The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 3

BELGIUM

Jean-Pierre Fierens and Joanna Kolber[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

Belgium is a federal state made up of federal and regional levels. It has a civil law system with federal statutes; royal decrees implement these statutes, which are the most important source of law. For some branches of law, however, statutes and decrees rendered at the regional level can be relevant sources of law. Legislative preparatory works, legal doctrine and case law provide strong authority on the interpretation and application of the law.

Civil proceedings are held in two instances. Decisions rendered by first instance courts can be appealed before appeal courts or, for labour courts' decisions, before labour appeal courts. Appeal courts' judgments can be subject to review by the Court of Cassation, but only on a point of law.

Two types of courts hear cases at first instance: first instance courts and specialist courts. First instance courts are competent to hear criminal cases, except for cases involving serious crimes (these are heard by a jury before the courts of assize), and all civil disputes, except for those that are reserved for the exclusive competence of other courts. At the first instance court, there is a special judge (the so-called attachment judge) who is solely competent to decide on issues relating to conservatory and executory attachments of assets. The first instance courts also have special sections that hear family law matters only.

Courts with special jurisdiction are courts of commerce, labour courts, police courts and justices of the peace.

Courts of commerce are solely competent to hear all commercial disputes (e.g., sales contracts or corporate disputes). These are disputes between any type of entity that

1 Jean-Pierre Fierens is a partner and Joanna Kolber is an associate at Strelia.

pursues economic goals, and they concern acts carried out for this pursuit. These courts also have exclusive jurisdiction regarding, for example, bankruptcy, intellectual property, competition and certain consumer matters.

Labour courts are competent to hear disputes relating to employment contracts and social security matters, among others.

Police courts have exclusive jurisdiction on, *inter alia*, civil claims for damages arising out of traffic and train accidents, and related criminal issues.

Justices of the peace are competent to hear matters relating to lease agreements or disputes between neighbours, among other types of claims and disputes.

There are special courts and procedures for public and administrative law, and immigration law matters.

Among the alternative dispute resolution (ADR) procedures, only mediation and arbitration are explicitly governed by law in Belgium. These procedures were fundamentally modified in 2013.

If the parties agreed to a contractual, multi-tier dispute resolution clause and failed to fulfil the prerequisites for bringing a case to court, the legal actions taken will not be held inadmissible. Rather, the actions will be suspended until the contractual conditions for instituting proceedings have been fulfilled.

II THE YEAR IN REVIEW

i Major legislative developments

The year 2015 has brought about several fundamental yet innovative statutory developments that are designed to increase the efficiency of the court system and of civil proceedings. Many of these developments have immediately come into force; others will apply as from 2016 or 2017.

The major change concerns the long-announced, simplified proceedings regarding all uncontested pecuniary claims. Such proceedings will be available starting 1 September 2017 at the latest and for all claims whose due date is on the date the lawsuit is launched, except for claims against public authorities or consumers and debtors who are not registered in the Belgian registry of companies, and also except for non-contractual claims and claims arising out of insolvency or similar proceedings. From that date onwards, courts' bailiffs will be competent, upon an attorney's request, to launch simplified proceedings for uncontested claims and to execute enforceable payment orders.

Creditors who are companies can also, since the beginning of 2015, settle their commercial disputes through expedited debt recovery proceedings before the courts of commerce. Previously, such proceedings were only available for claims up to €1,860, but they are now open to all claims as long as they are supported by appropriate documents and as long as such claims are uncontested.

Another change is the putting into operation the system of electronic filing of documents with the courts. Since the beginning of 2015, it has been possible to file written submissions and exhibits electronically with all courts of appeals in Belgium.

The new bill makes it possible to exchange all written communications with all courts, public prosecutors and other judicial organs electronically. The new law will enter into force on 1 January 2016.

All judgments rendered in civil proceedings instituted after 1 November 2015 will be provisionally enforceable, unless the court decides to the contrary and save for specific circumstances under the law. From now on, the rule is that judgments can be enforced pending appeal proceedings. Until this amendment came into force, a converse system was applied. A separate rule exists concerning oppositions against final default judgments.

