CEPANI NEWSLETTER 62

BELGIAN CENTRE FOR ARBITRATION AND MEDIATION • NPO

RESPONSIBLE EDITOR: MICHEL FLAMÉE

FEBRUARY 2012

Agenda

8 March 2011

Colloquium (As from 8.40 am-17.30 pm)

"*Les particularités de la procédure arbitrale : une approche pratique et comparée*"

Université Catholique de Louvain, faculté de droit, Crides - Jean Renauld

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News

Ontmoeting tussen CEPINA en NAI, 21 december 2011

De voorzitter, dhr. Michel Flamée, en de erevoorzitter van CEPINA, dhr. Guy Keutgen, hadden op 21 december 2011 te Rotterdam een ontmoeting met een delegatie van het Nederlands Arbitrage Instituut ("NAI"). Die bestond uit de voorzitter van de NAI, dhr. R. van Rooij, de nieuwe voorzitter vanaf 1 juni 2012, dhr. W.H. van Baren, professor F. De Ly en de directeur van het NAI, mevr. F.D. von Hombracht Brinkman. Tijdens de ontmoeting kon van gedachten worden gewisseld over een aantal onderwerpen van algemeen belang.

Meeting between CEPANI and the World Bank, 17 January 2012

The President, Mr. Michel Flamée and the Secretary General, Mr. Philippe Lambrecht met on 17 January 2012 with Mrs. Leroy, Senior Vice President and General Counsel of the World Bank Group. The World Bank is very active in legal and judicial reform issues on a global basis, and in a wide spectrum of legal areas and topics, including arbitration and mediation.

The objective of Mrs. Leroy's visit was to discuss whether the European Commission and other institutions like CEPANI would be interested in joining the Global Forum on Law, Justice and Development ("GFLJD") initiative which is being launched by the World Bank in January 2012. The GFLJD is envisioned to provide an innovative and dynamic permanent forum for knowledge exchange on legal issues, connecting countries, think-tanks, regional and international organizations, development agencies and civil society organizations. It plans to make relevant research and practices available as a public good to improve development outcomes through innovation in the field of law and justice.

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Articles

Report on the CEPANI and ICC Belgium colloquium on the new 2012 ICC Rules of Arbitration (Brussels, 17 January 2012)

By Cédric ALTER, partner at Janson Baugniet, assistant professor ULB,

On 17 January 2012 a seminar was held in Belgium jointly organized by ICC Belgium and CEPANI on the new 2012 ICC Rules of Arbitration, which entered into force as from 1st January 2012. Needless to say that it was a must-attend seminar for anyone interested or involved in ICC arbitration proceedings as counsel or arbitrator.

As previously, this full-day seminar brought together top specialists from different countries, under the presidency of Prof. Guy KEUTGEN.

Mr. Rudi THOMAES, secretary general of ICC Belgium, gave some introductory words, stressing the increased use of ICC arbitration to resolve disputes both in the private and public sectors.

This was followed by a general presentation of the new rules by Mr. John BEECHEY, President of the ICC Arbitration Court. Mr. Beechey first presented some statistics on the current activities of the Court (795 new requests in 2011, over 1.500 procedures currently pending,…). He further stated that the new rules are an important step for the ICC with the view of becoming more international, more transparent and more "user friendly". Amongst the reasons triggering the need for a revision of the rules, Mr. Beechey pointed out the demand for faster procedures, an increase in the number of multiparty arbitrations (currently around 33% of the arbitral proceedings), a demand for more transparency and a need for modernization of the drafting of certain articles (e.g., gender-neutral language). Mr. Beechey then introduced, article by article, some of the main modifications to the rules, which were subsequently examined in more detail by the following speakers.

Prof. Herman VERBIST, former Counsel at the Secretariat of the ICC Arbitration Court, was in charge of the topic concerning the Arbitral Tribunal, its constitution and its obligations under the 2012 ICC Rules of Arbitration.

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Amongst the numerous issues analyzed by Prof. VERBIST, one could stress: (i) the obligation of "impartiality" of arbitrators, now explicitly included in the statement to be signed by each prospective arbitrator before appointment (Article 11 of the Rules), (ii) the revised procedure for challenge of an arbitrator, which aims at more transparency (Article 14 of the Rules), (iii) the revised procedure regarding the nomination of arbitrators which gives more control to the ICC court in certain cases (Article 12 of the Rules), and (iv) the new obligations on arbitrators with regard to case management (Article 24, see also hereafter on that topic).

