

Global Arbitration Review

# The Guide to Challenging and Enforcing Arbitration Awards

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General Editor  
J William Rowley QC

Editors  
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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## Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com).

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

**David Samuels**

London

April 2021

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# Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

## Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

## Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

## Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

## Increasing press reports of awards under attack

During 2020, *Global Arbitration Review's* daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

## Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

*an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

## Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

### Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

**J William Rowley QC**

London

April 2021

# Part II

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Challenging and Enforcing Arbitration  
Awards: Jurisdictional Know-How

# 17

## Belgium

**Hakim Boularbah, Olivier van der Haegen and Anaïs Mallien<sup>1</sup>**

### **Applicable requirements as to the form of arbitral awards**

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#### **Applicable legislation as to the form of awards**

##### **1 Must an award take any particular form?**

The Belgian law on arbitration is contained in Part Six of the Belgian Judicial Code (BJC) (Articles 1676 to 1722). To a large extent, it is inspired by the UNCITRAL Model Law. Arbitration proceedings initiated before 1 September 2013, and court proceedings relating to those arbitrations, remain governed by the former rules of the BJC. In 2016 (by an Act of 25 December 2016), some minor changes and corrections of the Act of 24 June 2013 were implemented, which entered into force on 9 January 2017.

The form of arbitral awards is governed by Article 1713 of the BJC, which deals with the validity requirements and different aspects relating to the content of arbitral awards. Belgian law builds on Article 31 of the UNCITRAL Model Law, but also adding to it and deviating from it in a number of ways, including by requiring that an arbitral award issued in Belgium should be reasoned and by removing the opportunity for parties in an arbitration seated in Belgium to agree that no reasons need to be given (a lack of reasoning of an award in an arbitration seated in Belgium constitutes a ground for annulment of the arbitral award).

To be valid under Belgian law, an arbitral award rendered in Belgium must:

- as to form, be in writing and signed by the arbitral tribunal (the signature of the majority of the members of an arbitral tribunal is sufficient, provided the reason for any omitted signature is stated) (BJC, Article 1713, Section 3);

---

<sup>1</sup> Hakim Boularbah and Olivier van der Haegen are partners and Anaïs Mallien is an associate at Loyens & Loeff.



- as to substance, state the reasons on which it is based (BJC, Article 1713, Section 4) and contain, as a minimum, the following information:
  - the names and domiciles of the arbitrators;
  - the names and domiciles of the parties;
  - the object of the dispute (and a citation of the arbitration agreement, although this is not explicitly required by law);
  - the date on which the award was rendered; and
  - the place of arbitration.

Following an amendment of the Belgian law on arbitration in 2016, it is no longer required by law that an original copy of the award be filed with the competent court for the enforcement.

## **Applicable procedural law for recourse against an award**

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### **Applicable legislation governing recourse against an award**

- 2 Are there provisions governing modification, clarification or correction of an award? Are there provisions governing retraction or revision of an award? Under what circumstances may an award be retracted or revised (for fraud or other reasons)?

Parties may apply for an interpretation, a correction or an additional award within a month of the arbitral award being notified to the parties.

If there are any errors in calculation, any clerical or typographical errors, or any other errors of a similar nature, the parties (or the arbitral tribunal on its own motion) may request the correction of the arbitral award pursuant to Article 1715, Section 1a) of the BJC.

A party may also, subject to agreement by the other parties to that effect (which may result from the applicable institutional rules), request the arbitral tribunal to provide an interpretation of (an aspect of) the award (BJC, Article 1715, Section 1b)).

Unless agreed otherwise, the parties may also request the arbitral tribunal to issue an additional award on claims that had been presented to it but on which it did not rule (BJC, Article 1715, Section 3).

In principle, the same arbitral tribunal is competent to issue correcting, interpreting or additional awards as described above. When it is impossible for the same arbitrators to do so, the court of first instance is competent (BJC, Article 1715, Section 6).

In addition, Belgian law also provides parties with the opportunity to ask the court of first instance to order the arbitral tribunal to remedy certain potential annulment grounds. Pursuant to Article 1717, Section 6 of the BJC, parties must request the court seized in setting-aside proceedings to stay those proceedings for a period determined by the court, for the arbitral tribunal to take any measure necessary (including reopening the arbitration proceedings) to remedy the potential grounds for setting aside.

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## Appeals from an award

### 3 May an award be appealed to or set aside by the courts? What are the differences between appeals and applications to set aside awards?

Pursuant to Article 1716 of the BJC, appeals against arbitral awards are only possible when the parties have provided beforehand, in their mutually agreed arbitration clause, for the possibility of an appeal. In this very exceptional circumstance, the appeal should be brought before a new arbitral tribunal.

Pursuant to Article 1717 of the BJC, Belgian awards, which are not (or no longer) open to appeal, may be set aside by Belgian courts on the basis of an exhaustive list of grounds provided in the law.

If none of the parties are Belgian nationals, they may waive, by explicit declaration in the arbitration agreement or by later agreement, the possibility for annulment of the arbitral award (BJC, Article 1718).

The annulment (or setting-aside) decision is final and cannot be appealed before the courts of appeal (BJC, Article 1717, Section 2). However, a recourse before the Belgian Supreme Court remains open.

The law provides for a limited number of grounds that can warrant the setting aside of an arbitral award. Those exhaustive grounds are inspired by Article 34(2) of the UNCITRAL Model Law and are similar to the grounds for refusal of enforcement.

A party may seek the setting aside of a Belgian award if it provides proof of one the following grounds, as set out in Article 1717 of the BJC:

- one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is invalid under the law applicable to it, or if there is none, under Belgian law (Section 3(a)(i));
- the party seeking annulment invokes a violation of the right to be heard (i.e., that party was not notified properly of the appointment of an arbitrator or of the arbitral proceedings, or it was otherwise impossible for that party to present its case (Section 3(a)(ii)). This ground will be accepted only if the irregularity had an effect on the arbitral award;
- the arbitral award pertains to a dispute that does not fall within the terms of or under the scope of the arbitration agreement (Section 3(a)(iii)). Here, only the part of the award that does not fall under the scope of the arbitration agreement may be set aside;
- the arbitral award is not reasoned (Section 3(a)(iv));
- there was an irregularity in the composition of the arbitral tribunal or the arbitral proceedings, according to either the parties' agreement or Part Six of the BJC (Section 3(a)(v)). Irregularities in the arbitral proceedings may lead to a setting aside only if it is established that they had an effect on the award;
- the arbitral tribunal exceeded its powers (Section 3(a)(vi));
- the subject matter of the dispute cannot be settled by way of arbitration (non-arbitrability) (Section 3(b)(i));
- the award is contrary to public policy (Section 3(b)(ii)); and
- the award was obtained by fraud (Section 3(b)(iii)).