Also, the rules concerning a court's judgment in case of a party's default have been modified. The most important change in this respect is that judges in default proceedings must only raise grounds concerning violations of public policy. Until now, judges were obliged to consider all grounds as if the defaulting party had contested all claims. This will likely lead to more efficient handling of cases in which a party defaults.

According to the final major changes, since 1 November 2015 it has been impossible to appeal against interim judgments such as judgments ordering that an expert investigation be conducted; interim judgments may only be appealed together with an appeal against the final judgment of a case on its merits. The 2015 amendments have also significantly changed the rules on *res judicata* of judgments. As of now, the *res judicata* effect extends to all facts submitted to the judge for consideration, regardless of the legal definition given to these facts. Also, the entire system of annulling procedural acts has been changed: from now on judges may not raise any grounds of nullity of such acts *ex officio*. All nullity pleas must be submitted by the parties before any other grounds (e.g., regarding the merits of the dispute), except for some specific time periods.

And last but not least, the fees for court filings have increased since 2015.

ii Recent decisions

On 10 June 2015, the Brussels Court of Appeals rendered a judgment in which it considered the ECJ's ruling in the famous *Turner* case.[2] This is the first published case in Belgium that considers whether an anti-suit injunction is admissible in Belgium in such an explicit manner. The Brussels Court of Appeals was seized to hear a claim whose aim was to enjoin a party from undertaking any measures intended to have an expert investigation conducted in order to establish an infringement of intellectual property rights. Specifically, the defendant in the anti-suit claim wished that, failing the parties' mutual agreement, a bailiff carry out an expertise according to the proceedings of *saisie-description* or *saisie-contrefaçon*, which are available under Belgian and French laws for IP law matters. Such measures are available to a party upon court's leave. The Brussels Court found that, in the case at hand, where the other party did not agree to an expertise and where that party filed a motion to enjoin the other party from seizing a bailiff upon court's leave in order to have the expertise conducted, this motion constituted in fact a request for an anti-suit injunction. The Court held that such a claim is, under the *Turner* ruling, incompatible with the Brussels I *bis* Regulation and with the parties' right to access to court.

2 ECJ, Case No. C-159/02.

Further, the rulings in two important cases this year announced changes as regards legal fees in Belgium.

The first case was decided on 21 May 2015 by the Constitutional Court. The Court gave a ruling on a preliminary question concerning a series of tax law matters between taxpayers and the Belgian state. The question put forth to the Court was whether the state can be held liable for the legal fees due if it loses the case following a tax law lawsuit that was brought by taxpayers. Before the ruling of this case, the Constitutional Court had followed a steady line of case law whereby public authorities that defend collective interests in various civil proceedings should not be held liable for paying the prevailing party's legal fees, precisely because they act in the collective interest of the entire community. With its decision of 21 May 2015, the Constitutional Court has changed its previous line of case law and held that the fact that the Belgian state pursues general interests does not mean that it should be exempt from paying the prevailing party's legal fees. The commentators have welcomed this change in case law with satisfaction. Practitioners hope also that this case will incite the government to abolish the bill that was passed in 2014 that more generally aims to exempt the Belgian state from paying the prevailing party's legal fees. This law has not entered into force yet.

The second case that signalled a possible future change in the Belgian approach to legal fees concerns a reference to a case in 26 January 2015, which the Antwerp Court of Appeals referred to the Court of Justice of the European Union for a preliminary ruling. Under Belgian law, non-prevailing parties are obliged to pay the prevailing party's legal expenses whose sums do not exceed the amount fixed by the law. Because the applicable provision of the Belgian Code of Civil Procedure allows for flat rates for reimbursable legal fees only, the Antwerp Court requested a ruling on the question whether this provision is not contrary to Article 14 of the European IP Enforcement Directive No. 2004/48 whereby 'reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.' Although the request for a preliminary ruling concerns only the IP Enforcement Directive, it calls for a debate on a broader reconsideration of the Belgian system of the reimbursement of legal fees. A question can notably be raised on whether this system is fully compatible with the European Late Payment Directive No. 2011/7, which states that the creditor is entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding the fixed sum provided in the Directive and incurred because of the debtor's late payment, and these could include expenses incurred for instructing lawyers.

