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

30 JANUARY 2017	(12:00-14:00)	CEPANI40 Lunch debate on "Important advice for how to draft an unenforceable and lousy award - or the IBA Toolkit for Award Writing"
17 FEBRUARY 2017	(13:30-18:50)	CEA Event on Arbitration in Highly Regulated Sectors: Energy, Telecom, Pharma, Banking & Finance
23 FEBRUARY 2017	(17:30-20:30)	London event: The Place of the Arbitrator
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

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THE STATE OF THE INSTITUTE – A WORD FROM THE CEPANI PRESIDENT

Dirk De Meulemeester
CEPANI President

Looking back on the last two and a half years much work has been done by so many of you for which CEPANI is extremely grateful.

Administering cases is the fundamental core of CEPANI's work, therefore a lot of effort has been made by the Secretariat to further enhance our services. The working group on Effective Case Management, which was created in June 2014, focused on more efficiency and quality. To begin with, more stringent guidelines were put into place to help the arbitrators meet the necessity of a swift and efficient resolution of cases. The working group pursued its work by introducing the use of an online platform named "Box" for the CEPANI Secretariat, counsel and arbitrators. At the same time, the CEPANI website drew parties' attention to the fact that the secretariat highly recommends, in accordance with the CEPANI Arbitration Rules, to submit Requests for Arbitration and Exhibits in electronic form. Last but not least and coming soon is the implementation of a formal scrutiny of awards in order to improve the CEPANI awards general accuracy, quality and persuasiveness.

Fostering arbitration is the second overall task of CEPANI. It goes without saying that training is essential in order to meet the demand of arbitration users for highly skilled arbitrators and mediators. The CEPANI Arbitration Academy and the CEPANI ADR Academy were created pursuing that goal. In 2014, a clear focus was set on the International dimension. More than ever CEPANI travelled the world. A clear framework was set up whereby up to nine CEPANI members attend the UNCITRAL Working Group II on arbitration twice a year. CEPANI plays a more active role in IFCAI (The International Federation of Commercial Arbitration Institutions); we organize roadshows abroad; we continue to attend the missions of our government under the guidance of HRH Princess Astrid; and we took the Arbitration Academy on tour. In addition, and in order to promote Brussels as a place for arbitration, we are working with ICC Belgium on ways to promote and facilitate hearings in Brussels. Lastly, the working group that drafted the 2013 Arbitration law submitted some final changes to the law which was published in the Belgian State Gazette on 9 January 2017.

CEPANI also opened its doors for those who legitimately seek access to the Belgian arbitration community. For that reason the Board of Directors agreed to enter into Partnerships. The first agreement was concluded with HLTrad (Legal and Financial Translation Specialists) in the historic Alabama room in Geneva. Partners of CEPANI are enterprises with the highest standards, immaculate reputation and leaders in their field and cannot be party to an arbitration proceeding administered by CEPANI in any way. Other Partnerships will be announced in the months to come. In addition, and in order to improve the fractioned appearance of our arbitration landscape, CEPANI also reaches out to other leading organizations that foster alternative dispute resolution in a genuine way. A first agreement in that respect was signed with bMediation during the Mediation Summit just a couple days ago.

Arbitration practice is constantly evolving. CEPANI must adapt accordingly to answer the needs of the users. For the period to come, besides our continued and significant effort in improving the quality of our services, the focus will turn to the domestic level. Three main goals are set. Firstly, we will work on different business models like the one we have in place for many years now with DNS Belgium. Secondly, we will prepare the further evolution of our arbitration rules, for them to come into force on 1 January 2019. Thirdly, we will prepare the 50th anniversary of CEPANI.

I wish you an outstanding 2017

REPORT ON THE CEPANI40 – ICC YAF JOINT EVENT ON "ARBITRATING INTRA-CORPORATE DISPUTES"

BRUSSELS,
9 DECEMBER 2016

Kevin Ongenae
Associate at Jones Day
(Brussels)

On Friday 9 December 2016 CEPANI 40 and ICC YAF joined forces to organise a conference concerning intra-corporate disputes ('ICD'). The event truly put the 'i' in 'ICC', with speakers and participants from the Ukraine, Switzerland, France, Poland, the UK, etc. All were welcomed in the offices of Jones Day, which co-sponsored the event with Matray, Matray & Hallet.

