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MIDDLE EAST AND AFRICA ARBITRATION REVIEW 2023

The European Arbitration Review 2023 contains insight and thought leadership from 15 preeminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Europe's more interesting seats.

This edition also contains think pieces on human rights in arbitration, the mechanism's growing use in technology disputes, damages in investment disputes and the use of statistical samples.

All articles come complete with footnotes and relevant statistics.

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Preface

Welcome to *The Middle Eastern and African Arbitration Review 2023*, one of Global Arbitration Review's annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products such as our Arbitrator Research Tool, and repository of arbitral awards (Primary Sources).

In addition, assisted by external contributors, we curate a series of regional reviews that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is one such review. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 260-plus pages, they capture and interpret the most substantial recent international arbitration developments from around Africa and the Middle East, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Ghana, Kuwait, Lebanon, Morocco, Mozambique, Nigeria, Rwanda, Saudi Arabia and the UAE, and has overviews on energy, renewables, mining, virtual hearings and the importance of the date of valuation.

A close read of these reviews never disappoints. On this occasion, for this reader, the nuggets I stashed included that:

- the Russia–Ukraine war will likely increase political risk in Africa, as grain shortages lead to price rises and thereafter to civic unrest;
- tighter foreign exchange controls are starting to ramify for some investments;
- sandstorms, caused by climate change, are proving a bigger-than-expected problem for some solar projects;

- the first renewables-related disputes have already broken out, usually because of underperforming technology;
- Mozambique is about to modernise its arbitration law;
- Saudia Arabia now performs very creditably against the CIArb's 'London' principles; and
- Kuwait's courts, on the other hand, remain betwixt and between on some key jurisdictional points.

And many, many more. I particularly noted the description of different countries' renewables pipelines for future reference.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, GAR would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher, Global Arbitration Review
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Rwanda

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In summary

This article analyses the current status of the international arbitration field in Rwanda and identifies the most recent evolutions, as well as the trends of Rwandan courts in international arbitration-related matters.

Discussion points

- The 2008 Arbitration Act
- The Kigali International Arbitration Centre (KIAC)
- Recent institutional developments
- Setting-aside proceedings in Rwanda
- Recognition and enforcement of awards in Rwanda
- Negotiation of public contracts in Rwanda
- Investor–state arbitration

Referenced in this article

- The 2008 Arbitration Act (Law No. 005/2008 of 14 February 2008 on arbitration and conciliation in commercial matters)
- The 2010 Law establishing KIAC (Law No. 51/2010 of 10 January 2010 establishing Kigali International Arbitration Centre and determining its organisation, functioning and competence)
- The KIAC Arbitration Rules 2012 (Ministerial Order No. 16/012 of 15 May 2012 determining arbitration rules of Kigali International Arbitration Centre)
- The 2014 Ministerial Instructions (Ministerial Instructions No. 612/208.11 of 16 April 2014 setting up modalities for drafting, negotiating, requesting for opinions, signing and managing contracts)

Introduction

The Republic of Rwanda, also commonly referred to as the 'heart of Africa' for its central location or the 'land of a thousand hills' for its topography, is a landlocked country situated in Central-East Africa between Uganda to its north, Tanzania to its east, Democratic Republic of the Congo to its west and Burundi to its south.

With a land mass of 26,338 m² and an estimated population of 13.2 million, it is the most densely populated country in Africa, and current projections estimate that the population will reach around 21 million in 2050.[1] The country has four official languages: English, French, Kinyarwanda and Swahili.[2]

According to the 2020 World Bank Doing Business report, Rwanda is the second easiest place to do business in Africa (after Mauritius) and is now 38th globally. In 2021, its gross domestic product (GDP) was estimated at 10,944 billion Rwandan francs, with an 8 per cent average annual growth rate over the preceding two decades. The three main sectors contributing to GDP are the service (48 per cent), agriculture (24 per cent) and industry (20 per cent) sectors.[3]

In recent years, Rwanda has embarked on ambitious infrastructure projects, including the construction of a new international airport (Bugesera International Airport). The new airport is expected to be operational before the end of the decade and to have a capacity of eight million passengers per year for the first 10 years. It will then be expanded to a capacity of 14 million passengers per year, making it one of the largest airports on the continent.

