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Rapport Annuel
Annual Report
2022

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 2022 voor te stellen.

Op 8 september 2022, in het Vredespaleis te Den Haag, ondertekenden CEPANI, het Nederlands Arbitrageinstituut (NAI), het Luxembourg Arbitration Center (LAC), de Dutch Arbitration Association (DAA) en de Luxembourg Arbitration Association (LAA) een samenwerkingsovereenomst en richtten zij de Benelux Arbitration and ADR Group op, ter versterking en promotie van arbitrage en andere ADR mechanismen in de Benelux. Dit belangrijk samenwerkingsakkoord mondde alvast uit in een eerste gezamenlijk colloquium, georganiseerd te Luxemburg op 20 april 2023, waar de fundamenten werden gelegd van verdere samenwerking en integratie van onze arbitragecentra.

In 2022 heeft ons Belgisch Centrum voor Arbitrage in de Sportsector (Centre for Sports Arbitration, 'C-SAR'), de eerste C-SAR-arbitrageprocedures mogen inrichten. Deze specifieke afdeling van CEPANI, die in volle uitbreiding is, beheert op onafhankelijke wijze arbitrageprocedures in de sportwereld. De eerste positieve ervaring in deze procedures sterkt ons vertrouwen dat ook in 2023 en in de verdere toekomst boeiende sportzaken door het C-SAR zullen worden behandeld.

In haar functie van promotie van arbitrage, van ADR en van haar instelling, organiseerde CEPANI op 25 november 2022 opnieuw het jaarlijkse CEPANI-colloquium, ditmaal met als thema: "Default in International Arbitration: Striking the Balance". Dit uitdagend onderwerp werd uitvoerig behandeld door meerdere deskundige sprekers uit binnen- en buitenland. De debatten werden afgerond met een paneldiscussie waarbij vertegenwoordigers van belangrijke arbitrage-instellingen (NAI, LAA, AFA, DIS, ICC, CEPANI) hun visie hebben gedeeld op de procedurele uitdagingen van een versteklatende partij. Dit colloquium was alweer een aangename gelegenheid om collega's uit de arbitragegemeenschap terug te zien of te leren kennen.

CEPANI heeft in 2022 ook haar reglementen verder op punt gesteld met onder andere het in werking treden op 1 januari 2023 van een vernieuwd CEPANI Arbitragereglement en een update van het C-SAR reglement, nadat het nieuwe CEPANI Domeinnamenreglement op 1 januari 2022 al in werking was getreden. Deze update bood ook de gelegenheid om de tarieven voor de verschillende procedures te indexeren met 15%, een maatregel ter aanpak van de inflatie die in alle sectoren gevoeld wordt.

2022 was voorts een vruchtbaar werkingsjaar voor 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 en daarover aanbevelingen te formuleren. Co-voorzitters Sophie Goldman en Werner Eyskens stelden een gedetailleerd 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 en een regelmatige rapportering aan de Raad van Bestuur. Het mooie werk inzake diversiteit en inclusie werd ook opgemerkt door het tijdschrift Global Arbitration Review (GAR), dat CEPANI in twee categorieën nomineerde tijdens de GAR Awards 2023.

De lopende initiatieven rond milieubewustzijn binnen CEPANI werden ook in 2022 verder ontplooid, met dank aan de werkgroep Greener Arbitration onder het voorzitterschap van Flip Petillion. Onder het voorzitterschap van Marco Schoups werd in 2022 een nieuwe werkgroep Bouw en Arbitrage boven de doopvond gehouden. Meerdere experten in arbitrage en bouwrecht zullen hierin samenkomen om uitdagingen en toekomstperspectieven te bespreken inzake bouwlitiges. De verschillende werkgroepen en comités die binnen CEPANI bestaan, zijn een drijvende kracht van professionalisering van ons Centrum. Mijn oprechte dank gaat uit naar iedereen die zich in een of meerdere werkgroepen of comités inspant om ons arbitrage-instituut elk jaar beter op de kaart te zetten.

Ook CEPANI40 heeft opnieuw boeiende activiteiten georganiseerd in 2022. Zoals steeds leest u alles in detail daarover in de activiteitenverslagen. Van bijzonder belang dit jaar was de 'Global Conference of the Co-Chairs' Circle', die op 3 en 4 juni 2022 werd

georganiseerd rond het thema 'Legitimacy in and of Arbitration'. Het welslagen van deze conferentie is in grote mate te danken aan de inzet van de twee uittredende Co-Voorzitsters, Sophie Goldman en Sigrid van Rompaey. Hier past dan ook een hartelijk woord van dank aan Sophie en Sigrid, die hun mandaat ten volle hebben benut om CEPANI40 nog beter op de kaart te zetten in het arbitragemilieu. Wij zijn verheugd u te kunnen meedelen dat de rol van CEPANI40-Co-Voorzitters intussen overgenomen is door Guillaume Croisant en Katherine Jonckheere. Wij wensen hen een fijne samenwerking.

Ten slotte is dit voorwoord een uitgelezen kans om de medewerkers van het Secretariaat te bedanken voor de efficiëntie en toewijding die zij dagelijks aan de dag leggen. Zowel in de behandeling van dossiers als bij de organisatie van evenementen en andere promotieactiviteiten, kunnen wij steeds op hun volgehouden inzet rekenen.

Ik wens u een uitstekende lectuur.

Benoît Kohl

Voorzitter | Président | President

LE MOT DU PRESIDENT

C'est un grand honneur pour moi de vous adresser cette introduction en ma qualité de Président du CEPANI. J'ai le plaisir de vous présenter notre rapport d'activité pour l'année 2022.

Le 8 septembre 2022, au Palais de la Paix à La Haye, le CEPANI, le Nederlands Arbitrage Instituut (NAI), le Luxembourg Arbitration Center (LAC), la Dutch Arbitration Association (DAA) et la Luxembourg Arbitration Association (LAA) ont signé un accord de coopération et créé le Benelux Arbitration and ADR Group, afin de renforcer et de promouvoir l'arbitrage et d'autres mécanismes d'ADR dans le BeNeLux. Cet important accord de coopération a déjà abouti à un premier colloque commun, organisé au Luxembourg le 20 avril 2023, au cours duquel ont été jetées les bases d'une coopération plus poussée de nos centres d'arbitrage.

En 2022, notre Centre belge d'arbitrage dans le secteur du sport (Centre for Sports Arbitration, « C-SAR ») a pu mettre en place les premières procédures d'arbitrage C-SAR. Cette section spécifique du CEPANI en pleine expansion administre de manière indépendante les procédures d'arbitrage dans le domaine du sport. La première expérience positive de ces procédures nous conforte dans l'idée que des affaires sportives passionnantes seront également traitées par le C-SAR en 2023 et au-delà.

Dans le cadre de sa mission de promotion de l'arbitrage, des ADR et de leur institution, le CEPANI a de nouveau organisé son colloque annuel le 25 novembre 2022, cette fois-ci sur le thème : « Default in International Arbitration: Striking the Balance ». Ce sujet difficile a été traité en détail par plusieurs orateurs experts nationaux et étrangers. Les débats se sont terminés par un panel au cours duquel des représentants des principales institutions d'arbitrage (NAI, LAA, AFA, DIS, ICC, CEPANI) ont échangé leurs points de vue sur les défis procéduraux auxquels est confrontée une partie défaillante. Ce colloque a été une nouvelle fois l'occasion de revoir ou de faire connaissance avec des collègues de la communauté arbitrale.

Le CEPANI a également continué à peaufiner ses règlements en 2022, avec notamment l'entrée en vigueur le 1er janvier 2023 d'un règlement d'arbitrage du CEPANI remanié et une mise à jour du règlement C-SAR, alors que le nouveau règlement du CEPANI sur les noms de domaine était déjà entré en vigueur le 1er janvier 2022. Cette mise à jour a également été l'occasion d'indexer les tarifs des différentes procédures de 15 %, une mesure destinée à tenir compte de l'inflation ressentie dans tous les secteurs.

2022 a également été une année fructueuse pour le groupe de travail du CEPANI Diversité et Inclusion. L'objectif de ce groupe de travail était de situer le CEPANI en matière de diversité au sens large et de formuler des recommandations en ce sens. Les co-présidents Sophie Goldman et Werner Eyskens ont présenté un rapport détaillé au Conseil d'administration le 17 mars 2022 recommandant l'adoption immédiate d'un certain nombre de décisions spécifiques relatives au modèle de clause d'arbitrage et à l'adaptation du Règlement, à la composition du comité de nomination, à la transformation du groupe de travail en comité permanent et à l'établissement de rapports réguliers à l'intention du Conseil d'administration. Le bon travail en matière de diversité et d'inclusion a également été remarqué par le magazine Global Arbitration Review (GAR), qui a nominé le CEPANI dans deux catégories lors des GAR Awards 2023.

Les initiatives en cours autour de la sensibilisation à l'environnement au sein du CEPANI ont continué à se développer en 2022, grâce au groupe de travail Greener Arbitration sous la présidence de Flip Petillion. Sous la présidence de Marco Schoups, un nouveau groupe de travail Construction et Arbitrage a été créé en 2022. Plusieurs experts en arbitrage et en droit de la construction s'y réunissent pour discuter des défis et des perspectives d'avenir en matière de litiges de construction. Les différents groupes de travail et comités qui existent au sein du CEPANI sont une force motrice de la professionnalisation de notre Centre. Je remercie sincèrement tous ceux qui travaillent dans un ou plusieurs groupes de travail ou comités pour améliorer chaque année l'image de notre institut d'arbitrage.

Le CEPANI40 a à nouveau organisé des activités passionnantes en 2022. Comme toujours, vous pouvez lire tous les détails dans les rapports d'activité. Cette année, la 'Global Conference of the Co-Chairs Circle', organisée les 3 et 4 juin 2022 autour du

thème 'Legitimacy in and of Arbitration', a revêtu une importance particulière. Le succès de cette conférence doit beaucoup aux efforts des deux coprésidentes sortantes, Sophie Goldman et Sigrid van Rompaey. Un grand merci donc à Sophie et Sigrid, qui ont pleinement profité de leur mandat pour mettre le CEPANI40 encore plus en avant dans le milieu de l'arbitrage. Nous avons le plaisir de vous informer que le rôle de coprésidents du CEPANI40 a été repris par Guillaume Croisant et Katherine Jonckheere. Nous leur souhaitons une heureuse collaboration.

Enfin, cet avant-propos est une excellente occasion de remercier les collaborateurs du Secrétariat pour leur efficacité et leur dévouement au quotidien. Tant dans le traitement des dossiers que dans l'organisation d'événements et d'autres activités promotionnelles, nous pouvons toujours compter sur leur engagement soutenu.

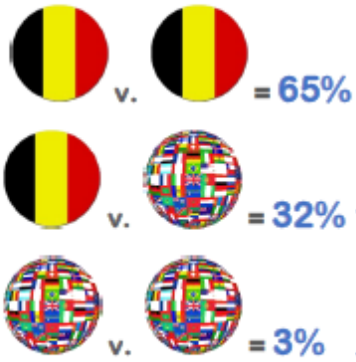
Je vous souhaite une excellente lecture.

Benoît KOHL

Voorzitter | Président | President

CEPANI STATISTICAL SURVEY 2022

Origin of the Parties



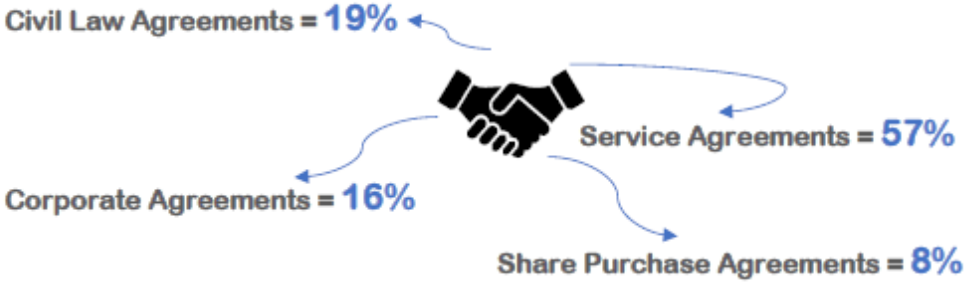
France	5
Germany	1
Luxembourg	3
The Netherlands	4
Sweden	1
USA	1

Language of the arbitral proceedings

DUTCH	FRENCH	ENGLISH
16%	57%	27%

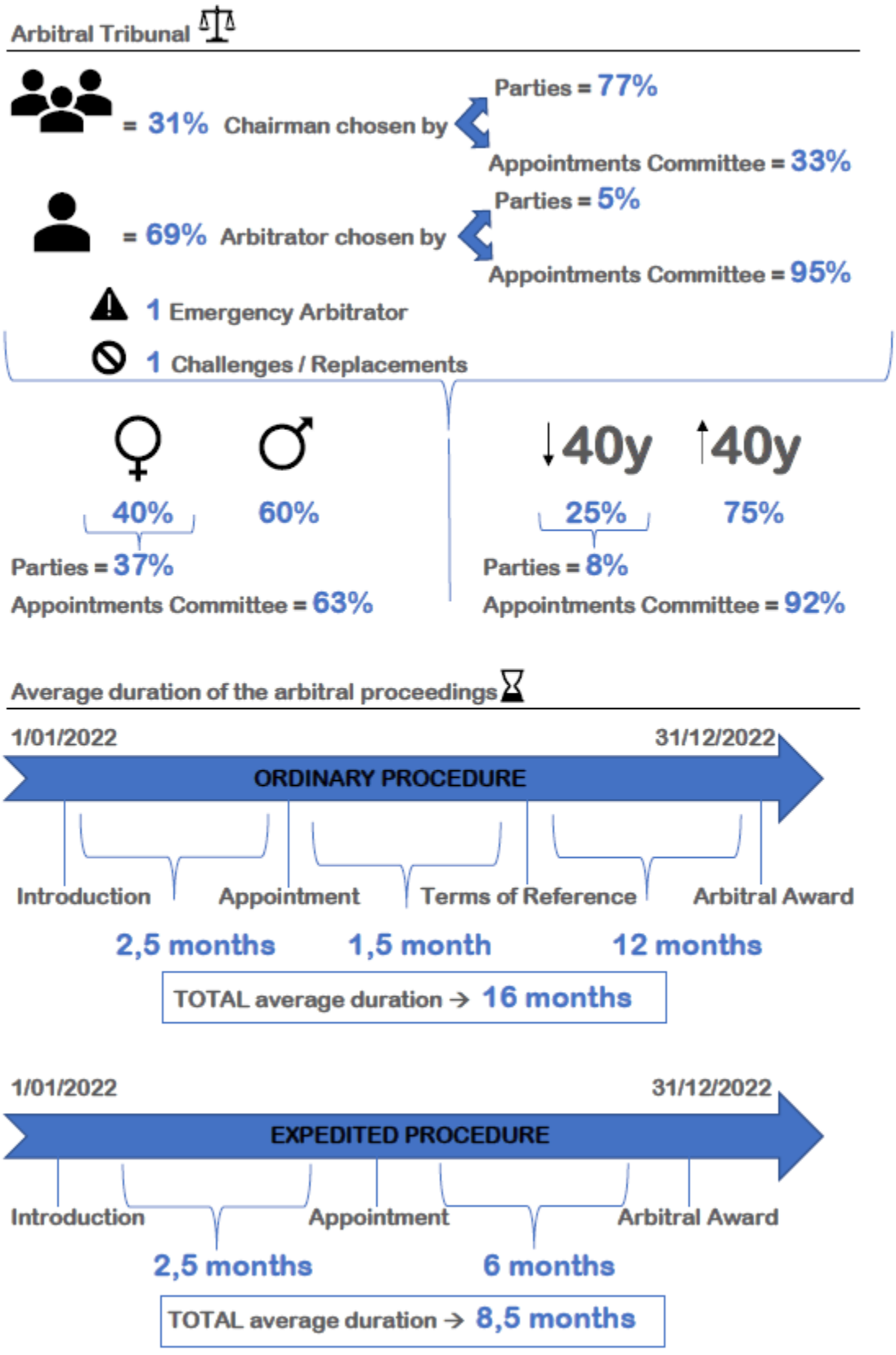
Place of the Arbitration

Nature of the dispute



Amount in dispute

< € 100.000,00 →	41%
€ 100.000,00 – € 200.000,00 →	3%
€ 200.000,00 – 500.000,00 →	11%
€ 500.000,00 – 1.000.000,00 →	14%
€ 1.000.000,00 – 10.000.000,00 →	19%
> € 10.000.000,00 →	14%


Arbitral Tribunal
= 31% Chairman chosen by
Parties = 77%
Appointments Committee = 33%
= 69% Arbitrator chosen by
Parties = 5%
Appointments Committee = 95%
1 Emergency Arbitrator
1 Challenges / Replacements
40%
60%
Parties = 37%
Appointments Committee = 63%
40y
40y
25%
75%
Parties = 8%
Appointments Committee = 92%
Average duration of the arbitral proceedings
1/01/2022
31/12/2022
ORDINARY PROCEDURE
Introduction
Appointment
Terms of Reference
Arbitral Award
2,5 months
1,5 month
12 months
TOTAL average duration → 16 months
1/01/2022
31/12/2022
EXPEDITED PROCEDURE
Introduction
Appointment
Arbitral Award
2,5 months
6 months
TOTAL average duration → 8,5 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 janvier 2023 – 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 :

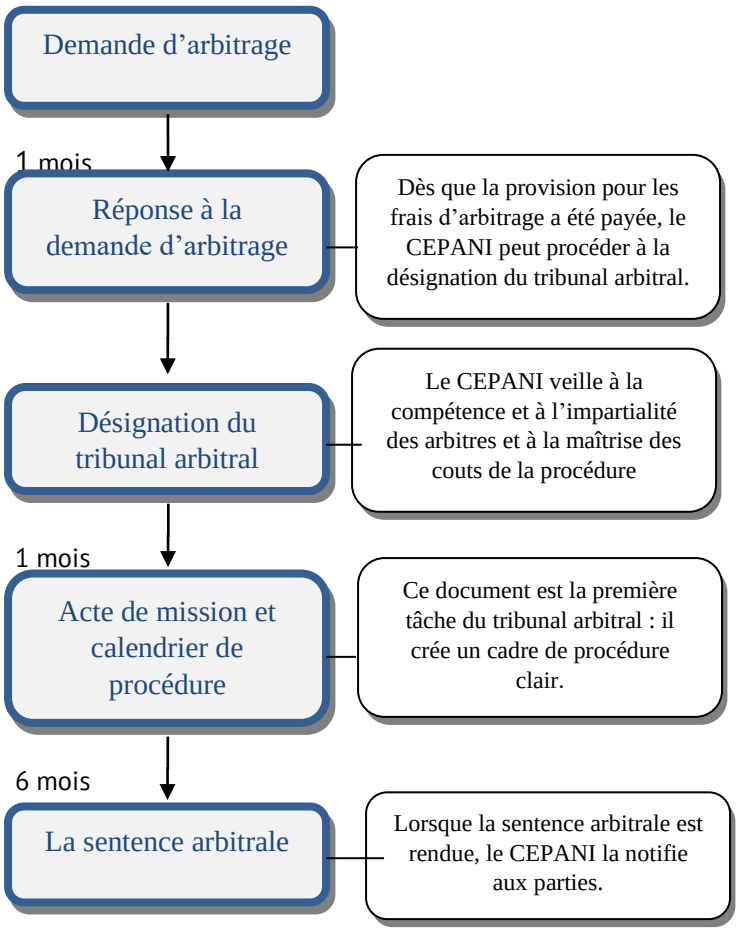
- Des salles de réunion / « breakout rooms »
- Un service de restauration
- Un soutien IT
- Le Wi-Fi, un service de photocopie, d'impression, de fax …

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 2021, vormde 2022 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 2022:

CEPANI40 WEBINAR "MEET THE EXPERTS"

19 January 2022, BRUSSELS

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

17 FEBRUARY 2022, BRUSSELS

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

Counsel, Stibbe

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

10 March 2022, Brussels

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"

31 March 2022, Paris

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

Director Secretary General, CEPANI

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

31 March 2022, Paris

- ASA-CEPANI40-CFA40-ICC-YAF-YCAP-ICDRY&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 REGLEMENT DES DIFFERENDS – UN CONTENTIEUX ? PENSEZ A L'ARBITRAGE

19 April 2022, Brussels

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 TRENDS IN ARBITRATION

22 April 2022, Rotterdam

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 May 2022, London

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

CEPANI'S GENERAL ASSEMBLY AND 4TH GLOBAL CONFERENCE OF THE CO-CHAIRS' CIRCLE – LEGITIMACY IN AND OF ARBITRATION

2-4 June 2022, BRUSSELS

On the first week of June, Brussels was not only the centre of the EU but also of the (arbitration) world, welcoming the 4th edition of the Global Conference of the Co-Chairs' Circle ("CCC Conference"). After Berlin in 2014, Helsinki in 2016 and Rome in 2018, the event was organised in Brussels in 2022 (after a break due to the pandemic), thanks to the tireless efforts of the co-chairs of **CEPANI40, Sophie Goldman (Tossens Goldman Gonne) and Sigrid Van Rompaey (Matray Matray Hallet),** assisted by their Steering Committee and the CEPANI Secretariat.

