

Overview of the Belgian Arbitration Procedure as of 2014

Jacques Malherbe
Professor emeritus of the Catholic University of Louvain
Avocat (Partner, Liedekerke, Brussels)

Belgium profiles itself as a country open to arbitration, both national and international. Evidence thereof is found in a modification of its arbitration law to conform with international standards and in the adoption by its main arbitration center – CEPANI – of a new arbitration regulation.

1. Origins of the Belgian law on arbitration

Arbitration was briefly foreseen in the French Code of civil procedure of 1806 (Book III – Title « Of arbitrations »), applicable in Belgium. The Code was however restrictive : arbitration was considered a « free shooter » of justice (R. David). The Belgian law of 11 July 1972 adopted the Uniform Law annexed to the European Convention in matter of arbitration executed in Strasbourg on 20 January 1966. This Convention was ratified only by Belgium¹.

The Belgian law was modified by the law of 27 March 1985 and by the law of 19 May 1998. It was replaced by the law of 24 June 2013 which is inspired often literally by the Model Law on international commercial arbitration of the United Nations Commission on International Trade Law (UNCITRAL, in French : CNUDCI) of 21 June 1985, modified in 2006².

Numerous countries have modified their law along the same lines.

The purpose is to make Belgium a country open to arbitration, particularly international arbitration. Belgium does not make any difference between domestic and international arbitration and does not limit the scope of its law to commercial arbitration. The law has been inserted in the Judicial Code.

¹ See generally G. Keutgen and G.A. Dal, *L'arbitrage en droit belge et international*, Brussels, Bruylant, 2nd ed., 2006 ; J. Linsmeau, *L'arbitrage volontaire en droit privé belge*, RPDB, Compl. VII : on the place of arbitration in international trade, G. Schraus and H. Van Houtte, *International Handels-en Financieel Recht*, Leuven-Amersfoort, Acco, 1991, p. 663.

² L. Demeyere and H. Verbist, *De nieuwe arbitragewet van 24 juni 2013*, RW, 2014, p. 83 ; D. Matray and G. Matray, *La conduite de la procédure arbitrale sous l'empire du nouveau droit belge de l'arbitrage*, *Arbitra* 1/2014, p. 81 ; M. Dal, *La nouvelle loi sur l'arbitrage*, J.T., 2013, p. 785.

Parties often refer to arbitration rules issued by arbitration centres. In Belgium, CEPANI, the Belgian Centre for Arbitration and Mediation, was created in 1969. The CEPANI Arbitration Rules, as they stand after their 2013 modifications, are frequently applied³.

We shall examine hereafter, by way of examples, how those and other rules may improve the arbitration procedure, by way of comparison with the Belgian statute.

CEPANI appoints arbitrators but does not intervene in the procedure. It must receive a copy of all procedural documents. It does not approve the draft arbitral award.

2. ICC Rules of Arbitration

The International Chamber of Commerce (ICC) was established in Paris in 1919. The ICC International Court of Arbitration was founded in 1923 to settle international commercial disputes. Its Arbitration Rules were revised for the last time in 2012. They are vastly applied.

An Arbitral Tribunal appointed under the ICC Rules submits its draft award to the Court which may lay down modifications as to the form of the award and draw the attention of the Arbitral Tribunal to points of substance without affecting its liberty of decision (art. 33).

UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly with offices in Vienna. It has adopted a Model Law on International Commercial Arbitration which has inspired many national laws on arbitration (resolution 40172 of 11 December 1985 and 61/33 of 11 December 2006).

It has also adopted Arbitration Rules in a present version of 2013 (Resolution 68/109 of 16 December 2013 of the General Assembly) replacing 1976 and 2010 versions, as well as Rules on Transparency in Treaty-based Investor-State Arbitration⁴. These Arbitration Rules were a.o. applied by the Iran-US Claims Tribunal.

ICSID

The International Centre for Settlement of Investment Disputes in Washington, D.C., has been established by the Convention on the Settlement of Investment Disputes between States and

³ M. Dal, *La nouvelle loi sur l'arbitrage*, J.T., 2013, p. 349 ; D. Matray and G. Matray, *Le nouveau règlement d'arbitrage du centre belge d'arbitrage et de médiation (CEPANI)*, *Arbitra* 1/2013, p.45 ; L. Demeyere and H. Verbist, *Het nieuwe CEPANI-ARbitragereglement van 1 januari 2013*, *RW*, 2014, p. 682.

