

Arbitration in Belgium

A Practitioner's Guide

Niuscha Bassiri &
Maarten Draye (eds)



Wolters Kluwer

Arbitration in Belgium

A Practitioner's Guide

Edited by
Niuscha Bassiri
Maarten Draye



Wolters Kluwer

Published by:

Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-5225-1

© 2016 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wklawbusiness.com

Printed in the United Kingdom.

Editors

Niuscha Bassiri is a partner at Hanotiau & van den Berg in Brussels. She has a solid track-record as counsel and arbitrator in numerous international arbitration matters under all major sets of arbitration rules, governed by various procedural and substantive laws and relating to diverse legal issues. She is also a lecturer at the ICHEC Brussels Management School on *International Commercial Law and Dispute Resolution*. In addition, she is a sought-after speaker on arbitration issues and publishes frequently. Ms Bassiri has been ranked by her peers and clients in Who's Who Legal since 2013 who describe her as an "*extremely sharp arbitrator and counsel*". Also, since 2013 she has been named as an expert in arbitration and in 2014 a "Rising Star" in *Expert Guides*. Ms Bassiri is a Board Member of the International Board of the Finnish Arbitration Institution as well as a Board Member of the Belgian Chapter of the Club Español de Arbitraje. She has also been invited to serve as a member of the Singapore International Arbitration Centre's Users' Council. In addition, she is a member of the Editorial Board of the Journal of International Arbitration. Ms Bassiri is admitted to the Cologne Bar and a member of the Brussels Bar.

Maarten Draye specializes in complex litigation as well as international and national arbitration. A member of the Brussels Bar, Mr Draye advises and represents clients in a wide range of fields and industries. He further acts as arbitrator and as secretary to arbitral tribunals. Mr Draye has been involved in arbitration proceedings under a variety of arbitration rules (ICC, LCIA, UNCITRAL, ICSID, SCC, SWISS, CEPANI, CRCICA and OHADA). Mr Draye regularly speaks and publishes on arbitration-related topics and has taught *International Commercial Law and Dispute Resolution* at ICHEC Brussels Management School. In addition to his legal work, Mr Draye represents Belgium at the ICC Commission on Arbitration and ADR, serves as chairman of the Alumni and Friends of the School of International Arbitration at Queen Mary (AFSIA) and is part of the CEPANI40 Steering Committee. He is a member of CEPANI, ICC YAF, YIAG and Young ICCA. Mr Draye joined Brussels arbitration and litigation boutique Hanotiau & van den Berg in 2007 after completing an internship at WilmerHale in London. He holds a Master of Laws (*Lic. Jur.*) and a Master in Management Economics from KU Leuven and an LL.M. in International Business Law from the University of London.

Contributors

Olivier Caprasse is specialized in domestic and international arbitration. He has sat as an arbitrator in more than thirty national and international arbitrations (ICC, CEPANI, AFA, Geneva Chamber of Commerce and Industry, CACI, ad hoc) and has represented clients in numerous arbitrations. He has been involved in cases related to joint ventures, post-mergers and acquisitions, insurance, construction, agency, commercial contracts, etc. Described as “*very professional*” and noted for “*his high quality of work*” (Who’s Who Legal 2014) or as “*outstanding*” and an arbitrator “*clearly on the rise*” (Chambers 2015), Mr Caprasse represents Belgium at the ICC Commission on Arbitration and ADR and is one of the experts for Belgium in the UNCITRAL working group II on arbitration and conciliation. He was a member of the task force, which drafted the 2013 new Belgian law on arbitration and an expert with the Minister of Justice before the Belgian Parliament for this reform. Professor of law at the Universities of Liège and Brussels (corporate law, arbitration), he has been the dean of the Liège law school from 2008 to 2012. He is the author of more than 100 publications in the fields of arbitration law and corporate law, among which is the treatise “*Les sociétés et l’arbitrage*” (Bruylant, 2001).

Maud Piers is a professor of law at the University of Ghent (Belgium) where she teaches and conducts research in the areas of arbitration law, ADR and European private law. She is also the Director of the Transnational Law Center at the University of Ghent where she is involved in interdisciplinary research on several topics such as “*Transnational dispute resolution in the digital age*”. Ms Piers was the former editor-in-chief of *b-Arbitra*, the Belgian Review of Arbitration, and is a member of the editorial board of the University of Ghent’s online journal on Private International Law (tijdschrift@ipr.be). She regularly acts as an arbitrator, is a member of the Board of Directors and the Bureau of CEPANI, the Belgian Center for Arbitration and Mediation, and is a member of the ICC Commission on Arbitration and ADR.

