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Annual Report
2021

CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

WOORD VAN DE VOORZITTER

Het is met grote eer dat ik u deze inleiding richt in mijn hoedanigheid van Voorzitter van CEPANI. Ik heb dan ook het genoegen u ons activiteitenverslag voor het jaar 2021 voor te stellen.

Dit jaar stond in de eerste plaats in het teken van de goedkeuring van het Reglement van het Belgisch Centrum voor Arbitrage in de Sportsector (Centre for Sports Arbitration, 'C-SAR'), dat op 1 januari 2022 in werking trad. Deze specifieke afdeling van CEPANI, die in volle uitbreiding is, beheert op onafhankelijke wijze de arbitrageprocedures in de sportwereld. Tot de opdrachten van C-SAR behoort tevens de aanstelling van arbiters die, als beroepsinstantie, geschillen beslechten waarover in eerste aanleg een beslissing is genomen door een beroepsfederatie. Deze specifieke afdeling van CEPANI, die aan arbitrage in de beroepssport is gewijd, bezorgt onze organisatie bijkomende dynamiek en bekendheid.

In haar functie van promotie van arbitrage, van ADR en van haar instelling, organiseerde CEPANI opnieuw studiemiddagen gewijd aan de presentatie van arbitrage aan de verschillende nationale balies. Deze presentatie, die in eerste instantie voor de balie van Luik georganiseerd werd, zal in juni en september 2022 nog plaatsvinden voor de Vlaamse balie van Brussel evenals voor de balie van Limburg. Hetzelfde initiatief werd al ondernomen bij de nationale Kamers van Koophandel en werd met succes verlengd in de loop van het jaar 2021. CEPANI nam daarnaast onder meer deel aan de 'Job Days' van de Katholieke Universiteit van Leuven. We werden tevens uitgenodigd om tijdens het 'ELSA Brussels'-evenement van de Vrije Universiteit van Brussel een workshop met als titel "Een geschil? Denk aan arbitrage" te organiseren. Deze evenementen waren een gelegenheid om CEPANI en haar werking voor te stellen aan de toekomstige juridische professionals. Gezien de grote ontvankelijkheid en actieve deelname van studenten, zal CEPANI in de toekomst nog vaker aanwezig zijn in universitaire middens, door deel te nemen

aan evenementen in samenwerking met studentenorganisaties en vakgroepen.

Op 25 november 2021 vond het jaarlijkse CEPANI-colloquium, 'What's on the Horizon?' plaats. Dit langverwachte evenement, dat onderverdeeld was in drie panels, (i) het CEPANI-Reglement, (ii) de zoektocht naar de waarheid in arbitrage en (iii) de digitalisering van de arbitrageprocedure, was een groot succes. Dit colloquium, het eerste fysieke evenement sinds het begin van de pandemie, stelde de arbitragegemeenschap in staat elkaar opnieuw in een aangenaam kader te treffen.

CEPANI heeft ook bijgedragen tot de ontwikkeling van de digitalisering van de arbitrageprocedure door innovatieve, technische middelen in te zetten die voor een betere veiligheid en snelheid van de procedure zorgen, zoals het versturen van een identiteitskaartlezer aan alle benoemde arbiters, of de promotie van de gecertifieerde elektronische ondertekening van Arbitrale Uitspraken verleend onder auspiciën van CEPANI. De rol van het Secretariaat werd op deze punten ook doeltreffend duidelijker gemaakt met het nieuwe CEPANI Arbitragereglement, waarin de arbitrageprocedure volledig online verloopt, evenals met de inwerkingtreding van het nieuwe CEPANI Domeinnamenreglement op 1 januari 2022.

Eén van de belangrijkste bijdrages was het verslag dat in maart 2022 werd opgemaakt door de CEPANI-werkgroep 'Diversiteit en Inclusie'. Het doel van deze werkgroep was om CEPANI te analyseren op het vlak van diversiteit in de ruime zin, door de vergelijking te maken met andere instellingen, en daarover aanbevelingen te formuleren. Zo zijn belangrijke maatregelen getroffen en gepland voor meer diversiteit binnen CEPANI in de toekomst, in het bijzonder binnen haar ledenbestand en bestuursorganen en met bijzondere aandacht voor de benoeming van arbiters.

Er lopen in 2022 ook tal van andere innovatieve projecten om de diversiteit en het milieubewustzijn ('greener arbitration') binnen CEPANI en binnen de gevolgde procedures van haar verschillende reglementen te bevorderen.

CEPANI40 heeft niet nagelaten heel actief te zijn in 2021. Dat zult u ook merken in de komende activiteitenverslagen. De 'Global Conference of the Co-Chairs' Circle', die op 3 en 4 juni 2022 wordt georganiseerd rond het thema 'Legitimacy *in* and *of* Arbitration'

wordt het hoogtepunt van het mandaat van de twee uittredende Co-Voorzitsters, Sophie Goldman en Sigrid van Rompaey. Ik hoop van harte u daar in groten getale te zien.

In deze context en aangezien hun mandaat als voorzitsters aan het einde van deze zomer tot hun einde komt, wens ik Sophie Goldman en Sigrid Van Rompaey te bedanken voor hun onvermoeibare inzet voor de ontwikkeling en de bekendheid van CEPANI40. De volgende CEPANI40-voorzitters zullen worden aangekondigd met oog op de CEPANI40-zomerborrel op 30 augustus 2022.

Ten slotte verdient de efficiëntie van het Secretariaat nogmaals te worden onderstreept. Het jaar 2021 heeft ervoor gezorgd dat een nieuwe medewerkster het team is komen versterken. Mijn oprechte dankbaarheid gaat uit naar Astrid, Camille en Emma.

Ik wens u een uitstekende lectuur.

Benoît Kohl

Voorzitter | Président | President

LE MOT DU PRESIDENT

C'est avec un véritable honneur que je vous adresse cette introduction en ma qualité de Président du CEPANI. J'ai ainsi le plaisir de vous présenter son rapport d'activités pour l'année 2021.

Cette année a tout d'abord été marquée par l'adoption du règlement du Centre Belge d'Arbitrage dans le secteur sportif (*Centre for Sports Arbitration*, « C-SAR »), en vigueur au 1er janvier 2022. Cette section spécifique du CEPANI en pleine expansion administre de manière indépendante les procédures d'arbitrage dans le domaine du sport. Le C-SAR a également pour mission de désigner des arbitres appelés à trancher, comme instance de recours, les litiges ayant fait l'objet d'une décision en première instance par une fédération professionnelle. Cette section spécifique du CEPANI, dédiée à l'arbitrage dans la pratique du sport professionnel apporte à notre institution un surcroît de dynamisme et de notoriété.

Dans sa fonction de promotion de l'arbitrage, des ADR et de son institution, le CEPANI a de nouveau organisé les « midis de la formation » dédiés à la présentation de l'arbitrage aux différents barreaux nationaux. Organisée dans un premier temps avec le barreau de Liège, cette présentation se tiendra avec le barreau flamand de Bruxelles ainsi que celui de Limbourg en juin et septembre prochain. Cette démarche déjà opérée auprès des chambres de commerce nationales s'est prolongée avec succès au cours de l'année 2021. Notamment, le CEPANI a participé aux « *Job Days* » à l'Université Catholique de Louvain. Le CEPANI a aussi été invité à l'évènement ELSA Brussels pour animer un workshop intitulé « Un contentieux ? Pensez à l'arbitrage ! » à l'Université Libre de Bruxelles. Ces évènements ont été l'occasion de présenter le CEPANI et son fonctionnement aux futurs professionnels du droit. Constatant la grande réceptivité et l'active participation des étudiants, le CEPANI sera, à l'avenir, d'avantage présent au cœur des universités, en participant à

différents événements en collaborations avec les organisations d'étudiants et les autorités facultaires.

Le 25 novembre 2021 s'est tenu le colloque annuel du CEPANI, intitulé « What's on the Horizon ? ». Organisé autour de trois panels, (i) le règlement du CEPANI, (ii) la recherche de la vérité en arbitrage et (iii) la digitalisation du processus arbitral, cet évènement tant attendu a été un réel succès. Premier évènement en présentiel depuis le début de la pandémie, ce colloque a permis à la communauté de l'arbitrage de se retrouver dans un cadre convivial.

Le CEPANI a également contribué à l'évolution de la digitalisation de la procédure arbitrale, en mettant en place des moyens techniques innovants permettant une meilleure sécurité et célérité de la procédure, tel que l'envoi d'un lecteur de carte d'identité à chaque arbitre nommé, ou la promotion de la signature électronique certifiée des sentences arbitrales rendues sous l'égide du CEPANI. Le rôle du Secrétariat sur ces points s'est aussi manifesté avec grande efficacité avec un nouveau règlement d'Arbitrage du CEPANI dans lequel la procédure d'arbitrage se déroule entièrement en ligne, ainsi qu'avec l'entrée en vigueur du nouveau règlement « Noms de domaine .be » au 1er janvier 2022.

L'une des plus importantes contributions a été le rapport de mars 2022 du Groupe de Travail sur la Diversité et l'Inclusion au sein du CEPANI. L'objectif du Groupe était de situer le CEPANI en matière de diversité au sens large, en le comparant à d'autres institutions, et de formuler des recommandations en ce sens. D'importantes mesures ont ainsi été mises en place et sont prévues afin de faire évoluer positivement la diversité dans le futur du CEPANI, particulièrement au sein de ses membres et organes et avec une attention particulière lors de la nomination des arbitres.

De nombreux autres projets innovants sont également en cours pour l'année 2022, afin de promouvoir davantage de diversité et d'éco-responsabilité (*greener arbitration*) au sein du CEPANI et des procédures menées sous ses différents règlements.

Le CEPANI40 n'a pas manqué d'être très actif tout au long de cette année 2021, comme vous pourrez le constater dans les nombreux rapports d'activité qui suivent. Le point culminant du mandat des deux co-présidentes sortantes, Sophie Goldman et Sigrid Van Rompaey est la *Global Conference*

of the Co-Chairs' Circle organisée les 3 et 4 juin 2022, sur le thème « Legitimacy *in* and *of* Arbitration ». J'espère vraiment vous y voir très nombreux.

A cet égard, je tiens à remercier Sophie Goldman ainsi que Sigrid Van Rompaey pour leur investissement sans relâche dans le développement et la notoriété du CEPANI40, leur mandat de présidentes se terminant à la fin de cet été. A ce titre, les prochains présidents du CEPANI40 seront annoncés en vue de l'évènement *summerdrink* du CEPANI40 qui se tiendra le 30 août prochain.

Enfin, l'efficacité du Secrétariat mérite, à nouveau d'être soulignée. L'année 2021 aura permis de renforcer l'équipe, par l'arrivée d'une nouvelle collaboratrice. Astrid, Camille et Emma trouveront dans ces quelques lignes l'expression de ma profonde gratitude.

Je vous souhaite une excellente lecture.
Benoît KOHL

Voorzitter | Président | President

EPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

CEPANI STATISTICAL SURVEY 2021

Origin of the Parties

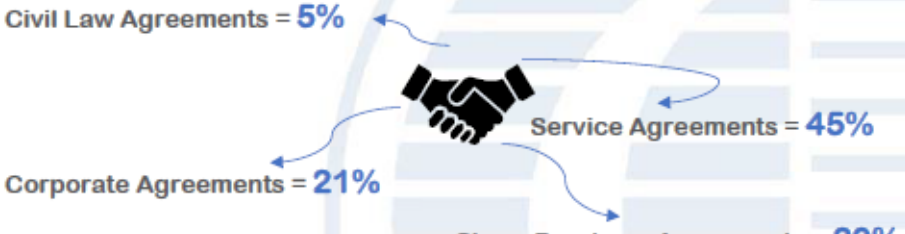
Canada	1
Czech Republic	1
Finland	1
France	5
Germany	1
Luxembourg	2
The Netherlands	2
Russia	1
South Africa	1
Switzerland	1
USA	3

Language of the arbitral proceedings

DUTCH	FRENCH	ENGLISH
24%	45%	31%

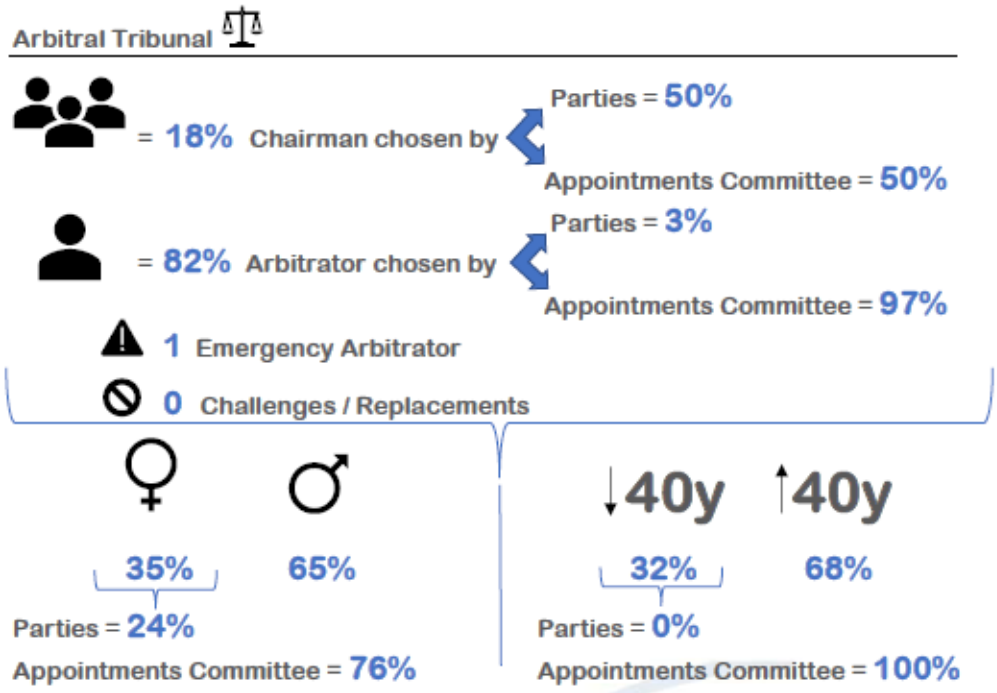
Place of the Arbitration

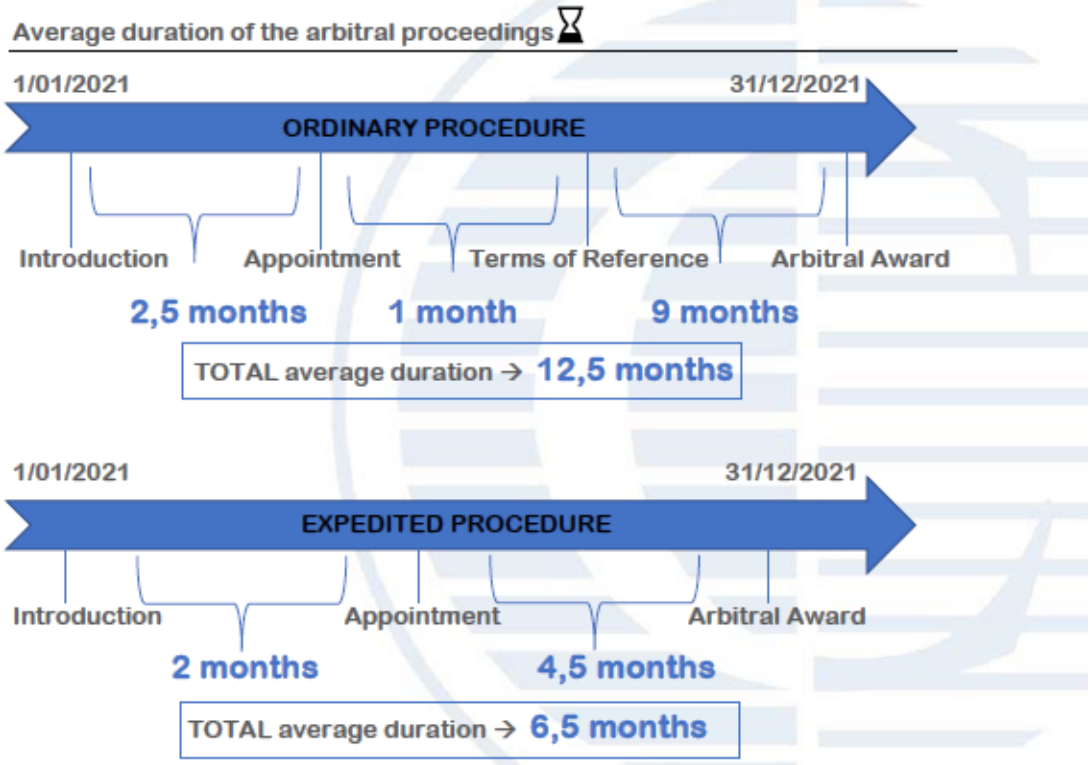
Nature of the dispute



Amount in dispute

< € 100.000,00 →	35%
€ 100.000,00 – € 200.000,00 →	5%
€ 200.000,00 – 500.000,00 →	16%
€ 500.000,00 – 1.000.000,00 →	11%
€ 1.000.000,00 – 10.000.000,00 →	22%
> € 10.000.000,00 →	11%


Arbitral Tribunal
= 18% Chairman chosen by
Parties = 50%
Appointments Committee = 50%
= 82% Arbitrator chosen by
Parties = 3%
Appointments Committee = 97%
1 Emergency Arbitrator
0 Challenges / Replacements
35%
65%
Parties = 24%
Appointments Committee = 76%
40y
40y
32%
68%
Parties = 0%
Appointments Committee = 100%


Average duration of the arbitral proceedings
1/01/2021
31/12/2021
ORDINARY PROCEDURE
Introduction
Appointment
Terms of Reference
Arbitral Award
2,5 months
1 month
9 months
TOTAL average duration → 12,5 months
1/01/2021
31/12/2021
EXPEDITED PROCEDURE
Introduction
Appointment
Arbitral Award
2 months
4,5 months
TOTAL average duration → 6,5 months

QUI SOMMES NOUS?

Le recours à l'arbitrage est de plus en plus souvent privilégié pour résoudre les différends. Celui-ci offre en effet un certain nombre d'avantages non négligeables : il est rapide, confidentiel et financièrement intéressant.

Le CEPANI, qui est le Centre belge d'arbitrage et de médiation, aide les parties à résoudre leurs différends commerciaux de manière sûre et efficace. Il s'engage à offrir aux parties en conflit le cadre juridique et administratif adéquat, afin d'assurer le meilleur traitement du litige.

Fondé en 1969, le CEPANI est aujourd'hui le principal centre d'arbitrage en Belgique. Il a étendu ses activités à d'autres formes de règlement des litiges. Situé au cœur de Bruxelles, qui accueille plusieurs institutions européennes ainsi que de nombreuses sociétés et organisations internationales, le CEPANI offre ses services dans un contexte national et international.

UNE DOUBLE MISSION

► Encadrer les procédures arbitrales et autres procédures qui appliquent les règlements du CEPANI

Le CEPANI désigne des arbitres, des médiateurs, des experts et des tiers indépendants. Il encadre le déroulement des procédures et offre des conseils pratiques ainsi qu'un soutien administratif. Outre l'arbitrage, le CEPANI gère également des procédures de médiation et de mini-trial et assure le suivi des conflits liés aux noms de domaine « .be ».

► Promouvoir l'arbitrage, la médiation et les autres formes de règlement alternatif des litiges

Le CEPANI organise régulièrement des conférences, des colloques, des séminaires ; il décerne un prix scientifique et publie des ouvrages sur le thème de l'arbitrage.

En matière de règlement alternatif des litiges, le CEPANI offre ses compétences uniques en Belgique.

L'ARBITRAGE, LE BON CHOIX POUR MON ENTREPRISE ?

LES AVANTAGES DE L'ARBITRAGE

En tant que mode alternatif de règlement des litiges, qui trouve une assise légale dans le Code judiciaire, l'arbitrage offre les **garanties** et la **sécurité juridique** habituelles, avec en prime une plus **grande flexibilité** et une **gestion efficace du temps**.

LES LITIGES POUVANT ÊTRE RESOLUS PAR L'ARBITRAGE

► Affaires financières, commerciales ou industrielles
► Conflits entre associés commerciaux
► Questions liées à une construction ou à la (co-)propriété immobilière
► Gestion de patrimoine, testaments et successions
► Conflits impliquant la responsabilité professionnelle
► Affaires bancaires et liées au droit des sociétés

LA PROCEDURE D'ARBITRAGE

Les parties peuvent soumettre leur différend à un tribunal arbitral, composé d'un ou de trois arbitres ou plus.

Après avoir examiné la demande et les arguments des parties, celui-ci rendra ensuite une décision contraignante, la « sentence arbitrale ».

L'arbitrage ne peut se dérouler qu'avec le consentement de toutes les parties impliquées. Ce consentement peut faire l'objet d'une clause incluse dans tout contrat au moment de sa signature ou d'un accord spécifique conclu après la naissance du litige.

ARBITRAGE INSTITUTIONNEL ET ARBITRAGE *AD HOC*

Les parties qui souhaitent voire résoudre leur conflit par l'arbitrage peuvent opter pour l'arbitrage *ad hoc*, ou pour une procédure supervisée par un centre d'arbitrage tel que le CEPANI.

Dans l'hypothèse d'un arbitrage ad hoc, la procédure est intégralement gérée par les parties ou les arbitres. La survenance de

difficultés peut en prolonger la durée. Les parties paient les frais et honoraires directement aux arbitres.

L'avantage de l'arbitrage institutionnel réside dans le fait que les parties peuvent se fonder sur le règlement du centre pour mener la procédure d'arbitrage. Il garantit une procédure équitable, sûre et rapide au terme de laquelle sera rendue une sentence arbitrale. Le règlement du CEPANI est concis et il offre un cadre contractuel souple aux parties.

UN ARBITRAGE CEPANI

Le CEPANI offre aux parties souhaitant entamer une procédure de résolution de conflit tout le support nécessaire. Il fournit aux parties un règlement – la dernière version du règlement d'arbitrage est entrée en vigueur le 1er juillet 2020 – offrant un cadre juridique clair et précis pour la conduite de la procédure. Le CEPANI n'exerce pas lui-même les fonctions d'arbitre, de médiateur ou de tiers indépendant.

Le Centre garantit la compétence et l'impartialité des arbitres, médiateurs et tiers indépendants, qu'il désigne en tenant compte des spécificités de chaque affaire qui lui est confiée. Les honoraires des arbitres et les frais dus au centre sont déterminés conformément à un barème dont le montant est calculé sur la base du montant des demandes.

Le Secrétariat du CEPANI veille à l'application correcte du règlement du CEPANI par les arbitres. Ce faisant, le Centre peut assurer le déroulement rapide et efficace de chaque procédure.

En termes de logistique, le CEPANI met à la disposition des parties :

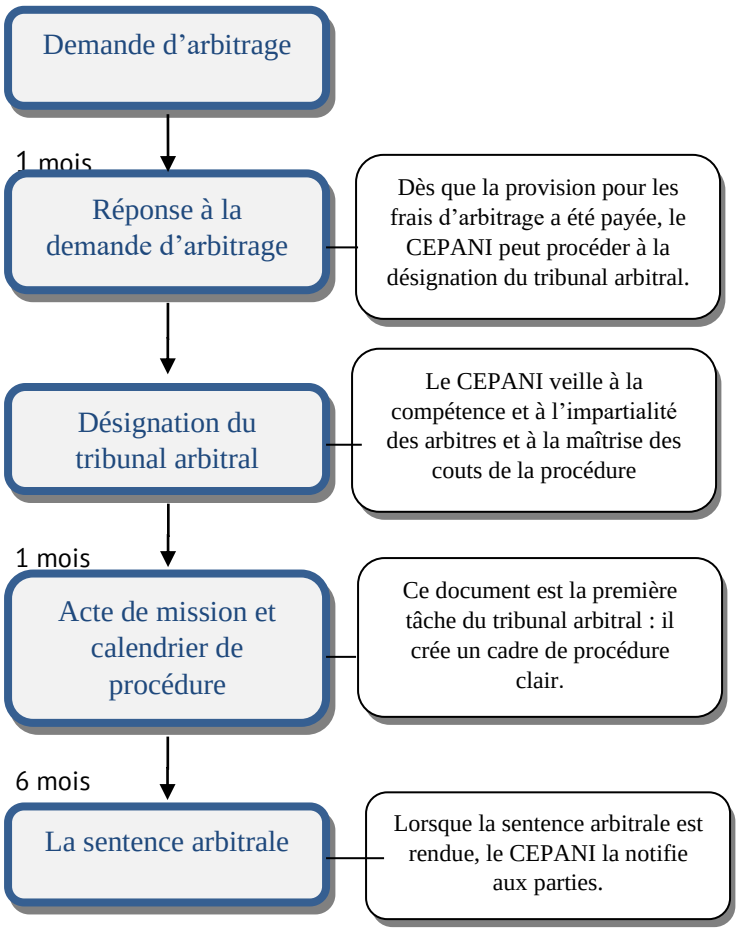
- Des salles de réunion / « breakout rooms »
- Un service de restauration
- Un soutien IT
- Le Wi-Fi, un service de photocopie, d'impression, de fax …

Le rôle du CEPANI est de créer un cadre légal et administratif sûr et de garantir une procédure confidentielle, impartiale et équitable.

Les parties peuvent insérer une clause d'arbitrage dans leur contrat ou convenir d'un arbitrage après la naissance d'un conflit. Les parties qui souhaitent faire référence au règlement d'arbitrage du CEPANI sont invitées à insérer dans leurs contrats la clause type suivante:

"Tous différends découlant du présent contrat ou en relation avec celui-ci seront tranchés définitivement suivant le règlement d'arbitrage du CEPANI par un ou plusieurs arbitres nommés conformément à ce règlement."

Aperçu de la procédure



Dans le cas d'un litige d'importance pécuniaire limitée, le CEPANI propose une procédure simplifiée. Sont visés les conflits pour lesquels le montant de la demande principale et de l'éventuelle demande reconventionnelle ne dépassent pas 100.000 EUR. Si, au cours de la procédure, le montant total des demandes principale et reconventionnelle vient à excéder ce montant, cette procédure reste applicable, sauf si les parties en conviennent autrement.