The CCC Conference takes place every other year. It is organised and hosted by one of the member organisations of the Co-Chairs' Circle (an informal organisation which gathers the main young arbitration associations), with the support of the other below40 organisations. This year's event was attended by around 200 participants from half a dozen countries.

The Conference was preceded, on 2 June, by the annual General Assembly of CEPANI, where its President, **Benoît Kohl**, and its Secretary General, **Emma Van Campenhoudt** presented the activities and budget of the organisation for the past year and the main projects for 2022, including greater collaboration with the other BeNeLux arbitral institutions and the return to full-scale in-person events.

The CEPANI has had a tradition for many years of inviting a prestigious speaker at the end of its annual general meeting. This year, **Prof. Olivier Caprasse** held the audience (including many international guests present for the CCC Conference) spellbound on the theme of silence and arbitration (see the full text of his keynote speech below).

After a cocktail at the FEB/VBO, the CCC Conference then kicked off with a "walking dinner with a view", on the splendid 24th floor rooftop terrace of **Freshfields Brussels**, under the patronage of **Nathalie Colin**.

The academic programme of the conference, focused on legitimacy in and of arbitration, started on 3 June with a keynote speech by **Prof. Bernard Hanotiau (Hanotiau & van den Berg).** Our very own Belgian "Pope" (or "Brad Pitt", in his words to his daughter) of the arbitration world set the scene on the legitimacy concerns in international arbitration.

Prof. Hanotiau's keynote speech was followed by two panels. The first one, composed of **Maude Lebois (GBS Dispute, Paris), Diana Paraguacuto-Maheo (Foley Hoag', Paris)** and **Olivier van der Haegen (Loyens & Loeff, Brussels),** and moderated by **Jonathan Lim (Wilmer Hale, London),** focused on the legitimacy of arbitration, discussing the challenges to resolving disputes through arbitration in times of geopolitical turmoil and protectionism as well as the key characteristics which render commercial arbitration legitimate and sought after.

The second panel, composed **of Michelle Bock (Squire Patton Boggs, Brussels and Washington DC), Prof. Niek Peters (Simmons & Simmons, Amsterdam) and Dorothée Vermeiren (Clifford Chance, Brussels),** and moderated by **Raphael Kaminsky (Teynier Pic, Paris),** tackled the questions of legitimacy in arbitration, in particular issues of legitimacy surrounding the taking of, and weight of, evidence.

After a sunny lunch at the mythic Chaloupe d'Or on the Grand Place, which allowed foreign guests to discover *garnaalkroketten* (for those who had not had the chance to catch one at Freshfields already), the afternoon continued in three parallel breakout sessions, allowing for greater interactions and debates with the audience.

The first one discussed how to gain ground in international arbitration, with one's firm, vis-à-vis the arbitration community at large and towards clients. It was moderated by **Guillaume Croisant (Linklaters, Brussels**), and composed of **Victor Bonnin Reynes (VB Arbitration, Madrid), Clément Fouchard (Reed Smith, Paris), Anya George (Schellenberg Wittmer, Zurich)** and **Catherine Anne Kunz (Lalive, Geneva)**

The second session, moderated by **Vanessa Foncke (Jones Day, Brussels)** focused on the legitimate responses when facing guerrilla tactics. It was composed of **Ander Forss**

(Castrén & Snellman, Helsinki), Giulio Palermo (Archipel, Geneva), Jan Erik Spangenberg (Manner Spangenberg, Hamburg) and **Gallina Zukova (Zukova, Paris).**

Finally, in the third session **Laura Alakija (Primera Africa Legal, Lagos), Thomas Granier (Asafo & Co, Paris), Melanie Riofrio Piché (Madrid International Arbitration Centre)** and **Gabriele Ruscalla (Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels),** moderated by **Saadia Batthy (Gide Loyrette Nouel, London),** covered what is expected from arbitral institutions in order to improve the legitimacy of arbitration.

After a report on the three sessions to the wider group by **Ulrich Kopetzki (Kopetzki, Vienna), Evelina T. Wahlström (Stockholm Chamber of Commerce**) and **David Zygas (Freshfields, Brussels),** and the closing remarks of Sophie and Sigrid, a German group of improv comedy, die Affirmative, conquered the audience with their depiction of the arbitration, and broader legal, world seen with humour through the lenses of outsiders.

The event finished on a high note with further networking activities, first at the Jeux d'Hiver on Friday eve (with the party continuing until 3am and, as per the rumour, even 5am for a few survivors at the infamous Barabar).

A glorious sun allowed said survivors to have an excuse to wear sunglasses during the closing brunch at the Chalet Robinson on Saturday. The participants to the guerrilla tactics session (and the others) even had the

opportunity to put into practice their discussions by trying to raid the rowing and paddle boats of the other attendees.

Merci **Sophie & Sigrid,** as well as all the organisers and generous sponsors, for this successful and wonderful event! As a foreign participant put it: "It had been a very long time since I had so much fun and enjoyed an event the way I enjoyed this one. As soon as I set foot in Rotterdam yesterday night I was missing Brussels already. CEPANI40 raised the bar to insurmountable heights!" The next CCC Conference should take place in Frankfurt in 2024. Bis bald!

BY ??

Associate, ??

CEPANI LUNCH DEBATE : THE CHANGE OF CIRCUMSTANCES IN THE NEW BELGIAN CIVIL CODE : UNRAVELING THE MEANING OF ARTICLE 5.74 IN A COMPARATIVE PERSPECTIVE

15 June 2022, BRUSSELS

As is usual for the setting of CEPANI's lunch debates, the event took place in the FEB/VBO's salon, which allowed for a pleasant and somewhat informal setting consisting of several round tables.

Benoît Kohl, the President of CEPANI, welcomed the audience for an interesting and instructive presentation of the speaker of the day, **Rafaël Jafferali** (Partner, Simont Braun, Professor for the Chair of Law of Obligations at the Université Libre de Bruxelles (ULB) and Affiliated Senior Researcher at the KU Leuven).

After a networking lunch, Rafaël Jafferali then gave an insightful presentation on the doctrine of the change of circumstances (a.k.a. hardship or imprévision / imprevisie), which found its way into the New Belgian Civil Code in the context of the reform of the Belgian law of obligations. The preparatory works of Article 5.74 reveal that the text is directly inspired by French law as well as international instruments of contract law such as the Principles of European Contract Law (PECL), Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law) (DCFR) and Unidroit Principles, which may thus serve as guidance.

Article 5.74 will be applicable by default to contracts formed as from 1 January 2023. The new rule deserves our attention, not in the least because practitioners will have to actively consider whether or not to exclude

and/or modulate the application of the provision when drafting contracts. To name one choice you may want to consider, the Belgian rules provide for summary proceedings ("procédure comme en référé"/"procedure zoals in kort geding"), but never intended to exclude the possibility of arbitration. This and the interplay with other rules (such as the rules on unfair terms) will give rise to interesting questions, of which the audience was eloquently made aware.

BY Ysaline le Paige

Associate, Clifford Chance Brussels

CENTRE FOR PROFESSIONAL TRAINING OF LIMBURG BAR ASSOCIATION

19 September 2022, Hasselt

Op maandag 19/09/2022 organiseerde het Centrum voor Beroepsopleiding van de Limburgse Balie (CBLB), in samenwerking met CEPANI en het advocatenkantoor Monard Law, een studiedag over arbitrage. De studiedag werd gemodereerd door Erik Monard (Monard Law) en door gewezen stafhouder Luc Vanderputte (Omnius Advocaten). Kris van der Beek (Monard Law) was gastspreker. Camille Libert vertegenwoordigde CEPANI. De spreektijd werd gebruikt om een concreet antwoord te geven op enkele vraagstukken waarmee de praktijkadvocaat in een arbitrageprocedure in aanraking kan komen. Kan een kortgeding in arbitrage? En beslag? Een expertise? Een getuigenverhoor? Hoe snel kom ik aan uitvoering toe? En de kosten? De volgende onderwerpen kwamen daarbij nader aan bod: arbitreerbaarheid, arbitragebeding, rechtsmacht, scheidsgerecht, voorlopige en bewarende maatregelen, arbitrale gedingvoering, bewijsvergaring, arbitrale uitspraak, rechtsmiddelen, erkenning en uitvoerbaarheid en kosten. De 32 aanwezige advocaten kregen uitgebreid de gelegenheid om vragen te stellen, zowel tijdens het seminarie, als tijdens een daaropvolgende lunch, aangeboden door CEPANI. Wij danken het CBLB, de sprekers en alle deelnemers.

BY Josephine Markopoulos and Kris van der Beek

Junior Associate and Partner, Monard Law

CEPANI LUNCH DEBATE ICCA & TASK FORCE ON DATA PROTECTION IN INTERNATIONAL ARBITRATION

6 October 2022, Brussels

Two weeks after the ICCA-IBA Roadmap to Data Protection in International Arbitration ("Roadmap") was published, the data protection task force's co-chairs, Melanie van Leeuwen (Derains & Gharavi) and Kathleen Paisley (AMBOS Lawyers), presented the Roadmap at the CEPANI Lunch Debate of October 2022.

The key takeaway from the interactive discussion is that, whether you like it or not, the law requires personal data to be protected, and the arbitration community must comply with it. The Roadmap's purpose is to give a practical overview of principles underlying data protection rules as they apply to international arbitration and their application in arbitral proceedings. Apart from explaining data protection concepts, the Roadmap gives practical guidance, and contains checklists and templates that can be used in arbitral proceedings.

The Roadmap considers that the main participants in an arbitration (parties, counsel, and arbitrators) are either controllers or joint controllers of the personal data that is shared and processed within the context of an arbitration. The main practical advice Ms. van Leeuwen and Paisley gave was to consider data protection and cybersecurity early in the process. Otherwise, parties may use data protection compliance as a sword or a shield throughout the arbitration. Some arbitral institutions already require or strongly suggest putting data protection compliance on the agenda of the initial case management conference. Putting it on the agenda is not sufficient. The agreed-upon steps and processes for ensuring data protection compliance must be documented. Detailing the data protection measures in the terms of reference, a procedural order, or a data protection protocol will assist arbitral participants in demonstrating compliance when inquired by the authorities.

The co-chairs then presented eight issues to be addressed and documented throughout the arbitration:

The first issue is the requirement to identify a legal basis for the processing activities. As a general guideline, relying on the data subject's consent is usually a bad idea. That is because consent can be revoked at any time. When that happens, the controller no longer has a lawful basis to continue the processing. The legal basis for processing activities in an arbitration will typically be the legitimate interest of the controller or a third party, subject to the conditions of Article 6(1)(f) of the GDPR.

Article 6(1)(f) of the GDPR provides for a three-prong test for a controller to rely on legitimate interests as a valid legal basis: the legitimate interests must be identified, the processing of personal data must be necessary, and a balancing test must be performed to ensure that the legitimate interests are not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Legitimate interests that can be relied upon in arbitrations are the administration of justice, the enforcement of legal rights, and the fair and efficient resolution of disputes.

The processing of sensitive data is prohibited in principle. Sensitive data include data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, health records or data concerning a natural person's sex life or sexual orientation.

However, Article 9(2)(f) of the GDPR allows for the processing of sensitive data when necessary for the establishment, exercise or defence of legal claims or whenever courts act in their judicial capacity. We consider that such processing of sensitive data – and by extension of non-sensitive personal data – is authorised in arbitration, whenever such is necessary for resolving legal disputes. However, additional measures may be required to ensure the integrity and security of sensitive data. Ms. van Leeuwen and Paisley considered that the absence of a specific mention of legal claims for non-sensitive data was an oversight of the European legislator. We believe that the

principle of *qui peut le plus, peut le moins* would apply in this context and that all personal data may be processed when such is necessary for the establishment, exercise, or defence of legal claims or whenever courts (or arbitral tribunals) act in their judicial capacity.

The second issue is the requirement for a lawful basis for data transfers. A data transfer occurs whenever personal data is sent outside the EEA. Such transfers require compliance with additional obligations and reliance on an appropriate basis for the transfer. In the context of international arbitration, it may be necessary to impose standard contractual clauses upon the non-EU participants. These standard contractual clauses were developed by the EU Commission to guarantee the same level of protection of personal data when sent and processed abroad. The Roadmap has appended the standard contractual clauses as Annex 6 and warns that, to remain valid, the standard contractual clauses must be adopted without modification.

Ms. van Leeuwen and Paisley also explained that courts could rely on a legal claims exemption because courts cannot enter into an agreement with the data subject or controller. By contrast, arbitration is a contractual form of dispute resolution, and thus, arbitrators can enter into agreements regarding the transfer and processing of personal data and adhere to the requirements imposed by the standard contractual clauses. Hence, it is doubtful that the legal claims exemption would apply to arbitrators analogous to courts. Therefore, arbitrators should specify a lawful basis when transferring data and enter into an agreement that includes the standard contractual clauses.

The third issue to be tackled and documented is the impact that data protection may have on the disclosure of documents. Within this context, data protection is often used as a sword or a shield by a party that seeks to complicate the production of documents. Discussions about the production and the redaction of documents containing personal

data may be similar to discussions about legal privilege that we have encountered in international arbitration. As parties and counsel in international arbitration may not be subject to the same ethical and data protection obligations, it is important to create an equal level playing field early in the process. That is why it is advisable to address data protection issues in the terms of reference or procedural order No. 1.

The fourth issue is the need to adopt a data security and a data breach protocol. Law firms practicing international arbitration tend to have adequate data security measures and policies in place. However, sole practitioners may sometimes be more lenient when it comes to security. Some participants may favour convenience over security and use a public Internet connection, exposing their infrastructure to leaks. It only takes one weak link to have a potential data breach. Even with good security measures in place, data breaches or ransomware attacks cannot be excluded. If that occurs in the context of joint controllership, it is critical that the other controllers are informed in time. The controller that is at the source of the breach is also interested in involving the joint controllers, as that may create a duty to cooperate in mitigating the data breach. Hence, the importance of agreeing on an adequate data security and data breach protocol, which may be revised from time to time to ensure continued protection as technology evolves.

The fifth issue is the need to manage the data subjects' rights. For example, what happens if a witness asks for access to its personal data that the other side or the arbitrator is processing? Who will handle the request and how? Such requests could impact the arbitration process, and considerations of legal strategy or professional secrecy may be incompatible with the data subjects' claimed rights. Hence, the advice is to discuss how to handle the requests at the outset.

The sixth issue is the notification. Who is responsible for notifying the data subject, and how specific should the notification be? In most cases, the parties submitting personal data are best positioned to ensure that adequate notice is being given to the data subject. Therefore, the recommendation is that the parties to an arbitration represent that adequate notice has been given, so it gets documented who is responsible.

The seventh issue is to document data protection compliance. Participants in an arbitration are encouraged to document who does what and in what form. Documenting

how compliance is being achieved should be available to the regulators. As this may impact the confidentiality of the arbitral proceedings, participants in an arbitration are encouraged to agree on the level of detail in documenting compliance efforts.

The eighth and final highlighted issue is the use of online case management platforms. The co-chairs advocated that using online platforms may benefit security in transferring data, minimising personal data, and making the redaction or pseudonymisation of personal data more manageable. They recognised that using online case management platforms might impact participants' reactivity, as it may take more time to log into the platform and apply all security measures than simply sending an email. However, that is a small price to ensure data protection compliance.

Ms. van Leeuwen and Paisley concluded their presentation by reminding the audience of potential pressure points of ensuring data protection in international arbitration: stay away from invoking consent as a legal basis; most data protection issues will be raised during disclosure, so arbitrators must get acquainted with data protection laws and be able to decide what is reasonable and what not; data breaches must be avoided and handled correctly if they occur; the possibility for a data subject to enforce its rights must be taken into account to avoid negative impacts on the arbitral process. Ensuring compliance may not be fun, but it is the law. Quite frankly, the arbitration community has an exemplary role to play. We deal with complex legal issues on a daily basis. It would be embarrassing if we fail to show that we can comply with sometimes annoying, but rather straightforward, data protection compliance rules.

an Janssen Attorney-at-law / Arbitrator PETILLION (Brussels)

BY Jan Janssen

Attorney-at-law / Arbitrator, Petillion (Brussels)

REPORT ON CEPANI'S ANNUAL COLLOQIUM ON DEFAULT IN INTENRATIONAL ARBITRATION

25 November 2022, Brussels

Op 25 November 2022, CEPANI held its long-awaited Annual Colloquium on "*Default in International Arbitration: Striking the balance*" in Brussels. This all-day event, which gathered around 120 participants from Belgium and abroad, interestingly touched upon a range of topics and challenges related to the situation where one of the parties is not participating in the entire arbitration proceedings.

Prof. Benoît Kohl (President of CEPANI) first gave a word of welcome to all participants. He highlighted that the absence of a party from the arbitral proceedings is one of the most difficult tasks arbitral tribunals and institutions may face, which is why the conference aims at studying this complex issue, in line with CEPANI's mission to promote and examine current and sensitive topics in arbitration.

The formal introduction of the day's topic was then given by **Mr. Dirk De Meulemeester** (Honorary President of CEPANI, DMDB Law), who essentially stressed that, when facing default, an arbitral tribunal cannot be expected to act as the defaulting party's advocate or counsel ad litem. However, at the same time, he raised the point that arbitrators should not turn a blind eye when this may be detrimental to the integrity of the arbitration, especially when public policy is at stake. Mr. De Meulemeester also underlined that, importantly, even when facing a defaulting party, arbitral tribunals should have regard to their duty to conduct the arbitration proceedings in an expeditious and cost-effective manner.