The latter three grounds (non-arbitrability, public policy and fraud) must also be raised by the court of first instance (when seized by the party seeking setting-aside of the award) on its own motion, thus even if the parties do not invoke any of these grounds.

It must be noted that a party may be estopped from advancing certain grounds for setting aside if it was aware of them during the arbitration proceedings but failed to invoke them before the arbitral tribunal (BJC, Article 1717, Section 5, referring to the grounds set out in Section 3(a), Paragraphs (i), (ii), (iii) and (v) (see above)).

If an arbitral award is set aside, it is deemed to no longer exist under Belgian law. If the award was set aside on any ground other than the invalidity of the arbitration agreement, it is possible for the parties to initiate new arbitration proceedings. In contrast, an appeal against the arbitral award (if the parties provided for that opportunity) will result in a new arbitral award, which in turn will be open to setting-aside proceedings.

In principle, only a person or entity that was a party to the original arbitration proceedings may request the annulment of the arbitral award. It is only in the event of fraud that a third party may be admitted to request the setting-aside of an arbitral award.

Nevertheless, the Belgian Constitutional Court decided (in a judgment dated 16 February 2017) that third parties aggrieved by an arbitral award should be able to exercise recourse against that award by way of third-party opposition proceedings instituted before domestic courts. Therefore, a third party is now in principle entitled to challenge an arbitral award in the same way as a third party can challenge a judicial decision (a challenge that is known as a *tierce-opposition/derdenverzet*, as provided in Article 1122 of the BJC). This opens the possibility for a review of the awards on the merits. So far, the legal regime governing this third-party opposition to an arbitral award has not been developed. The precise consequences of the Constitutional Court's decision remain to be delineated. In our view, there is a need to adjust the BJC to provide for the applicable regime to this specific challenge from third parties.

## **Applicable procedural law for setting aside of arbitral awards**

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### **Time limit**

#### **4 Is there a time limit for applying for the setting aside of an arbitral award?**

The law provides a time limit for initiating setting-aside proceedings of three months from the date on which (1) the award was communicated to the party seeking the set-aside, or (2) the arbitral tribunal's decision on an application for correction or a request for additional award or omitted claim (if such an application or request was made) was communicated to that party (BJC, Article 1717, Section 4).

In a judgment dated 28 January 2021, the Belgian Constitutional Court decided that the three-month deadline from notification of the award was unconstitutional when applied to the ground for challenge based on fraud, when it is proven that the fraud was unknown at the time of notification of the award.

## **Award**

**5 What kind of arbitral decision can be set aside in your jurisdiction?  
Can courts set aside partial or interim awards?**

Pursuant to Article 1717 of the BJC, only arbitral awards rendered by an arbitral tribunal with its seat in Belgium, which are not (or are no longer) open to appeal, may be set aside by Belgian courts on the basis of an exhaustive list of grounds provided in the law. Therefore, it must no longer be possible for the arbitral award to be contested before an arbitral tribunal. The fact that the award may be subject to an application for correction or interpretation, or that a request for an additional award on omitted claims has been submitted, does not render the application for annulment inadmissible.

However, pursuant to Article 1690, Section 4 of the BJC, a preliminary award that confirms the arbitral tribunal's jurisdiction may not immediately be subject to a setting-aside proceeding. An application for setting aside an interim award finding jurisdiction may be made only with the first subsequent award dealing with the merits of the case.

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## **Competent court**

**6 Which court has jurisdiction over an application for the setting aside  
of an arbitral award?**

Setting-aside proceedings must be initiated by an applicant by writ of summons served on the other party or parties to the arbitration proceedings, before one of the six competent courts in Belgium (the courts of first instance of Brussels (French-speaking and Dutch-speaking), Antwerp, Ghent, Liège and Mons) (BJC, Article 1717, Section 2).

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## **Form of application and required documentation**

**7 What documentation is required when applying for the setting aside  
of an arbitral award?**

The arbitral award will have to be part of the bundle of documentary evidence that will be submitted to the court of first instance. Article 1717, Section 2 of the BJC provides that an arbitral award may only be contested before the court of first instance, by means of a writ of summons. Under Belgian law, a writ of summons must contain:

- the signature of the court bailiff;
- the surname, first names and residence of the applicant and, where appropriate, the applicant's national register or company number;
- the surname, first names and residence or, if there is no permanent residence, the current address of the person on whom the summons is served;
- the subject matter and a brief summary of the arguments of the action;
- the court before which the action is being brought;
- the day, month, year and place where the writ was served; and
- details of the place, date and time of the court hearing.

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## Translation of required documentation

- 8 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with the application for the setting aside of an arbitral award? If yes, in what form must the translation be?

Although there is no express or formal requirement for translation of the exhibits submitted in setting-aside proceedings, the court will require a translation of the arbitral award in the language of the proceedings. Unless there is a challenge raised in relation to the translation, in principle, Belgian courts are satisfied with an informal translation.

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## Other practical requirements

- 9 What are the other practical requirements relating to the setting aside of an arbitral award? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

The typical costs involved in the setting aside of an arbitral award include a number of fixed fees, including a modest contribution to the budgetary fund for judicial assistance (€20), the statutorily prescribed contribution towards the other party's legal representation costs, as stipulated in Article 1022 of the BJC (a lump sum contribution), and other typical costs relating to the court registry and registration of the judgment.

There are no limitations on the length of submissions or the documentation filed by the parties. However, the application itself must be drafted in the language of the proceedings (either French or Dutch, depending on where the recognition or enforcement proceedings have been initiated).

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## Form of the setting-aside proceedings

- 10 What are the different steps of the proceedings?

Article 1717, Section 2 of the BJC provides that an arbitral award may only be contested before the court of first instance, by means of a writ of summons. This procedure is adversarial in nature.

The writ of summons must contain:

- the signature of the court bailiff;
- the surname, first names and residence of the applicant and, where appropriate, the applicant's national register or company number;
- the surname, first names and residence or, if there is no permanent residence, the current address of the person on whom the summons is served;
- the subject matter and a brief summary of the arguments of the action;
- the court before which the action is being brought;
- the day, month, year and place where the writ was served; and
- details of the place, date and time of the court hearing.

