The 2024 amendments to Belgium's arbitration law

Yves Herinckx
Avocat (Brussels), Solicitor (England and Wales),
Deputy Judge at the Brussels Court of Appeal

Abstract

A law of 28 March 2024 makes some technical amendments to Belgium's arbitration law. The main change consists of a welcome simplification of the time limits for seeking the annulment of an award and for challenging an order for the enforcement of the same award. Other amendments mostly confirm positions already accepted by case law, commentators and practitioners. Belgian law is still very much aligned with the UNCITRAL Model Law.

1. Belgium's arbitration law has been based on the UNCITRAL Model Law since 2013. The law of 24 June 2013 entirely restated the section of the Judicial Code dealing with arbitration. Some technical amendments were made by a law of 25 December 2016. A second series of amendments, which again are mostly technical and do not bring any change of substance to the 2013 regime, was recently included in a law of 28 March 2024.[1] It originates from a proposal drafted by a working group set up within CEPANI, the main Belgian arbitral institution. It proved uncontroversial before Parliament where the Justice Commission voted each of its relevant articles without raising any question or comment.[2] This paper provides a brief overview of the main changes made to the arbitration law.

(1) Time limits for setting aside application and for challenging enforcement orders

2. The new law clarifies and simplifies in various respects the time limit for the filing of a setting aside application against an arbitral award. The central principle was, and remains, that an application for annulment of an award must be filed within three

1 Loi du 28 mars 2024 portant dispositions en matière de digitalisation de la justice et dispositions diverses I*bis*/Wet van 28 maart 2024 houdende bepalingen inzake digitalisering van justitie en diverse bepalingen I*bis*, Articles 108 to 118, 145 and 146, *M.B./BS*, 29 March 2024, *erratum* 4 April 2024. See the legislative history at *Doc.*, Ch., 2023-2024, n° 55-3728/01 (bill), n° 55-3728/04 (Justice Commission's first report) and n° 55-3728/07 (Justice Commission's second report).

2 Justice Commission's first report, p. 50, and second report, p. 20.

months of the date of notification of the award to the party that wishes to have it annulled.[3]

3. ***Fraud.*** An extension is now provided for when the award is challenged on the grounds of fraud. The three-month time period will in that case only start running at the point in time when the challenging party becomes aware of the fraud.[4] This new provision implements a rule established by a 2021 judgment of the Constitutional Court, according to which the Constitution as well as Article 6 ECHR require the reopening of a window for challenging an award when fraud is discovered.[5]

4. ***Interplay between annulment and enforcement.*** The new law streamlines the interplay between the respective time limits for seeking the annulment of an award (three months from communication of the award) and for challenging a court order authorising the enforcement of an award (one month from service of the order). The old regime, resulting from a 2016 amendment to the law of 24 June 2013, provides for a somewhat tricky shortening of the three-month time period in certain circumstances where the one-month time period (which invariably starts later) expires first.[6] The new law wisely reverses the approach and provides, in case of overlap, for an extension of the time period that expires first.[7] If the enforcement order is served more than a month before the end of the three-month period for seeking an annulment, the time limit for challenging the enforcement order is postponed so that both deadlines fall three months after the communication of the award. If the enforcement order is served less than a month before the end of the three-month period for seeking an annulment, the time limit for launching annulment proceedings is postponed so that both deadlines fall one month after the service of the enforcement order. If the enforcement order is served at a time when the three-month period for seeking an annulment has already elapsed, the right to demand an annulment does not revive and the affected party may only challenge the enforcement order.

3 Judicial Code, Article 1717, § 4.

4 Judicial Code, Article 1717, § 4, b).

5 Const. C., 28 January 2021, No. 14/2021, B.10.2 and B.12; O. VAN DER HAEGEN and F. CUVELIER, "Le point de départ du délai pour introduire une action en annulation contre une sentence arbitrale obtenue par fraude", *JT* 2021, p. 509, § 11; M. SCHOUPS, G. DE BUYZER and J. VANDERHEYDE, "Termijn vernietiging van een arbitrale uitspraak verkregen door bedrog", *b-Arbitra* 2021/1, p. 103, § 22; C. VANGOIDSENHOVEN, "De termijn voor het instellen van een vordering tot vernietiging van een arbitrale uitspraak in geval van bedrog: gewikt, gewogen en te licht bevonden", *RDC* 2021, p. 56, at p. 57; M. DRAYE, "De vernietiging van arbitrale uitspraken naar Belgisch recht", *in* W. VANDENBUSSCHE a.o. (eds), *Arbitrage, bemiddeling en andere vormen van conflictafhandeling: vandaag en morgen*, Wolters Kluwer, 2023, p. 141, § 199.