⁴ See a.o. D.D. Caron, L.M. Caplan and M. Pellonpää, *The Uncitral Arbitration Rules, A Commentary*, Oxford Commentaries on International Law, Oxford University Press, 2006.

Nationals of other States (the ICSID Convention), formulated by the World Bank. The Convention provides for the possibility of arbitration (art. 36). The Centre has issued Rules of Procedure for the Institution of Conciliation Proceedings and of Arbitration Proceedings (the Arbitration Rules).

Other Centres and Rules

Numerous Centres and Rules exist throughout the world :

- The London Court of International Arbitration (LCIA);
- The Singapore International Arbitration Centre;
- The Hong Kong International Centre, etc⁵.

3. Fundamental Principles applicable to the procedure

Equality of treatment⁶

Parties must be treated on an equal footing. One party may not be granted more rights than the other one.

Principle of contradiction

Each party must be able to know the evidence and documents used by the other party. Documents must be communicated between parties. An arbitrator may not base his decision on elements which he knows personally but which parties did not have the occasion to discuss but, if a party fails to make observations, for instance on an expert's report, the principle of contradiction is not infringed.

If the arbitral tribunal schedules an unexpected hearing, refuses a postponement when counsel for a party is on vacation, holds hearings in a language which a party understands with difficulty, the principle of contradiction is infringed.

Is article 6 of the European Convention of Human Rights (right to a fair trial) applicable to arbitration ? *Prima facie* not because the Convention is predicated on the responsibility of a Member State for the violation of the rights protected by the Convention. An arbitral tribunal is not a jurisdiction instituted by the State. However, procedural guarantees are influenced by human rights.

⁵ For a general outline, see P. Ashford, Handbook on International Commercial Arbitration, 2nd ed., Huntington, New York, JurisNet LLC, 2014.

⁶ Judicial Code (J.C.), art. 1699.

Loyalty of debates

Parties may not misuse their right to a contradictory debate. Misuse may influence the allocation of arbitration costs. A party may not frivolously delay the procedure or, on the contrary, request absurdly short deadlines.

4. Determination of procedural rules

Parties must agree on the procedure to be followed by the arbitral tribunal⁷. Failing such agreements, the arbitral tribunal will determine the procedural rules to be followed⁸. The principle is therefore the liberty of parties, based on the consensual nature of arbitration, but within the boundaries of the principles cited above.

Under the CEPANI rules, parties and the Arbitral Tribunal are free to determine procedural rules. For all issues not covered by the Rules, parties and the Arbitral Tribunal act in the spirit of the Rules and make all reasonable efforts to make the Award enforceable⁹. There is no reference, as in the past, to the Belgian Judicial Code¹⁰.

Exceptions

However, parties may not derogate to certain provisions of the Judicial Code which are applicable notwithstanding any conventional clause to the contrary.

1. Art. 1682 : the judge before whom a litigation is brought which is the subject of an arbitration agreement will decline jurisdiction. The arbitral procedure may be initiated or continued in spite of the judicial actions.
2. Art. 1683 : a judicial action in order to obtain provisional or conservatory measures is not incompatible with an arbitration agreement (see also art. 1696 and 1697). The judge in summary proceedings (référé-kortgeding) has the same powers in arbitral proceedings as in judicial proceedings¹¹.

⁷ J.C., art. 1700, § 1.

⁸ J.C., art. 1700, § 2.

⁹ Art. 38.

¹⁰ D. and G. Matray, *Le nouveau règlement*, op. cit., p. 78.

¹¹ J.C., art. 1698.

3. Art. 1708 : a party may, with the agreement of the arbitral tribunal, request the president of the tribunal of first instance to order any measure in connection with the obtention of evidence.
4. Art. 1719 to 1721 : the arbitral award may only be forcibly executed if the tribunal of first instance has applied to it the executory formula.
5. Art. 1722 : the statute of limitation for a condemnation by arbitral award is 10 years starting with the communication of the award. If parties, after the formation of the Arbitral Tribunal, decide on new rules of procedure which do not suit the arbitrators, those may legitimately resign¹².

5. Applicable law¹³

The Arbitral Tribunal applies the rules of law chosen by the parties as applicable to the substance of the matter. The designation of the law of a State is deemed, but agreement to the contrary, to include only the substantial rules of law of that State and not its rules on conflicts of law.

Failing a designation by parties, the Arbitral Tribunal applies the rules of law which it deems appropriate. However, if the dispute is contractual, the arbitrators must decide in conformity with the stipulations of the contract and take into account the trade usages between parties which are traders¹⁴.