In general, after submission of the writ of summons, a case management conference will be held by the court, during which a procedural schedule will be set. The parties exchange

written submissions and, normally, a hearing is held several weeks after submission of the last written brief. The court will decide based on the application, the submissions exchanged between the parties, and the hearing, as well as the supporting evidence.

As a matter of principle, the court should render its decision within one month of the date of the hearing, but non-compliance with this deadline is not sanctioned. In practice, this deadline is not always respected and it can be several months after the date of the initial submission of the writ of summons before a decision is rendered.

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## Suspensive effect

### 11 Do setting-aside proceedings have suspensive effect? May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction?

The setting-aside proceedings do not have suspensive effect (i.e., the enforcement of the arbitral award is not suspended). An arbitral award may be recognised or enforced pending setting-aside proceedings in Belgium. However, the judge having jurisdiction for enforcement issues can, at the request of the party that filed a recourse against the enforcement decision, order a stay of the enforcement of the arbitral award.

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## Grounds for setting aside an arbitral award

### 12 What are the grounds on which an arbitral award may be set aside?

The law provides for a limited number of grounds that can warrant the setting aside of an arbitral award. Those exhaustive grounds are inspired by Article 34(2) of the UNCITRAL Model Law and are similar to the grounds for refusal of enforcement.

A party may seek the setting aside of a Belgian award if it provides proof of one the following grounds, as set out in Article 1717 of the BJC:

- one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is invalid under the law applicable to it, or if there is none, under Belgian law (Section 3(a)(i));
- the party seeking annulment invokes a violation of the right to be heard (i.e., that party was not notified properly of the appointment of an arbitrator or of the arbitral proceedings or it was otherwise impossible for that party to present its case) (Section 3(a)(ii)). This ground will be accepted only if the irregularity had an effect on the arbitral award;
- the arbitral award pertains to a dispute that does not fall within the terms of, or under the scope of, the arbitration agreement (Section 3(a)(iii)). Here, only the part of the award that does not fall under the scope of the arbitration agreement may be set aside;
- the arbitral award is not reasoned (Section 3(a)(iv));
- there was an irregularity in the composition of the arbitral tribunal or the arbitral proceedings, according to either the agreement of the parties or Part Six of the BJC (Section 3(a)(v)). Irregularities in the arbitral proceedings may only lead to a setting aside if it is established that they had an effect on the award;
- the arbitral tribunal exceeded its powers (Section 3(a)(vi));

- the subject matter of the dispute cannot be settled by way of arbitration (non-arbitrability) (Section 3(b)(i));
- the award is contrary to public policy (Section 3(b)(ii)); and
- the award was obtained by fraud (Section 3(b)(iii)).

The latter three grounds (non-arbitrability, public policy and fraud) must also be raised by the court of first instance (when seized by the party seeking setting aside of the award) on its own motion, thus even if the parties do not invoke such grounds.

It must be noted that a party may be estopped from advancing certain grounds for setting aside if it was aware of them during the arbitration proceedings but failed to invoke them before the arbitral tribunal (BJC, Article 1717, Section 5, referring to the grounds set out in Section 3(a), Paragraphs (i), (ii), (iii) and (v) (see above)).

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## **Decision on the setting-aside application**

### **13 What is the effect of the decision on the setting-aside application in your jurisdiction? What challenges are available?**

If an arbitral award is set aside, it is deemed to no longer exist under Belgian law. If the award was set aside on any ground other than the invalidity of the arbitration agreement, it is possible for the parties to initiate new arbitration proceedings. In contrast, an appeal against the arbitral award (if the parties provided for that opportunity) will result in a new arbitral award, which in turn will be open to setting-aside proceedings.

The decision of the court of first instance on an application for setting aside is not subject to appeal. A decision by the court of first instance is final (BJC, Article 1717, Section 2) and may only be reviewed by the Supreme Court (limited to matters of law).

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## **Effects of decisions rendered in other jurisdictions**

### **14 Will courts take into consideration decisions rendered in the same matter in other jurisdictions or give effect to them?**

This question is debated under Belgian law. As a matter of principle, a foreign decision on recognition and enforcement of a Belgian arbitral award should not bind the Belgian courts having exclusive jurisdiction over an application for setting aside a Belgian arbitral award. A foreign judgment cannot be recognised based on the EU Brussels Recast Regulation (since arbitration is excluded from the Regulation's scope). Lately, Belgian courts have applied other private international law instruments on this question, leading to controversial decisions.

## **Applicable procedural law for recognition and enforcement of arbitral awards**

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### **Applicable legislation for recognition and enforcement**

- 15 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Belgian law on arbitration is contained in Part Six of the BJC (as remodelled by the Arbitration Act of 24 June 2013 and by the Act of 25 December 2016) and is to a large extent inspired by the UNCITRAL Model Law. Chapter VIII of the BJC (Articles 1719 to 1721) governs the recognition and enforcement of arbitral awards.

Belgium is party to the following treaties facilitating recognition and enforcement of arbitral awards:

- the New York Convention of 1958 (which Belgium signed with the reservation of reciprocity). The New York Convention supersedes the Geneva Convention of 26 September 1927 on the enforcement of foreign awards, which Belgium had also ratified;
- the European Convention on International Commercial Arbitration of 21 April 1961; and
- the ICSID Convention of 18 March 1965 (the Belgian Act of 17 July 1970 implements the ICSID Convention under Belgian law).

The recognition and enforcement of ICSID arbitral awards is governed by a distinct regime.

Belgium has also signed bilateral treaties on recognition and enforcement of arbitral awards with Austria, France, Germany, the Netherlands and Switzerland.

Article 1721(3) of the BJC provides that a treaty concluded between Belgium and the country where the arbitral award was rendered takes precedence over domestic rules. This provision must be read together with the ‘more favourable law’ provision of the New York Convention, which provides that the Convention does not take precedence over legislation that is more favourable to recognition and enforcement.

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### **The New York Convention**

- 16 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Belgium is a party to the New York Convention. Belgium signed the Convention on 10 June 1958 and ratified it on 18 August 1975. The New York Convention entered into force on 16 November 1975.

Belgium has made a reciprocity reservation under Article I(3) of the Convention. Therefore, it is only applicable to the recognition and enforcement of arbitral awards made in the territory of a contracting state. In Belgium, the Convention is applicable in both commercial and civil matters.