III COURT PROCEDURE

i Overview of court procedure

Court procedures in Belgium are governed by the Judicial Code. Fundamental principles governing court proceedings relate to access to courts; independence and impartiality of courts; fair, public and mainly adversarial proceedings; and party autonomy and equality. Although the burden of proof rests on the alleging party, all parties to the proceedings have a duty of loyal cooperation in the proceedings, including in matters relating to gathering evidence.

ii Procedures and time frames

As a general rule, proceedings before the courts are initiated by a formal writ that a court bailiff serves on a natural or legal person, summoning that person to appear at an introductory hearing before a court. The writ is simultaneously registered at the court's docket. The law specifies where and on whom the writ may be served. It also specifies the time limit that must elapse between the date of service and the introductory hearing. The minimum period is eight days if the summoned party or parties are Belgian, and up to 80 days if the party or parties are located outside Europe. For urgent matters, a leave of court can be sought by the plaintiff to have this period shortened. In summary proceedings, this obligatory waiting period is two days. Introductory hearings, except those for urgent matters or otherwise upon the leave of court, are not held during the annual court holiday period between 1 July and 31 August.

Proceedings can also be initiated by parties' voluntary appearance or, in cases explicitly envisaged by statute, by a 'contradictory application'.

The first moment when the case is actually introduced to the court at a hearing presided over by one or three judges in a chamber is the introductory hearing.

If the defendant fails to appear at this hearing, the plaintiff may request that the court render a default judgment. The court, in its decision, will usually grant the plaintiff's requests as indicated in the writ, unless an exclusive jurisdiction ground or public policy issue presents itself.

If the defendant appears at the introductory hearing, the case can either be prepared for the main hearing or be pleaded by the parties and heard by the court immediately in 'short proceedings'. The latter scenario is possible if it is requested by the plaintiff in the writ of summons, and either the parties will agree to such short proceedings or the case will be a straightforward one concerning, for example, undisputed and unpaid invoices. If the case is heard in short proceedings, the court can either close the debates immediately at the introductory hearing or adjourn the hearing for a short period and render the judgment afterwards. If the case is not dealt with at the introductory hearing, arrangements will have to be made regarding the procedural calendar for the exchange of legal briefs, submission of evidence and hearing date. It is only after these arrangements are made that the defendant will have to reply, by way of its first legal brief, to the plaintiff's writ of summons. The Belgian Judicial Code does not stipulate any default time periods for procedural submissions or hearings. The hearing date is always determined by the court, depending on its caseload. The time limits for briefs and submissions are determined based on the available hearing date that is set either by the parties' mutual agreement or, in the absence of agreement, by the court. There can be multiple rounds of written submissions; in more complex cases, three rounds are usually envisaged. It is more efficient and faster to set the procedural calendar by the parties' mutual agreement rather than wait for the court to set one, because courts often do this only several months after the introductory hearing. All time limits can be changed during the proceedings if the parties agree. Complying with the time limits fixed by the parties or the court is obligatory, which means that legal briefs must be filed with the court on the specified dates and must be simultaneously communicated to the

opposing party. Late submissions will be excluded *ex officio*. The party's last legal brief is the 'synthesis brief', which replaces all previous briefs. The judge must only respond to the arguments developed in the synthesis brief.

Special arrangements concern the submission of evidence. The plaintiff should submit its pieces of evidence to the opposing party within eight days from the date of the introductory hearing. Any additional pieces should be submitted together with the legal briefs. The evidence must also be filed with the court, but this should only happen 15 days before the hearing or at a different date specified by the court. There is no sanction for late filing. As a last resort, the documentary evidence can also be submitted to the court at the hearing itself.