A highlight of the new 2012 Rules is the introduction of Emergency Arbitration. This topic was presented by Mr. Michael BÜHLER, former member of the ICC court. As noted by Mr. Bühler, one of the weaknesses of the previous rules was to be found in the ICC 'pre-arbitral referee procedure' which required a separate written agreement between the parties and was not often used. A similar procedure is now included in the new Rules of Arbitration (Article 29 of the Rules *juncto* Appendix V to the Rules), as was already the case for other arbitral institutions. This procedure shall take a maximum of 18 days and will only be applicable for arbitral clauses signed after the entry into force of the new Rules.

Prof. Johan ERAUW addressed the topic of "Arbitration with States and state entities under the new 2012 ICC Rules of Arbitration". He explained that some of the changes to the rules came from the need to adapt to concerns and whishes expressed by States or state entities in relation to investment arbitrations. As mentioned by Prof. Erauw, the call for transparency, to be balanced with the traditional confidentially of arbitral procedures, was of particular importance in this context. This can be illustrated, *inter alia*, by the new Article 22(3) which gives the tribunal broad powers to make orders, upon request of any party, regarding the confidentiality of the arbitral proceedings or of any other matters in connection with the arbitration.

"Efficiency in Arbitration" was the title of the lecture given by Mrs. Annet VAN HOOFT, former counsel at the Secretariat of the ICC Arbitration Court. Mrs. Van Hooft reviewed the different provisions of the new rules aiming at controlling time and costs in arbitral proceedings both at the outset and during the proceedings. For example, Article 24(1) of the new Rules introduces the obligation of a "case management conference" to be convened by the arbitral tribunal when drawing up the Terms of Reference or as soon as possible thereafter (see also Article 37 of the Rules which contains sanctions in terms of costs for the parties and fees for arbitrators in case of undue delays).

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Last but not least, Prof. Didier MATRAY made a presentation on multiparty arbitration. As Prof. MATRAY explained, multiparty arbitration was a source of difficulties under the previous version of the ICC arbitration rules. One of the main improvements in this respect is that the *prima facie* control on the validity of the arbitration clause will be exercised by the arbitral tribunal itself, unless the Secretary General refers the matter to the Court (Article 6(3)), such mechanism being also applicable for the joinder of additional parties (Article 7), claims between multiples parties (Article 8) and claims arising out of multiple contracts (Article 9).

Prof. Guy KEUTGEN, president of Francarbi and former president of the CEPANI, made the closing remarks of this very interesting day and summarized the main modifications to the new rules, before inviting the audience to participate to a lively questions and answers session with the orators.

This one day seminar gave an excellent overview of the new ICC Rules of Arbitration. A book will be published around April 2012 containing all written contributions.

Interview with Mr. Didier Matray, President of the CEPANI study group "Brussels, place of arbitration"

By Vanessa FONCKE, ***Lawyer at the Brussels bar (Jones Day)***

End of September 2011 a new study group on "Brussels, place of arbitration" was constituted within the framework of CEPANI. Among its members are some of the most reputable and outstanding practitioners and professors in international arbitration (see list of names at the bottom of the interview). The choice for Mr. Didier Matray, lawyer admitted to the bars of Liège, Paris and Cologne, may not have been an obvious one for presiding over a study group focusing on the promotion of Brussels. Mr. Matray's credentials in international arbitration and as Vice-president of CEPANI are, however, self-explanatory. As a true (multilingual) Belgian, Mr. Matray furthermore holds a lot of the Belgian trump cards that Brussels can also appeal

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to in the context of international arbitration and which he will hereafter elaborate on.

Mr. Matray, why did CEPANI decide to establish a study group "Brussels, place of arbitration"?

In fact they are many reasons. Outside Belgium a number of cities have done and are doing a lot of efforts for having arbitrations take place in their country. London has done a lot to attract arbitrations and has the full support of all political authorities in England to become the most famous place of arbitration in the world. Paris has followed the way and, under the impulse of the late Mr. Lazareff, has established an ambitious program called "Paris, place d'arbitrage". Singapore has taken a lot of initiatives as well and, more recently, the Dubai International Arbitration Centre, first created in 1994 as the "Centre for Commercial Conciliation and Arbitration", promotes its offer of arbitration services and facilities on an international scale.

This is a good sign that arbitration is becoming more and more attractive for everyone and that an increasing number of arbitrations are taking place in the world.

Of course Brussels could and should play a role in that field as well. We should, for example, take profit out of the sixth part of the Belgian civil procedural code which is very favorable to arbitration. Also, and that is certainly one key element, Brussels is the political capital of Europe and could become a hub for arbitration. We have a lot of excellent arbitrators in Belgium for conducting arbitral proceedings, as well as a lot of international law offices active in arbitration. Offering and extending the possibilities for conducting arbitrations in Brussels, would certainly be a service to them and in favor of arbitration.