The term “rules of law” is broader than the term “law”¹⁵. It may include “*lex mercatoria*”, general principles of law and the UNIDROIT Principles of the International Institute for the Unification of Private Law.

A tribunal will generally use the “voie directe”, i.e. determine the applicable law under criteria taken from traditional conflicts of law systems¹⁶.

In EU countries, the Rome I Regulation enacts general rules applicable to contracts but not to arbitration clauses. Those rules are a source of inspiration for arbitrators anyway.

The Vienna Convention on Contracts for International Sales of Goods (CISG) has been adopted by many countries and determines the law applicable to such contracts.

¹² Y. Derains and E.A. Schwartz, *A Guide to the New ICC Rules of Arbitration*, Kluwer Law International, 1st ed., 1998, p. 210.

¹³ J.C., art. 1710.

¹⁴ J.C., art. 1710.4.

¹⁵ L. Demeyere and H. Verbist, *De nieuwe Belgische arbitragewet van 24 juni 2013*, RW, 2014, p. 96.

¹⁶ See ar. 21 ICC Rules and Handbook on ICC Arbitration, p. 303.

Under the CEPANI Rules, the Arbitral Tribunal shall at the outset prepare Terms of Reference to be signed by parties and the Tribunal¹⁷. The Terms shall include :

- names and addresses of parties and counsels and members of the Arbitral Tribunal ;
- a succinct recital of the circumstances of the case ;
- a statement of parties' claims and of their amounts ;
- a determination of the issues in dispute, unless inappropriate ;
- the place of arbitration ;
- any other useful particulars.

It is usual in all arbitrations to submit such terms to parties at the beginning of the procedure.

If a party refuses to sign the Terms, proceedings will continue. Under the ICC Rules¹⁸, the Terms of Reference must then be submitted to the ICC Court for approval and the arbitration shall afterwards proceed.

6. Procedural Timetable

Under the CEPANI Rules, the Arbitral Tribunal shall establish a provisional procedural timetable, at a conference with parties organized by any means of communication¹⁹.

7. Evidence

The arbitral tribunal appreciates the admissibility and the evidentiary effect of all means of evidence failing an agreement of parties to the contrary²⁰.

Acts of instruction²¹

The arbitral tribunal may proceed to all necessary acts of instruction. Parties may authorize the tribunal to delegate one of its members to perform them. The tribunal may hear any person whether a witness or the parties without oath.

¹⁷ Art. 22.

¹⁸ Art. 23.3.

¹⁹ Art. 22.3 and 4.

²⁰ J.C., art. 1700, § 3.

²¹ J.C., art. 1700, § 4.

Appointment of experts²²

The arbitral tribunal may appoint experts to report on precise points which it determines. It may enjoin parties to give to the expert appropriate information and to give him access to documents, merchandise and other pertinent property items.

If a party to requests, the expert will take part in a hearing during which parties may put questions to him. The same rules apply to technical advisors of parties.

If a party holds an element of evidence, the arbitral tribunal may enjoin its production even under penalty (astreinte – dwangsom).

The issue of privileges is a different one, generally governed by the law of the place where a lawyer practices.

IBA Rules of Evidence

Parties or Terms of Reference often supplement the law or Rules by adopting the Rule on the Taking of Evidence in International Arbitration of the International Bar Association (2010), first issued in 1999. This system combines the anglo-saxon discovery and the continental system of communication of documents.

Assistance of the Court²³

A party may, with the consent of the Arbitral Tribunal request from the president of the tribunal of first instance judging as in summary proceedings to order all necessary measures in order to obtain evidence. The intervention of an ordinary judge will enable a party to apply Council Regulation (EC) no. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters²⁴.

Verification of documents²⁵

The arbitral tribunal may order the verification of the authenticity of a document and decide on alleged false nature of a document except if the document is an authentic deed (e.g. a notarial deed) : the arbitral tribunal must then let the parties submit the question to the tribunal of first instance.

²² J.C., art. 1707.

²³ J.C., art. 1708 and 1680, § 4.

²⁴ OJEC, 27.06.2001, L-174/1.

²⁵ J.C., art. 1700, § 5.

Does the arbitrator have the obligation to report criminal actions (e.g. money laundering) to the King's Prosecutor? No because arbitration is confidential but arbitrators must apply the rules of public policy ("ordre public").

