

ARTIKELLEN

Arbitration and Alternative Dispute Resolution
in the Belgian Construction Sector

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Introduction

Arbitration has long been the preferred means to resolve international construction disputes. The great majority of construction model contracts (such as the FIDIC's standard forms of contract) contain arbitration clauses. Construction disputes represent a significant proportion of the cases which are submitted each year to international arbitration, as shown by the statistics of the International Chamber of Commerce or other arbitral institutions.

Furthermore, the construction industry has often been in the forefront of the development of other alternative dispute resolution (ADR) mechanisms. For instance, Dispute Review Boards and Dispute Adjudication Boards were first put in place for construction projects.¹

However, in Belgium the use of arbitration and ADR in construction disputes remains underdeveloped. The majority of construction disputes are still being submitted to State Courts for their decisions. Yet, the development of ADR in Belgium over the last few years has been growing and has gradually affected the construction sector. There are now several institutions dedicated to providing arbitration and ADR services to the construction and real estate sectors.

This article aims to present the various arbitration and ADR mechanisms that are available in Belgium for construction disputes. First, the Belgian construction sector and the country's legislation will be shortly described. The specificities of construction disputes will then be outlined. Afterwards, Belgian legislation on arbitration and ADR will be explained, and finally, the last chapter will feature the most prominent Belgian institutions dedicated to construction disputes.

The Construction Sector in Belgium

The construction sector in Belgium accounts each year on average for 5 percent of the country's total GDP.² When all other activities directly linked to this sector

are taken into account, this figure even reaches up to 11 percent.³ This sector employs 200,000 workers⁴ from a working population of approximately 5 million people.⁵ The construction sector thus constitutes an important part of the Belgian economy.

The statistics show that the construction sector is mostly active in the residential market. In 2010, Belgian authorities delivered 27,054 building permits for the construction of new residential buildings. These permits authorized the construction of 49,701 new housing units, among which 25,599 were apartments and 24,102 were single family homes. On the other hand, the authorities delivered the same year 4,747 permits for industrial and commercial (non-residential) buildings, which is more than ten times less than the number of permits for residential constructions.⁶

The 2010 figures confirm the two main trends of the last fifteen years: (1) the steady decrease in the construction of industrial buildings (with the number of industrial building permits decreased by approximately 35 percent between 1996 and 2010 (that is from 7,238 permits in 1996 to 4,747 in 2010)⁷ and (2) the steady increase in the construction of new apartments as opposed to new single family homes (with the number of permits for new apartments increased by 51 percent and the permits for single family homes decreased by 24 percent between 1996 and 2010).⁸

Belgian Construction Law and Related Legislation⁹

Belgian legislation has very few rules regulating construction contracts.

The Belgian legal system is based on civil law traditions. A construction contract is considered a contract for hire of work (*contrat de louage d'industrie*) and is thus governed by the rules of the *locatio conductio operis* and the generally-applicable principles of contract law. The Civil Code does not contain any comprehensive legislation on the *contrat d'entreprise* in general or, specifically, on construction contracts.

Only four articles of the Civil Code deal with construction contracts: Article 1792 (decennial liability), Article 1793 (modifications and additions in the framework

3 Annual Report 2010-2011 of the Construction Confederation, p. 124 (available at <www.confed-erationconstruction.be/Portals/0/documents/Rapport%20annuel%202010-2011.pdf>).

4 CCE, Rapport sur la conjoncture dans le secteur de la construction en 2011 et sur les perspectives pour 2012, CCE 2012-0124, 23 January 2012 (available at <www.ccecb.fgov.be>).

5 Institut National de Statistique, Statistiques, Marché du travail et conditions de vie, Emploi, chômage, marché du travail (2000-2010) (available at <www.statbel.fgov.be>).

6 Institut National de Statistique, Statistiques, Industrie de la construction, Permis de Bâtir (1996-2010) (available at <www.statbel.fgov.be>).

7 Ibid.

8 Ibid.

9 B. Kohl, Droit de la construction et de la promotion immobilière en Europe: vers une harmonisation de la protection du consommateur en droit de la construction?, *EuroSCS: Eryant, Bruxelles, 2008*, p. 129.

1 C. Chem, The Dispute Board Federation and the Role of Dispute Boards in Construction - Benefits without Burden, in: Miguel Angel Fernández-Ballesteros and David Arias (eds), *Spain Arbitration Review*, Wolters Kluwer España, Vol. 2010, Issue 9, p. 6.