Pour les litiges d'importance pécuniaire limitée, le CEPANI propose une procédure moins coûteuse et plus rapide :

- une procédure accélérée est d'application pour les litiges dont l'enjeu est inférieur à 100.000 EUR
- procédure simplifiée /pas d'Acte de Mission
- délais plus courts

ANDERE METHODEN VAN GESCHILLENBESLECHTING

Mediatie

Mediatie is een alternatieve methode van geschillenbeslechting waarbij partijen een derde persoon (de bemiddelaar) verzoeken hen te helpen om een minnelijke regeling te vinden voor hun geschil dat voortvloeit uit eender welke contractuele of andere juridische relatie.

Mini-trial

Mini-trial is de perfecte procedurevorm voor iedere ondernemer die een geschil zo snel en efficiënt mogelijk wil oplossen zodat op korte termijn de normale handelsrelaties zouden kunnen worden hervat. In een mini-trial duidt iedere partij een hooggeplaatste verantwoordelijke aan als bijzitter in het mini-trialcomité. Deze vertegenwoordiger moet voldoende bevoegdheid hebben om de partij te kunnen binden wanneer een minnelijke regeling wordt bereikt. CEPANI duidt de voorzitter van het comité aan.

Technisch deskundigenonderzoek

Indien partijen tijdens een CEPANI-procedure met eventuele technische moeilijkheden worden geconfronteerd, kunnen zij beroep doen op het CEPANI-reglement voor technisch deskundigenonderzoek. Het technisch deskundigenonderzoek is ook mogelijk buiten een CEPANI procedure.

Een dergelijk deskundigenonderzoek kan een minnelijke regeling tussen partijen faciliteren of waardevolle gegevens opleveren. Indien nodig, kunnen partijen de resultaten van het deskundigenonderzoek in latere juridische procedures of in een arbitrage aanwenden. Tenzij anders overeengekomen, zijn de resultaten en conclusies van de expert bindend.

Aanpassing van overeenkomsten

De omstandigheden waarin een overeenkomst wordt gesloten, kunnen mettertijd veranderen. Dan kan de noodzaak ontstaan om de overeenkomst te herzien en waar nodig aan te passen aan de veranderde omstandigheden. Ook voor die procedure biedt CEPANI de juiste ondersteuning. Bij het opstarten van een procedure tot aanpassing van overeenkomsten benoemt CEPANI een onafhankelijke derde beslisser, die ofwel bepaalde aanbevelingen zal opstellen voor de betrokken partijen, ofwel, indien beide partijen daarmee op voorhand instemmen, een regel zal formuleren die hen definitief bindt.

NOG STEEDS NIET OVERTUIGD?

U beheert dagelijks uw onderneming met alle daarbij horende strategische, operationele en commerciële uitdagingen. Dit vormt een veeleisende en uitdagende opdracht. Er kan zich ten allen tijde een geschil voordoen met uw cliënten, leveranciers of vennoten. Het is in uw belang dat een dergelijk geschil **snel** en **efficiënt** kan worden behandeld.

Hebt u al gedacht aan arbitrage?

Een beslechting van een conflict via arbitrage laat toe om zeer snel **een beslissing te bekomen wanneer de situatie dringend is**. Uw geschil wordt op definitieve wijze behandeld **door competente en ervaren arbiters**. U kan zelfs arbiters kiezen die gespecialiseerd zijn in de sector waarin u actief bent of in de materie van het betrokken geschil.

De arbiters zijn geheel onafhankelijk en beslissen volledig neutraal. De zaken kunnen in om het even welke taal behandeld worden of in om het even welk land gekozen door de partijen. **De vertrouwelijkheid is gegarandeerd** – uw bedrijfsgeheimen en know-how zijn beschermd.

De beslissingen van de arbiters hebben **dezelfde waarde als beslissingen van de rechtbanken.** Zij beslechten daadwerkelijk de geschillen en laten u toe om beslag te leggen op de goederen van uw schuldenaar in meer dan 150 landen ter wereld.

Arbitrage biedt u een alternatieve manier van geschillenbeslechting aan met een grote toegevoegde waarde.

CEPANI biedt u tevens bemiddelings- en verzoeningsdiensten aan, evenals andere manieren van alternatieve geschillenbeslechting die steeds de voorkeur geven aan een minnelijke oplossing.

HET ONDERZOEK NAAR EN DE PROMOTIE VAN ARBITRAGE – WETENSCHAPPELIJKE ACTIVITEITEN VAN CEPANI

Net zoals 2020, vormde 2021 een jaar vol hoogwaardige wetenschappelijke evenementen.

CEPANI

ACTIVITEITENKALENDER

Hierna volgt een opsomming van de evenementen waaraan CEPANI en CEPANI40 actief heeft deelgenomen en die door CEPANI werden georganiseerd doorheen het jaar 2021:

CEPANI40 WEBINAR "MEET THE EXPERTS"

9 FEBRUARY 2021, BRUSSELS

The eagerly awaited "Meet the Experts" webinar, organized by CEPANI40 and moderated by its co-presidents Sophie Goldman (Tossens Goldman Gonne) and Sigrid Van Rompaey (Matray, Matray & Hallet), offered young (and less young) practitioners the chance to ask all questions they always wanted to ask (but never dared to!) to a panel composed of three renowned experts: Françoise Lefèvre (Linklaters), Jean-François Tossens (Tossens Goldman Gonne) and Dirk De Meulemeester (DMDB Law). The many questions submitted prior to the conference were grouped into 6 categories, namely (i) representation and non-participation, (ii) proceedings, (iii) award and initiatives of the arbitral tribunal, (iv) ADR and negotiations, (v) the dynamic within the arbitral tribunal and (vi) appointments. Due to the success of the webinar, which raised a significant number of questions answered by the experts during more than two hours, only a couple of them will be reported here.

A delicate situation frequently encountered : what to do if the respondent does not participate to the arbitration?

Dirk De Meulemeester: If we consider the hypothesis of a respondent in total default, meaning that that particular party is not participating in whatever way: there is no answer to the request, no participation to the case management conference, etc. There are 3 elements to be taken into consideration. The first one is the due process, meaning that as an arbitrator, you have to keep the inactive respondent in the loop of whatever potential communication you make with the parties. In the award, you have to identify every single effort you made to contact and allow the respondent to participate in whatever way to the arbitral proceedings. The second one is the absence of ficta confessio in international arbitration. If you are involved in an institutional arbitration, you will have to look at what is provided by the rules of that institution and obviously also to what is provided by the lex arbitri. The fact that there is no respondent disputing the claim does not mean that you can accept the particular claim brought to the tribunal. You have to analyse the merits submitted by the claim and that is

for sure quite a difficult exercise. The third element is to know to what extent you can be the devil advocate. It is linked to the jura novit curia principle. If you have to make an assessment of your own on the merits of the case, how far can you go? Can you make your own independent research? What do you do if you have the impression that the claim is time-barred? Although there is no certain answer, caution recommends that you remain within the boundaries of the claim submitted to you, e.g. by asking your questions to the claimant.

How to react if, as a young arbitrator, you are contacted by phone by the lawyer of one party? Do you notify other parties of this telephone call?

Jean-François Tossens: You should remain polite. There is no need to immediately hang up on the lawyer. Jean-François explained that he usually allows the lawyer to explain the reason of the call. For example, a case encountered was a lawyer saying he was going to send his e-mail in one hour but wanted to be sure that the regular mail could be delivered two days later. Due to the content of the question which was purely technical, there shouldn't be any issue answering to it. However, the ethics of arbitrators clearly prevent her or him to enter in whatever discussion relating to the case, even if only related to procedural aspects (e.g. the calendar). In that case, the reaction should consists of immediately interrupting the call and asking the lawyer to send an e-mail to all parties to allow the request to be discussed according to the contradictory arbitral procedure.

Françoise Lefèvre: Françoise shared a personal experience to highlight the risk created by a contact with the lawyer of one party. She has been once contacted by a lawyer who started to discuss the merits of the case. Françoise refused the discussion and hang up quickly after politely declining the discussion. Afterwards, during the procedure, that lawyer pretended that the discussion lasted for long and dealt with the merits of the case. Hopefully, Françoise was able to rely on the data of the telephone operator which showed that the duration of the call was in reality very short. However, as

a take out of this experience, Françoise recommends to notify the other parties of any telephone contact in order to avoid any doubt or incident caused by a party acting in bad faith.

Dirk De Meulemeester: Dirk states that in his practice, he would always notify any call to all parties, whatever the duration of it. A similar issue is the one where an e-mail is only addressed to the arbitrator. Dirk recommends to respond to these e-mails by copying anyone concerned and reminding that it is not accepted to address the tribunal unilaterally.

What makes, according to you, an excellent young arbitrator? (Françoise was requested to answer from the perspective of a counsel, Jean-François from the perspective of a co-arbitrator and Dirk from the perspective of an institution.)

Françoise Lefèvre: The key to be an excellent young arbitrator is the work. Even if it sounds obvious and moralizing, an arbitrator who works is the one reading in details, carefully analysing the exhibits. She says that from the counsel perspective, it is a pleasure to see that the arbitrator has read and marked the submissions, used post-it notes on the exhibits etc. To the contrary, what should be avoided is, as a young arbitrator, to limit yourself having a "helicopter view" of the case at hand. The second very important characteristic is the independence towards the party which has nominated you as an arbitrator.

Jean-François Tossens: From the co-arbitrator perspective, Jean-François recommends to young arbitrators to defend their view, but not being arrogant. He points out that the young arbitrator should not hesitate to defend his own opinion, even though the co-arbitrators have a more senior profile. The second element is to be very professional. Being perceived as professional is the key for a young arbitrator to get the chance to have further appointments.

Dirk De Meulemeester: Dirk recommends to have self-confidence, to dare to take decisions, to dare to draw the line when it has to be drawn. However, that does not mean that the young arbitrator should act as a so-called "little Napoleon".

The final intervention of the webinar was the, as ever topical, issue of diversity in arbitration proceedings, raised by Françoise. She shared her personal experience as a young arbitrator and explained the difficulty as a young woman to be considered seriously

by tribunals composed mostly of old men. She hoped to seem totally outdated when saying that but feared that it is still today a reality faced by young female arbitrators… Her final word supporting diversity was probably the best one to close the present contribution: Hang on in there!

BY Kevin XHEBEXHIA

Associate, Linklaters

WEBINARS "MOINS D'INCERTITUDE DANS VOS CONTRATS INTERNATIONAUX / MINDER ONZEKERHEID IN UW INTERNATIONALE CONTRACTEN

8 & 15 MARCH 2021, BRUSSELS

I. Introduction

A l'heure actuelle, les entreprises belges et étrangères doivent faire face à de nombreux problèmes qu'elles n'auraient pas pu imaginer il y a seulement quelques années. De la pandémie de Covid-19 à la cybersécurité, en passant par les conséquences du Brexit, les entreprises doivent s'adapter efficacement et rapidement à de nombreux bouleversements. A cet égard, force est de constater que le rôle du droit est devenu crucial en ces temps difficiles. En effet, un contrat bien rédigé peut offrir aux entreprises des outils de résilience efficace. En outre, l'organisation d'une veille et d'une analyse juridique de qualité est, aujourd'hui, de plus en plus importante pour soutenir l'activité des entreprises. Face à ce constat, la Fédération des entreprises de Belgique / Verbond van Belgische Ondernemingen a organisé les 8 et 15 mars derniers un Webinar très instructif réunissant des experts en matière contractuelle afin de proposer quelques pistes de réflexion. Ce Webinar, organisé sur deux temps de midi, était présidé par Mr. Philippe Lambrechts, administrateur – secrétaire général et executive manager auprès de la FEB, et Mr. Marc Beyens, président de l'Institut des juristes d'entreprise, que nous remercions et félicitons vivement pour leur remarquable prestation.

II. La gestion du risque « cyber » - relations contractuelles et assurance

Le premier thème abordé lors de ce Webinar portait sur la cybersécurité, un des plus grands défis des entreprises modernes. Ce premier sujet nous était présenté par Me. Marc Gouden, associé au sein du cabinet d'avocats Philippe & partners. Lors de cette présentation, Me Gouden a centré son propos sur la question du risque cyber (également appelé risque IT) analysé sous l'angle des relations contractuelles et des assurances. Ce risque cyber doit, selon Me Gouden, toujours être gardé à l'esprit lors de la rédaction de contrats commerciaux. Pour évaluer ce risque

lors de cette rédaction, une entreprise devra ainsi, notamment, se poser les questions suivantes: quel est le risque pour ses données ? quel est le risque pour ses systèmes ? quel est le risque au sein de son entreprise ? quel est le risque au sein de l'entreprise de ses cocontractants ? Sur la base des réponses obtenues, il conviendra de déterminer si l'entreprise a besoin, ou non, d'une assurance spécifique supplémentaire, ou d'un renforcement de ses assurances existantes. Le cas échéant, il pourrait également être exigé, lors de la conclusion d'une convention, que son co-contractant conclue une assurance spécifique. En effet, les problèmes d'hacking sont aujourd'hui de plus en plus fréquents et se produisent à tous les niveaux. Les hackeurs ne visent plus uniquement les grandes entreprises de plusieurs milliers d'employés, mais également les PME. Face à ce constat, Me Gouden a très efficacement listé trois recommandations à destination de toutes les entreprises. Tout d'abord, il est recommandé que le ou les juristes parcourent, avec le ou les informaticiens en charge de la gestion des systèmes informatiques de l'entreprise, tous les aspects IT de ces systèmes informatiques. De la sorte, les juristes pourront négocier les contrats de leurs entreprises en parfaite connaissance de cause, en étant au courant du processus et en étant capable d'appréhender les points sensibles. Ensuite, il est également opportun d'établir une Due Diligence des systèmes informatiques de l'entreprise. L'importance d'une telle Due Diligence est aujourd'hui accrue : la pandémie de Covid-19 et l'obligation soudaine de télétravail à imposer aux entreprises de passer très (trop) rapidement vers un quotidien quasi uniquement digital. Cette transition rapide risque d'avoir causé certaines brèches dans leur solidité. Mettre en place une Due Diligence est donc recommandé. Enfin, il sera opportun de revoir l'ensemble des contrats de l'entreprise afin de vérifier qui de l'entreprise ou du cocontractant supporte la responsabilité en cas d'hacking, et si une telle responsabilité pourrait être couverte dans certains circonstances.

III. Les transferts de données vers des Etats tiers après Schrems II

Après l'excellent exposé de Me. Marc Gouden, le Professeur Patrick Van Eecke, professeur à l'université d'Anvers et associé au sein du cabinet d'avocats Cooley LLP, a pris la parole afin de dresser le topo et donner quelques conseils de bonnes pratiques à mettre en œuvre suite à l'arrêt Schrems II, prononcé le

16 juillet 2020 par la Cour de justice de l'Union européenne. Par cet arrêt Schrems II, la Cour de justice a invalidé le système de « Privacy Shield » qui permettait le transfert de données personnelles vers des Etats hors Union européenne, en ce compris les Etats-Unis. Depuis lors, les responsables du traitement des données personnelles, à savoir les entreprises récoltant et utilisant ces données, doivent repenser les transferts de ces données vers des Etats tiers, ainsi que leur encadrement, afin que ces transferts respectent les règles en matière de protection des données personnelles et, notamment, le GDPR. Comme l'a très bien exposé le Professeur Van Eecke, l'arrêt Schrems II de la Cour de justice a pour conséquence que des données personnelles ne peuvent plus être exportées vers des Etats tiers, à moins que (i) l'Etat importateur n'offre une protection de ces données équivalente au régime de protection européen ou (ii) l'entreprise exportatrice et l'entreprise importatrice comblent l'écart en mettant en œuvre des mesures complémentaires. Ceci implique qu'il appartient dès lors aux entreprises situées dans l'Union européenne, d'une part, de vérifier elles-mêmes l'étendue de la protection offerte dans des Etats tiers et, d'autre part, de mettre en place des mesures complémentaires. A ce propos, le Professeur Van Eecke a présenté une méthodologie très didactique, pensée par le Conseil européen de la protection des données. Cette méthodologie peut être trouvée ici. En effet, le non-respect des dispositions du GDPR peut avoir des conséquences financières et judiciaires importantes. Il importe donc de s'y conformer.

BY Claire LARUE

Senior Associate, Loyens & Loeff

COVID-19, Brexit and cybersecurity issues, to name a few, are causing turmoil among economic actors across the globe. Resilience seems to be the most important asset to navigate through these difficult waters. But, as was apparent from the recent webinar series at the initiative of the Federation of Belgian Enterprises and the Belgian Institute of In-House Counsel, hosted in conjunction with CEPANI, a well-drafted contract can

already provide effective tools to avoid unpleasant situations while doing business in an international setting.

On 15 March 2021, in the second leg of the webinar series on “Dealing with uncertainty in international contracts”, two excellent speakers elaborated on the available tools to make a contract effective, what to keep in mind while drafting the contract and how to react when things turn for the worst.

Denis Philippe (Philippe & Partners) focused on clauses that allow parties to adapt a contract to changing circumstances; so-called hardship and force majeure clauses. The consequences of force majeure are a hotly debated topic these days. If the COVID crisis makes the performance of a contract impossible, for example because it is impossible to sell a product due to the closure of the production plant, who should bear the consequences? Should the price be refunded? What if the seller has incurred costs? Can the seller collect those costs?

Mr. Philippe explained how to anticipate unpredictable circumstances as much as possible and elaborated on the opportunities that hardship or force majeure clauses offer when the balance of the contract has been changed due to unforeseeable events.

Vanessa Foncke (Jones Day) discussed arbitration and ADR as more efficient and faster methods of dispute resolution in cases of uncertainty, especially when contracting parties themselves are no longer able to resolve an arising conflict and need to involve a third party. The possibility of adapting certain contracts to unforeseen circumstances is the aim of the CEPANI Rules on the Adaptation of Contracts, which is particularly well suited for the current circumstances. Other advantages of arbitration and mediation as tools to prevent and manage conflicts, such as higher enforceability and greater confidentiality, were put into perspective.

Ms. Foncke highlighted certain focal points that need to be taken into account when drafting arbitration agreements, for instance the different consequences when opting between ad hoc and institutional arbitration, and finished by setting out the possibilities that arbitration and ADR offer when it comes to changing circumstances.

BY Aster GENTILS

Associate, Jones Day

UNCITRAL WORKING GROUP II NEW YORK

22-26 MARCH 2021, VIRTUAL

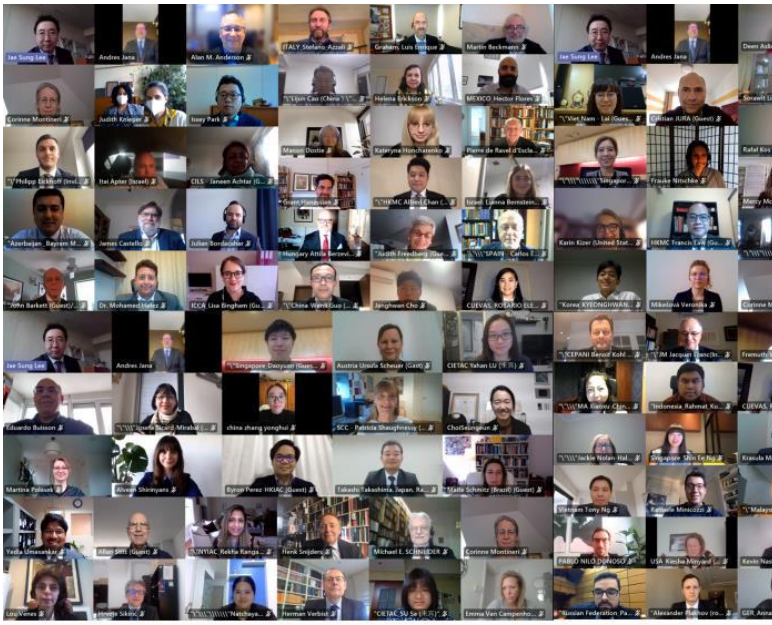
The UNCITRAL Working Group II on Arbitration and Conciliation / Dispute Settlement met for its 73rd session from 22 to 26 March 2021. Originally planned for early February, the meeting was moved to March and eventually had to take place online due to the Covid 19-restrictions that continue to be in place. This did not withhold delegates from countries and observers from participating in the Working Group's activities. CEPANI, represented by its President Benoît Kohl, Secretary-General Secretariat had been requested to update the draft provisions on expedited arbitration based on the deliberations, to prepare draft texts that could be included in an explanatory note and to prepare a model arbitration clause for ad hoc expedited arbitration.

During the formal sessions, the Working Group focused in particular on finetuning the draft expedited arbitration provisions – which will in principle take the form of an appendix to the UNCITRAL Arbitration Rules – and addressing the outstanding issues identified by the Secretariat in its working document. Given the limitations stemming from online meetings of this size, informal consultations were held in late February and all participants were invited to comment beforehand in writing. CEPANI answered this call and submitted such written comments on 15 February 2021. At the close of the deliberation on expedited arbitration, the UNCITRAL Secretariat was requested to prepare a revised version of the expedited arbitration provisions and the model clause based on the deliberations during the session. For the explanatory note, Emma Van Campenhoudt, Vanessa Foncke, Maxime Berlingin and Maarten Draye also participated in the session.

As previously reported, the Working Group II is currently working on issues related to expedited arbitration under the leadership of Mr. Andrés Jana (Chile, Chair) and Mr. Takashi Takashima (Japan, Rapporteur) with support from the UNCITRAL Secretariat. The Working Group is in particular preparing a set of ad hoc expedited arbitration rules. At the end of 72nd Session, the UNCITRAL

participants were encouraged to submit comments in writing. The UNCITRAL Secretariat will also prepare a revised version based on all the comments received. The goal is to present these drafts to the UNCITRAL Commission at its upcoming session this summer, and to finalize the draft, if possible, during the 74th session. Following its deliberations on expedited arbitration, on the last day, the Working Group also revised on the draft UNCITRAL Mediation Rules and accompanying documents. The UNCITRAL Secretariat will prepare amended drafts in light of these comments.

Finally, the UNCITRAL Secretariat informed the Working Group that future work of the Group will likely include issues of dispute resolution in a digital economy. It is worth noting that CEPANI had already submitted a proposal to the UNCITRAL Secretariat on digital arbitration on 2 February 2021.



BY Maarten DRAYE

Partner, Hanotiau & van den Berg

CEPANI 40 WEBINAR : EMERGING TRENDS IN ARBITRATION : DECARBONISATION AND DIVERSITY WEBINAR

6 MAY 2021, VIRTUAL

Pre-2020, decarbonisation and diversity were already emerging trends within international arbitration. Yet last year travel bans, enforced virtual hearings and a heightened global awareness of issues of diversity renewed the focus on these topics.

To discuss the ways in which these trends will shape arbitration in the years to come, CEPANI40 joined with Osborne Clarke to host a virtual conference on 6 May 2021. The event comprised two panel discussions, one on decarbonisation and another on diversity, moderated by UK-based Osborne Clarke partners Greg Fullelove and Jane Park-Weir. CEPANI40 co-chairs Sophie Goldman (Partner, Tossens Goldman Gonne) and Sigrid Van Rompaey (Partner, Matray, Matray & Hallet) opened and closed the event and Marie Canivet (Partner, Osborne Clarke Belgium) delivered the keynote address.

Danielle Griffiths (Senior Associate, Osborne Clarke UK) started the first panel by reminding the audience of the importance of decarbonisation to arbitration. Thanks to various factors including the European Green Deal, a Biden presidency and the post-Covid drive to 'build back better', a reduced carbon footprint is now a key goal for many governments and organisations. The result: over the next 30 years, businesses across sectors will have to engage with new regulation, technological innovation and alternative business models. The legal and commercial risk involved will provide fertile ground for disputes to be arbitrated.

Alongside Ms Griffiths was David Zygas (Senior Associate, Osborne Clarke Belgium). He discussed the types of disputes decarbonisation may lead to. Whilst there are currently many renewables arbitrations, comprising both investor-treaty and international commercial disputes, the multi-sector reach of decarbonisation will generate an influx of disputes across a range of subjects. On the other hand, countries falling behind on their net zero targets agreed under

the Paris Agreement may be required to take ambitious action. Companies affected by such action – for example, by the early closure of a coal plant – may seek compensation from the relevant country. The prevalence of this type of dispute is therefore also likely to increase.

Christine Falcicchio (Founding Principal, Sopra Legal) then spoke about the other aspect to decarbonisation: the climate footprint of arbitration itself. Ms Falcicchio spoke about the 'Green Pledge', founded by arbitrator Lucy Greenwood, and the need for increased use of online pleadings and virtual hearings to limit the environmental impact of arbitration. The success of virtual hearings throughout the pandemic in particular offers evidence of the potential for greener, more sustainable arbitrations.

On diversity, the panel began by explaining the reasons that greater diversity in tribunals and external counsel is needed. Gaëlle Filhol (Partner, Betto Perben Pradel Filhol) presented evidence that diverse groups produce better outcomes. Ravi Aswani (Barrister, 36 Stone) raised the fact that, where a natural resource of a developing country is the subject of the dispute, there may be questions about the legitimacy of a tribunal comprised entirely of persons who bear no connection to that country. Patrick Baeten (General Counsel, Engie) highlighted that currently there is very little diversity, particularly in tribunals.

Ms Filhol then considered the obstacles to greater diversity in arbitration, such as the tendency of clients and counsel to seek only arbitrators with whom they are familiar and/or who have prior experience. This is a common practice, even though, as Mr Aswani explained, this 'safe bet syndrome' is often based on perception rather than reality. Mr Baeten provided insight into the constraints faced by in-house counsel. For instance, if the list of arbitrators proposed by external counsel is not diverse, in-house counsel have little room to pick a diverse candidate.