The stage was set by Benoît Kohl. The afternoon consisted of two panels of three speakers each discussing a specific topic in intra-corporate arbitration. Each panel was skillfully moderated by, respectively, Diamana Diawara and Gautier Matray and each topic was discussed (and each panelist subjected to rigorous questioning) by Emilio Villano and Luigi Cascone.

After an enthusiastic introduction of the overarching topic by Manuel Arroyo, Vanessa Foncke kicked off by setting out the main challenge of intra-corporate arbitration, i.e. the arbitrability of ICD. The second speaker, Joseph Lee, provided a lively analysis concerning the role of arbitration in attaining efficient management accountability in the investment fund business. Maarten Draye tied in with Ms Foncke's topic again, with a deeper analysis of two of the reasons behind some jurisdictions' reluctance to allow ICD arbitration, i.e. the public interest and third party rights.

After the coffee break, Olexander Droug discussed the possibility and desirability of interim measures in ICD, while Roberto Oliva discussed the effects of arbitral awards concerning ICD. Bartłomiej Jarco considered the discretion the courts have when reviewing such arbitral awards.

The trend was, as keynote speaker Manuel Arroyo summarised, clearly in favour of arbitration. After that, everyone was clearly in favour of cocktail receptions

REPORT ON "ARBITRATION MEETS THE COMPETITION AUTHORITIES"

BRUSSELS,
13 DECEMBER 2016

Anouk Focquet
Senior Associate, Contrast
(Brussels)

On 13 December 2016 CEPANI, with the support of DG Competition, FEB and BSC, organized a colloquium regarding arbitration and competition law. The goal of the colloquium was to "*foster a better understanding of competition law by the arbitration world and share with DG Competition and national competition authorities insights as to the handling of competition law by the arbitration world*". The open and lively debates, introduced by Mr. Dirk De Meulemeester, did just that and more.

Mr. Eddy De Smijter and Phillippe Lambrecht kicked-off the colloquium by presenting the current situation in the relationship between the arbitration world and competition law. The conclusion is clear: there is a fragile relationship at best. Both Mr. De Smijter and Mr. Lambrecht conducted a survey on the interplay between competition law and arbitration; Mr. De Smijter from the competition authorities' side and Mr. Lambrecht from the arbitrators' side. It appears that none of the 20 national competition authorities that answered the survey have ever been in contact with arbitrators. An "*overwhelming*" number of arbitrators indicate that it would have been of help to be able to consult European or national competition authorities when confronted with competition law issues. More than 65% of arbitrators that participated in the survey indicate to have been confronted with questions relating to competition law.

A striking observation from the survey conducted among arbitrators was definitely that approximately 15% of arbitrators considers that competition law must not be taken into account (at least when it is not brought up spontaneously by the parties). The recommendation from Mr. De Smijter is nonetheless clear in this respect. Articles 101 and 102 TFEU must be applied by national courts ex officio. Because of judicial review of arbitral awards, arbitral tribunals "*at least have a clear interest*" in applying competition law, "*if not an obligation*".

Mr. Vincent Smith continued by providing participants more in-depth insight into ECJ case law regarding the judicial review of arbitral awards. Again, the conclusion is clearly that judicial review is a reality that arbitrators must take into account when handling competition law issues.

The round of individual presentations was concluded by Mr. Didier Matray with the "hottest" topic in competition law today: recovery of private damages for competition law infringements. Mr. Matray explained the main principles of Directive 2014/104/EU on antitrust damages actions of 26 November 2014: among others, easier access to evidence through disclosure of certain categories of evidence, joint liability and legal consequences of "passing on". EU member states should have implemented this Directive in their legal systems by 27 December 2016. Several governments, among others the Belgian government, have however missed this two-year deadline to enact the new damages legislation.

