

Arbitration and Company Law in Belgium

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1. INTRODUCTION: ARBITRATION IN BELGIUM

In 2013, fundamental changes were made in the area of arbitration in Belgium. Not only did Belgium pass new arbitration legislation, completely reforming the sixth part of its Judicial Code by the Act of 24 June 2013, in force since 1 September 2013,^{1,2} but CEPANI (the Belgian Centre for Arbitration and Mediation) also adopted new rules of arbitration, which entered into effect on 1 January 2013.

The Belgian legislation on arbitration is governed by the sixth part of the Judicial Code (Articles 1676–1723). Initially, this part of the Judicial Code transposed into national law the Uniform Law on Arbitration, adopted in Strasbourg on 20 January 1966 and implemented in Belgium by the Act of 4 July 1972.³

The sixth part of the Judicial Code was amended by the Act of 27 March 1985⁴ and by the Act of 19 May 1998⁵ but still contained a number of defects which caused it to be viewed unfavourably by foreign economic players and, hence, prompted international contract drafters by times not to choose Belgium as the place of possible arbitration.

The main difficulty derived from the involvement of the national courts at various stages of arbitral proceedings. Such

involvement by the courts and the delays which could derive from this involvement were for quite some time considered by international economic players as an obstacle to choose Belgium as the place of arbitration. For example, the old legislation applied to arbitration ordinary rules of law on the right to appeal.⁶ Thus, it was possible to bring proceedings to set aside an arbitral award before the Court of First Instance, whose decision could in turn also be appealed. The backlog facing certain courts meant that a party who was successful in arbitration could have to wait, in certain cases, four, five or even six years before being able to enforce the award. This was obviously a far cry from the swiftness which the parties sought when opting for arbitration to resolve their dispute.

In order to remedy this situation and render Belgium open to arbitration and, especially, international arbitration,⁷ the legislature adopted the New Arbitration Act in 2013.⁸

The New Arbitration Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 amended in 2006. The legislature thus sought to align Belgian legislation with more advanced legislation in the area of arbitration, although certain specificities of Belgian law which

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¹ Act of 24 Jun. 2013 amending the sixth part of the Judicial Code on arbitration, *Belgian State Gazette*, 28 Jun. 2013.

² For the first comments on this act, see: M. Piers (ed.), *De nieuwe arbitragewet 2013: essentiële bepalingen en hun praktische werking*, Antwerp, Intersentia, 2013; M. Dal, 'La nouvelle loi sur l'arbitrage', *J.T.*, 2013, 785; H. Verbist, 'De nieuwe Belgische Arbitragewet van 24 juni 2013', *TvA*, 2013, 155; H. Verbist, *New Belgian Arbitration Law of 24 June 2013 and New CEPANI Arbitration Rules of 1 January 2013*, *J. Intl. Arb.* 597 (2013); H. Verbist, 'Wat brengt het nieuwe Belgische arbitragerecht', *Orde Express*, jaargang 8, no 16; V. Foncke & G. Coppens, 'Wet van 24 juni 2013 tot wijziging van het zesde deel van het Gerechtelijk Wetboek betreffende de arbitrage', *R.D.C.*, 2013, 673; M. Piers & D. De Meulemeester, 'Nieuwe arbitragewet – België is voortaan een "UNCITRAL Modelwet"-land', *NJW*, 2013, 726; D. De Meulemeester & H. Verbist, *Arbitrage in de Praktijk op basis van het CEPANI Arbitragereglement van 1 januari 2013 en met verwijzing naar deel VI van het Gerechtelijk Wetboek*, Brussels, Bruylant, 2013; O. Caprasse, 'Le nouveau droit belge de l'arbitrage', *Revue de l'arbitrage*, 2013, 953; O. Caprasse, 'Introduction au nouveau droit belge de l'arbitrage', *Actualités en droit judiciaire*, Brussels, Larcier, 2013, 402; the Belgian chapters in A. Saletti, J. van Compernelle & J. Fr. van Drooghenbroeck (eds), *L'arbitre et le juge étatique. Etudes de droit comparé à la mémoire de Giuseppe Tarzia*, Brussels, Bruylant, 2014.

