CEPANI
1969 - 2019

#165

May and June 2023

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

AGENDA

4 July & 29 August 2023	**CEPANI Intern Days**
31 August 2023	**CEPANI40 Summer Drinks (3rd edition)**
22 September 2023	**Déjeuner-débat du CEPANI avec Pascal Hollander – « L'arrêt THIBELO de la Cour de cassation du 7 avril 2023 : une chance pour l'arbitrage et/ou un champ de ruine pour le droit belge de la distribution commerciale ? »**
17 November 2023	**CEPANI annual colloquium - ESG and International Commercial Arbitration – beyond the acronyms**

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REPORTS

CEPANI's annual general meeting and the keynote speech of Ms I. Stephanie Boyce ("Why diversity matters and why each of us has a responsibility to build truly diverse and inclusive professions")

1 June 2023

Emma Van Campenhoudt
Secretary General, CEPANI

CEPANI held its annual general meeting on 1 June 2023.

Benoît Kohl (CEPANI President) chaired the meeting and presented, together with **Emma Van Campenhoudt** (CEPANI Secretary General), the annual accounts for 2022, the budget for 2023 and the key events of 2022.

It was also the opportunity to adapt CEPANI's bylaws to the new Code of Companies and Associations. At this occasion, the board of directors has been reduced to 17 members: Benoît Allemeersch, Patrick Baeten, Maxime Berlingin, Olivier Caprasse, Stéphanie Davidson, Dirk De Meulemeester, Maarten Draye, Vanessa Foncke, Sophie Goldman, Hilde Jacobs, Benoît Kohl, Françoise Lefèvre, Philippe Lambrecht, Maud Piers, Marco Schoups, Emma Van Campenhoudt and Sigrid Van Rompaey.

The past directors were warmly thanked for their extensive contribution to CEPANI and were granted the title of honorary director.

The general meeting was concluded with a keynote speech of **Ms I. Stephanie Boyce** on "Why diversity matters and why each of us has a responsibility to build truly diverse and inclusive professions". The theme of the event was chosen to mark CEPANI's adaptation of its Arbitration Rules to take diversity and inclusion into consideration in the appointment of arbitrators. Continuing to foster diversity and inclusion in its own organisation is also a priority for CEPANI.

The Presidents of the French-speaking and Dutch-speaking Brussels Bars, Mr **Emmanuel Plasschaert** and Mr **Bernard Derveaux**, were associated to the event and welcomed Ms Boyce, together with CEPANI's representatives.

Ms Boyce, currently Linklaters' global Strategic Advisor on Diversity, Equity and Inclusion, was the 177th, the sixth female, the first Black office holder, the first person of colour and the second in-house solicitor in almost fifty years to become president of the Law Society of England and Wales. She made a compelling case, based on her own personal career path and the challenges she encountered, on the importance of diversity, equity and inclusion in the legal profession.

As Ms Boyce pointed out:
"*Women are three times less likely than men to be appointed as an arbitrator. The rule change undertaken by CEPANI, an express requirement to consider diversity and inclusion when appointing arbitrators is one way of ensuring that discrimination has no place in arbitration let alone dispute resolution.*
There is no "one-size-fits-all" magic solution to implementing equity, diversity and inclusion. Decisions are under increasing scrutiny, and achieving greater diversity and inclusion in arbitration appointments is recognised as a way of improving decisions to ensure the best possible outcomes and sends a loud signal that diversity in arbitration is important and is being taken seriously. Harnessing different views helps weigh up issues in more detail and enables consideration of the effects on those impacted by those decisions."

Her presentation was followed by a lively discussion with the audience, which continued over the drink reception.

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CEPANI's statistical report for 2022

Emma Van Campenhoudt
Secretary General, CEPANI

Introduction

CEPANI's statistical report provides a statistical overview of CEPANI arbitration in 2022 and its evolution in comparison with past years, including with respect to 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.