At the hearing, which is open to the public, the parties present their case by way of oral pleadings. Thereafter, the debates are closed and the judgment will follow. In principle, this takes about a month, but courts can also take longer because no obligatory time limits are imposed on them to hand down a decision.

Judgments are not provisionally enforceable unless, following a specific substantiated plea, provisional enforceability is granted by the court. To substantiate this plea, a risk of the defendant's insolvability must be established. If the plea is denied, the judgment can only be enforced as soon as it becomes final (i.e., after the time limit for lodging an ordinary recourse measure has elapsed or after the appeal judgment is rendered).

Ordinary means of recourse are appeals and oppositions (i.e., recourse against default judgments). The time limit for lodging an appeal or opposition starts to run on the date the first instance court's judgment is served on the parties, and this is a 30-day period for Belgian parties. This period is extended for non-Belgian parties in the same way as the time periods that apply to writs of summons. There are also extraordinary means of recourse, which include an appeal before the Court of Cassation, on points of law only, which is available against all appeal judgments, and a third-party opposition, which is the most common. Third-party opposition against a decision is pursued by a person who was not a party to the proceedings but whose rights are disadvantaged by the decision.

Interim relief is available under Belgian law. It can be obtained before or parallel to the proceedings on the merits of the case. It includes conservatory attachment of assets and any other measure to protect the applicant's rights.

Conservatory attachment is governed by separate procedural rules. It is available with regard to goods or debtors' claims against third parties, such as bank accounts. Claims and goods can be directly attached by the bailiff in the conservatory way, without obtaining leave of the court beforehand, if specific conditions are met. Otherwise, preliminary authorisation of the attachment judge is necessary. Proceedings before this judge are initiated by an *ex parte* application and finalised within a very short time by the judge's decision. To obtain leave of court, it is necessary to establish urgency as well as the fact that the claim is due and certain. Means of recourse, including third-party opposition, exist to quash the judge's authorisation and to lift the attachment.

To obtain other types of interim relief, an application must be made in separate summary proceedings conducted before presidents of the courts of first instance, commercial courts and labour courts in matters relating to their respective jurisdiction. The application is lodged by a writ of summons, and similar rules to those regarding the

organisation of the normal proceedings apply. However, time limits are much shorter. In extremely urgent cases, it is even possible to receive interim relief on the same day (e.g., when a piece of evidence must be protected from disappearing). Typically, however, and depending on the caseload, an interim order can be obtained within a period of several weeks to a few months.

The application will be granted if urgency (understood as a risk or serious loss or inconvenience to the applicant), a breach of a *prima facie* existing and indisputable subjective right, and the provisional character of the relief is established. The interim order is provisional and has no *res judicata* effect on the merits of the case. It is provisionally enforceable.

A separate type of quick relief is available in the form of injunctions. These are possible in cases involving, for example, breaches of intellectual property law or fair competition rules and are available only if statute allows for this explicitly. These proceedings deal with the merits of the cases, and the judgments will settle the parties' subjective rights in a definite manner, but the schedule followed in these proceedings will be the same as in summary proceedings and, therefore, quicker than in ordinary proceedings on the merits of a case.

iii Class actions

Class actions were introduced into the Belgian legal system on 1 September 2014.

Class actions can be pursued in matters involving mass damage (i.e., only by a group of consumers who have sustained loss as a result of the same cause that took place after the new law's entry into force). A group representative represents the group. This representative is either an association that is recognised by the government or one of certain consumer organisations. The class action is admissible if the following conditions are met:

a the cause of damage relates to the company's breach of its contractual obligations or violations of laws and European regulations specified in the statute on class actions concerning, for example, intellectual property laws, fair competition laws or product safety;

b the action has been instituted by a group representative who fulfils the requisite criteria and is considered suitable by the judge; and

c lodging a class action is more suitable than lodging a claim within normal proceedings.

The decision on the admissibility of the class action will specify which system, opt-in or opt-out, applies to the consumers' group.