³ Act of 4 Jul. 1972 approving the European Convention providing a Uniform Law on Arbitration, done in Strasbourg on 20 Jan. 1966 and inserting in the Judicial Code a sixth part on arbitration, *Belgian State Gazette*, 8 Aug. 1972.

⁴ Act of 27 Mar. 1985 on the overturning of arbitral awards, *Belgian State Gazette*, 13 Apr. 1985. On this subject see H. Van Houtte, 'La loi belge du 27 mars 1985 sur l'arbitrage international', *Revue de l'arbitrage*, 1986, 29; L. Matray, 'La loi du 27 mars 1985 et ses répercussions sur arbitrage commercial international', *Rev. dr. int. dr. comp.*, 1987, 243.

⁵ Act of 19 May 1998 amending the provisions of the Judicial Code on arbitration, *Belgian State Gazette*, 7 Aug. 1998. On this subject, see in particular G. Keutgen, 'La nouvelle loi sur l'arbitrage', *J.T.*, 1998, 761; B. Hanotiau & G. Block, 'La loi du 19 mai 1998 modifiant la législation belge relative à l'arbitrage', *Bull. de l'association suisse de l'arbitrage*, 1998, 528; H. Verbist, 'Reforme of Belgian Arbitration Law (The Law of 19 May 1998)', *R.D.A.L.*, 1998, 842; G. Horsmans, 'La loi belge du 19 mai 1998 sur l'arbitrage', *Revue de l'arbitrage*, 1999, 475; L. Demeyere, 'De wet van 19 mei 1998 betreffende de arbitrage', *R.W.*, 1998–1999, 865.

⁶ O. Caprasse, *supra*, 954.

⁷ Bill amending the sixth part of the Judicial Code on arbitration, Preamble, *Doc. parl. House.*, ord. sess., 2013–2014, No. 53 2743/001, 6.

⁸ Below we obviously refer to the provisions of the Judicial Code as amended by the New Arbitration Act.

address major concerns were maintained.⁹ The objective was also to provide international economic players with a familiar text.

It should be noted that the Belgian legislature opted for a unitary system¹⁰ in that, unlike in France or Switzerland, for example, Belgian law does not contain specific rules on international arbitration. Indeed, the sixth part of the Judicial Code governs both national and international arbitration.¹¹

Certain major changes were introduced through the adoption of the new sixth part of the Judicial Code. We cannot discuss all these changes in this text. Below we will hence touch on only some important procedural changes as well as the new definition of arbitrability (i.e., the possibility of arbitration).

The legislature provided for the consolidation of actions pertaining to arbitration before six Courts of First Instance or their president (Article 1680 section 6 of the Judicial Code). These are the Courts of First Instance in the judicial district of the appellate court within whose jurisdiction the place of arbitration is located (i.e., the two Courts of First Instance of Brussels and those of Liège, Mons, Ghent and Antwerp). Such consolidation allows a certain degree of specialization by the judiciary in the area of arbitration as the same judges are called upon to hear all cases relating to arbitration. The quality of the legal framework is thus improved.

Moreover, in the interest of speed and efficiency, decisions which must be taken by the national court during arbitral proceedings are now rendered by the president of the competent Court of First Instance, ruling as in summary (i.e., expedited) proceedings, without the possibility of appeal. This procedure is not new with respect to the intervention of the national court in the event of difficulty forming the arbitral tribunal, the replacement of an arbitrator or the lack of an arbitrator. However, it has now been extended to cover issues such as the disqualification of an arbitrator (Article 1680 section 2 and Article 1687 section 2 of the Judicial Code), a request to set a deadline for rendering the arbitral award if the arbitral tribunal is late in doing so (Article 1687 section 3 and Article 1713 section 2 of the Judicial Code) or requests for measures necessary in order to obtain evidence (Article 1680 section 4 and Article 1708 of the Judicial Code).

As indicated above, one of the major disadvantages of the former version of the sixth part of the Belgian Judicial Code was that it allowed for the possibility of appeal in the event an action was brought to overturn an arbitral award or with respect to the recognition and enforcement of an award. Once again, the Belgian legislature took into account the need for swiftness and efficiency in arbitral proceedings, provided that the Court of First Instance's

decision on a request to overturn an arbitral award or to recognize and enforce an arbitral award rendered in Belgium or abroad is final and thus not subject to appeal (Article 1680 section 5 of the Judicial Code).