2 SPF Economie, P.M.E., Classes moyennes et Energie, Le secteur de la construction constitue-t-il toujours un moteur de croissance pour l'économie belge?, December 2009 (available at <<http://economie.fgov.be>>).

of lump sum contracts), Articles 1798 and 1799 (subcontracting).¹⁰ These four articles were introduced in the Civil Code in 1804 because of the public mistrust towards construction professionals who often took advantage of the ignorance of their co-contracting parties. Since then, the legislator has never remedied the shortcomings of the Civil Code. No new comprehensive legislation has been adopted regarding construction contracts,¹¹ except for the law of 9 July 1971 which deals with the specific issue of the promotion and the construction of dwelling houses.

At first sight, parties to a construction contract thus seem to have an extended contractual freedom. However, a number of specific public policy rules restrict the parties' freedom. For instance, the profession of 'contractor' is governed by certain rules on, *inter alia*, the admission to the profession, registration, and accreditation requirements for public works. Architect contracts are also influenced by mandatory professional rules.^{12/13}

In addition, public works are subject to specific legislative instruments, including the *Cahier Général de Charge*¹⁴ (CGC) which regulates the performance of public works. Derogations from the CGC are possible but must be reasoned and rendered necessary by the specific characteristics of the tender. The CGC contains rules on, *inter alia*, price, modifications of the work, liability of the contractors, default, termination of the contract, etc.

Finally, the European legislation on consumer protection – such as the directive on unfair business-to-consumer commercial practices – generally applies to construction contracts between professional builders and private individuals. The consumer protection legislation restricts the contractual freedom of the professional party by banning certain contractual provisions which are considered abusive.

10 There is a growing tendency to consider that articles 1798 and 1799 of the Civil Code on subcontracting are not limited anymore to the construction sector (see a.o. B. Kohl, 'L'action directe des sous-traitants est-elle limitée au secteur de la construction immobilière?', J.L.M.B. (Revue de Jurisprudence Liège, Mons et Bruxelles) 2008, p. 1474).

11 Article 1798 of the Civil code was modified by the law 19 February 1990. The law of 19 February 1990 aimed to increase the protection of sub-contractors in case of bankruptcy of the contractor. The law of 19 February 1990 grants sub-contractors a right to direct action against the owner and establishes a lien on the debt due by the owner to the contractor during a 5-year period.

12 For example, the Law of 20 February 1939 grants architects a monopoly over the drawing of plans and the control of works for which a building permit is required (Article 4). Pursuant to Article 6 of this Law, an architect's profession is incompatible with that of a contractor. In addition, architects must abide by a code of ethics and professional conduct which has been rendered obligatory by Royal Decree of 18 April 1985. In that respect, architects must be and remain independent in the performance of their work.

13 On Belgian architect law see, for example, B. Devos and J.F. Henrotte, *L'architecte. Contraintes actuelles et statut de la profession en droit belge*, Brussels: De Boeck & Larcier 2011; about comparative law on architect contracts, see S. Van Guljik, *European Architect Law. Towards a new design*, Antwerp: Maklu, 2009.

14 Royal Decree of 26 September 1996.

Specificity of Construction Disputes¹⁵

Construction contracts are particularly prone to the emergence of disputes. The main factors which increase the risk of disputes are the long term of the contracts, the large number of intervening parties on a single project, the complexity of the building works, and the often high financial value of the contracts.¹⁶ Construction disputes usually pertain to the quality of the works, time and cost overruns, payment defaults, and contract documentation.¹⁷

The specificity of construction disputes is twofold: these disputes are technically complex and are often multi-party.

Firstly, these types of disputes are hardly exclusively contractual. Complex technical issues are either at the core of the dispute or underlie the contractual matters. Resolution of construction disputes therefore requires intensive fact and technical investigations.¹⁸ Parties (or ADR providers) will usually need to have recourse to one or several technical experts to support their case or resolve the dispute.

Secondly, the execution of construction contracts always involves many parties. An average construction contract involves at least an owner, contractors and sub-contractors, suppliers, insurers, and financing institutions. Each party has a direct contractual relationship with one or a few of the other intervening parties. The chains of contracts mean that disputes are regularly multi-party.

Arbitral tribunals have limited power to order the joinder of third parties to proceedings and the consolidation of multiple arbitral proceedings. In most instances, joinder or consolidation will require the consent of the parties (unless the contracts or arbitration rules contain appropriate provisions or unless joinder and consolidation can be ordered by state courts). Where joinder or consolidation cannot be achieved, it will almost invariably multiply the number of procedures and increase the risk of inflated costs and inconsistent decisions.