To the best of our knowledge, two class actions based on this new law have recently been launched. One concerns air travel and the other relates to rail transport matters. Some associations have also been recognised as group representatives, and some among them have announced intentions to launch further series of class actions (e.g., as an aftermath of this year's news about car engine software modifications). It is still unclear how class actions will be handled in practice by the courts. The only courts competent to hear these types of cases are the Brussels Court of First Instance or the Commercial Court, in matters relating to their respective jurisdictions. But even before

the introduction of the new law, it was possible for plaintiffs to join forces and institute proceedings together in one court case relating to the same cause of action. In such cases, individual plaintiffs were represented by one attorney. However, this type of proceeding was not free of technical and practical difficulties relating to, for instance, multiple addresses for document service purposes.

iv Representation in proceedings

Attorneys enjoy a monopoly on pleading before courts, which means that no other person can represent parties before courts unless the law specifically states otherwise. There are some exceptions, including the admissibility of representation of a natural person by a family member before the justice of the peace, or the unions' representation of employees before the Labour Court.

However, there is no obligation for a party to have attorney representation in Belgian court proceedings, except if the case is heard before the highest court, the Court of Cassation, and unless the court finds that a party representing itself is unable to present its case in a proper and calm way, in which case the court may impose on a party the obligation of representation by an attorney. Also, certain specific motions, such as *ex parte* motions or motions to challenge a judge, must be filed by an attorney. Litigants, both natural persons and legal entities, may therefore represent themselves in the proceedings. Legal entities may be represented by their authorised organs if proof of authority is furnished.

In practice, it is highly unusual for parties to represent themselves, except if the case is very simple (e.g., before justices of the peace or police judges).

v Service out of the jurisdiction

Service out of jurisdiction may be done under simplified rules of the Hague Convention of 1965 or, within the European Union, under Regulation No. 1393/2007, if these instruments apply to the given case. If not, service is done according to domestic rules.

The domestic rules do not differ depending on whether the party being served is a natural or legal person. If service is done by the bailiff, he or she will send the documents to the postal address by registered mail, or air mail if the service does not concern a neighbouring country. If the person's address is unknown, service is done on the attorney general who has jurisdiction in the district of the court where the case will be heard. Service out of jurisdiction will be considered invalid if proof is furnished that the party on whose request the document was served knew its opponent's Belgian address. If the foreign person in question is encountered in Belgium, service can be done on this person personally on such an occasion.

Some notifications issued by courts during court proceedings, such as information on changes to hearing dates, do not require formal service by the bailiff but only a formal notification by the court's clerk. Such notifications are done by mail or in other forms provided by the law, such as court mail. In practice, it is often suggested by the court's clerk, for practical reasons, that foreign parties provide an address for notifications of court documents in Belgium (e.g., at their attorney's offices). The documents are then delivered to the indicated address.

vi Enforcement of foreign judgments

Enforcement of foreign judgments is governed in Belgium either by international instruments, such as treaties or European regulations that provide for simplified uniform requirements, or according to Belgian private international law rules.

Foreign judgments can be enforced if they have been granted *exequatur*. *Exequatur* under Belgian domestic law will be granted following an *ex parte* application, lodged together with an authentic certified copy of the judgment, a certificate or evidence confirming that the decision is enforceable in the country of origin, a certificate confirming that the decision has been served on the debtor and, for default judgments, the original or certified copy of the document establishing that the document by which the proceedings were instituted has been served on the defaulting party.