Finally, the new sixth part of the Judicial Code has maintained the possibility in international contracts in which none of the parties is situated in Belgium, to provide the exclusion of any appeal to the state courts to overturn the arbitral award ('*opting out option*'). This is only possible if the parties which are natural persons do not have a Belgian nationality nor a domicile or residence in Belgium, and the parties which are legal entities do not have their statutory office, head office or a branch in Belgium (Article 1718 of the Judicial Code).

2. ARBITRABILITY

The first provision of the new sixth part of the Judicial Code sets out a new definition of arbitrability.

First, with respect to objectively arbitrable claims (*ratione materiae*), while the former wording merely provided that a dispute could be submitted to arbitration if it was capable of forming the object of a settlement, Article 1676 of the Judicial Code now provides as follows:

§1 Any pecuniary claim may be submitted to arbitration. Non-pecuniary claims with regard to which a settlement agreement may be reached may also be submitted to arbitration.

It follows that any pecuniary claim is arbitrable. In this regard, it should be noted that the concept of pecuniary claim should be interpreted broadly to include all claims which have a monetary value for the parties as assets or liabilities.¹²

For disputes involving a non-pecuniary claim, reference is made to the previously applicable sole criterion in that arbitration is possible if a settlement may be reached.

The new text thus allows arbitrators to rule on disputes relating to public policy or involving compulsory rules. This power had already been recognized in the case law and by legal scholars but the literal interpretation of the former wording of the Judicial Code, which referred only to the possibility of settlement, led to a rejection of arbitration in matters of public policy and to the nullity of the arbitration clause in matters involving compulsory rules.¹³ This is particularly important with respect to company law as a lot of provisions of the Belgian Company Code are either compulsory rules or related to public policy.

It is clear today that arbitrators have authority to settle cases calling into question public policy rules or matters involving

⁹ Bill amending the sixth part of the Judicial Code on arbitration, Preamble, *Doc. parl. House.*, ord. sess., 2013-2014, No. 53 2743/001, 5.

¹⁰ O. Caprasse, *supra*, 957.

¹¹ Bill amending the sixth part of the Judicial Code on arbitration, Preamble, *Doc. parl. House.*, ord. sess., 2013-2014, No. 53 2743/001, 6.

¹² Bill amending the sixth part of the Judicial Code on arbitration, Preamble, *Doc. parl. House.*, ord. sess., 2013-2014, No. 53 2743/001, 9.

¹³ O. Caprasse, *supra*, p. 407; O. Caprasse & R. Aydogdu, *Les conflits entre actionnaires. Prévention et résolution*, Brussels, Larcier, 2010, 373 et seq.

compulsory rules, but they have to apply these rules in the exercise of their judicial authority.¹⁴

Article 1676 of the Judicial Code also provides that:

'§ 4. The abovementioned provisions shall apply without prejudice to the exceptions provided for by law'.

Certain statutory provisions indeed limit the possibility of arbitration due to the sensitive nature of certain issues or the desire to protect the party considered the weaker of the two.¹⁵ This is notably the case with Article 1676 §5 of the Judicial Code:

'§ 5. Without prejudice to the exceptions provided for by law, an arbitration agreement entered into prior to any dispute that falls under the jurisdiction of the Labour Court pursuant to Articles 578 through 583 shall automatically be deemed null and void'.

In this regard, statutory provisions restricting arbitration in certain areas must be interpreted narrowly.¹⁶

With respect to subjectively arbitrable claims (*ratione personae*), Article 1676 section 2 of the Judicial Code provides as follows:

'§2. Whosoever has the capacity or is empowered to make a settlement may conclude an arbitration agreement'.

