IN-DEPTH

# International Arbitration

## BELGIUM



LEXOLOGY

# International Arbitration

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In-Depth: International Arbitration (formerly The International Arbitration Review) provides an analytical overview of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments while putting them in the context of each jurisdiction's legal arbitration structure and selecting the most important matters for comment.

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# Belgium

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## Summary

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# Introduction

The Belgian legal system is based on the civil law tradition and its arbitration regime is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law). The statutory provisions governing (international) arbitration are contained in the Belgian Judicial Code (BJC) at Articles 1676 to 1722. These provisions were amended by the Arbitration Act of 24 June 2013 (the 2013 Arbitration Act),[1] which entered into force on 1 September 2013.[2]

The temporal scope of the 2013 Arbitration Act had been subject to debate. However, in the high-profile *Stati v. Kazakhstan* case, the Court of Appeal of Brussels clarified that the 2013 Arbitration Act applies only to arbitration proceedings initiated after 1 September 2013, both for arbitrations located in Belgium and for those seated outside Belgium, and that arbitration proceedings initiated before 1 September 2013 and court proceedings relating to those arbitration proceedings remained governed by the former provisions of the BJC (even when the court proceedings were initiated after that date).[3]

The 2013 Arbitration Act mirrors the UNCITRAL Model Law, to a large extent, but differs in certain respects. Among the key distinctions, the 2013 Arbitration Act is not limited to commercial arbitration and encompasses all types of arbitration. In addition, Belgian law does not make a distinction between domestic and international arbitration, and the 2013 Arbitration Act applies whenever the seat of the arbitration is in Belgium (unless the parties agree otherwise, and subj to mandatory provisions).[4]

Belgian arbitration law specifically recognises the principle of *kompetenz-kompetenz* (Article 1682 of the BJC). Belgian courts must decline jurisdiction unless the arbitration agreement is invalid or has terminated (Article 1682(1) of the BJC). The objection to the courts' jurisdiction must be raised before any other defences by the respondents.[5] The law explicitly provides that arbitral proceedings can commence, continue and lead to an award despite the initiation of court proceedings, and that the arbitral tribunal can decide on its own jurisdiction (Articles 1682(2) and 1690 of the BJC).

In arbitration proceedings governed by Belgian law, the parties are largely free to organise the proceedings as they see fit. Arbitration proceedings are not confidential as a matter of law, and confidentiality needs to be agreed between the parties (directly or by reference to the rules of an arbitral institution).

A bill passed on 26 October 2022[6] aims to establish a central register for judicial decisions that will be published and made available to the public (revision of Article 782 of the BJC). While the new system does not apply to arbitral awards as it covers only judgments emanating from Belgian judiciary bodies, these judgments will be included when they relate to issues connected to arbitration, including judgments about the enforcement or setting aside of arbitral awards.

Because the 2013 Arbitration Act is based on the UNCITRAL Model Law, its provisions governing arbitration procedures largely align with those of other developed jurisdictions. From a comparative perspective, examples of atypical legal provisions on arbitration include the following:

1.

arbitration proceedings start when the request for arbitration is communicated (Article 1702 of the BJC), and the provisions of the BJC are very specific as to the means of communication and the way in which reception of the communication must be construed (Article 1678 of the BJC);

2. witnesses shall not be under oath when testifying (Article 1700(4) of the BJC);
3. parties are required to submit the exhibits on which they rely together with their written submissions (Article 1704(1) of the BJC); this is a default provision that stands in contrast to the practise of civil procedure in most common law countries;
4. the tribunal is not obliged to organise an oral hearing, except where a party specifically requests it (Article 1705(2) of the BJC);
5. a third party may request to intervene in the arbitration proceedings by writing to the tribunal directly, which then shares this communication with the parties (Article 1709(1) of the BJC); and
6. in all circumstances where a third party wishes to intervene, or is called to intervene, the arbitral tribunal's decision to allow the third party's intervention requires unanimity of the arbitrators (Article 1709(3) of the BJC).

Belgian law also includes a series of provisions regarding the making of the award. Awards must be reasoned (Article 1713(4) of the BJC) and contain information including the date and place of the award (Article 1713(5) of the BJC). Arbitral awards must be signed by the arbitrators; where there is more than one arbitrator and one fails to sign, the award may still be valid 'provided that the reason for the omission [of the signature of the others] is mentioned' (Article 1713(3) of the BJC).

On 28 March 2024, a new legislative act was adopted to introduce some amendments to Belgium's arbitration law.[7] The amendments are relatively minor, and mainly consist of confirming well-accepted solutions already articulated in Belgian case law, or in legal writing or practice. The most important amendments are outlined below.

## Recourse against awards

Belgian arbitration law continues to permit the inclusion of an appeal mechanism within arbitration agreements, allowing for an appeal before a second arbitral tribunal (Article 1716 of the BJC). In practice, however, this option appears to be rarely invoked and has gained little traction.