8. Place of arbitration²⁶

Parties may decide on the place of arbitration. Failing such a decision, the place of arbitration is determined by the arbitral tribunal, taking into account the circumstances of the case and the convenience for parties.

If the place of arbitration has not been determined, the place where the sentence is issued will be deemed to be the place of arbitration.

The place of arbitration is important as it determines the Court which will decide on various matters and as it may, in an international arbitration, give rise to limitations on the arbitral procedure and interventions of the courts. The arbitral tribunal may, unless the parties have agreed to the contrary, hold hearings and meetings in other appropriate places, after having consulted the parties.

In ICC arbitrations, Switzerland is by far the place which is most often selected by parties for arbitration, followed by the United Kingdom.

Initiation of the procedure

Unless the parties have agreed otherwise, the arbitral procedure starts on the date on which the defendant has received the request for arbitration. This date is important as it interrupts the running of the statute of limitation. The statute will run again after the issuance of the award. The interruption benefits only the claimant as long as the defendant has not made a claim. It does not benefit additional demands unless they are virtually included in the subject matter of the request (interest, increase of damages, ...)

Prima facie Agreement to arbitrate

The CEPANI Arbitration Rules provide that, lacking *prima facie* an arbitration agreement, the arbitration may not proceed if respondent does not answer the request for arbitration or refuses arbitration²⁷. The decision will be taken by CEPANI. If there is *prima facie* such an agreement, the arbitration shall proceed. The arbitral tribunal may of course still decide that it has no jurisdiction²⁸.

²⁶ J.C., art. 1701.

²⁷ Art. 6.

²⁸ Art. 7.3.

In the *Cekobanka* case, under the ICC Rules of Arbitration, the ICC Court refused to infer an arbitration agreement from an exchange of telexes under which a Lebanese bank has offered to submit the dispute to arbitration, a Czech bank had arguably accepted it but the Lebanese bank replied that the offer was no longer outstanding. The Czech bank brought an action in responsibility before the Paris Court against the ICC. The Court considered that the ICC Court had rightly applied the rules²⁹. The Rules do not prevent parties to submit the question of the existence of an arbitration agreement to the Courts³⁰.

9. Language of arbitration³¹

The language(s) to be used in the procedure is determined by the parties or by the arbitral tribunal failing a determination by the parties.

Unless the contrary has been decided, the selected language(s) will be used in communications of parties, oral procedure and awards, decisions or other communications of the arbitral tribunal.

It may be hazardous to provide for the use of two languages. Translations may be difficult and be a cause of annulment in the event of a discrepancy. It may be convenient to allow each party to use its language and to decide that the arbitral tribunal will use a language for all written communications and for the award.

The Belgian law of 15 June 1935 on the use of languages in judicial matters does not apply to arbitration.

Three quarters of ICC awards rendered in 2012 were rendered in English although less than 36 % of the parties came from English-speaking countries.

Translations

The arbitral tribunal may decide that any document be accompanied by a translation.

A translation of excerpts only may be considered a breach of due process³².

²⁹ *Ceskilovenska Obchodni Banka A.S. (Cekobanka) v Chambre de Commerce internationale, Tribunal de grande instance de Paris*, July 13, 1988, *Rev. Arb.* (1988), p. 367.

³⁰ D. and G. Matray, *Le nouveau règlement d'arbitrage du centre belge d'arbitrage et de médiation (CEPANI)*, *b-Arbitra*, 1/2013, p. 61.

³¹ J.C., art. 1703.

³² *Bloro Pack v Windmüller et Holschen KG*, Paris Court of Appeal, 1st ch., April 2, 2013, (2013) *Rev. Arb.* 538.

As many contracts are drafted in English, even when subject to curl law, translation of some legal terms may be a problem unless the correspondence with applicable law is indicated in brackets.

Exchange of briefs³³

Parties will exchange their briefs as claimant and respondent, including their arguments and the supporting facts, within the time limits and according to the modalities agreed by parties or decided by the Tribunal.

Normally, the procedural modalities will be included in the Terms of Reference prepared by the arbitral tribunal and signed by parties at the outset.

Additional briefs may be allowed. Documents provided must be annexed to the briefs.

Parties may, but agreement to the contrary, modify or add to their claim or defence. The arbitral tribunal may refuse such an amendment, e.g. because of the delay in formulating it or because of a substantial modification of the request on the basis of which the arbitrators have accepted their mission.