Thus, a person potentially acting in the name of a third party or in a certain capacity must have the power and capacity to act in its own right.¹⁷

The question of subjective arbitrability generally raises the question of whether public-law legal entities can have recourse to arbitration.¹⁸ In this regard, Article 1676 §2 provides that:

'§3. Without prejudice to specific laws, legal entities under public law may only enter into an arbitration agreement if the object thereof is to resolve a contractual dispute. The conditions applicable to the entering into of the contract, which constitutes the object of arbitration, also apply to the arbitration agreement itself. In addition, legal entities under public law may enter into arbitration agreements on all matters defined by law or royal decree enacted by the Council of Ministers. The decree may also set forth the conditions and rules to be respected when entering into such an agreement'.

Concerning in particular arbitrability of disputes within companies, Belgian company legislation contains no provision on

arbitration, meaning general rules of law apply. The aforementioned two-pronged criterion set out in Article 1676 of the Judicial Code must thus be applied to assess whether disputes in relation to a company are arbitrable.¹⁹

It is not possible to consider one by one all disputes which could arise in the life of a company in this text. However, it should be noted that authoritative literature argue that all corporate disputes are arbitrable.²⁰

We will discuss three types of disputes below, namely disputes relating to the expulsion or removal of a shareholder, the invalidation of resolutions of the general meeting and involuntary winding-up.

2.1. Disputes Relating to the Expulsion or Removal of a Shareholder

Belgian company law provides for the possibility to expel a partner or shareholder from the company.

In cooperative companies (*sociétés coopératives/coöperatieve vennootschappen*), a legal procedure applies in order to expel a shareholder for serious cause or for any other grounds indicated in the articles of association. The decision is taken by the shareholders' meeting, unless the articles of association grant this power to another corporate body (Article 370 of the Company Code). This provision also requires that a shareholder whose expulsion has been requested be invited to submit comments in writing to the corporate body competent for taking a decision on the proposed expulsion, in the month in which the registered letter containing the substantiated expulsion proposal is sent. Moreover, if so requested in the written comments, the shareholder in question must be heard. He may be assisted by counsel.

The literature²¹ and case law²² accept the arbitrability of disputes pertaining to the validity of an expulsion having regard to Article 370 of the Company Code and the company's articles of association.

In addition to the above-mentioned non-judicial expulsion procedure within cooperative companies, Belgian law also provides for a judicial expulsion procedure, for private limited-liability companies (*sociétés privées à responsabilité limitée / besloten vennootschappen met beperkte aansprakelijkheid*) and public companies (*sociétés anonymes / naamloze vennootschappen*). Article 334 of the Company Code, for private limited-liability companies,

14 G. Horsmans & Y. Decordt, 'La recherche arbitrale de l'efficacité sociétaire', *Liber Amicorum en l'honneur de Pierre Van Ommeslaghe*, Brussels, Bruylant, 2000, 561.

15 O. Caprasse, *supra*, 407.

16 Dendermonde Commercial Court, 28 Feb. 2013, *T.R.V.*, 2013, 266.

17 G. Keutgen & G. A. Dal, *L'arbitrage en droit belge et international*, t. I, 2nd ed., Brussels, Bruylant, 2006, 59.

18 O. Caprasse, *supra*, 408.

19 H. Laga & P. Nicaise, 'Arbitrage in de vennootschap', *L'arbitrage dans la vie des sociétés*, Brussels, Bruylant, 1999, 34; O. Caprasse & R. Aydogdu, *supra*, 379.

20 G. Keutgen & G. A. Dal, *supra*, 123; G. Keutgen & A. Goessens, 'L'arbitrage. Chroniques de jurisprudence 2003-2013', *J.T.*, 2014, 824; H. Laga & P. Nicaise, *supra*, 39; O. Caprasse & R. Aydogdu, *supra*, 379; G. Horsmans & Y. Decordt, *supra*, 564; D. Van Gerven, 'Arbitrage in vennootschapsgeschillen', *T.R.V.*, 1999, 533; K. Geens, 'De arbitrage over vennootschapsinterne conflicten', *Arbitrage en vennootschap*, Brussels, Bruylant 1999, 142 et seq.

21 O. Caprasse & R. Aydogdu, *supra*, 380; G. Horsmans & Y. Decordt, *supra*, 564; D. Van Gerven, *supra*, 533; F. Lefèvre, note on the Mons Court of Appeal's decision of 30 Jun. 1997, *R.D.C.*, 1999, 28; K. Geens, *supra*, 156.