Erica Stein focuses her practice on international arbitration, including both commercial and investment arbitration matters. Ms Stein’s work touches upon numerous industry sectors, including life sciences, energy and telecommunications. Named among the Who’s Who of Arbitration since 2012, Ms Stein has become a recognized expert in the field through her broad work experience in all aspects of

arbitral practice. Ms Stein is Special Counsel – Arbitration at Dechert LLP. Prior to joining Dechert, Ms Stein worked for six years at the ICC International Court of Arbitration where, as Counsel, she supervised hundreds of arbitral proceedings before arbitration panels worldwide, spanning nearly all regions and industry sectors. Thereafter, Ms. Stein worked for six years at the premier arbitration boutique in Belgium, where she acted as counsel and tribunal assistant (clerk/référéndaire) in numerous international arbitral proceedings conducted under the arbitration rules of all major arbitral institutions. Ms Stein has also sat as arbitrator in numerous proceedings, having acted as chair, sole arbitrator or co-arbitrator in proceedings conducted under the arbitration rules of the ICC, LCIA, UNCITRAL, CEPANI, the Danish Institute of Arbitration, and the German Institution of Arbitration. Ms Stein represents Belgium at the ICC Commission on Arbitration and ADR, and serves as Vice-President of the Standing Committee of the ICC Centre for ADR.

Caroline Verbruggen was appointed as judge with the Court of First Instance of Brussels in April 2013 and is an honorary lawyer with the Brussels Bar. Prior to that, she had been a lawyer practicing with a renowned international law firm in Brussels, specializing in arbitration. She was active as counsel and arbitrator in domestic and international cases (ad hoc and institutional). Ms Verbruggen graduated from Université Libre de Bruxelles (1993, *summa cum laude*) and from Duke University (LL.M., 1994, *Fulbright scholar*). She has authored a number of publications in the field of arbitration and is a member of the b-Arbitra editorial board.

Foreword

It has not gone unnoticed in the international arbitration world that Belgium – the small country which is home to the seat of the EU Commission and many related organizations, with its historical ties to old European empires, as well as its revived links to sub-Saharan Africa, nested on the cross roads between North and South Europe, on the one hand, and between continental Europe and the Anglosaxon world, on the other hand, with its three national languages and arbitration practitioners who are multilingual and often hold law degrees in both the civil and common law – has since 2013 taken various initiatives to put itself more prominently on the map of international arbitration. First, CEPANI, the country's largest arbitration institution and best known organization for ADR, amended its arbitration rules so as to incorporate latest best practice. They became effective on 1 January 2013, and less than half a year later, on 24 June 2013, the new arbitration law was adopted, becoming effective on 1 September 2013.

With this new modern law, which applies not only to commercial arbitration, but e.g. also to investment arbitration as well as sports arbitration, Belgium confirms its reputation as a hospitable country for international arbitration which it has always been. Belgian initiatives concerning arbitration were always inscribed in a wider, international context: the bilateral treaties on the execution of court decisions which Belgium signed in the nineteenth century already contained a clause on the recognition and execution of awards and the country was one of the first signatories of the multilateral treaty of Geneva on the enforcement of foreign arbitral awards. The Belgian legislator wisely refrained from re-inventing the wheel as regards arbitration, which explains why the chapter on arbitration in the 1967 new judicial code was modelled after the 1966 Strasbourg Convention on Arbitration and why in 2013 another model law, this time UNCITRAL's, was used as a basis for the new law on arbitration. The international spirit of the country also explains why international and domestic arbitration are in the new law governed by the same common regime. The only specificity in Belgian law for non-Belgian parties relates to the setting aside of awards rendered in Belgium. In 1985, the arbitration law was amended to exclude for parties who had no connection with Belgium the possibility to have the award issued in Belgium set aside. In 1998, the automatic nature of this special regime was abolished and the exclusion of annulment procedures became optional. The 2013 law has

maintained this option for parties without connection to Belgium to waive their right to have the award set aside.