Arbitration and Alternative Dispute Resolution in Belgium

Two forms of ADR are regulated in Belgium, namely arbitration and mediation. The rules that apply to these two types of ADR are not constraining but aim to promote the development of these mechanisms. Though arbitration has since long been recognized in Belgium, the introduction of mediation in the legislation is much more recent.

- 15 On construction disputes and international construction arbitration, see, e.g., J. Jenkins and J. Stubbings, *International Construction Arbitration Law, Arbitration in Context Series*, Vol. 1, Alphen a/d Rijn: Kluwer Law International 2006; A.J. van den Berg (ed.), *Preventing Delay and Disruption of Arbitration / Effective Proceedings in Construction Cases*, ICCA Congress Series, 1990 Stockholm Volume 5, Deventer: Kluwer Law and Taxation Publishers 1991.
- 16 D. Brown-Bereset and M. Scherer, 'Les modes alternatifs de règlement des différends dans le domaine de la construction', *Journées suisses de droit de la construction, Fribourg: Institut pour le droit suisse et international de la construction 2007*, p. 266.
- 17 P. Brooker and S. Wilkinson, *Mediation in the Construction Industry. An International Review*, Oxon: Spon Press 2010, p. 3-4.
- 18 Jankins and Stubbings, *International Construction Arbitration Law*, p. 7.

Arbitration¹⁹

The Judicial Code incorporates into Belgian Law the Model Law annexed to the European Convention on Arbitration signed in Strasbourg on 20 January 1966. Any arbitration seated in Belgium is governed by Article 1676 to 1723 of the Judicial Code.²⁰

The Judicial Code does not distinguish between the rules that apply to domestic or international arbitration. However, Article 1717-4 of the Code allows the parties to exclude the right to apply for the setting aside of an arbitral award if none of the parties is a Belgian citizen or resident or a corporation with its registered office or a branch office in Belgium.²¹

Arbitration law in Belgium is quite standard compared to those in other European countries. It does not contain any particularly notable features. The parties are free to determine the rules of the arbitral proceedings as long as the fundamental principle of fair and equitable treatment is respected (Articles 1693 and 1694 of the Judicial Code). According to Article 1696-2 of the Code, the arbitral tribunal has a discretionary authority to assess the admissibility and weight of the evidence submitted by the parties. Unless the parties agreed differently, the arbitral tribunal is not bound by the rules of evidence applicable in court proceedings.

Generally speaking, Belgian courts have adopted a neutral approach towards arbitration agreements: they have neither overtly favoured arbitration over other dispute resolution methods nor shown a bias against arbitration.²²

Mediation²³

Mediation was neither recognized nor regulated until 2001. The law of 19 February 2001 first introduced mediation in the field of family law matters. Eventually,

19 On Belgian arbitration law see, e.g., G.-A. Dal and G. Keutgen, *L'arbitrage en droit belge et international*, 2nd ed., Brussels: Bruylant 2012; P. De Bournonville, *Droit judiciaire - l'arbitrage*, Brussels: De Boeck & Larcier 2009; V. Van Houtte and R. Vermeersch, *Belgium in Getting the Deal Through: Dispute Resolution in 38 jurisdictions worldwide*, p. 12; D. Matray (coord.), *Arbitrage et modes alternatifs de règlement des conflits*, Liège: Formation permanents CUP 2002; H. Verbit and B. De Vuyst, *Arbitrage en alternatieve geschillenbeslissing in België/ Arbitrage et modes alternatifs de règlement des conflits en Belgique*, Bruges: de Keure 2002.

20 Although the UNCITRAL Model Law has not been fully incorporated in Belgian law, several provisions of the Model Law have inspired the most recent revision of the Code in 1998 (e.g., Article 20 regarding the seat of the arbitration and Article 33 regarding the correction and interpretation of arbitral awards). Significant differences remain between the Model Law and the provisions of the Code dealing with arbitration. Among others, the grounds available to set aside an award differ clearly in the two systems, with the Belgian rules being more elaborate in this respect than the Model Law. CEPANI, the major Belgian arbitration institution, is currently examining a possible revision of the Code's chapter on arbitration (V. Van Houtte and B. Kohl, 'Belgium' chapter in *The International Comparative Legal Guide to International Arbitration 2010*, A Practical cross-border insight into international arbitration, London: Global Legal Group 2010, p. 89, available at <www.iglg.co.uk>).

