CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

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Editors in chief: Maxime Berlingin, Maarten Draye, Sophie Goldman and Sigrid Van Rompaey

AGENDA

9 MARCH 2017	(14:00-17:00)	Half day colloquium: Third Party Funding in Arbitration
3/4 APRIL 2017	(00:00-00:00)	Pre-Moot 2017 on 3rd and 4th April 2017
8 JUNE 2017	(16:00-18:30)	Assemblée Générale/ Algemene Vergadering/ General Assembly

REPORTS

REPORT ON THE CEPANI40 LUNCH DEBATE ON "IMPORTANT ADVICE FOR HOW TO DRAFT AN UNENFORCEABLE AND LOUSY AWARD - OR THE IBA TOOLKIT FOR AWARD WRITING"

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Litigation and arbitration lawyer
(Brussels)

On 30 January, Dr. Rouven F. Bodenheimer (lawyer, co-founder of Bodenheimer Herzberg and co-chair of DIS40) was CEPANI40's guest speaker on a challenging and unusual topic, which aimed at giving advice on how to draft an unenforceable and lousy award. Dr. Bodenheimer delivered a speech by taking the opposite side of the recently released IBA Toolkit for Award Writing, an IBA Arb40 Subcommittee project to which he substantially contributed.

Parties to an arbitration proceeding may fear to receive an award, which would face grounds for refusal to enforce. How can such a situation arise? Dr. Bodenheimer gave several reasons for an award to be unenforceable: an arbitrator may simply ignore legal issues such as public policy or he may not meet the formal requirements of an award, for instance, by omitting the signature, the date or the place of arbitration. Among the general considerations of Do and Don't addressed by Dr. Bodenheimer are (i) the drafting of an award that does not observe the time limits; (ii) the decision of the arbitrator not to render a final award but only interim awards or to issue an award in a language that only the arbitrator understands, (iii) using Latin quotations without relevance to the case. Dr. Bodenheimer gave many other examples leading to an unenforceable and lousy award. He cited the case where the arbitrator may render an award without giving any reasons on how he reached its decision, so the award sounds incomprehensive to the parties.

By discussing these issues in an amusing way, the speech of Dr. Bodenheimer was a good opportunity to recall the responsibility of an arbitrator and the importance of drafting an award with the purposes of its

enforcement, especially by those who are in the early stages of their practice as an arbitrator. Drafting an award for young practitioners may at first be daunting as it may raise practical and legal questions. In that regard, Dr. Bodenheimer outlined that the IBA Toolkit aims to provide practical advice and guidance for drafting an award. The IBA Toolkit indeed contains tips and techniques for writing an award in an effective and consistent way as well as a useful checklist.

The lunch-debate ended with an exchange of views and recommendations between Dr. Bodenheimer and the audience, including on the interesting question of how to address dissenting and separate opinions in the text of the award.

REPORT ON SIXTY-SIXTH SESSION OF THE UNCITRAL WORKING GROUP II (ARBITRATION AND CONCILIATION)

Sigrid Van Rompaey
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Matray, Matray & Hallet (Antwerp)

The Sixty-sixth session of the Working Group II (Arbitration and Conciliation) was held in New York from 6 until 10 February 2017. CEPANI was represented by Dirk De Meulemeester, Jean-Francois Tossens, Vanessa Foncke, Maarten Draye and Sigrid Van Rompaey. The Belgian observer seat was taken by Mr. Jean-Christophe Boulet (advisor at the Belgian Ministry of Justice), Prof. Benoît Allemeersch and Prof. Benoît Kohl.

During this sixty-sixth session the Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation. The aim of the instrument is to promote conciliation and provide for an easy and fast enforcement which would further contribute to the development and promotion of conciliation.

Mainly the following four outstanding issues were on the agenda of the Working Group:

1. Legal effect of settlement agreements

Concerns were raised about the meaning of the phrase “legal effect” as it was ambiguous, including whether it referred to the substantive or procedural legal effect. Alternative texts were proposed that would make it clear that a settlement agreement could be used as a defence if the conditions set out under draft provision 3 “Application” were met and there were no grounds for refusing enforcement under draft provision 4 “Grounds for refusing to give legal effect to, or to enforce, a settlement agreement”.
Common ground was found to replace the phrase “legal effect” throughout the entire instrument.