Rwanda's legal system was initially based on the Belgian civil law system. However, since the turn of the millennium, and in particular after the country joined the Commonwealth in 2009, Rwanda has gradually shifted its legal system towards a more or less hybrid system comprising aspects of both common law and civil law. Rwanda is not a party to the Organisation of the Harmonisation of Business Law in Africa (OHADA), whose members are mainly located in Central and West Africa. Hence, no OHADA uniform act, such as the Uniform Act on Arbitration Law, applies in Rwanda.

1 National Institute of Statistics of Rwanda (NISR): https://statistics.gov.rw/statistical-publications/subject/population-size-and-population-characteristics.

2 Constitution of the Republic of Rwanda, article 8. In 2017, Swahili was recognised as the fourth official language, based on commitments entered into in 2007 in the East African Community, an organisation whose three founders – Kenya, Uganda and Tanzania – use Swahili as their official language, alongside English.

3 NISR, 'Gross Domestic Product – 2021', March 2022, p. 1.

2008 Arbitration Act

Arbitration in Rwanda is governed by Law No. 005/2008 of 14 February 2008 on arbitration and conciliation in commercial matters (the 2008 Arbitration Act), which entered into force on 6 March 2008. The 2008 Arbitration Act has considerably modernised Rwandan legislation on arbitration and is influenced by the 2006 UNCITRAL Model Law on International Commercial Arbitration, from which it transposed important features, including on issues of validity of arbitration agreements and interim measures.

Although the 2008 Arbitration Act includes provisions typical of national legislations modelled on the UNCITRAL Model Law (such as article 18 recognising the principle of Kompetenz-Kompetenz), a key distinction is worth mentioning. The Act applies to both domestic and international arbitration;[4] however, the Act does not list the provisions that would apply only to domestic arbitration or only to international arbitration . Although it seems rather clear that most provisions apply only to domestic arbitration while others apply to international arbitration,[5] the status of some rules remains unclear.[6] Similarly, the definition of 'international arbitration' given in article 3 of the Act lacks some clarity.

Moreover, arbitration proceedings are not confidential by default under Rwandan law, and confidentiality needs to be expressly agreed upon between the parties (directly or by reference to the rules of an arbitral institution).

The fact that the Act refers to both arbitration and conciliation has sometimes been found to render the Act difficult to read. To tackle this issue, Rwanda is considering reviewing the Act with a view to focusing solely on arbitration. This opportunity should also be used to clarify, among other things, the scope of the law.

Kigali International Arbitration Centre

The Kigali International Arbitration Centre (KIAC) was created as an initiative of the Private Sector Federation (PSF) of Rwanda. This initiative was supported by the government of Rwanda because arbitration was part of investment climate reforms. The KIAC was established by Law No. 51/2010 of 10 January 2010[7] and was officially launched in May 2012.

4 Article 2 of the 2008 Arbitration Act.

5 Articles 21 (recognition and enforcement of interim measures), 50 and 51 (recognition and enforcement of awards) of the 2008 Arbitration Act, which apply 'irrespective of the country in which [the interim measure or the award] was issued'.

6 See in particular article 32 of the 2008 Arbitration Act, which provides that the parties are free to choose the place of arbitration, but that in case of disagreement, the place of arbitration 'shall be Rwanda'. A similar type of rule applies in respect of the law applicable to the merits of the dispute (see article 40 of the Act).

7 Law No. 51/2010 of 10 January 2010 establishing the Kigali International Arbitration Centre and determining its organisation, functioning and competence.