22 See for example, Mons Court of Appeal, 30 Jun. 1997, *R.D.C.*, 1999, 28 and Brussels Court of Appeal, 27 Apr. 1999, *T.R.V.*, 1999, 525.

and Article 636 of the Company Code, for public companies, thus allow one or more shareholders collectively holding: (i) securities representing 30% of the voting rights attached to all outstanding securities;²³ or (ii) shares with a par value or accounting par value representing 30% of the company's capital to petition the court, for just cause, to have another shareholder be ordered to transfer to the petitioner(s) its shares as well as all securities it holds which can be converted or exchanged into shares of the company or which give the right to subscribe to the company's shares.

Once again, the majority opinion in the literature²⁴ and case law²⁵ is that disputes of this type may be submitted to arbitration based either on an arbitration clause or on an agreement entered into after the dispute arises.

Finally, Article 340 of the Company Code, for private limited liability companies, and Article 642 of the Company Code, for public companies, allow any shareholder, for just cause, to bring an action before the courts seeking to have the shareholders at the origin of the dispute be ordered to acquire all shares or subscription rights held by the petitioner(s). The above referenced case law and literature also emphasize that these types of disputes may be submitted to arbitration.

2.2. Annulment of Resolutions of the Shareholders' Meeting

Pursuant to Article 64 of the Company Code, a resolution adopted by the shareholders' meeting shall be annulled by court in the following circumstances:

- (1) when the resolution is affected by a procedural irregularity, if the claimant can prove that the irregularity could have influenced the decision taken;
- (2) violation of the rules governing the deliberations of the shareholders' meeting or deliberation on an item which was not on the agenda, with fraudulent intent;
- (3) the shareholders' meeting exceeded or abused its powers in passing the resolution;
- (4) when voting rights which were suspended pursuant to a statutory provision not included in the Company Code were exercised and, but for these unlawfully cast votes, the quorum

or majority required for the shareholders' meeting to adopt resolutions would not have been met;

- (5) for any other reason indicated in the Company Code.

Further to Article 178 of the Company Code, an action to annul a resolution of the shareholders' meeting may be brought by any interested party, provided this party did not vote in favour of the contested resolution, unless its consent was vitiated and, unless the invalidity results from a rule of public policy, has not expressly or implicitly waived its right to challenge the resolution.

Moreover, Article 179 of the Company Code provides that, in this context, if justified by serious cause, the party seeking to invalidate a resolution may request in summary proceedings the provisional suspension of enforcement of the decision.

As mentioned above, authoritative literature argues that all disputes relating to company law are arbitrable,²⁶ but there is very little literature and, until recently, no case law relating to the particular issue of arbitrability of disputes pertaining to the invalidation of corporate decisions.

We believe, however, along with the few authors who have touched on this subject,²⁷ that disputes relating to the invalidation of resolutions of the general meeting are arbitrable.

This position has recently been upheld by the Commercial Court of Dendermonde in its decision of 28 February 2013.²⁸ The Court expressly stated that nothing prevents from submitting that type of dispute to arbitration. The Court even confirmed the '*favour arbitrandum*' principle when stating that, under Belgian law, arbitrability is the principle and non-arbitrability the exception, it being understood that exceptions need to be narrowly interpreted.

2.3. Winding-Up of the Company

Articles 45, 343, 386 and 645 of the Company Code provide for the winding-up for just cause of private limited liability companies, cooperatives and public companies.

All the literature²⁹ considers that an arbitration clause is valid in this area. This was implicitly confirmed by the Court of Cassation in its decision of 2 February 1973.³⁰

²³ This threshold is lowered to 20% for public companies if the company has issued securities that do not represent capital.

²⁴ H. Braeckmans, 'Gedwongen overdracht en overneming, uitkoop regeling, gerechtelijke ontbinding van niet meer actieve vennootschappen en vereffening', *Het gewijzigde vennootschapsrecht*, 1995, Antwerp, Maklu, 1996, 303; E. Pottier & M. De Roeck, 'Le divorce entre actionnaires: premières applications jurisprudentielles des procédures d'exclusion et de retrait', *R.D.C.*, 1998, 563; O. Caprasse & R. Aydogdu, *supra*, 383-394; K. Geens & T. Verhoest, 'Développements récents dans la matière des procédures de sortie prévues par les articles 190ter et 190quater des lois coordonnées', *R.P.S.*, 1998, 341 et seq.