More importantly, Belgian arbitration law provides that arbitral awards may be set aside (or annulled) by the Belgian courts if the seat of the arbitration is in Belgium (Article 1717 of the BJC). However, a decision or partial award concerning the tribunal's jurisdiction cannot be challenged independently through a setting-aside application. Instead, jurisdictional determinations may only be contested in conjunction with an application to set aside the final award, once it has been rendered (Article 1690(4) of the BJC).

The limited grounds for setting aside an arbitral award are exhaustively listed in the law and closely mirror those for non-recognition under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Three grounds

may be raised *ex officio* by the court: non-arbitrability of the subject matter, public policy violation and fraud.

Only five Belgian courts have jurisdiction for setting-aside proceedings, hearing cases in either the French or the Dutch language (Article 1717(2) of the BJC). The competent courts are all courts of first instance; under the regime of the 2013 Arbitration Act, the judgment of these courts is final and cannot be appealed before the courts of appeal (Article 1717(2) of the BJC). A recourse remains open, however, for issues of law (and not fact) before the Belgian Court of Cassation.

In a recent case (*Euler Hermes NV v. AGFA Finance NV*), the Belgian Court of Cassation confirmed that, pursuant to Article 1705 of the BJC, an award can be partially annulled only if the part that is sought to be annulled can be dissociated from the rest of the award. As a consequence, the Court of Cassation reversed the 2020 judgment of the Court of Appeal annulling an award as a whole because it did not examine whether the decision against which the ground for annulment was raised was or was not dissociated from the other decisions taken by the arbitral tribunal. The Court of Cassation has concluded that, for this reason, the Court of Appeal's judgment violated Article 1705 of the BJC.[8]

One of the distinctive features of Belgian arbitration law is that the parties may decide to exclude the possibility for setting aside the award, but only if none of the parties is a Belgian national (Article 1718 of the BJC). This is one of the few instances in Belgian arbitration law where a distinction is made between 'domestic' arbitration (understood as being between Belgian parties, with a Belgian seat of arbitration) and 'international' arbitration. If the parties to the arbitration agreement specifically provide that they waive the right to setting aside, the arbitral award will be final and binding, without the possibility for recourse by the parties.

### Enforcement of arbitral awards

Belgium has ratified the New York Convention but has declared that it will apply the Convention subject to reciprocity. For the enforcement and recognition of foreign arbitral awards, Belgium has also signed several bilateral investment treaties (BITs) (with Austria, France, Germany, the Netherlands and Switzerland), as well as the European Convention on International Commercial Arbitration of 21 April 1961 and the International Centre for Settlement of Investment Disputes (ICSID) Convention of 18 March 1965. In principle, these treaties take precedence over Part VI of the BJC (Belgian arbitration law), except where the treaties provide otherwise (Article 1721(3) of the BJC). For example, the 'more favourable law' provision of the New York Convention provides that the Convention does not take precedence over the provisions of national legislation that are more favourable to recognition and enforcement.

The recognition and enforcement process of arbitral awards is initiated through a unilateral application submitted to the competent court. The grounds for the non-recognition of the award are similar to the grounds for setting aside the arbitral award and are listed in Article 1721 of the BJC.

## Year in review

## Legislative developments

A legislative amendment to the 2013 Arbitration Act was adopted on 28 March 2024 (the 2024 Act). The main changes relate to the time limits for applications for setting aside and for challenging enforcement orders. While the principle remains that applications for the setting aside of an award must be filed within three months of the date of notification of the award, an extension is now provided when the award is challenged on the grounds of fraud. In this case, the three-month period will only start to run on the date of the discovery of the fraud. This amendment crystallises a rule already established by a ruling of the Constitutional Court of 28 January 2021.[9]

The 2024 Act also simplifies the coordination of time limits for challenging an arbitral award (three months) and contesting an enforcement order (one month). Under the former regime, the three-month period for challenging an award could, in certain cases, be shortened if the one-month period expired first. The Act reverses that approach: where the two time limits overlap, the shorter period is extended to align with the longer period. Specifically, if the enforcement order is notified to the other party more than one month before the expiry of the three-month annulment period, the time limit to challenge both the award and the enforcement order is extended to at least three months. Conversely, if the enforcement order is notified less than one month before the annulment period ends, the time limit to challenge both actions is extended to at least one month from the date of notification.

The other changes introduced by the 2024 Act are generally technical or reflect positions already accepted by case law or practice, including:

1. explicitly granting the court of first instance the power to suspend the enforcement of an award during annulment proceedings;
2. clarifying that an earlier enforcement order is void if the award is annulled; and
3. technical updates, such as the recognition of the power of arbitral tribunals to hold hearings in person, remotely or in a hybrid format, as well as arbitrators' ability to sign awards electronically.

## Developments affecting international arbitration

The main arbitral institution in Belgium is the Brussels-based Belgian Centre for Arbitration and Mediation (CEPANI), whose functioning and rules are not dissimilar to those of the International Court of Arbitration of the International Chamber of Commerce (ICC) in Paris. Belgian parties and practitioners are also quite familiar with the practice of ICC arbitration, as they often opt for the ICC Arbitration Rules, and foreign parties also frequently choose Belgium as a seat for their ICC arbitration proceedings.