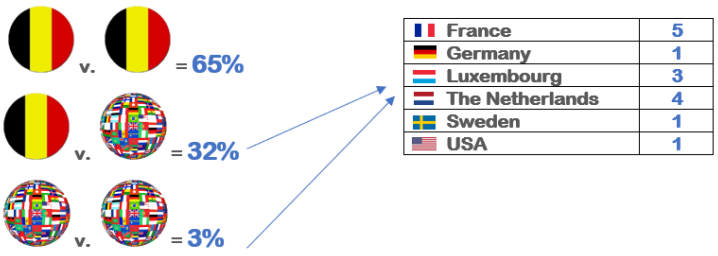
This was the case for appointments by both the CEPANI Appointments Committee – where it appears that 63% (!) of the Arbitrators proposed by the Appointments Committee were women – and the Parties themselves. Indeed, no less than 2 out of the 9 appointed three-member Arbitral Tribunals consisted exclusively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

Origin of the 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 only international Parties.

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 of the arbitral proceedings

In 2022, both the Dutch and the 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.

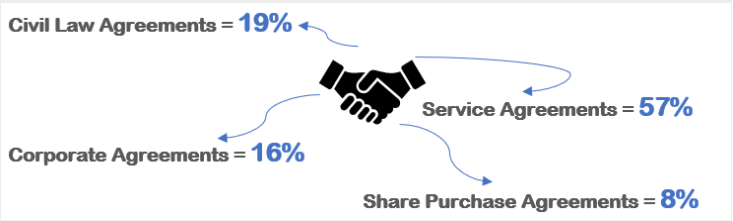
Place of the arbitration

The selection of Brussels as a place of arbitration is a steady trend.

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

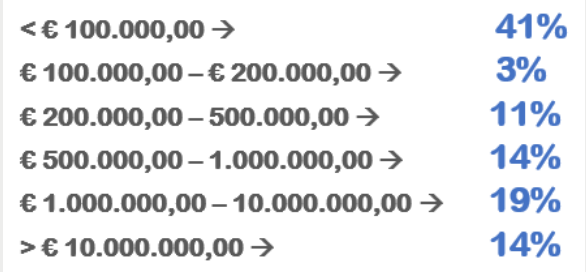
In comparison to 2021, 90% of the cases had Brussels as seat of arbitration, while 10% of the cases had their seat in another city.

Nature of the dispute



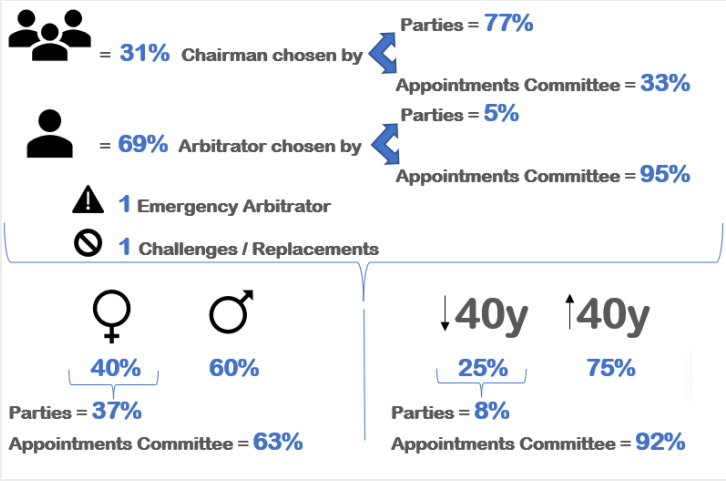
In 2022, 19% of the cases concerned general issues of civil law;
57% related to a service agreement;
8% related to a share purchase agreement; and
16% related to a corporate dispute.

Amount in dispute



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



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.