## Recognition proceedings

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### Time limit

- 17 Is there a time limit for applying for the recognition and enforcement of an arbitral award?

A party can apply to enforce a foreign or domestic award only if the award can no longer be contested before an arbitral tribunal or if it is declared provisionally enforceable. There is no strict deadline for commencing recognition and enforcement proceedings (but a statute of limitation of 10 years will apply).

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### Competent court

- 18 Which court has jurisdiction over an application for recognition and enforcement of an arbitral award?

The court of first instance has jurisdiction to hear applications for recognition and enforcement of arbitral awards.

In the case of a foreign award, the territorially competent court of first instance is the court of the place where the party against whom enforcement is sought has its domicile, residence, registered seat or branch in Belgium or, in the absence of any of these in Belgium, the place where the applicant wishes to enforce the arbitral award (BJC, Article 1720, Section 2).

In the case of a domestic award, the competent court is the court of first instance with jurisdiction at the place of the seat of the arbitration (BJC, Article 1680, Section 6).

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### Jurisdictional and admissibility issues

- 19 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement and for the application to be admissible? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As for any other proceedings, the applicant has to demonstrate that it has *locus standi* (meaning a genuine interest to act). Apart from that, there are no specific requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards, whether foreign or domestic. For an application to be admissible, the applicant must elect domicile in the jurisdiction of the competent court of first instance (indicating an address in that jurisdiction, generally at the premises of the law firm of the applicant's external counsel).

It is not required under Belgian law that an applicant identifies assets within the jurisdiction of the court to obtain the recognition and enforcement of an arbitral award.

## Form of the recognition proceedings

### 20 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*? What are the different steps of the proceedings?

Recognition proceedings are *ex parte* in Belgium, meaning recognition is sought by way of a unilateral request. The party against whom enforcement is sought has no right to be heard at that stage of the procedure (but can lodge an appeal against the *exequatur* order).

An application for enforcement or recognition must contain the following information pursuant to Article 1026 of the BJC:

- the date;
- the name, domicile and profession of the applicant;
- the subject matter of the dispute and a brief summary of arguments;
- the name of the judge in charge of the case; and
- the signature of the applicant's lawyer.

In general, the proceedings are conducted only in writing. The court will render its decision based on the application and supporting evidence. However, the court may summon the applicant, and the person against whom the enforcement is sought, to chambers if the need arises.

Normally, a court seized by a unilateral request will render its order after a very short period. Usually, this is within one month of the date of the application for recognition or enforcement (with the possibility that it is already rendered within a number of days).

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## Form of application and required documentation

### 21 What documentation is required to obtain recognition?

Pursuant to the New York Convention, the applicant must provide the court with the original or a duly authenticated copy of both the arbitral award and the arbitration agreement.

Pursuant to the BJC, the applicant must provide the court with the original or a duly authenticated copy of the arbitral award in its entirety. Following the entry into force of the latest amendments to the Belgian law on arbitration in January 2017, it is no longer required to provide the court with the original of, or a copy of, the arbitration agreement. This amendment was introduced to make Article 1720 of the BJC compatible with Article 35 of the UNCITRAL Model Law and Article 1681 of the BJC, which no longer requires the arbitration agreement to be in writing. Article 1721, Section 2 of the BJC provides that the court will stay the application for as long as a written award signed by the arbitrators is not provided in support of the application.

The application itself must be filed in triplicate and signed by an attorney entitled to plead before Belgian courts.

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## Translation of required documentation

- 22 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition? If yes, in what form must the translation be?

Pursuant to the New York Convention, if the required documentation is not drafted in the language of the proceedings (either French or Dutch, depending on where the recognition or enforcement proceedings have been initiated), it is necessary to submit a certified translation of the full arbitral award and the arbitration agreement.

No translation requirement is provided in the BJC. In practice, it is recommended to submit a translation (an informal translation should suffice) to allow the *exequatur* judge to have a clear understanding of the case.

In principle, other documents submitted to the court should also be translated into the language of the proceedings.

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## Other practical requirements

- 23 What are the other practical requirements relating to recognition and enforcement? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

An applicant must elect domicile in the district of the court of first instance with jurisdiction over the application for recognition and enforcement of the arbitral award. In practice, foreign applicants usually elect domicile at their attorney's office.

The typical costs involved in the enforcement of an arbitral award include a number of fixed fees to obtain the *exequatur* order of the arbitral award, including the register fees (currently €100 per applicant), a modest contribution to the budgetary fund for judicial assistance (€20) and the costs for obtaining a certified copy of the *exequatur* order (calculated on the basis of the number of pages of the *exequatur* order, which includes the arbitral award in its entirety). At this stage, the main expenditure will be the costs for obtaining a certified translation of the arbitral award.

If the arbitral award is recognised by the *exequatur* judge, a registration fee of 3 per cent of the amount of the award (excluding interest) will be levied by the Belgian Tax Authority. In principle, a registration fee is payable only by the award debtor.

The party seeking enforcement will also have to instruct a bailiff to serve the *exequatur* order on the award debtor. The bailiff works on the basis of fees fixed by law.

The aforementioned costs are recoverable from the award debtor as part of the payment requested under the arbitral award once it is enforced in Belgium.

There are no limitations on the length of submissions or the documentation filed by the parties. However, the application itself must be drafted in the language of the proceedings (either French or Dutch, depending on where the recognition or enforcement proceedings have been initiated).

If an award debtor does not lodge any recourse against enforcement proceedings, an arbitral award can be enforced within a few months. However, if recourse is lodged, the

time taken to enforce an arbitral award will depend on the nature of the objections of the award debtor.

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## Recognition of interim or partial awards

### 24 Do courts recognise and enforce partial or interim awards?

Belgian courts generally recognise and enforce partial and interim awards (whatever their form) as long as they contain an order that is no longer subject to appeal before the arbitrators.

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## Grounds for refusing recognition of an arbitral award

### 25 What are the grounds on which an arbitral award may be refused recognition? Are the grounds applied by the courts different from those provided under Article V of the New York Convention?

Article 1721 of the BJC provides several grounds for refusing recognition and enforcement that are inspired by Article 36 of the UNCITRAL Model Law and, to a large extent, are similar to those provided under Article V of the New York Convention.