CEPANI has issued a series of updates to its practices over the past few years.[10] On 1 January and 1 July 2020, a new set of rules was issued in response to the covid-19 crisis. One of the most distinctive features of these new rules is the recourse to electronic communications as the default rule for communication between CEPANI, arbitral tribunals and parties. Subject to any contrary agreement between the parties, all correspondence

can be done in electronic format. CEPANI also uses a secure online platform (BOX) for the exchange of correspondence, submissions, exhibits and procedural decisions, which helps centralise all the relevant documents of the case for the benefit of all stakeholders and contributes to the reduction of paper in international arbitrations. In 2021, a Guide to the CEPANI Arbitration Rules[11] was published, providing useful insight into the interpretation of the Rules and the extent to which practice may differ from that of other leading institutions. The Guide also provides useful comparisons between the CEPANI Rules 2020 and the previous Rules, which had been in force since 2013.[12] In 2023, CEPANI modified its Rules to promote diversity in the nomination of arbitrators. Article 15 of the Rules, in force from 1 January 2023, states that, when constituting a tribunal, '[t]he Appointments Committee or the President . . . shall take into account, inter alia, the availability, the qualifications and the ability of the arbitrator(s) to conduct the arbitration in accordance with the Rules, and considerations of diversity and inclusion'. This update positions CEPANI among the very few arbitral institutions that have explicitly provided for diversity in their Rules.[13]

CEPANI's statistics for 2024 provide useful insights into the types of cases handled by the institution.[14] The language of the proceedings reflects the multilingual character of Belgium and Brussels, as 50 per cent of the proceedings are administered in English, 25 per cent are heard in French and 25 per cent in Dutch. In 79 per cent of the cases, the parties have chosen Brussels as the seat, while the remaining 21 per cent had their seat in another Belgian city.

Regarding the types of disputes administered by CEPANI, 41 per cent of cases relate to service agreements and another 34 per cent concern share purchase agreements. Additionally, 17 per cent relate to corporate disputes, while the remaining 8 per cent concern general issues of civil law. This is a distinctive feature of CEPANI compared with the ICC, for example, where close to 40 per cent of disputes relate to engineering, construction and energy disputes.

Although the proportion of arbitrations involving no Belgian party has decreased compared to 2023, international participation remains an important feature. In 2024, 42 per cent of arbitrations involved at least one foreign party (primarily from other European countries, but also from the United States). The amounts at stake are also increasing, with 38 per cent of cases involving amounts higher than €1 million and about 5 per cent of cases involving disputes valued at over €10 million.

Another interesting initiative promoted by CEPANI is the implementation of the C-SAR Arbitration Rules – inspired by the CEPANI Rules of Arbitration – to resolve disputes in the field of sport. Sports arbitrations are administered by a specific section of CEPANI: the Belgian Centre for Sports Arbitration (C-SAR). The C-SAR Arbitration Rules are already available to all sports federations that wish to utilise its provisions to solve their disputes. If a sports federation wishes to include a C-SAR arbitration clause in its rules, it has to notify the C-SAR, which will decide whether to grant the request.

Finally, the arbitral institutions from Belgium (CEPANI), the Netherlands and Luxembourg have signed a cooperation agreement establishing the BeNeLux Arbitration and ADR Group. This initiative aims to promote collaboration and increase the visibility of arbitration within and beyond the Benelux area. It is particularly significant because these institutions are currently exploring the potential adoption of a harmonised legal framework for international arbitrations seated in the Benelux countries.

## Arbitration developments in local courts

### Awards tainted by fraud

In a landmark judgment of 16 November 2021 in the high-profile enforcement saga opposing Moldovan investors Stati to the Republic of Kazakhstan in relation to the enforcement of a US$500 million Energy Charter Treaty (ECT) arbitral award, the Brussels Court of Appeal held that the award had been obtained by fraud and quashed the exequatur order that had been obtained *ex parte* (and confirmed by the lower court).[15] Stati has filed an appeal before the Court of Cassation, where the case is currently pending.

### Role of tribunal secretaries

The role of tribunal secretaries has again come under scrutiny before the Belgian courts. The issue had previously arisen in the context of enforcement proceedings in the *Yukos* arbitration saga. However, because of the discontinuation of those enforcement measures, Belgian courts had not ruled on this issue.

The issue arose again in annulment proceedings relating to a partial award handed down by an ICC arbitral tribunal in a dispute between the European Union and companies from Germany (WTE) and Cyprus (EMEK). EMEK and WTE alleged, among other things, that the tribunal secretary had exceeded her role as defined in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (the ICC Note) applicable at the time. In a recent judgment,[16] the Court of First Instance in Brussels found that the tribunal had not delegated its decision-making power and that the tribunal secretary had not performed tasks that went beyond what the parties had agreed by referring to the ICC Note. In its judgment, the Court of First Instance ruled that the writing of 'all or part of the award' by an administrative secretary did not in itself demonstrate a delegation of arbitrators' decision-making powers, as long as there was a 'review and revision' process by the arbitral tribunal. The Court therefore dismissed the ground for annulment and the request for annulment more generally.

