CEPANI
1969 - 2019

#164

April 2023

Editors in chief: Guillaume Croisant, François Cuvelier, Iuliana Iancu and Sander Van Loock

AGENDA

26 May 2023	**UGENT - ArbMetaBlock2023**
1 June 2023, 15.30-19.00	**CEPANI Algemene Vergadering 2023 – Assemblée Générale du CEPANI 2023**
1 June 2023, 17-18	**Keynote speech by Ms. Stephanie Boyce on "Why diversity matters and why each of us has a responsibility to build truly diverse and inclusive professions"**
2 June 2023	**CJBB – CEPANI – IJE : Colloque Médiation et arbitrage : Premiers réflexes et outils pratique**
8 June	**CEPANI40 – Damages and quantum valuation in international arbitration**
4 July & 29 August 2023	**CEPANI Intern Days**
17 November 2023	**CEPANI's annual colloquium**

SERIES: Stories from a Young Arbitrator

REPORTS

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SERIES - STORIES FROM A YOUNG ARBITRATOR

With the April 2021 edition of the Newsletter, the Editors introduced a new series of short, topical posts written by young arbitrators. The authors will be sharing practical tips and insights from their experience as arbitrators, from dealing with defaulting parties or with non-represented parties to managing multi-language proceedings, from addressing falsified evidence and the interplay between the burden of proof and the standard of proof, to deciding jurisdictional challenges and evaluating the credibility of witnesses.

We hope you will enjoy this new series and, please, do not hesitate to reach out should you wish to participate.

EPISODE 17 – IURA NOVIT ARBITER?

Jan Janssen
Senior Associate,
Petillion (Brussels)

Da mihi factum dabo tibi ius (give me the facts, I will give you law) is a maxim meaning that the parties to a dispute must present evidence to the tribunal, which will arrive at a legal decision based on the parties' evidence. For a young practitioner, it may look like a daunting task to lay out the legal reasoning, when the parties to a dispute limit themselves to providing the facts on which the decision must be based. If only it were that easy. The role of an arbitral tribunal involves much more than analysing the evidence the parties have adduced and determining how the law must be applied to the facts of a matter.

The principle, and its corollary *iura novit curia* (the court knows the law), stem from the civil law tradition. These principles have seeped through international courts, that widely recognize *iura novit curia* as a general principle of law, and common law courts may also raise matters of public policy *sua sponte*. In conjunction with globalisation and international trade, legal practitioners may observe the approximation of laws and differences in legal culture getting attenuated by repeated encounters.

The extent to which arbitral tribunals may apply the *iura novit curia* or *iura novit arbiter* principle is debated, particularly in an international context. Some jurisdictions that apply the *iura novit curia* maxim treat foreign law as an issue of fact, rather than an issue of law. When conflicts of laws rules require the application of foreign law, it may be up to the parties to adduce the applicable principles of foreign law.

But international arbitrators do not know the concept of 'foreign law'. One day, they may serve as an arbitrator in proceedings that are governed by the laws of Belgium as *lex loci arbitri*, while the CISG is the substantive law or *lex causae* to be applied to the merits of the case, and the law applicable to the arbitration agreement may be Swiss law. Another day, the *lex loci arbitri* could be French law, the *lex causae* the laws of Panama, supplemented by mandatory provisions of Italian law, and the law applicable to the arbitration agreement, the laws of England and Wales. Is it reasonable to assume that arbitrators are familiar with all those legal systems and that they can navigate them when presented with factual evidence only?

When parties are well represented, they contribute to the arbitral tribunal's knowledge of the law. Through the quality of the debate between parties, it will be relatively easy for the arbitrator to understand which parts of the law applicable to the dispute must be studied to render justice through an enforceable award.

