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INTRODUCTION FROM THE EDITOR

Michael Polkinghorne, White & Case LLP, ICC Institute Council Member

This edition includes articles by **Juan Eduardo Figueroa Valdés** (on tribunal-appointed experts in international arbitration), by **Stefan Kuuskne** (on the USMCA Advisory Committee on Private Commercial Disputes), and by **Shanti Mogan** and **Wong Wen Sheng** (on forum shopping) and a case summary from **Yves Herinckx** (recent Belgian Constitutional Court decision on the contents of the notification of an arbitral award).

What's more?

This edition also includes news on the Study released by the LatinAmerican and Iberian Regional Chapter; the Chapter Connects of the AustralAsian Regional Chapter and the ICC Institute Innovation Meet-Ups; as well as an interview with esteemed risk management attorney and Council member **Giuliana Dunham Irving;** news on the new-born Task Forces and the launch of the ICC Institute Prize 9th edition!

AWARD NOTIFICATIONS SHOULD EXPLAIN HOW TO SEEK ANNULMENT

Should the notification of an arbitral award contain an information notice that tells the recipient how and when annulment proceedings can be filed? The prudent answer is affirmative when the seat of the arbitration is in a jurisdiction where the European Convention of Human Rights applies – if one follows the reasoning of the Belgian Constitutional Court in its recent judgment of 10 February 2022.[1] In the absence of the required notice the clock may not start running and the time period for seeking an annulment of the award may become open-ended.

This is nothing new to French practitioners. Article 680 of the French Code of Civil Procedure requires that the notification of a judgment include a prominent notice about the available legal remedies: "L'acte de notification d'un jugement à une partie doit indiquer de manière très apparente le délai d'opposition, d'appel ou de pourvoi en cassation dans le cas où l'une de ces voies de recours est ouverte, ainsi que les modalités selon lesquelles le recours peut être exercé". If the notice is missing or incorrect, calculation of the time limit does not start running. Case law has extended the scope of this rule to the notification of arbitral awards.[2]

The European Court of Human Rights decided on several occasions that, in order for the right of access to a court derived from Article 6 of the Convention to be properly guaranteed, the rules regarding legal remedies (*voies de recours*) must be clearly defined and these rules must be explicitly brought to the attention of the parties. These decisions, however, were always very fact-specific. *Da Luz Domingues Ferreira v Belgium*[3] and *Hakimi v Belgium*[4] were about criminal convictions by default of an incarcerated defendant. *Faniel v Belgium*[5] also related to a criminal conviction by default, where the defendant was unrepresented. *Assunção Chaves v Portugal*[6] was a civil matter for the protection of a child; the Court stressed the complexity of these proceedings, because of the issues to be addressed and because of the extremely serious and sensitive nature of what was at stake, as well as the fact that the party was unrepresented.

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1 Const. C., 10 February 2022, No 23/2022, www.const-court.be.

2 Ch. Seraglini and J. Ortscheidt, *Droit de l'arbitrage interne et international*, 2nd ed., LGDJ, 2019, No 520 and 922; J.-B. Racine, *Droit de l'arbitrage*, Thémis, 2016, No 919.

3 ECtHR, 24 May 2007, No 50049/99.

4 ECtHR, 29 June 2010, No 665/08.

5 ECtHR, 1 March 2011, No 11892/08.

6 ECtHR, 31 January 2012, No 61226/08.

This was also the case in *Gajtani v Switzerland*[7] where, in addition, the first instance decision mentioned an incorrect time period for filing an appeal.

The case brought before the Belgian Constitutional Court arose from the allegedly defective performance of a construction contract. The contractor lost in first instance, missed the deadline for filing an appeal and argued before the Court of Appeal that his lateness should be forgiven because the deed of service of the first instance judgment did not specify the applicable time limit. The Court of Appeal referred to question to the Constitutional Court for a preliminary ruling.

The Constitutional Court developed a reasoning based entirely on the right of access to a court and on Article 6 of the European Convention on Human Rights. It expressly referred to the ECtHR case law but did not try and identify any specific facts similar to those that had triggered that case law – doing so would have been impossible, the case was only about a mundane commercial dispute and the contractor had been legally represented. The Court stated as a general proposition that, in order for the right of access to a court to be guaranteed, the availability of legal remedies and the relevant time limits must be expressly communicated to the parties. It considered that the requirement applies generally for the benefit of all litigants: "*ces exigences essentielles relatives au droit d'accès au juge, qui constitue un aspect du droit à un procès équitable, valent de manière générale à l'égard de tout justiciable*". The Court declared that an explanatory notice, in the deed of service of a judicial decision, about the availability of legal remedies is an essential aspect of the general principle of the proper administration of justice and of the right of access to a court.

The judgment of the Constitutional Court only deals with the service of State court judgments. It says nothing about arbitration and the communication of awards. Given its reasons, however, and the Court's sweeping statement about the general application of the information requirement it imposes, it seems inevitable that the notification of arbitral awards must also comply. The judgment does not have the precedent value of a decision of the European Court of Human Rights – it is only a domestic Belgian decision – but it originates from one of the country's supreme courts and, as such, it should be seen as authoritative.

It will therefore be a wise practice, whenever the ICC Secretariat or any other arbitral institution or arbitrators in *ad hoc* arbitrations notify an award to the parties and the notification is meant to be the starting point of the time period for filing annulment proceedings (this is the case in most jurisdictions, France being a notable exception), to include in the notification letter a notice explaining how and when annulment proceedings can be filed. In Belgium, the CEPANI promptly started doing so after the Constitutional Court's judgment.

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7 ECtHR, 9 September 2014, No 43730/07.

Yves Herinckx
Avocat (Brussels) / Solicitor (England and Wales)

25 April 2022