2. Settlement agreements concluded in the course of judicial or arbitral proceeding

The Working Group recalled its understanding that (i) settlement agreements reached during judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards should fall within the scope of the instrument; and (ii) the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument.

3. Opt-out or opt-in for the parties to the settlement agreement;

A declaration by States regarding the effect of an opt-in by the parties
The opt-out or opt-in issue had been widely discussed at the previous session in Vienna.

Considering the divergence in views, the Working Group heard the suggestion that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement could be left to States when adopting or implementing the instrument. For example, if the instrument were to be a convention, a State could be given the flexibility to declare that that it would apply the convention only to the extent that the parties to the settlement agreement agreed to its application. However, it was pointed out that providing flexibility to Sates to formulate declarations to that effect might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between parties in different jurisdictions as a settlement agreement might be enforceable in one but not in another.

4. Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

Diverging views were expressed regarding the inclusion of defences for resisting enforcement of settlement agreements. The discussion focused mainly on the terms ”manifest failure of the conciliator to maintain fair treatment of the parties” and the ”non-disclosure by the conciliator of circumstances likely to give rise to justifiable doubts as to its impartiality or independence”. Some of the observers argued that terms like ”manifest” and ”fair treatment” should be avoided as the interpretation could be highly divergent from one State to another.

The efficiency of the Chair and the UNCITRAL Secretariat combined with the constructive cooperation of participants allowed the Working Group to make a significant progress in finalizing the draft provisions up for discussion.

We look forward to the continued discussion in Vienna during the sixty-seventh session in September 2017.

REPORT ON THE ANNUAL CONFERENCE OF THE BELGIAN CHAPTER OF CEA ON “ARBITRATION IN HIGHLY REGULATED SECTORS: ENERGY, TELECOM, PHARMA, BANKING & FINANCE”

Jose Mata Dona
Arbitrator and accredited mediator (Brussels)

On 17 February 2017, the Belgian chapter of the Spanish Arbitration Club held its second annual Conference on the topic: “Arbitration in Highly Regulated Sectors: Energy, Telecom, Pharma, Banking & Finance”. Kindly hosted and sponsored by Linklaters, the event had the support of the Belgian arbitral organization CEPANI, ICC International Court of Arbitration, ICC Belgium International Chamber of Commerce, the German Arbitration Institution and the Milan Arbitration Chamber.

The keynote speaker, Professor Bernardo Cremades outlined, on one hand, several considerations relatingto the level of complexity of investment and commercial arbitration in the aforesaid sectors, including issues such as: a) expert witnesses, b) unnecessary costs, c) public policy matters related to competition law and climate change, d) multilayered application of legal rules, e) parallel proceedings and f) rapid regulatory changes. On the other hand, Professor Cremades highlighted the potential of those sectors for arbitration, especially the financial sector.

With participants from Venezuela to Russia and an audience of over 100 attendees, the program continued with four round tables. The speakers came from Brussels, Cologne, Geneva, Zurich, Lisbon, London, Madrid and Paris. Expressing their own personal views and opinions, the panel were composed of trade regulatory affair experts, members of the regulatory authorities, foreign arbitral institutions, the Energy Charter Secretariat and prominent practitioners from renowned international and local law firms.

I. ENERGY

The first-round table addressed the energy sector and was composed of Yulia Selivanova, (Independent Practitioner, Brussels), Alejandro Carballo Leyda (Energy Charter General Counsel, Brussels) and Hermenegildo Altozano (Bird & Bird, Madrid).

To introduce the topic, Yulia Selivanova referred to the numerous cases brought against Spain in the sector of renewable energy. She then invited the speakers to identify elements that could bring certainty to future investors.

Notwithstanding any lessons learned from the past, it is not possible to guarantee certainty to investors. However, special administrative contractual concessions from host States was identified as one of the best practices.

II. TELECOMMUNICATIONS

The second-round table was composed of David McIlwaine (Pinsent Masons, London), Noradèle Radjai (Lalive, Geneva) and Virginia Rodríguez Serrano (CNMC, Subdirección de Regulación de Comunicaciones Electrónicas, Madrid) addressed the telecommunication sector with its different types of disputes: conflicts between regulators and service providers, competition, investment, consumers, private contractual and interconnection disputes. The place of arbitration is overlooked as being the result of the "lack of expert decision makers in litigation" plus "judges with heavy caseloads and limited time". All of this in fast-paced markets with a need for protection of confidential information.