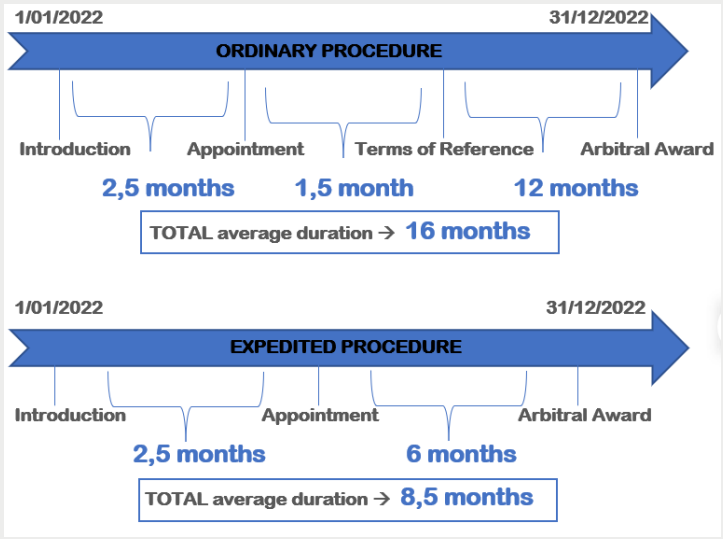
Women in arbitration

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 and in 2020 15% 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 the arbitral proceedings



In 2022, an arbitration procedure administrated under the CEPANI Arbitration Rules lasted 14 months, calculated as follows:

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

The CEPANI Arbitration Rules provide for a one-month deadline for Parties to pay the advance on arbitration costs and the Appointments Committee shall only appoint the Arbitral Tribunal when the advance on arbitration costs has been paid in full.
The delay of 2,5 months in practice is due to delays regarding the payment of the advance on arbitration costs by the Parties.

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

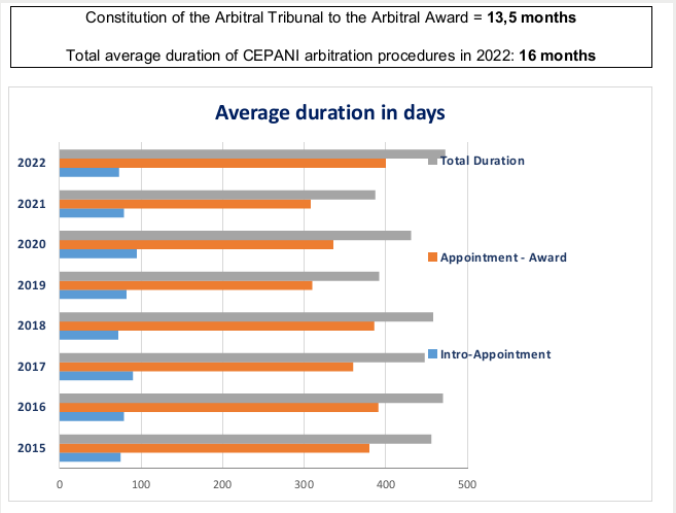
The reviewed Arbitration Rules which entered into force as from January 1, 2020 provide for a one-month deadline. Clearly, Arbitrators – in collaboration with the Parties and their Counsel – have made every effort to meet this short deadline.

Terms of Reference to the Arbitral Award = 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.
It is recommended that the Parties not only send their Counsel to attend this meeting, but also be present themselves. This may positively influence the time limits agreed upon.
The CEPANI Arbitration Rules grant the Arbitral Tribunal a deadline of six months to render its Arbitral Award as from the signature of the Terms of Reference. The average time limit of 12 months is due to the fact that, with the Parties'consent, Arbitral Tribunals often establish Procedural Timetables exceeding –and thus extending –the six-month deadline provided for in the CEPANI Arbitration Rules.

Expedited procedure

Following Article 29 of the CEPANI Arbitration Rules, the expedited procedure shall apply if the amount in dispute does not exceed the amount of €100.000,00 or if the Parties so agree.
In the context of an expedited procedure there are no Terms of Reference.
Moreover, the deadline granted to the Tribunal to make the Arbitral Award is 4 months as of the date of the establishment of the Procedural Timetable.
In comparison with 2021, an expedited proceeding under the CEPANI Rules lasted 6,5 months.



CEPANI Academic Prize 2021

24 May 2023

Niuscha Bassiri
Chair of the jury

For over 50 years, CEPANI, Belgium's "epicentre" of arbitration and mediation, has been on a mission to encourage and propagate academic research and know-how in arbitration, both nationally and internationally. In view of this mission, the young and youngish generation of arbitration practitioners certainly occupy a central place– just look around you. After all, it is the responsibility of young scholars to keep the torch of academic curiosity burning. To channel this noble mission, CEPANI created the Academic Prize.