21 *Ibid.*

22 *Ibid.*

23 On Belgian mediation law see, e.g., G. de Levala, *La nouvelle loi sur la médiation*, CEPANI Collection, Brussels: Bruylant 2005; P.-P. Renson, *La médiation. Voie d'avenir aux multiples facettes soumise aux aléas de la loi*, Actes du colloque du 29 mai 2008, Louvain-la-Neuve: Anthemis, 2008; B. Altemeersch, *De nieuwe wet op de bemiddeling*, Bruges: de Keure 2005.

by a law of 21 February 2005, mediation was extended to all civil matters. The Judicial Code now contains a chapter dealing exclusively with mediation (Chapter 7, Articles 1724 to 1737 of the Judicial Code).

This does not mean that mediation was not used in Belgium before 2001 or 2005; mediation was, however, a purely informal process. The law of 21 February 2005 intends to develop the practice of mediation by, *inter alia*, giving guarantees as to the qualification of mediators and the confidentiality of the process, on the one hand, and introducing the possibility of a 'judicial approbation' ('homologation') of the agreements reached in mediation, on the other hand.²⁴

Article 1724 of the Judicial Code provides that any dispute in respect of which it is permissible to compromise may be referred to mediation. However, the Judicial Code restricts the power of legal persons under public law to have recourse to mediation. Such persons may only take part in mediation if so duly authorized by a law or a Royal Decree. In the field of construction, this restriction is significant given that public works form an important part of the activity.

The Judicial Code foresees three kinds of mediation: (1) voluntary mediation which takes place independently of any judicial procedure and follows the rules of the Judicial Code, (2) judicial mediation which is ordered by a judge upon the parties' request or consent, and (3) 'ordinary mediation' which takes place outside the legal framework set by the Judicial Code.

The procedure is identical for the voluntary and the judicial mediation. The parties and the mediator must sign a mediation protocol and decide upon the organization and duration of the mediation. Any agreements reached between the parties during mediation must be made in writing. Since 2005, parties opting for a judicial mediation must select an accredited mediator (except if no accredited mediator has the required qualification to help solve the dispute). In voluntary mediation, the parties are free to choose a non-accredited mediator but cannot thereafter submit their agreement to judicial approbation.

The confidentiality of the procedure is guaranteed. All documents and communications made during mediation are confidential. They cannot later be used or produced in judicial or arbitral proceedings and are not admissible as means of evidence or as acknowledgment of a claim. Both the parties and the mediator are bound by the confidentiality obligation.

An agreement reached between the parties in mediation has the same legal value as a contract. The Judicial Code allows the parties to increase the binding force of their agreements. Whether mediation is voluntary (with an accredited mediator) or judicial, parties can submit their agreements to a judicial approbation ('homologation') in order that it be recorded in a consent judgement.

24 See parliamentary debate on the Law of 21 February 2005 and report on this Law's proposal, available at <www.kchamb.be/be> (ref. 5130327).

Belgian Arbitration and ADR Institutions Interested in Construction Disputes²⁵

There are several arbitral and ADR institutions in Belgium. The *Belgisch Centrum voor Arbitrage en Mediatie* or *Centre belge de l'arbitrage et de la médiation* ('CEPANI' or 'CEPINA') is the best known and widely-used. It deals with all kinds of cases. Other smaller institutions are specialized in construction and real estate disputes, namely the *Chambre de Conciliation, d'Arbitrage et de Médiation en matière immobilière*, the *Commission de conciliation construction* and the *Wetenschappelijk en Technisch Centrum voor het Bouwbedrijf* or *Centre Scientifique et Technique de la Construction*.

a The CEPANI-CEPINA

The CEPANI-CEPINA²⁶ is the prominent arbitration institution in Belgium. It was created in 1969 by the *Fédération des entreprises de Belgique* (the Belgian business federation) and the Belgian national committee of the International Court of Arbitration.²⁷

The CEPANI-CEPINA offers arbitration and mediation services as well as minimal, technical expertise and contract adaptation services. It is a non-specialized arbitration/mediation institution, i.e. its scope of activity is not restricted to any specific type of dispute on the basis of the subject matter or the capacity of the parties.

The statistics of the CEPANI-CEPINA show that construction arbitration forms an important part of the Centre's activity. The total number of arbitration cases relating to construction matters represented 16.66 percent of all cases in 2004, 4.25 percent in 2005, 13.7 percent in 2009, 9 percent in 2010, and 15 percent in 2011.²⁸ These statistics are similar to those of the International Commercial Court (ICC), where construction cases represent between 14 percent and 17 percent of all cases since 2005.²⁹ The CEPANI-CEPINA deals mostly with national cases, but about one-third to one-half of all cases involves a foreign party.