Ms Park-Weir concluded the discussion by asking the panel what steps the industry can take to improve diversity. Mr Aswani pointed out the benefits of virtual conferences, which require neither time away from work or caring responsibilities nor long and potentially expensive flights and accommodation. Mr Baeten emphasised the need for a pipeline of a diverse group of young arbitrators and lawyers, as recommended in the International Council for Commercial Arbitration Report No. 8. Ms Filhol recommended mentoring, spreading

awareness and the importance of creating an inclusive culture at the top.

The conference was another online success for CEPANI40 and a timely reminder of two key changes to expect over the coming years.

BY Zoe HUGHES-NIND

Trainee Solicitor, Osbrone Clarcke

ICC YAF WEBINAR : RED BETWEEN THE LINES. THE UNWRITTEN RULES OF A CAREER IN INTERNATIONAL ARBITRATION : THE JUNIOR YEARS WEBINAR

14 MAY 2021, VIRTUAL

The beginning of a career in any field is seldom straightforward or intuitive. A career in international arbitration is no exception. In addition to the steps one has to take in order to enter this highly competitive field – study in the right programs, get good internships, work hard, network in the right places at the right time, keep learning – there are additional layers of complexity due to its multicultural dimension, the high pressure that comes with the job and the often clashing demands on one's time.

The ICC YAF webinar "Read Between the Lines. The Unwritten Rules of a Career in International Arbitration: The Junior Years", which took place on 14 May 2021, was the first webinar in a series of events focused on the soft skills arbitration practitioners need in order to build a strong career, with an emphasis on practical real-life situations and the strategic approaches one could have in order to meet various challenges.

The webinar was kindly hosted by Jones Day and was very well-attended with more than 250 participants joining live from all continents. In an incredible show of solidarity, the following international associations lent their support to this ICC YAF event: CEPANI40, ArbitralWomen, Club Español del Arbitraje, ACICA45, PT-VYAP Portugal Very Young Arbitration Practitioners, MAD VYAP - Madrid Very Young Arbitration Practitioners, Paris Baby Arbitration, London VYAP - London Very Young Arbitration Practitioners and YRAP - Young Romanian Arbitration Practitioners.

Anna Masser (Partner, Allen & Overy, Frankfurt), Alya Ladjimi (Manager, ICC International Centre for ADR, Paris), Prof. Dr. Mohamed Abdel Wahab (Partner, Zulficar & Partners, Cairo) and Emilio Paolo Villano (Partner, ELEXI, Brussels-Turin) took turns answering the participants' questions about the unwritten rules of the junior years in international arbitration.

The below is a small selection of the answers given to questions raised by the participants who joined the webinar:

(1) The speakers agreed that LL.M. programs are not an absolute necessity, but can be a useful complement in a CV. A U.S. LL.M. is not

a necessity and students should also explore educational programs in developing markets, such as in South-East Asia, and Australia, which offer valuable programs for competitive tuition fees.

(2) Depending on the region, law firms may view a lawyer leaving the firm in order to pursue an LL.M. differently. In some jurisdictions, this is perceived as normal, while in others, firms prefer to hire someone after their LL.M. As in many other matters, prior research is key.

(3) A Ph.D. program will not necessarily confer an advantage in terms of employability. Here too, there are important cultural differences which need to be explored.

(4) A good CV is important, but not enough when applying to law firms. Employers will need to see that a candidate's trajectory shows passion for the field, sincerity and for some, a certain degree of humility is important. A bespoke application is also key. A candidate's personal skills and likeability play a major role in any interview.

(5) The fact that a candidate does not come from a traditional arbitration hub jurisdiction is no longer a disadvantage, as the international arbitration market has become larger, more global and more diverse, with disappearing territorial barriers. A candidate should research the work done by firms and find those firms that may be focusing on his/her jurisdiction(s) of interest and/or desired specialization.

(6) Juniors can express an interest in being assigned on particular cases, but they first need to impress through quality work, a good attitude and their ability to fit in a team.

(7) If juniors are overworked, they should be able to bring this issue to the attention of the supervising partner in a professional way. This could even be considered a must since it risks jeopardizing the entire team's deliverables.

(8) In order to build a professional network outside of the firm, juniors should carefully consider the firm's policies and sign up to international organizations for young practitioners. To get the most value from this network, they should get involved in the organization's activities, gradually build relationships from there and, with time, run for leadership positions.

(9) Juniors should keep an open mind when representing a variety of clients. All clients deserve good representation as part of their right to be heard. Moreover, due to the expansion of the arbitration market, there are now opportunities in fields that were

previously outside of the remit of arbitration, such as climate change.

The event was organized and moderated by Iuliana Iancu (Partner, Hanotiau & van den Berg, Brussels), Emily Hay (Counsel, Hanotiau & van den Berg, Brussels) and Vanessa Foncke (Partner, Jones Day, Brussels).

Stay tuned for the second event in this series, focused on mid-level associates (3 to 7 years post-qualification experience)!

BY Iuliana IANCU

Partner, Hanotiau & van den Berg &

Emily HAY

Counsel, Hanotiau & van den Berg &

Vanessa FONCKE

Partner, Jonesday

CEPANI-AIA WEBINAR : "DOUBLE-HATTING – DO WE NEED A VACCINE ?"

18 MAY 2021, VIRTUAL

Double-hatting has been a debated topic in the past few years and has recently been brought even more into the spotlight with the release of the first and second drafts of the ICSID and UNCITRAL Code of Conduct for Adjudicators in International Investment Disputes. Double-hatting occurs when an individual acts both as arbitrator and counsel in cases that involve the same or similar legal issues. Article 4 of the most recent draft code of conduct bars arbitrators from concurrently acting as counsel or expert witness in another investment case, unless the parties agree otherwise. The article further proposes a possible limitation on the aforementioned prohibition to cases of the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity. With regards to double-hatting, three issues arise. Firstly, it can give rise to actual or an appearance of bias. Secondly, it might cause a conflict of interest. The third and final issue does not arise out of double-hatting itself, but rather out of the limitation or prohibition of double-hatting and consists of the risk that this might negatively impact diversity.

On 18 May 2021, CEPANI and AIA (Associazione Italiana per l'Arbitrato) held a joint webinar on this topic. Once the scene was set by Benoît Kohl (President, CEPANI) and Andrea Carlevaris (President, AIA)002C the floor was given to the moderators: Maria Beatrice Deli and Dirk De Meulemeester. They divided the topic into three parts which reflected the issues that arise out of double-hatting. The parts were discussed one by one by Bernard Hanotiau (Hanotiau & van den Berg), Isabelle Michou (Quinn Emanuel Urquhart & Sullivan) and Mélanie van Leeuwen (Derains & Gharavi).

Issue 1: Bias

Bernard Hanotiau stated that the pool of arbitrators for international investment cases consists only of a small group of people, which is caused by the distinct nature of international investment law. Moreover, where commercial arbitration is mainly factual, investment arbitration is mainly legal and very complex. In recent years there has

been an enormous increase in international investment cases, which has led to an increase of lawyers acting both as counsel and as arbitrator in investment cases. This raises ethical problems, especially with regards to the independence and impartiality of arbitrators. He then gave the example of a counsel who invokes a certain interpretation of a Most-Favoured-Nation Clause in an investment arbitration. At the same time, the person acting as counsel is also sitting as an arbitrator in an investment case where one of the issues is the interpretation of a Most-Favoured-Nation Clause. In this case, there might be a risk that he or she would try to defend while acting as an arbitrator, an interpretation in line with the one that he or she is submitting as counsel. This can give rise to an appearance of bias in the eyes of a reasonable third person. Mr. Hanotiau then went on to say that double-hatting might give rise to challenges from the parties or that this might put the arbitrator's personal liability at risk for fraudulent conduct, in parallel to an action to set aside the award. He also questioned whether double-hatting adversely affects the reputation of ISDS. The issues are still much debated and so far doublehatting is not yet prohibited unless it is expressly stated so in the relevant treaty or in the rules of the relevant institution, which is for example the case under CETA and in the new ICSID and UNCITRAL draft code of conduct. The current policy in a number of law firms seems to be not to act simultaneously as counsel and arbitrator in investment cases.

Isabelle Michou confirmed that double-hatting is specific to ISDS as, because of the technical nature of ISDS, the potential for issue conflict is huge. This problem does not arise in commercial arbitration, which is reflected by the fact that the draft code of conduct applies only to ISDS.

Mélanie van Leeuwen agreed that it is an issue specific to ISDS, as in investor-state disputes there are mostly the same or similar standards are at stake. The question is whether limitations are the cure as it limits the potential pool of arbitrators.ES.

Issue 2: Conflict of Interest

Isabelle Michou focused on the inherent presence of a conflict of interest in double hatting. In the decision of the ICSID annulment committee in Eiser v. Spain, the committee noted that there are multiple ways in which a conflict of interest can arise when there is double hatting, even when the disputes are between different parties. This dictates caution. Double-hatting gives rise to

two specific concerns: conflict of interest and issue conflicts. The former relates to the relationship between arbitrators and counsel, which may give rise to actual or perceived bias. To tackle this issue, the Court of Arbitration for Sports changed its regulation in 2009 to prohibit double-hatting, because they considered that parties were prone to believe that arbitrators would favour counsel before which they were likely to appear in other cases. The same concern was raised with regards to ISDS. Issue conflicts concern the relationship of the arbitrator with a certain issue and the likelihood that an arbitrator will approach an issue with an open mind. This has given rise to challenges of arbitrators and annulment procedures. Attempts to address double-hatting concerns have been made in international treaties and institutional rules. Ms. Michou saw three ways in which the ICSID and UNCITRAL draft code of conduct deals with double-hatting. The first possibility occurs when there is party agreement. In this case, there is no prohibition. The consent of the parties must however be informed, which requires disclosure by the arbitrator. The second option is a full prohibition of concurrent double hatting, which is the default absent party consent to the contrary. The third and final option is a limited prohibition on concurrent double-hatting, limited to cases with the same factual background or with at least one of the same parties or their subsidiary, affiliate or parent entity. This final option is intended to allow newcomers to enter the arbitrator pool for investment disputes.

Bernard Hanotiau commented that in his view, double-hatting should be globally prohibited. There is however still the question of how far doublehatting goes. In the draft code of conduct, it is stated that double-hatting extends to expert work. Mr. Hanotiau stated that while he would not appear as an expert in an investment arbitration case, it should not be prohibited to act as an expert or as counsel in enforcement proceedings.

Mélanie van Leeuwen does not believe that a conflict-free arbitration world can be achieved. Rules and regulations cannot provide for the entirety of practice because practice comes up where the rules do not regulate. She also stated that we must be wary of rules imposing that a required period of time must have passed between acting as counsel and acting as arbitrator, as you cannot expect professionals to take a five-year break from counsel work if they ever want to be appointed as an arbitrator in investment treaty cases.

Issue 3: Diversity

Mélanie van Leeuwen brought up memories about one of the first IBA arbitration days in the late '90s, where she and a colleague were the only two women in the room. A lot has changed since then and now there are both men and women in the arbitration world. This change was brought about by the Equal Representation in Arbitration Pledge of 2015, which was signed by law firms, arbitral institutions and frequent users of arbitration. The goal of the pledge was to increase the number of women appointed as arbitrators. Besides this, there was also a call for transparency in arbitration that a number of institutions picked up on. The result is a significant increase of female arbitrators. While some progress has been made regarding gender diversity, more is to be done. Gender diversity is of course not the only form of diversity, there is also regional diversity. The arbitration community has launched REAL (Racial Equality for Arbitration Lawyers), which aims to promote racial equality amongst counsel and arbitrators and aims to combat racial bias and discrimination. This initiative is as much needed as gender diversity, as most of the conflicts in Africa, South America and Asia are being decided by white professionals from the western world. The obvious solution here is to enlarge the arbitrator pool with people who have their roots in the relevant jurisdictions. To achieve this goal, affirmative action by the arbitration community is needed. Despite this, REAL seems to get much less traction than the Pledge did in 2015.

Finally, there is also the issue of age diversity, in which arbitral institutions play an important role, as many young lawyers are granted their first appointments by institutions. Therefore, institutions must continue to give opportunities to young lawyers with ambition and proven qualities. Affirmative action might not be an appropriate solution for the age diversity problem, as some qualities that arbitrators need to possess come with age.

Overall, we can see that after 100 years since the institutionalisation of arbitration, the arbitration community has started to diversify. Banning double-hatting would do away with this progress. The saying "No one lives of arbitration alone" is still true for young arbitration lawyers and counsel from emerging jurisdictions. They cannot be expected to wait by the sidelines after their first appointment. As a result, double-hatting should only be applied where it is an issue, namely in ISDS. Nonetheless, the reality

remains that in ISDS you will not be appointed if you do not have experience as counsel. We should be very cautious not to kill the enlargement of the pool that we have just managed to establish by banning double-hatting.

Bernard Hanotiau stated that while diversity is certainly important, institutions must remain careful to appoint competent arbitrators. Moreover, reasons of diversity cannot legitimise double-hatting. In Mr. Hanotiau's view, the first point is competence, whatever the nationality or gender.

Isabelle Michou agreed that competence should always be the primary criterium.

BY Cyro Quinten Vangoidsenhoven

LL.M. Candidate, Queen Mary University of London (School of International Arbitration)

GESCHILLENBESLECHTING IN INTERNATIONALE HANDEL VIA ARBITRAGE – CEPANI EN VOKA WEBINAR

17 JUNE 2021, VIRTUAL

Op 16 juni 2021 organiseerden CEPANI en VOKA een webinar over "Geschillenbeslechting in internationale handel via arbitrage". Maarten Draye gaf een uiteenzetting, waarbij zowel de voor- en nadelen van arbitrage, de arbitrageovereenkomst en de arbitrale uitspraak werden besproken.

Arbitrage in internationale handel

Probleemstelling. Geschillenbeslechting in internationale handel heeft enkele bijzondere uitdagingen o.a. waar en hoe het geschil zal worden opgelost en hoe eventueel zal kunnen worden uitgevoerd?

Het is dan ook aangewezen om hierop te anticiperen in de overeenkomst tussen partijen. Een forumbeding of arbitragebeding is hierbij een essentieel onderdeel van de overeenkomst, waarmee zekerheid wordt geboden over hoe, waar en door wie een eventueel geschil zal worden geregeld. Partijen dienen zich bewust te zijn dat er alternatieven zijn voor de rechtbank waarbij arbitrage (eventueel in combintatie met ADR) een valabele optie is.

Pros en cons. In de afweging tussen een procedure voor een arbitraal scheidsgerecht dan wel voor de rechtbank, dienen een aantal voor- en nadelen in rekening te worden genomen. Arbitrage biedt een neutraal en vertrouwelijk forum, waarbij partijen mee de spelregels kunnen bepalen en flexibilteit aan de dag kan worden gelegd. De arbiters kunnen bovendien door de partijen worden gekozen op grond van hun expertise. De voornaamste downside die bij arbitrage overwogen moet worden, is wellicht de kostprijs. In tegenstelling tot een procedure voor de rechtbank, dienen niet enkel de erelonen van de advocaten te worden betaald, maar eveneens deze van de arbiter(s). Zeker bij arbitrages waar een arbitraal scheidsgerecht van drie arbiters zetelt, is een kosten-batenanalyse aan de orde.

De arbitrageovereenkomst

Definitie. De nieuwe arbitragewet voert een definitie van de arbitrageovereenkomst in die geen vormvereisten bevat: "*Een arbitrageovereenkomst is een overeenkomst*

waarin de partijen alle geschillen of sommige geschillen die tussen hen gerezen zijn of zouden kunnen rijzen met betrekking tot een bepaalde, al dan niet contractuele, rechtsverhouding aan arbitrage voorleggen."

Er is niet langer een geschrift vereist voor de rechtsgeldigheid van de arbitrageovereenkomst, die dus ook mondeling kan zijn. Het bewijs van een mondelinge arbitrageovereenkomst kan worden geleverd met alle middelen van recht (o.a. ook getuigen).

Inhoud. Er kan geen arbitrage plaatsvinden wanneer partijen niet zijn overeengekomen om hun geschil aan arbiters voor te leggen. Dit kan zowel voor als na het ontstaan van het geschil. Partijen stellen zich hierbij akkoord om hun geschil te onttrekken aan de rechtbanken en krijgen de mogelijkheid om een "tailor made" procedure overeen te komen (o.a. keuze van plaats van de arbitrage, toepasselijk recht, institutionele of ad hoc arbitrage, taal van de arbitrage enz.).

Modelclausule. De partijen die kiezen voor arbitrage en naar het arbitragereglement van CEPANI willen verwijzen worden aanbevolen de volgende clausule op te nemen: *"Alle geschillen die uit of met betrekking tot deze overeenkomst ontstaan, zullen definitief worden beslecht volgens het Arbitragereglement van CEPANI, door één of meer arbiters die conform dit reglement zijn benoemd."* Dit typebeding kan worden aangevuld met de volgende bepalingen: *"Het scheidsgerecht zal uit (een of drie) arbiters bestaan"; "De plaats van de arbitrage is (stad)"; "De taal van de arbitrage is (...)"; "De toepasselijke rechtsregels zijn (...)"*.

De arbitrale uitspraak

Uitvoerbaarheid. De arbitrale uitspraak bindt partijen zoals een vonnis (gezag van gewijsde). Wanneer een partij zou nalaten om een arbitrale uitspraak vrijwillig uit te voeren, kan de andere partij een procedure tot erkenning en tenuitvoerlegging voeren voor de rechtbank teneinde een exequatur van de arbitrale uitspraak te bekomen.

Deze uitvoerbaarverklaring (exequatur) geldt als voorwaarde om tot gedwongen uitvoering van een – Belgische of buitenlandse - arbitrale uitsrpaak te kunnen overgaan. De erkenning en uitvoerbaarverklaring van een arbitrale uitspraak kunnen slechts op limitatieve gronden worden geweigerd.

De gedwongen uitvoering is niet beperkt tot de plaats van de arbitrage, maar kan op alle plaatsen waar tegenpartij activa heeft. Het is dan ook de plaats waar de arbitrale uitspraak zal worden ten uitvoer gelegd - en niet de plaats van arbitrage - die bepaalt welke rechtbank van eerste aanleg territoriaal

bevoegd is voor de uitvoerbaarverklaring van de arbitrale uitspraak.

Vernietiging. Tegen de arbitrale uitspraak is in principe geen hoger beroep mogelijk, tenzij partijen dit contractueel zouden hebben bedongen in de arbitrageovereenkomst. Dit is zeer uitzonderlijk.

Als stok achter de deur hebben partijen wel de mogelijkheid om een vordering tot vernietiging in te stellen tegen de arbitrale uitspraak. Een vordering tot vernietiging kan enkel worden ingesteld voor de rechtbanken van de plaats van arbitrage (i.t.t. de vordering tot exequatur). De arbitrale uitspraak kan slechts worden vernietigd op grond van een beperkt aantal gronden (opgenomen in artikel 1717 Ger.W.), bijvoorbeeld indien de uitspraak in strijd is met de openbare orde of indien het scheidsgerecht niet rechtsgeldig werd samengesteld. De vordering tot vernietiging is dus geen hoger beroep waarin de gegrondheid van de arbitrale uistpraak wordt onderzocht.

Conclusie

Conclusie. Op de vraag hoe het best geschillenbeslechting te hanteren in internationale geschillen, dient met een aantal factoren rekening te worden gehouden. Arbitrage is in elk geval een te overwegen alternatief. Belangrijk daarbij is om een goede arbitrageovereenkomst te voorzien waarin wordt geanticipeerd op een efficiënte geschillenregeling. Er zijn standaardclausules beschikbaar waarin de essentiële elementen zijn opgenomen. Arbitrage biedt partijen de flexibiliteit van een “tailor made” procedure, die leidt tot een uitvoerbare titel, waartegen – behoudens afwijkende overeenkomst tussen partijen - enkel nog een vordering in vernietiging open staat die slechts op beperkte gronden kan worden ingesteld.

BY Charlotte DE MUYNCK

Advocaat, Monard Law

CEPANI 40 & CFA40 EVENT : "DUE PROCESS AND VIRTUAL HEARINGS : IS THE MARRIAGE GOING TO LAST AFTER COVID ?"

24 SEPTEMBER 2021, PARIS

On 24 September 2021, the CEPANI40 and the CFA40 organised, in the context of the Paris Arbitration Week, an in-person breakfast on the topic of the lasting (or non-lasting) effect of virtual hearings in arbitration and the questions arising in that context, notably with respect to due process. The question was whether, now that the borders are reopening and international travel resuming, virtual hearings should be reassessed.

The panel included Valentine Chessa (Partner, CastaldiPartners), Iuliana Iancu (Partner, Hanotiau & van den Berg), Sebastiano Nessi (Counsel, Schellenberg Wittmer), Giacomo Rojas Elgueta (Partner, D|R Arbitration & Litigation) and Aurélien Zuber (Counsel, ICC).

The panel first discussed whether there was a right in certain jurisdictions (in particular, in their respective jurisdictions and some jurisdictions analysed in the ICCA Project "Does a Right to a Physical Hearing Exist in International Arbitration?") for the parties to request a physical hearing. The main take-away was that, in most jurisdictions, there is no right-in-principle for a physical hearing, but the question seems to remain unsettled or subject to interpretation in certain jurisdictions. For instance, in Sweden, the Swedish Arbitration Act provides that the parties always have the right to an oral hearing. The question is whether an oral hearing is understood to mean a physical hearing. An interpretation of the preparatory works of the Swedish Arbitration Act would tend to support this view. On the contrary, in the Netherlands and the UAE, the arbitrators have the right pursuant to the *lex arbitri* to order a remote hearing.

With respect to the jurisdictions represented in the panel, in Belgium, the prevailing view is that the arbitral tribunal has the right to determine whether a remote hearing is appropriate or not, depending on the

circumstances of the case (even over the objection of a party). However, the use of the word "endroit" (which can be either translated by "place" but also by "location") in Art. 1701 of the Judicial Code ("(…) *le tribunal arbitral peut, après les avoir consultées, tenir ses audiences et réunions en tout autre endroit qu'il estime approprié*") seems to have given rise to some hesitations on the part of some practitioners as to whether tribunals can order virtual hearings over the objection of a party. In Switzerland and France, whilst the principle remains that there should be no absolute right for physical hearings, the panellists examined the question under the angle of due process and how it is conceived in their respective jurisdictions. This will lead to a case-by-case analysis, and whilst the absence of a physical hearing itself will likely not invalidate the proceedings, this may be different if other issues are at play. The pandemic also showed the need for some arbitral institutions to update their rules, which, to some extent, contained ambiguous provisions that could be read as prohibiting virtual hearings. The ICC included in Art. 26.1 of the 2021 version of its Arbitration Rules an express provision allowing virtual hearings: *" (…) The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*".

The panel then opened the floor for questions and comments to the audience: it was particularly interesting to see that, whilst counsel tend to favour physical hearings, arbitrators are more comfortable with remote hearings. It was also interesting to hear the different views of the participants as to whether body language is relevant for a case or not, whether a virtual hearing still requires the arbitrators (in the case of a panel) to gather in the same room while counsel are on screen, how potential technical difficulties may affect the efficiency of the virtual proceedings, and how virtual hearings can be integrated in a hybrid and dynamic process as one of several tools to improve the efficiency of the proceedings (rather than as an automatic technique).

This event was, in any case, an excellent opportunity to see each other in person for the first time in a long while; on that, everyone agreed.

BY Nicolas VANDERSTAPPEN

Avocat, Clifford Chance LLP

ANNUAL CEPANI CONFERENCE : "WHAT'S ON THE HORIZON"

25 NOVEMBER 2021, BRUSSELS

Le 25 novembre a eu lieu le colloque du CEPANI « What's on the horizon ». Attendu de longue date, ce premier évènement en présentiel depuis le début de la pandémie a permis à la communauté de l'arbitrage de se retrouver et d'échanger autour des trois panels organisés portant sur (i) le règlement du CEPANI, (ii) la recherche de la vérité en arbitrage et (iii) la digitalisation du processus arbitral.

L'évènement a débuté par un accueil de M. Dirk De Meulemeester, (Partner, DMDB Law) et président sortant du CEPANI qui a ensuite laissé la parole à M. Benoît Kohl (Partner, Stibbe), président du CEPANI. Ce dernier a souligné les avancées effectuées sous le mandat de M. De Meulemeester et la chance de pouvoir se réunir en présentiel.

Le règlement d'arbitrage du CEPANI

M. Werner Eyskens (Partner, Allen & Overy) a présidé le premier panel, sous un format interactif avec l'audience et portant sur de potentielles modifications au règlement d'arbitrage du CEPANI. L'utilité d'une codification du rôle du secrétaire du tribunal, des audiences virtuelles, du recours à un tiers financeur ainsi que de la détermination rapide des demandes manifestement infondées ont ainsi été examinées.

Tout d'abord, les attributions du secrétaire du tribunal arbitral ont été abordées par Mme Emma Van Campenhoudt (Secrétaire général du CEPANI) qui s'est livrée à un examen comparatif du rôle du secrétaire dans les principales institutions arbitrales, en soulignant notamment que le secrétaire n'a jamais de pouvoir décisionnel. Malgré ce rôle passif dans la procédure, il est attendu du secrétaire qu'il présente les mêmes garanties d'indépendance et d'impartialité que les arbitres. Après avoir relevé que les attributions du secrétaire ont été définies par plusieurs institutions arbitrales telles que la LCIA ou la SCC, Mme Van Campenhoudt a demandé aux participants si une codification analogue était souhaitable dans le règlement du CEPANI, ce à quoi l'audience a répondu par la négative, privilégiant une plus grande flexibilité.

M. Eyskens a ensuite examiné la problématique des audiences virtuelles,

popularisées par la pandémie de Covid-19. Il a plus particulièrement soulevé la question de la modification du règlement du CEPANI pour introduire des dispositions visant à assurer l'égalité des armes lorsqu'une seule des parties a la possibilité de se réunir physiquement en *cluster* durant le déroulement des audiences, ce que l'audience n'a pas considéré nécessaire (toujours dans un souci de plus grande flexibilité). Il a par ailleurs rappelé que la jurisprudence a considéré que la tenue virtuelle des audiences ne constituait pas un grief pour invoquer la nullité d'une sentence.