The situation becomes more complex in case of a default or when there is an imbalance in the quality of the parties' representation. It is not uncommon for a young arbitrator to be confronted with situations where the parties and their representatives are not so familiar with arbitral proceedings and/or the law applicable to the dispute. In such event, there is a fine balance to be struck between 'educating' the parties in the interest of procedural efficiency, on the one hand, and preserving the equality of arms, party autonomy, and avoiding the appearance of bias, on the other hand. It may prove delicate to raise issues of law that have not been addressed by the parties. Not raising a legal issue may be a deliberate choice and raising it could create frustration on the parties' side.

In assessing whether an issue should be raised proactively by the tribunal, relevant factors to be considered are: (i) is the legal issue essential to resolve the dispute that is presented to the tribunal (e.g. essential to establish jurisdiction and ensuring a solid award)?; (ii) does the issue constitute a matter of public policy ?; (iii) how is the *iura novit curia* principle implemented in the *lex loci arbitri* ; (iv) is there a risk that raising the issue would put, or be perceived to put, one of the parties in a more advantageous position?

When the latter risk is present, the consideration factors must be weighed properly, which is a delicate exercise, particularly for a sole arbitrator. Justice must not only be done; justice must also be seen to be done, and any appearance of bias is to be avoided at all times.

Irrespective of how careful the arbitrator has been in his balancing exercise of raising the issue, the way he or she presents the issue to the parties is of critical importance. A successful communication can only be achieved if the arbitrator shows a genuine willingness to understand the parties' respective positions and interests and when the parties recognize that their response to the question will assist the arbitrator in fulfilling his or her duties.

As the proceedings evolve, it becomes important to get a common understanding between the parties and the arbitral tribunal as to the issues that must be decided. This exercise may have been commenced when agreeing on terms of reference. However, the terms of reference should not be the endpoint for listing the issues. A dispute may have ripened and some issues that the parties considered to be relevant may no longer be relevant, whereas other issues might have gained importance. I see benefit in arbitrators taking a proactive role in discussing the list of issues with the parties. When a tribunal indicates the issues it would like the parties to focus on, time and money can be saved. And if a party considers that the tribunal errs by focusing on a particular issue, it can explain why it believes the tribunal is wrong. Such opportunity risks being missed if a tribunal adopts a more passive approach. But a proactive approach requires good preparation and active listening. An arbitrator who raises issues that are only tangential in nature risks to lose the trust of the parties. The same will happen if an arbitrator misses out on important issues, relevant to the dispute.

It will seldom be sufficient for an arbitrator to know the law. Arbitrators must be able to grasp the tensions that exist between the parties and work with the parties in managing the procedure efficiently. *Communicationis et psychologia novit arbiter* may not yet exist as a legal maxim; it is an aspiration arbitrators should aim at when fulfilling their duties and administering justice.

REPORTS

BeNeLux Arbitration and ADR Group: "Getting to know each other and what to expect from the future"

20 APRIL 2023

Lauren Rasking
Senior Associate (Allen & Overy)

On 20 April 2023, the Luxembourg Arbitration Centre (LAC) and the Luxembourg Arbitration Association (LAA) hosted the first joint event of the "BeNeLux Arbitration and ADR Group".

This BeNeLux Arbitration and ADR Group was launched on 8 September 2022, when the LAC, the LAA, the Belgian Centre for Arbitration and Mediation (CEPANI), the Netherlands Arbitration Institute (NAI) and the Dutch Arbitration Association (DAA) signed a cooperation agreement at the Peace Palace in The Hague.

The purpose of the BeNeLux Arbitration and ADR Group is to strengthen cooperation and promote arbitration and other ADR mechanisms in the BeNeLux area.

An appropriate first step for this exciting project to strengthen the ties between the Belgian, Dutch and Luxembourg arbitration communities was to get to know each other and brainstorm about the possible joint initiatives that the group could bring about. And so it happened on 20 April 2023, in Luxembourg.

The grey sky and light drizzle contrasted sharply with the buzzing excitement inside the Luxembourg Chamber of Commerce (LCC). The conference kicked off with a warm welcome from **Anne-Sophie Theissen** (Secretary General of the LAC and Director Legal and Tax of the LCC) and **André Prüm** (President of the LAA and Professor at the Luxembourg University), as well as an introduction from **Maxime Berlingin** (Chairman of the BeNeLux Arbitration and ADR Group) and **Estelle Brisson** (Communication of the LAA).