The word was then given to the next speakers, **Ms. Catherine Schroeder** (Schroeder Arbitration) and **Ms. Christina Mangani** (Simmons & Simmons LLP) whose presentation *on "Default at the pre-arbitration stage"* captivated the audience. Ms. Schroeder first examined the consequences of a party's default in the specific case of emergency arbitration. She notably highlighted that such situation may render emergency proceedings of less interest, considering that there is little chance the defaulting party will comply with order, if granted. She also raised the question whether, when a defaulting respondent suddenly appears in the proceedings at a later stage, that party should -– for the sake of due process – be able to intervene or, as the case may be, be granted an extension to present its case, as that would potentially affect the very purpose of emergency proceedings, which is to have the case settled (more or less) urgently. Overall, it was concluded that default in emergency arbitration did not seem to have a different impact on the conduct of the proceedings than in regular arbitration, in the sense that it would in principle not prevent the emergency proceedings from continuing. Ms. Schroeder nonetheless highlighted that eyes should remain open to the practice of the parties before emergency arbitrators in that respect, and that should issues of the sort become more frequent, this conclusion may have to be revisited. Ms. Mangani then went on to present the consequences, on the subsequent arbitration proceedings, of default in mandatory pre-arbitral mediations or negotiations (ADR). It was raised that, in case claimant disregards the mandatory pre-arbitral stage and immediately proceeds with the filing of its request for arbitration, the subsequent arbitration may be impacted as certain courts' general practice is to declare claimant's claims filed in that context inadmissible. However, Ms. Mangani stressed that forcing the parties to negotiate as an alternative remedy may give rise to surprisingly positive outcomes. Such a practice is found to be more and more adopted by national courts (*e.g.* Swiss courts) and may therefore be an interesting option to consider. On the contrary, a defaulting respondent at the pre-arbitral stage would not prevent the arbitration proceedings as

such from going forward. If the arbitral tribunal finds that claimant has in fact taken all appropriate steps to invite respondent to participate in the pre-arbitral ADR, Ms. Mangani argued that such default would, at worst, only delay the final decision on claimant's claims. Finally, it was suggested that, in such a case, one could envisage making respondent bear the arbitration costs considering that such costs might not have been supported at all, should respondent have taken part in the pre-arbitration stage in the first place.

After a deserved coffee break, the possibility to render a "*Default Award*" in the situation where a party does not show up in the proceedings was remarkably tackled by Ms. **Ulrike Gantenberg** (Gantenberg Dispute Experts) and Ms. **Lisa Reiser** (Baker McKenzie). Their presentation took the form of an interactive session where participants were notably asked to take a stance on different scenarios related to default in arbitration. Ms. Gantenberg and Ms. Reiser also gave insight on where the arbitration community and arbitration institutions stood with respect to certain sensitive issues, including on how and on the basis of which criteria institutions should appoint an arbitrator when one party fails to do so itself, or what should arbitrators do when facing a defaulting party at the (pre-) hearing stage. Interestingly, it was also stressed that, according to institutions, it was in fact very rare that a request for arbitration could not be served at all to respondent. Ms. Gantenberg and Ms. Reiner further highlighted the importance of transparent and open communication by the arbitral tribunal when a party is defaulting in the proceedings, and encouraged an "outside the box" thinking in that respect. This was in line with the overall view of the arbitration community that such defaulting party should still be notified of, and invited to participate in, each stage of the proceedings as much as possible.

Ms. **Niuscha Bassiri** (Hanotiau & van den Berg) then brilliantly met the challenge to keep the audience focused before lunch break, by sharing her views on whether an

arbitrator should be the "devil's advocate" in cases where a party is defaulting in the arbitration proceedings. She explained her view that one may think a bit more positively about the devil's advocate. Neither is the defaulting party a devil, nor is the arbitral tribunal an advocate for the defaulting party when it follows the mandatory laws and rules to conduct the proceedings in a procedurally fair manner. Ms. Bassiri notably shared her personal experience as an arbitrator facing a defaulting party, and recalled that there is in fact a shared role to play. On the one hand by the arbitral tribunal which needs to assert the facts and the law of the case, and on the other hand by the claimant, whose interest may lie in proactively anticipating the defaulting party's potential counterarguments to assist the arbitral tribunal. Ms. Bassiri also stressed that the task of an arbitrator is to test the participating party's case. In default proceedings, that may entail taking a limited role as the devil's advocate, in its role as guardian of the proceedings and due process (e.g. putting forward certain clarifying questions of facts or law), in order to protect the award from later challenges which, ultimately, she is convinced, may well be for the best of the participating party anyway.

The participants were subsequently invited to gather around a tasty walking lunch, after which the floor was given to Ms**. Anne K. Hoffman** (Hoffmann Arbitration). Ms. Hoffman addressed the burning question of whether an arbitrator or a judge is entitled to consider the law beyond the submissions of the parties, or the so-called "*iura novit arbiter*" principle, which is especially relevant where a party is defaulting. After having pointed out that arbitration rules and laws are mostly silent on that topic, Ms. Hoffman showed that, in practice, tribunals regularly refer to the principle and confirm its applicability, particularly in commercial and investment arbitration. In the course of her presentation, Ms. Hoffman notably raised that, while tribunals are not generally obligated to apply the said principle in commercial arbitration, the same cannot be said in the case of investment arbitration. Finally, Ms. Hoffman expressed her view that the "*iura novit*

arbiter" principle seemed to have found its way in modern international arbitration, but was not necessarily boundless as its application is de facto limited by considerations of due process, fairness and of enforceability of the award. Practically, and as a conclusion, Ms. Hoffman deemed necessary that arbitrators try to keep a balanced approach. As the LCIA guidance puts it, arbitrators *"[…] should rather show more caution (rather than be more audacious) than the courts before substituting their legal arguments for those of the parties*", by being notably careful not to seem partial when raising their own legal arguments.

Mr. Hakim Boularbah and **Ms. Anaïs Mallien** (Loyens & Loeff) pursued the afternoon by impressively tackling the specific subject of the impact of default on post-arbitration proceedings. Ms. Mallien first analysed the Belgian and French laws on the setting aside of arbitral awards, as well as the New York Convention, and examined the extent to which a defaulting party may rely on these rules to oppose further recognition and enforcement of the award before national courts, on the ground of its own absence in the arbitration proceedings. It was found that a defaulting party could try to argue, for example, a breach of (international) public policy or due process, a failure to notify procedural acts or an inability to defend its rights. However, Ms. Mallien explained that courts generally adopt a non- formalistic approach with respect to such claims, thus setting a high threshold for a defaulting party to succeed in obtaining the annulment or the non-enforcement of an arbitral award rendered against it on that basis. Mr. Boularbah then concluded that it was key to ensure notification of all acts and procedural steps to the defaulting party and that one cannot stress enough that it is not recommended to take the risk of not (or only partially) participating in arbitration proceedings as a strategy or tactic in

anticipation of annulment or setting aside proceedings, or as a defence at the enforcement stage, considering the approach taken by domestic courts.

A panel of eminent representatives of arbitration institutions, chaired by **Mr. Willem van Baren** (NAI), finally discussed the consequences of default on the different procedural steps of arbitration proceedings. **Ms. Estelle Brisson** (LAA), **Mr. Marc Henry** (AFA), **Mr. Rouven Bodemheimer** (DIS), **Ms. Friederike Schäfer** (former counsel ICC) and **Ms. Emma Van Campenhoudt** (CEPANI Secretary General) each shared their own experience of dealing with defaulting parties and raised some interesting questions. Notably, the panelists discussed the interplay between the obligation to pay the arbitration costs and the right to access to justice, and the potential solutions arbitration institutions could put forward to guarantee a better access to arbitration proceedings, in particular in presence of an impecunious party. The level of scrutiny to be applied by arbitration institutions to default awards was also debated. The audience was subsequently invited to take part and raise questions, which gave rise to instructive exchanges of views, notably on whether an arbitral award that could not be served to a party should be kept… for 100 years!

Fortunately, as confirmed by Prof. Benoît Kohl in its concluding remarks, we will not have to wait that long for attending the next edition of CEPANI's Annual Colloquium which was already announced for November 2023. See you there!

BY Lily Kengen

Associate, Tossens Goldman Gonne

VPG-CEPANI SEMINARIEREEKS OVER ADR & ARBITRAGE

14 and 28 October 2022, Brussels

Het domein van de buitengerechtelijke conflictafhandeling staat niet stil. Hoewel ADR en arbitrage er nog niet in geslaagd zijn (en misschien nooit in zullen slagen) om de klassieke rechtbankprocedure te verdringen als leidend paradigma voor de oplossing van geschillen, neemt hun belang wel stelselmatig toe. Dat blijkt vooreerst uit de opbouw van ons Gerechtelijk Wetboek, dat in zijn oorspronkelijke versie eindigde met het vijfde deel over beslag en executie. Daar is naderhand een zesde deel over arbitrage, een zevende deel over bemiddeling en recent een achtste deel over collaboratieve onderhandelingen aan toegevoegd. Ook bestaat er een toenemende tendens om rechtszoekenden (weliswaar nog steeds op voorzichtige wijze) te duwen richting alternatieve methoden van conflicthantering. Iedere advocaat is thans verplicht om zijn cliënt te informeren over de mogelijkheid tot bemiddeling, verzoening en elke andere vorm van minnelijke oplossing van geschillen (art. 444, tweede lid Ger.W.). Voorts kan de rechter tegenwoordig zelfs ambtshalve een bemiddeling bevelen, behalve indien alle partijen daartegen gekant zijn (art. 1734, tweede lid Ger.W.). Ten slotte heeft de COVID 19-crisis ervoor gezorgd dat de digitalisering van ADR en arbitrage in een stroomversnelling zijn gekomen, wat nieuwe vragen doet rijzen op het vlak van cyberveiligheid en gegevensbescherming.

Het thema van de buitengerechtelijke conflictafhandeling vormde dus een uitermate geschikt en actueel onderwerp voor een tweeledige hybride seminariereeks, waarvoor het Vlaams Pleitgenootschap bij de balie te Brussel en CEPANI de krachten hebben gebundeld. Op 14 en 28 oktober 2022 vonden er tijdens de middagsessies plaats in het KBC-auditorium in de Havenlaan in Brussel, die ook steeds via livestream te volgen waren.

Gedurende de eerste sessie, die georganiseerd werd tijdens de mediation

week van de Federale Bemiddelingscommissie, stonden bemiddeling en de minnelijke oplossing van geschillen centraal. **Mr. Caroline Daniels** beet de spits af met de uiteenzetting "Wegwijzer: de advocaat en alternatieve vormen van geschillenoplossing". Na een korte heropfrissing van de krachtlijnen van de Wet van 18 juni 2018 (de zgn. "Waterzooiwet"), gaf Mr. Daniels in volgelvlucht een overzicht van de verschillende ADR-mechanismen. Zij besteedde daarbij ook aandacht aan de Consumentenombudsdienst, een instantie die vaak over het hoofd wordt gezien in de traditionele lijstjes. Ten slotte vestigde Mr. Daniels de aandacht op een verborgen voordeel van de schikkingskamers in de ondernemingsrechtbanken. Die kamers laten soms sneller dan een pleitkamer toe om een tussenvonnis te verkrijgen waarin een onderzoeksmaatregel wordt bevolen.

Als tweede spreker kwam **Mr. Charlotte De Muynck** aan bod met haar presentatie over "*E-mediation*". Hoewel online bemiddelen ontegensprekelijk een aantal voordelen biedt (zoals het vermijden van fysieke confrontatie, de snelheid en flexibiliteit en de efficiëntie), zijn er op dit moment in België weinig concrete richtsnoeren voor bemiddelaars die daartoe willen overgaan. Er is enkel artikel 7 van de deontologische code. Luidens deze bepaling mag "de bemiddelaar ook virtuele sessies organiseren". Mr. De Muynck wees dus op meerdere caveats waarmee rekening moet worden gehouden bij een online bemiddeling. Verder deelde zij een aantal handige tips en tricks met de toehoorders.

Mr. Fleur Goister en **Drs. Anna Wilmot** namen de derde presentatie voor hun rekening over de *"basisbeginselen van de collaboratieve onderhandeling*". De spreeksters beperkten zich niet tot een loutere juridisch-technische uiteenzetting van de ADR-methode. Zij lichtten ook de mindset toe die nodig is om aan tafel te gaan en het traject dat moet worden doorlopen. Daarbij valt ook de aangepaste terminologie op (zoals andere partij in plaats van tegenpartij en collega in plaats van tegenstrever). Wat betreft de juridische knelpunten, onthouden wij vooral het gebrek aan homologatiemogelijkheid van het collaboratief akkoord. Dit kan eventueel op kunstmatige wijze worden ondervangen door de zaak aanhangig te maken bij de

rechter en te doen alsof er op één punt geen akkoord is.

Tijdens de tweede sessie op 28 oktober 2022 lag de focus op de alternatieve geschillenbeslechting, met name op bindende derdenbeslissing en arbitrage. Hoewel het praktisch belang van de bindende derdenbeslissing niet te onderschatten valt, zijn actuele besprekingen over dit thema eerder schaars. **Mr. Alexander Hansebout** bracht daar op uitstekende wijze verandering in. Bovendien was er ook een goede aanleiding om het onderwerp van onder het stof te halen. In maart 2020 gaf de raad van de Nederlandse Orde van advocaten bij de balie te Brussel goedkeuring aan een nieuw Reglement bindende derdenbeslissing. Bovendien geeft het nieuw verbintenissenrecht ook erkenning aan de figuur (art. 5.49 BW). Mr. Hansebout behandelde zowel de voor- als nadelen van de methode alsook een aantal juridisch-technische aspecten (zoals de overeenkomst, de procedure en de afdwingbaarheid). Hij sloot af met een oproep om de nodige creativiteit aan de dag te leggen om de bindende derdenbeslissing in te passen in een meerlagig systeem van geschillenbeslechting.

Vervolgens behandelde **Mr. Flip Petillion** het uitdagende thema van GDPR in arbitrage. De naleving van de Algemene Verordening Gegevensbescherming is vanzelfsprekend niet het eerste waar de verschillende actoren aan denken bij het initiëren van een arbitrageprocedure. Niettemin moeten partijen, advocaten, arbiters en arbitrale instanties de vereisten inzake GDPR naleven wanneer er gegevens van natuurlijke personen in het spel zijn. Mr. Petillion gidste de toehoorders op een overzichtelijke en begrijpelijke wijze doorheen de vele vragen die hieromtrent rijzen (o.m. wat iedere deelnemer moet doen om GDPR-conform te zijn, welke problemen er zich kunnen voordoen en hoe persoonsgegevens buiten de grenzen van de EER gedeeld kunnen worden). Ten slotte wees Mr. Petillion op het bestaan van een *ICCA-IBA roadmap* voor gegevensbescherming in internationale arbitrage die heel wat checklists en voorbeelddocumenten bevat. Een volgende uitdaging zou erin bestaan om deze te reduceren tot toegankelijke en makkelijk te hanteren best practices.

Afsluiten gebeurde in stijl met een tweeluik dat gebracht werd door **Mr. Maarten Draye**: enerzijds over urgentiearbiters en anderzijds over de vernietiging van arbitrale sententies.

Centraal in het betoog van Mr. Draye stond de rol van urgentiearbitrage als een nuttig wapen om tot een snelle beslissing te komen. In België bestaat er met het klassieke kort geding weliswaar een waardig alternatief, maar dat is in andere rechtstelsels niet altijd het geval. Daardoor bestaat er in België ook een zeker spanningsveld tussen beide mechanismen. Mr. Draye is er echter van overtuigd dat geen van beide voorrang moet krijgen. Partijen moeten in dringende gevallen de mogelijkheid hebben om de meest efficiënte weg te kiezen. Ten slotte kon Mr. Draye de toehoorders boeien met een stelselmatige bespreking van de vernietigingsgronden, die doorspekt was met praktijkvoorbeelden.

Het VPG en CEPANI kijken met voldoening terug naar de tweevoudige seminariereeks. In het voorjaar verschijnt het boek "Buitengerechtelijke conflictafhandeling: vandaag en morgen" met de schriftelijke neerslag van de verschillende presentaties. Dit boek zal ongetwijfeld een meerwaarde betekenen voor de Belgische literatuur inzake ADR en arbitrage.

BY Wannes Vandenbussche

Ass. Prof. Ghent University

Linklaters (Brussels)

BRUSSELS, THE HEART OF THE LEGAL WORLD

31 October 2022, Miami

The International Bar Association's 2022 Annual Conference in Miami (USA) was the occasion for hub.brussels to organise an event promoting Brussels as a legal hub and to sell the Brussels legal offering to the international market. Hub.brussels teamed up with CEPANI, the Nederlandse orde van advocaten bij de balie te Brussel (NOAB), l'Ordre français des avocats du barreau de Bruxelles and EDPO for a seminar on "*Brussels, the Heart of the Legal World"* at the Surfcomber Hotel (Miami Beach).

The presentations were held under the auspices of the Consul General of Belgium in Atlanta, Mr. Michel Gerebtzoff, and the hub.brussels team. The 73 attendees, which included 36 US and 28 Belgian participants, were warmly welcomed and were presented with an overview of hub.brussels' mission, network and activities. NOAB President, Mr. Bernard Derveaux, explained the conditions under which non-Belgian lawyers are allowed to practice in Brussels under their home title and through an establishment in Belgium. He discussed the registration conditions for the

Brussels Bars' 'tableau', 'EU list' and 'B list' and the respective advantages of being enrolled on these lists. He welcomed lawyers to settle in Brussels and to consider Brussels as the location for centralising their activities.

Former NOAB President, Mr. Patrick Dillen, gave 10 reasons why Brussels should be one's gateway to the European legal market. In addition to the important Brussels-based European Institutions and the Brussels legal market being an open market, he also referred to the quality of the city's lawyers and institutions (including CEPANI) and its multilingual environment at the 'cultural crossroads' of northern and southern Europe. Finally, Mr. Dillen emphasized Brussels' standard of living and high-quality, varied and affordable cuisine.

On behalf of CEPANI, **Mr. Pascal Hollander** (Hanotiau & van den Berg) set out six reasons to arbitrate in Brussels. Readers will not be surprised that Mr. Hollander stressed (i) the city's openness, cultural and linguistic diversity, its sensitivity to the needs of international business, and Brussels' rule of law tradition as the 'capital of Europe'. He dwelled on (ii) Belgian's modern arbitration law and CEPANI's new arbitration rules (effective since 1 July 2020) and (iii) focused on the elements of the Brussels' legal environment that make it attractive for international arbitration. The latter include Belgium's monistic and liberal approach to arbitration, e.g. regarding the appointment of arbitrators, the organisation of the proceedings, the possibility to agree on waiving setting aside proceedings, etc. Mr. Hollander referred to (iv) CEPANI's 50-year long tradition of excellence, and (v) Brussels being a top venue for arbitral hearings. He finished by (vi) stating the reasons why parties should consider choosing a Belgian arbitrator for their case, many of which were illustrated by his very own presentation.

Ms. Jane Murphy (EDPO) explained why it is important for non-EU companies to remember their GDPR obligations when offering goods or services to individuals in the EU or when monitoring individuals' behaviour in the EU. An important obligation could be the appointment of a GDPR representative. Ms. Murphy stressed that one should not confuse this with the obligation to appoint a Data Protection Officer or other types of representatives. She briefly discussed the interplay with the Privacy Shield and any Adequacy decision, and offered some thoughts on appropriate solutions.

