CEPANI
1969 - 2019

#162

February 2023

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

AGENDA

21-22 March 2023	**CEPANI40's Brussels Pre-Moot to the Vis Moot**
29 March 2023 (08:30-10:30)	**PAW Joint event CEPANI | NAI | VIAC & AFA "The (Un)usual Suspects" Efficiency as a fundamental principle of international arbitration (Linklaters Paris)**
29 March 2023 (16:00-18:30)	**PAW Joint event CEPANI40 | CFA40 |ASA below 40 |YCAP | ICC YAAF | LCIA YIAG | ICDR Y&I | DIS40 | AFM below 40|PVYAP: The world post-Achmea: National courts' treatment of investment arbitration (August Debouzy)**
20 April 2023	**BeNeLux Arbitration and ADR Group – Arbitration in BeNeLux: Getting to know each other and what to expect from the future**
17 November 2023	**CEPANI's annual colloquium (ESG and International Commercial Arbitration - Beyond the Acronyms)**

IN MEMORIAM Jacques Levy-Morelle

SERIES: Stories from a Young Arbitrator

REPORTS

NEWS

NEWS FROM OUR PARTNERS

IN MEMORIAM Jacques Levy-Morelle

Jacques Levy-Morelle est décédé le 24 février dernier.

Pendant de longues années, il a été un membre actif et écouté du conseil d'administration du CEPANI. Les avis qu'il exprimait étaient toujours pondérés et frappés à l'aune d'une grande connaissance du monde de l'entreprise. Ils contribuèrent à enrichir les débats au sein du conseil en dépassant l'aspect purement juridique des problématiques abordées. Dans cet esprit, l'arbitrage était à ses yeux d'abord un mode alternatif de règlement des litiges au service des entreprises.

Jacques Levy-Morelle a aussi été membre suppléant puis membre effectif de la Cour internationale d'arbitrage à Paris. Il s'y est inscrit dans la lignée de ses prédécesseurs immédiats, deux grands juristes d'entreprise, Jean Van Uytvanck, directeur général de Petrofina et Pierre Gabriel, secrétaire général de la FN. A Paris, il a été largement apprécié pour son indépendance et pour son expérience comme secrétaire général d'une entreprise à vocation mondiale, le groupe Solvay, répondant à la vocation universelle de la Chambre de commerce international.

En tant que dirigeant d'une entreprise majeure du monde des affaires, Jacques Levy-Morelle avait cette qualité rare de faire du droit un élément essentiel de la stratégie de l'entreprise avec les potentialités et les contraintes qui en découlent.

Lui-même était issu d'une famille de juristes et d'hommes politiques, libéraux au sens noble du terme.
Je pense en particulier à son père, Henri Levy-Morelle qui a dirigé le service juridique de Solvay et qui a été professeur à l'École de commerce Solvay de l'Université Libre de Bruxelles.

Mais au-delà de ses qualités professionnelles et singulièrement comme juriste, Jacques Levy-Morelle était un homme chaleureux, d'une grande élévation morale et d'une constante curiosité intellectuelle.

Avec son départ, le CEPANI perd un précieux conseiller et un fidèle allié.

Pour ma part, je perds un ami très cher.

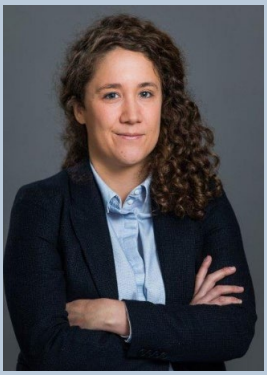
Guy Keutgen

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 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.

REPORTS

CEPANI40 WEBINAR
"VIRTUAL HEARINGS.
LESSONS LEARNED"

16 FEBRUARY 2023

Krystyna Khripkova
Counsel
Integrites (Kyiv and Brussels)

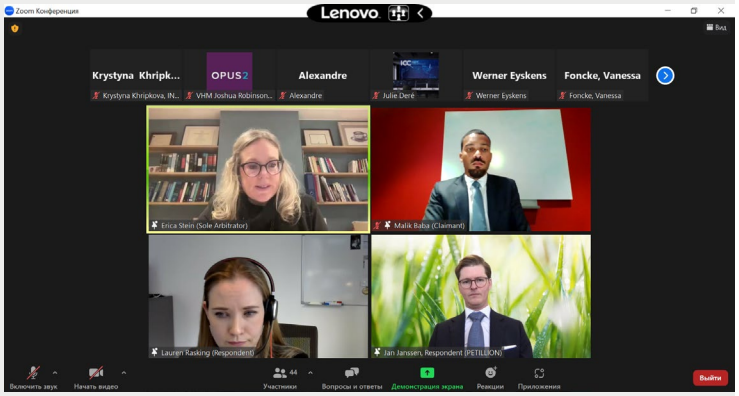
On 16 February 2023, CEPANI40 invited prominent arbitration practitioners to discuss their experience with virtual hearings and what lessons they learned. The panellists engaged the audience with an interactive mock prehearing conference hosted by Opus 2 where Mr. **Malik Baba** (Stibbe) advocated for 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:

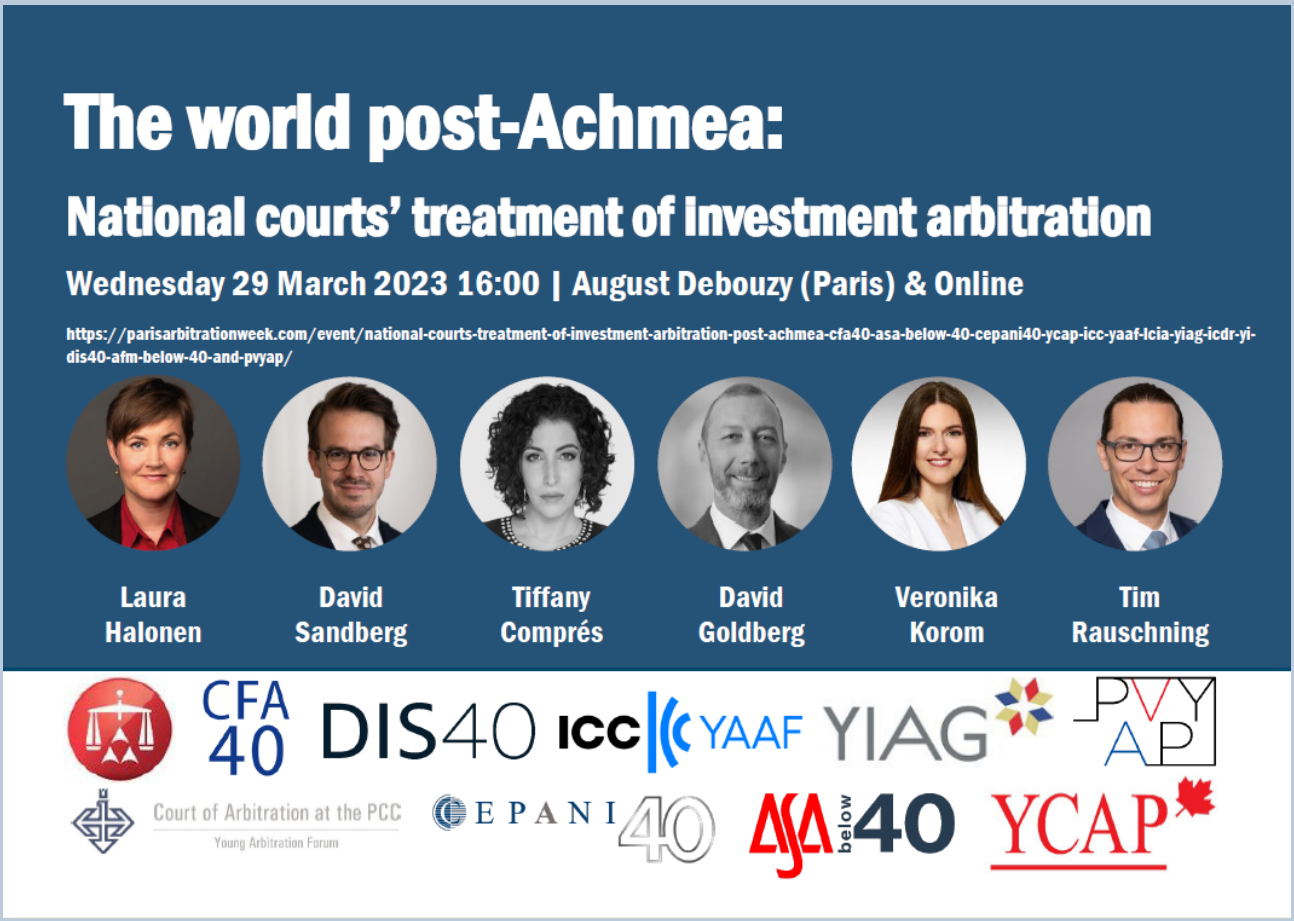
1. The energy of IPH has a positive effect on the quality of the debate and creates (i) a more cooperative atmosphere, which in turn leads to better fact-finding and (ii) an opportunity for counsel to meet in the corridor and remove some tension from the proceedings.
2. Body language, which is essential 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.

NEWS

» **CEPANI40 at PAW: THE WORLD POST-ACHMEA: National courts' treatment of investment arbitration**
29 MARCH 2023 (16:00) | August Debouzy (Paris) & Online



Register here.