The book which you are about to explore now, is a third tool offered to the international community of arbitration practitioners for their activities in Belgium and a most valuable complement to the new law. The authors have not only written an exhaustive and well-structured commentary of the new law; the commentary, which is elaborated in the same logical and structured format for each article, presents the reader with an insight in Belgian arbitration law which exceeds the statutory text, but refers also to jurisprudence and doctrine and highlights the historical evolution of the legislator's treatment of the issues. It contains useful references to source material and compares the new statutory provisions not only with the UNCITRAL Model Law (explaining in detail where and why the law deviates from the Model Law), but with the arbitration laws of neighbouring countries such as Germany and Switzerland which also influenced the legislator. When the authors find issues left open by the legislator they do not hesitate to offer their own views (e.g. on the arbitrability of certain disputes; pre-appointment interviews of arbitrators; an expert's and an administrative secretary's duty to disclose issues that may give rise to justifiable concerns about his/her independence or impartiality; the tribunal's lack of jurisdiction to amend court-ordered interim and conservatory measures; the authority of international arbitration tribunals seated in Belgium to apply their own standard of proof; the possibility for an arbitral tribunal to impose penalties on a party which disregarded its order to produce evidence; ...).

In their effort to make Belgium even more accessible to foreign arbitration practitioners, the authors go far beyond commenting the new law. When appropriate, they give a place to topics not dealt with in the law and shortly situate them in the Belgian context. Thus, in their commentary of the article on the appointment of arbitrators, they also discuss the use of administrative secretaries. Another example is the legal relationship between arbitrators and parties. The authors do not spare their criticism of the new law as they find it occasionally defective, e.g. where it grants the state courts jurisdiction to review also the merit of an arbitral tribunal's decision that it lacks jurisdiction, which, according to the authors, contradicts the *res judicata* of the arbitral tribunal's decision.

Each article's commentary is preceded by the French and Dutch official texts of the article, as well as the unofficial English translation (published by the Belgian Ministry of Justice). Where necessary, the authors suggest an alternative and possibly better translation into English. For each article, the commentary devotes a special sub-chapter to the role of party autonomy in the discussed provision, as well as the impact of the provision on the costs of the arbitration – if any. The fact that the same structure is used for the commentary of each article makes the book especially practical for research.

The book is a treasure trunk of information for arbitration practitioners, whether Belgium is the seat of the arbitration or the place of enforcement of the award. It even guides the reader through the intricacies of the choice of language which exists in

certain courts and addresses issues such as the conflict of laws rules in arbitration. “Arbitration practitioners” even include Belgian judges for whom the book also contains useful recommendations, amongst others about the interplay between the law and the rules of arbitration institutions chosen by the parties.

As this excellent commentary follows closely after the publication of the third edition of the “Belgian” part of *L’arbitrage en droit belge et international* of G. Keutgen & G.-A. Dal, it may be concluded that the Belgian arbitration library is as complete and actual as any domestic or foreign arbitration practitioner – or scholar – may wish.

Vera Van Houtte
Leuven – Den Haag, October 2015

Preface

A 2015 study for the European parliament looked in astonishment to the unused potential of Belgium as a seat for international arbitration with the following words:

*Belgium is currently a State in transition with respect to its place within arbitration. In many ways it is an ideal jurisdiction for arbitration, and particularly for international arbitration, as the location of the European Union institutions in Brussels means that Belgium has one of the most developed and culturally/nationally diverse groups of legal practitioners in Europe. [...] Nonetheless, arbitration remains surprisingly underdeveloped in Belgium[.]*¹

One of the main reasons for this finding has without doubt been the 1972 Belgian Law on Arbitration, which was afflicted with a number of shortcomings. Despite the various subsequent efforts to make Belgium a more attractive arbitration place – the most famous one being the automatic exclusion of annulment for international arbitrations introduced in 1985, but already amended to an opt-out system in 1998 – the Belgian legislator fell short in adequately remedying the deficiencies.

Until 2013, when an entirely new arbitration law based on the UNCITRAL Model Law on Commercial Arbitration was adopted. This new law put in place a liberal system for arbitration, with limited but efficient court intervention. Also in 2013, CEPANI, the Belgian Centre for Arbitration and Mediation, conducted an overhaul of its arbitration rules adapting them to the most recent trends in the practice of international arbitration.