²⁵ On this subject see, e.g., E. Kobił, 'La commission de conciliation construction, le point sur deux années d'activité', *DCCR (Droit de la consommation/Consumentenrecht)* 65 (2004), p. 81-85; H. Verbiest, 'Arbitrage in bouwzaken en aanbestedingsdossiers: aspecten bekeken vanuit een Belgisch en Europeesrechtelijk perspectief', *Tijdschrift voor Internationaal Privaatrecht* 2004, p. 76-87; J. Hulbosch, 'Résolution des conflits dans les dossiers relatifs aux dommages de construction', *Ech. Log. (Les échos du logement)*, December 2000; B. Allomeersch, 'De procedure voor de Verzoeningscommissie Bouw - Een kritische commentaar', *TBO (Tijdschrift voor Bouwrecht en Ontoerend recht)*, September 2003, p. 77-94.

²⁶ Official website: <www.cepani.be>.

²⁷ H. Verbiest and K. Dhont, 'Le centre belge d'arbitrage et de médiation (CEPANI) adopte de nouveaux règlements. Lignes de force', *R.D.I.D.C. (Revue de droit international et de droit comparé)* 1(2000), p. 115.

²⁸ CEPANI Newsletter No. 31, July 2005; CEPANI Newsletter No. 32, April 2006; CEPANI Newsletter No. 44; CEPANI Newsletter No. 63, March 2012; all available at <www.cepani.be>.

²⁹ ICC ICArb. Bull., Vol. 16/1, 2005, p. 13; ICC ICArb. Bull., Vol. 17/1, 2006, p. 12; ICC ICArb. Bull., Vol. 18/1, 2007, p. 13; ICC ICArb. Bull., Vol. 19/1, 2008, p. 12; ICC ICArb. Bull., Vol. 20/1, 2009, p. 13; ICC ICArb. Bull., Vol. 21/1, 2011, p. 14.

In 2000, the CEPANI-CEPINA set up a working group to examine the possibility of promoting arbitration in the construction sector. The working group noted that the use of arbitration could be increased in the Belgian construction sector, as shown by the international and Dutch traditions to refer construction cases to arbitration.³⁰ Belgium is indeed far away from the quasi-systematic recourse to arbitration that exists in the Netherlands and for international contracts.

b *The Chambre de Conciliation, d'Arbitrage et de Médiation en matière immobilière* (CCAI) was created in 2005 by various local associations of notaries, lawyers, architects, land surveyors, and expert architects. The association of owners and the association of lenders later joined the CCAI as institutional members. It was created as a response to the perceived high costs and long duration of ordinary judicial proceedings. The aim of the CCAI is to offer mediation, conciliation, and arbitration services for the resolution of real estate disputes. The CCAI brings together lawyers and technical experts who are supposed to complement and assist each other for the purpose of resolving disputes in a fast and cost-effective manner.³¹

The CCAI has the broadest jurisdictional scope of all ADR institutions specialized in construction and real estate disputes. Any real estate dispute can be referred to the CCAI. This covers disputes relating to leases, building works, real estate sales, leasing, neighbourhood nuisance, urbanism, environment, etc. Both private individuals and professionals can refer their disputes to the CCAI.

Model Clause

The CCAI proposes on its website a model clause which leaves the choice between arbitration, conciliation and mediation to the parties. Failing a choice by the parties, they shall be deemed to have chosen mediation.

The model clause forbids parties to initiate a judicial procedure before taking part in the chosen ADR procedure (save for requesting preliminary or conservatory measures). This obligation can easily be enforced in case of a mediation or arbitration clause. The Judicial Code indeed provides that, if a dispute is submitted to a judge (or an arbitrator) in breach of a mediation or arbitration clause, (1) the judge (or arbitrator) must suspend the proceedings until the end of the mediation procedure (Article 1725) or (2) the judge must declare itself incompetent (Article 1679) and refer the parties to arbitration. Such a rule does not exist for conciliation, and parties may thus have difficulties to enforce their conciliation clauses. Therefore, it is advisable to choose mediation or arbitration over conciliation for enforcement purposes.

Collaboration Between Lawyers and Technicians

One of the distinct features of the CCAI procedure is the collaboration that exists between legal and technical experts for the resolution of disputes. The CCAI Rules

³⁰ CEPANI Newsletter No. 27, October 2003, available at <www.cepani.be>.