Mme Stéphanie Davidson (Partner, Leysa) a ensuite discuté du recours à un tiers financeur et des difficultés quant au secret professionnel de l'avocat et aux conflits d'intérêts pouvant en résulter. A cet égard, elle a souligné que le règlement de la CCI prévoit une obligation pour les parties de révéler l'intervention d'un tiers financeur dans le cadre de la procédure d'arbitrage. L'audience a estimé, à une quasi-unanimité, être favorable à l'introduction d'une disposition analogue dans le règlement du CEPANI.

Enfin, la détermination rapide des demandes manifestement infondées a été considérée par M. Herman Verbist (Partner, Everest). Il a évoqué la possibilité de bifurquer entre la sentence sur la responsabilité et celle sur le quantum. La communauté arbitrale présente a admis qu'il était en pratique difficile d'attester à un stade préliminaire si une demande était manifestement sans fondement et a par conséquent rejeté l'idée de codification de ce point dans le règlement du CEPANI.

Keynote speech de M. Koen Geens

M. Koen Geens (député fédéral, Ministre de la justice sortant) a remplacé M. Vincent Van Quickenborne (Ministre de la justice), empêché à cause des mesures sanitaires. M. Geens s'est livré à un exposé historique passionnant sur la place de la justice dans l'Etat belge (notamment par rapport à la santé publique, eu égard à la situation actuelle), rappelant la place essentielle occupée par celle-ci pour le jeune Etat belge au 19ème siècle (comme en témoigne notamment le Palais de justice de Bruxelles et le système carcéral belge, qui était alors montré en exemple jusqu'aux Etats-Unis) et la contrastant avec les problèmes résultant de son sous-financement actuel. M. Geens a également fait part des grands axes de réforme qu'il suggérerait à son successeur.

La recherche de la vérité en arbitrage

Mme Françoise Lefèvre (Partner, Lefèvre Arbitration) a ouvert le second panel en

distinguant la vérité scientifique de la vérité judiciaire qui peut être définie comme un jugement normatif dont la preuve est encadrée et réglementée. Elle a ensuite présenté le premier sujet du panel à savoir les témoignages et la fiabilité y afférente. Mme Lefèvre a mentionné un rapport de la CCI (The Accuracy of Fact Witness Memory in International Arbitration) qui a établi que la mémoire des témoins peut significativement être altérée par des informations postérieures à l'évènement. Dès lors, elle a conseillé de limiter la preuve par témoignage à ce qui ne peut être prouvé par un autre biais et, dans la mesure du possible, de suivre les conseils de l'étude précitée notamment en ce qui concerne la formulation des questions posées.

M. Benoît Allemeersch (Partner, Quinz) a ensuite exposé les principes de la production de documents dans le contexte des procédures d'arbitrage. En droit belge, il est acquis que le tribunal arbitral dispose d'une grande flexibilité bien que l'écrit reste le moyen de preuve par excellence. Il a également évoqué la possibilité pour une partie de requérir la production d'un document pour autant que celui-ci soit suffisamment spécifié.

M. Maxime Berlingin (Partner, Fieldfisher) a ensuite relevé l'impact de l'intervention de l'expert sur les dommages octroyés. Il s'est également référé au Queen Mary and PwC Study on Damages Awards in International Commercial Arbitration. A Study of ICC Awards qui souligne la différence drastique entre l'évaluation du dommage par l'expert du demandeur et par celui du défendeur, le dernier s'élevant à seulement 12% du dommage réclamé par le demandeur. Or, il apparait que ce décalage ne découle pas du parti pris qu'aurait l'un ou l'autre expert mais bien du libellé des missions confiées et des hypothèses de base soumises aux experts. A cet égard, M. Berlingin a réitéré l'importance que l'expert comprenne exactement le contenu de sa mission.

Ces interventions ont ouvert la voie au dernier sujet de ce panel abordé par Mme Vanessa Foncke (Partner, Jones Day) qui a présenté les Règles sur la conduite efficace de la procédure d'arbitrage international, plus connues sous la dénomination de « Règles de Prague ». Adoptées en décembre 2018, ces règles se présentant comme une alternative civiliste aux Règles de l'IBA confèrent un rôle plus proactif au tribunal arbitral en lui permettant, par exemple de définir une date limite pour la présentation des preuves.

Digitalisation

Le dernier panel du colloque, modéré par M. Kevin Ongenae (doctorant en arbitrage, UGent) avait pour thème la digitalisation de la procédure arbitrale. Mme. Claire Morel de Westgaver (Partner, Bryan Cave Leighton Paisner) a exposé que la technologie est déjà utilisée par certains cabinets d'avocats, par exemple via des algorithmes qui sélectionnent les documents à produire. De son avis, l'intelligence artificielle se développera principalement en ce qui concerne (i) les technologies de détection de mensonges qui pourraient être amenées à remplacer les contre-interrogatoires de témoins et (ii) la réalité virtuelle qui sera utilisée pour les audiences.

Ensuite, Mme. Kathleen Paisley (Partner, Ambos Law) a insisté sur le fait que les données personnelles doivent être protégées par toutes les parties prenantes à la procédure arbitrale. En ce qui concerne les arbitrages soumis à une loi européenne, le RGPD est d'ailleurs d'application. D'autre part, elle a recommandé de mettre en place des procédures qui assurent le respect et la sécurité des données sur les plateformes en ligne de *case management*.

Présentation du « Guide to the CEPANI Arbitration Rules »

M. Olivier Caprasse (Caprasse Arbitration) a conclu la journée en introduisant le « Guide to the CEPANI Arbitration Rules » qui se veut une analyse du règlement CEPANI sans rattachement à un système juridique unique. Les auteurs ont procédé à une analyse article par article du règlement en (i) soulignant les changements par rapport à l'ancien règlement, (ii) analysant chaque règle et de ses nuances et (iii) ajoutant une note pratique du secrétariat du CEPANI. Dès lors, le livre se veut un outil à destination de tous les praticiens en répondant aux questions pratiques que peuvent se poser ceux qui s'initient à l'arbitrage mais également en abordant des points plus techniques tels que les questions d'arbitrage multipartites ou encore de consolidation.

Il est certain que ce colloque fut un énorme succès pour le CEPANI. Outre la joie de pouvoir se retrouver, les différents panels ont permis aux 120 participants d'aborder une variété de sujets cruciaux liés au futur de l'arbitrage et de mieux les appréhender.

BY Marie DELCOURT

Associate, STIBBE

!!! CEPANI/CEPANI40 ACTIVITIES IN 2022 !!!

- CEPANI40 WEBINAR "MEET THE EXPERTS EPISODE 2" BRUSSELS

19 JANUARI 2022

Almost one year after the success of the first edition in February 2021, CEPANI40 hosted, on Wednesday 19 January 2022, the second edition of the webinar "Meet the experts!".

The event was moderated by CEPANI40 Co-Chairs, Sophie Goldman (Partner, Tossens Goldman Gonne) and Sigrid Van Rompaey (Partner, Matray, Matray & Hallet). The goal of the exercise remains the same: offering young practitioners a unique opportunity to ask questions to seasoned arbitrators.

This webinar, attended by around 50 enthusiast participants, was organised in the form of a practical and interactive Q&A with a panel of four international renowned experts:

- **Hakim Boularbah** (Partner, head of the Belgian litigation & risk management practice group, Loyens & Loeff, Brussels);
- **Elena Gutierrez García de Cortázar** (Partner, MGC Arbitration, Paris);
- **Anna Masser** (Partner, head of arbitration in Germany, Allen & Overy, Frankfurt); and
- **Roland Ziadé** (Partner, global head of international arbitration, Linklaters, Paris).

All participants were invited to ask two questions to the panel ahead of the session. During the discussion, moderated by Sophie Goldman and Sigrid Van Rompaey, the

experts answered these practical questions and shared their personal experience and expertise. The discussions revolved around several main topics, including:

- the arbitration proceedings as such (e.g., issues of abuse of process or confidentiality);
- the scope of the arbitration clause and specific provisions (e.g. applicable law and the use of languages, the latter one being always a topic of great interest for Belgian lawyers as a participant rightly pointed out!);
- the decisions taken on the merits and on costs;
- the organisation of virtual hearings and video conferences;
- the enforcement of awards;
- the non-participation of a party to the arbitration proceedings;
- the use of artificial intelligence in arbitration;
- the issue of diversity in arbitration.
- Etc.

The experts finally shared a few practical tips & tricks for the first appointments as an arbitrator, such as:

- joining a firm where there are leading arbitrators (to benefit from their experience and be appointed as tribunal secretary);
- never ever answering an email in a bad mood;
- exercising authority with a smile;
- being aware that one will always have to do the extra mile;
- (over) preparing well;
- thoroughly reviewing the applicable rules;
- thinking ahead;
- reading the submissions promptly;
- keeping your calm;
- maintaining a distance from any potential incident and avoiding taking things personally.

BY Charlotte PEIFFER

Associate, Linklaters

- CEPANI40 LUNCH DEBATE ON THIRD PARTY FUNDING 2" BRUSSELS

17 FEBRUARY 2022

On 17 February 2022, CEPANI held a lunch debate on third-party funding. The event took the form of an informal discussion between Mr Dirk De Meulemeester (former President of CEPANI) and Ms Olivia de Patoul (Senior Legal Counsel at Deminor Recovery Services, a Belgium-based litigation funder).

Third party litigation funding is a practice originating in common law jurisdictions. It enables a third party (a so-called funder) to provide financial resources to a claimant enabling that claimant to initiate court or arbitration proceedings. Typically, a litigation funder pays for all the costs that the claimant would normally bear (including legal fees, expert costs, arbitrator's fees, provision to arbitral institutions, etc…) and obtains a share of the proceeds if the claim eventually succeeds or is successfully settled. If, on the contrary, the case is unsuccessful, the funder bears the financial loss and the claimant does not have to pay any fee (so-called "no cure, no pay" rule). In continental Europe, this practice offers an interesting solution to the impossibility for lawyers to charge their services on the basis of a contingency fee.

During the lunch debate, Ms de Patoul explained that – as a litigation funder – Deminor only funds a particular case after having conducted an in-depth due diligence of the case. This due diligence includes examining the amount in dispute, conducting KYC (Know Your Client) checks on the parties in dispute, examining the litigation strategy and legal issues raised by the dispute, as well as assessing the enforcement possibilities. On average, Deminor only finances 2 out of 10 cases advanced by claimants to Deminor for litigation funding. Deminor usually finances only cases for which the amount in dispute is 10 million euros or higher. If Deminor agrees to finance a case, it enters into a funding agreement with the claimant. In terms of returns, Deminor aims to get a multiple of the funding provided or approximately 30% of the money recovered.

Among the advantages of litigation funding, Ms de Patoul also explained that having a litigation funder on its side usually sends a tough and clear message to the defendant that the claimant is serious about a case. The fact that a litigation funder has accepted to

finance a case is also proof of the seriousness of the claims in dispute.

In terms of involvement, Deminor's role may be twofold. Either Deminor's role is limited to funding (in such a case, Deminor only offers passive support to the client but remains nevertheless involved in all major strategic decisions of the case) or Deminor is involved in the management of the case and is then typically involved in the engagement of lawyers, in reviewing submissions or preparing important hearings.

The discussion took a lively turn when members of the audience started to ask specific questions relating to the relationship and conflicting interests at stake between a claimant, the lawyer and a funder. Although admittedly, there could be a divergence of interest between those parties (for instance if a funder wishes to settle a dispute whilst the claimant wants to pursue the case), Ms de Patoul insisted on the importance of building a strong and reliable relationship with all stakeholders. It is therefore important to have a smooth interaction with all parties involved and to ensure that such relationships are built on trust. She also stressed that a funder is not a lawyer and therefore no privilege applies between a funder and its client. Instead, a non-disclosure agreement is agreed with the client in order to safeguard the confidentiality of all the information shared with the funder.

BY QUENTIN DECLEVE

Associate, Van Bael & Bellis

- CEPANI40-FIELDFISHER SEMINAR "ARBITRATION IN POST M&A DISPUTES" BRUSSELS

10 MARCH 2022

Le 10 mars dernier, Fieldfisher s'est associé au CEPANI40 pour donner une conférence sur l'arbitrage dans le cadre des litiges post-M&A. Cet événement, modéré par **Maxime Berlingin** (Fieldfisher, Belgique), a réuni plus de 90 personnes et a offert un aperçu de plusieurs particularités de ce type de litiges.

Tout d'abord, **Marily Paralika** (Fieldfisher, France) a exposé les difficultés procédurales qui peuvent se poser notamment en raison du caractère multipartite des litiges post-M&A. En effet, il est courant que ces litiges impliquent non seulement l'acheteur et le vendeur, mais également la société-cible et d'autres tiers. A cet égard, les conditions auxquelles le règlement du CEPANI permet les demandes d'intervention et la jonction de plusieurs arbitrages ont été examinées. Marily Paralika a également abordé la question de la bifurcation et de la date de commencement de l'arbitrage. L'attention des praticiens a été attirée sur le fait que, selon l'article 3(3) du règlement CEPANI, l'arbitrage commence uniquement lorsque les frais d'enregistrement ont été payés. Cela peut avoir une importance pour le respect des délais prévus au contrat de cession d'actions.

Alexandra Underwood (Fieldfisher, UK) a ensuite fait une présentation de l'assurance représentations et garanties. Cette assurance a pour but de protéger une partie des pertes financières résultant de représentations et garanties inexactes. Après un aperçu des caractéristiques principales d'une telle assurance, son impact sur la conduite de la procédure arbitrale a été expliqué notamment par rapport à la notification des claims, l'obligation de déclaration du risque à l'assureur, la désignation du tribunal arbitral, etc. Alexandra Underwood a également souligné l'importance d'avoir des clauses d'arbitrage identiques dans le contrat de cession d'actions et la police d'assurance, afin de faciliter la jonction et l'intervention.

Enfin, la conférence s'est clôturée par un exposé de **Koen Van den Broeck** (Fieldfisher, Belgique) sur deux sujets fondamentaux ; l'évaluation du dommage et la production de documents. Sur le premier sujet, il a notamment été question de la définition du dommage, de la différence entre la valeur totale d'une entreprise et la valeur des actions et des méthodes de valorisation. Le deuxième sujet a mis en lumière les

difficultés pour le vendeur d'obtenir des documents appartenant à la société-cible. A cet égard, Koen Van de Broeck a examiné la procédure prévue à l'article 1708 du Code judiciaire qui permet à une partie, avec l'accord du tribunal arbitral, de demander la production de documents au président du tribunal de première instance.

Le débat sur ces questions passionnantes s'est prolongé lors d'un cocktail, qui été l'occasion pour les participants d'enfin se retrouver en personne.

BY Sophie BOURGEOIS

Counsel, Stibbe

- CEPANI-AFA-VIAC-NAI MORNING DEBATE "DEFAULT IN ARBITRATION" PARIS

31 MARCH 2022

EN

At the occasion of the eagerly awaited in-person return of the Paris Arbitration Week (28 March – 1 April), L'Association Française d'Arbitrage (AFA) and CEPANI, together with the Netherlands Arbitration Institute (NAI) and the Vienna International Arbitral Centre (VIAC), hosted a morning debate on default in arbitration at the Paris office of Orrick.

The speakers brilliantly met the challenge to grab the audience's attention despite an early start at 8:30 am, six hours after the end of the Young Arbitration Cruise the night before.

After a moving overview of the situation of arbitration in Ukraine by **Olena Perepelynska** (President, Ukrainian Arbitration Association), **Marc Henry** (President, AFA), introduced the speakers and topics of discussions, starting his welcoming words by the well-known

quote of Lamartine, "*un seul être vous manque, et tout est dépeuplé*".

The speakers shared the arbitration institutions' applicable rules and practice, as well as topical case law and personal war stories, on five key themes. **Charles Kaplan** (President, AFA Arbitration Committee and Partner at Orrick) introduced the discussion on default of a party in general, before examining in more detail the default of a party in the payment of advances on costs. **Benoît Kohl** (President, CEPANI) led the debate on the default of a party in the constitution of the arbitral Tribunal, followed by **Niamh Leinwather** (Secretary General, VIAC) on default in the proceedings and **Camilla Perera-de Wit** (Secretary General, NAI) on the default of arbitrators.

Benoît Kohl concluded the morning debate by stressing the close ties between the organising institutions. The participants then had the opportunity to continue the discussions over a proper Parisian breakfast, with croissants and café au lait.

NL

Ter gelegenheid van de langverwachte fysieke terugkeer van de Paris Arbitration Week (28 maart - 1 april), organiseerden L'Association Française d'Arbitrage (AFA) en CEPANI, samen met het Nederlands Arbitrage Instituut (NAI) en het Weens Internationaal Arbitraal Centrum (VIAC), een ochtenddebat over verstek bij arbitrage op het kantoor van Orrick in Parijs.

De sprekers slaagden er glansrijk in de aandacht van het publiek vast te houden, ondanks de vroege start om 8u30, zes uur na het einde van de Young Arbitration Cruise de avond voordien.

Na een aangrijpend overzicht van de situatie op vlak van arbitrage in Oekraïne door **Olena Perepelynska** (voorzitter, Oekraïense Arbitrage Vereniging), introduceerde **Marc Henry** (voorzitter, AFA) de sprekers en discussieonderwerpen. Hij begon zijn welkomstwoord met het bekende citaat van Lamartine: "*un seul être vous manque, et tout est dépeuplé*".

De sprekers deelden de toepasselijke regels en praktijken van de arbitrage-instellingen, evenals actuele rechtspraak en persoonlijke ervaringen, over vijf hoofdthema's. **Charles Kaplan** (voorzitter, AFA Arbitration Committee en partner bij Orrick) leidde de discussie in over verstek van een partij in het algemeen, alvorens nader in te gaan op verstek van een partij bij de betaling van voorschotten op de kosten**. Benoît Kohl** (voorzitter, CEPANI) leidde het debat over verstek van een partij bij de samenstelling van het scheidsgerecht, gevolgd door **Niamh Leinwather** (secretaris-generaal, VIAC) over verstek in procedures en **Camilla Perera-de Wit** (secretaris-generaal, NAI) over verstek van arbiters.

Benoît Kohl sloot het ochtenddebat af door de nauwe banden tussen de organiserende instellingen te benadrukken. De deelnemers kregen vervolgens de gelegenheid om de discussies voort te zetten onder het genot van een echt Parijs ontbijt, met croissants en café au lait.

BY Emma VAN CAMPENHOUDT

Secretary General, Cepani

- ASA-CEPANI40-CFA40-ICC-YAF-YCAP-ICDR Y&I"CRYPTOCURRENCIES IN ARBITRATION : THE FUTURE IS NOW" PARIS

31 MARCH 2022

Lors du quatrième jour de la *Paris Arbitration Week* qui s'est déroulée du 28 mars au 1er avril, l'ASA, CEPANI40, CFA40, International Centre for Dispute Resolution (ICDR) Y&I, Young Canadian Arbitration Practitioners (YCAP) ont organisé une conférence dans les bureaux du cabinet August Debouzy sur le sujet suivant : « *Cryptocurrencies in arbitration : The Future is Now* ».

La conférence était animée par un panel entièrement féminin comprenant **Dora Grunwald-Kadar** *(Osborne Partners)*, **Aija Lejniece** (independant practicioner) et **Ekaterina Oger Grivnova** *(Allen & Overy)* et modéré par **Anastasia Davis Bondarenko**

(Fortress Investment Group) et **Vasuda Sinha** *(Freshfields)*. Les oratrices ont abordé quatre sujets : une introduction aux crypto-monnaies, une présentation de leurs principaux usages et des litiges qui peuvent survenir en conséquence, la quantification du préjudice, ainsi que les méthodes d'exécution des sentences arbitrales rendues en matière de crypto-actifs.

La conférence a été ouverte par une brève introduction et définition des crypto-monnaies, de la *blockchain*, des monnaies et de leurs dérivés (en ce compris les dérivés de dérivés – « *tokens* »). Les crypto-monnaies sont essentiellement utilisées pour le commerce, et leur principale caractéristique est la volatilité de leur prix. En outre, les NFT (« *Non-Fungible Tokens* ») ont été définis par les oratrices comme des identifiants numériques uniques que l'on peut trouver sur la *blockchain* et qui ne peuvent pas être échangés contre autre chose. Les « *smart contracts* » ont, pour leur part, été décrits comme des contrats codés qui s'exécutent automatiquement. Quant au Métavers (ou « *Metaverse* »), qui est rapidement devenu le centre d'attention de *la Paris Arbitration Week* cette année, celui-ci a été défini comme un monde numérique parallèle qui pourrait se révéler d'une grande utilité pour les praticiens de l'arbitrage à l'avenir. À titre d'exemple, le panel a évoqué la possibilité que les audiences arbitrales, en ce compris l'audition des témoins et des experts, puissent se tenir dans le Métavers.

En ce qui concerne les crypto-arbitrages, les panélistes ont évoqué quatre litiges possibles liés aux crypto-monnaies, à savoir : les arbitrages relatifs aux « smart contracts » (déclarations frauduleuses, erreurs de codage, illégalité, (in)capacité à les conclure), les arbitrages relatifs aux consommateurs (AAA, Jams, ICC, HKIAC, CPR et ad hoc), les arbitrages commerciaux (contrats commerciaux entre crypto-acteurs, crypto-monnaies ou actifs liés aux crypto-monnaies en tant qu'objets d'un contrat, crypto-monnaies en tant que paiement) et les arbitrages relatifs aux traités d'investissement. Les questions de quantification des préjudices liés aux crypto-actifs ont également été discutées, notamment les pertes découlant de la

fermeture d'une plateforme en ligne et les pertes occasionnées par le comportement défectueux des « tokens », ces questions étant source de nombreuses difficultés pour les experts chargés d'évaluer les préjudices à indemniser (recours à la théorie de la perte d'une chance, valorisation des crypto-actifs, etc).

Le dernier point qui a été abordé par les intervenantes concernait les méthodes d'exécution de sentences arbitrales rendues à la suite d'un crypto-arbitrage. En principe, il ne semblerait exister aucune restriction à la mise à exécution d'une telle sentence, sauf si l'ordre public de l'État requis l'interdit. Afin de faire exécuter une sentence rendue en crypto-monnaie, plusieurs facteurs doivent être pris en considération lors du choix du siège de l'arbitrage, notamment en ce qui concerne le statut de la crypto-monnaie dans le droit national en question (en tant bien), les pouvoirs du juge de l'exécution et les recours ouverts aux parties : ordonnances de gel et injonctions patrimoniales, ordonnances de divulgation.

BY Joya CHERFAN

Master student in Arbitration, Université Paris-Saclay

- CEPANI & EUROPEAN LAW STUDENTS ASSOCIATION- ULB : Workshop sur l'arbitrage et les modes alternatifs de règlement des différends – Un contentieux ? Pensez à l'arbitrage - BRUXELLES

19 avril 2022

Le 19 avril 2022, le Professeur Benoît KOHL (Président du CEPANI) s'est rendu à l'Université Libre de Bruxelles afin de présenter l'Arbitrage, les modes alternatifs de règlement des conflits et le CEPANI aux étudiants en droit invités par ELSA (EUROPEAN LAW STUDENTS ASSOCIATION-ULB)**.**

Cette présentation avait notamment pour ambition de démystifier la procédure d'Arbitrage (s'agissant, par exemple, de ses coûts), en l'abordant de manière pratique, tenant compte des développements récents de la matière.

Le professeur KOHL a commencé par présenter l'Arbitrage en général, ses particularités, avantages et inconvénients.

Le Professeur KOHL a expliqué que l'Arbitrage est régi par des règles arrêtées sur mesure par les parties, rapide, confidentiel, confié à des arbitres experts du domaine concerné, il permet de résoudre nombre de litiges, sans être réservé aux contentieux complexes internationaux.

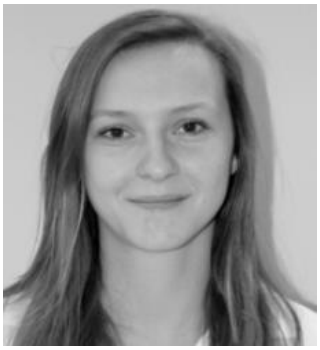
La procédure d'Arbitrage a également été comparé à la Médiation. Le CEPANI et son règlement d'Arbitrage ont ensuite été présentés (clause d'Arbitrage, introduction d'une demande d'Arbitrage, provision, nomination du Tribunal Arbitral, procédure accélérée, *scrutiny*, notification de la Sentence Arbitrale, …).

Le Professeur KOHL a également explicité les autres Règlements du CEPANI (expertise technique, adaptation des contrats, mini-trial, noms de domaine, C-SAR).

Enfin, le Président du CEPANI et la Secrétaire Générale, Madame Emma VAN CAMPENHOUDT ont répondu aux questions très pertinentes des étudiants.

BY Astrid MOREAU

Legal Attaché, Cepani



- CEPANI-NAI JOINT COLLOQUIUM ON THE CEPANI AND NAI APPROACH TOWARDS TOPICAL TRANDS IN ARBITRATION ROTTERDAM

22 avril 2022

The CEPANI-NAI Colloquium took place in Rotterdam, in a newly opened Depot Boijmans Van Beuningen, the world's first publicly accessible art storage facility. Approximately a hundred participants gathered at the event to discuss practices of the major Belgian and Dutch arbitration institutions.

Mr. Gerard Meijer, president of NAI, opened the Colloquium announcing the focus of the event, namely topical developments in international arbitration and their reflection in the new CEPANI Arbitration Rules 2020 and the new NAI Arbitration Rules, expected to come into force on 1 July 2022. Gerard also mentioned that it was the last joint conference of CEPANI and NAI, as the Luxembourg arbitration community will join the following Benelux arbitration events.

The first panel of the Colloquium discussed the perspectives of both arbitration institutions. **Ms. Emma Van Campenhoudt**, Secretary General of CEPANI, and **Ms. Camilla Perera-de Wit**, Secretary General of NAI, presented the most significant revisions recently implemented in their arbitration rules regarding, inter alia, earbitration, confidentiality, data protection and expedited procedures. In particular, both rules now have clear and detailed provisions to enable users to have virtual hearings. The NAI is also currently developing an online digital platform. Ms. Van Campenhoudt and Ms. Perera-de Wit further provided useful statistics on the pending and new arbitrations, languages used and appointments made demonstrating that both institutions have seen a steady increase in the number of new cases over the last years.