NEWS FROM OUR PARTNERS

» ***INSTITUUT VOOR BEDRIJFSJURISTEN/ INSTITUT DES JURISTES D'ENTREPRISE***

PUBLICATIE: HET BEROEP VAN BEDRIJFSJURIST - ALGEMENE ORGANISATIE & DEONTOLOGIE

In het najaar van vorig jaar kondigde het Instituut voor bedrijfsjuristen (IBJ) de publicatie aan van het **boek** "**Het beroep van bedrijfsjurist – Algemene organisatie & deontologie**". Dit boek is geschreven door **Philippe Marchandise** en **Pierre Schaubroeck**, erevoorzitters van het IBJ en uitgegeven door **Wolters Kluwer**. Het zal een leidraad vormen voor de uitoefening van het beroep, rekening houdend met de deontologie en heeft ook als doel het beroep van bedrijfsjurist meer bekendheid te bezorgen.

Dit tweetalig boek biedt een bespreking van de diverse aspecten van het sinds 2000 gereglementeerde beroep van bedrijfsjurist: zijn taken en zijn plaats in de onderneming, de deontologie, tucht en vertrouwelijkheid en de internationale dimensie. Het is de eerste volledige studie van ons beroep.
Het IBJ had het genoegen Philippe Marchandise en Pierre Schaubroeck te mogen interviewen over hun boek.

Lees het Interview >
Link onder lees het interview: IBJ - IJE - Publicatie: het beroep van bedrijfsjurist - algemene organisatie & deontologie

PUBLICATION: LA PROFESSION DE JURISTE D'ENTREPRISE - ORGANISATION GÉNÉRALE & DEONTOLOGIE

Fin de l'année dernière, l'Institut des juristes d'entreprise (IJE) annonçait la parution du **livre « La profession de juriste d'entreprise – Organisation générale & déontologie** », rédigé par **Philippe Marchandise** et **Pierre Schaubroeck**, présidents honoraires de l'Institut et publié par **Wolters Kluwer**. Cet ouvrage servira de guide pour l'exercice de la profession en tenant compte de la déontologie et il vise également à faire connaître plus largement notre profession.

Cet ouvrage bilingue explore les différents aspects de la profession de juriste d'entreprise, réglementée depuis 2000 : ses devoirs, sa place au sein de l'entreprise, la déontologie, la discipline, la confidentialité et la dimension internationale. Il s'agit de la première étude complète de notre profession.
L'IJE a eu le plaisir d'interviewer Philippe Marchandise et Pierre Schaubroeck à propos de leur livre.

Lire l'interview >
Lien à mettre pour Lire l'interview IBJ - IJE - Publication: La profession de juriste d'entreprise – Organisation générale & déontologie

» *Acolad.*

Best practices for legal translation

Just as your firm pays great attention to detail when producing legal papers, legal translation requires careful handling by specialized professional translators.
Poorly translated documents – whether there are errors in meaning, language or formatting – can pose serious risks to business negotiations, to the strength of a court case or to a legal firm's credibility with international clients and partners.
The good news is that these translations can be entrusted to language service providers that understand the need to comply with local norms and regulations and that work with specialized and highly trained professionals.
Here are a few best practices that good translation service provider will take into account when working with your legal documents:

1. Ensuring data confidentiality
2. Working to tight deadlines
3. Certification for translated legal documents
4. Expert linguists
5. Subject specialists
6. Correct formatting protocol

Do you want to learn more about these points? Then just click: **Read the article**

Fast, Reliable and Accurate Legal Language Services
Acolad Legal solves multilingual challenges for legal professionals across all practices, types of documents and areas of law. Our global network of legal language experts will ensure the best quality and the highest level of customer service.
Learn more about Acolad Legal services on our website: https://www.acolad.com/en/legal.html

Responsible publisher: B. Kohl

» *KLUWER ARBITRATION*

Wolters Kluwer will be present at the upcoming **8th EFILA Annual Conference** 2023 - CLIMATE CHANGE AND INTERNATIONAL INVESTMENT LAW & ARBITRATION: CHALLENGES AND UNCERTAINTIES, which will be held in Madrid on 16 March.

During the conference Ewa Cairns-Szkatuła, our Director Technology Product Management, will speak about **Kluwer Arbitration: Data-Driven Arbitrator, Expert Witness and Counsel Selection**. Olesea Bojonca will be hosting the Wolters Kluwer booth where you can learn about the latest enhancements on Kluwer Arbitration.

Register now: 8th EFILA Annual Conference 2023 Tickets, Thu 16 Mar 2023 at 09:00 | Eventbrite

Responsible publisher: B. Kohl