BELGIUM

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Belgium: no longer a proper guerrilla terrain for arbitration

Brussels used to be an ideal terrain for arbitration guerrilla tactics. This is now history. A new law has turned Belgium into an efficient and attractive place for arbitration.

In the past, guerrilla fighters could indeed harass their opponents and disrupt the arbitration by challenging an arbitrator, disputing the admissibility of a document, or seeking the annulment of an award. Bringing a challenge of an arbitrator before a State court would freeze the arbitration proceedings pending the court's decision. In the case of an institutional arbitration, it was unclear whether the State courts had jurisdiction to hear the challenge and whether an appeal was available against the court's decision. But a litigant could, in effect, considerably delay the arbitration by simply filing a challenge with a State court and then an appeal if unsuccessful. Furthermore, an argument that a document produced in the arbitration was inadmissible could not be dealt with by the arbitral tribunal; the issue had to be brought before the State courts and the arbitral proceedings were suspended in the interim. As for setting aside proceedings (they could last for several years), first before the court of first instance and then before the court of appeal; the courts also had the power to suspend the enforcement of the award pending the annulment proceedings. It is no surprise that these features resulted in harrowing war stories. Fortunately, times have changed.

The new law: entry into force and main features

The law of 24 June 2013 'amending Part 6 of the Judicial Code in respect of arbitration' entirely replaces Belgium's arbitration legislation. The new law applies to all arbitrations commenced on or after 1 September 2013. Arbitrations that were pending on that date, as well as subsequent enforcement or annulment proceedings in respect of existing arbitrations, continue to be governed by the former law.

The law is based on the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. It contains a single set of rules that applies to both domestic and international arbitrations. Its provisions constitute a chapter ('Part 6') of the Judicial Code, ie the code of civil procedure.

Party autonomy is the main underlying feature of the law. Most provisions are not mandatory and apply only by default, if the parties have not agreed otherwise. In the case of an institutional arbitration, the rules of the chosen institution will generally prevail over the provisions of the law.

Arbitrability is broadly defined. All disputes having an economic interest ('toute cause de nature patrimoniale', a wording copied from Swiss law) may be submitted to arbitration. The State and State-controlled entities may agree to arbitrate contractual disputes. Consumer disputes are fully eligible for arbitration. Labour disputes are also arbitrable, but only if the agreement to arbitrate is made after the dispute has arisen. The issue of the arbitrability of distribution and agency agreements is not addressed in the new law; the prevailing case law of the Supreme Court[1], which establishes that a distributor or an agent active in Belgium may not be bound to arbitration unless the arbitrators must apply Belgian substantive law, continues to apply.

The role of State courts

In the past, the involvement of the State courts in Belgian arbitrations could cause significant delays. Cases were heard first before the Court of first instance and could be brought for a full review to the Court of appeal, where the backlog of cases often stretched several years. The new law gives the final say to the Court of first instance (or its President, for a more expeditious treatment in certain circumstances). Its judgments in arbitration matters are no longer appealable. A recourse to the Supreme Court (the Cour

de Cassation) remains possible, but only on points of law. In addition, the new law concentrates arbitration cases before five courts of first instance (Brussels, Antwerp, Ghent, Liège and Mons) out of a total of 27 in the country, in order to promote specialised expertise in these courts.

With regard to the appointment, challenge and replacement of arbitrators, the courts' role is subsidiary to that of the arbitral institution chosen by the parties. If the parties have referred to institutional rules, and if the rules provide that the institution itself is in charge of appointing arbitrators and of dealing with challenges, then the State courts must defer to the institution and may not step in. The new law unfortunately does not clarify whether a decision of the institution that dismisses a challenge is final, or whether the alleged lack of impartiality or independence of the arbitrator can be raised again later as a ground for setting aside the award. Situations comparable to the French *Tecnimont* case[2] – where the dismissal by the International Chamber of Commerce (ICC) of a challenge of an arbitrator did not prevent the court from subsequently annulling the award on the same grounds – could thus possibly arise. Appointments of arbitrators are dealt with by the President of the Court of first instance on an ex parte application. Challenges and replacements are dealt with by the President *inter partes*. The arbitration proceedings may continue whilst a challenge is pending.

The State courts and the arbitral tribunal have concurrent jurisdiction over conservatory and interim measures. The jurisdiction of the courts in this respect does not end when the tribunal is constituted. If circumstances change, the courts and the tribunal also have the concurrent power to withdraw or amend their own, and each other's, interim measures.

With the consent of the arbitral tribunal, a party may seek assistance from the President of the Court of first instance to obtain evidence. The President may, in particular, order a third party to produce documentary evidence or to appear as a witness before the tribunal. This assistance is also available for arbitral proceedings seated outside Belgium.

The new law, unsurprisingly, affirms the competence-competence principle, gives the arbitral tribunal the power to rule on its own jurisdiction, and obliges State courts to decline jurisdiction when faced with a valid arbitration defence. When the validity or the scope of an arbitration agreement is disputed, however, the law does not give priority to one body or the other: each of the State court and the arbitral tribunal may decide on the issue, and neither must wait for the other. This is different from the French approach, where the State courts must leave the arbitral tribunal to rule on its jurisdiction first unless no arbitral tribunal has been seized and the arbitration clause is manifestly invalid or inapplicable[3]. In any event, the Belgian courts retain the power to review the tribunal's decision on jurisdiction at the stage of enforcement or annulment of the award (but a partial award that deals only with jurisdiction cannot give rise to an immediate application for setting aside; this must await a final award).