The next speaker was **Mr. Rogier Schellaars**, partner at Van Doorne in Amsterdam, who presented the new NAI rules on expedited arbitral proceedings currently subject to discussion. NAI plays the role of "an intelligent follower" using best practices of other institutions on expedited procedures. Following empirical research, the drafters of the new rules set the threshold of two million EUR for the expedited proceedings rules to apply. The rules are expected to include an optout mechanism and are designed to operate on a stand-alone basis. Thus, they do not require the seat of arbitration to be in the Netherlands. A sole arbitrator will be

appointed by default, and the tribunal should play a gatekeeper role, so that it can consult and decide if the case remains in the expedited proceedings or moves to normal proceedings. The award in principle should be rendered in five months after the case management conference. Mr. Schellaars has also stressed that for the proper application of the rules, it is important to develop the relevant guidance note or commentary.

After the lunch break, **Mr. Werner Eyskens**, partner at Allen & Overy in Brussels, and **Mr. Gerard Meijer**, president of NAI and partner at Linklaters in Amsterdam, discussed several topical issues, such as virtual hearings, early determinations, third party funding and tribunal secretaries. The speakers made presentations on the Belgian and Dutch perspectives, which were followed by live polls addressed to the audience. In particular, the speakers mentioned that the new CEPANI and NAI Rules provide for virtual or hybrid hearings and tribunals should have discretion in this respect. Early determinations, although not expressly provided for in the rules, could potentially be granted under other provisions ensuring efficient and timely proceedings, such as Articles 21(1),(3) and (4) of NAI Rules and Article 24(2) of CEPANI Rules. While third party funding issues become more topical in the region, the Dutch and Belgian markets remain small compared to some common law jurisdictions. Neither the NAI, nor the CEPANI Rules provide for the disclosure of third party funders. Finally, both speakers agreed that no delegation of the decision-making powers to the tribunal secretary could be allowed. However, Mr. Meijer mentioned that the rules of the Dutch institution, Arbitration Board for the Building Industry, provide for an advisory vote of the secretary.

The next panel consisting of **Ms. Bregje Korthals Altes-van Dijk**, partner at Ysquare in Amsterdam, and **Ms. Sophie Goldman**, partner at Tossens Goldman Gonne in Brussels, talked about diversity and inclusion in international arbitration. Ms. Altes-van Dijk presented a strong business case as to why there should be more inclusiveness in the field. This, for instance, results in the enlargement of the talent pool, fosters representativeness and legitimacy, contributes to better decision-making and out of the box thinking. Furthermore, the moral duty to foster diversity should be a driver in and of itself. Ms. Goldman provided a short background of the Pledge on Equal Representation in Arbitration. She referred to the concrete mechanisms that proved to be successful

over the past 15 years, such as appointing a fair representation of women, ensuring that governing bodies, committees and conference panels have such fair representation, collecting gender statistics for appointments and others. It was reported, for example, that the average percentage of women appointments increased from below 5% in 2005 to above 20% in 2020. However, the speakers stressed that the arbitration community should do more to close the still existing gap in gender diversity and to work on other elements of diversity, such as race, age or background.

The final panel discussed how the arbitration community could make arbitrations greener. **Ms. Pauline Ernste**, senior associate at NautaDutilh in Amsterdam, presented on the current initiatives, such as the Green Pledge, and stressed that arbitration institutions should play an important role in making arbitrations more sustainable. Ms. Ernste made several specific proposals, such as adopting a model procedural order that would include green language, for example, ordering the parties to refrain from using hard copies or to offset emissions for flights. **Mr. Flip Petillion**, partner at PETILLION in Brussels, stressed that the CEPANI Rules and Belgian law allow conducting arbitrations digitally and even without a hearing, if parties so wish and agree "to be green and keep it on screen". Thus, party autonomy remains the cornerstone. Both rules however do not provide for the electronic signature of an award or an e-award, mainly due to the enforceability concerns.

At the end of the day, **Mr. Benoît Kohl**, president of CEPANI, thanked the speakers and organizers and closed the event stressing that the comparison of the arbitration institutions' practices as discussed during the Colloquium is extremely useful and helps to continue improve arbitration rules.

BY Tetyana MAKUKHA

Foreign Associate, NautaDutilh, Amsterdam

-ARBITRATION & DIGITALISATION, A PERFECT MATCH

MISSION ECONOMIQUE DE LA BELGIQUE AU ROYAUME-UNI

9 MAI 2022

La mission économique de la Belgique au Royaume-Uni a été l'occasion pour le CEPANI d'organiser, avec Hub Brussels (l'Agence bruxelloise pour l'Accompagnement de l'Entreprise / het Brussels Agentschap voor Bedrijfsondersteuning), un événement visant à promouvoir l'arbitrage, en particulier sa flexibilité et son adaptabilité aux nouvelles technologies, auprès des décideurs économiques belges et britanniques.

Le séminaire a été introduit par Mme **Isabelle Grippa**, CEO de Hub Brussels, qui a mis en exergue les nombreux atouts de la capitale de l'Europe comme place d'arbitrage, bien connus des membres du CEPANI : caractère international, arbitres et conseils expérimentés et multilingues, infrastructures et services de qualité, localisation centrale,... Sans oublier la gastronomie !

Mme Grippa a ensuite laisse la parole à M. **Benoît Kohl**, Président du CEPANI, qui a introduit son prédécesseur et le "*key note speaker*" du séminaire, M. **Dirk De Meulemeester** (Associé, DMDB Law, Bruxelles).

Au cours d'une présentation pleine d'énergie et d'humour, M. De Meulemeester a remis en perspective avec brio la digitalisation croissante de nos sociétés en général, et de l'arbitrage en particulier, tout en dressant le panorama des principales avancées accomplies et des défis encore à relever.

M. De Meulemeester a ainsi lancé parfaitement le panel composé de Mme **Kathleen Paisley** (Associée, Ambos law, Bruxelles), M. **Alexander Uff** (*Barrister*, Quadrant Chambers, Londres) et Mme **Claire Morel de Westgaver** (Associée, Bryan Cave Leighton Paisner, Londres). Cette dernière a modéré avec adresse le retour d'expérience des trois panélistes, qui ont partagé avec les

participants à la conférence leurs « *war stories* » et perspectives sur les évolutions technologiques de l'arbitrage, notamment à la suite de la crise causée par la pandémie.

L'événement a été conclu par M. **Pascal Smet**, Secrétaire d'Etat bruxellois pour le commerce extérieur. Il s'est fait l'écho aux propos de Mme Grippa, en soulignant les atouts de Bruxelles comme place d'arbitrage, et en affirmant la volonté de la Région de soutenir de manière ambitieuse les efforts du CEPANI à cet égard. Affaire à suivre…

Les participants au séminaire ont ensuite eu l'opportunité de se rendre à la réception organisée par la City of London à la Guildhall pour les participants à la mission économique. Ils ont notamment pu y entendre – tout en dégustant des spécialités belges bien connues – SAR la **Princesse Astrid**, figure de proue de la délégation belge, mentionner l'arbitrage dans son discours de remerciement !

BY Guillaume CROISANT

Managing Associate, Linklaters Brussels

- Colloque : Évolutions et alternatives en matière de règlement des litiges-CEPANI-FEB-CONFEDERATION CONSTRUCTION

  12 MAY 2022

- Visit to CEPANI from students of Commercial Transactions and Disputes module within the Universiteit Antwerpen Master of Laws programme

  13 MAY 2022

- Midi de la formation CJBB : un contentieux ? Pensez à l'arbitrage – Bruxelles

  17 MAY 2022

- ASSEMBLEE GENERALE DU CEPANI/ CEPANI ALGEMENE VERGADERING

  2 JUNE 2022

- Co-chair Circle (The Co-Chairs' Circle is an informal platform for the exchange between young arbitration practitioner groups

  3 & 4 JUNE 2022

- IFCAI GENERAL ASSEMBLY ROME 2022 – ROME

  8 JUNE 2022

- Déjeuner débat avec Rafaël Jafferali sur l'imprévision

  15 JUNE 2022

- Lunch debate balie Limburg

  24 JUNE 2022

- ICCA 2022 - Edinburgh - Joint Conference of European national arbitral institutions

  18-22 SEPTEMBER 2022

- Colloque du CEPANI "Default in International Arbitration, Bending over Backwards"?

  25 NOVEMBER 2022

STORIES FROM A YOUNG ARBITRATOR

EPISODE 1 - WHAT IF A PARTY DOES NOT PARTICIPATE IN THE ARBITRAL PROCEEDINGS?

Nathan TULKENS
Avocat - Advocaat
Clifford Chance LLP, Brussels

When a claimant has initiated arbitration proceedings against a respondent, a general assumption is that the parties will actively participate in the proceedings to defend their position.

However, it can happen that one party, usually the respondent, simply refuses to participate in the proceedings, either from the beginning of the arbitration or at a later stage. There are many reasons why a party might act like this, such as for example pending insolvency or liquidation proceedings, practical impossibility to use means of communication for the time being or, simply, the desire to avoid the financial cost associated with the defence and then attempt to challenge the award at the enforcement stage.

Nowadays, tribunals are increasingly likely to encounter issues related to a non-participating party in arbitrations, as parties face higher risks of insolvency as well as trade and travel restrictions because of the Covid-19 pandemic.

If an arbitrator appointed under the CEPANI Arbitration Rules (2020) (the " 2020 Rules") is faced with this situation, what can he or she do?

First of all, it is widely accepted that arbitral tribunals have an inherent power to conduct proceedings in the absence of one party, even without an express authorisation from institutional rules or national laws (G. BORN, International Commercial Arbitration, Vol. 3, 2nd ed., Kluwer Law International, 2014, p. 3027). In this case, the 2020 Rules expressly authorise the arbitrator to do so in article 7.2 (as do most sets of arbitration rules).

But that does not mean that the arbitrator may automatically progress towards an award favourable to the participating party (most of the time, the claimant), as the principle whereby the absence of a party is interpreted as an acceptance of the allegations that have been made against it is usually not applicable in arbitration, and certainly not in CEPANI proceedings. On the contrary, arbitration rules often provide that the tribunal must consider all the evidence before making its award (see article 24, §2 of the 2020 Rules and article 1699 of the Judicial Code). Thus, even if one party fails to appear in the

arbitration to contest the claims brought against it, the tribunal must still proceed with the case and be satisfied that the claimant has proved its entitlement before making the award. It cannot "short circuit" the procedure by rendering a "default award" (jugement par defaut/berechting bij verstek), which does not exist under the Rules. On the contrary, it must scrutinise the evidence presented by one party while simultaneously ensuring procedural fairness for the other absent party.

In practice, the tribunal will inevitably face a number of issues resulting from the non-participation of a party. Without being exhaustive, we will try to explore some of these issues and to provide a few practical tips for arbitrators – young or not – to navigate them, with due regard to the 2020 Rules.

Should I verify whether I have jurisdiction to hear the case? Yes, you should. According to article 6 of the 2020 Rules, if the respondent fails to submit an answer to the request for arbitration within the deadline, the President shall conduct a prima facie review of the existence of an arbitration agreement. Notwithstanding this prima facie analysis by the President, article 7, §3 of the 2020 Rules states that if a party against which a claim has been made does not submit an answer, the arbitral tribunal shall itself rule on its jurisdiction.

Should I keep attempting to communicate with the non-participating party? Yes, absolutely, at all stages of the proceedings. The rule whereby all communications must be sent to all parties simultaneously (article 8, §1 of the 2020 Rules) is not affected by the fact that a party is not participating. To minimise the risk of challenge of the award, the non-participating party must have received a fair and reasonable opportunity to present its case throughout the proceedings. You should therefore continue to properly notify that party of every procedural document, every procedural step and every deadline. As a matter of good practice, you should keep a record of each and every attempt to communicate with the absent party, as this documentation might become necessary in the context of a subsequent challenge of the award.

What if the absent party has not even notified me of its contact details? The 2020 Rules provide that "communications shall be validly made if sent to the last address of the addressee, as notified either by the latter or, as the case may be, by another party." (article 8, §4).

What if three arbitrators were foreseen and the absent party had the right to appoint an arbitrator? The CEPANI Appointments Committee or the President will appoint the arbitrator in the place of the non-participating party (article 15, §3 of the 2020 Rules).

How can I prepare the terms of reference in the absence of a party? You should prepare them with the input of the participating party and, when the terms of reference are ready for signature, the Secretariat will fix a time limit for obtaining the missing signature of the non-participating party, after which the proceedings may continue (article 23, §2 of the 2020 Rules).

Who will pay the advance on arbitration costs? The participating party will need to substitute payment on behalf of the other party in order

to proceed. This is made possible by the 2020 Rules, which provide "any party shall be free to pay the whole of the advance on arbitration costs should the other party fail to pay its share" (article 38, §3). - What if a party does not show up to the hearing? You must first verify that the non-appearing party was duly summoned to the hearing and that there is no valid reason for its absence. Once that is established, you may proceed with the hearing (article 24, §5 of the 2020 Rules).

Should I proactively raise arguments that the non-participating party might have made? On the one hand, you must be satisfied that the claims presented to you are well-founded in fact and in law and you should therefore not simply accept the contentions of the participating party without enquiry. The burden of proof should remain the same for the participating party, but do not hesitate to ask questions to the participating party about its submissions or request it to submit additional facts and evidence. In addition, you should of course always proactively raise objections which relate to the public order. On the other hand, keep in mind that you have no duty to, and should not, act as de facto counsel or representative of the party who has chosen not to participate. You should hence avoid the natural tendency to fill the vacuum created by the absence of one party.

Should I order the non-participating party to bear the full arbitration costs and parties' costs? Not necessarily, as you can still freely allocate how these costs shall be borne by the parties, but note that one of the criteria you may take into account in your decision is "the manner in which the parties have cooperated in handling the case" (article 39, §4 of the 2020 Rules).

Acting as arbitrator in a case where a party is refusing to participate is like being the referee of a game of tennis where only one player is on the court. It is a very challenging task, and a frustrating one too as you are deprived of the benefits resulting from the adversarial nature of normal proceedings. But as long as you did everything you could to safeguard the due process rights of non-participating party at all stages of the proceedings, you should be confident that you complied with your duty to render a valid and enforceable award.

As a very useful reference tool, have a look at the 2015 practice guidelines on party non-participation published by the Chartered Institute for Arbitrators (CIArb), which offer some practical tips on how to conduct proceedings when faced with a party (claimant or respondent) who does not participate. ■

EPISODE 2 - THE IMPACT OF INSOLVENCY ON (PENDING) ARBITRATION PROCEEDINGS UNDER BELGIAN LAW

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Introduction – private international law

With the global economy under stress because of the Covid-19 pandemic, it has become increasingly important for arbitrators (and counsel) to be acquainted with the main impacts of a party's insolvency on (pending) arbitration proceedings.

In an international context, or for a dispute between Belgian parties but where the seat is not located in Belgium, an arbitrator faced with the insolvency of a party will first have to determine the law applicable to this issue.

Under most circumstances (in intra-EU disputes), they will apply Article 7 of the EU regulation 2015/848 of 20 May 2015 on insolvency proceedings (the "Insolvency Regulation"), pursuant to which the law applicable to insolvency proceedings is the law of the EU Member State within the territory of which such proceedings are open (i.e. the place of the debtor's COMI, or centre of main interests, in accordance with Article 3 of the Insolvency Regulation). The law applicable to insolvency proceedings, in the meaning of the Insolvency Regulation, determines – among others – the debtors against which insolvency proceedings may be brought on account of their capacity, the respective powers of the debtor and the insolvency practitioner, the effects of insolvency proceedings on current contracts to which the debtor is party, the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings, and the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuit or arbitration.

In accordance with Article 18, of the Insolvency Regulation (see also Article 119(4)(3) of the Belgian Code of Private International Law for situation where the COMI would not be in a EU Member State), the law applicable to the effects of insolvency proceedings on any pending lawsuit or arbitration concerning an asset or right which forms part of the debtor's insolvency estate should be the law of the Member State where the lawsuit is pending or where the arbitration has its seat. As stressed by recital 73, this rule should not affect national rules on recognition and enforcement of arbitral awards.

The below developments will focus on the situations where Belgian insolvency law is applicable (i.e. where, depending on the issues at hand, the seat of the arbitration is in

Belgium and/or the debtor's COMI is located in Belgium).

The main questions which may then have to be determined by an arbitrator is (i) the impact of insolvency proceedings on pending arbitrations, (ii) whether a claimant may initiate proceedings against an insolvent respondent and (iii) whether an insolvent claimant may initiate arbitration.

How does a party's insolvency impact pending arbitration proceedings?

As is well known, Belgian insolvency law (Book XX of the Code of Economic Law) mostly provides for two different types of insolvency proceedings in commercial matters: bankruptcy and judicial reorganisation. 3 Judicial reorganisation does not have an impact on pending arbitration (or court) proceedings. However, during a judicial reorganisation, a temporary moratorium will be imposed during which arbitral awards (and judgments) cannot be enforced against the undertaking's assets.

In case of bankruptcy, all proceedings, including arbitration, or enforcement measures against the debtor are automatically suspended as of the date of judgment declaring it bankrupt. The other party in a pending arbitration is then required to file a notice of its claim with the bankruptcy trustee through a centralised online insolvency register.

The bankruptcy trustee appointed by the bankruptcy judgment has full control over the bankruptcy estate and is required to draw up a list of the bankrupt company's liabilities by a date set in the bankruptcy judgment. In doing so, the bankruptcy trustee must decide whether to accept the claim notified by the creditor. If the claim is accepted, the proceedings are terminated in so far as they are directed against the bankruptcy trustee.

However, if the bankruptcy trustee does not accept the claim or reserves their decision, the arbitration may continue. The bankruptcy trustee is then deemed to act in the arbitration on behalf of the bankruptcy estate.

This means that an arbitrator faced with the insolvency of a party occurring during a pending arbitration should (i) verify that this party's counsel is instructed by the bankruptcy trustee and (ii) stay the proceedings until the bankruptcy trustee accepts the claim against the bankruptcy estate (leading to the termination of the proceedings) or refuses such claim and continue the proceedings.

In a case unrelated to insolvency proceedings, the Supreme Court (Cour de cassation/Hof van Cassatie) ruled on 7 November 2019 (Case No. C.19.0048.N), that an arbitration clause may be disregarded if it imposes a manifestly unreasonable financial burden on a party, thereby breaching the party's right of access to justice. To date, no published ruling has applied this reasoning in the context of insolvency proceedings. However, one could expect bankruptcy trustees to argue that significantly high arbitration fees (which the other party is unwilling to pay) constitute an unreasonable financial burden on the bankruptcy estate, thereby allowing them to disregard the arbitration clause in favour of state courts. In Belgium, court fees are indeed marginal compared to arbitration costs.

Can one initiate arbitration against an insolvent entity?

A judicial reorganisation does not affect a party's ability to initiate arbitration against a party subject to reorganisation proceedings.

Where the potential respondent has been declared bankrupt, in principle, legal proceedings cannot be brought directly against it. Rather, all creditors are required to file a notice of claim with the bankruptcy trustee. Setting-off between a claim arising out of the insolvency procedure and a claim unrelated to the insolvency (i.e. arising out of agreements concluded before the insolvency) are possible where both claims are closely related.

If the bankruptcy trustee rejects the creditor's claim in their final report, the concerned creditor may bring the matter before the Enterprise Court. The Enterprise Court will either rule on the dispute or decline jurisdiction in favour of another court, or an arbitral tribunal in the presence of an arbitration agreement.

Bankruptcy trustees are generally bound by arbitration agreements that have validly been entered into before the bankruptcy. Arbitration may therefore be initiated against a bankrupt debtor only to the extent that the bankruptcy trustee contests the underlying claim, and only after the matter has been brought before the Enterprise Court.

The only exception is when claims which would not have arisen but for the bankruptcy, and which are closely related to it, fall within the exclusive jurisdiction of the Enterprise Court (such as, for instance, the claims of the bankruptcy trustee challenging the debtor's transactions because they are deemed fraudulent or occurred after the taking over of the administration of the bankruptcy estate by the bankruptcy trustee). Given that the Enterprise Court's jurisdiction is considered to be a matter of public policy (see also Article 6 of the Insolvency Regulation), arbitration agreements relating to claims falling under this category will not be enforceable.

In case claimant initiates arbitration proceedings against an insolvent respondent, an arbitrator will thus have to verify (i) that claimant's claims were rejected by the bankruptcy trustee, (ii) that the Enterprise Court declined jurisdiction and (iii) that respondent's counsel is instructed by the bankruptcy trustee.

Can an insolvent entity commence arbitration?

An insolvent party may initiate arbitration proceedings through the bankruptcy trustee acting on its behalf. The bankruptcy trustee has the obligation to liquidate the bankruptcy estate's assets in order to be able to pay the creditors. If the bankruptcy estate has claims against a third party that are subject to an arbitration agreement, the bankruptcy trustee may commence arbitration proceedings.

In Belgium, it is generally accepted that where an arbitration agreement applies to claims of the bankruptcy estate, the bankruptcy trustee is bound by that clause. Hence, these claims may only be resolved by arbitration.

The arbitration agreement may nevertheless be challenged if (i) it was entered into with a view to prejudicing the other creditors and/or (ii) it was entered into during the so-called "suspect period", i.e. a period of time prior to the bankruptcy, determined by the Enterprise Court, during which the actions taken by the debtor may be declared null and void.

In practice, it remains uncommon for bankruptcy trustees to initiate arbitration proceedings, barring exceptionally large bankruptcy estates. Trustees usually have limited funds at their disposal to liquidate and manage the bankruptcy estate and will therefore shy away from costly (arbitration) proceedings.

In case an insolvent claimant initiates arbitration proceedings, an arbitrator will thus have to verify (i) the validity of the arbitration agreement and (ii) that claimant's counsel is instructed by the bankruptcy trustee.

As indicated, it remains to be seen whether the Supreme Court's 2019 decision will lead bankruptcy trustees to attempt to avoid enforcing an arbitration agreement on the basis that the arbitration fees would impose a manifestly unreasonable financial burden on the bankruptcy estate. ■

EPISODE 3 - IT IS ALL ABOUT EFFICIENCY, THEY SAY. ABOUT THE OPPORTUNITY TO BIFURCATE ON JURISDICTION ISSUES

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When a party to Arbitration proceedings (typically, but not necessarily the Respondent) raises an issue about the jurisdiction of the arbitral tribunal, typically by alleging that there is no valid arbitration clause or that the arbitration clause is not in a document to which that party formally agreed (general terms and conditions), or that certain party(ies) (e.g. intervening parties, non-signatories issues) are not bound by the arbitration agreement, the first question for the arbitrator is often (even absent any request in that direction by any of the parties): should I bifurcate or not ? In other words, should I decide on certain specific issues on a preliminary basis, even if by doing so, I may generate additional costs and time?

As I will set out in this contribution, my recommendation as a young arbitrator is that you are often better off bifurcating an issue which appears preliminary to a determination on other aspects of the case (typically on jurisdiction issues) than starting a complex analysis as to whether that issue is meritorious enough to deserve a bifurcation and, hence, risking to prejudge the case and potentially give the impression to the party raising that issue that its position is weak before even being heard on it.

For the purpose of this contribution, I have chosen typical jurisdiction issues that may encourage an arbitral tribunal to bifurcate (validity, enforceability of the arbitration clause and third-party/non-signatories issues), notably because my experience as an arbitrator so far related to a jurisdiction issue raised by the respondent. It is also for these issues that it makes most sense to bifurcate quasi automatically. Let's recall, however, that bifurcation can happen on many instances, for instance to separate liability and the quantum of the damages. Interesting contributions have been written on the topic of bifurcation, to which we refer for substantive analysis (M. Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question", 29(3) Arb. Int'l 493 (2013) ; L. Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings", 36 (4) Journal of International Arbitration, 421 (2019) ; L. Greenwood, "Does Bifurcation Really Promote Efficiency?", 28 (2) Journal of International Arbitration, 105 (2011)).

We read that bifurcation (when issues like objections to the jurisdiction of the arbitral tribunal arise) may be the source of efficiency "if the earlier determination of a matter by the arbitral tribunal: (i) eliminates the need

for the parties to address certain issues which become moot as a result of the earlier decision, and/or (ii) clarifies the scope of other issues which may be relevant for the subsequent deliberation on the claims and counterclaims and/or (iii) settles the entire dispute by finding in favour of a defence raised by a party on a point of procedure or on the merits" (M. Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question", 29(3) Arb. Int'l 497 (2013)).

Authors have written that, while bifurcation should be decided on a "case-by-case" approach, "in some cases bifurcation might be considered as an almost inevitable step (…) when issues (…) are essential for the 'foundation' of the arbitral proceedings" such as the validity of the arbitration agreement, its enforceability or when requests have been made to extend the arbitration to parties which are not signatories of the arbitration agreement (also by way of joinders) or to consolidate separate but connected proceedings" (M. Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question", 29(3) Arb. Int'l 498 (2013)).

We agree with this statement that such issues typically require a preliminary determination. If a party comes with a request for intervention of a third-party and the question of the jurisdiction of the tribunal – if contested – is not treated beforehand, the risk exists that the parties should develop alternative arguments in their submissions and their oral arguments, and lose time for the potential filing of a claim towards that third-party before the competent domestic courts. In this specific example, another advantage of bifurcation is also to avoid that a thirdparty gains access to confidential information if, eventually, the tribunal considers that it has no jurisdiction towards that third-party. A preliminary decision on these issues may also "be relevant in the context of settlement negotiations that the parties may carry in parallel to the arbitral proceedings" (M. Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question", 29(3) Arb. Int'l 503 (2013)).