The seminar ended with a short presentation of the Brussels lawyers present and with a networking cocktail, including – what else? – famous Belgian beers…

BY Alexandre Hansebout

Partner, Altius

!!! CEPANI/CEPANI40 ACTIVITIES IN 2023 !!!

- THIRD EDITION OF CEPANI40'S "MEET THE EXPERTS" BRUSSELS

19 JANUARI 2023

On Thursday 19 January 2023, the CEPANI40's "Meet the Experts!" event returned for a third edition hosted, for the first time in-person, in the Brussels office of Allen & Overy.

Much like the previous editions, the event aimed at giving young practitioners an opportunity to hear directly from experienced lawyers about their work as arbitrators and – for the first time in this third edition – more generally, about their careers in the field of arbitration.

After an introduction by **Lauren Rasking** (Allen & Overy), CEPANI40 Co-Chairs **Katherine Jonckheere** (Lalive, London) and **Guillaume Croisant** (Linklaters, Brussels) moderated a lively and thought provoking Q&A session with a panel of four Belgian and international experts:

- **Pascal Hollander** (Partner, Hanotiau & van den Berg, Brussels);
- **Maude Lebois** (Partner, GBS Disputes, Paris);
- **Emma Van Campenhoudt** (Secretary General, CEPANI);
- **Marieke van Hooijdonk** (Partner, Allen & Overy, Amsterdam).

Through questions that had been sent by the audience ahead of the session, the four panellists shared their insights on a number of topics, ranging from advice on how to navigate a career in arbitration and land a first appointment as arbitrator, to thoughts about handling challenges in arbitral proceedings and promoting diversity in all aspects of arbitration.

The panellists shared some tips on how to effectively manage arising opportunities and multiple pressures in order to build a fulfilling career in arbitration. Their advice was, amongst others, to:

- Learn as much as possible from working in a broad range of fields, whether in arbitration, litigation or even fields not directly related to dispute resolution;

- Gain visibility, for example by publishing articles, speaking at conferences, or getting involved in professional associations;

- Be intentional and selective in the choice of these activities, depending on what fits best with one's career path;

- Be patient;

- Be mindful about how to evolve within a firm, such as fostering key client relations, developing a specific expertise or benefiting from the guidance of a mentor;

- Know your limits and be passionate about the work.

When discussing first appointments as arbitrator, the panellists emphasized again the importance of the visibility that can arise from publications and other academic engagements, and the relevance of experience acquired through work as a tribunal secretary. The experts also highlighted the value of being able to seek the support and insight of experienced lawyers when faced with procedural difficulties. Finally, they emphasised the key role of arbitral institutions in opening up the arbitration field to young and diverse profiles. The recent change in the CEPANI rules to formally integrate diversity and inclusion considerations in the appointment of arbitrators was highlighted as another step in the right direction.

The participants had the opportunity to network after and (welcomed innovation of this year!) before, the event during networking drinks.

A likely fourth edition of the event will no doubt be a great opportunity to continue these discussions and shed light on other thorny aspects of arbitration work!

- 2023 BRUSSELS PRE-MOOT FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

21-22 MARCH 2023

On The 7 th edition of the Brussels Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot started on Tuesday 21 March, when 19 teams (the University of Palestine could not make it) arrived from four continents in Brussels, sometimes flying from (very) far away and braving jetlag.

The Pre-Moot gathered teams from Ankara University, China-EU School of Law, Ecole du Barreau de Paris (EFB), Erasmus University Rotterdam, Ghent University, Leopold-Franzens-Universität Innsbruck, Maastricht University, National University of Rosario, Queen Mary University of London, The Hague University of Applied Sciences, Ukrainian Catholic University, University of Basel, University of Copenhagen, University of Delhi, University of Liège, University of New South Wales, University of Oslo, and University of Warsaw.

This year, the Pre-Moot was organised under the auspices of **CEPANI40** by **Guillaume Croisant** (Co-Chair) and **Alexandre Hublet** (Member of the Steering Committee), and co-hosted by the Brussels offices of **Linklaters LLP and White & Case LLP**. The pleadings and networking events took place at both law firms, which are conveniently within walking distance of one other.

After the teams' registration, the first general round was launched simultaneously at both law firms. The teams, their coach(es) and the arbitrators were then kindly invited to participate in the networking lunch organised at Linklaters LLP, which was the perfect occasion to meet, discuss and share anecdotes on the intense but rewarding experience that the Willem C. Vis International Commercial Arbitration Moot is.

The second and third general rounds followed in the afternoon.

The day ended with a networking reception at White & Case LLP, which allowed teams, coaches and arbitrators to further meet and exchange over drinks and appetizers – all tired but enriched by the very pleasant first day of the Pre-Moot, and ready for the second one!

On Wednesday morning, participants met up for the fourth general round. The top eight teams then advanced to the final rounds: the grand finale saw the universities of Copenhagen and Queen Mary London face off at White & Case, arbitrated by **Benoît Kohl** (CEPANI President), **Erika Stein** (Stein Arbitration) and **Sophie Goldman** (past organiser of the Pre-Moot). In the end, it was the University of Copenhagen that came out on top, after a very high-quality final.

The Pre-Moot brought together more than 130 arbitration practitioners acting as arbitrators, with various levels of experience with the Vis Moot. Arbitrators were mostly lawyers or coaches, but also legal advisors at arbitral institutions (such as ICC in Paris and UNCITRAL in Geneva) and alumni from previous editions of the Moot and working in different sectors.

Many thanks to all the arbitrators, and stay tuned for the 2024 Brussels Pre-Moot!

-CEPANI AND CEPANI40 AT THE 2023 PARIS ARBITRATION WEEK

29-30 MARCH 2023

CEPANI EVENT: "THE (UN)USUAL SUSPECTS" EFFICIENCY AS A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL ARBITRATION (29 MARCH 2023)

CEPANI, the Netherlands Arbitration Institute (NAI), the Vienna International Arbitral Centre

(VIAC), and the Association Française d'Arbitrage (AFA) joined forces for the second time in a row at the Paris Arbitration Week (PAW), this year to explore the topic of efficiency from the perspective of arbitration under the respective rules of these four institutes. The roughly 100 participants were rewarded for their early alarm (the event started at 8:30am) by a breakfast featuring specialities from the four countries, including Dandoy speculoos.

The participants were welcomed by **Roland Ziadé** (co-head of the global arbitration practice of Linklaters, whose Paris office kindly hosted the event), before an introduction by **Gerard Meijer** (NAI President), who moderated the lively panel debate with witty humour and great energy. After having made clear that the "unusual suspects" did not refer to the distinguished speakers of course, but to regional institutions vis-à-vis the bigger international institutions such as the ICC, Mr. Meijer introduced the concept of efficiency of, and in, arbitration, and whether it constituted a fundamental principle of international arbitration (in light of the European Court of Human Rights' case law and the legal maxim "justice delayed is justice denied"). He also managed to foster an interactive debate throughout the event, reassuring the participants as from the start that they did not need to disguise their comments as questions, but that interventions and comments were most welcome!

The representatives of the four institutions, and the audience, discussed topics including the effects of the flexibility of institutional rules on efficiency, the effect of the desire for speed on efficiency, organisational aspects of an institute's secretariat that may impact efficiency, various procedural features and mechanisms, and of course costs.

Camilla Perera-de Wit (NAI Secretary General) started the discussion by presenting how flexible the NAI rules and Dutch arbitration act were, before **Marc Henry** (AFA President) made the case that the "need for speed" should not be, per se, the holy grail and should not jeopardise the quality of the arbitral tribunal's decision. He defended the position that celerity is not a principle of international arbitration, but at most a rule of good conduct to help guarantee due process. A number of participants pointed out that the responsibility to ensure the efficiency of the arbitral process did not lie only with the arbitrators (who may be victims of "due process paranoia" when it comes to e.g. limit

the number of submissions or the procedural deadlines), but also with the parties (prompt to submit increasingly longer submissions and abundant exhibits).

Benoît Kohl (CEPANI President) and **Emma Van Campenhoudt** (CEPANI Secretary General) then discussed how the organisation of SMIs ("small and medium institutes") can entail increased efficiency and responsiveness (without offence to the ICC, whose chair of the ICC Commission on Arbitration and ADR, Melanie van Leeuwen, was present in the audience and described herself as a "great supporter" of the four institutions), including in the context of emergency arbitration. Mr. Kohl pointed out that those procedures of course almost start on a Friday or just before/during the holidays, and that a heads-up call ahead of the filing of the request will always be highly appreciated by CEPANI! Urgent relief under the NAI Arbitration Rules, that allow summary proceedings closed to Dutch state court kort geding proceedings, was also discussed by Ms Perera-de Wit and Mr Meijer.

Mr. Henry then touched upon the topic of early determination, that is usually possible either (i) by the arbitral institution, before the constitution of the arbitral tribunal (e.g. AFA, CEPANI, ICC rules), or (ii) by the tribunal after the constitution of the same (e.g. LCIA, ICSID, PCA rules). In his view, early determination should be generalised before the institutions rather than the arbitrators. In the audience, Bernard Hanotiau made the point that, in his experience, early determination requests are barely ever granted by arbitrators in practice.

Niamh Leinwather (VIAC Secretary General) presented the challenge procedure at VIAC, which is of the responsibility of its board, before a discussion on expedited proceedings. Mr. Kohl pointed out that it was quite usual, for CEPANI expedited proceedings, to see proceedings looking very much alike to the proceedings conducted under the normal rules (drawing up of terms of reference even when they are not required, deadlines of several months for submission, several hearing days, etc.)

Finally, the institutions discussed the added value of the "light scrutiny" (i.e. on formal aspects, calculations, costs, etc. but not a review of the tribunal's position and argumentation) they usually conduct. Mr. Kohl pointed out that, for CEPANI proceedings, the scrutiny lasts around one week. It is conducted first by the counsel in

charge, then reviewed by the Secretary General, and finally by the President.

Mr. Meijer then concluded the lively debate, before the second part of the networking breakfast

CEPANI40 EVENT: THE WORLD POST-ACHMEA: NATIONAL COURTS' TREATMENT OF INVESTMENT ARBITRATION (29 MARCH 2023)

CEPANI40 teamed up with several other below 40 organisations (CFA40, ASA below 40, YCAP, ICC YAAF, LCIA YIAG, ICDR Y&I, DIS40, AFM below 40 and PVYAP) to bring a panel discussion titled "The world post-Achmea: National courts' treatment of investment arbitration".

Over one hundred PAW delegates gathered at the offices of August Debouzy – and many others followed online – for a discussion about how national courts have dealt with the infamous judgment of the Court of Justice of the European Union (CJEU) in Slovak Republic v Achmea B.V. of 6 March 2018. In Achmea, the CJEU ruled that the arbitration clause contained in the Netherlands-Slovakia Bilateral Investment Treaty (BIT) was incompatible with EU law (and, by implication, investor-state arbitration conducted under BITs between EU member states generally).

The panel was expertly moderated by **Laura Halonen**, Of Counsel at WAGNER Arbitration, who noted at the outset that the effects of the Achmea ruling have reverberated around the world. Since then, most EU Member States have concluded a multilateral treaty terminating the BITs between them, including, controversially, the sunset clauses in those BITs (which extend protection of investments made prior to the date of termination of the BIT for a specified period of time). However, the biggest impact, Ms Halonen noted, has been seen in domestic courts which have been faced with decisions on whether to annul or enforce investment arbitration awards rendered under intra-EU BITs (as well as awards in intra-EU arbitrations under the Energy Charter Treaty (ECT), since the CJEU's subsequent ruling in *Moldova v Komstroy* of 2 September 2021 which extended the *Achmea* reasoning to intra-EU arbitrations brought under the ECT).

The distinguished panellists, all having personal experience with the interesting topic, guided the audience through an impressive *tour d'horizon* of the developments in their respective jurisdictions:

-**Tiffany Comprés**, Partner at FisherBroyles (covering the US)

- **David Goldberg**, Partner at White & Case (for the UK)

- **Veronika Korom**, assistant professor at ESSEC Business School (for France)

- **Tim Rauschning**, Counsel at Luther (for Germany)

- **David Sandberg,** Senior Associate at Mannheimer Swartling (for Sweden)

Ms Korom started by sharing her observations on the April 2022 Paris Court of Appeal's annulment of intra-EU investment arbitration awards in *Strabag v Poland* and *Slot v Poland* for lack of a valid arbitration agreement, based on *Achmea*. In doing so, the Paris Court of Appeal abandoned previous French case law favourable of upholding arbitration agreements based on the common intention of the parties without reference to any national law.

Next, Mr Sandberg gave the lay of the land in Sweden, where the Supreme Court handed down the key decision in late 2022. After having sought a preliminary ruling from the CJEU, the Swedish Supreme Court set aside an intra-EU arbitration award in *PL Holdings v Poland*, ruling that intra-EU arbitrations are contrary to public policy. As Mr Sandberg pointedly noted, in the specific circumstances of the case, the Supreme Court could nonetheless not have set aside the award on the basis of invalidity of the arbitration agreement because – in accordance with Swedish law – Poland had waived such an objection by not raising it during the arbitration.

Mr Rauschning closed the 'European' loop by discussing how intra-EU awards have not fared much better (at least from the investor's perspective) in the German courts, which is where *Achmea* originated. A constitutional complaint against the German courts' annulment of the award brought by *Achmea*, arguing that the CJEU's judgment was an ultra vires act, is currently pending. *Achmea's* reasoning was again confirmed in the context of pending intra-EU arbitrations against Croatia and the Netherlands, although the Berlin regional court has rejected an application to declare inadmissible an intra-EU ICSID arbitration against Germany due to

the nature of ICSID arbitrations – which decision is on appeal.

Ms Halonen then guided the discussion to the treatment of intra-EU investment arbitration awards outside the EU. Ms Comprés began by explaining that presently the key precedent in the US is the D.C. Court of Appeals' upholding of the intra-EU ICSID award in Micula v Romania. The Court rejected Romania's objections on the basis of Achmea, albeit on the narrow ground that a valid agreement to arbitrate existed at the time of the underlying events as well as the commencement of the arbitration (2005), which preceded Romania's accession to the EU (2007).

Mr Goldberg concluded the overview of developments in the different key jurisdictions by recounting his experience arguing the subject before the UK Supreme Court in *Micula v Romania*. The Supreme Court dealt a significant blow to *Achmea* by ruling that intra-EU ICSID arbitral awards will be enforced in the UK because it had acceded to the ICSID Convention (1967) before it joined what later became the EU (1973). Post-Brexit UK has therefore become a particularly attractive jurisdiction for enforcement of intra-EU arbitral awards, whether rendered under a BIT or the ECT, at least when it comes to ICSID awards. The UK Supreme Court's reasoning can nonetheless not hypothetically be extended to awards that require enforcement under the New York Convention, to which the UK acceded only in 1975.

An intercontinental battle of EU courts, on the one hand, and, on the other, UK and US courts, is therefore underway when it comes to treatment of intra-EU investment arbitration awards.

The speakers concluded by sharing their thoughts on recent developments in the context of anti-suit injunctions; in particular, the anti-suit injunctions applied for by Spain in renewables cases *9REN Holding v Spain* and *NextEra Energy Global Holdings v Spain* in various EU jurisdictions to stop US courts from enforcing intra-EU awards. These have in turn been responded to by (anti-)anti-suit injunctions in the US courts, leading to two very recent orders by the DC District Court,

both issued on the same day by the same judge (Judge Tanya Chutkan). In both cases, the DC Court opined that the investors' success in confirming and enforcing the awards was highly likely. As observed by Ms Comprés, these cases will bring the EU and the US head-to-head.

Ms Comprés' observations necessarily did not include a discussion of the decision that came out in the US on the same day of the panel, in *Blasket Renewable Investments v Spain,* where Judge Richard Leon for the DC Court refused to enforce an ECT award against Spain based on *Achmea*, because of lack of a valid arbitration agreement.

The highly informative panel ended with comments from the audience, including a few remarks by the esteemed professor George Bermann, who was Chair of the PL Holdings v Poland arbitral tribunal and gave further valuable insights on the topic. Professor Bermann particularly noted the distinction made by the CJEU between investment and commercial arbitration and how, although it may seem like it, we have not seen every scenario. The panel agreed that national courts' treatment of *Achmea* will give plenty of material for another discussion on the same topic at the next Paris Arbitration Week.

After a drinks reception kindly hosted by August Debouzy, many participants joined the Young Arbitration Cruise, which has now become one of the recurring highlights of the PAW (organised jointly by ICC YAAF, PVYAP and CFA40)

CEPANI'S D&I ADAPTATION OF RULES SHORLISTED AT THE 2023 GAR AWARDS (30 March 2023)

In recognition for the change of its Arbitration Rules making explicit the taking into account of D&I considerations in the appointment of arbitrators, CEPANI was shortlisted for two awards during the Global Arbitration Review (GAR) Awards 2023, (i) the Equal Representation in Arbitration (ERA)

Pledge Diversity Award and (ii) the Arbitral Institution that impressed in 2023.

CEPANI was represented by its President (Benoît Kohl) and Secretary General (Emma Van Campenhoudt), and by three members of its D&I standing committee (Sophie Goldman, Werner Eyskens and Guillaume Croisant – the fourth member of the committee is Niuscha Bassiri)

CEPANI40 WEBINAR

"VIRTUAL HEARINGS. LESSONS LEARNED"

16 FEBRUARY 2023

On 16 February 2023, CEPANI40 invited prominent arbitration practitioners to discuss their experience with virtual hearings and what lessons they learned. The panellists engaged the audience with an interactive mock prehearing conference hosted by Opus 2 where Mr. **Malik Baba** (Stibbe) advocated for holding the hearing on the merits virtually and Mr. **Jan Janssen** (Petillion) and Ms. **Lauren Rasking** (Allen & Overy) argued against a virtual hearing ("**VH**"). The prehearing conference was brilliantly moderated by a Sole Arbitrator, Ms. **Erica Stein** (Stein Arbitration), and held according to the prehearing protocol (Procedural Order No.1), which was provided to the participants in advance of the webinar.

The theme of Mr. Baba's oral submissions in favor of VH was a famous proverb: "necessity

is the mother of invention". According to Mr. Baba, Covid-19 restrictions caused arbitration practitioners to start resolving disputes through a remote forum. Why not embrace progress and continue enjoying the benefits of VH? Mr. Baba named several advantages of VH that made it preferrable to an in-person hearing ("**IPH**"). In particular:

1. VH is cost-effective. This is particularly true in multijurisdictional disputes as arbitrators, counsel, parties, experts and witnesses are no longer required to travel and stay in hotels. Parties will also save costs for renting conference rooms that may be rather expensive.
2. VH is time-efficient and allow easy scheduling of the hearing, since the time previously required for traveling can be saved. Thus, time set aside for the hearing is reduced.
3. VH is more convenient because: (i) counsel can more comfortably attend to other urgent matters from their office if the need arises; (ii) it is easier to do last minute legal research to address the tribunal's questions from the office where the legal team has all its resources available, including a library; and (iii) it ensures minimal disruption to private life when all participants may enjoy the comfort of one's home at night and see their family – this will help with the performance at the hearing.

VH reduces the impact on the environment by eliminating travel to a hearing venue.