Keynote speaker **Filip de Ly** (Professor at the Erasmus University in Rotterdam and Chairman of the International Commercial Arbitration Commission of the International Law Association) gave his views on the comparative features and challenges of arbitration in the BeNeLux, leaving the audience pondering about the use of slides, the order of countries in the BeNeLux abbreviation and, more fundamentally, the desirability of different rules governing domestic and international arbitrations.

Next up was a panel discussion on the reasons to choose a seat of arbitration in the BeNeLux. Moderated by **Jan Schaefer** (Partner at King & Spalding), representatives from each of the countries gave their best elevator pitch to demonstrate the attractiveness of the various seats: **Camilla Perera-de Wit** (Secretary-General and Director-General of the NAI) and **Roelien van den Berg** (Partner at Avizor Advocates & Arbitrators) promoted the Netherlands; **Maarten Draye** (Partner at Hanotiau & van den Berg) and **Vanessa Foncke** (Partner at Jones Day) defended the Belgian colours; and **Laure-Hélène Gaicio-Fievez** (Partner at BSP) and **Nicolina Bordian** (Legal adviser at the LAC) supported a Luxembourg seat. Although the author of this report may be biased, the argument based on the Belgian culinary scene got quite some traction in the audience.

The Minister of Justice of the Grand Duchy of Luxembourg, **Sam Tanson**, was proud to announce that she had "just signed the new arbitration law, so it will be published in the next few days" (NB: the new law entered into force on 25 April 2023). This modern framework, inspired by the UNCITRAL Model Law, intends to make arbitration more flexible, efficient, and attractive for parties seeking to resolve their disputes by granting extended powers to tribunals and limiting the grounds for setting aside awards.

The following panel discussed essential tips for enforcing an arbitral award in the BeNeLux. Led by **Hilde van der Baan** (Partner at Allen & Overy), the panellists explained the similarities and differences between the various countries at the enforcement stage: **Mirjam van de Hel-Koedoot** (Partner at NautaDutilh) for the Netherlands, **Hakim Boularbah** (Partner at Loyens & Loeff and Professor at the University of Liège) for Belgium and **Clara Mara-Marhuenda** (Partner at Arendt & Medernach) for Luxembourg.

Last but not least, the final panel explored whether a BeNeLux Uniform Arbitration Act and/or a Single BeNeLux Arbitration Court would benefit the BeNeLux Arbitration Community. Panellists **Gerard Meijer** (President of the NAI), **Françoise Lefèvre** (Member of the ICC Court of Arbitration) and **Elisabeth Omes** (Partner at Elvinger Hoss Prussen), moderated by **Maxime Berlingin**, exchanged views on the pros and cons of a Uniform Arbitration Act and discussed what such an act should look like and how it could be enforced across the BeNeLux. At the end of a lively debate (including my personal favourite quote: "The UNCITRAL Model Law is like a pizza Margherita – you can add toppings"), the BeNeLux Arbitration Community attending the conference took a vote and most certainly welcomed this ambitious initiative.

This interesting day was topped off with a wine tasting and dinner at a wine estate in the Luxembourgish Moselle. The dreary weather outside (drizzle had meanwhile turned into moderate thunderstorms) could not dampen the jovial mood between the newly established and reinvigorated alliances made between the various arbitration communities. We were told that 2022 had not produced the highest volume of Luxembourg wine but the quality was beautiful – perhaps an apt description of this ambitious and first-class project for BeNeLux Arbitration.