The Directive encourages victims of competition law infringements to obtain compensation, among others, through arbitration. Mr. Matray pointed out that the main difficulty in this respect will lay in proving that damages actions fall within the scope of the arbitration clause. The Directive does not address this issue. Parties could of course solve the issue by entering into an arbitration agreement *ex post*. Both Mr. Matray and Mr. Smith referred in this respect to the *CDC v. Akzo Nobel et al.* case (C-352/13). The ECJ's silence in this case regarding the scope of arbitration clauses (as opposed to its restrictive interpretation of jurisdiction clauses and the opinion of the Advocate General) may, according to Mr. Matray, be considered as rather arbitration friendly. As Mr. Smith concluded: "*more on the horizon?*"

Mr. Matray also touched upon the matter of preliminary questions to the ECJ. Today, the ECJ refuses to answer questions from arbitral tribunals.

This issue was further discussed during the concluding panel debate among Mr. Eddy De Smijter, Mr. Jacques Steenbergen, Mr. Jean-Paul Vulliéty and Mr. Philippe Sarrailhé, chaired by Mr. Frank Wijckmans.

Mr. Wijckmans set the scene for the debate by opening with the statement that competition law provides tremendous potential for the arbitration world, especially compared to court cases. Arbitration cases allow more time for pleadings, are more suited to handle complicated document requests, offer more room to involve experts and guarantee confidentiality. Mr. Sarraihlé referred to a study of Queen Mary University (the School of International Arbitration) to confirm this statement. The study finds that competition law will become an increasing market for litigation and arbitration. Also according to the study, competition law is today the 5th most important area for dispute resolution. This demonstrates how important competition law is likely to be in the field of arbitration. In addition, while arbitration is for most parties the preferred forum for such cases, today there is still more litigation. This mismatch must be looked into in the future; the colloquium has taken the first steps in this respect.
Subsequently, the panel debate focused on the following topics, as raised during the individual presentations:

- **The obligation to apply competition law *ex officio***. Together with Mr. De Smijter, all experts were unanimous on this point: arbitral tribunals must apply competition law *ex officio*, i.e. even when they are not asked by the parties. This does not qualify as ruling *ultra petita*, according to Mr. Jean-Paul Vulliéty. According to Mr. Sarraihlé arbitrators do not only have the power to raise competition law issues *ex officio*, they have a duty to do so. Mr. Steenbergen stressed that the real issue in arbitration is: "*what will the review court do? It will look at competition law. Therefore, arbitration must take into account competition law in order to avoid annulment.*"
- **Preliminary rulings**. As pointed out by Mr. Matray, the ECJ refuses to answer questions from arbitral tribunals. The survey presented by the FEB included the question whether it may be useful for arbitrators to be able to consult with competition authorities. Mr. Sarraihlé mentioned the possibility that arbitrators obtain advice from the competition authorities when applying article 101(3) TFEU (in case of consent from the parties). In this respect, Mr. Steenbergen explained that the Belgian competition authority could indeed provide assistance in the form of *amicus curiae*. The procedure of informal guidance seems excluded as such procedure can only apply to practices that have not yet been implemented. Arbitral tribunals (and parties) should however be careful when contacting a competition authority as they risk signaling a potential issue to an investigative authority.
- **The arbitrability of competition law infringements** in light of the *CDC v. Akzo Nobel et al.* case. Adding to the presentations of Mr. Smith and Mr. Matray, Mr. Sarraihlé recommended in this respect that arbitration clauses are drafted carefully, including tort claims and the possibility to agree on an arbitration agreement *ex post*. This may avoid (some of the) discussions regarding arbitrability in case a competition law issue arises *post factum*.
- **Access to evidence**. Mr. Matray, Mr. Sarraihlé and Mr. Vulliéty all pointed out that under the new private damages Directive arbitral tribunals do not have the same status as national courts with regard to the disclosure of evidence. If a party has an interest in not disclosing certain evidence, the arbitral tribunal (or the other part(y)(s)) will have to apply to the competent national court in relation with taking of evidence issues. Another (indirect) solution, offered by Mr. Vulliéty, is to include in the terms of reference that the arbitral tribunal shall be entitled to infer a negative conclusion if a party does not bring forward certain evidence ordered by the arbitral tribunal.