Exequatur will only be refused in exceptional circumstances, for example:

a if the result of granting the *exequatur* will be manifestly contrary to Belgian (international) public policy;

b if the debtor's rights of defence were violated;

c if the judgment was only obtained to evade the application of the law designated by Belgian conflict of laws rules (only in cases where the parties are not free to dispose of their rights);

d if the judgment is still open to ordinary recourse under the law of the country where it was rendered;

e if the foreign judgment is irreconcilable with a Belgian judgment or an earlier foreign judgment that can be recognised in Belgium;

f if the claim was brought after the claim between the same parties and the same cause of action had been lodged before a Belgian court, and the proceedings regarding this claim are still pending;

g if Belgian courts have exclusive jurisdiction; or

h if the foreign court's jurisdiction was based solely on the presence of the defendant or assets located in the country where the judgment was rendered and without any link to the dispute. Specific grounds for refusal of enforcement are provided for judgments in, for example, intellectual property or insolvency matters.

vii Assistance to foreign courts

Belgian courts can assist foreign courts in obtaining evidence according to procedures laid down in the Hague Convention on civil procedure of 1954 or in European Regulation No. 1206/2001. Pursuant to the latter, foreign courts can ask Belgian courts to take evidence on their behalf or request permission to do so themselves. Under the Hague Convention, assistance by Belgian courts may be provided for following a letter of request transmitted to the Belgian Ministry of Justice.

viii Access to court files

In Belgium, no general principle of publicity of court files and proceedings applies. Only hearings, reports and judgments are public or publicly available.

A member of the public cannot obtain evidence in relation to ongoing proceedings, but can participate in the hearings during which the case is pleaded, unless the court has ordered the hearings to be held behind closed doors. After the completion of the

proceedings, members of the public can obtain a copy of the judgment, but not of any other documents that were exchanged during the proceedings. If a copy of the decision is requested by a third party, privacy of the parties and proceedings (judges and clerks) could be safeguarded by blanking out or redacting the names. In practice, court clerks are very cautious in granting members of the public access to case judgments.

ix Litigation funding

Litigation is predominantly funded by litigants themselves. Parties with insufficient income can apply for *pro bono* legal assistance that is paid for by the Belgian state.

Third-party funding in Belgium is not regulated by any laws or guidelines. This type of funding is not common in litigation, but it seems to be gaining more importance in international arbitration, including when the seat of arbitration is in Belgium. Foreign third-party funders are beginning to offer their services in Belgium. So far, one UK funder has established a branch in Antwerp.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Conflicts of interest are a matter solely of the ethical rules binding lawyers. There are several bar associations in Belgium, but the rules on conflicts of interest are similar for all of them. Conflicts of interest and their violations are managed and sanctioned by the bar associations.

The fundamental principle is that attorneys must be independent and may not represent conflicting interests. Conflicts of interest occur when, in a client's case, an attorney is influenced by interests of other or former clients, of other third parties, or by his or her own interests, and when such influence can be demonstrated as probable in an objective manner. Although it is generally prohibited for an attorney to act against current or former clients, some exceptions are allowed. Common to all exceptions is the client's explicit consent to the attorney's representation of conflicting interests.

The same law firm's representation of clients with conflicting interests is not explicitly prohibited by ethical rules, but is also not an encouraged or common practice. Chinese walls must then be implemented. It is crucial that sufficient measures are taken to ensure the effective separation and protection of the respective clients' confidential information, and that not only a figurative but also a physical separation of teams, case files, digital files, etc. is implemented, as if separate law firms were handling the respective clients' cases. In practice, Chinese walls are implemented in corporate or competition law cases, but not in litigations.

ii Money laundering, proceeds of crime and funds related to terrorism

Attorneys are subject to European and Belgian laws as well as ethical rules on prevention of money laundering and terrorism. Not only are they prohibited from receiving any funds that were obtained by a criminal act, they also have an obligation to execute due diligence and actively report suspicious transactions. This obligation arises in connection with legal assistance regarding actions that are considered suspicious (e.g., sale or purchase of real estate, managing assets, opening bank accounts, setting up and managing

business associations, or acting on behalf of the client regarding financial or real estate transactions). In relation to such cases, attorneys are obliged to verify the client's identity and the precise nature of the transaction, and remain particularly cautious in identifying suspicious elements. They must report any actions relating to money laundering or the financing of terrorism, or any suspicions of such actions, to the local bar association's president, who in turn can transmit this information to the Belgian Financial Intelligence Processing Unit.