On the other side, it goes without saying that bifurcation may trigger additional costs and time, in particular where the matter is not "solved" at the outcome of the bifurcated issue (e.g. because the objection is dismissed), and the rest of the case remains to be argued. Therefore, some have written that "arbitrators should only order bifurcation where they can be reasonably certain that the jurisdictional challenge is meritorious" (L. Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings", 36 (4) Journal of International Arbitration, 426 (2019)). In other words, the arbitrators should look at the likelihood of success of a challenge of the tribunal's jurisdiction before determining whether they should take the (very formal) decision to bifurcate.

This reasoning is precisely where, in my opinion, the problem rests, when facing the question of the opportunity to bifurcate: by deciding whether or not to bifurcate, the arbitrator may lift a corner of the veil on its opinion on the case, even before the parties have been heard on their arguments. If the underlying justification for a bifurcation is that the issue to be bifurcated be "reasonable", or "meritorious", a refusal to bifurcate may be seen a contrario as a "prejudgment" by the arbitral tribunal as to this very issue and creating the feeling on the

part of a(some) party(ies) that the issue has already been dismissed.

Moreover, the fact that additional costs may be created by the bifurcation (and that these additional costs should therefore be balanced with the "reasonableness" (the vagueness of the concept of "reasonableness" or "frivolousness" makes that what is reasonable for one arbitrator will not be necessarily reasonable for another, which, therefore, makes an appreciation of such decision difficult and unpredictable) of the objection to be bifurcated) appears, in most instances, as a non-issue. Indeed, nothing prevents the arbitral tribunal from putting the additional costs generated by a bifurcation at the expense of the party at the origin of it. In its determination on the costs, the arbitral tribunal can base its decision by reference to the frivolous objections raised by that party, which led to such bifurcation.

However, we should not "put the cart before the horse": when a party comes with an objection as to the jurisdiction of the tribunal, the arbitral tribunal should as often as possible bifurcate the issue and treat it on a preliminary basis. If the objection really appears "frivolous", nothings prevent the arbitrator from encouraging the parties to deal with this issue rapidly. But one should always avoid giving the feeling to a party that its case is not treated diligently and independently, and therefore risking an annulment of the arbitral award.

As a young arbitrator, my tip would therefore be: when you are dealing with an objection of a party as to the jurisdiction of the tribunal, bifurcate. Of course, one case is not the other; you will always want to make an analysis of the circumstances of the case. In some circumstances, it may be "crystal clear" that the objection is purely frivolous. Of course, you may have the feeling that a bifurcation will lead to lengthy and costly proceedings. But letting each party an opportunity to present its case without suffering the feeling that its arguments are not taken seriously is to me of paramount importance. This justifies, as such, in most cases, to bifurcate the issues relating to the jurisdiction of the tribunal, without prejudice to sanctioning abusive attitudes when deciding on the costs. ■

EPISODE 4 - IN SEARCH OF THE TRUTH: THE EVIDENCE BY WITNESS MEMORY

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An arbitration practitioner once told me that arbitration proceedings are not a 'quiet river' for an arbitrator. I may agree on that statement, at least for the following reason. It is expected from the arbitrator in his/her decision to determine what happened between the parties, in the past. Reconstructing the truth and establishing the best possible synthesis of what actually happened several years ago between the parties is indeed one of the difficult missions of the arbitrator, in particular when the parties rely on fact witnesses, i.e., those who have a personal knowledge of the facts. Fact witnesses may fill in the evidentiary gaps in the absence of written documents, give the background of the business transaction in dispute or explain what the intention of the parties was at that time. The issue however is that human memory is far from being perfect and hence, reconstructing the truth from fragmented recollections of various witnesses is clearly a challenge for the arbitrator. This short article addresses witness evidence as seen from the arbitrator's role and not from that of the parties themselves.

Hearing fact witnesses can contribute to the persuasion of the arbitrator: one may agree that this is the purpose of evidence. The more credible is the witness, the more likely he/she is to convince the arbitrator and give weight on the merits of the case. Depending on legal cultures, the approaches to witness evidence may be different. In the civil law culture, witness evidence in commercial matters is pretty rare in comparison with the common law culture which has placed more focus on witness evidence, in particular on witness statements and the cross-examination of witnesses.

Under Belgian judicial law, the arbitral tribunal may hear any person during the proceedings, such testimony is taken without an oath, and unless otherwise agreed by the parties, the arbitral tribunal shall freely assess the admissibility and weight of the evidence. Many arbitral institutions also include in their arbitration rules one or more articles dedicated to evidence. For instance, article 24.2 of the 2020 CEPANI Arbitration Rules provides that unless the parties have agreed otherwise, the arbitral tribunal shall be free to decide on the rules for the taking of evidence and obtaining evidence from witnesses. In addition, in the field of evidence in international arbitration, there are accepted practices within the arbitration community drawn from guidelines such as the IBA Rules on the Taking of Evidence and the IBA Guidelines on Party Representation.

When relying on fact witnesses, what is the nature of people's memory? How precisely does a person remember what he/she was

doing several years ago on a specific date? If one of your colleagues can remember that there was a bouquet of flowers on the table during a meeting, you may not remember that information. The same applies to witnesses: memory selects what interests each of us. In fact, it is important to understand the memory process. The better the arbitrator will be aware of the functioning of memory, the better positioned he/she will be to determine the probative value of witness evidence.

As a first element, the arbitrator should draw the attention of the parties on the production of evidence and make sure that, in concertation with the parties, the terms and conditions for the taking of witness evidence are addressed during the case management conference and in Procedural Order no. 1, taking into account the legal culture of the parties. Such order will address different points, such as whether the IBA Rules on the Taking of Evidence apply, or whether the parties wish more tailormade rules considering the specificities of the case. These rules will usually address the submission of a written witness statement, the appearance of the witness during the hearing, the consequences if the witness summoned to appear fails to appear without due justification, the possibility for the arbitrator to refuse to hear a witness and the conduct of the hearing (including cross-examination). Most importantly, the arbitrator must make sure that the oral and written evidence of each party is submitted to the contradiction of the other party.

Before the evidentiary hearing, the arbitrator must read the witnesses' statements in advance, so he/she understands why the witness is called and what one party is trying to achieve by that witness. The arbitrator shall also decide if there is a specific witness he/she wants to hear even if the parties did not make such a request. During the evidentiary hearing, the arbitrator will monitor the time, may ask questions during the examination of the witness or reformulate a question while maintaining strict impartiality, and decide on any incidents during the hearing. He/she must understand the questions that are asked to the witness and why they are asked. The arbitrator shall check whether the facts on which the witness is testifying are disputed or not. Most importantly, he/she shall not forget that a fact witness does not draw legal consequences: the witness tells the facts. The legal consequences are for counsel and the arbitrator. Finally, the arbitrator will remember that a neutral fact witness is pretty rare: the witness is being asked to give evidence because it generally supports the case of one party.

The ICC released a Report (dated November 2020) on the accuracy of fact witness memory in international arbitration. The ICC Task Force on Maximising the probative value of witness evidence looked at the science, with input from psychologists specialising in human memory, and the arbitral practice. The Report indicates that scientific studies show that the memory process is subject to distortions and that it is not a fixed image but rather a dynamic process that can be affected by subsequent events. For instance, the Report highlights that some practices, such as having counsel prepare a witness statement, can have a distorting effect upon the witness' memory, even if this may help the witness to communicate to the tribunal its

understanding of the facts. Besides, talking to co-witnesses, interviewing witnesses in a group rather than individually or changing just one word within a question can change the evidence that a witness recounts (e.g., asking how long an event was or how short may receive different answers).

The Report gives useful recommendations to reduce distorting effects, such as the use of open-ended questions rather than specifically or potentially leading questions or to encourage the witness to identify the source of its knowledge. Giving clear instructions to the witness prior to his/her examination and indicating to him/her that "I don't recall" is permissible are also techniques that reduce the distorting effects. Furthermore, the ICC Task Force makes recommendations with respect to the specific role of the arbitral tribunal and the questions the latter could ask itself when considering steps to take in order to mitigate the effect of imperfect memories (such as should it discuss with the parties the taking of witness evidence at the outset of the proceedings to avoid memory contamination or should it investigate at the hearing how witnesses were prepared in order to assess the reliability of the evidence, and is such investigation compatible with attorney-client privilege?). A case-by-case analysis is required to determine which steps are appropriate as, for instance, witness testimony does not always depend on accurate memory (e.g., the accuracy of a witness' memory which provides technical background may not always be a relevant issue).

The Report contains valuable insights while stressing the need for further research in this area. As a general recommendation, educating himself/herself to better understand the functioning of human memory can be helpful for an arbitrator. Even if memory is not perfect, the Report emphasises that witness evidence remains valuable and important and that a predetermined view of the hierarchy of the value of different types of evidence may not be prudent in international arbitration, i.e., witness evidence should not be pushed into the background compared to documents : "The aspiration should be to reduce the imperfections to the extent reasonably possible in order that the decision rendered can be just, based on a reasonably close approximation of what in fact happened, and in the process enhance the satisfaction of users with the arbitral process" (§6.19 of the Report) – isn't this also part of the mission of the arbitrator in search of the truth ? ■

EPISODE 5 – ETHOS IN THE POST-TRUTH ERA

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Who remembers this child of two Jamaican immigrants, born in Harlem and educated in a public school in the Bronx? Who remembers that he became a four-star general in the US army, ending up as Chairman of the Joint Chiefs of Staff? Who remembers that he was the first African-American national security advisor and US Secretary of State? Who remembers the doctrine he implemented, and which bears his name today, that limited the propensity of the US to go to war and aimed at avoiding another Vietnam? Who remembers that, in a warmonger administration, he was a moderate, which led him to resign in 2005?

Despite all this, Colin Powell is most remembered for his 2003 address to the United Nations Security Council, during which he (unsuccessfully) tried to convince the world that Iraq remained in control of weapons of mass destruction. He declared, "every statement I make today is backed up by sources, solid sources. These are not assertions. What we are giving you are facts and conclusions based on solid intelligence". In a 2005 interview for ABC, Colin Powell recognised that these statements, which were later proven to be false, tarnished his reputation, defining it as a "blot" on his career. A "blot" that obscures all the rest. Ironically, as the Guardian summed up, he "will be most remembered for the act he most regretted".

The recent death of Colin Powell, former US Secretary of State, made me want to reflect on the importance of one's credibility, especially in the arbitration community, and the fragility of such credibility, especially in these years where facts have become less relevant than beliefs.

The theory of rhetoric, as identified by Aristotle 2,500 years ago, may help us understand the issue at stake: the art of persuasion is based on three pillars: (i) ethos, the authority and credibility of the speaker, (ii) pathos, appealing to the feelings and emotions of the audience and (iii) logos, the logic (or rationality) of the speech.

In litigation, and arbitration is no exception to this, effective lawyers must persuade the adjudicators that the position they represent is right. These three pillars apply at every stage of a proceeding. Arbitrators, who are appointed via their peers, must pay attention to their ethos. Legal writing mainly focuses on logos, analysing legal reasoning and demonstrating the soundness of an interpretation of the law. Let us focus on ethos for once.

Such focus is even more important in today's world. Returning to Sec. Powell's speech to the UN, besides the personal harm to Sec. Powell's reputation, this speech may also

have been part of a broader change: to decrease the value of the speech of senior officials. In Aristotle's words, the position held, as well as the credentials and experience of the speaker, are no longer sufficient to generate confidence. Recent years have increased this phenomenon, making some intellectuals assert that we have entered into post-truth politics, post-truth being defined by the Oxford dictionary (awarding this adjective the 2016 'word of the year') as "relating to circumstances in which people respond more to feelings and beliefs than to facts". Recent examples are Trump's false statements about electoral fraud in the 2020 US election or discussions on social media about the COVID-19 pandemic, where the opinions of physicians and epidemiologists were challenged, or even treated suspiciously, while attention and credence were given to unsubstantiated beliefs.

Some mainstream opinions, such as the French version of the Wikipedia article on "post-truth politics" refer to Sec. Powell's UN speech as one of the origins of the broad movement of lack of confidence in the media and the evolutionary process that has led to post-truth politics. Even if a (direct) link between this 2003 speech and the radical change of the political debate in recent years is impossible to prove, and the causes of post-truth politics are multiple, this speech dramatically affected US credibility and remains an example of lies by senior officials, invoked as evidence for "alternative" theories.

One act can thus affect one's career, and have a large butterfly effect.

The importance of ethos should however not be a prison. When I was drafting my first award, having been appointed as sole arbitrator, besides all the questions on what I would decide for the outcome of the case or the legal reasoning underlying my decision, fears crossed my mind that I had to avoid such-and-such line of reasoning, or needed to add another paragraph to the award, to avoid hurting the party (and its lawyer) whose argument I was rejecting. Above all was the fear that the award could be annulled, a terrible blot on the reputation of a (young) arbitrator.

This leads me to two reflections.

First, as lawyers, we have a duty to investigate the statements we make to an arbitral tribunal. It is a well-known saying that the lawyer is the first judge of their client's case. As lawyers, we should only present arguments we believe to be true, such belief being based on our assessment of the facts of the case at hand and of the applicable law. Of course, our role is to represent the clients and defend their rights in the best way. We can argue new legal theories or propose to overturn case law following a new reasoning. But our responsibility is to find a balance between our loyalty to the client and our duty to the arbitral tribunal. In practice, this might sometimes be difficult, as knowledge of the facts may evolve throughout the arbitration proceeding, for example through document production, expert reports or witness statements. Sometimes there is not even written evidence, just the word of one party against the other. Finding this balance is essential, as presenting a frivolous case can severely harm the reputation of the lawyer involved. One must sometimes refuse to make certain arguments, no matter how difficult it might be to say "no" to a client. As

arbitrators, we should ensure that we have properly addressed all the arguments raised, after having paid due consideration to the evidence filed. We should not be afraid to reject arguments we consider unconvincing and, especially during the proceedings, refuse requests that would not be helpful to the outcome of the case. The so-called due process paranoia, making arbitrators accept procedural requests to avoid a possible future annulment, may have its roots in the excessive importance given by arbitrators to the potential harm that an annulment of their award may cause to their ethos, compared to a slower arbitration proceeding.

Second, one should not judge others too harshly. We all make mistakes, and the underlying reasons for an action are not always obvious. The annulment of an award is certainly a difficult decision for the arbitrators involved, but the reasons for an annulment can be diverse. And it does not erase the legal skills of the arbitrators whose decision has been annulled or their previous accomplishments. The same applies to the lawyers involved. What, at the end of an arbitration proceeding, may appear to be a frivolous case, may have had solid roots at the outset. The lawyer involved may have faced an ethical dilemma between the loyalty due to their client and stepping down from the case, preferring the former for reasons unknown to someone external to the attorney-client relationship.

In his 2005 ABC interview, Colin Powell explained the importance for him of loyalty and the fact that, even if he was "reluctant" about the war, his loyalty to the President who appointed him made him support the war effort. We can easily see the moral dilemma in this case. For a soldier, is it surprising to prefer loyalty? How difficult must it be to resign from one of the highest positions in the US Government, especially when you are the first person from a discriminated minority to hold such office? We can believe that Sec. Powell's decision was not the one we would have taken, but not one of us was in his shoes then. We can at least recognize he was in a very difficult position and honour him for the many other achievements of his career. In our careers, we all have choices to make, each one coming with consequences we dislike, but cannot avoid. The external world will only see the conclusion of what might have been a months-long dilemma. Before drawing a definitive conclusion about someone, we should reflect on why this person acted this way and try to understand the dilemma they faced.

To conclude, in one sentence, we must be firm with ourselves when presenting arguments or drafting awards, ensuring solid factual and legal grounds for statements we make, and tolerant vis-à-vis others, as we cannot know the underlying thought processes behind other people's actions. With that in mind, thinking about one's own ethos in the context of arbitration proceedings should not be a fear of doing wrong, but a commitment to doing better. ■

EPISODE 6 - DEALING WITH THE COMPLEXITIES OF UNSOPHISTICATION

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* The views expressed in this piece are the author's personal views only – not those of his employer.

Sophistication brings complexity. The more sophisticated the parties, their counsel, the more the arbitration is complex, so is the commonly held view. Complexity is even more pronounced in multi-jurisdictional, international, arbitration, which requires the conciliation – or causes the collision, depending on one's outlook and point of view – of legal cultures and traditions. But does that mean that the less sophisticated the parties, and counsel, the less complex the arbitral process will be? As arbitrator, what I do see is that dealing with unsophisticated parties and counsel can lead to complexities, or perhaps even complications.

In his article the 'Sociology of International Arbitration' (2015) [31(1) Arbitration International, 1, 3], the late Emmanuel Gaillard described international arbitration as a 'social field' involving a 'constellation of actors' sharing a 'common meaning system'. In the often-elitist monde of international arbitration, things are done in a certain way, as though by habit. There are social norms of conduct. There are expectations about how things are done. These norms are not necessarily shared outside of that 'system' – to adopt Gaillard's term. And this is often the case in the small matters that young arbitrators tend to be called upon to adjudicate. As I was once told by a mentor, it is the small cases that are often the most difficult, and most complex. That is the reason why they tend to be excellent learning opportunities. And so I will address below some of the lessons I learnt in dealing with the complexities, or complications rather, of unsophistication. These can permeate in various ways, which I can capture through a series of non-exhaustive questions: What to do when a party or their representative is not responding to correspondence either from the other side and/or from the tribunal? What to do with recalcitrant or uncooperative conduct? What to do when procedural orders are not being followed, when deadlines are being missed? What to do when a party or counsel are clearly ignoring or not understanding a provision of the relevant arbitral rules or procedural order? What to do when both parties and counsel are not consulting with each other and incessant complaints are unnecessarily being brought to the attention of the tribunal? What to do when the parties jointly propose a procedural process that is simply unworkable?

The first challenge is to ensure that Procedural Order No. 1 is adequately tailored to the requirements of a given case. A draft should be circulated to the parties for their comment and review. A procedural

teleconference should be organised for the arbitrator to explain how the process will unfold, including his/her expectations of the parties, and hear the parties' views. This is the when the arbitrator should inform the parties of his/her expectation that they cooperate and consult in good faith and collaboratively on all – and I do emphasise here the term all – issues before resorting to him/her for the sake of the good, efficient and expeditious conduct of proceedings.

This brings me to the second challenge. It ought not be taken for granted that parties and their counsel necessarily grasp the complexities of arbitral rules, and arbitration as a process more generally. Let us not forget that arbitration is a specialist field, within the specialist discipline of Law. Not all parties, and not all lawyers will be familiar with its intricacies. When dealing with non-specialised parties and counsel, arbitrators ought to educate participants about the process. This can be done by way of a teleconference with the parties. One of the positive consequences of the COVID-19 era is that meetings are now routinely held over Zoom or any other accessible platform. Assembling the parties over a brief procedural teleconference to hear their views on a disputed issue and dispose of it in a reasoned manner – and take the opportunity to explain that decision by reference to the relevant rules – has never been easier. The earlier that is done, the more the process will run in a fluid, efficient and expeditious manner.

The third challenge is to ensure that the parties are adhering with rigour and discipline to the arbitral process. Reasonable, but firm, deadlines are one way of instilling that. However, this can only be done if the arbitrator adopts that rigour and discipline him/her-self. This means that parties' communications should be processed, and receipt acknowledged, swiftly for there to be a tempo to the process.

The last challenge comes from within – it has to do with dealing with arbitrators' due process paranoia. It is now a common thread that court judges manage adjudicative processes and dispose of issues in a more decisive, efficient and expeditious way than arbitrators, so many increasingly argue. I was reminded of this by reading a recent interview of Toby Landau QC in the Global Arbitration Review (Global Arbitration Review, '"You would be shocked": a fireside chat with Toby Landau', 22 November 2021) where he pointed out that, in court, a judge would not hesitate to let counsel know that a line of questioning in crossexamination is unhelpful; whereas, in arbitration, there is more hesitancy – '… nobody has the nerve to say, "Actually, this is not very helpful"', says Landau.. It ought not be that way. Arbitrators, especially young ones, should not shy away from being decisive as long as they are acting within their jurisdictional and procedural contours which, needless to say, they need to be fully on top of. The key is to ensure that each side has had the right to be heard at each step of the process but that does not mean that one cannot make decisive rulings based on his/her independent view.

And so, to conclude, I do believe that the beauty of the complexity of our discipline is to be found everywhere – in the big and the small matters. This is what makes arbitration so profoundly interesting. ■

EPISODE 7 - SUMMARY INSIGHTS INTO SUMMARY DISMISSAL IN INTERNATIONAL ARBITRATION

Joanna KOLBER
Partner, Strelia

Introduction

Having had a more "classic" experience as an arbitrator under the NAI, CEPANI and ICC Rules, it was with somewhat of a challenge that I was recently confronted with a party's motion for expeditious determination of the other party's defence.

It proved quite a task to find any practical guidance about the precise circumstances in which such a motion could be considered and granted. This prompted me to investigate the topic of summary dismissal of claims in arbitration in more detail. I am now happy to share some of my insights with the readers of the CEPANI newsletter.

Summary dismissal: some basics

What is summary dismissal?

Summary dismissal is a procedure for speedy resolution of issues without a full procedure and without considering all the evidence. Summary dismissal is often also referred to as summary disposition, early disposition, expeditious determination or similarly, with some authors pleading to underscore in particular the phrase 'early' or 'expeditious'. This is to avoid giving the impression that summary disposition of claims would not involve sufficient scrutiny.

Historically, summary dismissal originates from common law jurisdictions. Continental lawyers are not particularly familiar with this notion, but Belgian litigators might see some distant parallels with the so-called 'short debates' before Belgian courts (pursuant to Article 735 of the Belgian Judicial Code), which allow for early and speedy resolution of specific types of claims.

Proponents of summary dismissal stress that summary dismissal may facilitate settlements, discourage parties from bringing frivolous claims and, most importantly, lead to greater efficiency and speed of arbitration. Critics argue that that summary dismissal proceedings might violate the parties' due process rights, thus endangering the validity and enforceability of arbitral awards. They also consider that motions for summary dismissal add to the complexity of arbitration proceedings because they would force parties to engage in additional rounds of arguments. Some even complain that summary dismissal leads to the Americanisation of arbitration. In Belgium, where the arbitration law includes an obligation to provide reasons for the arbitral award, some critics also add that summary dismissal might stand in the way of fulfilling this obligation.

Is summary dismissal acceptable? Are arbitral tribunals empowered to summarily dispose of claims?

It is debatable whether arbitral tribunals have the discretion to dispose of claims or defences, or other issues without an authorization to do so expressed explicitly by

the parties or in the applicable arbitration rules. According to some authors (and the ICC; see the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (ICC Note), the arbitral tribunals' broad discretion to determine the procedural rules also encompasses the tribunal's discretion as regards summary disposition. Others disagree.

With the introduction of the party's right to file an objection that a claim is 'manifestly without merit' in the ICSID Rules in 2006, summary dismissal started to make its way in international commercial arbitration. Since then, several arbitral institutions included the party's right to file a motion for summary dismissal in their rules: among others, the LCIA, SCC, SIAC, HKIAC and JAMS. Others, such as the ICC, chose a middle way and, rather than including summary dismissal in their rules, provide guidance about this tool in their note of conduct issued to the parties and arbitral tribunals. Many other institutions have so far refrained from amending their rules in this respect (e.g., DIS, CIETAC). CEPANI also remains among the latter.

Framework for summary dismissal: regulation in arbitration rules

The way summary dismissal is addressed in arbitration rules or notes of conduct varies. Some rules speak only of summary dismissal of claims (e.g., ICSID), others also refer explicitly to defences (e.g., SIAC, LCIA), yet others to also other issues (e.g., SCC, JASM, HKIAC). Some rules specify that the claims may be dismissed if they are manifestly without legal merit (e.g., ICSID, SIAC), others extend it also to allegations of fact that are manifestly unsustainable (e.g., SCC, ICC). Some rules specify which types of issues may be subject to early disposition ruling, e.g., jurisdiction, admissibility, merits (e.g., ICSID), whereas others do not. Some rules or notes of conduct require the motion for summary dismissal to be made within a specific time limit (e.g., ICSID), whereas others do not (e.g., ICC, HKIAC, SIAC). Some rules provide for more elaborate proceedings to be followed with regards to summary dismissal (e.g., SCC, ICC), others merely include the arbitral tribunal's authorization to make early determination (e.g., LCIA).

There is very little published case-law or other guidance about the circumstances in which arbitrators could consider dismissing claims expeditiously, or about what precisely constitutes a manifestly unfounded claim, defence or issue in commercial arbitration.

Some exceptions are the ICC and the SCC arbitrations. The ICC Note advises arbitrators to consider any circumstances they consider relevant, including the stage of the proceedings and the need to ensure time and cost efficiency. The SCC Rules advise to consider whether the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

Ground rule: due process and opportunity to be heard

It goes without saying that, under all rules that explicitly provide for summary dismissal and in all circumstances, arbitrators should put the parties' due process rights and their opportunity to be heard in the foreground.

Fast-forward to my personal experience

In the case I handled, the claimant requested that the sole arbitrator expeditiously consider the respondent's defence as manifestly

unfounded and grant the claimant's claim. The request for expeditious determination was formulated in claimant's second round of submissions, somewhat halfway through the arbitration and shortly before the respondent was about to file its last submission. In the specific circumstances of the case, the application for expeditious determination was unlikely to contribute to a speedy and cost-efficient resolution of the dispute. Among other things, several parties' submissions were filed at the time of the application, the proceedings were nearing the end and the case itself was subject to the ICC Expedited Procedure Rules, which impose tight time limits for the resolution of the dispute which in themselves help achieve a speedy result.

In the future, hopefully more practical guidance on the topic will become available. It is also with great curiosity that we await the CEPANI's future steps. It remains to be seen whether the CEPANI will change its cautious approach to summary dismissal which it expressed as recently as in the 2020 questionnaire in the UNCITRAL Working Group on Expedited Arbitrations. ■

EPISODE 8 – THE QUEST FOR A QUALITATIVE AWARD: WHERE THERE IS A WILL, IS THERE A (SAFE) WAY?