The aim of this prestigious award is to provide those young professionals, who are interested in arbitration and alternative dispute resolution, with an opportunity to seize a spot for themselves in the world of arbitration, by enabling their works to get greater recognition and wider audience.

CEPANI's Academic Prize is awarded every three years. The contest is open to all candidates under 40. The amount of the prize is 5.000 EUR.

The works under consideration were submitted in 2021, hence this is the 2021 edition. Due to the pandemic, the awarding of this important academic prize has been postponed from 2022 to this year.

The 2021 edition was a great success, consisting of eight superb applications from international practitioners from Belgium, Canada, Egypt, France, Germany, Mexico, Poland and Turkey.

Moreover, the 2021 edition was marked by the overall extremely high quality of the publications in competition as well as diversity of topics.

Four of the publications were in English, three in French and one in Dutch.

The names of the eight authors and their publications that participated in the 2021 edition are the following:

- Ilka Hanna BEIMEL for her work on: "*Independence and Impartiality in International Commercial Arbitration - An Analysis with Comparative References to English, French, German, Swiss, and United States Law*";

- Jonathan BROSSEAU for his work on: "*Applicable Ethical Framework: How the New York and ICSID Conventions Induce Light, Darkness, and Shadow in the Arbitral Space";*
- Karim EL CHAZLI for his work on: "*L'impartialité de l'arbitre - Etude de la mise en œuvre de l'exigence d'impartialité de l'arbitre";*
- Alexander FAVOREEL for his work on: "*Onafhankelijkheid en onpartijdigheid van de arbiter bij vrijwillige, commerciële multi party arbitrage - De samenstelling van het arbitragetribunaal en de mogelijkheid tot wraking bij vrijwillige, commerciële multi party arbitrage";*
- Léonor JANDARD for her work on: "*La relation entre l'arbitre et les parties - Critique du contrat d'arbitre*";
- Rahmi KOPAR for his work on: "*Stability and Legitimate Expectations in International Energy Investments*";
- Sebastián PARTIDA for his work on: "*La convention d'arbitrage dans le droit des nouvelles puissances économiques*";
- Piotr WILIŃSKI for his work on: "*Excess of Powers in International Commercial Arbitration - Compliance with the Arbitral Tribunal's mandate in a comparative perspective*".

Amongst the eight contributions, two were found to be of an exceptional quality and received the highest "marks" from the jury.

The international jury of this edition was composed of the following persons:
- Mr. Patrick BAETEN, Secretary General at Besix;
- **Prof. Stavros BREKOULAKIS,** Professor at the Queen Mary University of London and arbitrator practicing at 3 Verulam Buildings (Gray's Inn), London;
- **Prof. Eric DE BRABANDERE,** Professor at Leiden University**,** Attorney at the Brussels Bar, DMDB LAW;
- Ms. Sophie GOLDMAN, Attorney at the Brussels Bar, Tossens Goldman Gonne;
- Dr. Gabriele RUSCALLA, Attorney at the Paris Bar, Liedekerke;
- **Ms. Niuscha BASSIRI,** chair of the jury**,** Attorney at the Cologne Bar and Member of the Brussels Bar, Hanotiau & van den Berg.

After careful examination of the works submitted and several elaborated deliberations, the jury has decided to award the 2021 edition of the Academic Prize to **Dr. Karim EL CHAZLI** for his thesis on the topic: *"L'impartialité de l'arbitre - Etude de la mise en œuvre de l'exigence d'impartialité de l'arbitre."* Congratulations, Dr. El Chazli!

This work is of exceptional quality. It makes a very significant contribution to the world of arbitration and provides food for thought on a rather complex, but foundational, issue: that of how impartiality of arbitrators is *actually* perceived v. how it *should* be perceived. The piece contains a thorough examination of this issue through an extensive overview of jurisprudence, and it arrives at a clear conclusion with novel thoughts and perspectives.

The jury was particularly impressed by the thought process and the manner in which Dr. El Chazli worked through the lawyers of the topic to arrive at a potential solution when addressing the challenges to impartiality. Dr. El Chazli introduces the concept of the "risk of impartiality", which entails a consideration of factors extrinsic to partiality that play a role in the analysis of impartiality. It is this novelty of perspective presented with clarity that has led the jury to conclude that this work will no doubt be the basis of future debates and – who knows – be the beginning of a game-changing approach towards impartiality of arbitrators.