²⁵ President of the Brussels Commercial Court, 5 Feb. 1998, unpublished, cited by E. Pottier & M. De Roeck, *supra*, 563; President of the Courtrai Commercial Court, 4 Apr. 1997, unpublished, cited by K. Geens & T. Verhoest, *supra*, 371; Antwerp Court of Appeal, 27 Jan. 2005, *R.D.C.*, 2006, 438; Brussels Court of Appeal, 20 Dec. 2005, *R.D.C.*, 2006, 454.

²⁶ G. Keutgen & G.-A. Dal, *supra*, 123; G. Keutgen & A. Goessens, *supra*, 824; H. Laga & P. Nicaise, *supra*, 39; O. Caprasse & R. Aydogdu, *supra*, 379; G. Horsmans & Y. Decordt, *supra*, 564; D. Van Gerven, *supra*, 533; K. Geens, *supra*, 142 et seq.

²⁷ O. Caprasse, *Les Sociétés et l'Arbitrage*, Bruxelles, Bruylant, 2002, 167; O. Caprasse & R. Aydogdu, *supra*, 382; G. Horsmans & Y. Decordt, *supra*, 564.

²⁸ Dendermonde Commercial Court, 28 Feb. 2013, *T.R.V.*, 2013, 266, note S. Sobrie.

²⁹ For example, G. Keutgen & G.-A. Dal, *supra*, 124; H. Laga & P. Nicaise, *supra*, 38; J. Van Gelder & J. Linsmeau, 'Le Respect de la Règle de Droit par l'Arbitre et par l'Amiable compositeur', note on the Court of Cassation's judgment of 2 Feb. 1973, *R.C.J.B.*, 1975, 384; G. Horsmans & Y. Decordt, *supra*, 564; O. Caprasse & R. Aydogdu, *supra*, 388.

³⁰ Court of Cassation, 2 Feb. 1973, *R.C.J.B.*, 1975, 384, note by J. Van Gelder & J. Linsmeau.

The winding up decided by an arbitral tribunal is only enforceable to third parties if the publicity formalities imposed by the Company Code (Article 74, 4 a) of the Company Code) have been complied with.³¹

3. ENFORCEABILITY OF THE ARBITRATION AGREEMENT

The validity of the arbitration agreement depends on the consent of the parties, which are consequently only bound by the agreement if they have accepted it.³² Thus, aside from the issue of arbitrability discussed above, it is necessary to examine the scope of the arbitration agreement in the context of corporate disputes.

An arbitration clause may be inserted in the company's articles of association. In this case and provided the clause is drafted appropriately and covers the dispute in question, the company shall be bound by it.³³

The same holds true for its shareholders, including those who acquired this status after inclusion of the arbitration clause in the articles. It is indeed generally considered that by acquiring this status, they adhere to the articles of association.³⁴ It should be noted however that the European Court of Human Rights' decision in *Suda v. Czech Republic*³⁵ could be viewed as contrary to this position. In this case, which involved a squeezed-out minority shareholder, the ECHR held that imposing arbitration on the shareholder in proceedings relating to the redemption value of his shares, even though the shareholder had not consented to the arbitration clause, violates Article 6 of the European Convention on Human Rights, as the arbitral tribunal had not been 'established by law' and the proceedings were not public.

The management organs and their members, the liquidators as well as the auditors are also subject to the arbitration clause in the articles in that, by accepting their office, they indicate their adhesion to the articles of association.³⁶

Finally, the trustee in bankruptcy is also bound by the arbitration clause. This is confirmed by the Court of Cassation in its decision of 8 May 1998.³⁷

The question also arises as to whether an arbitration clause provided in the articles is enforceable in the context of a dispute between parties bound by the clause but which arises from another

agreement such as a shareholders agreement. In this case, the answer will depend on the wording of the clause as well as on the content of the agreement. Indeed, if the agreement contains an arbitration clause or contains no dispute resolution provisions, the arbitration clause in the articles can be given effect. On the other hand, if the agreement excludes the possibility of arbitration, it must be concluded that the agreement prevails over the arbitration clause in the articles.³⁸

Corporate organs may also rely on internal rules or rules of procedure governing the exercise by the organ of its prerogatives.