This vision was complemented with the results of the 2016 International Dispute Resolution Survey released by Queen Mary University of London. Further, the panel discussed the Spanish provisions of the General Telecommunications Act, the legislative Act that constituted the Spanish National Commission of Markets and Competition (CNMC) and the case law that set apart the classic dispute resolution function and the arbitration role of the CNMC. In general terms, ITechLaw was recommended as an educative forum to explore.

III. PHARMACEUTICAL PRODUCTS

The third-round table addressed the sector of pharmaceutical products. The panel, composed of Nuno Salazar Casanova (Uría Menéndez - Proença de Carvalho, Lisbon), Kenneth Beale (Boies, Schiller & Flexner LLP, London) and Simon Gabriel (Gabriel Arbitration, Zurich), initially covered the intersections of Investment Arbitration and Pharmaceuticals by means of a showcase of property, patent and regulatory disputes (See, Hourani v Kazakhstan, Eli Lilly v Canada and the Apotex v USA cases). This first intervention was closed with some considerations on TPP and the future. Then, the panel analysed two specific approaches to arbitration of pharmaceutical products taken from the Swiss and Portuguese experience.

IV. BANKING & FINANCE

The last round table addressed the banking & finance sector discussing the changing horizons of financial disputes. This panel was composed of James Menz (Deputy Secretary General of DIS and Head of Case Management, Cologne), Dirk van Gerven (President of the Supervisory Board of the FSMA, Vice-president of CEPANI, Partner with NautaDutilh – Brussels), Georges Affaki (Independent Arbitrator, Professor of Law, Affaki Avocats, Paris). They discussed the new ICC report on Financial Institutions and International Arbitration by presenting its new empirical findings and the reasons behind the perceived reluctance of banks to embrace arbitration for their core business. One of the listed reasons was that arbitration is not used to its full potential. The panel also remarked the relatively new opening of investment arbitration towards banking as financial investment instruments "ranging from straightforward loans to negotiable instruments, securities and oil hedges are qualified as investments under the relevant treaties". In general terms, P.R.I.M.E. was mentioned for its list of experts in the sector.

The event finished with some insightful closing remarks by Linklaters Global Head of Arbitration, Françoise Lefèvre, and was followed by a cocktail reception.

NEWS

» 4TH BRUSSELS PRE-MOOT

The 4th Brussels Pre-Moot will be held on 3rd and 4th April 2017.

The Brussels Pre-Moot is a pre-competition for the popular Willem C. Vis International Commercial Arbitration Moot on International Sales Law and International Arbitration in Vienna and Hong Kong. The Pre-Moot will help the teams to improve their pleading skills just before the official Moot in Vienna. This year's edition of the competition is based on the CAM-CCBC Rules (Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada).

For more information and to enroll as an arbitrator, please go to www.brusselspremoot.be.

» CEPANI 40 EVENT DURING THE VIS MOOT IN VIENNA

The 24th edition of Willem C. Vis International Commercial Arbitration Moot will take place from 6 to 13 April 2017 in Vienna. The traditional CEPANI 40 networking drink (co-hosted by Lydian) will be held on Saturday 8 April 2017 from 4:30 to 6:00 PM at Planter's Club. For more information and registration, see here.

» ICC APPOINTS NEW ICC COURT SECRETARY GENERAL AND DEPUTY SECRETARY GENERAL

The International Chamber of Commerce (ICC) has announced the appointment of Alexander G. Fessas as Secretary General of the ICC International Court of Arbitration ("ICC Court") and Director of ICC Dispute Resolution Services and Ana Serra e Moura as Deputy Secretary General of the ICC Court. They will respectively succeed Andrea Carlevaris and José Ricardo Feris who are returning to private practice at the end of May.

» THE ICC REVISED RULES OF ARBITRATION

The ICC Revised Rules of Arbitration will apply from 1st march 2017. The new rules are available here.

VARIA

- 6 APRIL 2017: a half-day seminar co-hosted by YIAG and the Moot Alumni Association will be held during the Vis Moot in Vienna. The topics are "Security for Costs" and "Time limits and commencement of arbitration".

- 8 APRIL 2017: ICC YAF and YAAP are organizing their joint annual conference during the Vis Moot in Vienna, on the topic: “Young approaches to arbitration”.

- 24 APRIL 2017: The first 1st ICC European Conference on International Arbitration will be held in Paris.

- 25 APRIL 2017: the next ICC Commission on Arbitration and ADR will be held in Paris.

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