An appeal in cassation was lodged before the Belgian Court of Cassation by WTE and EMEK, alleging that the judgment was contrary to Article 11 of the BJC, which provides that 'judges may not delegate their jurisdiction'. The Court of Cassation rejected the appeal on 23 April 2023. The Court of Cassation noted that arbitration proceedings are specifically regulated in Part VI of the BJC, which adapts and incorporates the UNCITRAL Model Law. For this reason and based on the 'contractual nature' of arbitration proceedings, the Court of Cassation held that the rules of the BJC that sit outside of this specific part of the law (including Article 11) do not apply to arbitration proceedings. Therefore, the prohibition imposed on judges to delegate their jurisdiction provided by Article 11 was found not to be applicable, as such, to arbitrators (unless the parties have agreed otherwise).

This is an important judgment for arbitration practice. Due to the incorporation of the legal provisions on arbitration in the BJC, a long-standing debate divided academics and practitioners about the effect of the ordinary rules of civil procedure on arbitration proceedings. By its judgment, the Court of Cassation has, in substance, freed arbitration from the influence of national conceptions of procedural law and opted to recognise

arbitration as a fully stand-alone method of international dispute resolution. The holding confirms that, although arbitration rules can, depending on the choices of national legislators, be enacted either in stand-alone statutes or in civil procedure or private international law codes, the important point is to ensure that arbitration is free to harness the diverse legal background of its users so as to provide a flexible, secure and effective method of international dispute resolution.

This is also a welcome development for the attraction of Brussels as an arbitral seat. International practitioners are now assured that their arbitrations are governed only by the specific legal provisions on arbitration. The Court's ruling could also serve to inspire other Model Law countries.

Arbitrability of disputes

In a landmark judgment handed down on 7 April 2023,[17] the Belgian Court of Cassation reversed its long-standing case law that disputes concerning the termination of exclusive distribution agreements may be submitted to arbitration – even when the agreement is governed by a foreign law chosen by the parties – when the Rome I Regulation is applicable to these agreements.

The Belgian Code of Economic Law (BCEL) provides for a specific protective regime of exclusive distributors in the case of unilateral termination or termination by fault of the supplier. The rules on the unilateral termination of exclusive distribution agreements of undetermined term (Articles X.35 to X.40 of the BCEL) are mandatory under Belgian law. Article X.39 of the BCEL provides that the aggrieved distributor may, in any situation, sue its supplier in Belgium, and that if the dispute is brought before the Belgian courts, the judge must exclusively apply Belgian law.

For almost 50 years, Belgian case law held that a dispute concerning the unilateral termination of an exclusive distribution agreement could only be submitted to arbitration if the arbitral tribunal was to apply Belgian law or a law providing for similar protection of the aggrieved distributor. Otherwise, the Belgian court seized of the case had to set aside the arbitration clause, agree to hear the case and apply Belgian law. This prompted many Belgian distributors to sue their former suppliers before Belgian courts in unilateral termination situations, despite their distribution agreement containing a foreign choice of law clause or an arbitration clause, or both.

In the above-mentioned case, a Belgian distributor and an Austrian supplier were engaged in an exclusive distribution agreement of undetermined term. Governed by Austrian law, the contract included an arbitration clause designating Vienna as the arbitration seat. Upon the unilateral termination of the agreement by the supplier, the distributor initiated legal action before Belgian courts, seeking damages under Belgian protective regulations. Initially, both the Court of First Instance and the Court of Appeal upheld the supplier's objection to the jurisdiction of Belgian courts, citing the arbitration clause. However, the distributor appealed to the Court of Cassation, contending that the arbitration clause was invalid and had to be set aside because the arbitral tribunal would have to apply Austrian law, which lacks the same level of protection as Belgian law.

Overturning its prior case law, the Court of Cassation ruled that despite the language of Article X.39 of the BCEL, a Belgian court adjudicating a dispute concerning the termination

of an exclusive distribution agreement cannot disregard the foreign law chosen by the parties and substitute it with Belgian law. Accordingly, Belgian courts cannot condition the arbitrability of the dispute on the arbitral tribunal's application of Belgian distribution law or a foreign law offering a similar level of protection. The new solution is intended to be grounded in the Rome I Regulation concerning the application of law to contractual obligations, which supersedes domestic (Belgian) law. In particular, the Court ruled that the provisions of Belgian distribution law do not constitute 'overriding mandatory provisions' under Article 9(1) of the Rome I Regulation because they primarily safeguard private, rather than public, interests. This interpretation is said to stem from the case law of the European Court of Justice (ECJ), notably the *Unamar* judgment of 17 October 2013.[18]

Enforcement of arbitral awards

In addition to the above-mentioned enforcement proceedings brought by Moldovan investors against the Republic of Kazakhstan, a number of foreign investors have been seeking to enforce their investment treaty award by attaching monies owed to states or state-controlled entities by EUROCONTROL, the Brussels-based European organisation for the safety of air navigation.