Such rules are not required by law and are not governed by a specific regulation.³⁹ However, it is accepted that, as a decision of a corporate organ, the rules of procedure must comply with the articles of association.

An arbitration clause provided for in such rules would be effective,⁴⁰ but we consider that the articles must authorize the inclusion of an arbitration clause in the rules of procedure as otherwise it will be considered a tacit amendment of the articles.⁴¹ Certain scholars dispute this position and believe that the rules of procedure may contain an arbitration clause even in the absence of an authorization in the articles.⁴²

As for arbitration agreements that fall outside corporate documents, such as an arbitration agreement provided by a share purchase agreement or a shareholders agreement, it is first necessary to verify the identity of the parties, against whom alone it may be enforced.⁴³

4. INTERIM AND CONSERVATORY MEASURES

Articles 1691 et seq. of the Judicial Code provide that, unless otherwise agreed by the parties, the arbitral tribunal may order interim and conservatory measures it deems necessary, it being understood that the arbitral tribunal may require the requesting party to provide appropriate security. Likewise, at the request of one of the parties, the arbitral tribunal may amend, suspend or terminate an interim or conservatory measure.

An interim or protective measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by

31 G. Keutgen & G. A. Dal, *supra*, 124.

32 G. Keutgen & G. A. Dal, *supra*, 98; D. Matray & G. Matray, 'La Rédaction de la Convention D'arbitrage', *La Convention D'arbitrage, Groupes de Sociétés et Groupes de Contrats*, Brussels, Bruylant, 2007, 25.

33 O. Caprasse & R. Aydogdu, *supra*, 398 and the references cited.

34 G. Keutgen & G. A. Dal, *supra*, 123; D. Van Gerven, *supra*, 534; H. Lagae & P. Nicaise, *supra*, 34.

35 European Court of Human Rights, *Suda v. Czech Republic*, 28 Oct. 2010, No. 1643/06. On the evolution of case law of the European Court of Human Rights on the application to arbitration of Art. 6 of the European Convention of Human Rights see F. de Ly, 'Arbitration and the European Convention on Human Rights', *Liber Amicorum en l'honneur de Serge Lazareff*, Paris, Pedone, 2011, p. 181 et seq.

36 A. Benoit Moury & D. Matray, 'L'arbitrage et le Droit des Sociétés', cited by O. Caprasse & R. Aydogdu, *supra*, 406.

37 Court of Cassation, 8 May 1998, *Rev. Not.*, 1998, 397.

38 O. Caprasse & R. Aydogdu, *supra*, 410; H. Lagae & P. Nicaise, *supra*, 43.

39 H. Lagae, 'Het Reglement van Inwendige orde in Vennootschappen', *T.P.R.*, 1993, 895 et seq.

40 Brussels Court of Appeal, 27 Apr. 1999, *T.R.V.*, 1999, 525, note by D. Van Gerven.

41 D. Van Gerven, *supra*, 534.

42 O. Caprasse & R. Aydogdu, *supra*, 412.

43 G. Horsmans & Y. Decordt, *supra*, 563.

the arbitral tribunal, enforceable irrespective of the country in which it was issued.

The arbitral tribunal may however not authorize attachment orders.

The power granted to the arbitral tribunal does not prevent the parties from requesting a state court for an interim or conservatory measure. The Belgian legislature expressly confirmed this assertion in Article 1683 of the Judicial Code whereby *'it is not incompatible with an arbitration agreement for a request to be made to a court for an interim or conservatory measure before or during*

arbitral proceedings and for a court to grant such measure, nor shall any such request imply a waiver of the arbitration agreement'.

As a consequence, the new Article 1698 of the Judicial Code provides that the court ruling in summary proceedings shall have the same power of issuing an interim or conservatory measure in relation to arbitration proceedings, irrespective of whether they take place on Belgian territory, as it has in relation to court proceedings. The court must exercise such power in accordance with its own procedures taking into account the specific features of arbitration (Article 1698 of the Judicial Code).