The grounds for refusal of *exequatur* set forth in Article 1721 of the BJC are similar to the grounds for annulment of Belgian arbitral awards. Hence, recognition and enforcement of an arbitral award may be refused if the party against whom enforcement is sought evidences that:

- one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is invalid under the law applicable to it, or if there is none, under Belgian law;
- the right to be heard of the party against whom enforcement is sought were breached (i.e., that party was not notified properly of the appointment of an arbitrator or of the arbitral proceedings or it was otherwise impossible for that party to present its case), if the irregularity had an effect on the arbitral award;
- the arbitral award pertains to a dispute that does not fall within the terms of, or under the scope of, the arbitration agreement. If only part of the award falls under the scope or terms of the arbitration agreement, only that part may be recognised and enforced;
- the arbitral award is not reasoned. Recognition or enforcement may be refused only if such reasoning is required under the rules applicable to the arbitration proceedings;
- there was an irregularity in the composition of the arbitral tribunal or the arbitral proceedings, either according to the parties' agreement, or to the law of the country where the arbitration took place. Irregularities in the arbitral proceedings may only lead to a refusal of recognition where it is established that they had an effect on the award;
- the arbitral award has not yet become binding on the parties (for example, because it is still open for appeal) or has been set aside or suspended by a court of the country where the award was made (or which laws were applicable to the proceedings); or
- the arbitral tribunal exceeded its powers.

Recognition and enforcement of an arbitral award may also be refused *ex officio* if:

- the subject matter of the dispute cannot be settled by way of arbitration (non-arbitrability);
- the award is contrary to public policy; or
- the award was obtained by fraud.

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## Effect of a decision recognising an arbitral award

### 26 What is the effect of a decision recognising an arbitral award in your jurisdiction?

The order of the *exequatur* judge recognising an arbitral award rendered in Belgium is immediately enforceable and is not subject to appeal by the party seeking recognition and enforcement.

Under Belgian law, the party against whom enforcement is sought can challenge the decision granting the *exequatur* to the award within one month of the date of the service of the order by way of third-party opposition proceedings before the same court of first instance, this time in adversarial proceedings. The challenge does not in itself stay the enforcement of the arbitral award.

As of 9 January 2017, the party who lodges a recourse against a decision enforcing an arbitral award issued in Belgium, and who wants to have the arbitral award set aside, must submit a setting-aside application concomitantly with the challenge to the enforcement order and in the same procedure (provided that the deadline to file a setting-aside application has not expired) (BJC, Article 1717, Section 7).

Aside from that, it has long been decided by the Belgian Court of Cassation that third parties (those who did not participate and who were not called to participate in the arbitration) may not challenge an order recognising and enforcing the arbitral award. The Belgian Constitutional Court decided in a judgment dated 16 February 2016, however, that a third party should have the right to directly challenge an arbitral award before the Belgian courts (to avoid being opposed to the *res judicata* effect of that award). Nevertheless, it remains the case that a third party may not challenge the enforcement of an arbitral award.

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## Decisions refusing to recognise an arbitral award

### 27 What challenges are available against a decision refusing recognition in your jurisdiction?

If recognition is refused, an applicant may only lodge an appeal against that decision before the Belgian Court of Cassation on points of law (the Arbitration Act of 2013 removed the possibility to challenge the decision before a court of appeal).

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## **Recognition or enforcement proceedings pending annulment proceedings**

### **28 What are the effects of annulment proceedings at the seat of the arbitration on recognition or enforcement proceedings in your jurisdiction?**

With respect to foreign arbitral awards, Article VI of the New York Convention provides that, if annulment proceedings are initiated in the state where the award was rendered, the *exequatur* judge may, if appropriate, adjourn the decision on the enforcement of the award. Belgian courts essentially rely on the seriousness of the grounds invoked at the seat of the arbitration for setting aside an arbitral award. If there is no reasonable risk of the award being set aside, Belgian courts will not adjourn the proceedings.

There is no similar provision under Belgian law pertaining specifically to the adjournment of recognition proceedings in the event of a setting-aside proceedings pending in the state where the arbitration had its seat. Nevertheless, once the *exequatur* is granted, the person against whom enforcement is sought and who challenges the recognition order may request before the court of attachments a temporary stay of the enforcement of the *exequatur* order based on Article 1127 of the BJC. According to the relevant case law and legal literature, the applicant must demonstrate either that there is a strong *prima facie* chance that the *exequatur* order will be reversed or that a risk of irreparable harm exists.

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## **Security**

### **29 If the courts adjourn the recognition or enforcement proceedings pending annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security?**

In accordance with Article VI of the New York Convention, the *exequatur* judge may, at the request of the applicant, order the person against whom enforcement is sought to post suitable security. Article VI grants the *exequatur* judges a great margin of discretion in deciding whether to order the posting of security and the amount that should be posted as security.

As for the adjournment of the decision on the enforcement of an award, Belgian *exequatur* judges will consider the likelihood of success of the setting-aside proceedings as well as the potential ease or difficulty of enforcing the award.

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## **Recognition or enforcement of an award set aside at the seat**

### **30 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an arbitral award is set aside after the decision recognising the award has been issued, what challenges are available?**

Pursuant to Article V(1)(e) of the New York Convention, and new Article 1721(1)(a)(vi) of the BJC, the setting aside of an arbitral award at the seat of the arbitration is a ground for refusal of its recognition and enforcement. However, it can be argued that the enforcement court retains discretion under Article V of the New York Convention in this respect (hence the same argument can be made with respect to Article 1721(1)(a)(vi) of the BJC).

Under the former regime of the BJC, the setting aside of an arbitral award was not one of the grounds for refusal of recognition and enforcement (former Article 1723). Therefore, several prominent authors have argued that Belgian law was more favourable and had to prevail based on Article VII(1) of the New York Convention.

## Service

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### Service in your jurisdiction

- 31 What is the procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction? If the extrajudicial and judicial documents are drafted in a language other than the official language of your jurisdiction, is it necessary to serve these documents with a translation?

Service of judicial and extrajudicial documents is carried out by bailiffs. They are the only officers entitled to perform that mission pursuant to the BJC. The service must occur in the language of the region in which the service will be carried out (Dutch, French or German). The *exequatur* order, which must be served on the defendant, includes the arbitral award in its entirety, which will already have been translated at this point.

The bailiff works on the basis of fees fixed by law.

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### Service out of your jurisdiction

- 32 What is the procedure for service of extrajudicial and judicial documents to a defendant outside your jurisdiction? Is it necessary to serve these documents with a translation in the language of this jurisdiction?