6 M. DRAYE, "Caught Somewhere in Time – Time Limits for Opposing Enforcement and Seeking Annulment of Arbitral Awards before Belgian Courts", *b-Arbitra* 2018/2, p. 331, §§ 56-65; Y. HERINCKX, "Les délais de recours contre les sentences arbitrales et leur exequatur", *JT* 2018, p. 720, § 7.

7 Judicial Code, Article 1717, § 7.

The new law enters into force on 8 April 2024. The time limit for filing a challenge against a decision is to be determined in accordance with the legal rules that are in force on the date of the decision that is being challenged.[8] This may lead to some curious situations that sit astride the change in law. If an award is issued before 8 April 2024 and an order for its enforcement is issued after that date, the time period for launching annulment proceedings will still be governed by the old regime whilst the time period for challenging the enforcement order will be governed by the new regime. Particular caution will thus be necessary for a few weeks after the entry into force of the new law.

Particular caution also remains essential when faced with the enforcement of a Dutch or a German award. Old bilateral treaties are still in force and contain specific procedural rules with regard, in particular, to time limits.[9] The legislative history of the law of 28 March 2024 notes that, in accordance with requirements recently introduced in the Judicial Code[10], the *exequatur* order must be accompanied by an information sheet setting out how, where and when a challenge may be filed. It also notes that this information will be complex when a bilateral treaty applies and recommends that the party who requests an enforcement order should take the initiative of stating the applicable rules in its application document.[11]

5. ***Correction, interpretation or addition.*** When an award gives rise to a request for correction or interpretation, or for an additional award, the new law confirms that the three-month time period for challenging the initial award only starts running when the tribunal renders its decision on the new request.[12] This was already the case under the 2013 law but, considering some inconsistency in the legislative history[13], it was thought useful to restate the point more clearly. Unfortunately the new provision now creates an ambiguity that did not exist in 2013. When the request for interpretation, correction or addition is dismissed by the tribunal, the wording of the 2013 law (which referred to the time of the tribunal's decision "about the request", *la décision du tribunal arbitral sur la demande introduite en vertu de l'article 1715*/*de beslissing van het scheidsgerecht over de vordering ingesteld krachtens artikel 1715*) left no doubt that an extended time period nevertheless started running when the dismissal decision was notified to the parties. The legislative history of the 2024 law

8 Cass., 10 February 2010, *Pas.* 2010, p. 428, P.09.1697.F; opinion Adv. Gen. MORMONT before Cass., 28 November 2022, www.juportal.be, C.21.0502.F; G. CLOSSET-MARCHAL, *Code judiciaire: droit commun de la procédure et droit transitoire*, Larcier, 2011, § 178.

9 Y. HERINCKX, "Pour la dénonciation des traités bilatéraux en matière d'arbitrage", *JT* 2015, p. 690, § 7.

10 Judicial Code, Article 780/1; Royal Decree of 26 December 2022 determining a template information sheet.

11 Statement of reasons, *Doc.*, Ch., 2023-2024, n° 55-3728/01, pp. 144-145.

12 Judicial Code, Article 1717, § 4, a).

13 Y. HERINCKX, *op. cit.* ("Les délais …"), § 4 and ftn. 9.

states that this is still the case now[14], but the wording of the new law seems to suggest the opposite: the extension now applies "in case of interpretation or correction or in case of an additional award" (*en cas d'interprétation ou de rectification d'une sentence ou en cas de sentence additionnelle*/*in geval van interpretatie, verbetering of aanvulling van een uitspraak*) and starts from the time of the notification of the tribunal's decision "about the interpretation, the correction or the additional award" (*la décision du tribunal arbitral sur l'interprétation, la rectification ou la sentence additionnelle*/*de beslissing van het scheidsgerecht over de interpretatie, verbetering of aanvulling van de uitspraak*). It is submitted that, in view of the legislature's clearly stated intent, the extension must still apply when the application for an interpretation, correction or addition is dismissed. In effect there is thus no change in this respect to the situation that has been prevailing since 2013.

