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Belgium Adopts a New Law on Arbitration

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On 16 May 2013, Belgium's House of Representatives adopted the bill no. 53-2743 that is meant to replace the Sixth Part of the Belgian Code of Civil Procedure (*Code judiciaire/Gerechtelijk Wetboek*) and thoroughly modernize the Belgian arbitration law. The *travaux préparatoires* leading to this new law may be consulted here (in French and Dutch).

The main purpose of the reform is to align Belgium's arbitration law to the UNCITRAL Model Law and confirm Belgium's friendliness towards arbitration.

Historically, Belgium's arbitration law has always been slightly isolated. It was originally based on the European Convention providing a Uniform Law on Arbitration drafted by the Council of Europe in 1966. However the Convention was signed by Austria and Belgium only. Belgium was the sole State to ratify the Convention, hence transforming a uniform law into a quite unique one.

The tide has now turned and Belgium will join the 66 members club that enacted a legislation based on the UNCITRAL Model Law. Some of Belgium's idiosyncrasies will however remain.

Belgium's new arbitration law chose not to distinguish between international and domestic arbitration. To this extent, the new law maintains the *status quo* in Belgium. The drafters of the new law believed that the frontier between domestic and international arbitration is not always easy to draw. Moreover they intended to provide equal treatment to domestic and international arbitration and saw no reasons why domestic arbitration should be treated under stricter terms.

The new law transposes the improvements of the UNCITRAL Model Law adopted in 2006 regarding the validity of the arbitration agreements and interim measures. An arbitration agreement does not have to be concluded in writing to be valid under Belgian law (however, when disputed, the existence of the arbitration agreement has to be evidenced in writing). In addition, interim measures ordered by an arbitral tribunal shall be recognized as binding and shall be granted enforcement by the courts.

As to the grounds for annulment of an arbitral award and the refusal to enforce it, the new Belgian law contains some provisions in addition to the UNCITRAL Model Law.

First, an arbitral award rendered in Belgium may be set aside if it fails to state the reasons on which it is based. The duty to state the reasons of a decision is considered an essential feature of every jurisdictional mission in Belgium. However, if the award is rendered in a country where the reasoning of an arbitral award is not mandatory, the lack of reasons will not prevent an arbitral

award from being enforced.

Second, the setting aside of an award may also be granted if the arbitral tribunal exceeded its powers. A topical example of this occurs when the arbitrators decide as *amiables compositeurs* without the consent of the parties to do so.

Third, in addition to allowing the annulment of an award which violates public policy, the new law expressly provides that an arbitral award may be set aside if it was obtained by fraud.

The lawmaker also decided to maintain a special feature of the Belgian arbitration law relating to the setting aside of arbitral awards. Pursuant to the new article 1719 of the Code of Civil Procedure (which reproduces provisions previously contained in Article 1717, § 4, of the Code), the parties to an arbitration taking place in Belgium have the possibility to renounce in advance to request the setting aside of an arbitral award. However this possibility is available only if the parties do not have their registered seat, their primary place of business, or a branch in Belgium. If one of the parties is an individual, that party should neither be of Belgian nationality nor a Belgian resident. In other words, the waiver is solely available to legal persons and individuals that have no ties with Belgium.

The new law should also put an end to some debates that agitated the arbitration community in Belgium and abroad.

In 2005, the Court of Appeal of Brussels decided (to the surprise of many specialists) that challenges of arbitrators must be submitted to the national courts – only – and that the system whereby challenges were decided by an arbitral institution contravenes public policy… It is now expressly stated that the parties are free to organize the procedure applicable to the challenge of arbitrators as they see it fit, e.g. by reference to the rules drafted by an arbitral institution.

Under the previous law, an arbitral award could be set aside not only if it failed to state its reasons, but also if it contained contradictory provisions. There were some recurring discussions as to whether the contradiction had to exist in the operative part of the award or whether any contradicting provisions in the reasoning of the arbitral tribunal could justify the setting aside of the award. Another aspect of controversy was whether a reasoning fraught with contradictions could qualify as a reasoning at all. The debate should now come to an end. Pursuant to the explanatory statement accompanying the new law, the presence of contradictory provisions in an award is no longer a ground for annulment.

On other aspects, the controversy might endure. Some commentators assert that Belgium allowed for the enforcement of arbitral awards despite their setting aside in the country where they had been rendered. There is however not much case law on the enforcement in Belgium of foreign annulled awards to support such a conclusion. Commentators usually rely on a judgment of the Court of first instance of Brussels of 6 December 1988 (*Sonatrach v Ford Bacon Davies*) which appear not only outdated and isolated but also very specific given the factual circumstances of the case. Sonatrach had opposed the recognition and enforcement in Belgium of an award rendered in Algiers, asserting that the award had been set aside by a Court of Algiers. The Court of first instance of Brussels did not apply article V, 1, e), of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on the ground that at the time the award was rendered, the country in which the award was made (i.e. Algeria) had not adhered to the Convention. Pursuant to the reciprocity reservation made by Belgium, the Court of first instance

refused to apply the New York Convention. The Court found further that Sonatrach did not invoke any ground for the refusal of recognition and enforcement of the award foreseen by the Belgian Code of Civil Procedure nor any ground that would justify the setting aside of the award in Belgium. It refused, on procedural grounds, to recognize the decision of the Algiers Court annulling the award. The Court of first instance of Brussels denied therefore Sonatrach's motion to oppose the recognition and enforcement of the award in Belgium.

On this issue, the new law transposes Article 36, (1), (a), (v), of UNCITRAL Model Law which provides that recognition and enforcement may be refused if "*the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made*". The construction of this provision is not the same in all the States which have adopted the Model Law. In some countries, the courts consider that they have discretion to enforce awards which have been set aside in their country of origin, while in other countries, the enforcement is refused as soon as a ground for refusal is met.

It is true that the UNCITRAL Model Law uses the modal verb "*may*", which tends to imply that the refusal to enforce is possible, although not mandatory. By contrast, the new Belgian law provides that the court "*refuses the recognition and the enforcement of an arbitral award, irrespective of the country in which it was made, in the following circumstances only […]*". Although the wording does not carry the same idea of discretion as in the original text of the Model Law, one cannot say that the new law deprives the judge of any freedom whatsoever to grant the leave for enforcement. All in all, the issue is similar to the difference between the English and the French version of Article V, 1, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Only practice and case law will allow to determine where Belgium stands in this debate.

The new law was published in the official journal (*Moniteur belge/Belgische Staatsblad*) on 28 June 2013 and it will come into force on 1 September 2013.

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