As an arbitral institution, the KIAC does not itself resolve disputes but administers the resolution of disputes by arbitral tribunals in accordance with its institutional rules published in 2012 (the KIAC Rules 2012)[8]. The KIAC Rules 2012 apply to all disputes referred for arbitration to KIAC (but not automatically to all arbitration seated in Rwanda).[9]

The KIAC boasts an impressive track record in terms of cases administered. Since its inception in 2012, the KIAC has administered more than 200 cases (60 per cent being domestic cases and 40 per cent being international cases) and has averaged 25–30 cases per year since 2017.

The KIAC Rules 2012 are a modern set of rules, inspired by the ICC Rules and UNCITRAL Rules consistent with international best practices and covering all aspects of arbitral proceedings. A series of important features of the Rules deserves special attention. First, the KIAC Rules 2012 provide for scrutiny of the draft award that the arbitral tribunal shall submit to KIAC's Secretariat. The Secretariat 'may as soon as practicable suggest modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance'.[10] This is likely to ensure a better quality of arbitral awards, following in the footsteps of International Chamber of Commerce (ICC) practice. Second, the rules allow a party to make an application to an 'emergency arbitrator' to obtain 'urgent interim or conservatory measures that cannot await the constitution of the Arbitral tribunal'.[11] This adaptation allows the parties to draw on the – already quite extensive – practice of ICC arbitral tribunals on admissibility and jurisdiction over emergency arbitration proceedings. Third, the Rules provide that 'all meetings and hearings shall be in private and any records, transcripts or documents used shall remain confidential'.[12] Since the 2008 Arbitration Act does not provide that arbitration proceedings are confidential by default (as explained above), this provision of the Rules ensures that KIAC arbitration proceedings remain confidential.

Recent institutional developments

In recent years, the KIAC has gained international recognition notably through:

8 The KIAC Rules 2012 entered into force in May 2012 with the publication of the Ministerial Order No. 16/012 of 15 May 2012 determining the arbitration rules of Kigali International Arbitration Centre (KIAC).
9 KIAC Rules 2012, article 1.
10 KIAC Rules 2012, article 38.
11 KIAC Rules 2012, article 34 and Annex II.
12 KIAC Rules 2012, article 36.

- its involvement in the establishment of the African Arbitration Association (AfAA) launched in June 2018,[13] aimed at promoting, encouraging, facilitating and advancing the use of international arbitration within the African continent; and
- the signing of a cooperation agreement with the International Centre for Settlement of Investment Disputes (ICSID) in April 2019,[14] which provides for the possibility of holding ICSID hearings at KIAC facilities, reinforcing the trend of bringing investment disputes closer to where they arise. This agreement also encourages knowledge-sharing between the ICSID and the KIAC with regard to arbitration, conciliation, and other methods of dispute resolution.

The KIAC has also embarked on a review of its Rules that will enable it to incorporate some of the latest best practices in international arbitration and modernise the Rules to take into account developments such as virtual hearings, which have become prominent since the covid-19 pandemic. The review is expected to be completed by end of 2023.

Annulment and enforcement of arbitral awards

In 2008, the same year it enacted the Arbitration Act, Rwanda became party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention). Rwanda recognises and enforces foreign arbitral awards on the basis of reciprocity,[15] and therefore only recognises awards issued in countries that themselves recognise awards issued in Rwanda, which is the case for all countries party to the NY Convention.

The only available recourse against an arbitral award under the 2008 Arbitration Act is a recourse for annulment (setting-aside). The Act provides for grounds for annulment similar to the grounds for non-recognition of awards in the 1958 New York Convention and the UNCITRAL Model Law.[16] Among those grounds, two may be raised by a court on its own motion: the grounds of non-arbitrability and violation of public policy.