While time will tell whether “13” will prove to be a lucky number for Belgian arbitration, these are surely exciting times for arbitration practitioners. With the present book, the editors hope to contribute to the numerous efforts of CEPANI, the Belgian Ministry of Justice and other Belgian practitioners who have devoted their time and energy to promote Brussels and Belgium as a globally recognized place of arbitration.

1. T. COLE, I. BANTEKAS, F. FERRETTI, C. RIEFA, B. WARWAS & P. ORTOLANI (editor: European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs), *Legal Instruments and Practice of Arbitration in the EU*, 15 January 2015, European Parliament Document PE 509.988, p. 58 – available online at <http://www.europarl.europa.eu/studies>.

The aim of this book is to provide practical guidance to arbitration practitioners, in-house counsel and judges on how to conduct arbitrations in Belgium.

To facilitate its use, the book is not structured per topic, but as an article-by-article commentary on the 2013 Law on Arbitration. It goes, however, beyond the contents of the Law in order to show a complete picture of arbitration in Belgium. Each article commentary follows the same structure, addressing in turn (i) the purpose of the provision; (ii) a comparison with the Old Belgian Law on Arbitration; (iii) a comparison with the UNCITRAL Model Law on Commercial Arbitration; (iv) an in-depth analysis; (v) party autonomy; and— where appropriate — (vi) issues concerning costs.

The core of each article commentary is the in-depth analysis, which will provide recommendations to practitioners and judges. Furthermore, it will also show the interplay of the 2013 Law on Arbitration with the rules of major arbitration institutions in Belgium as well as in the neighbouring countries (CEPANI, DIS, ICC, LCIA, NAI) and the New York Convention. Finally, each analysis also deals with related issues that are not addressed expressly in the Law, but may be of relevance for the issues covered in the provision in question.

The completion of this project would not have been possible without the support of many. At the risk of omission, the editors wish to thank the following persons in particular. First, our co-authors, who enthusiastically agreed to contribute to this book, each of whom adds his or her unique experience and background. Second, our colleagues at Hanotiau & van den Berg in Brussels, and in particular Véronique van den Berg, for their invaluable support. We are also indebted to our publisher Kluwer Law International, and in particular Eleanor Taylor, for believing in this project from its very inception and bearing with us as deadlines expired. Last but not least, we want to thank our respective families for the love, motivation and the patience during the many nights, weekends and holidays that were spent on “the book”. This book is dedicated to you.

Niuscha Bassiri & Maarten Draye
Brussels, January 2016

Abbreviations and References

The Belgian Law on Arbitration (hereafter “**B.L.A.**”) is set out in Book VI of the Belgian Judicial Code (hereafter “**B.J.C.**”). Its articles will be referred to as articles from the B.J.C. The B.L.A. is largely modelled after the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (hereafter the “**UNCITRAL Model Law**” or “**Model Law**”)

The Belgian Law on Arbitration in its version before 1 September 2013 (hereafter “**Old B.L.A.**”) will remain relevant for arbitrations seated in Belgium that commenced prior to the entry into force of the B.L.A. Furthermore, particular attention will be given to the changes of the B.L.A. General references to the previous Belgian Law on Arbitration will be made to the Old B.L.A. References to specific provisions will be made as articles of the **Old B.J.C.**

At the outset of each commentary, the article in question will be quoted in its official Dutch and French versions. Furthermore, an English translation is provided. This translation is based on an unofficial translation circulated by the Belgian Ministry of Justice, with a number of suggested improvements. These improvements and the reasons behind it are clearly marked for each paragraph.

The unofficial English translation of the B.L.A. is further included as a single text as Appendix I. Moreover, the unofficial German translation of the B.L.A. is included as Appendix II. The CEPANI Rules 2013 can be found in Appendix III. Appendix IV contains a comparative list of key terms in English, French, Dutch and German.

Finally, for ease of the reader, references to case law and doctrine are made in full. The style of referencing corresponds to the citation style used in Belgium, which will facilitate further research.