NEWS

» **Keynote speech by Ms. Stephanie Boyce on "Why diversity matters and why each of us has a responsibility to build truly diverse and inclusive professions"**

WHY DIVERSITY MATTERS AND WHY EACH OF US HAS A RESPONSIBILITY TO BUILD TRULY DIVERSE AND INCLUSIVE PROFESSIONS

I. Stephanie Boyce

Ancienne présidente /
Voormalig voorzitster,
Law Society of England
and Wales

01/06/2023, 17:00

FEB/VBO,
Rue Ravensteinstraat 4
1000 Brussels

EPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

Register here

Responsible publisher: B. Kohl

» **CEPANI40 - DAMAGES AND QUANTUM VALUATION IN INTERNATIONAL ARBITRATION – 8 JUNE 2023**

CEPANI40 is delighted to invite you to an insightful afternoon on **damages and quantum valuation in international arbitration**, kindly hosted by Liedekerke Brussels.

This event will include an in-depth, hands-on **training workshop** provided by two quantum experts and a **panel discussion** between quantum experts and international arbitration practitioners, followed by a **networking cocktail**.

You can register for either the Training Workshop or the Panel Discussion, or both. **For more information and registration, click here.**

Programme and speakers:

14h00 - 14h30: Registration for the Training Workshop
14h30 – 17h00: Training Workshop - "Revisiting the ABC's of Damages and Quantum Valuation in International Arbitration".

The Workshop is intended for junior and mid-level profiles, yet open to all keen on learning and/or refreshing the fundamentals of quantum valuation. Spots will be limited to ensure an interactive session.

Workshop trainers

- Fabienne Borde, Managing Director, Kroll Advisory
- Benoit d'Udekem, Vice President, Analysis Group
- Introduction & Closing: Iris Raynaud, Senior Associate, Hanotiau & van den Berg

17h00 – 17h30: Registration for the Panel Discussion
17h30 – 19h00: Panel Discussion - "Working with quantum experts".

The Panel will cover the perspectives of experts, arbitrators and counsel as to the good practices and the challenges of working on quantum valuation issues in arbitration proceedings. The Panel Discussion is open to all.

Panelists:

- Counsel: Bruno Hardy, Counsel, Liedekerke
- Arbitrator: Niuscha Bassiri, Partner, Hanotiau & van den Berg
- Damage experts:
  - Matthias Cazier-Darmois, Senior Managing Director, FTI Consulting
  - Battine Edwards, Forensic Partner, Deloitte Forensic
- Moderator: Beatrice Van Tornout, Senior Associate, Liedekerke

19h00: Cocktail reception

» **2 juin 2023 – Colloque Médiation et arbitrage : Premiers réflexes et outils pratiques**

Organisé en partenariat avec la Conférence du jeune barreau de Bruxelles, le CEPANI et l'institut des juristes d'entreprise, avec le soutien de la FEB

Sous la coordination de Mesdames Françoise Lefèvre, Emma Van Campenhoudt et Stéphanie Davidson

L'avocat informe le justiciable de la possibilité de médiation, de conciliation ou de tout autre mode de résolution amiable des litiges (article 444 du Code judiciaire). Le principe est clair ; il répond à une préoccupation simple et légitime : conseiller et accompagner son client vers une solution ou une décision de justice, en-dehors des cours et tribunaux. Permettre au client d'être acteur de la solution lors d'une médiation ou, comme partie lors d'une procédure d'arbitrage, lui permettre de connaître le déroulement et les arcanes de la procédure, afin de rester maître de sa stratégie.

Pour pouvoir informer le client, l'avocat doit toutefois être lui-même avisé des spécificités de ces deux procédures, de leurs forces, de leur déroulement. Tel est l'objectif de cette formation, axée sur la pratique et visant à aborder les questions que tout avocat peut se poser et se voir poser par le client lorsque la possibilité de recourir à la médiation ou à l'arbitrage se présente.