Lily KENGEN
Associate, Tossens Goldman Gonne (Brussels)

One may argue that an arbitrator is entrusted with the mission to render a complete, informed and reasoned award, in accordance with the applicable rules and contractual provisions, which entails the duty for the arbitrator to do everything within his/her powers to fully investigate the dispute, both in fact and in law. In that context, an arbitrator may in certain circumstances be tempted to supplement the parties' legal argumentation to substantiate the upcoming award. It is especially the case when the arbitrator bears – at it is often the case – a 'double-hat', and also (and, sometimes, primarily) acts as counsel. The same may go when facing an insufficient defence or a mismatch between the parties' respective positions, leading to an overall unbalanced debate. That "déformation professionnelle" legal practitioners acting as arbitrators may already have struggled with, necessarily raises the following question: to which extent, in the quest for a qualitative award, is an arbitrator allowed to intervene in the arbitration proceedings, notably with a view to "fill a gap" in the legal argumentation?

The fundamental rule in arbitration is that the primary control rests with the parties. The latter have, in principle, command not only of the procedural aspects of the arbitration proceedings as provided by Article 1700 of the Belgian Judicial Code, but also of the substantive matters presented to arbitration. Does that mean that arbitrators are bound hand and foot by the parties, who can – as the case may be – take their decider down with them if they fail to adequately present their case? Of course, it does not.

In this short contribution I identify certain tools which, as a young arbitrator, I have come to find useful to draw the parties' attention to legal and factual issues relevant to their dispute or to supplement any potential shortcomings in their case, and briefly highlight the basic principles which I believe should be kept in mind or complied with in doing so.

First and foremost, when it comes to ensuring a smooth and complete arbitration process, 'prevention is better than cure' and the taking of prior procedural measures is therefore key. In particular, once an arbitrator is seized with a new matter, it may be useful – depending for example on the content and quality of the first submissions – to hold a preparatory conference call (or in-person meeting) with the parties at the outset of the arbitration proceedings. Such conference may be a good opportunity to provide a thorough explanation of the procedure and applicable rules, as well as to make sure that the parties adequately prepare themselves and, as a consequence, provide sufficient substance for an arbitrator to render a satisfactory award. In

presence of an unrepresented party, an arbitrator may also take that opportunity to recall the possibility to be represented by counsel (or, as the case may be, pro bono counsel), which will generally lead to more qualitative and comprehensive submissions.

That being said, it should be reminded that a party is never under the obligation to be represented by counsel in arbitration proceedings and that arbitrators should refrain from inadvertently suggesting otherwise (see, i.a. Article 24(7) of the CEPANI Arbitration Rules and Article 26(4) of the ICC Arbitration Rules).

Procedural orders as such are also a subtle method to "raise a flag" when one or both parties seem to overlook an important and relevant point. Young arbitrators in particular should not be shy to ask questions and require parties or their counsel to answer them in their upcoming submissions. This strategy proves very useful in guiding the parties towards factual or legal issues they may not have thought of in the preparation of their initial arguments, or – as the case may be – in pointing out missing evidence or a potential miscalculation in a party's financial claim. This initiative nonetheless requires that the arbitrator fully embrace the matter from the start and carefully analyse the request for arbitration, the respondent's reply and the related exhibits.

Alternatively, arbitrators may also question the parties during a case management conference, or at the occasion of the hearing, with the parties answering either directly or by means of a post-hearing brief. In that context, however, arbitrators should be careful to raise their questions in such a way that these are not perceived as biased or deliberately leading (e.g., to the extent possible, by directing them to both parties, by adopting a neutral wording, etc.).

In case those preventive measures and incentives do not suffice to wind up the legal debate, arbitrators may still encourage the parties by raising remaining issues 'head-on'. Under Belgian law for instance, certain specific rules must, because of their very nature, be raised ex officio by arbitrators. This is the case of public policy rules, which arbitrators are bound to apply, even when the parties fail to invoke them in support of their position (e.g., prohibition of corruption, nullity of certain non-compete clauses, etc.). It is also sometimes held that a decider must raise mandatory provisions of Belgian law when applicable to the dispute at hand (e.g., rules on unfair contract terms, rules on commercial leases protecting the lessor or the lessee, etc.). Even in the absence of public policy and mandatory provisions it may still however be argued that the arbitrator should feel free to draw the parties' attention to other legal or contractual provisions that may be relevant to the dispute and, therefore, to its upcoming decision. Making sure that the legal debate is complete and exhaustive is indeed a prominent element of the quest for a qualitative award.

When engaging in a more proactive role, arbitrators should nonetheless be particularly mindful to fully embrace the duty to treat the parties equally and to ensure due process. This is why, in practice, it is recommended that an arbitrator raising a new point (of law or of fact), whatever its nature, do so in the most impartial way possible and, in any event, always give both parties the opportunity to comment in accordance with the adversarial/contradictory principle. In

addition to the above, it should also be borne in mind that certain provisions of Belgian law specifically enable judges (and arbitrators) to decide discretionarily on certain issues, even in the absence of any argument made in that respect by any party. It is notably the case when ruling on interests and penalty clauses, where the decider may play a moderating role or correct a potentially unfair situation, notwithstanding the parties' respective views (or, as the case may be, absence thereof), in accordance with Articles 1153, 5th indent and 1231, §1 of the old Belgian Civil Code.

Finally, arbitrators are entrusted with the power to decide on the costs of the arbitration proceedings. The extent of this power depends on the applicable arbitration rules, but it is often described as discretionary (e.g., ICC, CEPANI). When deciding on costs, arbitrators thus enjoy a dedicated space where they can operate (almost) freely. I would encourage arbitrators to make the most of that possibility, notably by thinking outside the box or displaying a certain degree of creativity in their reasoning. Indeed, apart from the general "costs follow the event" rule, which should not necessarily be automatically applied, other various (less known) formulas (e.g., leaving each party support its own costs irrespective of the outcome, where appropriate) and criteria (e.g., the parties and their counsel's conduct during the proceedings, the reasonableness of the costs incurred, the disparities between the parties' respective costs, etc.) for apportioning and allocating arbitration costs should be considered, for the purpose of rendering an all-the-way-reasoned and fair award.

Overall, arbitrators may be encouraged to oversee and conduct the arbitration process proactively, both from a procedural and a substantive perspective, including by making (a careful and wary) use of the many tools at their disposal, for the sake of rendering the best possible award. In that context, a decider should not be afraid to put his/her personal legal knowledge, creativity and experience to the service of the full investigation of the case to be resolved. Ultimately, an arbitrator's own qualities are their best asset and, usually, the very reason they have been entrusted with the mandate in the first place. Of course, playing an active role in the arbitration process may prove to be a little riskier, but is it not worth it? ■

EPISODE 9 – DO NOT LET A NON-RESPONDING PARTY SPOIL YOUR ARBITRATION !

Marijn De Ruysscher
Counsel, Lydian (Brussels)

You finally have that long-awaited arbitrator appointment. You note that the respondent does not (yet) have a lawyer, but at least you have an e-mail address so you can easily contact them. You send your initial e-mail to the parties, inviting them for a short case management conference and asking them to provide their input for the draft terms of reference. Of course, as you have seen so many times before as counsel, you provide a short deadline to make sure that your arbitration gets off to a good start. You will make sure that your arbitration is a speedy one and improves the statistics!

When the deadline is finally there, Claimant's counsel is asking for some additional days, as it seems you were a bit optimistic with the tight deadline. Finally, you get the required input from Claimant's side. From the Respondent's side, however, you receive no reply at all. You still are so optimistic to assume it is a mistake, so you send Respondent a reminder, giving them another day or two to get back to you. Again, no reply. The same goes for another reminder. What to do next? Should you send Respondent a registered letter inviting them to a case management conference? Should you continue sending e-mails although there is no reaction? And why is Claimant's counsel not really helpful and sending you a suggestion what to do, assuming you as arbitrator will solve this situation?

This hypothetical scenario shows that being an arbitrator yourself may be very different to what you are used to when being counsel in an arbitration. You may be used to arbitrations where both parties are represented by professional lawyers, fighting on the subject matter of the case, but cooperating in a professional way on the procedural points of the case.

The most likely situation where a party does not cooperate is where a Respondent, for whatever reason, refuses to respond. It may be an intentional strategy, it may be for financial reasons, but it may also be a lack of understanding of the legal consequences of an arbitration. You are in the end 'only' a lawyer and not a court so how binding can it be if they get an e-mail from you?

However, it is not to be excluded that as arbitrator you also get limited input and support from Claimant's side. This will likely be caused by limited arbitration experience by Claimant's lawyer who may expect the Arbitral Tribunal 'to do the necessary' once the claim is filed, perhaps not always realizing that arbitration is typically tailored to the choices and preferences of the parties and not of the Arbitral Tribunal.

We will focus here on the situation of a non-responding or non-cooperative Respondent. The most difficult and tricky situation is when a party is not responding at all to any communication. When a party is fully ignoring any communication you send, they may later in annulment proceedings try to deny that they were aware of the arbitration and that they were not able to exercise their

rights of defense (article 1717, § 3a, ii Judicial Code).

If a party is merely non-cooperative during the arbitration, things could be easier. The situation could for example be that a Respondent is willing to sign the Terms of Reference, or has engaged a lawyer, but is merely not providing (sufficient) input afterwards, not filing submissions or not attending a hearing, for whatever reason. In that case, Respondent cannot just claim it was not aware of the arbitration.

Luckily the applicable arbitration rules typically provide for solutions for an Arbitral Tribunal to advance the arbitration. If the CEPANI Arbitration Rules are applicable, article 8.4 determines that communications can be validly made to the last address of the addressee. If the non-responding party is a Belgian company, you could also do your own check in the Cross-Roads Bank of Enterprises in order to check the actual seat of the company.

Article 23.4 foresees the situation where a party does not sign the Terms of Reference. In case of a non-responding party, it will be the other party that will have to advance the arbitration costs in full, otherwise the arbitration cannot start. In case of an ad hoc arbitration where you may have agreed on another way of remuneration (for example an hourly rate), you should make sure that the party cooperating is sufficiently provisioning your work.

In general, it is important as arbitrator to remain professional and make sure you keep offering the non-responding or non-cooperative party the possibility to participate in the arbitration, even though you may know after a while there will be no response. It is also important to carefully consider how you should send communications to this party and to keep a record of such communications in your file. Finally, also make sure that you set out all these facts in the arbitral award itself, so that it becomes clear for a court when reviewing the award in the framework of potential annulment proceedings that you as an arbitrator took all reasonable measures to make sure this party could participate in the arbitration and could exercise its rights of defense, but that it was actually the proper choice of this party not to do so. You should indeed anticipate throughout the handling of such case that at any time in the future, there could be annulment proceedings being initiated that will review your work. For that reason, it is essential that you not only remain independent and impartial and respect all parties' rights of defense, but also that this clearly follows from the communication that is on record. And in the end, you should not let this non-cooperative or non-responsive party spoil your arbitrator appointment and enjoy the experience! ■

WERKGROEPEN

DIGITAL ARBITRATION

VOORZITTERS:

Kevin ONGENAE

Dirk VAN GERVEN

LEDEN:

Tom HEREMANS

Camille LIBERT

Mathieu MAES

Flip PETTILLION

Emma VAN CAMPENHOUDT

Herman VERBIST

Het afgelopen jaar concentreerde huidige werkgroep zich voornamelijk op het mobiliseren van de ADR-beoefenaars voor het gebruik van de gecertifieerde elektronische handtekening voor de ondertekening van procedurele documenten in de loop van zowel arbitrage-, bemiddelings- en domeinnaamprocedures.

Hiertoe stuurde het Secretariaat arbiters, mediators en derde-beslissers bij hun benoeming een eID cart reader toe, teneinde laatstgenoemden aan te sporen gebruik te maken van dit type handtekening, opdat CEPANI ADR-procedures nog efficiënter, veiliger en sneller zouden kunnen verlopen.

Voor het komende jaar zal de werkgroep de digitale evoluties op het nationale en internationale toneel blijven opvolgen en zich verder inzetten voor een aantal projecten zoals de mogelijke introductie van een nieuwe case management softwaresysteem en de hiermee gepaard gaande creatie van een digitaal platform voor het voeren van de CEPANI domeinnaamprocedures.

Recht en praktijk staan wat digitalisering betreft niet stil en CEPANI volgt steeds de laatste evoluties op!

DIVERSITY

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Dirk VAN GERVEN

Op initiatief van Voorzitter Kohl is in 2021 de Werkgroep Diversity & Inclusion opgericht, onder co-voorzitterschap van Sophie Goldman en Werner Eyskens. De Werkgroep telt 12 leden, waaronder Niuscha Bassiri, Hakim Boularbah, Marie Canivet, Nathalie Colin, Vanessa Foncke, Françoise Lefèvre, Maud Piers, Emma Van Campenhoudt, Dirk Van Gerven en Sigrid Van Rompaey. De Werkgroep heeft talrijke bijeenkomsten en werksessies gehad in 2021 en 2022, en heeft een eerste rapport opgesteld. Dit rapport werd voorgesteld en besproken tijdens de vergadering van de Raad van Bestuur van 17 maart 2022.

Ce premier rapport contient tout d'abord une analyse économique de la plus-value d'une diversité accrue dans des organisations professionnelles, et il résume ensuite l'évolution des attentes des clients de la présence d'une diversité au sein du secteur juridique d'une part, et plus précisément dans le monde de l'arbitrage. La conclusion de cette analyse est que, même en dehors de toute considération morale, éthique ou idéologique, le public utilisateur des services d'arbitrage attend de la communauté d'arbitrage la présence d'une diversité, y compris au sein des institutions d'arbitrage.

De Werkgroep beperkt zich niet tot specifieke vormen van diversiteit, doch vat diversiteit zeer breed op. Hoewel beschikbare statistische informatie dikwijls slechts één of twee vormen van diversiteit weergeeft en hoewel niet alle vormen van diversiteit even zichtbaar zijn of zichtbaar gemaakt worden,

beveelt de Werkgroep aan dat CEPANI zich tot doel stelt om alle vormen van diversiteit te stimuleren, zonder enige beperking, op vlak van geslacht, nationaliteit, etnische oorsprong, socio-economische achtergrond, opleiding, leeftijd, gezondheidsbeperking, seksuele voorkeur, enz. De Werkgroep besliste tevens om "inclusie" mee op te nemen in haar eigen benaming, omdat inclusie duidt op een proactieve, open houding ten opzichte van alle, zelfs niet gekende of duidelijk gedefinieerde vormen van diversiteit.

Le rapport décrit ensuite les données statistiques disponibles en ce qui concerne la diversité de genre et d'âge, tant au niveau des désignation d'arbitres qu'au sein des différents organes, comités et groupes de travail du CEPANI, et leur évolution au fil des dernières années, et il compare ces données à celles d'autres institutions d'arbitrage.

Enfin, le rapport propose une série d'initiatives pour améliorer la diversité et l'inclusion au sein du CEPANI, et notamment:

- l'introduction du critère de diversité dans la clause-type d'arbitrage CEPANI;
- la mention de la prise en compte de diversité et inclusion dans les procédures de sélection d'arbitres dans le Règlement CEPANI;
- l'engagement d'améliorer notamment la diversité homme/femme au sein des différents comités et groupes de travail; l'organisation d'un rapport périodique au Conseil d'administration sur la réalisation de ses objectifs; et l'encouragement et la recherche proactive de candidats arbitres reflétant la diversité du public utilisateur des services d'arbitrage;
- des changements dans la gouvernance du CEPANI, notamment en ce qui concerne (i) l'utilisation de l'anglais comme langue de travail au sein du CEPANI et pour ses activités externes; (ii) la transformation du Conseil d'administration en un groupe plus restreint avec des mandats d'une durée déterminée afin d'améliorer la rotation de ses membres et (iii) la création d'un Conseil de supervision qui se penchera sur des questions plus stratégiques;
- différentes initiatives pour attirer comme membres du CEPANI de plus nombreux juristes d'entreprises,

représentants du monde académique et magistrats;

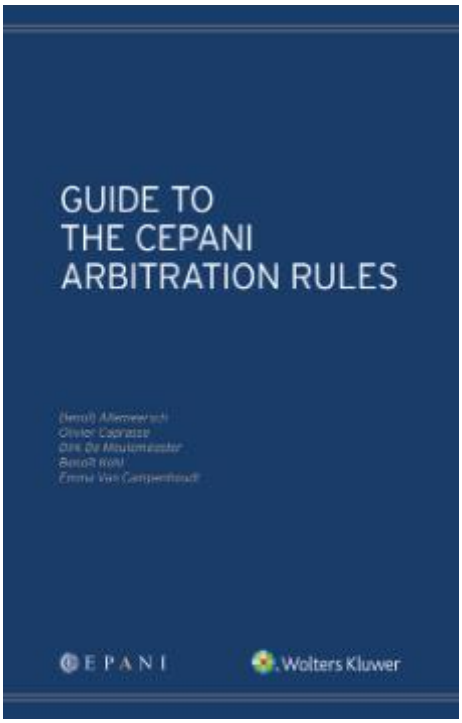
- la création d'un Comité de Diversité et Inclusion permanent à mettre sur pied au sein du CEPANI, qui mettra sur pied différentes initiatives de formation, accompagnement et sensibilisation et qui devra faire rapport au Conseil d'administration.

Co-voorzitters Sophie Goldman en Werner Eyskens stelden dit rapport voor aan de Raad van Bestuur op 17 maart 2022 met de aanbeveling om onmiddellijk een aantal specifieke beslissingen te nemen met betrekking tot de model arbitrageclausule en de aanpassing van het Reglement, de samenstelling van het benoemingscomité, de omvorming van de werkgroep tot een permanent comité, een regelmatige rapportering aan de Raad van Bestuur over diversiteit en de proactieve aanmoediging van kandidaat-arbiters. Met betrekking tot de governance-gebonden aangelegenheden (taalgebruik, hervorming Raad van bestuur) stelden zij voor om de Werkgroep "structuur en organisatie" zich over deze punten te laten buigen, met overweging van de argumenten uit hun rapport die dergelijke aanpassingen bepleitten. Tenslotte stelden zij een aantal "thought leadership" initiatieven voor die een vaste Commissie Diversity & Inclusion verder kan uitwerken en er dan verslag over uitbrengen aan de Raad van Bestuur.

Een definitieve beslissing over deze voorstellen zal genomen worden op de vergadering van de Raad van Bestuur van 2 juni 2022.

PUBLICATIONS

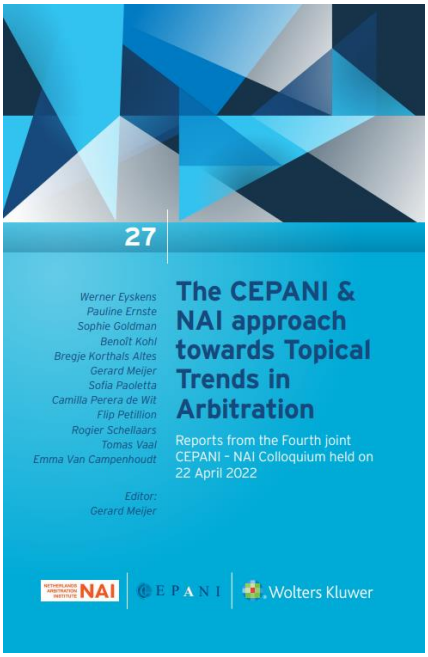
OUVRAGES SCIENTIFIQUES



CEPANI, the Belgian Centre for Arbitration and Mediation, helps its clients to solve their commercial conflicts in a safe and efficient manner.

The Guide to the CEPANI Arbitration Rules offers arbitration users all the necessary information and explanations on the CEPANI Arbitration Rules – updated as recently as July 1, 2020 – which establish a clear legal context for the management of the proceedings. The Guide contains a commentary on each article of the 2020 Rules, whereby attention was given to the difference between the 2020 and 2013 Rules. The Guide also contains practical hands-on information and guidelines from the Secretariat.

Auteurs: B. Allemeersch, O. Caprasse, D. De Meulemeester, B. Kohl, E. Van Campenhoudt



The present book contains contributions that form the basis of the presentations held at the fourth joint CEPANI NAI Colloquium, which took place in Rotterdam on 22 April 2022. The various contributions focus on topical arbitration trends of 2022.

The trends are looked at both from the perspective of the New CEPANI Arbitration Rules (2020) and from the perspective of the New NAI Arbitration Rules (2022). Specific topics discussed are, inter alia, e-Arbitration, early determination, confidentiality & transparency, data protection, cybersecurity, third party funding an dexpedited arbitration. Some topics were consciously not included in the new arbitration rules. Proper solutions may yet be reached on the basis of the general provisions in these rules, which are also discussed.

More fundamental trends, such as diversity & inclusion in arbitration and greener arbitrations, are discussed in separate chapters.

The book aims to provide guidance for a balanced approach of the trends signalled.

Auteurs: W. Eyskens, P. Ernste, S. Goldman, B. Kohl, B. Korthals Altes, G. Meijer, S. Paoletta, C. Perera de Wit, F. Petillion, R. Schellaars, T. Vaal, E. Van Campenhoudt

NEWSLETTER

CEPANI publiceert maandelijks een nieuwsbrief met korte informatieberichten omtrent arbitrage en CEPANI. Deze nieuwsbrief wordt elektronisch gepubliceerd en is beschikbaar op onze website.

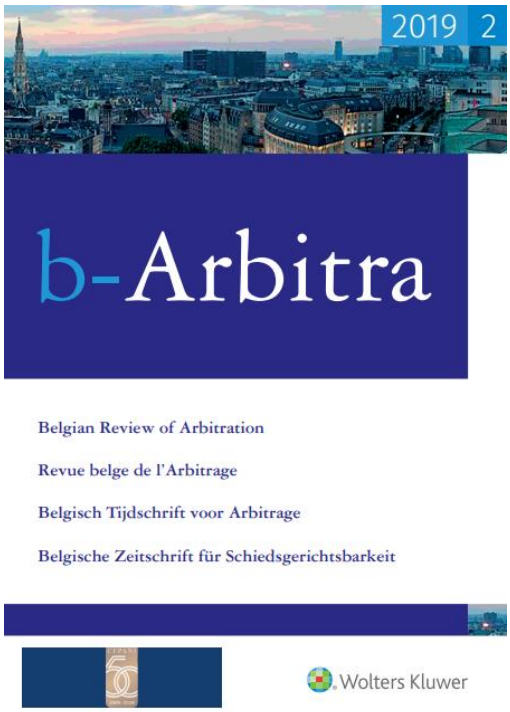
Veel dank aan Guillaume Croisant, François Cuvelier, Iuliana Iancu en Sander Van Loock die er elke maand voor de publicatie van instaan.

Marijn De Ruysscher et Claire Larue ont cessé leur fonction de Rédacteurs de la Newsletter.

Ils ont été remplacés par François Cuvelier et Sander Van Loock.

Nous tenons à leur adresser nos plus sincères remerciements pour la précieuse contribution qu'ils ont apportée à la Newsletter.

B-ARBITRA



b-Arbitra, the Belgian journal for arbitration, is an initiative of CEPANI, the Belgian Centre for Arbitration and Mediation. The journal is published by Wolters Kluwer and appears two times per year. It is available in hard copy and online
through jura.be and kluwerarbitration.com. b-Arbitra includes contributions in English and in French, Dutch and German, the three official languages of Belgium. Each article and court decision is accompanied by an abstract in English.

b-Arbitra aims to support scientific research on fundamental issues related to arbitration and to promote a critical and innovative analysis of these issues as well as of more concrete topics that are important for the arbitration public. The journal also aims to initiate a debate on new issues in the field of arbitration and to provide a forum for the exchange of information in Europe, in light of the internationalization of arbitration and the increase in cross-border disputes. As Belgium has adopted the UNCITRAL Model law and court decisions in relation to arbitration are not systematically published by the Judiciary, b-Arbitra also seeks to make Belgian arbitration related case law as widely available as possible.

Current editors-in-Chief are Caroline Verbruggen and Maarten Draye, assisted by an editorial board composed of Lisa Bingham, Olivier Caprasse, Luc Demeyere, Melissa Magliana, Claire Morel de Westgaver, Maud Piers, Erica Stein, Jean-François Tossens, Annet van Hooft and Herman Verbist. The co-Editors-in-Chief wish to extend a warm welcome to Claire Morel de Westgaver as a new board member. In addition, they wish to express their sincere thanks to Luc Demeyere, who will step down from his position on the editorial board, for his hard work and unwavering support as a board member of b-Arbitra since its creation in 2013.

Proposals for articles, interesting case law or any other question or comment in relation to b-Arbitra can be sent to the Co-Editors-in-Chief at b-arbitra@wolterskluwer.com.

STATISTICAL OVERVIEW

INTRODUCTORY NOTE

This yearly report provides a statistical overview of CEPANI arbitration in 2021 and its evolution in comparison with past years.

In this report, you will find information about proceedings administered by CEPANI such as the origin of the Parties, the language and the seat of the arbitration, the constitution of Arbitral Tribunals, the specificities of the appointed Arbitrators, the average duration of CEPANI arbitration procedures and more.

The 2021 statistics show no impact of the still ongoing COVID-19 pandemic. On the contrary, CEPANI arbitration procedures were completed in shorter period of time in comparison with the previous years. This was the case for both classic and expedited arbitration procedures.

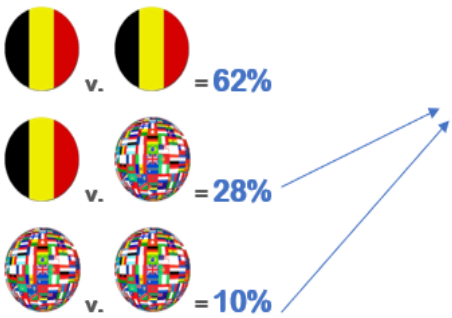
Furthermore, the general trend of internationalization has continued its pace; this reflects in the origin of the Parties, the language of the arbitration and the nationality of the appointed Arbitrators.

More striking is the amount in dispute that is generally overall higher than in 2020. Over a third of the CEPANI arbitration procedures involved cases over one million euros.

PARTIES

GEOGRAPHICAL ORIGIN

In 2021, 62% of the cases were introduced between Belgian Parties, 28% involved at least one Belgian and one international Party, and 10% of the cases involved only international Parties.