For the sake of completeness and anticipating Respondent's submissions, Mr. Baba chose not to shy away from potential shortcomings of VH commenting on three major disadvantages. The first is the loss of the human aspect. "In other words, counsel would need to see people in the flesh, otherwise they would lose the ability to rely on body language" and to assess a witness' or expert's credibility or arbitrators' perceived sensitivity to it. However, it is doubtful that this constitutes a convincing argument against VH as participants can scrutinize body language equally well through a screen when faces are seen in close-up. Moreover, a witness or an expert can be nervous, and their body language can be misinterpreted. Therefore, it would not be worth incurring the costs of a face-to-face meeting (IPH), which in any event could be unreliable. The second drawback is the risk of technological issues such as unstable internet connections, audio- and visual- IT problems etc. However,

such risks can be mitigated with appropriate measures such as organising testing sessions before the hearing, having a reliable hearing services provider as well as a local IT team ready to resolve any immediate problems. Third, it could be inconvenient for participants from different time zones to participate in VH. Yet, this issue is manageable – the parties can agree on shorter hearing days, unusual starting and finish times or more convenient times for each party in turn. Mr. Baba concluded that most of these challenges could be mitigated if the parties engaged constructively early on.

In response, Respondent's team objected to holding a VH in this arbitration as being unfair, costly and uncertain. Ms. Rasking alleged that VH would violate Respondent's right to present its defense and would be prejudicial to her client's right to a fair and efficient resolution of the dispute. She started her argument by rebutting Claimant's submissions:

1. VH will create a particular disadvantage to Respondent due to the time zone difference as Claimant proposed a timing that was favorable to it. Participation in the hearing during inconvenient and unreasonable hours will affect Respondent's team's performance, concentration and ability to respond effectively to questions, preparation and coordination both within a team and with a client.
2. Technological issues such as poor internet connection, audio- and video- disruption and/or trouble with documents that are being displayed could affect the quality and continuity of the hearing.
3. The parties will incur additional costs to set up and manage the platform to be used for VH, costs of hosting data online and constant IT support. These costs will be disproportionate and unreasonable.
4. Furthermore, ethical behavior cannot be guaranteed or controlled in a virtual environment. To the contrary, VH will create opportunities for misconduct – like coaching witnesses or interference by third parties – and a hearing protocol will be insufficient to prevent this type of behavior.
5. VH will raise serious concerns about confidentiality/security of information that have been exchanged during VH and a leak of sensitive data.

Mr. Janssen added four more reasons to reject Claimant's request for VH:

1. The energy of IPH has a positive effect on the quality of the debate and creates (i) a more cooperative atmosphere, which in turn leads to better fact-finding and (ii) an opportunity for counsel to meet in the corridor and remove some tension from the proceedings.
2. Body language, which is essential for good communication, gets lost in VH. Thus, it will not be possible to see the immediate rection of opposing counsel or a witness as direct eye contact will be lost during cross-examination in VH.
3. It is easier to sabotage VH and delay the proceedings, where the costs of such delay, given the collective billing rates of tribunal members and counsel, are enormous.
4. It is tiresome to look at your own image on the screen the entire day, screen fatigue affects concentration on legal and factual issues of the case.

Following the parties' oral submissions, Ms. Stein invited Ms. **Roopal Patel** (Opus 2) to explain the technical side of having VH and what services the platform offers. Ms. Patel focused on four distinct parts of the hearing, which are the venue, the people, the interaction between the participants, and the supporting records and services, which could include the hearing bundle and the transcripts. The only component that fundamentally differs when it comes to VH is the venue. Ms. Patel added that the platform – which is a cloud-based solution accessible via dedicated URL and specific user credentials – allows counsel to communicate and collaborate with colleagues effectively within one environment and to navigate through case materials easily as each side prepares for and participates in the VH. The solution also offers a real-time transcription and an activity wall. She concluded that the platform is fully managed by a dedicated support staff ready to help any minute.

After having heard the parties' submissions and the presentation of Opus 2, Ms. Stein closed the mock conference part and opened Q&A part of the webinar, which was joined by CEPANI40 Co-Chairs Ms. **Katherine Jonckheere** and Mr. **Guillaume Croisant**. The speakers were invited to share top tips for advocating in VH. When answering a question about "the key logistical points to think about when organising" VH, Mr. Baba highlighted the importance of: (i) selecting a suitable video conferencing system and (ii) ensuring the confidentiality/security of the proceedings. Ms. Patel added that: (iii)

planning and testing the system would be critical to any VH to make sure everything would go smoothly. Speaking about the future of VH in post-pandemic era, Ms. Stein observed the trend that parties were more willing to keep short (i.e. limited in scope) hearings remote/online and to hold longer hearings with a debate between the parties in person. Lastly, the speakers commented on "the upcoming greener arbitration trend" by opining that – in their experience – parties started to increasingly raise environmental concerns when deciding on conducting arbitrations digitally, i.e., refraining from using hard copies, and deciding whether to opt for VH instead of IPH.

BY Krystyna Khripkova

Counsel, Integrites (Kyiv and Brussels)

STORIES FROM A YOUNG ARBITRATOR

EPISODE 10 –HOW PANDEMICS CAN ALSO CREATE OPPORTUNITIES FOR YOUNG ARBITRATORS

Lauren Rasking
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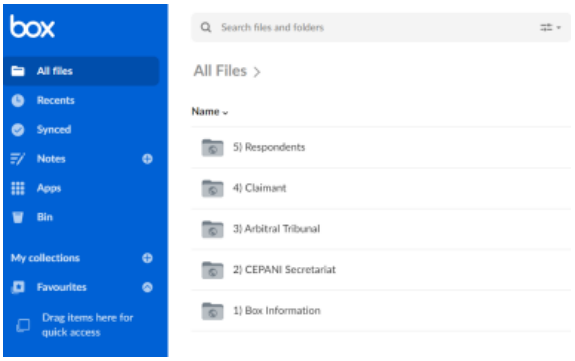
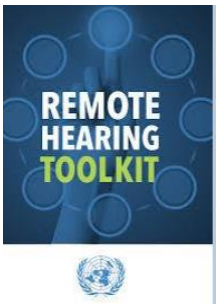
Many articles have been written about the impact of the ongoing COVID-19 crisis on the practice of commercial arbitration. One trend that all commentators seem to agree on, is the development and acceleration of the use of innovative technologies and online platforms to enable electronic filing, document exchange, communications, and even fully virtual or hybrid hearings. This accelerated digitalisation creates challenges, but also opportunities for young arbitrators. I believe that the next generation is well placed and has an important role to play in promoting and adopting new technologies, and in implementing new ways of conducting dispute resolution.

Thankfully, they are not alone and can find support in many arbitral institutions that have almost universally adopted guidelines and detailed protocols on how to conduct remote proceedings. In this post, I would like to focus on a few tools that I, both as a young arbitrator and as a counsel, have found to be particularly useful when traveling, attending physical meetings, and even sending hard copy letters, all became more difficult, and in some cases even impossible.

The first tool that I would like to focus on is one that both arbitrators and the parties can benefit from, and this from the very beginning of the arbitral proceedings: the use of a secure online platform for document exchange between the parties, the arbitrator and the CEPANI secretariat, better known as “the Box”. The CEPANI Box was introduced years before there was any inkling of a global pandemic that would change the way arbitration proceedings are usually run. Many readers of this newsletter were probably already persuaded by the advantages of a platform that allows for the centralised, easily accessible and economical exchange of documents and file management. However, in times of remote working, where both the arbitrators and the parties had to access documents online and where sending physical letters – let alone voluminous bundles of written submissions and supporting evidence – became both more burdensome and less effective, the

availability of this type of secure platform can only be encouraged.





Another tool I would like to mention is the publication of a checklist for remote hearings, which derives from initiatives taken by many arbitral institutions to support their users and arbitrators. Inspired by notes, checklists and protocols of other institutions such as ICC, HKIAC, VIAC, CIArb and NAI, CEPANI also published a checklist with practical guidance on how to organise a remote or virtual hearing. Unless the parties have agreed for the dispute to be decided on the basis of documents (article 24.4 and 29.3 of the CEPANI Arbitration Rules), the tribunal may summon the parties to appear at an oral hearing. It is up to the tribunal to decide, after consulting with the parties, whether to hold a physical hearing or rather a virtual/hybrid hearing via videoconference, teleconference or any other appropriate means of communication (article 24.3 of the CEPANI Arbitration Rules).

In my recent experience, a remote hearing can have significant advantages. By eliminating any travel time and requiring a higher degree of focus, remote hearings tend to be more time-efficient and cost-effective for the parties. It also allows the parties and arbitrators to bring up documents promptly on screen, to read and comment on transcripts, to follow simultaneous translations and to create links within a counsel team or between members of a tribunal, live during the hearings, by having all data and participants present on one online platform. However, this requires some preparation, and this does not only include having an IT support team on stand-by. As set out in the CEPANI checklist, it is important to have a clear agreement between the parties on organising a fully virtual or hybrid hearing, to set out the ground rules during a case management conference and to document these in a procedural order and cyber protocol (some suggested wording can be found in the annexures to the checklist). You want to avoid any successful challenges of an award on the basis of a violation of the rights of defence of a party that feels it was unable to make its arguments properly in a virtual setting.

Finally, when first appointed as an arbitrator, expect your electronic ID-reader and

guidance note in the post to allow you to validly sign certain communications using a qualified electronic signature. This includes Terms of Reference of Procedural Orders, but excludes – at least under the current rules (i.e. article 34.2 of the CEPANI Arbitration Rules) – the Award. Although the parties and arbitrators are not obliged to make use of the electronic signature, they are encouraged to do so (see article 8.2 of the CEPANI Arbitration Rules). As you can avoid the administrative burden and time spent meeting in person to merely sign a document or arranging for couriers to transport originals to collect the required wet ink signatures, one can only support such development. Although this option is not yet available for the Award, some changes introduced by other arbitral institutions might entail a welcome move in this direction (see, for example article 26.2 of the 2020 LCIA Rules, or the ICC Guidance note dated 1 January 2021).

The above tools and developments fit with the broader innovations that the practice of commercial arbitration needs to embrace to face other challenges, such as climate change, the need for more transparency, diversity, and cost-effective and swift decisions. We can take comfort in the fact that the next generation of young arbitrators has some of the tools at their disposal, and will undoubtedly drive further innovation, so that they are well equipped to meet these challenges.

EPISODE 11 –WALKING ON THIN ICE WHEN ADDRESSING CORRUPTION AS AN ARBITRATOR

Julie SPINELLI
Partner, Le 16 Law, Paris

"I know it when I see it…". This is what I had been told about identifying corruption when acting as an arbitrator, by reference to the well-known line of Supreme Court Justice Potter Stewart in his concurring opinion in the 1964 Jacobellis v. Ohio case related to the detection of pornography. On that basis, I had understood that when I would have to deal with corruption as an arbitrator, it would be somehow manifest. Except that when corruption crossed my path as a sole arbitrator, I found myself in the troubling situation where allegations of corruption were merely insinuated by a party without however being substantiated nor formally pleaded as a legal defense. As a result, I found myself wondering to what extent I could or should investigate suspicions of corruption where a party had simply insinuated corruption but made little effort to substantiate its allegations. On the one hand, further investigating allegations of corruption based on mere insinuations could be seen as a lack of impartiality and neutrality toward to party accused of corruption. On the other hand, not addressing the suspicions of corruption could make me complicit in the parties' wrongdoing (if any) and/or lead me to render an unenforceable award. Between the two, although I felt caught between a rock and a hard place, I erred on the side of caution and chose the proactive approach of investigating further the allegations of corruption.

Setting the scene

The issue arose in a Paris-seated ICC arbitration relating to a dispute opposing a Korean-based consulting company providing strategic support to global defense contractors (the **Consultant**) and a major European company specializing in optronics, avionic and electronic systems for civil and military applications in the naval, aeronautical and space sectors (the **Company**).

The dispute related to the non-payment of commissions allegedly due to the Consultant after the Company had entered into several supply contracts with a Korean submarine shipbuilder. While the Company acknowledged that the Consultant had been

instrumental in the conclusion of the supply agreements, it nevertheless refused to pay the commissions in full because the Consultant had suddenly disappeared at the implementation stage of said agreements.

The Company had not formally argued that the Consultant's CEO had engaged in corruption in the context of the disputed contracts. Nor did it advance a proper corruption defense to justify the non-payment of the commissions by invoking, for instance, multiple red flags that would prevent it from paying the commissions, as I had encountered in other cases where I acted as counsel. Nevertheless, the Company's

Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19, pp. 225 – 265), in this particular scenario, the tribunal ought to determine whether such allegations have been raised in good faith but suffer from a lack of available evidence or whether they have been raised in bad faith simply to "taint" the other side's case. In turn, the tribunal must decide whether to investigate or simply to rule that the party has failed to make its corruption case.

It is widely admitted that corruption entails public interests beyond those of the parties. Corruption allegations are thus different from standard legal arguments which, unlike corruption, can easily be disregarded by the arbitrator when a party fails to raise or prove them. To the extent arbitrators are administering justice with a large autonomy

insinuation inevitably raised a red flag, to which I could not turn a blind eye.

Addressing corruption sua sponte without making a party's case: a delicate exercise

It is uncontroversial that the arbitral tribunal should examine allegations of corruption when raised by a party. The more difficult question is to what extent the tribunal can and should investigate suspicions of corruption where a party has pleaded, or simply insinuated, corruption, but made little effort to substantiate its allegations. As once explained by Domitille Baizeau and Tessa Hayes ("The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte", in being granted by national courts, international arbitrators, like state courts, have a moral and political interest in taking part in the battle against corruption. Apart from that, there is a more pragmatic reason for deciding to investigate corruption allegations: arbitrators have a duty to render an enforceable award.

In France [the author's jurisdiction], state courts regularly set aside arbitral awards when they consider that there are sufficiently serious, precise, and converging indicia that enforcing the award would contravene international public policy. To make such determination, French courts do not hesitate to perform a de novo review. French courts may completely re-evaluate the evidence or revisit previously decided issues that corruption touches on (although the court will not re-examine the merits of the award itself). When performing such review, French

courts will have little regard for the arbitral tribunal's prior findings, including where no allegation of corruption was submitted by the parties during the arbitration and/or addressed by the arbitral tribunal (eg, Court of Cassation, civ 1, 23 March 2022 *(Belokon*), Court of Cassation, civ 1, 7 September 2022 (*Sorelec*); Paris Court of appeal, 5 April 2022 (*Santullo vs Gabon*) and Paris Court of appeal, 28 May 2019 (*Alstom*)).

Against this backdrop (and although the *Belokon* and *Sorelec* decisions were not yet rendered), I decided to adopt a proactive approach and inquire about the insinuations of corruption made in my case to ensure the enforceability of my arbitral award. I made this decision even though the Company had not formally raised a corruption defense.

There was a certain discomfort in taking the initiative to follow up with requests for evidence and explanations about the corruption insinuations being made. This is because the arbitral tribunal's role is to remain impartial, ensure that due process is respected by not making a party's case and avoid ruling ultra petita, although arguably the arbitral tribunal's basic mandate is to assess the parties' claims under the applicable law, which includes public policy provisions.

In this case, while making sure that the principles of due process were respected, I felt empowered to seek evidence on my own initiative. French law was applicable to the merits and Paris was the seat of the arbitration. The 2021 ICC Arbitration Rules gave me broad powers "to establish the facts... by all appropriate means" (Article 25(1)) and to "summon any party to provide additional evidence" at any time (Article 25(4)). Likewise, French law provides that "the arbitral tribunal shall take all necessary steps concerning evidentiary and procedural matters", "may call upon any person to provide testimony", and "may enjoin" a party to produce any item of evidence in its possession (Article 1467 of the French Code of Civil Procedure).

Seeking additional factual evidence turned out to be the right approach in the present case

Following the Company's insinuations that the Consultant's CEO had been prosecuted and convicted for bribery, the Consultant replied that while his CEO had been convicted for bribery in relation to unrelated contracts by the first instance court, the decision was subsequently reversed by the appellate and the Supreme Court. However, the Consultant failed to substantiate its argument and notably to provide any documentary evidence of the reversal of charges.

I thus requested that the Consultant produce all documentary evidence establishing that its CEO was acquitted, in particular the court decisions (with full translations). In addition, I summoned the Consultant's CEO, who had filed a witness statement but whose appearance was not requested by opposing counsel, to appear at the hearing on the merits where I was able to conduct my own

inquiry as to how he assisted the Company in obtaining the supply agreements and why he should be entitled to the payment (at least in part) of the commissions under the disputed agreement.

Eventually, I was convinced that I had sufficient elements to dispel the accusation of corruption in my case, which might have improperly affected my decision-making process had I not conducted factual investigations on my own motion.

Allegations of corruption are sensitive as they imply criminal wrongdoing by one or both parties and difficult evidentiary questions will almost inevitably arise. Nevertheless, in view of the recent developments related to the control of public policy by national courts (especially French ones), arbitrators should no longer shy away from investigating suspicions of corruption sua sponte and, to the contrary, get clarity as to the existence (or lack) of corruption.

EPISODE 12 –BE YOURSELF

Olivier van der Haegen
Partner, Loyens & Loeff Brussels

When I was asked to give a short testimonial on my experience as (young or younger?) arbitrator, I reflected on the handful of Cepani and ICC cases where I have been lucky to sit. I have experienced several examples of what has been witnessed by colleagues and friends in this nice and refreshing section of the Cepani newsletter. As many others, I sat in a few cases where the respondent was defaulting – which made me experience some of the challenges related to this peculiar situation well-described by Nathan Tulkens (Episode 1) and Marijn de Ruysscher (Episode 9) (I am thus also very much looking forward to Cepani's annual colloquium in relation to this acute topic in a few weeks).

As sole arbitrator, I also had to deal with a respondent defaulting in the beginning of the arbitration, then appearing in the course of the arbitration through a Swiss receiver upon the opening of parallel insolvency proceedings in Switzerland and which eventually refused to take part in the pursuit of the arbitration after I declined the receiver's request to suspend the proceedings based on the governing insolvency laws and rules (see, in this respect, Guillaume Croisant's testimonial in Episode 2).

More recently, I had the privilege to be appointed co-arbitrator in three-member tribunals, which made me experience new challenges, including voicing one's own opinions in (gentle) disagreements amongst arbitrators.

These experiences have all been extremely enriching. Sitting as an arbitrator is and remains the best way to fuel one's skills as counsel, and as lawyer generally. It makes you understand, better than through any

other experience, what works and what does not in terms of advocacy. It has also taught me how to better deal with witness evidence or document production. As I sought to express it during the recent CCC conference in Brussels, on some of these issues, we, arbitration specialists, sometimes tend to follow certain patterns too bluntly, losing sight of the goal of these tools and procedures. When used in a tailor-made and case-specific fashion, they do make the proceedings more efficient and can lead to a better outcome. However, as arbitrator, I also saw how witness hearings or document production may sometimes be a waste of time and money.

An arbitrator can – and, in my view, should – consider with the parties, preferably at the outset of the proceedings, when why and how witness testimony or document production should take place, having the specificities of the case and the target in mind. For example, I once had to discuss the possibility of allowing parties to call the representatives of the other party as witnesses. Some draft procedural orders No. 1 allow for this, but often only upon authorization of the Tribunal and in very broad terms; other remain silent on it. In my case, one of the parties was represented by a US counsel and the latter was very reluctant (to say the least) to accept that the procedural rules would allow for such a possibility. However, in that case, providing a precise procedural framework for the scenario in which one party would have to call a representative of the other party was useful: the case of one party was indeed (partly) based on proving the knowledge that the other party's representative had of certain issues at the time the contract was entered into, knowledge that the other party denied.