In November 2021, it was reported that Egypt had successfully attached monies held by EUROCONTROL, after which the case settled.[19] In at least two other known cases pending before the Belgian courts (*Micula v. the State of Romania*[20] and *Becchetti v. Albania*),[21] investors also attached monies held by EUROCONTROL.

The first case lasted almost 10 years before the Belgian courts and the ECJ after the ICSID award was rendered. An award was rendered by an ICSID tribunal in 2013 ordering Romania to pay around €164 million to the Micula brothers for the violation of fair and equitable treatment under the applicable BIT. The award was given executory effect in July 2015. Because of Romania's refusal to comply with the award, the Micula brothers served an attachment order on EUROCONTROL. In September 2015, Romania brought an action before the Court of First Instance in Brussels seeking the lifting of the attachment. On 25 January 2016, the Court upheld Romania's application and ordered that the attachment be lifted.[22] On 26 February 2016, one of the Micula brothers appealed the judgment before the Brussels Court of Appeal, asserting that the ICSID award constituted a legally enforceable title in itself and that the attachment order was made on that basis. However, in the meantime, the European Commission had issued Decision 2015/1470 in March 2015 on the prohibition for Romania to pay the compensation as decided by the ICSID award because the compensation would constitute state aid, which is incompatible with the EU internal market. For this reason, the Brussels Court of Appeal stayed the proceedings and referred a set of questions to the ECJ to clarify the matter. The ECJ issued its order on 21 September 2022 and decided that a court of an EU Member State seized of the enforcement of the arbitral award subject of Decision 2015/1470 is required to set aside that award and may not enforce it.[23] Following the ECJ's order, the proceedings before the Brussels Court of Appeal were discontinued on 27 September 2022.[24]

In the second case, the Court of First Instance in Brussels rendered a judgment on 23 March 2022, deciding, inter alia, that, following established case law of the Belgian courts, the airline fees due by EUROCONTROL do not enjoy immunity from execution contrary to what was alleged by Albania. The tribunal decided that the award creditor (Becchetti) was

authorised to attach those fees to enforce the ICSID award of 2019 ordering Albania to pay about €120 million for the violation of the provisions of the applicable BIT.[25] On 15 May 2023, the Brussels Court of Appeal dismissed the appeal brought by EUROCONTROL and upheld the attachment ordered by the Court of First Instance. The Court notably found that Albania was the actual creditor of the fees owed by EUROCONTROL, notwithstanding the fact that the fees were collected by state-owned company Albcontrol, and that the attachment did not violate the sovereign immunity of Albania.[26]

Res judicata of arbitral awards

Recently, interesting developments have occurred before Belgian courts concerning the *res judicata* effect of arbitral awards.

On 24 May 2023, the Brussels Court of First Instance issued a judgment in which it ruled – in what appears to be a first for Belgian courts – that a violation of the *res judicata* of arbitral awards may lead to the annulment of an award on the grounds of public policy.[27]

This decision arose from a dispute concerning the sale of shares in a Belgian company between M M (the seller), a Belgian national, and French company Holding Socotec (the purchaser). The dispute concerned the guarantees given by the seller over employment contracts of the target company. By awards rendered in 2017 and 2018, an arbitral tribunal seated in Belgium ruled that Holding Socotec was, in principle, entitled to invoke M M's contractual guarantee. Yet, because the amount of damages had not been definitively established, the claim for compensation was ruled unfounded (at that stage). In 2020, after seizing Belgian courts, the parties eventually reached a settlement. However, following M M's failure to make the payment, Holding Socotec initiated new CEPANI arbitration proceedings. In its award of 11 July 2022, the arbitrator rejected the objection of inadmissibility raised by M M, which was based on the *res judicata* effect of the 2017 and 2018 arbitral awards, and upheld Holding Socotec's claims for compensation.

M M filed for annulment of the 2022 award, arguing that by disregarding the *res judicata* effect of the 2017 and 2018 awards, the arbitrator had rendered an award contrary to Belgian international public policy, justifying its annulment. While the Brussels Court of First Instance rejected the annulment request as unfounded, in its judgment, the Court explicitly accepted that the violation of the *res judicata* effect of a prior award could, as a matter of principle, justify the annulment of an arbitral award on the grounds of public policy, pursuant to Article 1717, Section 3(b)(ii) of the BJC. The Court emphasised that an award rendered in Belgium holds – between the parties – the same effect as a Belgian judgment, and since the *res judicata* effect of Belgian judgments is part of public policy, the same must apply to Belgian arbitral awards.