Given the nature of these obligations, litigation attorneys are practically never confronted with them.

iii Data protection

Under the Belgian data protection statute, which implements the European Data Protection Directive, the processing of personal data is subject to strict conditions, including, among other things, the subject's agreement and the pursuit of a legitimate interest. These rules also bind legal professionals and, therefore, apply when attorneys gain access to personal data for the purposes of locating documents or evidence. Sharing personal data with a country outside the European Union is only possible under specific conditions.

In Belgian litigation practice, sharing personal data hardly ever poses any difficulties.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Privilege is an unknown concept in Belgian law. Rather, attorneys are bound by a duty of professional secrecy that is governed by the Belgian Criminal Code and legal ethical rules. It is a matter of public policy that cannot be dealt with, nor can it be waived by parties' agreement. Professional secrecy relates to all acts of client–attorney communication (i.e., correspondence, memoranda, advice, information provided by the client, and telephone or other conversations). However, client–attorney communication can be submitted as evidence in court in favour of the client, but not against him or her, and only by the attorney or client and not by third parties. Professional secrecy can be set aside only in exceptional circumstances (e.g., in circumstances of emergency as defined by criminal law, when the secrecy contradicts a higher moral value; for example, in the case of a threat to human life, where the attorney has to report crimes against minors or vulnerable persons about which the attorney learned during the handling of the case, or where the attorney's rights of defence require disclosure of certain information, while taking into account the principle of proportionality). Attorneys should not accept cases in relation to which they could be called to testify. If this happens, attorneys can refuse the testimony by invoking professional secrecy.

Specific European rules on professional secrecy relate to European competition law and fighting terrorism and money laundering.

Also, in-house lawyers who are members of the Belgian Institute of In-house Counsel are bound by the duty of professional secrecy. However, this duty only relates to legal advice given by a lawyer to his or her employer and its affiliated companies, as well as related correspondence (draft agreements are, however, not protected by this duty).

Recent developments, such as the adoption of anti-money laundering and terrorism laws, indicate enfeeblement of the, generally, absolute character of the duty of professional secrecy. Bar associations, however, plead for strict compliance with this duty, which protects the fundamental interests of clients, attorneys and society as a whole.

ii Production of documents

In principle, each party should produce documents to satisfy its burden of proof. If such documents are in the possession of the opponent or a third party, and have not yet been submitted, the court may order their production. This is only possible if there are serious, concrete and consistent presumptions that the opponent or third party holds a document that can provide evidence of a fact relevant for the resolution of the case. It is sufficient that the fact is relevant, it does not have to be of overriding importance for the resolution of the dispute. A fact is relevant if it shows a serious connection with the subject matter of the dispute. If the fact is already proven by means of other evidence it will not be considered relevant. Fishing expeditions are not allowed. The document, in whatever form, must be clearly identified. Therefore, documents stored electronically will be subject to production only if the party proves their existence and sufficiently identifies and describes them. The fact of possession, not control of the document, is crucial. If a party shows that it does not hold the document, it will not be ordered to produce it. A third party effectively holding this document, however, may be ordered to produce it. Orders for production of documents can be coupled with fines for failure to comply.

Courts have broad discretion in deciding on requests for documents and evidence production. If a request is held to be oppressive or disproportionate, it will not be granted lightly.

VI ALTERNATIVES TO LITIGATION

An increasing number of disputes are settled by arbitration, particularly those with significant financial interests or confidentiality requirements.

i Arbitration

National and international arbitration proceedings whose seat is in Belgium are governed by the Judicial Code, which, since 2013, has been based fully on the UNCITRAL Model Law. This law introduced several major changes to support the development of arbitration: more flexibility, increased state support with respect to pending arbitral proceedings, centralisation, and specialisation of courts that are competent in arbitration matters.

Enforcement of international arbitral awards is also governed by the new code, unless the application of the New York Convention of 1958 prevails.