Different regimes are potentially applicable for the service of extrajudicial and judicial documents abroad depending on the state addressed.

In principle, service on a defendant who is not domiciled or has no (chosen) place of residence in Belgium is governed by the BJC, more specifically Article 40, which provides that service occurs by registered mail through normal postal services, and that the service is deemed complete at the time of delivery of the documents to the postal services. However, international agreements take precedence over the general rule of domestic law. Hence the procedures set forth at the European and international levels (as set out below) will supersede Article 40 of the BJC.

Service from and to Member States of the European Union is regulated by Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), which replaces Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. Regulation 2020/1784 provides a procedure for the service of documents via designated 'transmitting agencies' and 'receiving agencies' between EU countries, including Denmark. A transmitting agency transmits documents to a receiving agency, which 'serve[s] the document or ha[s] it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State'

(Regulation 2020/1784, Article 11(1)). With the 2020 reform, it is now also possible, under certain conditions, to serve judicial documents directly on a person who has a known address for service in another Member State by any electronic means of service available under the law of the Member State for the domestic service of documents (Regulation 2020/1784, Article 19). With respect to translation, Regulation 2020/1784 provides that in:

*all cases where the document to be served is not in the official language or one of the official languages of the place of service, the receiving agency should inform the addressee in writing . . . that the addressee can refuse to accept the document to be served if it is neither in a language which the addressee understands nor in the official language or one of the official languages of the place of service. (Preamble)*

This right of refusal also applies in respect of service by diplomatic agents or consular officers, service by postal services, electronic service and direct service. Regulation 2020/1784 provides that it 'should be possible to remedy the service of the refused document by serving a translation of the document on the addressee' and that if a translation is attached, it 'should be certified or otherwise deemed suitable for proceedings in accordance with the law of the Member State of origin'.

Service in states outside the European Union is regulated by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, for those states that have ratified the Convention. The Convention provides that the authority or judicial officer competent under the law of the state in which the documents originate (in Belgium, the bailiff is a competent judicial officer) shall forward a request to the central authority of the state addressed (as designated by that state – in Belgium, the Federal Public Service for the Judiciary). In this respect, the Belgian Supreme Court has admitted the 'double date theory', determining that the service of judicial acts is deemed to be accomplished towards the served party from the date this party actually receives the served act. Towards the serving party, service under Article 3 of the Convention is considered effective when the judicial act is handed over to the postal service of the state of origin with notice of registered sending, and therefore prior to the actual receipt of the act by the served party. The Convention allows for service by way of alternative channels (such as registered mail), on the condition that the contracting states did not issue an objection in that regard. The Convention provides that if 'the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed'.

Judicial and extrajudicial documents can also be served through diplomatic channels, especially when they are to be served on sovereign states.

## **Identification of assets**

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### **Asset databases**

33 **Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?**

Article 22 of the Belgian Constitution protects the right of the debtor to privacy, including the privacy of its estate. Therefore, only restricted means exist to identify the assets of an



award debtor located in Belgium. Public registers are available for immovable property (land and mortgage registers) but not for other types of assets (movable and intangible properties).

Usually award creditors use publicly available information, run private investigations or perform third-party attachments (garnishments) with banks and financial institutions to identify assets in Belgium.

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### Information available through judicial proceedings

#### 34 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Under Belgian law, it is possible to request investigatory measures from a court, which allow the collection of evidence and potential disclosure of assets of a certain party located in Belgium. Specifically, pursuant to Article 877 of the BJC, a party may request an order from the competent court forcing a debtor to disclose specific documents. Courts will only order a party (or a third party) to file a document containing evidence of a relevant fact if there are serious, precise and corroborative presumptions that a party or a third party holds that document. Although this option is only available in the course of court proceedings, investigatory measures can also be requested by means of an *ex parte* application if the applicant demonstrates an absolute necessity to waive adversarial proceedings (i.e., extreme urgency, the need to benefit from a surprise element or it being impossible to identify the adverse party).

Additionally, the Belgian legislature introduced a new procedure in Articles 1447/1 and 1447/2 of the BJC for creditors in Belgium seeking to identify assets of their debtor located in Belgium (modelled after the procedure set forth in Regulation (EU) No. 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters). The operability of these provisions was linked to an update of the central register system of the National Bank of Belgium, which was installed on 30 June 2020 and is now operational. The procedure allows a judgment creditor who has reasons to believe that the judgment debtor holds one or more accounts with a bank in Belgium, but cannot identify the bank, or banks, to nevertheless initiate third-party garnishment proceedings (without thereby identifying the third party or bank, which is normally a requirement) and at the same time request the court to obtain the information necessary to allow the bank and the debtor's account to be identified from the information authority (the National Chamber of Bailiffs). The National Chamber of Bailiffs has access to a central register operating as a centralised electronic database of information regarding accounts and financial contracts (this register was updated to an automated and permanently updated system that holds real-time information in the course of 2020, as mentioned above). As soon as the court receives the requested information, it decides on the relating third-party garnishment. Although this procedure does require the judgment creditor to provide the court with some indications that the judgment debtor holds accounts with certain banks in Belgium, it certainly facilitates asset discovery and, hence, debt recovery in purely domestic cases (indeed, the procedure after which it was modelled exists only in cases of cross-border enforcement within the European Union pursuant to Regulation No. 655/2014).

Foreign creditors are already able to submit a request for to obtain account information pursuant to Article 555/1 of the BJC (implementing Regulation No. 655/2014). The National Bailiffs' Association of Belgium was appointed as information authority on 2 July 2018 and the corresponding procedure entered into force on 1 January 2019.

## **Enforcement proceedings**

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### **Attachable property**

#### **35 What kinds of assets can be attached within your jurisdiction?**

The two types of attachments that can be made are:

- attachments of immovable assets of the debtor (such as real estate property); and
- attachments of movable assets, which will usually take the form of third-party attachments, namely the attachment by the creditor of a claim owed by a third party to the debtor.

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### **Availability of interim measures**

#### **36 Are interim measures against assets available in your jurisdiction?**

Article 1413 et seq. of the BJC authorise award creditors to apply conservatory attachments against assets of their debtor. Conservatory attachments operate like freezing orders.

Conservatory attachments are valid for a (renewable) three-year period from the date of their service on the debtor by the bailiff.

Other types of interim measures that are possible include requesting an order for security, a specific guarantee or the appointment of a court receiver who can keep and preserve movable assets during the course of the proceedings. The rules concern conservatory attachments (which are the most frequently applied in Belgium).