In the case at hand, the awards had been rendered in Belgium and, in its judgment, the Court expressly referred to the *res judicata* effect of 'Belgian' arbitral awards (which, according to the Court's reasoning, form part of Belgian public policy). It may therefore be questioned whether the reasoning of the Court also extends to foreign arbitral awards. The answer appears to be affirmative, as under Article 1713, Section 9 of the BJC, foreign arbitral awards, like their Belgian counterparts, have the same effect as a Belgian judicial decision between the parties. It remains to be seen whether other courts, particularly the Court of Cassation, will follow the approach adopted in this case by the Brussels Court of First Instance.

In another case, on 8 September 2023, the Court of Cassation referred two preliminary questions to the ECJ concerning the *res judicata* effect of arbitral awards.[28] The case involves the International Association of Federation Football (FIFA), the Royal Football Club Seraing (RFCS) and awards rendered by the Court of Arbitration for Sport (CAS) seated in Lausanne (Switzerland). The dispute originated in 2015 when FIFA sanctioned the RFCS for violating third-party ownership (TPO) regulations, prohibiting clubs from transferring economic rights in players to third parties. The RFCS contested these sanctions before the CAS, which upheld FIFA's decision in a 2017 award. The award rendered by the CAS was subsequently challenged, and upheld, before the Swiss Federal Tribunal. The RFCS also launched judicial proceedings before the Brussels Commercial Court and the Liège and Brussels courts of first instance. Following the dismissal of all those actions, the RFCS appealed to the Brussels Court of Appeal, arguing that the FIFA TPO ban might contravene EU competition law and fundamental freedoms. In response, FIFA contended, inter alia, that the legality of the TPO ban had already been confirmed by the CAS award, which had *res judicata* effect. Despite the arbitration clause contained in FIFA statues, the Brussels Court of Appeal ruled that the Belgian courts had jurisdiction to rule on the substance of the dispute, on the basis that the arbitration clause was not specific enough, so that it did not constitute a valid arbitration agreement under Article 1681 of the BJC. Despite deciding that it was competent to hear the case, the Brussels Court of Appeal dismissed the claims based on the *res judicata* effect of the CAS award.

The case ultimately ended before the Court of Cassation, which referred two questions to the ECJ. First, the Court of Cassation asked whether, under EU law, national law on *res judicata* (here, Belgian law) can apply to an arbitral award that has already been reviewed for compliance with EU law by a court of a non-Member State, which does not have the authority to refer to the ECJ for a preliminary ruling. In its second, related question, the Court of Cassation asked whether EU law prohibits national laws from giving probative value (subject to evidence to the contrary) to an arbitral award that has been reviewed for compliance with EU law by a court in a non-Member State that similarly has no access to the ECJ.

In her opinion issued on 16 January 2025, Advocate General (AG) Tamara Ćapeta opined that the ECJ should answer the first question in the affirmative.[29] She that the Court should develop a specific approach to the judicial review of arbitral awards resulting from 'self-sufficient' mandatory arbitration, such as the one before CAS on the basis of the FIFA statutes. The AG highlighted two important differences between commercial arbitration and sports arbitration involving CAS that, in her view, warranted a specific assessment in light of the principle of effective judicial protection. First, unlike commercial arbitration, which is voluntary, CAS's jurisdiction is mandatory, meaning it does not reflect the parties' choice to exclude access to a court and to prevent the applicability of certain legal rules. Second, the dispute resolution system under the FIFA statutes is self-sufficient in terms of enforcement. In a self-enforcing system, it is unlikely that the question of compatibility of the arbitral award with EU law will reach a 'court or tribunal' in the sense of Article 267 of the Treaty on the Functioning of the European Union (i.e., one that could refer a question to the ECJ) in enforcement proceedings. The AG considered that, due to these differences, access to national courts and their review powers should be extended to ensure effective judicial protection. Regarding the second question, the AG concluded that the national rules in question did not excessively impair the right to effective judicial protection, as they only recognised the probative value of factual determinations made by the arbitral

award, without preventing the court from ensuring the full effect of EU law and making a preliminary reference if necessary. Therefore, the AG recommended a negative answer to the second question.

While it remains to be seen whether the ECJ will follow the opinion of the AG, this referral is an illustration of the broader debate on the balance between arbitration's autonomy and judicial oversight in matters affecting EU public policy. The ECJ's response (which is yet to be issued) could clarify the extent to which arbitration decisions can be subject to national and EU legal scrutiny, potentially impacting the enforceability of arbitral awards beyond this specific case.

Finally, in a judgment of 14 December 2023, the Court of Cassation confirmed the position already accepted by case law and commentators that the *res judicata* effect of an arbitral award must be determined in accordance with the law in force at the time the award was rendered.[30]

## Investor–state disputes

There has been considerable movement on the investor–state disputes front in Belgium over the past few years, not only before arbitral tribunals and local courts but also at the political level.

### Annulment of investment treaty awards

An important judgment was handed down in 2024 in annulment proceedings over an investment treaty award.