³¹ By-law of the CCAI (available at <www.moniteur.be>).

provide that mediation and conciliation proceedings must be conducted by a college composed of one technical expert and one lawyer. In the case of arbitration, the CCAI Rules provide that a three-member arbitral tribunal must, as a rule, include at least one technician and one lawyer. Disputes will be resolved by single arbitrators only in exceptional cases or upon the request of both parties.

The combination of lawyers and technical experts is also present in the Bureau of the CCAI, the organ which supervises the arbitral procedures. The Bureau comprises four members who are chosen among the institutional members of the CCAI and represent both the legal and the technical professions. The presence of at least one lawyer and one technical expert in all mediations, conciliations, and arbitrations is an interesting feature. In real estate disputes, resolution of the technical issues is often a preliminary step. The collaboration between the legal and the technical ADR experts thus increases the understanding of the dispute and the chances of amicable settlement between the parties. However, in purely legal disputes (such as rent issues or financing of leasing, for instance) having the presence of two mediators or conciliators seems redundant. Unfortunately, the CCAI Rules do not provide for any exceptions with regard to the number or qualification of mediators and conciliators.

The Bureau of the CCAI designates the mediators, conciliators, and arbitrators from a closed list. The mediators, conciliators, and arbitrators on this list have at least seven years of experience in their field of expertise, and the mediators are accredited.

Procedure and Costs

Another important feature of the CCAI procedure is that the procedure is simple, making it swift and cost-efficient.

The conciliation, mediation, and arbitration procedures are very succinctly described in the CCAI Rules. The Rules contain provisions on the commencement of the ADR procedure, the appointment of the mediators, conciliators, or arbitrators, the financial aspects of the procedures, confidentiality obligations, and some minor procedural issues. For the rest, the parties and the mediators, conciliators, and arbitrators are free to adopt any suitable procedural rules.³²

The CCAI Rules set tight deadlines for conciliation and arbitration procedures. In principle, conciliations cannot exceed two months (Article 8 of the CCAI Rules), while arbitral awards must be rendered within 45 days from the closing of the proceedings (Article 14 of the CCAI Rules). The cost of an ADR procedure under the CCAI Rules is relatively low. The mediators, conciliators, and arbitrators are paid at an hourly rate of 85 Euro (excl. VAT) and the CCAI has an administrative fee of 50 Euro. The significantly low cost of these type of procedures makes the CCAI affordable to consumers.

³² The CCAI Rules also contain a very broad provision giving the Bureau the power to take all measures necessary for the proper conduct of ADR procedures, including the compliance with the deadlines and the recovery of sums due to the CCAI. This provision should in principle allow the parties to call on the Bureau in order to settle any procedural difficulties that cannot be directly resolved by the mediators, conciliators, or arbitrators because of their personal conflict of interest or lack of initiative.

Over the last two years, the CCAI dealt with about a hundred cases, 75 percent of which were resolved amicably.³³ The number of arbitration cases is still limited (about ten cases every year). It could be explained by the novelty of the institution and also by the fact that the CCAI Rules do not allow the parties to nominate their own arbitrators.

c The Commission de conciliation construction/De Verzoeningscommissie Bouw
The Commission de conciliation construction (CCC) was set up in 2001 by four institutions: the Confédération de la construction/Confederatie Bouw (an organization of employers comprising approximately 15,000 businesses in the construction field); the consumers' association Test-Achters/Test-Aankoop; the Bouwunie (formerly known as Nacebo, the Flemish federation of the SMEs in construction); and the Royal Federation of Architects in Belgium. The Flemish Architects organization (the NAV) joined the CCC in 2005. The CCC's statutory objective is to ... prevent ... and ... settle ... disputes between private individuals and construction professionals.³⁴ CCC helps resolve construction disputes by conciliation procedures in order to avoid as much as possible the difficulties associated with judicial proceedings, i.e., ... excessive judgement, high costs, slowness, formalism, incompetence of certain experts, and lack of control on the experts' activities³⁵, among other things.

Model Clause

Article 7 of the CCC's Procedural Rules sets forth a model clause that the parties can insert into their contracts.³⁶ Pursuant to this model-clause, the parties undertake to insert the same conciliation clause into all the contracts they conclude with third-parties for the execution of the works. Consequently, all the contractors, subcontractors, and architects working on that project should in principle be bound by the same conciliation clause. This guarantees that any interested party in the resolution of the dispute will be present at the conciliation proceedings. It is important considering that the objective of conciliation is the conclusion of a final and binding settlement agreement (a 'transaction'). Under Belgian law, a

³³ Report of the TV program 'Une brique dans le ventre' about the CCAI, broadcasted on the public television channel RTBF (available at <www.ccai.be>)

³⁴ Article 4 of the by-laws of the CCC, published in the annex of the Moniteur belge dated 19 April 2001, p. 3969.