Document production can make arbitration proceedings very efficient, but, here again, I have seen the IBA Rules on the Taking of Evidence in International Arbitration being applied too abstractly, without due regard to the specificities of the case and the goal which is, and must be, the proper determination of the factual and legal issues at hand for purposes of resolving the dispute. Document production is a topic on which the legal and cultural background of the parties and their counsel has a strong influence. An arbitrator can have an impact on when, how and for which purpose(s) a document production phase should take place. He or she can decide, for example, that a party does not need to obtain documents for the sole purpose of rebutting the other party's claim, which – in principle (although some exceptions exist) – is not the goal of document production.

A last example concerns bifurcation. I have read in this section of the Cepani's newsletter an interesting piece from Nicolas Vanderstappen (Episode 3). He explained when, in his view, an arbitrator should bifurcate proceedings. My experience tells me that an arbitrator should be extremely cautious when applying theoretical principles, general rules or precedents in respect of this issue. Bifurcation, I submit, should not be the favored procedural route to deal with every (or even many) jurisdictional

or admissibility objection. It is mostly relevant and efficient when an issue truly relates to jurisdiction and (cumulatively) can effectively lead to disposing all or at least a substantial part of the disputed issues. Even then, regard must also be had to the consequences of potential setting aside proceedings against (ensuing) partial awards, a topic on which national arbitration laws vary considerably and which is often overlooked.

On all these points, I find the best arbitrator is the one who is not afraid of adapting models and precedents to the specificities of the case he or she is called upon to decide. Conversely, the fear of disappointing is rarely a good guide in decision-making. As others have put it, the worst arbitrator is "the one who hates to displease the parties" (see Y. Derains, L. Levy, Is Arbitration only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator, ICC, January 2011, p. 8).

My (modest) tip to fellow (young) arbitrators: be yourself (in any event, everyone else is already taken)!

EPISODE 13 –PREPARATION AND ANTICIPATION

Karen Paridaen
Senior Associate, NautaDutilh Brussels

The first thing that popped up in my mind when asked to write this piece might be pushing on an open door, but I found that sitting as an arbitrator influences – for the better – the way you think and act as counsel. It is the difference between knowing something and actually living and experiencing it. For instance, I knew that it is important to present your case in a structured and logical way, making it easy for the court to understand and rule on (often complex) facts, legal issues and arguments. But it was not before having sat as a sole arbitrator, that I fully realized and felt how paramount this really is. As arbitrator, you want to perfectly understand the facts, the validity of the legal arguments and whether there is (sufficient) proof. This, I find, is all the more so when you sit as a sole arbitrator, especially in one of your first cases. The idea of having to take up a leading role in an arbitration and take the ultimate decision can seem quite impressive, especially when the counsels and parties are twice your age, stakes could be important for the parties, emotions can run high and some difficult legal issues have to be addressed. And the last thing you want to do, is make a mistake (particularly if you intend to put one party entirely in the wrong). You want to find all the answers that you need to make your decision, in a well-documented, structured and convincing way in the briefs, the exhibits and during the pleadings. And this made me realize that as counsel, you should not only carefully structure your briefs, but you must think ahead of what an arbitral tribunal (or judge) needs as tools to make its decision: what will the tribunal require to award your claim or defense? Which core factual and legal elements and which proof? The arbitrator experience makes you more conscious that as counsel, it is your job to proactively provide them with these answers and to give them the comfort they need to follow your argument. Interestingly, sitting "on the other side" also makes you realize that it is not always that easy to decide and that there is a real threshold you need to cross, because as an arbitrator you need to be very critical and make sure you are getting it right and are not being misled.

Another point I would like to touch upon from my experience, might be a cliché, but nevertheless truly important: in-depth study of the case before the hearing. As arbitrator, a timely thorough examination of the case helps you to identify the possible routes that you can take in your decision-making, which in turn allows you to test the parties at the hearing in an appropriate way. It helps you to

put a finger on certain blind spots or (legal/factual) issues that you consider relevant for the discussion and want to see better explained. Because, after the hearing, you are on your own and you will have to do with what is on the table. Reopening of the proceedings is always possible, but should remain exceptional.

In this respect, I find it very useful when defending a case as counsel, that the arbitral tribunal flags before the hearing that there are certain factual or legal questions that it explicitly wants you to deal with in your briefs. In one case I was involved (as counsel), this concerned a question on "le criminel tient le civil en état" and the influence of an already pending civil claim relating to the same facts on the arbitration. By indicating that certain issues might be important for the decision-making, the arbitral tribunal helps both itself and the parties and it is also beneficial for the general efficiency of the proceedings (as it might for example prevent that the tribunal finds itself forced to reopen the proceedings). In the same vein, a list of pre-trial questions based on the reading of the briefs, is very productive. This not only allows the parties to (duly) prepare for these specific questions (and avoid surprises at the hearing), but also gives comfort to the arbitral tribunal that the questions and their reply have been given due consideration. It might again also limit the occurrence of reopening the proceedings or (extensive) post-hearing briefs.

And this brings me to a final experience I thought might be interesting (or recognizable) for young arbitrators: the difficulty of coming up yourself with a legal argument or infer a legally relevant fact from the exhibits that is not discussed or invoked by the parties, but might nevertheless be relevant for the case. I find it a sometimes difficult line between the arbitrator's duty to judge the case according to her or his insights and the duty not to violate the rights of defense. Where it is more or less clear that you can for example further substantiate the existing legal reasoning of a party, it is much more difficult to feel whether you can infer your own arguments from existing exhibits and apply your own legal reasoning. In practice, this might present a (young) arbitrator with a bit of a challenge. Again, proper preparation before the hearing reduces this problem because you can submit questions and hear the parties.

To conclude this post, I would like to say that sitting as an arbitrator is a very enriching experience, from both a professional and from a human perspective. My (practical and modest) hint for other young arbitrators would be to prepare well, don't feel intimidated by the fact that you are young and don't hesitate to ring up a colleague (or someone from Cepani) to ask for a bit of advice. Finally, yes, you are spending too much time on your first cases, but that is a fair price to pay to gain this experience.

EPISODE 14 – EXPERTS AND WITNESSES IN THE ARBITRATION PROCEEDING

Adrien FINCK
Managing Associate, Deloitte Legal (Brussels)

1.This post gives me the possibility to address an important topic of arbitral proceedings that we were confronted with in our first case(s) as arbitrators: the expert appointment by the Arbitral Tribunal and the witness and expert nomination by a party.

A clear distinction must be made between the appointment of an expert by the Arbitral Tribunal (in agreement with the parties) and the expert unilaterally appointed by one of the parties to support his or her case.

2. The **first possibility** is governed by Article 1707 of the Judicial Code ("§*1. Le tribunal arbitral peut, sauf convention contraire des parties, a) nommer un ou plusieurs experts chargés de lui faire rapport sur les points précis qu'il détermine; b) enjoindre à une partie de fournir à l'expert tous renseignements appropriés ou de lui soumettre ou de lui rendre accessible, aux fins d'examen, toutes pièces, toutes marchandises ou autres biens pertinents. § 2. Si une partie en fait la demande ou si le tribunal arbitral le juge nécessaire, l'expert participe à une audience à laquelle les parties peuvent l'interroger. § 3. Le paragraphe 2 s'applique aux conseils techniques désignés par les parties. § 4. Un expert peut être récusé pour les motifs énoncés à l'article 1686 et selon la procédure prévue à l'article 1687")* and the rules of the arbitration institutions such as the CEPANI (*Article 24.2 of the CEPANI Rules of 1 January 2023: "The Arbitral Tribunal shall proceed within as short a time as possible to examine the case by all appropriate means. Unless it has been agreed otherwise by the parties, the Arbitral Tribunal shall be free to decide on the rules as to the taking of evidence. It may, inter alia, obtain evidence from witnesses and appoint one or more experts of which it will establish the mission"*) and the ICC (*Article 25.3 of the 2021 Arbitration Rules: "The arbitral tribunal, after consulting the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert"*).

It is therefore not disputed that the Arbitral Tribunal may appoint an expert to enlighten it on certain points of the dispute, either of its own motion or at the request of a party. Nevertheless, this opportunity must be carefully analyzed as Professor Caprasse indicated (O. Caprasse, "Arbitrage et expertise" in *L'expertise judiciaire*, La Charte, 2003, p. 197) and must be indispensable to the outcome of the dispute (*Ibid. p. 185*).

It is up to the Arbitral Tribunal to determine the mission of the expert (Article 24.2, paragraph 1 of the CEPANI Rules, Article 25.3 of the ICC 2021 Arbitration Rules, the latter specifying that the appointment must be made after consultation with the parties). In practice and to ensure maximum compliance

with the principle of adversarial proceedings, the parties must always be involved throughout the expertise process, from the appointment of the expert to the submission of his or her final report.

The Arbitral Tribunal is also entrusted with monitoring the progress of the expertise to prevent it from becoming bogged down. Similarly to state courts, the Tribunal is not bound by the expert report as it is the case for judicial courts. The Arbitral Tribunal is not obliged to follow the expert's opinion if their conviction conflicts with it (Article 962 of the Belgian Judicial Code). The Arbitral Tribunal could therefore reject the report provided that it explained very clearly the reasons in its award, failing which it would risk being eventually set aside.

3. The **second possibility** is for the parties to appoint their own expert and/or witness as provided for in Article 24.2 of the CEPANI Rules, which also refers to witness testimony, as does Article 25.2 of the ICC 2021 Arbitration Rules: "*The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned*".

The procedural aspects of the organization of the hearing of witnesses and/or experts appointed by the parties is not governed by the rules of the two aforementioned arbitral institutions. It is therefore up to the Arbitral Tribunal to determine these rules, in accordance with the principle of adversarial proceedings. In practice, these rules are reflected in the terms of reference, drawn up by the Arbitral Tribunal and the parties. To do this, the Tribunal may resort to the "IBA Rules on the Taking of Evidence in International Arbitration", which are a compromise between common law and civil law practices.

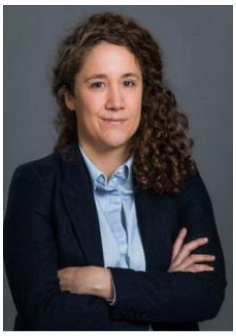
As a rule, the parties have the free choice of their witnesses and/or experts. It is not necessary for the witness to be independent of the appointing party - one of its director may perfectly testify. In order to comply with the principle of adversarial proceedings, however, a written statement by the witness (or the report of the expert appointed by the party) must be included in the documents of the proceedings. Legal scholars also admit that counsel to a party may provide limited assistance to the witness (L. Jaeger, La preuve par témoins à l'épreuve du contradictoire, in *Le principe du contradictoire en arbitrage*, Larcier, 2016, p. 114).

Hearing attendance by the witness is the key element in this process. The hearing of the witness and/or expert appointed by a party will consist primarily of cross-examination by counsels of the opposing party. Each Arbitral Tribunal may lay down its own rules in this regard, in consultation with the parties in accordance with the principle of adversarial proceedings. In practice, these will be set out in the terms of reference and/or in a procedural order.

4. This possibility of cross-examination is a major difference from the traditional judicial procedure. It allows counsel to point out the weaknesses of the positions of the opposing party while playing a certain dose of psychology. As an arbitrator, testimonies shed light on certain parts of the dispute that could be difficult to discern from the parties' written submissions.

To conclude on this second possibility, if a party decides to appoint his or her own expert in the arbitration proceeding, the choice of the expert is key. In addition to his/her perfect knowledge of the expertise subject, his or her reputation is also very important. It is also necessary to avoid appointing an expert who has previously acted in the disputed transaction on behalf of the appointing party, otherwise a certain credibility could be lost.

EPISODE 15 – DUTY TO GIVE EACH PARTY AN OPPORTUNITY TO PRESENT ITS CASE, WHERE IS THE LIMIT?



Iris Raynaud
Senior Associate, Hanotiau & van den Berg (Brussels)

It is often said that conducting an arbitration with a non-responding party is not always an easy task (see already on that topic, Episode 1 – What if a party does not participate in the arbitral proceedings). Surely, the task does not get easier if the non-responding party acts inconsistently. For instance, if it decides to participate in the arbitration at a late stage. Whilst this is unlikely to happen often, my advice is, never say never.

Up until the closing of the proceedings, one may argue that late cooperation is better than no cooperation. Considering the adversarial nature of arbitration, a tribunal will likely want to hear a party even if it engages late with the arbitration. However, a belated participation can be very disruptive. If the non-responding party appears after the exchange of written submissions, or after the hearing, for instance, the tribunal may find itself compelled to extend the procedural calendar, and possibly organise a new hearing if circumstances so require. The tribunal may find ways to limit the disruption, but the opposing party may still complain about it. In this less-than-ideal scenario, any resulting delays and additional costs should be accounted for when allocating costs.

But what if the non-responding party appears after the proceedings are closed but before the award is issued? Imagine the following scenario. Since the start of the arbitration, respondent has not been participating. The tribunal has done all that was required in these circumstances. It has made sure (and has evidence) that respondent is aware of the ongoing proceedings. It has kept respondent informed of all the steps in the proceedings. It has granted respondent sufficient time to present its defence. In all its correspondence to the parties, it has drawn respondent's attention to Article 1706 of the Belgian Judicial Code and Article 24.5 of the CEPANI Rules (if it is a CEPANI arbitration seated in Belgium), it has systematically invited respondent to participate in the proceedings and reminded respondent that an adverse award could be issued against it. Despite all that, respondent has not participated and has not attended the hearing. At some point, the tribunal decides to close the proceedings and sends its draft award to the arbitral institution. A couple of days later, whilst the draft award is under review, the tribunal receives a letter from respondent asking for the proceedings to be reopened on the ground, yet to be justified, that it was previously unable to participate.

Hmm … tricky.

If the arbitration is under the CEPANI Rules, Article 25.2 of these Rules provides that the decision to reopen the proceedings "at any time prior to the rendering of the Award" falls under the tribunal's entire discretion.

So what should the tribunal decide?

Admittedly, if the arbitration is seated in Belgium, the starting point should be Article 1699 of the Belgian Judicial Code establishing the standards of due process in arbitration. As fundamental as it sounds, the tribunal must grant each party an opportunity to present its case. The requirement, though, is that a party must only be given a reasonable opportunity. In other words, the rights of defence are not unlimited and must be balanced with other considerations, such as the need for efficiency of the proceedings (See C. Verbruggen, "Commentary on Article 1699" at [26], "Commentary on Article 1717" at [41], in Arbitration in Belgium, A Practitioner's Guide, N. Bassiri & M. Dray (eds), pp. 273 and 469). It is therefore accepted that the tribunal sets certain limits,for instance, by closing the proceedings once the parties' presentations and the deliberations are completed. Article 25.1 of the CEPANI Rules in fact requires the tribunal to close the proceedings "[a]s soon as possible after the last hearing or the filing of the last admissible documents". The purpose of closing the proceedings is, precisely, to avoid delays to the arbitral process by late requests and/or submission.

Hence, the first question for the tribunal is whether a reasonable opportunity was granted to respondent before the proceedings were closed. Whether that standard is met will depend on the circumstances of the case. The criteria to be considered are as follows. Is there evidence that respondent was aware of the ongoing proceedings? Is there evidence that respondent was kept informed of all its steps? Was respondent given appropriate time to prepare its case and file its memorials? Was respondent informed of the date of the oral hearing? Was respondent informed of the contents of that hearing? In fact, all these questions should have been answered by the tribunal before deciding to close the proceedings in the first place.

If the standard is met (as it should), then reopening the proceedings should only be ordered in exceptional circumstances. The applicable threshold should be a high one and could be inspired by the wording of Article 1717, § 3, a), ii) of the Belgian Judicial Code. If respondent proves it was under the "impossibility" to present its defence, then yes, reopening the proceedings should be warranted. Whether respondent was under such impossibility will, once again, depend on the circumstances of the case. Evidence of respondent's incapacity will be determinative here.

Additional considerations to be pondered when deciding on the issue may include the following questions. Are the proceedings likely to be substantially delayed if the request is granted? Is respondent showing some willingness (or not) to present its defence in an expeditious manner? Is respondent willing to pay its part of the advance on costs? In short, any question that may help assess whether the request is a genuine attempt to protect one's right to be heard, or, instead, a manoeuvre to delay the proceedings.

No matter what the final decision is, when deciding on this delicate issue, the tribunal will have one goal in mind: to convince any reviewing court that respondent's right to present its case has been guaranteed.

EPISODE 16 – THE UNUSUAL TASK TO DECIDE AS AMIABLE COMPOSITEUR

Charlotte VAN TEMSCHE
Senior Associate, Nautadutilh (Brussels)

Parties may decide to entrust the arbitral tribunal with the task of ruling on their dispute as amiable compositeur. This means that the arbitral tribunal may act without being bound to strictly apply legal rules and is free to decide on the dispute by reference to considerations of fairness and justice. If, at first glance, this power to decide as *amiable compositeur* may seem appealing because it would give the arbitral tribunal greater freedom; the other side of the coin is that it might put the (young) arbitrator into some kind of legal no-man's land.

In these exceptional cases, I would **first** recommend that the arbitral tribunal determines, in consultation with the parties, the nature and exact scope of the *amiable composition*, as this notion is indeed open to several different interpretations. For instance, amiable composition may mean that the arbitral tribunal:

• should completely ignore any legal rules and decide the case based strictly on principles of fairness and justice; or

• should apply the relevant legal rules to the dispute but may moderate the effect of such rules in case where their strict application to the case at hand may lead to unfair solutions; or even

• should decide according to general principles of law.

It is thus highly advisable to determine the nature and exact scope of the *amiable composition* at the outset of the arbitration proceedings (e.g. in the Terms of Reference or Procedural Order No. 1) in order to ensure legal certainty and greater predictability of the outcome of the proceedings; nothing prevents parties to decide this at a later stage of the proceedings (e.g. in the arbitral award).

Under Belgian law, it is generally admitted that the approach to be taken by the arbitral tribunal sitting as *amiable compositeur* must be to strictly apply relevant legal rules to the situation at hand and to depart from this strict

application only to the extent that the result of this exercise would not appear to be fair or equitable. As Professor G. de Leval puts it, the arbitrator deciding as amiable compositeur does not rule "against" the law, but *"if necessary without the assistance of the law when its application would lead to too harsh consequences*" (G. de Leval, « La désignation et la mission des arbitres. Notes succinctes sur le droit positif applicable en Belgique », *Rev. dr. int. et comp*., 1976, p. 180, informal translation). In other words, the amiable composition appears either as a corrective, or as a complement to the rules of law. It could therefore make it possible to set aside the strict application of the law insofar as it would be too severe for a party in light of the concrete circumstances of the case.

Other scholars have also clarified that when provided in the arbitration agreement, the arbitral tribunal is not as such required to use its power to decide on the case as *amiable compositeur*. It is indeed a mere faculty which arbitrators may use (or not use) at their own discretion; it may well be, for instance, that making a decision based on the strict application of legal rules would actually result in a fair and balanced solution overall. On the other hand, arbitrators may decide to deviate from the letter of the law and base their reasoning on equity considerations to avoid unfair results.