The arbitral institutions to which parties most commonly submit their disputes are CEPANI, the Belgian Centre for Arbitration and Mediation formed in 1969, and the International Chamber of Commerce, which is particularly popular in international disputes. Some arbitration proceedings (e.g., in the maritime and insurance sectors in Belgium), are rather held in *ad hoc* proceedings. In general, resolving disputes through arbitration is becoming ever more popular.

An appeal against an arbitral award is only possible if it is provided for in the arbitration agreement. Otherwise, an award rendered in Belgium can be challenged on similar grounds as laid down in the UNCITRAL Model Law. Parties to disputes with no links to Belgium can exclude the award challenge proceedings entirely.

Arbitration has been subject to major developments in recent years, including the amendment of the Belgian law on arbitration and of the CEPANI Rules in 2013. It is expected that these changes will attract more domestic and international parties to arbitration in Belgium. First decisions by state courts based on the new law are being rendered and confirm the positive approach of Belgian courts towards arbitration.

ii Mediation

Mediation is also governed by the provisions of the Judicial Code, which were modified in 2013. Several institutions, such as CEPANI, provide a framework for mediation proceedings. Mediation, particularly in commercial disputes, is not very common, however. Nevertheless, an increased number of mediation proceedings can be seen in family matters. This year, a new federal mediation service has been launched for consumers. It is hoped that this service will facilitate the resolution of B2C disputes.

iii Other forms of alternative dispute resolution

Other forms of alternative dispute resolution are not very widespread in Belgium. Expert assessments of a case are sometimes sought with respect to determination of price (e.g., of shares or goods). In construction contracts, expert panels are also sometimes sought to resolve disputes, as is conciliation. Some institutions, such as CEPANI, offer other forms of alternative dispute resolution procedures (e.g., mini-trial, adaptation of contracts and support or specific procedures for the resolution of domain name disputes).

VII OUTLOOK AND CONCLUSIONS

The latest innovative legislative developments undertaken by the 2014-elected parliament and other pragmatic solutions adopted by the courts give positive outlooks of increased efficiency of dispute resolution before state courts. Alternative means of dispute resolution continue to develop. Thanks to increased government initiatives, it is expected that mediation, especially, will gain in popularity.

Appendix 1

ABOUT THE AUTHORS

JEAN-PIERRE FIERENS

Strelia

Jean-Pierre Fierens specialises in corporate and contract law. Over the past 10 years he has been appointed numerous times as sole arbitrator, co-arbitrator or chairman of an arbitral tribunal as well by institutions in *ad hoc* arbitration proceedings. He also acts as counsel in arbitration matters. He is an Accredited Mediator at the CEDR (Centre for Effective Dispute Resolution).

Mr Fierens was President of the Dutch-speaking Bar Council of Brussels from 1998 until 2000. He was admitted to the Brussels Bar in 1973 and holds a Master of Laws degree (LLM) from Columbia University (1980).

Before becoming one of the founding partners of Strelia in 2013, Jean-Pierre Fierens had been a partner in the Brussels office of Stibbe since 1986. He chaired the board of Stibbe and was the head of the litigation department at Stibbe Brussels.

Mr Fierens has published numerous articles on arbitration-related topics and has often been invited as a speaker at conferences.

He is listed as a 'leading lawyer' in the main international directories for dispute resolution.

JOANNA KOLBER

Strelia

Joanna Kolber is an associate in the litigation and arbitration department of Strelia in Brussels, Belgium. Her areas of practice cover diverse commercial disputes with a particular focus on international trade and services law matters. She also specialises in private international law.

Ms Kolber is member of the Brussels bar. Before joining Strelia, she worked as an attorney in an international law firm in Antwerp and law firms in Germany and Poland. She also worked in the in-house department of an international investment company in the United States and advised on private international law in a Belgian NGO.

She obtained her law degree from the Jagiellonian University of Krakow in 2006. She is a member of the CEPANI 40 Steering Committee, is currently preparing a doctoral thesis and regularly publishes and speaks on topics concerning international arbitration. She is fluent in English, Dutch, Polish, German and French.

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