An application for setting aside the award must be made within 30 days from the date of the notification of the award.[17] The procedure presents an interesting feature to enable the court to send the case back to the arbitral tribunal if the ground for the setting-aside can be remedied. The 2008 Arbitration Act allows

13 See: https://afaa.ngo/resources/Documents/African%20Arbitration%20Association%20launched%20-%20Global%20Arbitration%20Review.pdf.
14 See: https://icsid.worldbank.org/news-and-events/news-releases/icsid-concludes-cooperation-agreement-kiac.
15 Article 50 of the 2008 Arbitration Act. However, Rwanda did not make a declaration on reciprocity when it became party to the NY Convention.
16 Article 47 of the 2008 Arbitration Act.
17 Article 48 of the 2008 Arbitration Act.

the Rwandan courts, 'where appropriate', to 'suspend the cassation [read: the annulment proceedings, based on the French version of the Act] proceedings for a period of time it determines in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion which may eliminate the grounds for cassation [annulment] of the award taken'.[18]

Two arbitration-related cases have been selected for this article, to highlight the types of disputes that have led to annulment proceedings, and the way these disputes have developed before the Rwandan courts.

The first case concerns a share purchase agreement dispute between a Rwandan and an Italian businessman.[19] In 2012, Mr Nsanawe sold his shares in Papyrus Bakery Café Ltd to Mr Cornacchia. The parties entered into a shareholding agreement whereby they agreed that all disputes would be settled by the Rwandan courts. Mr Cornacchia was eventually unable to pay the full amount and therefore requested Mr Nsanawe to redeem shares equivalent to the amount that he had paid, and Mr Nsanawe accepted. This led to the conclusion of a second agreement, a share transfer agreement, by which the parties accepted that any dispute would be settled by an arbitral tribunal. A dispute arose and Mr Cornacchia lodged a claim before the KIAC regarding the performance of the share transfer agreement. The KIAC ruled that the parties were no longer bound by the share purchase agreement and that the share transfer agreement had to be respected.

Dissatisfied with the award, Mr Nsanawe appealed to the Commercial High Court, requesting the award the be annulled on the grounds that (1) the arbitral tribunal had no jurisdiction to hear the dispute (article 47.1(c) of the 2008 Arbitration Act) and (2) the award was issued after the time limit fixed by the parties (article 47.1(d) of the 2008 Arbitration Act). The Commercial High Court ruled that the arbitral tribunal lacked jurisdiction because the shareholding agreement referred the dispute to the Rwandan courts, and therefore quashed the award.

Mr Cornacchia appealed this decision to the Rwanda Supreme Court, arguing that the dispute referred to the KIAC and decided upon by the arbitral tribunal relied only on the share transfer agreement, and not on the shareholding agreement. Mr Nsanawe filed a cross-appeal, contending that the award should in any event be set aside because it was issued after the time limit fixed by the parties.

In a 2016 decision, the Supreme Court found that Mr Cornacchia's claim had been lodged based on the share transfer agreement that provided for arbitration, and that the arbitral tribunal had therefore jurisdiction to hear the

18 Article 49 of the 2008 Arbitration Act.
19 Rwanda Supreme Court, *Yari Cornacchia v Nsanawe*, 26 February 2016, RCOMAA0053/15/CS.

case. Importantly, the Supreme Court also rejected Mr Nsanawe's cross-appeal ruling that the failure to comply with the time limit fixed by the parties is not a ground for annulment contemplated in article 47.1(d) of the 2008 Arbitration Act. Accordingly, the Supreme Court quashed the judgment of the Commercial High Court and confirmed the award.

In another interesting insurance-related case, the Supreme Court has been invited to rule on the impact of parallel criminal proceedings on arbitration proceedings.[20] A company, Tromea Ltd, entered into an insurance contract with Soras Ltd to cover fire and theft hazards. In the course of the relationship, goods were stolen from Tromea's store and Tromea filed an insurance claim for compensation with Soras. The parties failed to reach an amicable settlement and Tromea referred the case to arbitration. The arbitral tribunal refused to stay the proceedings to await the decision in the criminal case concerning the burglary committed in Tromea's store, and decided that Soras was liable to pay the value of the stolen goods, in addition to late interests and damages for breach of contract.

