this violation had an influence on the arbitral decision.

Unsuccessful claimants had challenged an unfavorable arbitral award dated 8 April 1999 issued under the rules of the Arbitration Chamber of the Antwerp Chamber of Trade and Industry. The claimants argued that the principles of due process and their right to defense had been violated because the tribunal had heard one party after the hearing without validly notifying the claimants.

The claimants eventually appealed to the Belgian Supreme Court, arguing that Article 1704 (2)(g) of the Judicial Code gave rise to two different grounds of annulment. The first ground applies if the parties have had no chance to present their case or express their views. The second ground applies if there has been a violation of a compelling rule of the arbitral proceedings, insofar as this violation had an influence on the arbitral decision. The claimants argued that only the second ground required an influence on the arbitral decision. They claimed that a denial of the right to defense should lead to the annulment of the arbitral award, regardless of whether the violation of

those rights had an influence on the arbitral award. The Supreme Court accepted this reasoning in a decision dated 25 May 2007 and made it clear that denial of the right to defense invalidates the arbitral award, regardless of whether the denial had an effect on the arbitral decision.

The case was then referred back to the Ghent Court of Appeal, which, in line with the Supreme Court's judgment, invalidated the arbitral award. In so doing, it dismissed the claimant's argument that the violation of the right to a fair trial had to be raised during the arbitral procedure and that such belated submission of this ground for annulment was contrary to the principle of good faith. The claimant appealed to the Supreme Court once again, arguing that "each action of a party that consists of concealing an irregularity in the arbitration procedure and any subsequent invocation of that irregularity as grounds for invalidating that arbitral award in case it is unfavorable to it, is contrary to the execution of an arbitral agreement in good faith."

In a second judgment of 21 January 2011, the Belgian Supreme Court dismissed this argument on the basis that the right to a fair trial must be regarded as a matter of public policy and, as a consequence, cannot be waived by a party. Moreover, violations of public policy rights can be invoked in every stage of the proceedings, from the arbitral proceedings up to the enforcement or set-aside proceedings before an ordinary court. According to the Supreme Court, rules of due process, which include rules to avoid dilatory procedural maneuvers, cannot prevail over fundamental human rights, including the right to a fair trial.

B.2 Membership by one party in the arbitral institution does not provide automatic grounds for nullity.

Under the Belgian Judicial Code, an arbitral agreement is null and void if such agreement favors one party with respect to the appointment of the arbitrator(s).

By a judgment of 29 May 2009, the Belgian Supreme Court confirmed a prior judgment of the Ghent Court of Appeal that the mere fact that a party is a paying member of the arbitral institution that was appointed in the arbitral clause is not, in itself, sufficient to successfully invoke this ground of nullity.

The solution might be different, however, if it can be established that the paying member has an effect on the appointment of the arbitrator(s) by the relevant arbitral institution.

B.3 Arbitrability of distribution agreements

When a Belgian court is addressed on the merits concerning the unilateral termination of an exclusive distributorship under the Belgian Distribution Act (now incorporated in Book X, Title 3 of the Code of Economic Law), and the defendant objects to jurisdiction based on an arbitration agreement, the test of arbitrability is either to be made in accordance with the law applicable to the distributorship agreement (*lex causae*) or the law of the addressed court (*lex fori*). Applying the *lex fori* in cases falling under the scope of the Belgian Distribution Act, Belgian courts mostly decided that if the distribution agreement is governed by foreign law and contains an arbitration clause, such a dispute may not be referred to arbitration. This is because Article 6 of the Belgian Distribution Act, which applies to distributorships covering the whole or part of Belgium, even when the parties have validly agreed to a different applicable law, provides that any agreement by the parties deviating from this Act will have no effect.

On 14 January 2010, the Supreme Court confirmed that an arbitration clause in a distribution agreement governed by Californian law and validly providing for ICC arbitration in Paris was null and void under the Act. The Belgian Supreme Court consequently upheld the decision of the lower court to grant substantial termination compensation under the Act to the distributor, to the detriment of the Californian manufacturer.

B.4 State courts competent notwithstanding valid arbitration clause

In *United Maritime Agencies (UNAMAR) v. Navigation Maritime Bulgare*, the Belgian Supreme Court and the Court of Justice of the European Union (CJEU) reached the conclusion that a national (in this case, Belgian) court may deny the application of an arbitration clause valid under foreign (in this case, Bulgarian) law, on the basis of a mandatory rule of the *lex fori* (in this case, the Belgian Act on Commercial Agency Agreements, which transposes EU Directive 86/653 relating to self-employed commercial agents).

The action was initially brought before the Commercial Court in Antwerp, which had to rule on the alleged unlawful termination of a commercial agency agreement between a principal based in Bulgaria and a commercial agent with headquarters in Belgium. The agency agreement contained a choice for Bulgarian law and the parties agreed to submit any dispute to the Arbitration Court at the Bulgarian Chamber of Commerce and Industry in Sofia.