Even though the law of 2013 did not say so in so many words, it was thought that the extension of the time limit for seeking the annulment of an award did not apply when the request for interpretation, correction or addition is dismissed because it was itself filed out of time.[15] The opposite interpretation would indeed permit an open-ended circumvention of the deadline. The new law remains silent on the point. It is perhaps a missed opportunity.

(2) Suspension of enforcement and security

6. The Court of First Instance seised of an application for the setting aside of an award is now expressly granted the power to suspend the enforcement of the award pending the annulment proceedings.[16] This power was already recognised by case law and commentators.[17] It applies equally in respect of Belgian and foreign awards, i.e., irrespective of whether the annulment proceedings belong to the jurisdiction of a Belgian or a foreign court. This removes any residual uncertainty about whether the "attachment judge" (*juge des saisies*, *beslagrechter*) has the exclusive power to order

14 Statement of reasons, *Doc.*, Ch., 2023-2024, n° 55-3728/01, p. 140.

15 Y. HERINCKX, *op. cit.* ("Les délais …"), § 4.

16 Judicial Code, Articles 1717, § 8, and 1721, § 2/1.

17 M. BERLINGIN and L. ATYEO, "La suspension d'un arbitrage en cours et de l'exécution d'une sentence arbitrale par le juge étatique statuant au provisoire", *b-Arbitra* 2021/2, p. 324; C. VERBRUGGEN, "Article 1720", *in* N. BASSIRI and M. DRAYE (eds), *Arbitration in Belgium, A Practitioner's Guide*, Wolters Kluwer, 2016, p. 503, § 27.

a suspension of enforcement measures under Article 1127 of the Judicial Code – he holds that power, but he is not the only one to do so.[18]

The Court of First Instance may require the delivery of security one way or the other, *i.e.*, it may order the award creditor to post security as a condition for pursuing the enforcement of the award pending the annulment proceedings or the challenge against the *ex parte* enforcement order, or it may order the award debtor to post security as a condition for obtaining a suspension of the enforcement.[19]

(3) No enforcement of annulled awards

7. Enforcement proceedings often move faster than annulment proceedings, so that an award may already have the benefit of an enforcement order (a so-called "exequatur") at the point in time when it is annulled. The law now makes it clear that an earlier enforcement order lapses if and when the award is subsequently annulled.[20] This applies equally to Belgian and foreign awards. There is thus clearly no room in Belgium for any application of the French *Hilmarton*/*Putrabali* doctrine, which ignores annulment judgments rendered in the jurisdiction of the seat and allows the enforcement in France of awards annulled in their country of origin.[21]

The legislative history of the new law confirms, however, that a foreign annulment judgment will only have an impact on an earlier Belgian enforcement order if that judgment "meets the applicable legal conditions".[22] This must be understood as a reference to the conditions set out in Article 25 of the Code of International Private Law for the recognition of foreign judgments. An annulment judgment rendered in breach of fundamental principles of due process, for instance, will therefore not stand in the way of the further enforcement of the award in Belgium.[23]

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18 J.-FR. VAN DROOGHENBROECK and A. HOC, *Voies de recours*, *in* G. de Leval (ed), *Droit judiciaire*, t. 2, vol. 2, Larcier, 2021, § 9.276(E); K. WAGNER, "Facultatieve schorsende werking van het derdenverzet voor de tenuitvoerlegging (commentaar bij artikel 1127 Ger.W.)", *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Wolters Kluwer, 2023, § 5. See also L. DEMEYERE and H. VERBIST, "De nieuwe Belgische arbitragewet van 24 juni 2013", *RW* 2014-2015, p. 83, § 81.

19 Judicial Code, Articles 1717, § 8, and 1721, § 2/1, paragraph 2.

20 Judicial Code, Article 1720, § 7. See on this issue Civ. Brussels, 8 June 2017, *b-Arbitra* 2017/2, p. 301 and A. HANSEBOUT, "De actualiteit van de arbitrale uitspraak: een conflict tussen het exequaturvonnis en het vernietigingsvonnis", *b-Arbitra* 2018/1, p. 93.