Powers of the arbitral tribunal

The tribunal may order conservatory and interim measures. Contrary to the Model Law, however, the arbitrators may not act on an ex parte application. The tribunal may attach a fine ('astreinte') to its orders or awards, payable to the other party in case of non-compliance. The tribunal may also subject its decision to the provision of security by the beneficiary of the measures. If it later appears that the measures should not have been granted, the party that requested them will be liable for any damages.

The law provides that interim measures, whether contained in an award or an order, may be declared enforceable by the courts. This also holds for interim measures ordered by tribunals seated outside Belgium. The court may make the enforcement conditional upon the provision of adequate security.

The tribunal enjoys broad powers with regard to the conduct of the proceedings and the taking of evidence. Subject to what the parties may have agreed, the tribunal is free to determine the procedural rules. The parties must in any event be treated equally and must be given a full opportunity to present their case in accordance with the adversarial principle ('dans le respect du contradictoire'). Expert witnesses may be challenged for lack of impartiality or independence when appointed by the tribunal, but not when appointed by a party. In contrast with the situation that prevailed under the former law, the tribunal has the power to rule on the authenticity and the admissibility of documents (with a limited exception relating to the authenticity of notarial deeds, which must still be referred to

the State courts).

In the absence of a choice of substantive law by the parties, the tribunal may apply the law that it considers appropriate. The award must be reasoned.

Enforcement and annulment

Arbitral awards can be declared enforceable upon a simple ex parte application to the Court of first instance. The process is the same for Belgian and foreign awards. The award debtor may afterwards, within a month of service of the enforcement decision, file an opposition and ask the court to rehear the case *inter partes*. The opposition proceedings, in principle, do not suspend the enforcement of the award, but the court may order otherwise.

Belgian awards may be set aside by the Court of first instance. An annulment claim must be submitted within three months of the notification of the award. The proceedings take place *inter partes*. The award may continue to be enforced pending the annulment proceedings, but, again, the court may order otherwise.

The grounds for refusal of enforcement and for annulment are copied from the Model Law, and include: invalidity of the arbitration agreement, award rendered beyond the scope of the arbitration agreement, arbitral procedure not conducted in accordance with the agreement of the parties, non-arbitrability of the dispute, and public policy grounds. The new Belgian law adds one more ground to the list contained in the Model Law, namely the lack of reasons in the award (save in the case of foreign awards that need not be reasoned in accordance with the law of the seat). The new law also adds that some of the grounds in the list will only lead to a denial of enforcement or to an annulment if they have had an effective impact on the award. Procedural irregularities are deemed waived if a party has not raised them without undue delay. In accordance with the Model Law, the annulment of a foreign award in the State of the seat is a ground for refusal of enforcement, and Belgium therefore ceases to follow the French *Hilmarton* and *Putrabali* doctrine according to which an international arbitral award survives annulment by the courts of its jurisdiction of origin[4]. It remains to be seen whether Belgian case law will switch to the English and US approach (*Yukos* in England, *Baker Marine* and *TermoRio* in the US), by giving effect to annulment decisions issued in the primary jurisdiction, but ignoring these decisions when they result from a biased judicial process[5].

When the parties to the arbitration have no connection with Belgium, they may waive in advance any annulment recourse. This waiver must be specific and cannot derive, for instance, from a clause in the rules of the relevant arbitration institution.

Room for new guerrilla skirmishes?

Belgian courts have jurisdiction to assist arbitral proceedings seated in Belgium, and to set aside awards rendered in such proceedings. The new law also gives them jurisdiction whenever a defendant is domiciled in Belgium, which seems to suggest that the Belgian courts may in that case appoint or remove an arbitrator or set aside an award even if the seat of the arbitration is abroad. This clearly was not intended by Parliament but, until case law clarifies this issue, Belgium may become a place where foreign arbitration guerrillas come and fight proxy battles. For the rest, arbitration in Belgium can now rely on solid legal foundations and expect efficient support from the courts.

Notes

1 Cass, 28 June 1979, *Pas*, 1979, I, 1260; Cass, 15 October 2004, *Pas*, 2004, p 1597; Cass, 16 November 2006, *Pas*, 2006, p 2351; Cass, 14 January 2010, *Pas*, 2010, p 119; Cass, 3 November 2011, *Pas*, 2011, p 2428; Cass, 5 April 2012, *Pas*, 2012, p 760.

2 Reims, 2 November 2011, *Rev arb*, 2012, p 112.

3 French Civil Procedure Code, Art. 1448. A similar approach is adopted in Switzerland for arbitrations with a local seat: Federal Supreme Court, 6 August 2012, 4A_119/2012, *ASA Bull*, 2012, p 864.

4 Cass fr, 1st civ, 27 June 2007, *Putrabali Adyamulia c. Rena Holding*, *Rev arb*, 2007, p 507, note E Gaillard; Cass fr, 1st civ, 23 March 1994, *Hilmarton*, *Rev arb*, 1994, p 327, note Ch. Jarrosson.

5 *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855 (27 June 2012); *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2nd Cir 1999); *TermoRio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007).