In a ruling of 12 April 2024, the Court of Cassation quashed the judgment rendered by the Brussels Court of First Instance on 18 February 2022, which had set aside a US$10 million investment arbitral award rendered against the Republic of Poland.[31] The award had condemned the Republic of Poland for an alleged denial of justice on the part of its Supreme Court, which had (according to the arbitral tribunal) adopted a discriminatory attitude towards the investor. In the first known decision to annul an investment treaty award in Belgium, the Court of First Instance had ruled that the award conflicted with Belgian international public policy, in that it had blatantly failed to respect the required standard of the concept of denial of justice under international law.[32]

The Court of Cassation quashed the judgment rendered by the Court of First Instance on the ground that it violated Article 1717, Section 3(b)(ii) of the BJC by conducting a full assessment of the application of the public policy rules at stake by the arbitral tribunal, instead of examining the effects of the award on public policy. In its ruling, the Court of Cassation stated that the role of the annulment judge was not to reassess the dispute in the light of the applicable public policy provisions, but rather to verify whether the award itself was contrary to public policy.

In another case, the Court of Cassation handed down a judgment in set-aside proceedings concerning the protection afforded to binational investors.

Mr Rawat, a Franco–Mauritian individual, initiated a claim against the Republic of Mauritius before a Permanent Court of Arbitration/UNCITRAL arbitral tribunal under the France–Mauritius BIT. Specifically, Mr Rawat sought US$1 billion in damages for alleged

breaches of the treaty's investment protection standards by the Republic of Mauritius. On 6 April 2018, the arbitral tribunal issued an award dismissing its jurisdiction over the matter, primarily because of Mr Rawat's dual nationality.[33] In essence, the tribunal concluded that the BIT in question did not extend protection to investors holding nationality in both signatory states.

Subsequently, Mr Rawat lodged an application with the Brussels Court of First Instance to annul the award. On 30 June 2021, the Court handed down its judgment, rejecting the annulment application and upholding the arbitral tribunal's decision on the exclusion of dual nationals from the BIT's scope of protection.[34] The Court concurred with the tribunal's interpretation that the term 'nationals' in the BIT should be understood within the broader context of the treaty. Consequently, it concluded that the reference to the ICSID Convention in a provision of the BIT indicated the signatories' intent to exclude investors with dual nationality. Furthermore, the Court noted that this conclusion was reinforced by the joint efforts of France and Mauritius to exclude dual nationals from another BIT by incorporating an ICSID arbitration clause. Finally, the Court emphasised that BITs aim to foster economic cooperation between signatories, a goal potentially undermined in cases involving dual nationals.

Mr Rawat subsequently appealed to the Belgian Court of Cassation, contending that the Court of First Instance had misconstrued the interpretation of the BIT. On 6 April 2023, the Court of Cassation dismissed the appeal.[35] The Court rejected some of Mr Rawat's arguments, stating that they necessitated an examination of the arbitral award, which had not been filed in the proceedings. Additionally, the Court upheld the Brussels Court of First Instance's reasoning, affirming that the interpretation of the BIT's provision on 'nationals' must consider the treaty's entire context, including any relevant provisions of international law between the two contracting states.

Belgium as a respondent state

Belgium is a party not only to the ICSID Convention but also to more than 60 BITs, which it negotiated and concluded together with the Grand Duchy of Luxembourg as the Belgium–Luxembourg Economic Union. Belgium is also a party to the ECT.

In the first known decision of this type, an ICSID tribunal composed of Juan Fernandez-Armesto, Stanimir Alexandrov and Brigitte Stern ordered Belgium to pay €40 million to UAE-based port operator DP World for expropriating part of its concession for a container terminal at the port of Antwerp.[36] The award, issued on 15 February 2024, was accompanied by a dissenting opinion by DP World's appointed arbitrator, Stanimir Alexandrov, and a declaration by Brigitte Stern, the arbitrator appointed by Belgium. Belgium had already been found liable in a decision on jurisdiction and liability dated 10 April 2021.[37] This is reported as the very first arbitral award in which Belgium has been found to be liable to pay damages in an investment treaty arbitration. In April 2015, Belgium had prevailed at the jurisdiction stage against the Chinese investor Ping An in ICSID proceedings for claims arising from the 2008 financial crisis.[38]

Belgium is currently facing another investment claim in ICSID proceedings initiated by the Libyan Investment Authority (LIA) in late 2023, under the 2004 BIT between Libya and the Belgium–Luxembourg Economic Union.[39] The LIA's claim relates to a long-standing dispute between Libya and the Global Sustainable Development Trust (GSDT), a non-profit

organisation headed by Prince Laurent of Belgium, brother of King Philippe. For several years, GSDT has been trying to recover a claim of nearly €70 million said to be owed by the Libyan Ministry for Agriculture. The dispute saw criminal attachments ordered by Belgian courts on assets of the LIA, which were reportedly frozen in the hands of Euroclear because of United Nations sanctions. Belgium has also issued a European arrest warrant for LIA's chair and CEO, Ali Mahmoud Hassan Mohammed. Meanwhile, the LIA reportedly filed a criminal complaint against Prince Laurent in July 2023, accusing him of extortion, fraud and illegal influence in relation to his attempt to recover the funds.