Soras applied for annulment and, after the Commercial High Court rejected the petition, Soras appealed to the Supreme Court alleging that the award should be annulled on the grounds that (1) the arbitral tribunal should have stayed the proceedings pursuant to the civil law principle according to which criminal proceedings suspend civil proceedings, which is public policy (article 47.2(b) of the 2008 Arbitration Act); and (2) the arbitral tribunal exceeded its power in awarding late interests and damages for breach of contract because such damages were not contemplated by the insurance contract (article 47.1(c) of the 2008 Arbitration Act).

The Supreme Court upheld the award in favour of Tromea. It found that, although the principle that criminal proceedings suspend civil proceedings is public policy, it was not applicable to the case because damages claimed by Tromea originated from the insurance contract concluded with Soras, and not from the burglary. It also decided that the arbitral tribunal did not exceed its power as it had adjudicated the claims made by Tromea in its submission.

Negotiation of public contracts in Rwanda

Arbitration is the instrument of choice in Rwanda to resolve disputes that arise out of contracts with Rwandan public entities. Pursuant to Ministerial Instructions No. 612/08.11 of 16 April 2014 (the Instructions) Rwandan public institutions and organs who receive public funds must, where possible, take the

20 Rwanda Supreme Court, *Soras Assurances Generales Ltd v Tromea Ltd*, 21 October 2016, RCOMAA0020/16/CS.

initiative 'to draft the contract to be proposed to the other party'[21] and include, inter alia, a dispute resolution clause.[22]

If the parties wish to opt for an arbitration clause, the Instructions state that the Rwandan entity 'shall not be allowed to apply any international arbitration clause except clauses relating to Kigali International Arbitration Center (KIAC)'.[23] It is also common that the draft contract will provide for Kigali as the place of arbitration, although this is not strictly mandated by the Instructions.

The (foreign) counterpart can, of course, seek to refuse referring the dispute to the KIAC. In that case, the Rwandan entity 'shall seek legal opinion from the Minister of Justice/Attorney General who shall decide or negotiate with the other party on the applicable dispute resolution clause'.[24] The alternative rules to apply if the parties decide not to use the KIAC Rules 2012 are the UNCITRAL Rules or the East African Court of Justice Arbitration Rules. It is therefore advisable for any party wishing to do business with public entities in Rwanda to familiarise themselves with the KIAC Rules 2012 and arbitration system in Rwanda generally.

Investor–state arbitrations involving the Republic of Rwanda

Rwanda is a signatory to the ICSID Convention, as well as to several bilateral Investment Treaties (BITs), not all of which are in force. BITs with Germany (1967), Belgium–Luxembourg (1983), the United States of America (2008) and South Korea (2009) are currently in force. Other BITs have been signed but are not yet in force, including with Morocco (2016), Turkey (2016), Qatar (2018), the Central African Republic (2019), and the Democratic Republic of the Congo (2021). All BITs, with the exception of the 1967 BIT with Germany, allow foreign investors to submit dispute resolution to arbitration. A BIT with France is currently under negotiation.

Rwanda has been the respondent in two investor–state arbitrations to date, both based on the 2008 BIT with the United States of America. The first was introduced by a US company in 2010 but was discontinued a year later.[25] The second came to an end in 2022 with an award in which the ICSID tribunal ruled in favour of Rwanda and declined its jurisdiction on the ground that the claimants, two US companies, had no material investment in Rwanda.[26]

21 Articles 3 and 7 of the Instructions.
22 Article 11 of the Instructions.
23 Article 14 of the Instructions.
24 ibid.
25 *Olyana Holdings LLC v Republic of Rwanda*, ICSID Case No. ARB/10/10, Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1), 7 January 2011.
26 *Bay View Group LLC and The Spalena Company LLC v Republic of Rwanda*, ICSID Case No. ARB/18/21, Decision on jurisdiction and liability, 30 March 2022.

Outlook and conclusions

The future of arbitration in Rwanda seems bright. Rwanda already benefits from a well-functioning arbitration centre and a classical arbitration law, which the state and the judiciary support and intend to modernise further. Arbitration is recognised as a tool for dispute resolution in public contracts and thus a method of dispute resolution endorsed by the government. These positive factors, alongside Rwanda's use of both the French and English languages, contribute to increasing Rwanda's role in the international arbitration arena in Central and Eastern Africa.

