Kluwer Arbitration Blog

Belgium in the spotlight

Olivier van der Haegen (Linklaters) · Wednesday, April 30th, 2014

During past months, the Belgian arbitration community has been very active in promoting its country and Brussels in particular, as a major international arbitration centre.

2013 and 2014 are indeed vintage years for Belgian arbitration.

First, the Cepani, the major Belgian arbitration institution, modernised its arbitration rules. The new rules entered into force as from 1 January 2013 (see the previous post of D. De Meulemeester). As the readers of this blog will know, these rules have been the object of attention around the globe as they were applicable in this year's Vis Moot case.

Second, Belgium has a new arbitration law review, called B-Arbitra. The first and second volumes have been released and contain thought-provoking articles in English, French and Dutch, on Belgian but also foreign and international arbitration developments.

Third, Belgium enacted a new law on arbitration, which entered into force on 1 September 2013. The law is largely inspired by the UNCITRAL Model Law (see the previous post of G. Matray).

At a colloquium organized in Brussels on this new piece of legislation, the Belgian Minister of Foreign Affairs, Didier Reynders, pointed out the many advantages of Brussels as a seat of international arbitrations. With humour and a glimpse of irony, he applied the criteria that are put forward to promote other European cities as arbitration hubs to the case of Brussels. The result was that Brussels presented many of those advantages, yet sometimes more favourably, among others because of cheaper facilities (hotels, transport, conference rooms). The location of Brussels, its role as a European and international administrative centre and the number of practising lawyers used to working in different languages (with many specialists of EU and international law) are other advantages that can be underlined.

In this framework, I wanted to briefly comment on a couple of measures that have been taken by the Belgian legislator in order to increase the efficiency of arbitration in Belgium.

Among the most important amendments made in this purpose are the modifications to the rules on jurisdiction, role and powers of Belgian courts when seized during the arbitration proceedings or once an award is rendered. Indeed, the most important chapters of national laws on arbitration are those concerning the available recourses to the judicial courts, either during the arbitration procedure or following it.

Unfortunately, the backlog of Belgian judicial courts is quite significant. Therefore, the time within which a judicial decision can be obtained was considered harmful to arbitration proceedings seated in Belgium. Parties do sometimes need a rapid intervention of State courts, either in order to make arbitration proceedings advance, or to ensure that one party cannot unduly delay the execution of an award by introducing lengthy and dilatory judicial proceedings at the annulment or enforcement stage.

The new law sought to tackle this issue by giving jurisdiction to the President of the Court of First Instance, acting as in summary proceedings, to intervene during the arbitration procedure in order to decide issues in relation to the appointment, replacement and challenge of arbitrators (when no institution has been appointed or when the institution is helpless), or to take the necessary measures for collecting evidence, or to impose attachments (see, primarily, Article 1680, §§1-4 of the Belgian Judicial Code). The decisions made by the President of the Court of First Instance in this respect are not open to appeal.

The new law also provides that the Courts of First Instance – located at the seat of the Courts of Appeals in whose jurisdiction the place of arbitration is situated or where enforcement is sought – will decide upon all requests in relation to enforcement or the setting aside of arbitral awards. Again, the decisions in relation to annulment or enforcement of arbitral awards are no longer open to appeal, but only to a possible recourse before the Belgian Supreme Court (Article 1680, §5).

This will certainly increase the efficiency of annulment and enforcement proceedings. Since the Courts of Appeals are among the most backlogged jurisdictions in Belgium, the removal of the possibility to appeal judgments on setting aside and enforcement is of great practical importance. Also, concentrating jurisdiction for all arbitration-related proceedings in the hands of certain well-defined courts will increase their specialisation in the subject.

Another measure taken by the Belgian legislator so as to increase the efficiency of arbitration-related court proceedings concerns the limitations put on the ability to introduce recourses against arbitral awards.

The grounds for setting aside awards rendered in Belgium are those of the UNCITRAL Model Law (public policy, due process, absent or invalid arbitration clause, inarbitrability). Yet, three additional grounds for setting aside are still available under the newly amended regime: (i) the absence or the lack of reasoning of the award, (ii) the fact that the arbitral tribunal exceeded its powers (Article 1717, §3, a), and (iii) the fact that the award would have been obtained by fraud (Article 1717, §3, b). The former “contradictions in the reasoning” ground has been abolished (see our previous post on that subject).

Now, in order to be able to invoke these grounds, the law provides that the parties will have to demonstrate that they were not aware of them during the arbitral procedure and, therefore, that the issues on which they are based could not be invoked at that time, except naturally for the grounds related to the content of the award (lack of reasoning) or for those that can be raised by the courts *ex officio* (inarbitrability, breach of public policy or fraud) (see Article 1717, §5).

This requirement was previously only applicable to issues relating to the constitution of the tribunal or to the validity of the arbitration clause. Today, it will also apply to a breach of due process. The law further provides that a violation of due process will not justify annulment if it can be proven that the irregularity did not have consequences on the award (Article 1717, §2; the way

the latter condition is framed is important – it means that the onus of proof that the breach had no consequences on the award will rest on the defendant in the annulment proceedings).

Even though these procedural requirements exist under other national laws and many institutional rules, it remains to be seen how they will be applied in practice and how they will be construed by Belgian courts.

For instance, if a party raises an issue with respect to due process during the arbitral procedure, yet agrees to further continue the proceedings with a mere "*reservation of rights*" and without seizing the competent institution, will that be sufficient in order to be able to invoke later a breach of due process at the annulment stage? Some could consider this as falling short of the requirement that the ground was actually "*invoked*" when it became apparent (see, for example, Court of Appeals of Paris, 2 April 1998, Rev. arb., 1999, p. 821).

Yet, on the other hand, if a party would be required not only to raise the issues immediately but also to refuse to continue the process absent a decision by the arbitrators and/or the institution, in order to safeguard its right to later request annulment, the new requirement could prove inadequate in its purpose to increase efficiency of arbitration, as it could lead parties to raise as many issues as possible at all times before the arbitrators, or encourage them to cease the institution or even the judicial courts with multiple requests during the arbitral process.

Finally, the new Belgian law also adopted the UNCITRAL three months deadline, starting as from the notification of the award (or of its rectification/interpretation), to enter into setting aside proceedings, whatever the annulment ground invoked (Article 1717, §4). Previously, certain grounds for annulment, such as the fact that the award would have been obtained by fraud for example, could be raised within three months as from the point at which the issue was discovered.

This is another choice made by the Belgian legislator in order to increase efficiency of arbitration-related proceedings. However, in case of fraud or issues concerning the constitution of the arbitral tribunal in general, starting the deadline as from the notification of the award can sometimes lead to undue restrictions of the parties' rights of defence, because the facts that warrant annulment in such situations can become apparent only after a lapse of time following the notification of the award.

It can thus be observed that the options available to national legislators in order to increase efficiency of arbitration-related court proceedings require the striking of a difficult balance between the parties' fundamental right to enter into legitimate recourses against arbitral awards and the limitations of this right justified to avoid undue, dilatory and/or multi-pronged judicial recourses.

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