Moreover, the piece is easy to follow. The analytical rigor is well complemented by structural semblance and clarity of thought. Even non-native speakers with French-language skills will have little difficulty following the comprehensive stock-taking of issues and sub-issues.

The jury was also impressed by the contribution of **Dr. Piotr WILIŃSKI** for his work on: "*Excess of Powers in International Commercial Arbitration - Compliance with the Arbitral Tribunal's mandate in a comparative perspective*". The comparative approach follows a structured methodology with extensive research provided in support. This too is a very easy read of a complex topic, which the jury highly recommends.
From a practical point of view, the litigator, in particular, will value this contribution immensely as it not only provides answers to all questions on the tribunal's mandate, but is also a source of inspiration. Arbitrators, too, will be well-advised to have this excellent paper at hand.

Therefore, the jury awards Dr. Wiliński's contribution with a special mention. Congratulations, Dr. Wiliński!

And, finally, congratulations to all participants! It was a pleasure for the jury to read, review and discuss the wonderful and important contributions of the 2021 edition.

Colloque médiation et arbitrage : premiers réflexes et outils pratiques

2 juin 2023

Guillaume Croisant
Linklaters

Le CEPANI a organisé, le 2 juin 2023, un colloque sur la médiation et l'arbitrage en partenariat avec la Conférence du jeune barreau de Bruxelles et l'institut des juristes d'entreprise, avec le soutien de la FEB (où se déroulait l'événement).

Celui-ci a débuté par une présentation de Mme **Sandra Becker** (médiatrice, PMR-Europe) sur la communication non-violente, en vue de donner de premiers outils en cas de participation à une médiation.

Un premier panel, constitué de **Charlotte De Muynck** (avocate (Monard Law), médiatrice), **Gil Knops** (avocat (elegis), médiateur) et **Vanessa Depoortere** (juriste d'entreprise (Belga Films) et médiatrice) a ensuite évoqué 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 second panel, constitué de Mme **Françoise Lefèvre** (avocate, arbitre, médiatrice), **Lily Kengen** (avocate, Tossens Goldman Gone) et **Jean-François Lerouge** (juriste d'entreprise, Equans) a exposé 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 a exposé, de manière pratique et interactif, 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.

CEPANI40's event on damages and quantum valuation in international arbitration

8 June 2023

Priyanka Shinde
Hanotiau & van den Berg

On 8 June 2023, CEPANI40 organised an event on damages and quantum valuation in international arbitration, an issue some might say is the most important in an arbitration. The event, which was hosted by Liedekerke in Brussels, was divided into two parts: (i) a training workshop; and (ii) a panel discussion.

Introducing and moderating the workshop was **Ms. Iris Raynaud**, a senior Associate at Hanotiau & van den Berg (Brussels). In the training workshop, **Ms. Fabienne Borde**, Managing Director in the Expert Services practice of Kroll (Paris), and **Mr. Benoit d'Udekem**, Vice-President (Brussels) in Analysis Group, shared their key and valuable understanding of how experts assess contractual damages in commercial disputes. The presentation covered a wide range of issues, including: (i) in which cases can quantum experts assist in evaluating damages; (ii) how can quantum experts help establish or contest a claimant's entitlement to damages; (iii) how do quantum experts approach the estimation of damages; and (iv) how do quantum experts account for the passing of time until the Arbitral Award is issued. They used an interactive and examples-based approach to break down complex concepts of quantum valuation so as to help even those unfamiliar with the topic grasp the concepts with ease. From the outset, Ms. Borde and Mr. d'Udekem encouraged questions from the audience, which then led to an interactive discussion between them and the attendees. This interactive discussion was often based on practical experiences the attendees had, wherein they sought the keen insight of Ms. Borde and Mr. d'Udekem to better understand how experts valued the quantum in certain situations and what were the considerations that experts weighed when making their calculations.