Second, after having clarified the concept and exact scope of the *amiable composition,* it is important for the arbitral tribunal to bear in mind and inform the parties that the power to decide as *amiable compositeur* is not unlimited:

• first, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. Pursuant to Article 1710(4) of the Belgian Judicial Code, "*irrespective of whether it decides on the basis of the rules of law or as amiable compositeur, the arbitral tribunal shall decide in accordance with the terms of the contract if the dispute is contractual in nature and shall take into account the usages of the trade if the dispute is between commercial parties*" (emphasis added, informal translation);

• second, the arbitral tribunal must adhere to the terms of the parties' arbitration agreement. The arbitral tribunal must only rule on the points determined by the arbitration agreement at the risk of ruling *ultra petita* and having the award set aside;

• third, the arbitral tribunal may not disregard the applicable arbitration rules. Pursuant to Article 23(5) of the CEPANI Rules, the "*Arbitral Tribunal shall have the power to decide on an ex aequo basis ("amiable composition") only if the parties have authorized it to do so. In such event, the Arbitral Tribunal shall nevertheless abide by the Rules*" (emphasis added, informal translation).

• fourth, the arbitral tribunal cannot render a decision that is contrary to public policy;

• fifth, the arbitral tribunal must respect due process and the rights of the defense pursuant to Article 1699 of the Belgian Judicial Code; and

• sixth, the arbitral tribunal must reason its award. In particular, the arbitral tribunal must confront the solutions of the dispute which are deduced from the sole strict application of legal rules with equity considerations and give reasons in the award.

In conclusion, the arbitrator who has been granted the power of deciding as *amiable compositeur* has the freedom to rule in equity in order to reach a fair and equitable solution in cases where the strict application of legal rules would lead to unjust outcomes. To that extent,

the arbitrator ruling as *amiable compositeur* has greater freedom than the arbitrator who is required to decide the dispute strictly in accordance with the rules of law. This freedom should, however, not be overestimated and must be exercised within the bounds set out above. This framework will hopefully give more comfort to the (young) arbitrator sitting as *amiable compositeur*, who will not be required to systematically and unreservedly disregard the rules of law.

WERKGROEPEN

GREENER ARBITRATION

VOORZITTERS:

Flip PETTILLION

Adrien FINK

Astrid MOREAU

LEDEN:

Lauren RASKING

Iuliana IANCU

Sophie GOLDMAN

The Committee members met monthly as of January 2023. The goal of the Committee is to make CEPANI lead the way in Belgium in the field of greener arbitration, and dispute resolution proceedings in general.

There are different ways to do achieve that goal.

1. The Committee has proposed the signing by CEPANI of the International Green Pledge. It was informed that the Board has approved this proposal.

2. The Committee further proposes the adoption by the Board of the CEPANI Greener Arbitration Pledge. The text is meant to be used by individual counsel, their firms, and arbitrators. The purpose is for these people to approve the pledge and publish it on their website or in their firm brochures.

The Committee also proposes that the Board approves the promotion by CEPANI of the adoption of this pledge.

3. The Committee proposes the adoption by the Board of the language that can be incorporated in a Procedural Order (PO) 1 or in Terms of Reference (ToR).

The Committee also proposes that the Board approves the promotion by CEPANI of the use of these texts in arbitration proceedings.

4. The secretariat has handed over a list of channels through which the Committee can promote the signing of the International Green Pledge and other achievements of the working group.

The Committee will proceed with the preparation of such promotions as of its next meeting in May 2023.

The Committee also considers the proposal to organize a survey (as the workgroup "Diversity & Inclusion" has done) to collect ideas and expectations from CEPANI members and users of CEPANI services with regard to greener arbitration.

DIVERSITY

VOORZITTERS

Sophie GOLDMAN

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Nathalie COLIN

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MAUD PIERS

Marie CANIVET

Emma VAN CAMPENHOUDT

Dirk VAN GERVEN

A la suite des travaux préparatoires effectués par le Groupe de travail sur la Diversité et l'Inclusion, mis en place par le Président du CEPANI il y a un peu plus d'un an, plusieurs dispositions ont été prises afin d'assurer une plus grande diversité tant au sein des organes du CEPANI qu'en ce qui concerne la désignation des arbitres.

Parmi les recommandations du Groupe de travail adoptées par le conseil d'administration on notera tout d'abord l'adoption des « D&I Policy and Commitment » publié sur le site du CEPANI et la création d'un Comité permanent D&I, ayant vocation à mettre en œuvre d'autres initiatives

concrètes visant à favoriser la diversité et l'inclusion au sein du CEPANI. Ce Comité est composé de Werner Eyskens, Sophie Goldman, Niuscha Bassiri et Guillaume Croisant.

On relèvera ensuite, et surtout, la modification de l'article 15.1 du Règlement, qui précise à présent la nécessité de prendre en compte des considérations de diversité et d'inclusion dans le cadre de la nomination des arbitres.

L'article 15.1 du Règlement est libellé comme suit, dans sa nouvelle version :

> « *Article 15. – Nomination et confirmation des arbitres*
>
> *1. Le Comité de Nomination ou le Président nomme ou confirme le Tribunal Arbitral conformément aux règles suivantes. Il tient notamment compte de la disponibilité, des qualifications et de l'aptitude du ou des arbitres à mener l'arbitrage conformément au Règlement, et de considérations relatives à la diversité et à l'inclusion* ».

Overwegingen van diversiteit en inclusie ter gelegenheid van de aanstelling van arbiters worden hiermee niet enkel geformaliseerd, maar worden hiermee ook gelijk geschakeld met de overwegingen van beschikbaarheid, kwalificaties en bekwaamheid voor de kandidaat arbiters waarbij geen van deze criteria overigens exhaustief zijn (de tekst vermeldt dat er "meer bepaald" rekening mee wordt gehouden).

De nieuwe regel draagt er derhalve zorg voor om niet één overweging voorrang te geven over een andere, en de formulering geeft aan datelke overweging gewogen dient te worden en dat elke aantstelling kadert binnen de specifieke context van het individueel dossier.

La nouvelle formulation à l'article 15.1 vient conforter l'engagement pris par le CEPANI en 2016 par la signature du «Pledge for Equal Representation in Arbitration ».

Désormais toutefois, l'engagement du CEPANI en matière de diversité et d'inclusion, consacrée par le nouvel article 15.1 du Règlement en ce qui concerne les nominations, dépasse le Pledge et la

seule question du genre. Il y est, en effet, fait référence aux considérations de diversité de manière large, englobant mais ne se limitant pas à celle de genre.

Dans le même esprit, le CEPANI a tenu à préciser, dans ses « Diversity & Inclusion Policy and Commitment » récemment adoptés et publiés sur son site internet, que l'institution s'engage à faire de son mieux pour « aider à créer plus d'opportunités pour tous, indépendamment du sexe, de la religion, de l'orientation sexuelle, de l'origine, de la couleur, de la nationalité, du handicap ou du statut socio-économique, dans le domaine de l'arbitrage ».

La consécration formelle de la prise en compte des considérations de diversité et d'inclusion dans le Règlement du CEPANI est sans nul doute une étape importante vers l'amélioration de la diversité dans les panels d'arbitrages administrés sous son égide. Cependant, la diversité des arbitres nommés ne dépend pas seulement des institutions, mais aussi des parties. C'est pourquoi le CEPANI insiste également, dans sa policy, sur le fait qu'il attend également « de ses membres qu'ils apportent leurs différentes perspectives, idées et expériences, dans le cadre de tout travail ou toute activité, dans un but unique et commun : aider à créer plus d'opportunités pour chacun, s'assurer de l'implication de tous, avec une emphase sur ceux qui ont été sous-représentés historiquement et construire un futur plus inclusif et divers dans le monde de l'arbitrage ».

Met deze initiatieven neemt CEPANI een voortrekkersrol, zeker in een continentaal Europese context, door diversiteit en inclusie te formaliseren op allerlei vlakken en binnen verschillende dimensies. CEPANI erkent hiermee tevens dat, in lijn met de maatschappelijke evoluties, dit geen verstarde benadering mag zijn, en zij vertrouwde om die reden aan de nieuw opgerichte D&I Commissie de taak toe om bestaande initiatieven uit te werken en concreet vorm te geven, maar ook om verdere initiatieven te ontwikkelen. Deze dynamische waakzaamheid om de diversiteit en inclusie binnen CEPANI te blijven aanpassen en verbeteren zal ongetwijfeld bijdragen aan de verdere uitstraling van het instituut en zal helpen de volgende generaties te verzamelen die het instituut in de toekomst verder zullen uitbouwen.

Ces initiatives ont d'ailleurs valu au CEPANI une nomination pour le Global Arbitration Review ERA Pledge Award 2023. Le CEPANI était représenté à la cérémonie des GAR AWARDS Gala par Emma

Van Campenhoudt, Benoit Kohl, Sophie Goldman, Werner Eyskens, Niuscha Bassiri and Guillaume Croisant.

ARBITRATION AND CONSTRUCTION

VOORZITTERS:

Marco SCHOUPS

LEDEN:

Helga VAN PEER

Françoise LEFEVRE

Nicolas RESIMONT

Vera VAN HOUTTE

Vanessa FONCKE

Elke VAN OVERWAELE

Koen VAN DEN BROECK

Benoît KOHL

Op initiatief van de Voorzitter werd een werkgroep samengesteld Arbitrage & Construction.

Leden van de werkgroep zijn Helga Van Peer, Cepani-voorzitter Benoît Kohl, Vera Van Houtte, Françoise Lefèvre, Nicolas Resimont, Koen Van den Broeck, Vanessa Foncke, Elke van Overwaele met als voorzitter Marco Schoups.

De werkgroep heeft als taak te onderzoeken wat de relatie is tussen de bouwsector en arbitrage, waarom er weinig arbitrage is in de bouw en hoe dit kan gepromoot worden.

De werkgroep heeft vergaderd op 22 november 2022, 24 januari 2023 en 18 april 2023. Een vierde en wellicht laatste vergadering is gepland op 5 juli 2023.

De leden van de werkgroep hebben diverse instellingen, bouwondernemingen en bouwactoren bevraagd. Er is gekeken naar de Nederlandse Raad van Arbitrage in de bouwsector en er is nagedacht over verschillende pistes om de arbitrage meer te promoten in de Belgische bouwsector. De werkgroep zal voorstellen en suggesties uitwerken.

De ontwerpteksten worden besproken worden op 5 juli 2023, waarna de werkgroep tegen eind augustus / medio september een verslag met een voorstel tot actieplan voor de raad van bestuur zal opstellen en indienen.

SPORT AND ARBITRATION

Le CEPANI s'est récemment ouvert au monde du sport. En effet, le CEPANI a créé en son sein une section spécifique dédiée aux litiges en matière sportive, le Centre Belge d'Arbitrage dans le secteur sportif (Centre for Sports Arbitration, « C-SAR »).

Le C-SAR administre donc les procédures d'arbitrage dans le domaine du sport conformément au Règlement d'Arbitrage du C-SAR et ses annexes (« Règlement »). Les utilisateurs du Règlement d'arbitrage du CEPANI ne devraient pas être top désorientés, le Règlement s'en étant fortement inspiré[1].

[1] Le Règlement d'Arbitrage du C-SAR peut se consulter sur le site internet du C-SAR à l'adresse suivante : www.c-sar.be sous l'onglet *Règlement*

Ainsi, chaque fédération sportive a désormais la possibilité de prévoir une clause d'arbitrage C-SAR dans son règlement.

Les procédures d'arbitrage administrées par le C-SAR seront régies, outre par le Règlement, par les règles de procédure particulières à cette fédération sportive[2] qui figurent à l'Annexe IV du Règlement, lesquelles primeront alors sur les dispositions contenues de ce dernier.

Le C-SAR a bien démarré ses activités. En effet, l'Union Royale Belge de Football Association (« l'URBSFA ») a, en 2022, inséré la clause d'arbitrage C-SAR dans son règlement. Le C-SAR est dès lors désormais compétent pour administrer certains arbitrages concernant des différends opposant l'URBSFA aux clubs professionnels de football belge (division 1, division 2 et division 3 de football) à savoir, plus précisément, les différends entre l'URBSFA et les clubs professionnels de football en matière d'octroi de licences, autrefois de la compétence de la Cour belge d'arbitrage pour le sport. Deux arbitrages ont ainsi été soumis au C-SAR dans le cadre des licences portant sur la saison 2022-2023.

[2] Sous réserve d'acceptation préalable par le C-SAR.

L'Annexe IV.A du Règlement contient les règles spécifiques, dérogeant au Règlement général qui s'appliquent dans le cadre de ces recours. On peut, notamment, relever des spécificités au niveau du délai pour introduire la procédure d'arbitrage et pour rendre la sentence, de la désignation et la composition du tribunal arbitral, du traitement de données confidentielles, du caractère public de la sentence et du barème pour les frais d'arbitrage.

Bien que, par le passé, le CEPANI pouvait déjà administrer (et a administré) des différends en matière sportive, il s'est récemment doté d'un règlement spécifique en la matière auquel toutes les fédérations sportives peuvent désormais se référer. Ce règlement tient compte, en effet, des spécificités des arbitrages en matière sportive (en particulier les délais) et de certaines contraintes particulières de procédure.

L'URBSFA a été la première fédération sportive à recourir au C-SAR pour les différends en matière de licence. Le C-SAR formule le vœu que l'expérience acquise au travers des premières procédures arbitrales administrées en application de son règlement, et la qualité des sentences rendues par les arbitres désignés par ce dernier, puisse convaincre d'autres fédérations de choisir également le C-SAR comme institution de référence pour le règlement des différends relevant de leur pratique sportive.

Pour plus d'informations à ce sujet, nous vous invitons à consulter l'article : « *L'arbitrage des litiges en matière sportive : le nouveau règlement du C-SAR (Center for Sport Arbitration)- Arbitrage bij sportgeschillen: nieuw Reglement van het C-SAR (Center for Sports Arbitration)* », B. Kohl, E. Van Campenhoudt, B-Arbitra, 2022/2, p. 433-446.

HERZIENNING DEEL VI GERECHTERLIJKE WETBOEK

CEPANI treedt niet alleen op als instituut voor de administratie van geschillen in arbitrage, mediatie en andere vormen van ADR. Het Centrum vormt ook reeds vele decennia een platform voor de studie en promotie van arbitrage. Zo speelde CEPANI een vooraanstaande rol bij de invoering van een nieuw Deel VI in het gerechtelijk wetboek in 2013, en het invoegen van enkele wijzigingen bij de Potpourri-IV wet uit 2016.

Met tien jaar ervaring en rechtspraak over de "nieuwe" arbitragewet onder de arm, heeft een Werkgroep voor de Herziening van Deel VI zich op verzoek van het ministerie van justitie gebogen over de vraag op welke punten de wet verbeterd zou kunnen worden.

Het resultaat is een ontwerp van wet, dat recent aan de minister van justitie werd voorgesteld en thans verder in behandeling is.

Dit ontwerp voorziet een aantal beperkte wijzigingen met het oog op de verduidelijking, en waar nodig verbetering, van de Belgische arbitragewet. Deze kunnen grosso modo worden opgedeeld in drie categorieën:

Een aantal wijzigingen zijn overwegend van didactische aard en vormen een codificatie van de huidige arbitragepraktijk. Deze beogen meer duidelijkheid en transparantie, ook voor buitenlandse partijen die een zetel van arbitrage in België overwegen. Zo wordt bijvoorbeeld voorgesteld om de termijn van één maand voor derdenverzet tegen een exequaturbeschikking opnieuw uitdrukkelijk in te schrijven in de wet. Daarnaast werd de terminologie op bepaalde punten aangepast, om deze in lijn te brengen met andere wetgeving en recente wetswijzigingen (zoals bijvoorbeeld Boek 8 van het BW).

Een tweede reeks wijzigingen beoogt om te verzekeren dat de Belgische arbitragewet, ondanks de steeds veranderende omgeving, tot de meest moderne en vooruitstrevende arbitragewetgevingen blijft behoren. Zo wordt voorgesteld om toe te laten dat een arbitrale uitspraak elektronisch geveld zou worden, op voorwaarde dat de uitspraak zou worden voorzien van een gekwalificeerde handtekening. Bovendien werd voorgesteld om onder dezelfde voorwaarde ook de uitvoering van een elektronisch gevelde arbitrale uitspraak, geveld in België of in het buitenland, in België toe te laten. Nadat België in 2013 reeds koos voor de meest soepele vormvereisten voor arbitrageclausules, beoogt dit voorstel om ook voor arbitrale uitspraken de wetgeving aan te passen aan de voortschrijdende digitalisering, zonder daarbij uiteraard de nodige garanties voor authenticiteit van de arbitrale uitspraak over het hoofd te zien. Gelet op de succesvolle ervaring met online zittingen tijdens de Covid 19-pandemie, werd ook uitdrukkelijk ingevoegd dat een scheidsgerecht, na partijen te hebben gehoord, kan beslissen dat een hoorzitting

rechtsgeldig gehouden kan worden in persoon, op afstand, of in een hybride vorm.

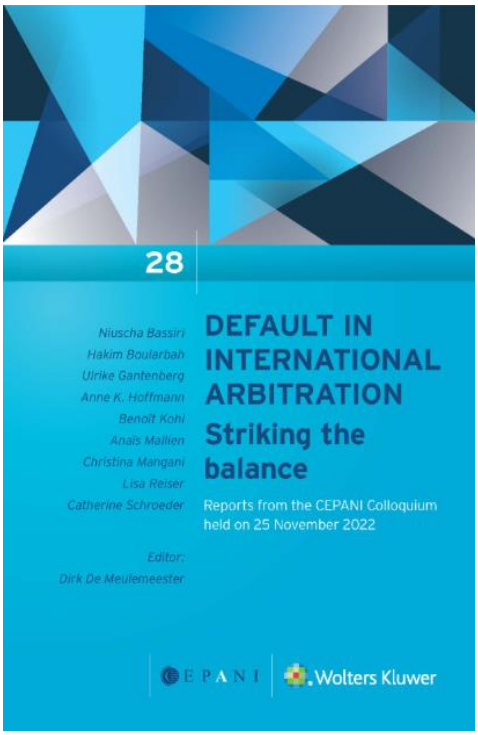
Een laatste reeks wijzigingen betreft verduidelijkingen of toevoegingen die zich opdringen in het licht van belangrijke rechtspraak inzake arbitrage. Het meest in het oog springend is daarbij het voorstel om, in het licht van een arrest van het Grondwettelijk Hof ter zake, opnieuw te voorzien in een afzonderlijke termijn voor het instellen van een vordering tot vernietiging wegens fraude. De vervaltermijn voor het instellen van een vordering tot vernietiging zou voortaan, net zoals onder de oude arbitragewet het geval was, drie maanden bedragen vanaf het moment waarop een partij kennis krijgt van zulke fraude.

Net zoals in 2016 was het Leitmotiv voor de voorgestelde aanpassingen dan ook evolutie en geen revolutie. Maar wel transparantie, verduidelijking, rechtszekerheid en efficiëntie, om de wet up-to-date te houden op basis van de ervaringen uit de praktijk

De Werkgroep werd voorgezeten door Benoît Kohl. De Werkgroep bestond verder uit (in alfabetische volgorde) Benoît Allemeersch, Maxime Berlingin Olivier Caprasse, Dirk De Meulemeester, Maarten Draye, Françoise Lefèvre, Cecile Seyir en Herman Verbist.