Summary of Contents

Editors	v
Contributors	vii
Foreword	xv
Preface	xix
Abbreviations and References	xxi
Arbitration in Belgium: An Introduction <i>Olivier Caprasse</i>	1
CHAPTER I General Provisions: Articles 1676 to 1680	13
Article 1676 <i>Niuscha Bassiri & Maud Piers</i>	15
Article 1677 <i>Erica Stein</i>	31
Article 1678 <i>Erica Stein</i>	37
Article 1679 <i>Erica Stein</i>	45
Article 1680 <i>Maarten Draye</i>	51

Summary of Contents

CHAPTER II Arbitration Agreement: Articles 1681 to 1683	77
Article 1681	
<i>Maud Piers</i>	79
Article 1682	
<i>Maarten Draye & Erica Stein</i>	89
Article 1683	
<i>Niuscha Bassiri</i>	105
CHAPTER III Composition of Arbitral Tribunal: Articles 1684 to 1689	113
Article 1684	
<i>Maarten Draye</i>	115
Article 1685	
<i>Maarten Draye</i>	123
Article 1686	
<i>Maarten Draye</i>	149
Article 1687	
<i>Maarten Draye</i>	169
Article 1688	
<i>Maarten Draye</i>	183
Article 1689	
<i>Maarten Draye</i>	191
CHAPTER IV Jurisdiction of Arbitral Tribunal: Articles 1690 to 1698	197
Article 1690	
<i>Niuscha Bassiri</i>	199
Article 1691	
<i>Niuscha Bassiri</i>	209
Article 1692	
<i>Niuscha Bassiri</i>	219
Article 1693	
<i>Niuscha Bassiri</i>	225
Article 1694	
<i>Niuscha Bassiri</i>	229

Article 1695	
<i>Niuscha Bassiri</i>	233
Article 1696	
<i>Niuscha Bassiri</i>	239
Article 1697	
<i>Niuscha Bassiri</i>	247
Article 1698	
<i>Niuscha Bassiri & Maarten Draye</i>	255
CHAPTER V Conduct of Arbitral Proceedings: Articles 1699 to 1709	265
Article 1699	
<i>Caroline Verbruggen</i>	267
Article 1700	
<i>Maarten Draye</i>	279
Article 1701	
<i>Erica Stein</i>	329
Article 1702	
<i>Erica Stein</i>	337
Article 1703	
<i>Erica Stein</i>	341
Article 1704	
<i>Erica Stein</i>	349
Article 1705	
<i>Erica Stein</i>	357
Article 1706	
<i>Niuscha Bassiri</i>	365
Article 1707	
<i>Erica Stein</i>	373
Article 1708	
<i>Maarten Draye</i>	381
Article 1709	
<i>Erica Stein</i>	389

Summary of Contents

CHAPTER VI	Arbitral Award and Termination of Proceedings: Articles 1710 to 1715	397
Article 1710		
<i>Maud Piers</i>		399
Article 1711		
<i>Maud Piers</i>		409
Article 1712		
<i>Maud Piers</i>		415
Article 1713		
<i>Maud Piers</i>		421
Article 1714		
<i>Maud Piers</i>		439
Article 1715		
<i>Maud Piers</i>		443
CHAPTER VII	Recourse against Arbitral Award: Articles 1716 to 1718	449
Article 1716		
<i>Caroline Verbruggen</i>		451
Article 1717		
<i>Caroline Verbruggen</i>		455
Article 1718		
<i>Caroline Verbruggen</i>		489
CHAPTER VIII	Recognition and Enforcement of Arbitral Awards: Articles 1719 to 1721	495
Article 1719		
<i>Caroline Verbruggen</i>		497
Article 1720		
<i>Caroline Verbruggen</i>		503
Article 1721		
<i>Caroline Verbruggen</i>		511
CHAPTER IX	Time Bar: Article 1722	531
Article 1722		
<i>Maarten Draye</i>		533

CHAPTER X Entry into Force and Applicability <i>ratione temporis</i> of the B.L.A.: Articles 59 and 60 of the Law Amending Part VI of the Judicial Code on Arbitration of 24 June 2013	537
Articles 59 and 60 (Law of 24 June 2013) <i>Maarten Draye</i>	539
APPENDIX I Belgian Law on Arbitration (English Version)	547
APPENDIX II Belgian Law on Arbitration (German Version)	573
APPENDIX III CEPANI Rules 2013	599
APPENDIX IV Comparative List of B.J.C. Terms	627
Index	631