21 Cass. fr., 27 June 2007, *Putrabali Adyamulia v. Rena Holding*, *Rev. arb.*, 2007, p. 507 and note E. GAILLARD; Cass. fr., 23 March 1994, *Hilmarton*, *Rev. arb.*, 1994, p. 327 and note Ch. JARROSSON.

22 Statement of reasons, *Doc.*, Ch., 2023-2024, n° 55-3728/01, p. 146.

23 A similar approach is adopted in The Netherlands (Dutch Hoge Raad, 24 November 2017, *x t. OJSC Novolipetsky Metallurgichesky Kombinat*, *TvA*, 2018, p. 33, § 3.4.6; Gerechtshof Amsterdam, 28 April 2009, *Yukos Capital t. Rosneft*, *TvA*, 2010, p. 5, § 3.5) and in England (*Yukos Capital v Rosneft* [2012] EWCA Civ 855, §§ 125 and 133).

(4) Remote hearings

8. Arbitral tribunals are expressly given the power to hold hearings in person, remotely or in a hybrid format.[24] This merely confirms the widely accepted interpretation of their powers under the 2013 regime. The tribunal must consult with the parties before deciding on the format of the hearing and should abide by the parties' agreement, if any. If the parties disagree, the decision belongs to the tribunal. In other words, a party cannot unilaterally block the holding of a remote hearing.

(5) Electronic signatures

9. Arbitrators may validly sign their awards electronically, if they use a so-called "qualified electronic signature".[25] Each party, however, may require the delivery of a hard copy of the award, signed in wet ink.[26] This aims at facilitating enforcement in those jurisdictions where the recognition of electronic awards may be refused or is controversial.

Awards issued in electronic format, if they bear a qualified electronic signature, are enforceable as such.[27] Enforcement proceedings in Belgium do not require the submission of a copy of the award bearing a manuscript signature.

(6) Arbitrators' address

10. The 2013 arbitration law required that awards include an express reference to the arbitrators' "domicile", *i.e.*, their home address.[28] The rule was ignored as often as it was observed and its breach was not a ground for annulment of the award. This is now replaced with a requirement to show the arbitrators' "address". It may be their home or their office address, as they wish.

24 Judicial Code, Article 1705, § 1, paragraph 2.

25 See European Regulation 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market, Article 3, 12°.

26 Judicial Code, Article 1713, § 3, paragraph 2.

27 Judicial Code, Article 1720, § 4.

28 Judicial Code, Article 1713, § 5, a) (pre-2024). The "domicile" is the place where one is recorded in the population registry (Judicial Code, Article 32, 3°). In practice, this is generally the home address.

(7) Partial set aside

11. The new law makes it clear that, when grounds for setting aside affect only a separable part of an award, the annulment must be limited to that part.[29] Commentators already considered that this rule was implied in the 2013 statutory regime.[30] An identical provision existed before 2013 but was not expressly included in the law of 24 June 2013.[31]

(8) Awards declining jurisdiction

12. An award that declines jurisdiction may be challenged by way of annulment proceedings.[32] The 2013 law already allowed a challenge against this type of awards but it was not entirely clear whether this had to be done by way of, and subject to the time limit for, annulment proceedings.[33] Belgian law departs in this respect from the UNCITRAL Model Law, which does not give state courts the power to overrule arbitrators when they decide that they lack jurisdiction.[34]

(9) Intertemporal rules

13. The 2013 restatement of Belgium's arbitration law provided that it applied to, and only to, arbitrations that commenced on or after 1 September 2013. Arbitrations commenced before that date remained subject to the old arbitration law. Despite the apparent simplicity of this clear criterion, a controversy arose in connection with

29 Judicial Code, Article 1717, § 2.

30 G. KEUTGEN and G.-A. DAL, *Larbitrage en droit belge et international*, t. I, 3rd ed., Bruylant, 2015, § 700; C. VERBRUGGEN, "Annulment and enforcement of arbitral awards in Belgium", *in* S. GOLDMAN and S. VAN ROMPAEY (eds), *Annulment and enforcement of arbitral awards from a comparative law perspective*, Wolters Kluwer, 2018, p. 3, § 5.

