

# Arbitration

Arbitration presents fundamental differences with judicial proceedings. How is it regulated, what are its advantages and possible difficulties? What are the costs?

## 1 WHAT IS ARBITRATION?

Arbitration is a method of dispute resolution by which two or more parties entrust a third party (or third parties) called arbitrator(s) with the task of deciding their dispute by an arbitral award that has the same value as a judgment rendered by a court.

Arbitration results from the free will of the parties (which is expressed through an arbitration agreement) to refrain from bringing current and future disputes before the state courts and to have their case decided by an arbitral tribunal instead.

In the presence of a valid arbitration clause, the national court must declare itself without jurisdiction.

## 2 HOW IS ARBITRATION REGULATED?

Arbitration is usually administered by an **institution** chosen by the parties (CEPANI, ICC, LCIA, LCIA, NAI,...), which oversees the procedure and whose arbitration rules are accepted by the parties. This is called institutional arbitration.

It is also possible to opt for **ad-hoc** arbitration, i.e. without the assistance of an institution. The parties then set out the procedure to be followed by the arbitrator(s) ("the arbitral tribunal").

Arbitration is also regulated by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (in force in 159 countries).

The arbitration procedure is further defined by the Belgian Judicial Code, more specifically the articles 1676 to 1723 (which are based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006)).

## 3 WHAT DISPUTES CAN BE DECIDED THROUGH ARBITRATION?

Any dispute of a patrimonial nature (i.e., one that can be assessed in money) may be arbitrated. Disputes of a non-patrimonial nature, but which are permitted to be settled, may also be the subject of arbitration. Disputes that will therefore be non-arbitrable are the exceptions (e.g. the status of persons (divorce, filiation)). Some specific limitations also exist in the field of labour law), insurance contracts or forced co-ownership.

In the case of legal entities governed by public law, the latter may be parties to arbitration proceedings in contractual matters.

The arbitral tribunal may order provisional or protective measures, with the exception of measures of conservatory seizure on assets.

When a question of jurisdiction arises, the arbitral tribunal may rule on its own jurisdiction, including any exception relating to the existence or validity of the arbitration agreement.

## 4 WHAT ARE THE POSSIBLE RECOURSES AGAINST AN ARBITRATIONAL AWARD?

- An arbitral award is not subject to appeal or opposition. There is therefore only one instance.
- The arbitral award may be the subject of a request for annulment when it is no longer possible to challenge it before the arbitrators.

The request must be submitted to the court of first instance, which rules without possibility of an appeal. Annulment is granted only in very specific cases listed in Article 1717 §3 Judicial Code and does not concern the merits of the dispute.

Foreign parties may exclude any action for annulment of an award.

- Finally, it is possible to file third party opposition against the decision by which the award was made enforceable.

## 5 WHAT ADVANTAGES DOES ARBITRATION OFFER?

- **Confidentiality:** the arbitration procedure is inherently confidential. The hearings are not public.
- **Independence and impartiality:** like judges, arbitrators are independent and impartial towards the parties, their counsel and other arbitrators. Otherwise, they will be challenged.
- **Speed:** arbitration does not suffer from the problem of backlogs in (some) courts. The parties' choices regarding the proceedings and the availability of arbitrators may nevertheless influence the length of the arbitration.
- **Specialization of the arbitrator:** the possibility of choosing an arbitrator or arbitrators who are experts in the field of the dispute offers guarantees in terms of the quality of the award rendered.
- **Ideal in the event of international disputes:** unlike the ordinary courts, arbitration offers a certain flexibility in the event of an international dispute. Arbitration could, for example, be conducted in English.

## 6 WHAT TO DO IN CASE A PARTY REFUSES TO EXECUTE AN ARBITRAL AWARD?

The parties generally comply with an arbitral award. If not, the award may be declared enforceable by a simple application to the Court of First Instance, which may refuse recognition and enforcement only in the circumstances listed in Article 1721 of the Judicial Code. An arbitral award that meets certain conditions can also easily be enforced in the 159 countries in which the New York Convention is in force.

## 7 WHAT ARE THE COSTS?

The parties shall advance the arbitrators' fees. Arbitration institutes provide for scales on this subject. In principle, the parties advance the costs equally. At the end of the arbitration, the arbitral tribunal must decide on the award of costs and expenses.

If they opt for institutional arbitration, the parties will also have to pay the administrative costs of the arbitration institute.

Finally, in the same way as with ordinary court proceedings, the parties will bear their own defense costs (lawyer, technical advisors, etc.).

The legal framework of procedural indemnity does not apply to arbitration. Three main trends exist at the end of the arbitration procedure to settle the fate of arbitration and defense costs:

1. the unsuccessful party is required to pay the full amount of the arbitration costs and to reimburse the successful party for the latter's full defense costs: this is the principle of "Costs follow the event", based on the right to full compensation for the damage;
2. the costs of the arbitration shall be divided according to the outcome of the parties' respective claims and defenses;
3. each party shall pay half of the costs of the arbitration and shall bear its own defense costs.

The parties often agree on these terms in the arbitration agreement. In other cases, the arbitrators have the freedom to decide on this point.

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