³⁵ G. Coene, 'De verzoeningscommissiebouw', DCCR (Droit de la consommation/Consumentenrecht) 2001, p. 334.

³⁶ The model clause does not make conciliation a mandatory step before a party initiates legal action. The conciliation only becomes mandatory if one of the parties submits to the CCC a dispute arising in connection with the execution of the works. Once the CCC has been sought to handle the dispute, the other signatories of the clause are bound to accept the CCC's competence. The fact that conciliation is not per se mandatory is a cost-saving and efficient mechanism. It prevents the introduction of a conciliation procedure by a party which has no interest or will to settle the dispute. On the other hand, it suffices that one of the intervening parties - be it the party that has incurred damage or the party alleged to have caused the damage - believes that a settlement is possible for a conciliation to take place.

'transaction' only binds the parties to the settlement agreement and cannot be opposed against other interested parties (Article 2051 of the Civil Code). Since its inception in 2001, the CCC has tried to promote the insertion of its model clause in construction and architect contracts. The organizations which are part of the CCC have, for example, inserted the model clause into their own model contracts³⁷ or have issued a general recommendation on their websites or publications to make use of the CCC's model clause.³⁸ In addition, the Union of Towns and Communes conducted a publicity campaign in 2007 to promote the CCC among consumers.³⁹ The promotion campaigns seem to bear fruit. An increasing number of cases have been submitted to the CCC on the basis of a contractual clause,⁴⁰ and other organizations have now inserted the CCC's clause in their model contracts⁴¹.

Jurisdiction

The jurisdiction of the CCC is limited and well-defined. First, the dispute must relate to defects of a technical nature and any related dispute arising from it. Second, a consumer⁴² must be a party to the dispute. Disputes exclusively between professionals are expressly excluded from the CCC's jurisdiction (Article 4 of the Procedural Rules). Finally, the works must have been ordered or purchased off plans by the consumer for his or her personal needs.

While the CCC does not deal with purely legal cases, the Procedural Rules, however, allow the expert-conciliator to submit a non-binding opinion on the technical liabilities of the parties, if one party so requests (Article 17 of the Procedural Rules).

Expertise and Conciliation

The determination of the technical issue is central to the CCC's procedure, whereby conciliation and expertise are combined. The CCC-nominated conciliator has in fact a dual mission. On the one hand, he or she must try to make the parties come to an accord during the entire duration of the mission. On the other

hand, the conciliator must observe and consider all the necessary elements regarding the technical defects (Articles 15 and 16 of the Procedural Rules).

The combination of conciliation and expertise makes sense in the framework of construction disputes. A conciliator will indeed need to have a good understanding of the dispute in order to present the parties with acceptable proposals. This particular combination has two other advantages. Firstly, the drawing up of a technical report can make the parties aware of the weaknesses of their individual position and encourage them to settle their dispute in fear of a detrimental judicial decision. Secondly, the findings of the expert-conciliator will help speed up judicial proceedings if the conciliation is unsuccessful. Article 17 of the Procedural Rules provides that the technical conclusions of the expert-conciliator are deemed contradictorily and are binding upon the parties. Thus, even if the conciliation was to fail, the court would be able to rely on the conclusions of the expert-conciliator and would not necessarily have to order a preliminary judicial expertise.

Procedure

Submitting a request for conciliation to the CCC bars temporarily the possibility to commence judicial proceedings. The procedure is a bit more formalistic than that of the CCAL.

At the first procedural meeting, the CCC designates an expert-conciliator (and if necessary, a specialist for assisting the expert-conciliator on specific technical issues) taking into account the nature of the dispute. Thereafter, the expert-conciliator visits the premises, and based on what he or she has observed, tries to draw up a proposal for amicable settlement. If the parties do not succeed in reaching an agreement, the expert-conciliator will draw up a first technical report on the causes of the defects, the method of repair, the valuation of the price and duration of the repair works, and the damages for the loss of enjoyment and depreciation caused by the defects.

If the expert considers that additional investigations are needed, he or she must first send to the parties a description of the investigations, their duration, and a cost estimate. If one of the parties approves these conditions, the expert can proceed. Within three months from its nomination, the expert informs the parties about its findings and submits a conciliation proposal. Finally, after the submission of its final report, the expert-conciliator may propose to the CCC that the parties should be called in for a last conciliation meeting.⁴³

According to the CCC's statistics, an average of 69 cases are handled by the CCC every year. In the great majority of the cases (80%), disputes are submitted by

37 See the Test-Achat's 'Convention d'entreprise générale pour la construction d'une habitation' (available at <www.test-achats.be>), Bouwunie's 'Modelcontract Renovatie' and 'Modelcontract aanmerking' (available at <<http://bouwunie.be>>).