Following the amendment of the BJC by law dated 23 August 2015, any measures of enforcement, including conservatory garnishment, against assets owned by a sovereign state, will only be successful if an exception enshrined in Article 1412 *quinquies*, Section 2 of the BJC applies (i.e., when the assets are not covered by sovereign immunity).

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### **Procedure for interim measures**

#### **37 What is the procedure to apply interim measures against assets in your jurisdiction?**

The following conditions are required to apply for a conservatory attachment against assets in Belgium:

- a valid title (i.e., a claim that is certain and due, and definite or subject to a provisional estimate); and
- urgency, to be determined on the basis of objective criteria.

However, Article 1414 of the BJC provides that a judgment, even not enforceable, can serve as an authorisation to lay interim measures on assets of the debtor. For the purposes

of Article 1414, non-recognised foreign arbitral awards are equally considered as judgments provided that a treaty exists between Belgium and the state where the award was made.

Moreover, garnishments of bank accounts (or of other types of claims held by a debtor in Belgium) can be made without prior authorisation.

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### **Interim measures against immovable property**

#### **38 What is the procedure for interim measures against immovable property within your jurisdiction?**

Apart from the general rules relating to application for interim measures against assets, specific documentation has to be filed with the court of attachments with the *ex parte* application, namely an extract from the land register pertaining to the immovable property targeted by the interim measure and a mortgage certificate.

If the court of attachments grants the authorisation, its order has to be served on the debtor. To be valid, the conservatory attachment on immovable property must be registered in the mortgage register.

The debtor has one month to lodge an appeal against the order of the court of attachments from the date of its service by the bailiff.

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### **Interim measures against movable property**

#### **39 What is the procedure for interim measures against movable property within your jurisdiction?**

There are no specific rules dealing with conservatory attachments against movable property (other than the general rules for the application of interim measures against assets).

Once the authorisation is granted by the court of attachments, the order has to be served on the debtor. An appeal may be lodged within a month of the date of service.

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### **Interim measures against intangible property**

#### **40 What is the procedure for interim measures against intangible property within your jurisdiction?**

A prior authorisation of the court of attachments is required, in principle. However, in respect of intangible assets, pursuant to Article 1445 of the BJC, garnishments may be made on the basis of a 'private title', without prior authorisation of the court of attachments.

An order of the court of attachments or a writ of attachment (if no authorisation has been requested) must be served by a bailiff on the garnishees listed in that document (generally, banks, financial institutions and companies). The garnishees have 15 days from the date of the service to issue a declaration of every debt they owe the principal debtor as well as their origin, amount, and terms and conditions. If they fail to do so, garnishees may be summoned before the court of attachments to be declared themselves debtor of all or part of the principal claim (and costs). Moreover, as soon as the order or the writ has been served on the garnishees, they may no longer relinquish any sums or securities that form

the object of the attachment, again under penalty of being declared debtor of the principal claim (and costs) themselves.

The garnishments must be notified to the debtor within eight days of the service on the garnishees by the bailiff. A challenge can be lodged within a month of the date of that notification.

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## Attachment proceedings

### 41 What is the procedure to attach assets in your jurisdiction?

To lay an ‘executorial’ attachment on assets (i.e., an attachment that will enable the creditor to be paid out of the value of the assets), the creditor must hold an enforceable title (i.e., the *exequatur* order enforcing the arbitral award). Once this title is granted, the creditor can either convert a conservatory attachment measure into an executorial attachment, or lay an autonomous executorial attachment.

According to Articles 1491 and 1497 of the BJC, if a conservatory attachment was made pending the grant of an enforceable title, no new attachment is required to convert the interim measure into an executorial attachment. The service of the *exequatur* order on the debtor will automatically convert the conservatory attachment into an executorial one. However, if an appeal has been lodged against the interim measure, Article 1491(3) of the BJC provides that the conversion is delayed until a judgment is handed down by the court of attachments.

To avoid the risk of a delay in the conversion of the interim measure into an executorial attachment, the creditor may choose to lay an autonomous executorial attachment based on the title obtained in the meantime. The autonomous attachment can be made from the day after service of the title on the debtor.

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## Attachment against immovable property

### 42 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The ‘executorial’ attachment of immovable property is preceded by the service of a prior notice to pay under the penalty of attachment. To save time, service of the prior notice can be made at the same time as service of the enforceable title on the debtor. The prior notice is registered in the mortgage register. From that point, the immovable property cannot be disposed of.

Service of the writ of executorial attachment can only be performed 15 days after service of the prior notice on the debtor. Furthermore, the attachment will have to be registered in the mortgage register within 15 days.

After the registration of the attachment in the mortgage register, the creditor has one month to file an *ex parte* application with the court of attachments to request the appointment of a notary to proceed with the auction of the attached property. A challenge may be brought by the debtor no later than one month after service of that order.

According to the BJC, a public auction shall take place within six months of the order appointing the notary (in principle, an appeal by the debtor against the appointment order does not stay the auction process). Meanwhile, the notary gathers information (title deeds,

land plans, etc.) and visits the attached immovable property to draw up the terms of sale. The terms of sale have to be served on the interested parties at least one month prior to the first auction session. Those terms can be challenged within eight days of their service (on form and substance). Once any dispute on the terms of sale is settled by the court of attachments, the public auction can take place. In principle, the property is allocated to the highest bidder.

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### **Attachment against movable property**

#### **43 What is the procedure for enforcement measures against movable property within your jurisdiction?**

The ‘executorial’ attachment of movable property is preceded by service of a prior notice to pay under the penalty of attachment. To save time, service of the prior notice can be made at the same time as service of the enforceable title on the debtor. There must be at least one day between service of the prior notice and the laying of the attachment.

The bailiff will draw up a report describing precisely and in detail the attached movable property. This report is either given to or served on the debtor. The auction will take place one month after this service. In principle, movable property is allocated to the highest bidder.

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### **Attachment against intangible property**

#### **44 What is the procedure for enforcement measures against intangible property within your jurisdiction?**

Similarly to conservatory garnishments, an attachment writ served on garnishees must be notified to the debtor within eight days. The debtor has 15 days to challenge the garnishment. Article 1543 of the BJC provides that if the debtor has not filed an appeal against the attachment within the 15 days, the garnishees shall transfer the attached monies (their debts towards the principal debtor) up to the amount of the principal claim of the creditor. The monies will be transferred in the hands of the bailiff, at the earliest, two days after expiry of the 15-day deadline. If the debtor challenges the attachment, any transfer of funds to the bailiff will be stayed until a decision is handed down by the court of attachments.