Aimery de Schoutheete

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Aimery de Schoutheete has more than 35 years of experience in business law at the Belgian law firm Liedekerke Wolters Waelbroeck Kirkpatrick.

He has extensive experience in drafting and negotiating commercial contracts, with particular focus on distribution agreements and trading contracts for commodities, and in handling litigation and arbitration before the Belgian courts, foreign EU jurisdictions and both national and international arbitration tribunals (ICC, CEPANI, Swiss Chambers, ad hoc procedures). In the past 12 years, he has regularly been appointed as arbitrator in proceedings before the ICC and CEPANI, whether as sole arbitrator or as chairman of the tribunal.

His focus is directed towards the commercial distribution area as well as the natural resources (upstream and downstream), mining, petrochemical, commodities and agribusiness industries. Aimery also has experience in the hospitality and construction sectors.

Aimery de Schoutheete is a recognised specialist in the field of distribution law, as is evidenced by his several publications in this field. For a period of 12 years (2002–2014), he was the member of the editorial committee of the Revue de Droit Commercial, in charge of general commercial law (including distribution law and arbitration matters). He is currently a member of the peer review committee of the Revue de Droit Commercial. He is also recognised as a specialist in the field of arbitration and was a member of the ICC task force on emergency arbitration. He is admitted on the ICC's and CEPANI's lists of arbitrators. He is also admitted on the arbitrators list of the OHADA Arbitration Court, IDArb and the Swiss Chamber of Arbitration (SCAI).

Aimery de Schoutheete is the chairman of Liedekerke Great Lakes, the firm's subsidiary in Kigali, Rwanda, and of Liedekerke DRC, the firm's subsidiary in Kinshasa, Democratic Republic of the Congo.

Julien Degrooff
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Julien Degrooff is part of Liedekerke's international arbitration and dispute resolution practice.

Julien assists clients in complex multi-jurisdictional litigations and international arbitrations, primarily in the areas of energy, distribution and corporate disputes.

Julien has represented clients in arbitrations involving financial statement and fraud analysis, regulatory issues in the pharmaceutical sector in the EMEA region, and complex financial and geological issues in the mining sector in the Democratic Republic of the Congo. Julien has also represented a sovereign state in Belgian enforcement proceedings, raising novel issues in Belgian law.

Julien holds a bachelor of laws and a bachelor of political science from the Université Saint Louis (USL 2016) and a master of laws from the University of Louvain (UCL 2018), where he graduated *summa cum laude*. His master thesis was awarded the PwC Chair in Tax Law Award. He studied as an exchange student at the McGeorge School of Law of Sacramento, California (2017)

Liedekerke is one of the largest independent law firms in Belgium. With more than 120 lawyers, the firm has offices in Brussels and Kigali, as well as in London and Kinshasa.

The lawyers of our international arbitration and dispute resolution practice represent clients in international arbitration proceedings governed by a wide range of applicable laws, both civil law and common law, and the team has been consistently ranked in the *GAR 100*.

Beyond Europe, Liedekerke has an in-depth knowledge of francophone Africa and the Great Lakes Region as well as of the Middle East and handles arbitrations for various companies and governments in these regions. The team specifically handles mining arbitrations in francophone Africa and assists clients in large engineering and construction disputes in the Middle East, as well as distribution and M&A disputes. Our lawyers have expertise in the local laws of the various regions, including OHADA, the laws of the DRC, Rwanda and Burundi, and the civil laws of Egypt, Lebanon, Qatar, Kuwait and the UAE.

Liedekerke has also been involved in some of the largest multi-jurisdiction enforcement proceedings in Belgium and abroad, in relation to both investor–state and commercial arbitration, representing sovereign states and foreign investors alike, and the team is widely recognised for its expertise in the coordination of cross-border proceedings.

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