38 The architect organization recommends consumers to submit their construction disputes to the CCC.

39 Annual Report of the CCC, 2011, p. 3.

40 For instance, following the publicity campaign conducted by the Union of Towns and Communes, the number of cases submitted to the CCC more than doubled, reaching 102 cases in 2008.

41 For example, Iruinoweb, the prominent Belgian real-estate website offers both an architect model contract and a constructor model contract which include the CCC's model clause (available at <<http://iruinoweb.be>>). L'Echo, the Belgian economic newspaper, also has a model contract available on its website, the 'Contrat d'entreprise pour des travaux' which includes the CCC model clause (available at <<http://monargent.lecho.be>>).

42 A consumer is any natural person who either (i) builds or renovates a habitation and hires architect or builder, or both, or (ii) buys a habitation off plans from a real-estate promoter.

43 The Procedural Rules also set forth an emergency procedure for the designation of an expert in case of extreme urgency. The expert is designated no later than one day after the request. The visit of the premises takes place if possible within 24 hours and within a maximum of 43 hours after the expert's designation. The Procedural Rules contain safeguards against any abusive recourse to the emergency procedure. If the expert finds that extreme urgency is lacking, the requesting party will have to bear all the costs associated with the first visit to the premises and the cost.

consumers. The CCC has a relatively high success rate: an average of three out of four cases are settled amicably by the parties.

In terms of time and costs, the CCC's annual statistics show its time- and cost-efficiency. In most cases (80% on average), the procedure does not cost more than the basic fixed rate, i.e., 200 Euro for each party (increased by 200 Euro when a specialist is appointed to assist the expert-conciliator). The low fees can be explained by the fact that a great majority of disputes are resolved during the first site visit. The duration of procedures is usually less than twelve weeks.

d *The Centre Scientifique et Technique de la Construction/Wetenschappelijk en Technisch Centrum voor het Bouwbedrijf*

The *Centre Scientifique et Technique de la Construction* (CSTC) is a research institute created in 1960. The CSTC has 70,000 members representing the entire construction sector (contractors, plumbers, glazier, roofing contractors, etc.). The members of the CSTC are mostly small- and medium-size businesses.⁴⁴ The CSTC is not *per se* an ADR service provider. It pursues scientific and technical research for the benefit of its members, gives information, assistance and technical advice, and tries to contribute to the innovation and development of the construction sector.

With regard to technical advice, the Technical Advice Division of the CSTC (ATA) answers any technical questions relating to construction works. Technical advice can be requested before, during, or after the execution of the works. Preliminary advice aims to limit the risk of errors during the conception stage of the works, while *ex post* advice aims to identify and resolve any defect at any stage of the works. Technical advices from the ATA are always made in consultation with the concerned contractors.

The services of the ATA are exclusively available to professionals and judicial experts. Requests to the ATA, and the resulting technical advice, can be made either verbally (by phone) or in writing. Upon the express request of a contractor, the ATA can also visit the construction site and submit a written report containing an analysis of the technical problem and possible remedies. The technical advices of the ATA are in principle free-of-charge. A fee will be due only if a written report is requested by the parties or if the ATA acts upon the request of a judicial expert. A fee will also be due if analyses, measurements, calculations, etc. are needed. These fees, however, are quite low: 125 Euro for a written report and 625 Euro per day for tasks related to a judicial expertise.

Conclusion

During the last decade, the development of arbitration and ADR in the construction sector has been constant. The creation of two new institutions dedicated solely to the resolution of construction and real estate disputes has obviously met a demand from the construction industry for amicable, fast, and more economical

way of settling disputes. The CCAI and the *Commission Conciliation Construction* are slowly being recognized as competent and effective ADR institutions.

However, despite the high success rate of these institutions in settling disputes, the use of ADR in construction disputes remains low in Belgium. It seems that professionals and consumers are still insufficiently informed and aware of the advantages of ADR and arbitration compared to judicial proceedings. Publicity campaigns conducted by the authorities and ADR institutions should eventually increase the public awareness and the use of ADR in Belgium. The insertion of an identical ADR clause in the contracts of all intervening parties on a same project should also help resolve the problems linked to multi-party disputes.