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AGENDA

20 April 2023	**BeNeLux Arbitration and ADR Group – Arbitration in BeNeLux: Getting to know each other and what to expect from the future**
27 April 2023	**ICC Belgium – CEPANI40 – IBJ/IJE Arbitration for Unprecedented Challenges: Keep Calm and Be Ready!**
12 May 2023	**ICC Belgium: Visit to the ICC International Court of Arbitration® in Paris**
15 May 2023	**CEPANI – AFA – VIAC – NAI: London Dispute Settlement Week: THE (UN)USUAL SUSPECTS: Efficiency as a fundamental principle of international arbitration**
26 May 2023	**ArbMetaBlock2023**
4 July & 29 August 2023	**CEPANI Intern Days**
17 November 2023	**CEPANI's annual colloquium**

SERIES: Stories from a Young Arbitrator

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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 16 – THE UNUSUAL TASK TO DECIDE AS *AMIABLE COMPOSITEUR*

Charlotte Van Themsche
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

REPORTS

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

21-22 MARCH 2023

Charlotte Pfeiffer
Associate (Linklaters)

The 7th 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

Guillaume Croisant Managing Associate, Linklaters, and CEPANI40 Co-Chair

Katherine Jonckheere Associate, LALIVE (London), and CEPANI40 Co-Chair

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).

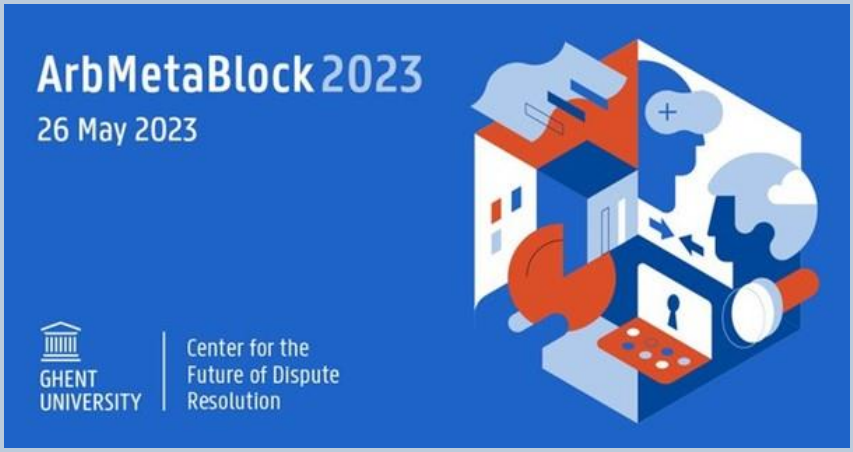
CEPANI'S D&I ADAPTATION OF RULES SHORLISTED AT THE 2023 GAR AWARDS (30 March 2023)

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).

NEWS

» **ARBMETABLOCK 2023**



We are excited to announce the **ArbMetaBlock2023 Conference**, where leading experts in technology and dispute resolution will come together to discuss the impact of blockchain, the Metaverse, and Web3 on arbitration.

These concepts have become part of the conversation in the arbitration community, but few understand their true significance and potential impact. That's why this conference is an unmissable opportunity to explore how these technologies will transform arbitration and how practitioners and institutions can adapt to stay relevant.

Expert panelists will discuss crucial topics such as the impact of blockchain and the Metaverse on arbitration, the changing role of lawyers and arbitration institutions, and the effect of new technology on arbitration fundamentals during our full-day event. UNCITRAL will also be in attendance to share their insights and present their work in are of blockchain and arbitration.

Our impressive lineup of confirmed speakers includes Mihaela Apostel, Pedro Arcoverde, Elizabeth Chan, Paul Cohen, Dirk De Meulemeester, David Earnest, Elizabeth Zoe Everson, Anna Guillard Sazhko, Wendy Gonzales, Emily Hay, Cemre Kadioglu Kumptepe, Matthias Lehman, Niamh Leinwather, Aija Lejniece, Maud Piers, Colin Rule, Sean McCarthy, Sophie Nappert, Ekaterina Oger Grivnova, Pietro Ortolani, Amy Schmitz, Takashi Takashima, David Tebel, Leandro Toscano, and Dirk Van Gerven.

The event is organized by the Center for the Future of Dispute Resolution at the University of Ghent in collaboration with leading organizations, including ArbTech, Arbitrate.com, Cepani, Cepani40 CyberArb, MetaverseLegal, and UNCITRAL.

Don't miss this opportunity to gain a deep understanding of the impact of blockchain, the Metaverse, and Web3 on arbitration. Register and join us for a thought-provoking and engaging conference.

» **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.

NEWS FROM OUR PARTNERS

» *KLUWER*

WEBINAR PANEL SESSION
Ethical Dilemmas in International Arbitration

Date: Wednesday 19 April 2023

Time: 5:30 - 6:30 PM Hong Kong time

Please join us for a webinar co-hosted by Norton Rose Fulbright and Wolters Kluwer, ‘Ethical Dilemmas in International Arbitration’.

International arbitration combines a patchwork professional regulatory environment, divergent expectations as to what kinds of conduct are inappropriate and limited arbitral powers to restrain unethical conduct by parties or advocates. How should international arbitration practitioners respond when faced with an ethical dilemma? This panel will focus on three areas that frequently present ethical dilemmas for arbitration counsel: preparation and examination of witnesses, confidentiality, and fraudulent or corrupt conduct by a party. Our two moderators and three panelists will draw on their extensive knowledge and experience to help guide listeners through the ethical labyrinth.

Register now!