Canada	1
Czech Republic	1
Finland	1
France	5
Germany	1
Luxembourg	2
The Netherlands	2
Russia	1
South Africa	1
Switzerland	1
USA	3

Compared to 2020, procedures involving only Belgian Parties have slightly increased, procedures involving at least one Belgian and one international Party have decreased by 10%, while on the other hand procedures involving exclusively international Parties have increased by 5%.

LANGUAGE

DUTCH	FRENCH	ENGLISH
24%	45%	31%

In 2021, the language of the cases remained the same compared to 2020.

Indeed, 45% of the cases were introduced in French, 24% in Dutch and 31% in English

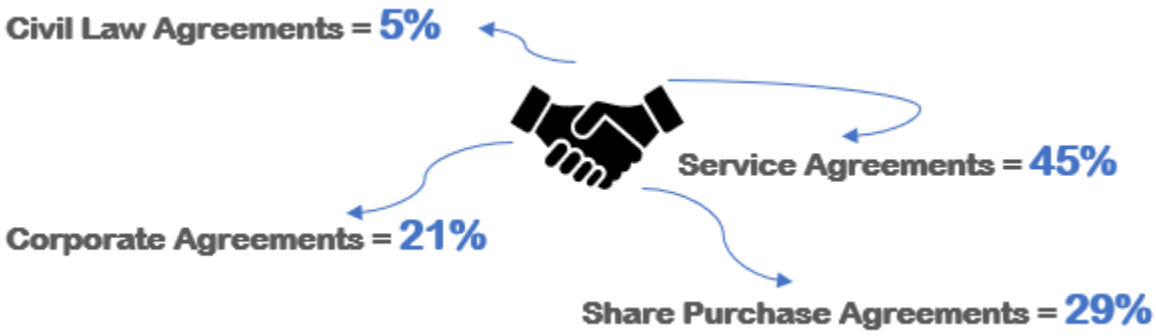
PLACE OF ARBITRATION

Brussels as place of arbitration is a steady trend.

In 2021, 90% of the cases had chosen Brussels as seat of their arbitration and only 10% of the cases had their seat in another city, which were mainly located elsewhere in Belgium except for Luxembourg.

In comparison to 2020, 86% of the cases had Brussels as seat of arbitration, while 14% of the cases had their seat in another city.

NATURE OF THE DISPUTE



In 2021, only 5% of the cases concerned general issues of civil law;
45% related to a service agreement;
29% related to a share purchase agreement; and
21% related to a corporate dispute.

In comparison to 2020, corporate disputes have decreased with 9%, while share purchase-agreement related disputes increased with 7% and service agreement related disputes increased with 21% (!).

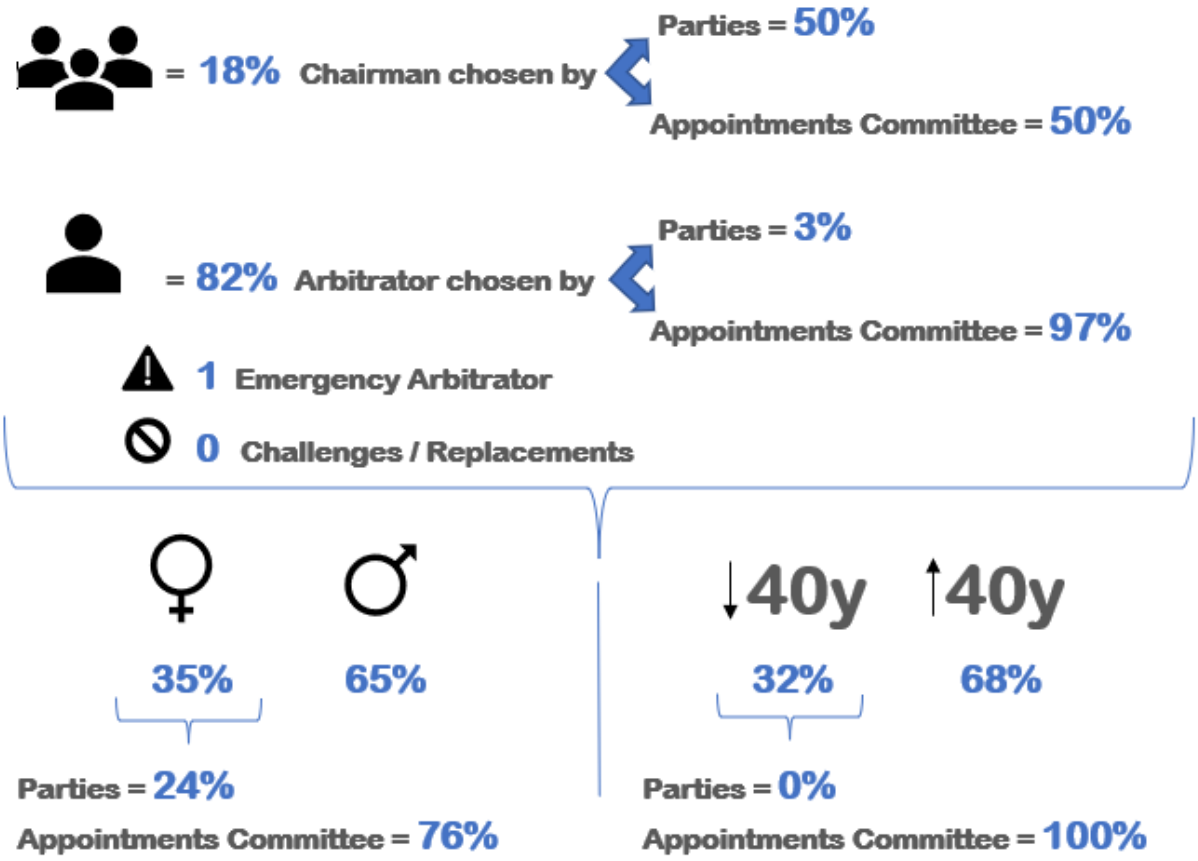
AMOUNT IN DISPUTE

< € 100.000,00 →	35%
€ 100.000,00 – € 200.000,00 →	5%
€ 200.000,00 – 500.000,00 →	16%
€ 500.000,00 – 1.000.000,00 →	11%
€ 1.000.000,00 – 10.000.000,00 →	22%
> € 10.000.000,00 →	11%

From the above, it is clear that expedited proceedings (< € 100.000,00) have been very successful (35% of the cases), while cases over one million euros have also increased (33% of the CEPANI cases compared to 25% in 2020).

ARBITRAL TRIBUNAL

CONSTITUTION



The majority, i.e. 82%, of the Arbitral Tribunals were composed of a Sole Arbitrator. 18% of the Tribunals were composed of three Arbitrators.

In comparison to 2020, 65% of Sole Arbitrators were appointed.

This evolution marks an important change compared to the previous years where a majority of the Arbitral Tribunals were composed of three Arbitrators.

WOMEN IN ARBITRATION

In 2021, 35% of the Arbitrators appointed by CEPANI were women, 76% of which were appointed by the CEPANI Appointments Committee and 24% directly by the Parties. This is a very positive change in favor of 'Diversity and Inclusion in Arbitration'.

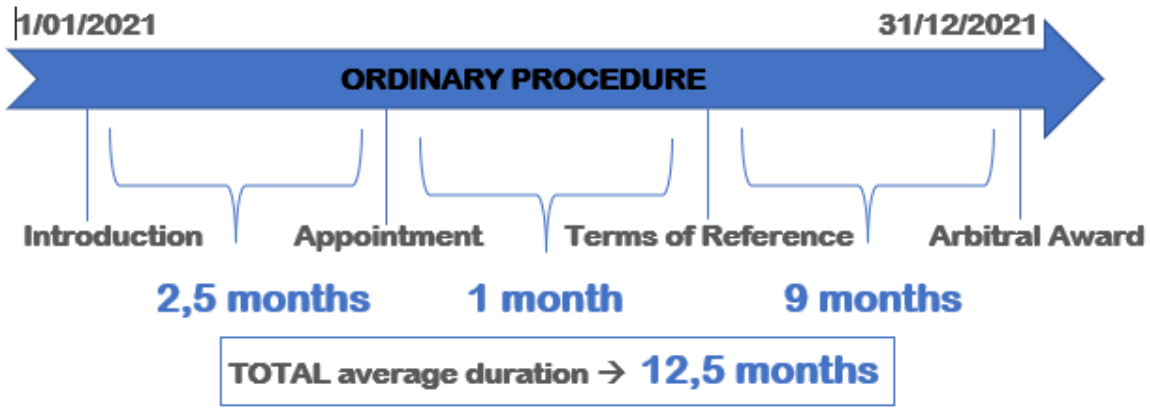
In 2019 only 10% of women Arbitrators were appointed and in 2020 15% of the appointed Arbitrators were women.

YOUNGSTERS IN ARBITRATION

In 2021, 32% of the Arbitrators appointed by CEPANI were below 40 years old.

All of them were appointed by the CEPANI Appointments Committee, none of them directly by the Parties.

AVERAGE DURATION OF CEPANI PROCEEDINGS IN 2021



In 2021, an arbitration procedure administrated under the CEPANI Arbitration Rules lasted **12,5 months,** calculated as follows:

- Introduction to the constitution of the Arbitral Tribunal = 2,5 months.

The CEPANI Arbitration Rules provide for a one-month deadline for Parties to pay the advance on arbitration costs and the Appointments Committee shall only appoint the Arbitral Tribunal when the advance on arbitration costs has been paid in full.

The delay of 2,5 months in practice is due to delays regarding the payment of the advance on arbitration costs by the Parties.

- Constitution of the Arbitral Tribunal to the Terms of Reference = 1 month.

The reviewed Arbitration Rules which entered into force as from January 1, 2020 provide for a one-month deadline. Clearly, Arbitrators - in collaboration with the Parties and their Counsel – have made every effort to meet this short deadline.

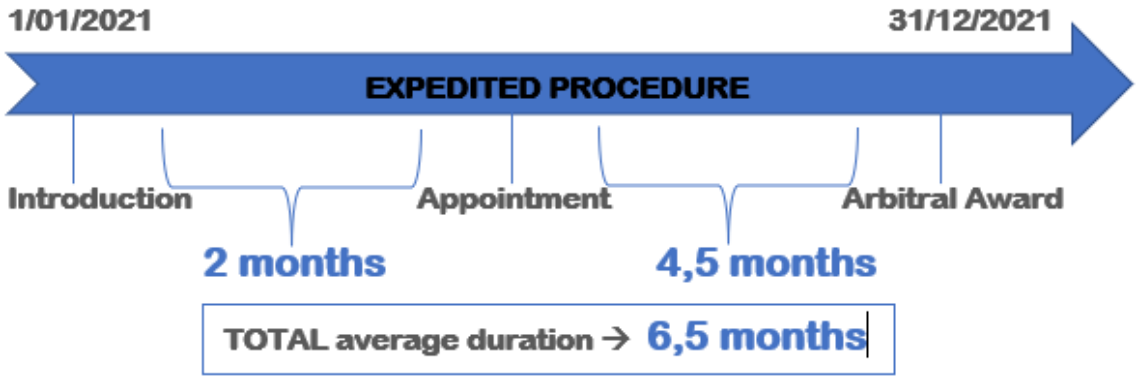
- Terms of Reference to the Arbitral Award = 9 months.

When drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal will organise a case management meeting between the Arbitral Tribunal and all Parties involved in the proceedings. This meeting may take place in person or via telephone or video conference. After having consulted the Parties, the Arbitral Tribunal will draw up in a separate document the Procedural Timetable.

It is recommended that the Parties not only send their Counsel to attend this meeting, but also be present themselves. This may positively influence the time limits agreed upon.

The CEPANI Arbitration Rules grant the Arbitral Tribunal a deadline of six months to render its Arbitral Award as from the signature of the Terms of Reference. The average time limit of 9 months is due to the fact that, with the Parties' consent, Arbitral Tribunals often establish Procedural Timetables exceeding – and thus extending – the six-month deadline provided for in the CEPANI Arbitration Rules.

In comparison with 2020, an arbitration proceeding lasted an average of 14 months.



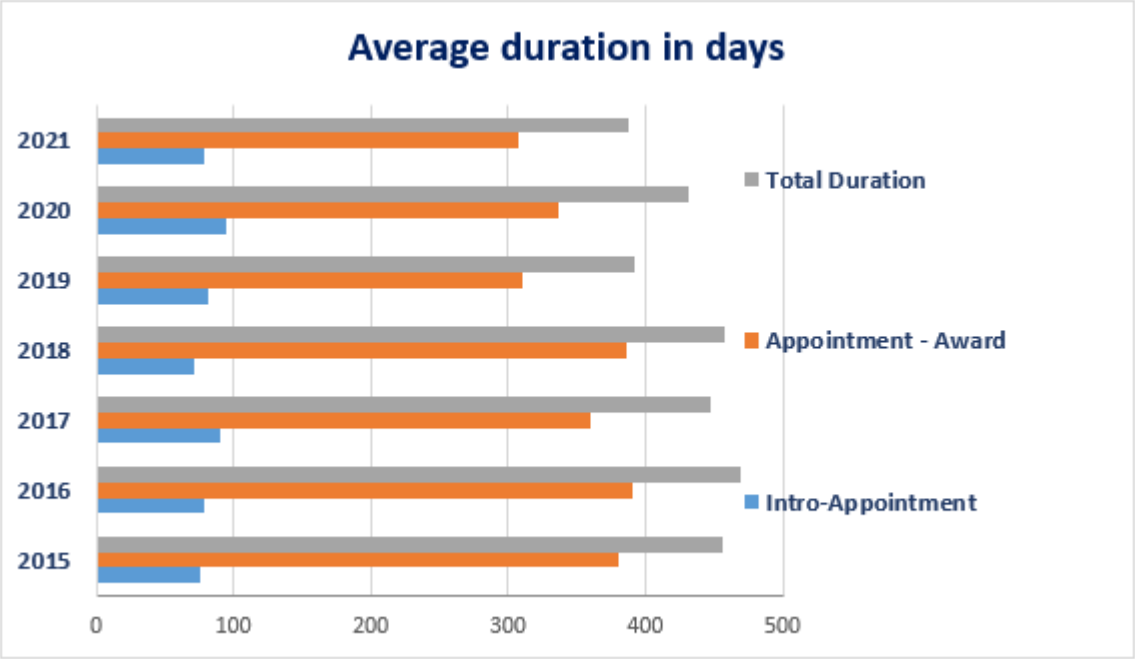
Following Article 29 of the CEPANI Arbitration Rules, the expedited procedure shall apply if the amount in dispute does not exceed the amount of € 100.000,00 or if the Parties so agree.

In the context of an expedited procedure there are no Terms of Reference.

Moreover, the deadline granted to the Tribunal to make the Arbitral Award is 4 months as of the date of the establishment of the Procedural Timetable.

In 2021, an expedited proceeding under the CEPANI Rules lasted 6,5 months.

Constitution of the Arbitral Tribunal to the Arbitral Award = **10 months**
Total average duration of CEPANI arbitration procedures in 2021: **12,5 months**



MANAGEMENT VAN CEPANI

Benoît Kohl

Voorzitter

(06.2020-…)

Philippe Lambrecht

Vice- Président

(09.2017-…)

Maud Piers

Vicevoorzitter

(06.2017-…)

Emma Van Campenhoudt

Secrétaire – Générale

(09.2017-…)

Astrid Moreau

Attachée juridique

(04.2021 - …)

Camille Libert

Adviseur

(03.2015 - …)

LEDENAFDELING

In **2021** viel ons de eer te beurt om als leden te mogen verwelkomen:

1- Alexandre CRUQUENAIRE
2- André DELHEZ
3- Yves DERWAHL
4- Joris MERTENS
5- Marc GOUDEN
6- Bo Ra HOEBEKE
7- Michel VAN HUFFEL
8- Jean-Quentin DE CUYPER
9- Geert DE BUYZER
10- Dimitri DE BURNONVILLE
11- Pia Sobrana GENNARI CURLO
12- Anne JUNION
13- Marily PARALIKA
14- Koen VAN DEN BROECK
15- Helga VAN PEER
16- Gisèle STEPHENS-CHU
17- Armel WAISSE
18- Serge LEJEUNE
19- Gabriele RUSCALLA
20- Marc DE BLOCK
21- Hilde DE JONGE

Hoe lid worden?

Eénieder met belangstelling voor arbitrage of bemiddeling, ongeacht zijn/haar nationaliteit, kan lid worden van CEPANI.

De leden van CEPANI genieten de volgende voordelen:

- Een verminderde inschrijvingsprijs voor alle activiteiten van CEPANI;
- Een verminderde prijs voor de boeken en tijdschriften die CEPANI publiceert;
- Vermelding in de ledenlijst op de CEPANI-website;
- Vermelding in het repertorium van de CEPANI-leden.

Let wel: lidmaatschap van CEPANI biedt geen garantie of recht op een benoeming tot arbiter.
Iedere aanvraag tot lidmaatschap dient via het online formulier te worden bezorgd aan de voorzitter van CEPANI.

De aanvraag wordt op de eerstvolgende vergadering voorgelegd aan de Raad van Bestuur, die vervolgens beslist of de voorgelegde kandidatuur wordt aanvaard.

Overeenkomstig de statuten moet een kandidatuur steeds worden ondersteund door twee bestaande leden van CEPANI.

Vervolgens vragen wij u een recente versie van uw Curriculum Vitae te sturen aan info@cepani.be.

Tot slot dient u de twee bestaande leden te vragen hun ondersteuning van uw kandidatuur bekend te maken in een schrijven gericht aan de voorzitter van CEPANI per e-mail: evc@cepani.be

In 2021 bedraagt de prijs voor het lidmaatschap 255,00 EUR excl. BTW (303,55 EUR incl. BTW).
Het lidmaatschapsgeld omvat een jaarabonnement op het Belgisch tijdschrift voor arbitrage b-Arbitra.

Wij danken u alvast voor uw interesse in CEPANI en kijken er naar uit u te mogen verwelkomen op onze activiteiten!

DANKBETUIGING

Début 2022, la composition du Comité de Récusation du CEPANI a été modifiée.

M. Michel Flamée, M. Paul Martens et M. Jacques Levy-Morelle ont cessé leur fonction au sein de ce comité. Je les remercie vivement d'avoir contribué pendant tant d'années au bon fonctionnement du comité de récusation du CEPANI et au rayonnement de celui-ci en leur qualité de membre de ce comité. Tant au nom du CEPANI qu'en mon nom personnel, je tiens à les remercier de tout cœur pour tout le travail accompli au cours de toutes ces années.

Ils ont été remplacés par M. Jean Cattaruzza, M. Geert Jocqué, Mme. Saskia Mermans et Mme. Caroline Verbruggen.

Nous souhaitions également remercier particulièrement Me. Sophie Goldman, Me. Werner Eyskens ainsi que l'ensemble du groupe de travail « Diversity & Inclusion » pour leur travaux et leur rapport final remarquable qui permettra au CEPANI de mettre en place d'importantes mesures sur ce thème.

Enfin, nous remercions Me. Sophie Goldman et Me. Sigrid Van Rompaey dont le mandat de co-Présidentes du CEPANI40 se termine en septembre 2022. Nous sommes très reconnaissants des nombreuses initiatives mises en place et de la multitude d'évènements organisés avec en apothéose le *Co-chair Circle* à Bruxelles en juin 2022. Nous saluons leur engagement sans faille pour le développement du CEPANI et pour les jeunes praticiens de l'Arbitrage.

EMMA VAN CAMPENHOUDT

SECRETARY GENERAL CEPANI

PARTNERSHIPS

Le CEPANI faisant office de voie d'accès à la communauté belge de l'arbitrage, de nombreuses entreprises ont manifesté leur intérêt à collaborer avec lui.

Le CEPANI a décidé d'accéder à ces demandes, tout en appliquant des normes strictes.

En tant que centre d'arbitrage, le CEPANI estime que l'indépendance, l'impartialité et l'intégrité constituent des exigences primordiales et cruciales pour assurer son bon fonctionnement et inspirer la confiance auprès de ses utilisateurs.

Par conséquent, les partenaires du CEPANI doivent être des entreprises qui appliquent elles-mêmes des normes strictes, jouissent d'une réputation sans faille et figurent au premier plan dans leur domaine.

Partners van CEPANI mogen op geen enkele manier betrokken partij zijn bij arbitrageprocedures die CEPANI leidt.

Aangeslotenen of personeelsleden van CEPANI-partners mogen geen functies uitoefenen in de bestuursorganen van CEPANI en mogen evenmin worden aangesteld of bekrachtigd als arbiter, mediator, scheidsrechter of expert.

Partnerships worden aangegaan met het oog op een langdurige relatie en kunnen alleen op een niet-opzichtige en esthetisch verantwoorde manier in beeld komen op de CEPANI-website, in de CEPANI-newsletter en tijdens conferenties waarvan CEPANI of CEPANI40 de hoofdorganisator is.

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LEGAL

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Wolters Kluwer
When you have to be right

Op 15 november 2016 is CEPANI een partnership aangegaan met Wolters Kluwer Belgium voor een aanvangsperiode van vijf jaar.

Dit partnerschap werd in 2021 verlengd. De samenwerking is nu voor onbepaalde tijd gesloten en zal jaarlijks worden geëvalueerd.

Wolters Kluwer Belgium biedt informatie, software en diensten aan juridische, tax, accounting, finance en HSE professionals en bedrijven. Ze helpen hun klanten efficiënter en effectiever te werken en vol vertrouwen beslissingen te nemen.

Wolters Kluwer staat ook in voor de wetenschappelijke verzameling van CEPANI alsook b-Arbitra.

Arbitration practitioners of the Belgian Centre for Arbitration and Mediation (CEPANI) and the International Chamber of Commerce in Belgium (ICC Belgium) have selected together the best service providers for your arbitration hearing in Brussels, the heart of Europe.

Brussels has everything it takes to make an excellent seat of arbitration. Its state-of-the-art arbitration law, international character, multi-language services and modern conference facilities, as well as its first-class hotels and restaurants provide an excellent context for a swift and cost-friendly resolution of all your commercial disputes.

This PLATFORM provides the opportunity to respond to the needs of arbitration practitioners for organizing a hearing in Brussels. All venues and service providers have been carefully selected by local arbitration practitioners in order to meet the international standards.

Het federale Instituut voor bedrijfsjuristen (IBJ) is, opgericht bij wet van 1 maart 2000, de enige beroepsorganisatie voor bedrijfsjuristen die waakt over de intellectuele onafhankelijkheid van zijn leden. In een voortdurend evoluerende geglobaliseerde business en juridische omgeving wil het IBJ het baken zijn voor de bedrijfsjuristen in hun cruciale rol van business partner en juridisch raadgever van hun werkgever.

Het Instituut voor bedrijfsjuristen volgt de ontwikkelingen en trends van het beroep op de voet. We spelen zeer proactief in op de actualiteit van de juridische wereld.

Als kenniscentrum zijn wij zowel een antenne als klankbord voor onze leden. Hiervoor organiseren wij tal van opleidingen, seminaries, studiedagen en webinars om de kwaliteit van het beroep te onderbouwen en te versterken, dit in de vorm van een verplichte Voortgezette Opleiding.

Dit is belangrijk omdat de bedrijfsjuristen wettelijk gebonden en beschermd zijn door vertrouwelijkheid van hun adviezen die een belangrijke impact hebben op de goede werking van hun bedrijf.

De bedrijfsjurist speelt ook een rol in het voorkomen van gerechtelijke en administratieve procedures, in een land waar hun aantal, achterstand en gebrek aan financiering groot zijn. In geval van geschil is de bedrijfsjurist vaak de best geplaatste persoon om de toepassing van alternatieve methoden van geschillenregeling, zoals arbitrage en bemiddeling, te bevorderen. In dit kader onderhouden wij nauwe banden met CEPANI.

Le CEPANI et l'IBJ sont convaincus d'une part, de la sécurité et de la confiance que l'arbitrage et les modes alternatifs de règlement des litiges de manière générale peuvent apporter aux opérateurs économiques en tant qu'instrument de règlement rapide et équilibré des litiges et d'autre part, de son apport au développement de l'économie nationale et internationale.

Le CEPANI et l'IBJ invite à chacune de leurs manifestations un représentant de l'autre organisation qui sera dispensé des frais d'inscription.

Le CEPANI et l'IBJ échangent des informations et publications d'intérêt commun concernant l'arbitrage et les ADR et se tiendront mutuellement au courant des conférences, séminaires etc… qu'ils organisent. Les évènements du CEPANI et de l'IBJ sont mentionnés sur leurs sites web respectifs et dans leurs bulletins d'informations adressés à leurs membres.

Selon Benoît Kohl, Président du Cepani « *Tant l'Institut que le CEPANI ont la volonté d'être au service des entreprises. Le juriste d'entreprise est la première personne confrontée aux conflits et c'est lui qui proposera à sa Direction de recourir à une médiation, ou le cas échéant, d'initier un arbitrage. Face à ce constat, des rapprochements se sont opérés, surtout et en particulier durant la crise sanitaire, où l'on se rend compte que la médiation et l'arbitrage constituent de formidables outils au bénéfice des juristes d'entreprise ».*

Marc Beyens (Président honoraire de l'*IJI*) indique également « *Nous représentons deux organisations qui ne poursuivent aucun but lucratif et nous veillons à la défense d'intérêts collectifs. A travers l'expérience des juristes d'entreprise, nous nous rendons compte que souvent, ce ne sont pas les procédures judiciaires qui mènent au meilleur résultat. Parmi les solutions que le CEPANI offre, il y a d'abord la médiation. J'ai moi-même eu plusieurs expériences de médiation voire de conciliation, qui permettent aux parties de comprendre les besoins des uns et des autres, et d'être acteur de la solution, plutôt que de s'en remettre à un juge. Nous estimons qu'il est important de sensibiliser nos 2100 membres, juristes d'entreprise, aux avantages des méthodes alternatives de règlements de conflits, et de faire connaître le CEPANI, qui offre un cadre permettant d'atteindre une solution satisfaisante pour les conflits auxquels nos membres sont confrontés* ».

NOTES

TABLE DES MATIERES

FOLLOW US ON LINKEDIN!!

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