The second part of the event, the panel discussion, brought into the room representatives of the three groups of people that are involved in an arbitration when it comes to damages: an arbitrator, a counsel, and the experts in damage valuation.
The panellists included **Mr. Bruno Hardy**, an arbitration counsel from Liedekerke (Brussels), **Ms. Niuscha Bassiri**, a seasoned arbitrator and Partner at Hanotiau & van den Berg (Brussels), and two damages valuation experts, **Mr. Matthias Cazier-Darmois**, a Partner at HKA (Paris), and **Ms. Battine Edwards**, a Forensic Partner at Deloitte Forensic (Paris). Moderating the panel was **Ms. Beatrice Van Tornout**, a Senior Associate at Liedekerke (Brussels).

The topics that were touched on by the panel covered both practical and academic issues that arise in an arbitration. For example, one of the issues the panel engaged in was when it came to causality, what role did a quantum expert play, what is their added value and the boundaries they adhere to. A common thread amongst the panellists was that there are two aspects to causation: the issue of causation as a legal question and the issue as a factual question. From a counsel's perspective, Mr. Hardy explained that the value is added when we have experts involved in the case from the beginning as they open a box of facts on counterfactuals, which more often than not, counsel do not turn their mind to. From a tribunal's perspective, Ms. Bassiri explained that the most convincing way of dealing with this issue would be to have an industry specific expert explain the assumptions made and the quantum expert to use those assumptions in their calculation. From the damages expert's perspective, Mr. Cazier-Darmois and Ms. Edwards touched on the boundaries they set depending on the extent of documentation available, especially when looking at the "but for" scenarios.

Another interesting discussion that took place concerned the effect of instructions counsel give to experts. From the expert's perspective, both Mr. Cazier-Darmois and Ms. Edwards shared that the instructions essentially set the scope of assessment the expert carries out. Mr. Cazier-Darmois drew a distinction between good instructions, which aim to keep the expert focused on things that fall within their expertise, and the not so good instructions, which tend to sensor the expert's opinion on matters that can harm the case. Ms. Bassiri added to this discussion, and explained that, more often than not, to get away from the "hired gun" image that is often painted of experts, an expert can maintain credibility before the tribunal by stating the kind of assumptions and instructions counsel has given to the expert.

The panel did not shy away from discussing one of the more prevalent topics in international arbitration: the current and prospective impact of Artificial Intelligence on damages valuation. Other issues that were discussed included (i) the strategic decisions related to procedure when it comes to expert reports; (ii) difficulties experts deal with when there is either too much or to little data; (iii) some problems faced when it comes to damages analysis; (iv) recommendations about the flow of documents between parties' counsel; (v) tips for preparing experts for cross-examination; and (vi) an expert's code of ethics.

Guillaume Croisant (Linklaters Brussels), CEPANI40's Co-Chair, concluded the event with a few words on upcoming CEPANI40's activities and on the Equal Representation for Expert Witnesses (ERE) Pledge (see more here: https://www.expertwitnesspledge.com/take-the-pledge)

The participants could then continue the discussion during a drink reception.

Belgium's Supreme Court overturns decades-old precedent and allows disputes about the termination of exclusive distribution agreements to be settled by arbitration, even if governed by foreign substantive law

Pascal Hollander
Partner, Hanotiau & van den Berg

As well known by Belgian practitioners, in its landmark decision *Audi-NSU/Adelin Petit* of 28 June 1979, the Belgian Court of cassation, referring to article 4 of the Law of 27 July 1961 on the Unilateral Termination of Exclusive Distribution Agreements (nowadays incorporated in the Belgian Code of Economic Law as its Article X.39), which provides for the jurisdiction of the Belgian courts on disputes falling within its scope of application and which mandates such Belgian courts to apply Belgian law regardless of the law designated by the parties, had ruled that disputes pertaining to the termination of distribution agreements carried out in whole or in part on the Belgian territory could not be settled by arbitration agreed upon before the termination if arbitration had as object and effect the application of a foreign law. It had therefore rejected the appeal against a decision of the lower court that had refused the enforcement in Belgium of an arbitral award rendered in Switzerland and applying Swiss law as foreseen by the exclusive distribution agreement between a Belgian distributor and a German supplier. In a 1988 decision, the Court of cassation had refined its holding by stating that these disputes were arbitrable only if the arbitrators were obliged to apply Belgian substantive law.