The viewpoint that was generally shared by the panelists is that the arbitration world has a clear interest in embracing (the application of) competition law in arbitration cases. Certainly some obstacles will have to be faced. At the same time, the importance of certain issues should not be overstated. As regards preliminary rulings from the ECJ, for example, these often do not bring the concrete input which arbitrators may hope to receive. Hence, it should be carefully considered whether this is a point worth fighting for.

In order to make sure that this colloquium does not remain the first (and last) encounter between the arbitration world and the competition authorities, the panel concluded on the following next steps:

- **Advocacy**. Mr. De Smijter worded this as follows: "*you need missionary men and women in the arbitration world*" who will show authority in this field of arbitration to their fellow arbitrators.
- **Debate**. Both the arbitration world and competition law enforcers should sit around the table (presumably under Chatham House Rule) on a regular basis to discuss, for example, trends in competition law and arbitration or hypothetical cases that are of general interest. Concrete next steps to bring both worlds closer to each other should ideally be based on such debates.
- **Education**. The colloquium underscored that training of arbitrators in competition law (especially on economic matters, such as, the definition of the relevant market and market position) is an essential next step. Brussels hosts so many experts that it cannot be difficult to establish a credible program that will be embraced by the arbitration and the competition law world alike.
- **Private damages**. With all the expertise that is available in Brussels, it should be possible to mount a credible arbitration alternative instead of litigation through ordinary courts. Given the novelty of the legislation, private damages, present a unique opportunity to have both worlds meet.

I definitely look forward to the follow-up from this colloquium. As stated by Mr. Wijckmans, the conference can only be seen as a success if it results in effective next steps.

RAPPORT SUR "DE STRATEGIE IN INTERNATIONALE ARBITRATE – LA STRATEGIE DANS L'ARBITRAGE"

BRUXELLES, 12 JANVIER 2017

Christophe Devue
DALDEWOLF (Brussels

Le 12 janvier 2016, le Cepani a organisé un séminaire consacré au sujet, rarement traité, des aspects stratégiques de l'arbitrage international. Les différents intervenants ont tenté de répondre à la question conductrice du séminaire : « le comportement des parties, de leurs conseils, des arbitres, peut-il ou non être influencé par une stratégie prédéterminée ? ».

Après une introduction de Me Denis Philippe, Me Hakim Boularbah et Me Oliver van der Haegen se sont adressés à un auditoire attentif sur les questions stratégiques intervenant lors de l'établissement de la clause d'arbitrage.

Me Jean-Pierre Fierens a, ensuite, précisé que l'expérience, les connaissances linguistiques, la(les) nationalité(s), l'expertise, l'âge et le sexe, sont tant de critères qui, combinés avec d'autres considérations (géographiques, culturelles), se révèlent être stratégiques lorsqu'il s'agit de désigner des arbitres.

Le flambeau a été passé à un panel animé par M. Philippe Lambrecht (Cepani) au cours duquel M. Patrick Baeten (Engie), M. Olivier Henin (SNCB), Me Vanessa Foncke et Me Matray ont fait part de leur expérience quant aux sujets abordés au cours de la matinée.

Pour débuter la seconde partie de la journée, présidée par Me Matray, M. Philippe Jous (Caamous Consult) a fait part de son expérience de chef d'entreprise dans les sélections des conseils et des stratégies qui y sont associées.

Me Koen Van den Broeck a notamment précisé que les témoins et les experts peuvent être déterminants pour emporter la conviction du tribunal arbitral. Me Elliott Geisinger a présenté les aspects stratégiques dans la conduite de la procédure.

En fin d'après-midi, Me Bernard Hanotiau a exposé les quatre considérations stratégiques sur la base desquelles les arbitres orientent la procédure.