La séance débutera par une présentation sur la communication non-violente, en vue de donner de premiers outils utiles en cas de participation à une médiation. Un premier panel constitué de deux avocats médiateurs et d'un juriste d'entreprise évoquera ensuite le déroulement d'une médiation (Comment initier et aborder une réunion de médiation ? À quoi être attentif ? Faut-il des écrits ? Un dossier de pièces ? Comment préparer le client ? Comment choisir son médiateur ? Qui paye et combien ? La médiation, cela marche ? La médiation est-elle conciliable avec la procédure judiciaire ? …). Le deuxième panel, également constitué de deux avocats pratiquant l'arbitrage et d'un juriste d'entreprise, exposera les particularités de la procédure d'arbitrage (Convient-il de conseiller une procédure d'arbitrage via un centre d'arbitrage ou une procédure ad hoc ? Comment rédiger ou comment comprendre la clause d'arbitrage qui lie mon client ? Comment choisir l'arbitre ? Puis-je me calquer sur une procédure judiciaire pour défendre mon client ? À quoi s'attendre ? Que se passe-t-il si mon adversaire fait défaut ? …). Chaque panel exposera les atouts et spécificités du mode alternatif de résolution de conflit faisant l'objet de son exposé, sous la forme d'échanges et de questions, en offrant un retour d'expérience et de bonnes pratiques.

La formation est axée sur la médiation et l'arbitrage en matières civile et commerciale. Elle se veut résolument pratique et interactive : venez poser vos questions aux experts !

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Programme

13h00 Accueil des participants et enregistrement

13h15 Propos introductifs

Madame Emma Van Campenhoudt, secrétaire générale du CEPANI
Madame Julie Dutordoir, directeur général de l'Institut des juristes d'Entreprise
Monsieur Emmanuel Plasschaert, bâtonnier du barreau de Bruxelles
Monsieur Nicolas Gillet, président de la Conférence du Jeune barreau

Premier panel présidé par Madame Charlotte De Muynck, avocate, médiatrice

13h30 Communication non-violente : sensibilisation à la nécessité de recourir aux bons modes de communication

Madame Sandra Becker, médiatrice (PMR-Europe)

14h30 La médiation : c'est utile et ça marche !

Madame Charlotte De Muynck, avocate, médiatrice,
Monsieur Gil Knops, avocat, médiateur
Madame Vanessa Depoortere, juriste d'entreprise (Belga Films) et médiatrice

15h15 Séance de questions

15h30 Pause-café

Deuxième panel présidé par Madame Françoise Lefèvre, avocate, arbitre, médiatrice

15h45 L'arbitrage : une procédure à part entière – Echanges sous formes de questions/réponses avec la salle

Madame Françoise Lefèvre, avocate, arbitre, médiatrice,
Madame Lily Kengen, avocate, arbitre
Monsieur Jean-François Lerouge, juriste d'entreprise (Equans)

16h45 Conclusions

17h00 Fin des travaux

Ce colloque donne droit à 4 **points de formation** (sous réserve d'agrément).

Les attestions seront disponibles sur la plateforme LGO dans les jours qui suivent la formation.

Inscription colloque en présentiel
Inscription colloque en ligne

Responsible publisher: B. Kohl

» **CEPANI Intern Days – 4 July and 29 August 2023**

CEPANI has the pleasure of inviting you to its "CEPANI Intern Days"!

Places are limited and registration is mandatory: we will welcome only 6 interns per day. We will have to work on a "first come first serve" basis!

Following the four previous editions that encountered a great success, CEPANI has the pleasure of organizing the fifth edition of its "Intern Days": a unique opportunity for law students as well as newly qualified lawyers to take a look behind the scenes and spend a whole day at the CEPANI offices in the heart of Brussels. Interns will receive a full tour of the CEPANI offices, presentations on the CEPANI ADR Rules and on arbitration in Belgium by successful and confirmed practitioners and arbitration experts, a welcome pack and lunch with a couple of CEPANI members.