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### **Attachments against bank accounts**

#### **45 Is it possible in your jurisdiction to attach bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible in your jurisdiction to attach the bank accounts opened in a branch or subsidiary of a domestic bank located abroad?**

In principle, Belgian courts only have jurisdiction to order enforcement measures that have effect on the Belgian territory. This follows from the principle of territoriality. In other words, a Belgian attachment judge may grant authorisation only for attachment measures against assets that are situated in Belgium. The question, therefore, is whether the assets (here, bank accounts opened in a branch or subsidiary of either a foreign bank located in

Belgium or abroad, or of a domestic bank located abroad) may be deemed to be located on the Belgian territory.

The Belgian Supreme Court specified in its *Hemisphere* judgment of 26 September 2008 that, pursuant to the principle of territoriality, a Belgian judge cannot order an attachment on assets situated on the territory of a foreign state, nor can a creditor instruct a bailiff to garnish assets of its debtor that are not situated in Belgium. In *Hemisphere*, the Court confirmed that a (third-party) attachment can be levied on a foreign legal entity that has a branch in Belgium, if the claims of the third party on the foreign legal entity relate to the activities of the branch.

## **Enforcement against foreign states**

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### **Applicable law**

**46 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?**

The Act of 17 July 1970 implementing the ICSID Convention in Belgium sets out a specific regime applicable to the recognition and enforcement of ICSID arbitral awards. Article 3 of the Act of 1970 provides that the Ministry for Foreign Affairs is entitled to validate the authenticity of the awards for recognition and enforcement purposes. This is done simply by presenting a certified copy of the foreign arbitral award (signed and certified by the Secretary General of the ICSID Secretariat) to the competent ministry. The verified and certified documents are then transmitted by the Ministry of Justice to the Chief Clerk of the Court of Appeal of Brussels to grant the *exequatur* to the arbitral awards.

There are no other domestic rules that specifically govern recognition and enforcement of arbitral awards against foreign states. If the award is not an ICSID award, the general rules will apply.

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### **Availability of interim measures**

**47 May award creditors apply interim measures against assets owned by a sovereign state?**

Following an amendment of the BJC by law dated 23 August 2015, any measures of enforcement, including conservatory garnishment, against assets owned by a sovereign state will only be successful if an exception enshrined in Article 1412 *quinquies*, Section 2 of the BJC applies (i.e., when the assets are not covered by sovereign immunity).

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### **Service of documents to a foreign state**

**48 What is the procedure for service of extrajudicial and judicial documents to a foreign state? Is it necessary to serve extrajudicial and judicial documents with a translation in the language of the foreign state?**

Unless provided otherwise by a treaty, judicial and extrajudicial documents intended for service on sovereign states are usually served through diplomatic channels.

No specific provision of the BJC governs diplomatic service, which is based on an international custom, recognised and admitted in Belgium. In practice, when judicial and extrajudicial documents are intended for service on sovereign states, they are transmitted by bailiffs to the foreign government through the Belgian Ministry for Foreign Affairs. The Ministry acts as intermediary by sending the documents to the Belgian Embassy located in the foreign state. The Embassy then forwards the documents to the competent local authority. In general, a copy of the judicial and extrajudicial documents is also sent by the Ministry for Foreign Affairs to the diplomatic mission of the foreign state in Belgium, for information purposes.

No specific provisions of the BJC govern the need for translation of extrajudicial or judicial documents for service to a foreign state, but translations will normally be provided.

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### **Immunity from enforcement**

#### **49 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? Are there exceptions to immunity?**

Pursuant to Article 1412 *quinquies*, Section 2 of the BJC, there are three specific exceptions to enforcement immunity of assets belonging to a foreign state:

- the foreign state has ‘explicitly’ consented to enforcement against the assets. The Belgian Constitutional Court determined in 2017 that the requirement that the consent also be ‘specific’ (as the law still reads) only applies with regard to diplomatic assets;
- the foreign state has specifically allocated these assets to the enforcement of the claim that forms the basis of the application for enforcement; and
- the assets are specifically used or allocated to an economic or commercial activity and are located in Belgium.

The party seeking to enforce against the assets of a foreign state must obtain prior authorisation from an attachment judge, who will determine whether one of the above-mentioned exclusions applies. This is so even if, under the general rules, prior authorisation would not be required.

Otherwise, state immunities are governed by customary international law as interpreted and applied by Belgian courts. Belgium has signed the UN Convention on Jurisdictional Immunities of States and Their Property, but that treaty has not yet entered into force.

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### **Waiver of immunity from enforcement**

#### **50 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? What are the requirements of waiver?**

It is possible for a foreign state to waive its state immunity from enforcement. The waiver needs to be explicit.

Assets used or intended to be used for diplomatic purposes, including bank accounts, are covered by a special immunity from enforcement by virtue of customary international law and the 1961 Vienna Convention on Diplomatic Relations. Waiver of diplomatic immunity from enforcement needs to be explicit and specific.

There is little authority on the persons or organs of state entitled to waive immunity from enforcement. According to legal literature, the issue is governed by the law of the foreign state concerned.

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### **Piercing the corporate veil and alter ego**

51 Is it possible for a creditor of an award rendered against a foreign state to attach the assets held by an alter ego of the foreign state within your jurisdiction?

In principle, although this matter remains controversial, the creditor of an award rendered against a foreign state cannot attach the assets held by an alter ego of the foreign state, except in the case of simulation.

The Belgian Supreme Court has confirmed that the attachment judge is competent to decide on questions of simulation.



# Appendix 1

## About the Authors

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Hakim Boularbah is recognised as an expert in civil and commercial litigation and arbitration at national, European, and international levels. His practice covers civil and commercial litigation and arbitration, especially where it presents an urgent or a cross-border dimension. Hakim has an extensive practice in enforcement of foreign judgments or awards (especially against sovereigns), and in obtaining interim relief measures and protective measures or in opposing them. Hakim is professor of civil procedure law at the University of Liège. He is the author of numerous books and publications on judicial law, private international law and arbitration. He holds a law degree (1996) and a PhD (2007) from the University of Brussels. Hakim heads the litigation and arbitration practice of Loyens & Loeff's Brussels office.

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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