Given that the 1979 decision was about the recognition and enforcement in Belgium of a foreign award, a controversy arose as to whether the same restricted arbitrability criterion (the obligation for the arbitrator to apply Belgian substantive) applied also when a court had to decide on a plea of denial of jurisdiction raised by a foreign party brought before a Belgian court by a Belgian distributor, in disregard of an arbitration clause in the distribution agreements. By three decisions rendered in 2004, 2006 and 2010, the Court of cassation held that when assessing the arbitrability of a dispute, the lower court may have regard to its *lex fori* and must reject arbitration if any provision of the *lex fori* (*i.e.* Belgian law) declares a dispute non-arbitrable. As the disputes giving rise to these three decisions were about the termination of exclusive distribution agreements carried out in Belgium, the Court of cassation clearly stuck to its 1979 precedent when deciding whether the lower court had erred or not in deciding whether it had jurisdiction over the dispute in the presence of an arbitration clause binding the parties.

In its *Air Transat* decision of 3 November 2011, the Court of cassation expanded its 1979 holding also to disputes about commercial agency agreements (governed by another statute providing for a similar rule giving jurisdiction to Belgian courts where the agent has its principal place of business in Belgium), which it held to be non-arbitrable unless the arbitrators were bound to apply Belgian substantive law or the law of another country providing for a similar substantive protection for the commercial agent.

The criticism against the protectionist stance of the Court of cassation increased in recent years, due to two different but converging grounds.

On the one hand, with the 2013 revision of the Belgian arbitration law, the general criterion of arbitrability of disputes set by article 1676 of the Judicial Code was relaxed: any patrimonial dispute (thus ultimately involving a right that can be ascribed a monetary value) became arbitrable unless expressly provided otherwise in a particular law. As the existing limitation to the arbitrability of disputes concerning the termination of distribution agreements was not expressly stated in the law but came from the interpretation thereof in the 1979 decision of the Court of cassation, some scholars and lower courts opined in favour of unrestricted arbitrability of such disputes.

On the other hand, still in 2013, the Court of Justice of the European Union ("ECJ") issued its ruling in the UNAMAR case (a dispute between a Belgian commercial agent and a Bulgarian principal), stating the conditions under which a choice of law made in accordance with the Rome Convention on the Law Applicable to Contractual Obligations (the "Convention") (the predecessor of the Rome I Regulation No 593/2008 on the Law Applicable to Contractual Obligations (the "Regulation")) could be derogated from to give effect to overriding mandatory provisions ("lois de police") of another law. The ECJ stressed that the parties' autonomy in designating the law applicable to their contractual relationship was the cornerstone of the Convention (and therefore also of the Regulation) and that the derogation thereto in favour of another "loi de police" susceptible to apply to the situation in dispute should be *restrictively* considered. The ECJ stressed in particular the definition of overriding mandatory provisions in Article 9.1 of the Regulation, which are "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation*".

Some legal scholars expressed the opinion that the holding of the CJEU's *UNAMAR* decision could potentially lead to an evolution of the doctrine strictly abided until then by the Belgian Court of cassation. In an article authored in 2014 by the undersigned (P. Hollander, "L'arrêt UNAMAR de la Cour de justice : une bombe atomique sur le droit belge de la distribution commerciale ?", *J.T.*, 2014, p. 297-301), the *UNAMAR* decision had been dubbed a potential '*atomic bomb'* on the Belgian commercial distribution laws, as it was foreseen that its holding could apply not only to disputes relating to the termination of commercial agency agreements but also to exclusive distribution agreements and, if followed by the Court of cassation, this would mean the end of the restricted arbitrability of such disputes.

These are precisely the two grounds on which the Belgian Court of cassation relied in a decision rendered on 7 April 2023 where, after extensively quoting the *UNAMAR* decision, the Court decided that (i) disputes concerning the termination of distribution agreements are patrimonial and may thus in principle be settled by arbitration; (ii) articles X.35 to X.39 of the Code of Economic Law aim at protecting private interests and therefore do not qualify as "overriding mandatory provision" ("lois de police") under Article 9.1 of the Rome I Regulation; and (iii) therefore, a Belgian court may not make the arbitrability of a dispute relating to the termination of an exclusive distribution agreement, to which the Rome I Regulation applies,

depend on whether Belgian law (or a law offering a similar protection to the distributor) applies or not.