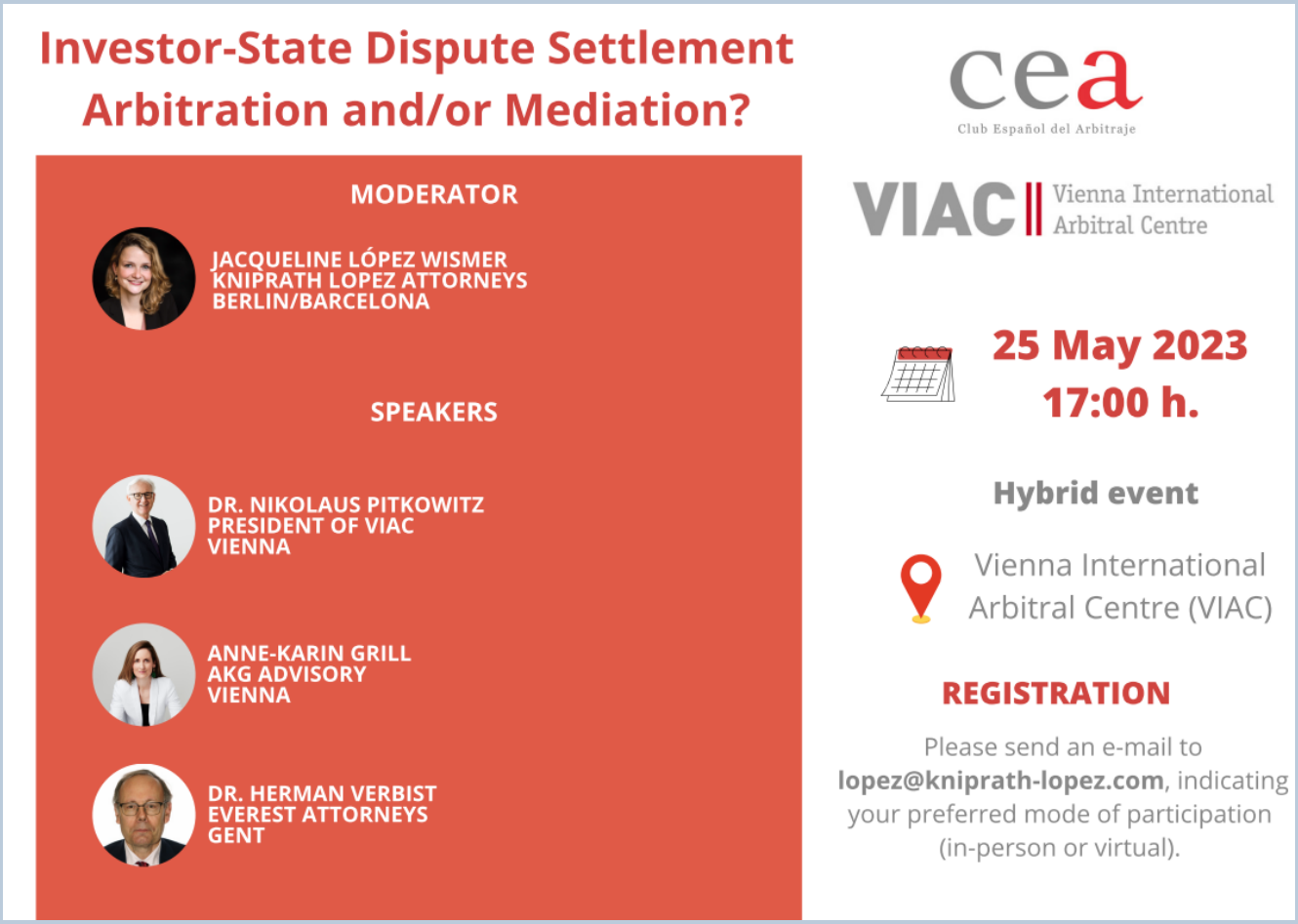
The Intern days will be held on the 4th of July and on the 29th of August 2023, as from 10.30 am to 3pm.

Should you wish for yourself or any of your summer interns in arbitration or newly qualified lawyers in your litigation department to be enrolled for one of our intern days, please let us know by sending e-mail to Ms. Emma Van Campenhoudt, Secretary General of CEPANI, at evc@cepani.be.

Please specify which date you would prefer.

Responsible publisher: B. Kohl

» **CEA, VIAC, "Investor-State Dispute Settlement. Arbitration and/or Mediation?"**



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NEWS FROM OUR PARTNER

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