In January 2024, Belgium's Finance Minister Vincent Van Peteghem announced that the state had been threatened with potential claims by Russian investors under a 1989 BIT between the USSR and the Belgium–Luxembourg Economic Union.[40] The threats reportedly relate to the Belgian state's refusal to release Russian assets frozen in Belgium following sanctions taken in the wake of the invasion of Ukraine. No arbitration proceedings have been reported to date.

In addition, Belgium is also reportedly involved in a contractual arbitration launched by French stated-owned Engie in October 2023. The dispute is said to concern a cap on electricity producers' market revenues introduced by Belgium in late 2022, which Engie alleges would breach agreements relating to two nuclear plants.[41]

Political developments

The Belgian government has also been active at the political level in discussions regarding investor–state dispute settlement systems.

Like other EU Member States, Belgium has decided to terminate all its intra-EU BITs following the movement that swept Europe after the *Achmea* decision of the ECJ.[42-] Consequently, on 23 February 2022, Belgium passed a law[43] on the approval of the 29 May 2020 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union.[44]

In light of the legal uncertainty surrounding the applicability of the arbitration provisions of the ECT to intra-EU disputes following *Achmea*, in 2020 Belgium submitted a request to the ECJ for an opinion on the compatibility of the draft Article 26 of the modernised ECT (governing the arbitration between foreign investors and states) with EU law in the context of its intra-EU applicability.[45] Together with this announcement, the Belgian government explained that it was putting the question to the court 'in a neutral manner' without taking a stand on the issue, with the aim 'to provide clarity and legal certainty'.[46] The request concerned only 'the draft modernised Energy Charter Treaty, in view of the fact that this mechanism could be interpreted as allowing its application intra-European Union, i.e., between an investor who is a national of an EU Member State only and an EU Member State'.[47] On 16 June 2022, the ECJ rendered its opinion and declared Belgium's request inadmissible. In particular, the ECJ considered that it did not dispose of sufficient information on the amended text of Article 26 of the ECT and its possible modifications subject to the ongoing negotiations. As such, the ECJ qualified the request as premature and inadmissible.

This is the second time that Belgium has pushed for an opinion from the European Union on investment treaty dispute systems, with the first being its September 2017 request for

the highest court in the European Union's opinion in relation to the investment court system of the comprehensive economic and trade agreement between the European Union and Canada.[48]

While several EU Member States have announced their withdrawal from the ECT (including Italy, France, Spain, Germany, the Netherlands and Poland) and the European Commission is advocating for a coordinated withdrawal of all EU Member States to mitigate the effects of the ECT's sunset clause (Article 47), Belgium has not yet formalised its position.

## Outlook and conclusions

A number of positive factors are converging to reinforce Belgium's already significant role in the context of international arbitration. The modern framework of the Arbitration Act, the recent revision of the CEPANI Arbitration Rules, the judiciary's growing familiarity with international arbitration matters and the increasing selection of Brussels as the seat of arbitration by parties, institutions and arbitral tribunals in high-profile disputes all reflect this positive trajectory.

In the context of ongoing discussions surrounding investor–state dispute settlement and the increasingly important role of EU institutions in shaping future frameworks, Brussels is well positioned to emerge as a key hub for the resolution of international investment disputes, whether before arbitral tribunals seated in Brussels or before new bodies that are likely to be established in the future.

### Endnotes

**1** In 2016, several minor amendments and corrections were made to the Act of 24 June 2013 by an Act of 25 December 2016, which entered into force on 9 January 2017. ^ Back to section

**2** Act of 24 June 2013, amending Part VI of the Belgian Judicial Code (BJC) relating to arbitration. ^ Back to section

**3** *Republic of Kazakhstan v. Stati*, Court of Appeal of Brussels (17th ch), 17 November 2020, *b-Arbitra*, 2021, No. 1, pp. 148–60. ^ Back to section

**4** Article 1676(7) BJC. Article 1676(8) BJC, however, provides that a certain number of provisions of Part VI of the Code are applicable irrespective of both the seat of arbitration and the will of the parties. This is notably the case of the provisions on the recognition and enforcement of awards. ^ Back to section

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**19** See C Sanderson, 'Egypt settles with Finnish iron investor', *Global Arbitration Review*, 9 December 2021, https://globalarbitrationreview.com/egypt-settles-finnish-iron-investor. ^ Back to section

**20** *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on annulment, 6 February 2016, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/05/20. See also T Jones and S Perry, 'Belgian court seeks guidance from ECJ on Micula award', *Global Arbitration Review*, 28 March 2019, https://globalarbitrationreview.com/belgian-court-seeks-guidance-ecj-micula-award; and C Sanderson, 'Albania creditors freeze aviation funds', *Global Arbitration Review*, 8 January 2021, https://globalarbitrationreview.com/albania-creditors-freeze-aviation-funds. ^ Back to section

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