31 Judicial Code, Article 1705 (pre-2013). For a recent application, see Cass., 10 February 2023, *RDC* 2023, p. 1212, C.21.0273.N, with note J. KOLBER and C. VANGOIDSENHOVEN, "Over het aantonen van een invloed op de arbitrale sententie en de verplichting tot gedeeltelijke vernietiging", §§ 28 and 29, and *b-Arbitra* 2023/1, p. 57, with note MD.

32 Judicial Code, Article 1717, § 3, a), i).

33 Judicial Code, Article 1690, § 4, paragraph 2 (pre-2024); N. BASSIRI, "Article 1690", *in* N. BASSIRI and M. DRAYE (eds), *op. cit.*, p. 199, § 15; D. DE MEULEMEESTER, "De (de novo) toetsing van een bevoegdheidsvraag door de annulatierechter naar aanleiding van het vonnis d.d. 24 februari 2022 van de vierde kamer van de rechtbank van eerste aanleg te Brussel", *b-Arbitra* 2023/1, p. 326, §§ 85-93.

34 UNCITRAL Model Law on International Commercial Arbitration, Article 16(3). See Dutch Hoge Raad, 21 April 2023, *TvA*, 2023, p. 148, § 3.2.6 and opinion Adv. Gen. B.J. DRIJBER, www.rechtspraak.nl, § 5.18; H.M. HOLTZMANN, J. NEUHAUS, E. KRISTJANSDOTTIR, Th. WALSH, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, 2015, p. 487.

foreign arbitrations that had commenced before 1 September 2013 but only gave rise to Belgian court proceedings – typically in connection with the enforcement of the award – after that date.[35] The new law now provides that these situations are governed by the 2013 restatement. Given the passage of time since 2013, it is likely that very few cases will still be affected by this.

The intertemporal criterion adopted in 2013 failed to provide a solution when no arbitration was commenced at all, whether before or after the 1 September 2013 cut-off date. This is for instance the case when a defendant to court proceedings invokes an arbitration agreement and disputes the jurisdiction of the state courts. The Court of Cassation filled the gap and decided that the date of the arbitration agreement, in lieu of the nonexistent date of commencement of the arbitration, was the relevant factor.[36] The law of 28 March 2024 reverses the solution with a view to expanding the scope of application of the 2013 restatement, and provides that, in the absence of arbitration proceedings, the relevant factor is the date of commencement of the court proceedings.[37]

(10) Silence in response to Constitutional Court

14. A judgment of 16 February 2017 of the Constitutional Court tasked the legislature with setting up a possibility of challenge by third parties against arbitral awards.[38] Third parties may challenge court judgments by way of a so-called *tierce opposition*/*derdenverzet*. The Constitutional Court considered that it was discriminatory that third parties to an arbitral award could not exercise a similar right.

Implementing this command, however, would have made Belgium an unorthodox – and relatively unattractive – arbitration jurisdiction. Belgian awards would become vulnerable to a type of challenge that does not exist in the major arbitration jurisdictions. The legislature opted to apply the Hippocratic oath, "first, do no harm", and to change nothing to the position of third parties.

35 Brussels, 17 November 2020, *b-Arbitra* 2021/1, p. 148, reversing Civ. Brussels, 20 December 2019, *b-Arbitra* 2020/1, p. 147.

36 Cass., 27 September 2018, *Pas.* 2018, p. 1751, C.16.0346.F, *b-Arbitra* 2020/1, p. 95 and note K. ONGENAE, "Temporeel toepassingsgebied van de Arbitragewet 2013 in procedures voor de bodemrechter".

37 Law of 24 June 2013, Article 25, § 2, as replaced by the law of 28 March 2024, Article 145.

38 Const. C., 16 February 2017, No. 21/2017; O. CAPRASSE and M. MALHERBE, "L'extension du recours en tierce opposition aux tiers lésés par une sentence arbitrale", *b-Arbitra* 2017/2, p. 207; J. VAN COMPERNOLLE and G. DE LEVAL, "L'ouverture de la tierce opposition au tiers lésé par une sentence arbitrale : une lacune législative comblée par la Cour constitutionnelle", *Rev.not.b.* 2017, p. 494; B. ALLEMEERSCH and G. SCRAEYEN, "Arbitrage et tierce opposition", *JT* 2018, p. 65; M. DRAYE, "The Three Card Trick – Reflections on Third Party Opposition in Arbitration", *b-Arbitra* 2019/1, p. 117.