Le dernier panel de la journée a été dirigé par le professeur Johan Erauw. Me Rieke Smakman, Me Vera Van Houtte, Me Elisabeth Matthys et M. Jacques Levy-Morelle (Solvay) ont pris la parole pour partager leur expérience et prendre position sur les questions abordées au cours de l'après-midi.

Me Peter Callens a clôturé la journée par une brillante synthèse des positions exprimées

NEWS

» 4TH BRUSSELS PRE-MOOT 3 AND 4 APRIL 2017

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 EN BMEDIATION GAAN SAMENWERKEN

CEPANI en bMediation hebben een samenwerkingsovereenkomst gesloten. Door samen te werken willen beide organisaties actief bijdragen tot een doorbraak van duurzame effectieve methodes van geschillenbeslechting in burgerlijke en commerciële zaken. Zowel bMediation als CEPANI onderschrijven daarmee het plan van de Minister van Justitie om onder meer bemiddeling een volwaardige plaats te doen verwerven in het Belgische justitielandschap.

Hun samenwerking zal zich o.a. uiten in informatie en overleg aangaande wetgevende initiatieven en inzake lezingen, colloquia, studiedagen en opleidingen.

Beide organisaties behouden hun eigen structuren en hun bestaande samenwerkingsverbanden, maar zullen zich thans samen inzetten voor de realisatie van een waarachtige cultuur van duurzame geschillenbeslechting in België. Ze staan evenzeer open voor samenwerking met andere organisaties die deze doelstelling van algemeen belang nastreven.

» LE CEPANI ET BMEDIATION VONT COOPERER

Le CEPANI et bMediation ont conclu un accord de coopération. Par leur coopération les deux organisations désirent contribuer activement à la percée de méthodes efficaces et durables de règlement de conflits en matière civile et commerciale. bMediation et le CEPANI souscrivent de ce fait au projet du Ministre de la Justice de donner entre autres à la médiation une place à part entière dans l'univers de la justice belge.

Leur coopération portera entre autres sur l'information et la concertation dans le domaine d'initiatives législatives, ainsi que dans celui des conférences, colloques, journées d'étude et formations.

Les deux organisations gardent chacune leur propre structure et leurs accords de collaboration existants, mais elles uniront désormais leurs efforts en vue de la réalisation d'une véritable culture de règlement durable des différends en Belgique. Elles sont tout aussi disposées à coopérer avec d'autres organisations qui poursuivent ce même objectif d'intérêt général.

» BOOK "DE STRATEGIE IN INTERNATIONALE ARBITRAGE – LA STRATEGIE DANS L'ARBITRAGE INTERNATIONAL" AVAILABLE NOW

This book contains the reports of the speakers of the CEPANI Colloquium of 12 January 2017. It covers the issue of strategy in international arbitration in all of its aspects, ranging from the drafting of the arbitration clause to the enforcement of the arbitral award. Each topic is, moreover, approached from different viewpoints, including the arbitrator, the in-house lawyer, the expert and the arbitrator.

With contributions by H. Boularbah, P. Callens, D. De Meulemeester, E. Geisinger, B. Hanotiau, P. Jous, J. Kraus-Kolber, D. Matray, D. Philippe, K. Van Den Broeck and O. van der Haegen.

For more information and to order, please see here.

» **CEPANI TO TAKE PART IN LONDON SEMINAR TO PROMOTE BRUSSELS AS PLACE OF ARBITRATION**

On 22 February 2017, CEPANI will take part in a seminar at the Residence of the Ambassador of Belgium to the United Kingdom to promote the unique features of Brussels as place for arbitration.

VARIA

» 10 FEBRUARY 2017: NAI Jong Oranje and LCIA YIAG hold a workshop on emergency and fast track proceedings in Amsterdam. For more information, see here.

» 20 FEBRUARY 2017: ICC YAF is organizing an event in Paris as part of the ICC Frankfurt Investment Pre-Moot on the topic "What Next in Investment Arbitration". For more information, see here.

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