Notwithstanding this choice of law and the parties' agreement to submit their dispute to arbitration, the commercial agent decided to initiate proceedings in Belgium on the basis of Belgian law, thereby claiming an indemnity in lieu of notice, a goodwill indemnity and additional compensation for dismissal of staff on the basis of the Act.

At issue was Article 27 of the Act, which provides that, "[w]ithout prejudice to the application of international conventions to which Belgium is a party, any activity of a commercial agent whose principal place of business is in Belgium shall be governed by Belgian law and shall be subject to the jurisdiction of the Belgian courts." This gave rise to the question whether: (i) the arbitration clause in the Agreement is enforceable; and (ii) the broader compensation rules set forth by the Act were mandatory provisions that overrode the parties' decision to choose Bulgarian law in the Agreement.

By a first judgment of 5 April 2012, the Supreme Court held that the New York Convention did not preclude a Belgian court before which an action is brought in relation to a contract governed by a foreign law chosen by the parties, from denying the application of an arbitration clause, even if such clause is valid under the chosen foreign law. However, the refusal to apply a valid arbitration clause is only possible on the basis of a rule of the *lex fori,* which considers that the subject of the dispute is not capable of settlement by arbitration.

The Supreme Court then decided to stay the proceedings and refer a question for a preliminary ruling to the CJEU. In a preliminary ruling of 17 October 2013, the CJEU held that under specific conditions, a national law implementing an EU Directive can override the laws of another EU Member State and, as such, can be of a "mandatory" nature under Article 7 of the Rome Convention.

In a second judgment of 12 September 2014, the Supreme Court confirmed that the Act satisfies the conditions that were set out by the CJEU, and is a mandatory provision of Belgian law. The Supreme Court thus quashed the judgment of the Antwerp Court of Appeal, which had held that the arbitration clause under Bulgarian law was valid and had declined jurisdiction as a result.

B.5 Invalidity due to conflicting reasons in award

Pursuant to Articles 1704.2(i) and (j) of the Judicial Code, an arbitral award can be set aside if it lacks reasoning for the decision or if it contains conflicting provisions. In a judgment of 13 January 2011, the Supreme Court gave a broad interpretation of these grounds for invalidity and sided with the Brussels Court of Appeal, which had implicitly held that an arbitral award can also be invalidated in the case of conflicting reasons in the award.

This somewhat "formalistic" approach by the Supreme Court can have far-reaching consequences. Among others, it substantially increases the risk that an otherwise perfectly defendable arbitral award is invalidated by an ordinary court. Since any contradiction in the

reasoning behind an arbitral award can now potentially lead to an invalidation of that award, this may result in a significant increase in proceedings to set aside awards by the losing party in arbitral proceedings, even where the outcome of the initial arbitral award was perfectly justified.

B.6 Scope for setting aside unreasoned arbitral awards

In a judgment of November 28, 2014, the Supreme Court held that the Court of First Instance (which may set aside an arbitral award when it is contrary to "public policy" or when it is not reasoned) must not re-examine the underlying dispute in the light of the statutory "public policy" provisions applying to the facts of the case, but must only verify that the arbitral award itself is not in conflict with public policy.

The arbitrator's duty to state the reasons for the arbitral decision is an essential feature of arbitration in Belgium. This duty implies that the arbitral tribunal should state the facts and briefly explain why the decision was rendered on the basis of these facts. The control exercised by the Court of First Instance in the context of annulment proceedings as to whether an arbitral award is sufficiently reasoned cannot amount to a review of the intrinsic merits of the reasons supporting the arbitral decision. According to the Supreme Court, the fact that the reasoning is incorrect does not constitute a breach of the relevant provisions of the Judicial Code.

C. Trends and observations

While the vast majority of national commercial disputes are still brought before the national courts, arbitration (whether institutional or *ad hoc*) and its advantages are becoming more known and increasingly popular as an alternative to regular court proceedings, especially in the context of international commercial contracts. In recent years, there has been a marked increase in arbitration proceedings, which have arisen out of the financial crisis. In certain specific sectors (like the travel sector, for which an arbitration commission exists), arbitration has even become the norm.

Arbitration in Belgium is usually handled in English, Dutch or French, which are languages that are generally spoken and understood within the legal community in Belgium, although there is certainly an increase in the use of English in arbitration proceedings in the country. This may be related to the fact that Belgium has some excellent arbitrators with a worldwide reputation, who act as arbitrators in arbitration cases in Belgium or abroad.

The new Arbitration Act also increased the efficiency of arbitration proceedings in Belgium.

However, it remains to be seen what the impact will be of the UNAMAR case law (see Section B.4) on arbitration in Belgium and how broadly lower national courts will interpret and apply this case law in practice to deny the application of a valid arbitration clause under foreign law, on the basis of a mandatory rule of Belgian law. An effect of this UNAMAR case law may indeed be that the use of arbitration clauses in international commercial contracts will decline in favor of forum clauses granting (exclusive) jurisdiction to an EU court in order to enhance legal certainty and avoid a situation like that in the UNAMAR case.