PUBLICATIONS

OUVRAGES SCIENTIFIQUES



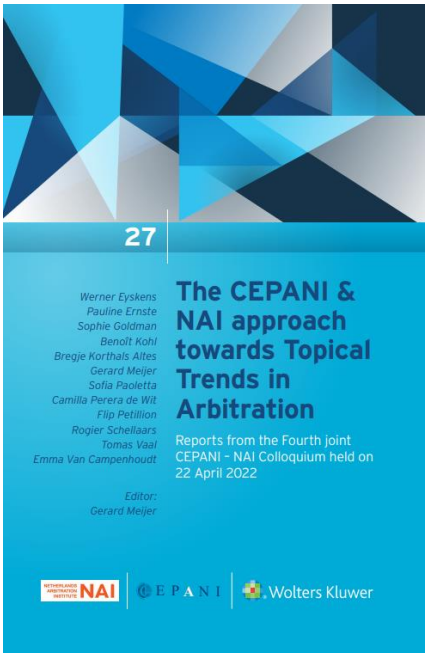
The book Default in International Arbitration - Striking the balance contains contributions that form the basis of the presentations held at the CEPANI Colloquium which took place in Brussels on 25 November 2022. The various contributions focus on all aspects of default in international arbitration.

When one of the parties, especially the respondent (or one of them), is not participating in the entire proceedings (or part thereof), navigating between the sharp cliffs of due process and equality of arms can be difficult for an Arbitral Tribunal. This is even more so when international public policy is at stake.

There are no one-size-fits-all answers, especially when default is merely part of a 'strategy' or tactic' in anticipation of annulment proceedings or at the enforcement stage. Sure, Arbitral Tribunals have ex officio powers to investigate. In some circumstances there is even a duty to investigate. But, do arbitrators have the duty to uphold the integrity of arbitration? What is the real scope of 'ficta confessio' in international arbitration? How blind or naive should we allow an Arbitral Tribunal to be? To what extent is an Arbitral Tribunal allowed to be street-smart, i.e. not to become the devil's advocate?

These and many more pressing questions will be dealt with in this book on default in arbitration by its authors Niuscha Bassiri (Partner at Hanotiau & van den Berg, Brussels). Hakim Boularbah (Partner at Loyens & Loeff, Brussels), Ulrike Gantenberg (Partner at Gantenberg Dispute Experts, Düsseldorf), Anne K. Hoffmann (Partner at Hoffmann Arbitration, Dubai), Anaïs Mallien (Associate at Loyens & Loeff, Brussels).

Christina Mangani (Supervising Associate at Simmons & Simmons, Paris), Lisa Reiser (Senior Associate at Baker McKenzie. Frankfurt), Catherine Schroeder (Partner at Schroeder Arbitration, Paris), Dirk De Meulemeester (Partner at De Meulemeester & De Brabandere, Brussels) and Benoit Kohl (President of CEPANI).



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.

B-ARBITRA

b-Arbitra, the Belgian journal for arbitration, celebrates its tenth anniversary. Launched in 2013, b-Arbitra 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, 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 Alexander Handsebout who will be joining the board in 2023.

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

This yearly report provides a statistical overview of CEPANI arbitration in 2022 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.

CEPANI's pioneering role in the field of diversity and inclusion, driven by the eponymous working group, has led to a further increase in the appointments of female Arbitrators in 2022, i.e. 40% in 2022 compared to 35% in 2021, 15% in 2020 and 10% in 2019.

This was the case for appointments by both the CEPANI Appointments Committee - where it appears that 63% (!) of the Arbitrators proposed by the Appointments Committee were women - and the Parties themselves. Indeed, no less than 2 out of the 9 appointed three-member Arbitral Tribunals consisted exclusively of female Arbitrators.

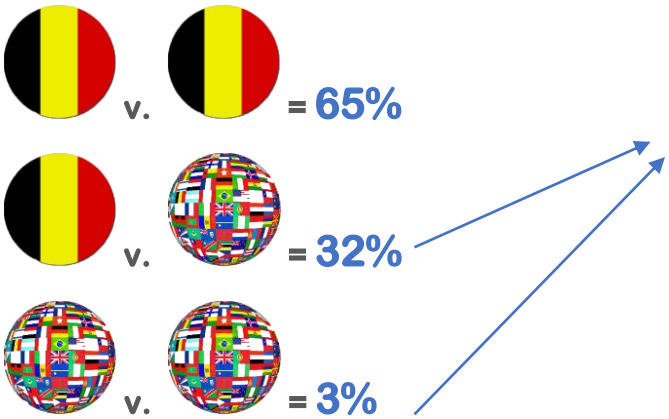
Also striking is the amount in dispute which shows that more than 40% of the cases were expedited procedures with an amount in dispute below € 100.000,00, while on the other hand no less than 14% of the CEPANI cases involved arbitration procedures above 10 million euros.

The correlation of files with a larger amount in dispute is reflected in the duration of CEPANI arbitration procedures in 2022, which on average lasted 3,5 months longer than in 2021.

Finally, CEPANI continues its commitment to ensure that each case is handled with the requested efficiency, rapidity, and efficacy, and in accordance with the specific needs of the Parties.

PARTIES

In 2022, 65% of the cases were introduced between Belgian Parties, 32% involved at least one Belgian and one international Party, and 3% of the cases involved solely international Parties.



France	5
Germany	1
Luxembourg	3
The Netherlands	4
Sweden	1
USA	1

Compared to 2021, procedures involving only international Parties have decreased by 7%, procedures involving at least one Belgian and one international Party have increased by 5%, while on the other hand procedures involving exclusively Belgian Parties have slightly increased by 3%.

LANGUAGE

DUTCH	FRENCH	ENGLISH
16%	57%	27%

In 2022, both the Dutch and English cases decreased by respectively 8% and 4%, while the French cases increased by 12% in comparison to 2021.

Indeed, 57% of the cases were introduced in French, 16% in Dutch and 27% in English.

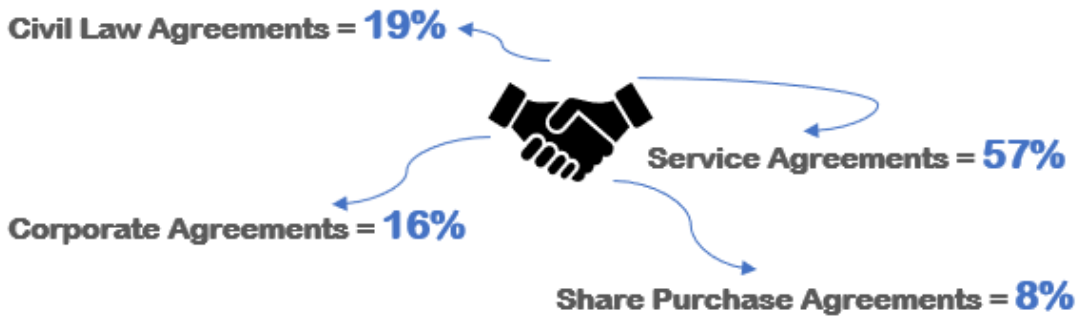
PLACE OF ARBITRATION

Brussels as place of arbitration is a steady trend.

In 2022, 84% of the cases have chosen Brussels as seat of their arbitration and only 16% of the cases had their seat in another city, which were all located in Belgium.

In comparison to 2021, 90% of the cases had Brussels as seat of arbitration, while 10% of the cases had their seat in another city.

NATURE OF THE DISPUTE



In 2022, 19% of the cases concerned general issues of civil law;
57% related to a service agreement;
8% related to a share purchase agreement; and
16% related to a corporate dispute.

In comparison to 2021, corporate disputes and share purchase agreement related disputes have both decreased with respectively 5% and 21% (!), while civil law agreement related disputes have increased with 14% and service agreement related disputes with 12%.

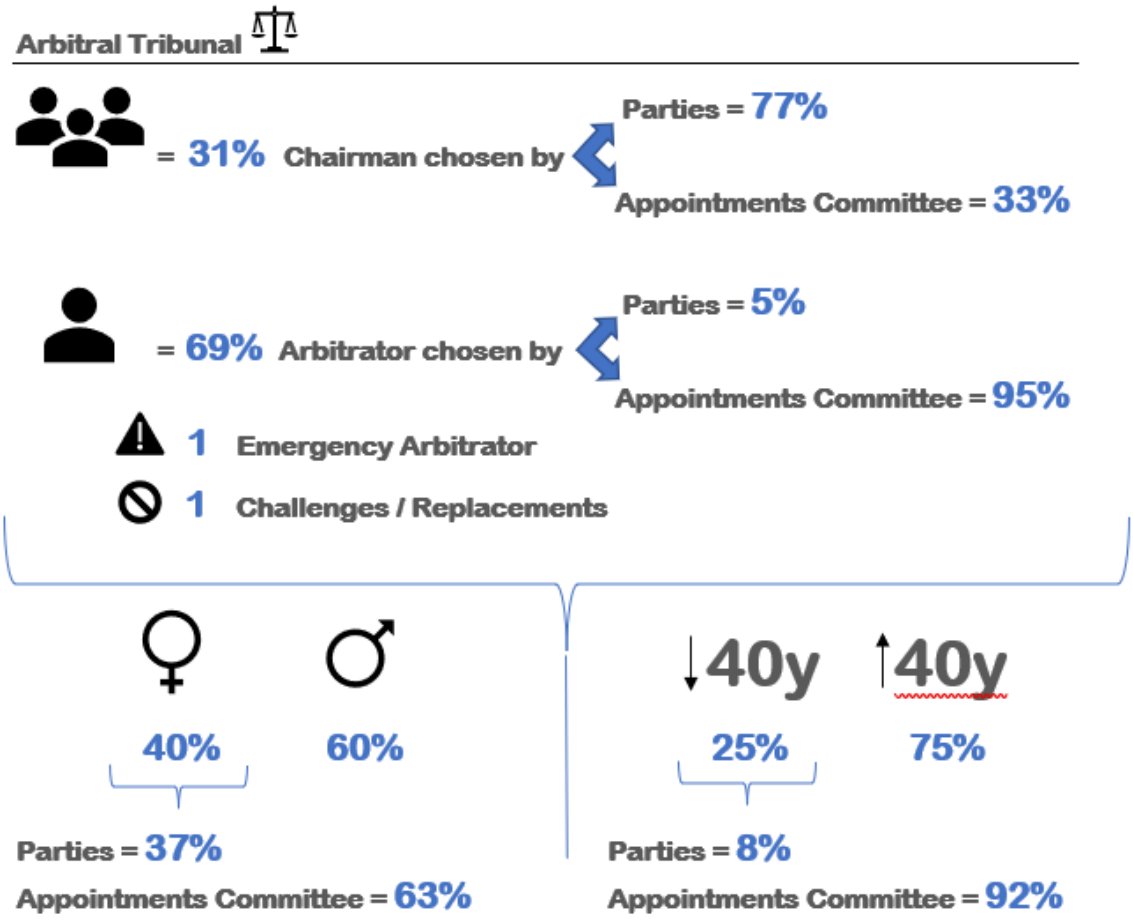
AMOUNT IN DISPUTE

< € 100.000,00 →	41%
€ 100.000,00 – € 200.000,00 →	3%
€ 200.000,00 – 500.000,00 →	11%
€ 500.000,00 – 1.000.000,00 →	14%
€ 1.000.000,00 – 10.000.000,00 →	19%
> € 10.000.000,00 →	14%

From the above, it is clear that expedited proceedings (< € 100.000,00) have been very successful (41% of the cases), while cases over 10 million euros have also increased (14% of the CEPANI cases compared to 11% in 2021 and only 6% in 2020).

ARBITRAL TRIBUNAL

CONSTITUTION



The majority, i.e. 69%, of the Arbitral Tribunals were composed of a Sole Arbitrator. 31% of the Tribunals were composed of three Arbitrators.

In comparison to 2021, 82% 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 2022, 40% of the Arbitrators appointed by CEPANI were women, 63% of which were appointed by the CEPANI Appointments Committee and 37% directly by the Parties. This is a very positive change in favor of 'Diversity and Inclusion in Arbitration'.

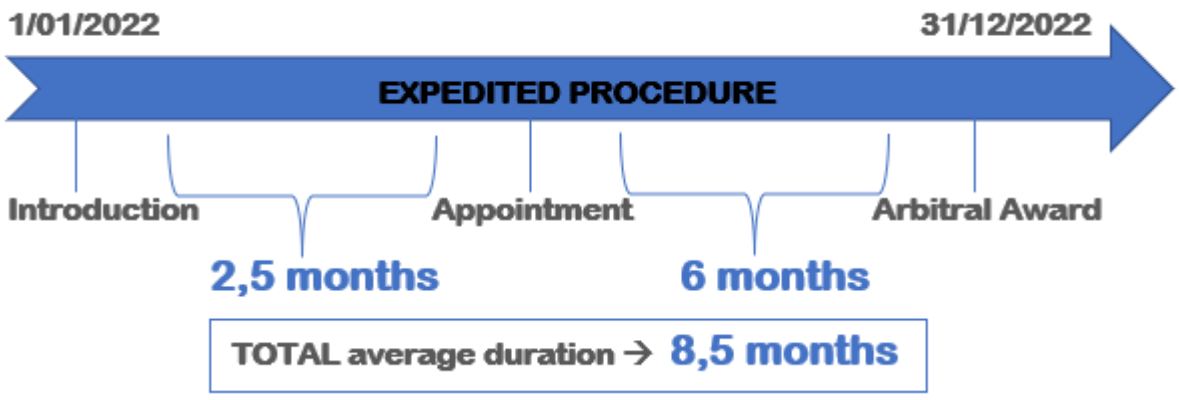
In 2019 only 10% of women Arbitrators were appointed, in 2020 15% of the appointed Arbitrators were women and in 2021, 35 % of the appointed Arbitrators were women.

YOUNGSTERS IN ARBITRATION

In 2022, 25% of the Arbitrators appointed by CEPANI were below 40 years old.

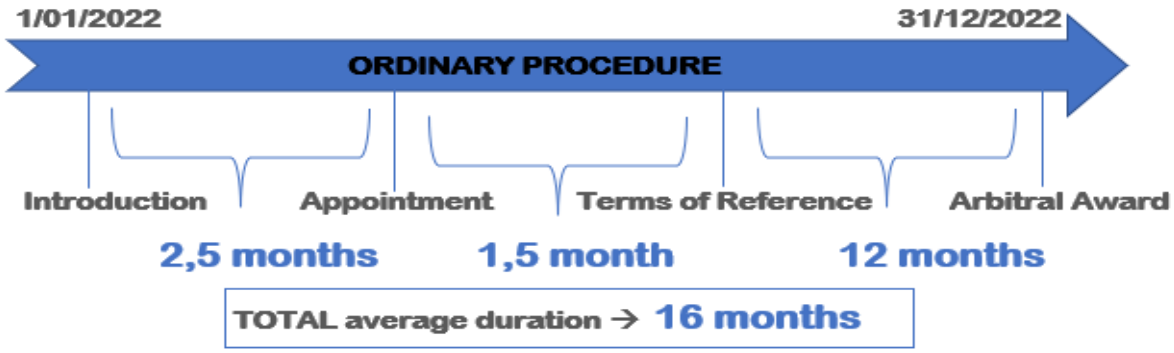
92% of them were appointed by the CEPANI Appointments Committee, 8% by the Parties.

AVERAGE DURATION OF CEPANI PROCEEDINGS IN 2022



In 2022, an expedited arbitration procedure administrated under the CEPANI Arbitration Rules lasted 8,5 months!

In 2022, a classic procedure administrated under the CEPANI Arbitration Rules lasted 16 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. The Appointments Committee shall only appoint the Arbitral Tribunal when the advance on arbitration costs has been paid in full.

In practice the 2,5 months are due to delays when paying the advance on arbitration costs.

Constitution of the Arbitral Tribunal to the Terms of Reference = 1,5 month.

The CEPANI Arbitration Rules provide for a one-month deadline. Clearly, Arbitrators - in collaboration with the Parties and their Counsel – have made every effort to meet this strict deadline.

Terms of Reference to the Arbitral Award = 12 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.

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 12 months is due to the fact that Procedural Timetables are established in consultation with the parties and exceeding – and thus extending – the six-month deadline provided for in the CEPANI Arbitration Rules.

In comparison with 2021, an arbitration proceeding lasted an average of 12 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-….)

Damien Van Caelenberg

Attaché juridique (01.2023-…)

Camille Libert

Adviseur (03.2015-…)

LEDENAFDELING

In **2022** viel ons de eer te beurt om als leden te mogen verwelkomen:

1. **Alexander Blumrosen**
2. **Quentin Van den Eynde**
3. **Julie Spinelli**
4. **Bart De Bock**
5. **An Vermeersch**
6. **Emmanuel Plasschaert**
7. **Emmanuel Cornu**
8. **Benjamin Marchandise**
9. **Dominique De Marez**
10. **Gaetano Jannone**
11. **Pierre-Yves Thoumsin**
12. **Emmanuel Mathieu**
13. **Karen Paridaen**
14. **Joanna Kolber**
15. **Gunther Meyer**
16. **Olivia de Patoul**
17. **Nathan Tulkens**
18. **Thomas John**
19. **Sophie Bourgois**
20. **Friedrich Rosenfeld**
21. **Audry Stévenart**
22. **Béatrice Castellane**
23. **Béatrice Vann Tornout**
24. **Lisa Bingham**
25. **Ady van Nieuwenhuizen**
26. **Lenssens**
27. **Thomas Granier**
28. **Esther Lanotte**
29. **Hafez Virjee**
30. **Evelien Van Espen**
31. **Adrien Fink**

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 2022 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 2023, la composition du Comité de Récusation du CEPANI a été modifiée. M. Guy KEUTGEN a cessé sa fonction au sein de ce comité. Je le 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 sa qualité de Président de ce comité. Tant au nom du CEPANI qu'en mon nom personnel, je tiens à le remercier de tout cœur pour tout le travail accompli au cours de toutes ces années.

CEPANI40 is de afgelopen jaren zeer actief geweest. In dit verband, wens ik Sophie Goldman en Sigrid Van Rompaey van harte te bedanken voor hun onvermoeibare investering in de ontwikkeling en de bekendheid van **CEPANI40, aangezien hun mandaat als covoorzitsters van CEPANI40 eind zomer 2022 afliept.** We zijn hen erg dankbaar voor de vele initiatieven en evenementen die werden georganiseerd, en om de internationale reputatie van CEPANI40 naar een hoger niveau te hebben getild. Onder hun voorzitterschap organiseerde CEPANI40, onder andere, haar eerste evenementen tijdens de prestigieuze Paris Arbitration Week. Echter, was hét hoogtepunt van het mandaat van de twee vertrekkende covoorzitsters, Sophie Goldman en Sigrid Van Rompaey, de Global Conference of the Co-Chairs' Circle, georganiseerd te Brussel op 3 en 4 juni rond het thema "Legitimacy in and of Arbitration". We prijzen hun niet-aflatende inzet voor de ontwikkeling van CEPANI en voor de jonge arbitragebeoefenaars. Veel succes voor de toekomst!

Last but not least, I thank my incredible, dynamic and reliable team, without which all this would not be possible!

EMMA VAN CAMPENHOUDT

DIRECTOR 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.

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"Institut des juristes d'entreprise (IJE) 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'IJE invitent à chacune de leurs manifestations un représentant de l'autre

organisation qui sera dispensé des frais d'inscription.

Le CEPANI et l'IJE 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'IJE 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 s'est rendu 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

FOLLOW US ON LINKEDIN!!

CEPANI npo

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