The Court held in particular:
"*It follows […] from the principle of the primacy of European Union law over national law that the Belgian court seized with a dispute over the termination of an exclusive distribution agreement to which the Rome I Regulation applies, notwithstanding the provisions of Article X.39 Code of Economic Law, cannot override the foreign law chosen by the parties to apply the aforementioned Belgian provisions.*

It also follows that the Belgian court may not make the arbitrability of a dispute concerning the termination of a concession of exclusive distribution to which the Rome I Regulation applies subject to the condition that the arbitrators will apply the aforementioned Belgian provisions or a foreign law offering equivalent protection." (Unofficial translation)

Given that the Rome I Regulation applies to all contracts concluded after its entering into force on 17 December 2009 (and that the holding of the *UNAMAR* decision relied upon by the Court of Cassation concerned the Convention, that came into force in 1991), it can be said that the Court of cassation's decision of 7 April 2023 concerns all agreements entered into since 1991. As for the agreements entered into before that date, Article 98 of the Belgian Code of Private International Law refers to the rules of the Rome I Regulation. With this judgment, the Belgian Supreme Court has thus widely opened the door to the arbitration of disputes concerning the termination of distribution agreements carried out in Belgium, regardless of the substantive law chosen by the parties to apply thereto and regardless of the time when the agreement was entered into. And the reasoning of the Court can certainly expand to disputes about commercial agency agreements.

The '*atomic bomb'* has exploded!

Le CEPANI participe à la mission économique princière au Sénégal

21-25 mai 2023

Emma Van Campenhoudt
Secrétaire générale, CEPANI

CEPANI a participé à la mission économique qui s'est déroulée au Sénégal du 21 au 25 mai 2023 sous la présidence de Son Altesse Royale la Princesse Astrid, Représentante de Sa Majesté le Roi.

La mission princière au Sénégal, organisée principalement par Hub-Brussels a connu un franc succès avec près de 370 membres de la délégation. Dans le cadre de cette mission, Hub-Brussels a mis sur pied plusieurs séminaires qui se sont tenus le 22 mai 2023 à Dakar. L'un d'entre eux portait sur le secteur des services et a permis de mettre à l'honneur plusieurs entreprises belges actives dans ce secteur. Le CEPANI figurait parmi elles et y était représenté par Aimery de Schoutheete, qui s'est attaché à promouvoir Bruxelles comme place d'arbitrage et du CEPANI comme institution arbitrale.

NEWS

» **31 August 2023 – CEPANI40's Summer Drinks (3rd edition)**

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CEPANI 40

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Places are limited

» **22 septembre 2023 (12-14h) – déjeuner-débat avec Pascal Hollander – « L'arrêt THIBELO de la Cour de cassation du 7 avril 2023 : une chance pour l'arbitrage et/ou un champ de ruine pour le droit belge de la distribution commerciale ? »**

Comme exposé ci-avant, la Cour de cassation vient d'opérer un revirement spectaculaire de sa jurisprudence en matière d'arbitrabilité des litiges relatifs à la fin d'un contrat de concession de vente exclusive exécuté sur tout ou partie du territoire belge, en décidant que ces litiges sont arbitrables même si les arbitres appliquent un droit étranger. La Cour a justifié cette décision par son analyse selon laquelle les articles X.35 à X.39 du Code de droit économique (ex-loi du 27 juillet 1961) ne constituent pas des dispositions de lois de police au sens de l'article 9.1 du Règlement Rome I et que, vu la primauté du Règlement sur la loi interne, le choix par les parties d'un droit étranger doit être respecté.

Cette décision va engendrer un bouleversement fondamental dans le contentieux du droit de la distribution, mais aussi dans la négociation des contrats de concession de vente (et d'agence commerciale). Ces conséquences seront abordées par Pascal Hollander à l'occasion d'un déjeuner-débat le 22 septembre 2023.

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