CEPANI Rules

According to the CEPANI Rules, the briefs must also be sent to the secretariat of CEPANI³⁴. If a party is represented by counsel, communications are made to counsel unless the parties request otherwise³⁵.

Communications may be made in electronic form allowing for proof of sending³⁶.

Oral procedure³⁷

Unless the parties have agreed to the contrary, the arbitral tribunal will organize an oral hearing if a party so requests.

The president is in charge of conducting the hearing.

³³ J.C., art. 1704.

³⁴ Art. 8.1.

³⁵ Art. 8.4.

³⁶ Art. 8.2.

³⁷ J.C., art. 1705.

Ex parte procedure³⁸

If the claimant does not develop its request, the arbitral tribunal puts an end to the procedure.

If the respondent does not develop its defence, the arbitral tribunal carries on with the procedure. It may not consider such failure as an acceptance of the allegations of claimant.

If one of the parties does not participate in the oral procedure or does not produce documents, the arbitral tribunal carries on with the procedure and decides on the basis of the elements at its disposal.

10. Consolidation

Under the CEPANI Rules³⁹, if two or more arbitrations under the Rules are related (“connexes”- “verknocht”) or indivisible (“indivisibles” – “ondeelbaar”), they may be consolidated by the President or by the Appointments Committee of CEPANI.

If all parties agree, consolidation will take place. If not, the decision will be taken by the President or the Committee.

It will take into account whether parties have not excluded consolidation in their agreement, whether the claims in the various arbitrations are made pursuant to the same arbitration agreement and, if not, whether the claims are compatible, the proceedings involve the same parties or the disputes arise from the same legal relationship.

It will take into account the progress made in each arbitration and the place of arbitration.

Consolidation may not be ordered when a decision has already been rendered even on preliminary measures or admissibility.

A new arbitral tribunal, which may include previously appointed arbitrators, will be appointed in the event of consolidation. CEPANI or parties⁴⁰ will appoint it.

The Belgian law notions of relatedness, meaning that “The disputes are bound by such a narrow tie that there is an interest in instructing and judging them at the same time in order to avoid irreconcilable solutions”⁴¹ and of indivisibility, meaning that “The execution of separate decisions would be materially impossible”⁴².

³⁸ J.C., art. 1076.

³⁹ Art. 13.

⁴⁰ G. Keutgen, *Le nouveau Règlement d’arbitrage du Centre belge d’arbitrage et de médiation (CEPANI)*, RDIDC, 2013, p. 109.

⁴¹ J.C., art. 30.

⁴² J.C., art. 31.

11. Closing of the Proceedings

The CEPANI Rules provide that the Arbitral Tribunal shall declare the proceedings closed as soon as possible after the last hearing or the filing of the last admissible documents.

Interim measures⁴³

The Arbitral Tribunal may order provisional or conservatory measures and fix a guarantee to be supplied by the requesting party. However, it may not order an attachment.

Under the CEPANI Rules⁴⁴, a party may request from CEPANI the appointment of an arbitrator to decide provisionally on interim or conservatory measures. His decision must be rendered in principle within 15 days.

After the constitution of the Tribunal, it may decide on such measures by a Procedural Order.

Interim and conservatory measures ordered by the Ordinary Courts must be communicated to the Arbitral Tribunal and to the secretariat⁴⁵.

Under the ICC Rules, measures that cannot await the constitution of an Arbitral Tribunal may be requested from an Emergency Arbitrator⁴⁶. The emergency arbitrator delivers an order which does not bind the Arbitral Tribunal. Parties may opt out of those provisions or provide for another procedure.

Under the ICC Rules, the time limit to deliver a final award is 6 months⁴⁷ starting from the signature of the Terms of Reference. The Court may fix a different time limit or extend the time limit.

Under the ICC Rules, a party which proceeds with the arbitration without raising an objection to a procedural failure is deemed to have waived its right to object⁴⁸.

Belgian law includes a similar rule⁴⁹. It also excludes the possibility of annulment in stated cases⁵⁰ such as the lack of validity of the Convention, the impossibility to assert its rights, the fact that the dispute would fall outside of the Convention or of the irregular constitution of the Arbitral Tribunal.

⁴³ J.C., art. 1641-1698.

⁴⁴ Art. 26.

⁴⁵ Art. 27.

⁴⁶ Art. 29 and Appendix V to the Rules.

⁴⁷ Art. 30.

⁴⁸ Art. 39.

⁴⁹ Art. 1679.

⁵⁰ Art. 1717, § 5.