Have any concrete goals been put forward? Very concretely, where would the CEPANI study group like Brussels to be as place of arbitration in one to five years from now?

First of all, it is true that every reputable center of arbitration has more and more arbitrations. The statistics of the ICC, for instance, show that the average number of arbitrations is steadily growing. Second, the stakes of arbitrations –meaning the financial consequences and related problems– are becoming more and more important. Also, more and more parties are involved in arbitrations. Before, arbitration was mainly a two parties process, but if you take a look at the ICC statistics for instance, every year they administer arbitrations with more than 20 parties. Two years ago they even administered an arbitration involving 82 parties. This makes me believe that arbitration is becoming more important in general, which really requires a good infrastructure. If you want to host an arbitration involving 80 parties, you will need appropriate accommodation, such as a large enough hearing room. That

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being said, the goal is that Brussels could host any kind of arbitration, so that we could accept smaller arbitrations, for instance between agents and principals, but also the big financial arbitrations (including investment claims) and the big contractual claims. In terms of figures, we haven't set any explicit goals. The idea for the time being is simply to take part in the growth of international arbitration and to promote Brussels more and more as a place for conducting it. You have to know that we started our discussions on Brussels as place of arbitration just a few months ago. A lot of good and concrete ideas are on the table –on which I will come back later– but obviously we have not yet achieved all of the work ahead.

Waarom verdient Brussel het om als plaats van arbitrage te worden gepromoot? Wat zijn de essentiële voordelen verbonden aan arbitrage in Brussel en welke punten zouden kunnen worden verbeterd?

Laat mij misschien eerst de verschillende voordelen van Brussel als plaats van arbitrage kort even op een rij zetten:

- Ten eerste, zijn de kosten van levensonderhoud en voor dienstverlening in Brussel in de regel veel lager dan, bijvoorbeeld, in Parijs of Londen. Wanneer arbitrale procedures twee tot vier weken duren, is dit lage kostenniveau (bijvoorbeeld voor restaurants en logies) uiteraard zeer handig.

- Brussel is de hoofdstad van Europa en de zetel van vele andere internationale instellingen en ondernemingen. Dit zorgt voor een grote internationale aanwezigheid in Brussel die in niet vele andere steden ter wereld kan worden teruggevonden en wat een voordeel kan zijn voor buitenlandse personen die aan een arbitrage deelnemen.

- België heeft met het zesde deel van het Gerechtelijk Wetboek een zeer moderne wetgeving inzake arbitrage aangenomen. Bovendien werd die wetgeving in het kader van een CEPINA werkgroep –voorgezeten door Prof. Keutgen, de voormalige voorzitter van CEPINA– nog verder bijgeschaafd tot een nieuw ontwerp van wettekst. De nieuwe wetgeving zou op de internationale standaard zijn gebaseerd, wat een groot competitief voordeel voor Brussel zou zijn. We hebben met CEPINA overigens ook een uitstekend gereputeerd arbitragecentrum.

- Een ander, meer politiek, voordeel is dat Brussel meegeniet van de Belgische reputatie inzake neutraliteit wat voor grote scheidsrechterlijke zaken belangrijk is.

- Tot slot, is er in België documentatie voorhanden in het Frans, Nederlands en Duits, maar ook in het Engels. Voor een eerder kleine stad is er veel documentatie in het Engels beschikbaar, wat voor internationale zaken soms cruciaal is.

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De moeilijke punten zijn meer psychologische punten. Gerechtelijke procedures nemen in België teveel tijd in beslag; of dat is althans toch de reputatie van België. Voor arbitrages is het nochtans hoofdzakelijk van belang om spoedig voorlopige maatregelen voor de voorzitter van het gerecht te kunnen bekomen en dat gaat heel goed in Brussel. Ook de procedures voor nietigverklaring van arbitrale uitspraken nemen niet noodzakelijk al te veel tijd in beslag, maar de mogelijkheid om die procedure over drie niveaus uit te spreiden, lijkt dan wel weer te veel. In Zwitserland, bijvoorbeeld, is de nietigverklaringsprocedure beperkt tot één instantie (het Tribunal Fédéral suisse) en niet drie zoals in België. Het ontwerp van wettekst voorbereid door CEPINA zou die procedure dan ook tot twee instanties willen beperken, waarbij een verzoek tot nietigverklaring direct bijt Hof van Beroep en niet meer bij een Rechtbank van Eerste Aanleg zou worden ingediend.

Tot slot, hebben we ook een postuniversitaire opleiding in arbitrage nodig in Brussel. De Zwitsers doen dat bijvoorbeeld met hun Master in internationale arbitrage en trekken daarmee studenten van over heel de wereld aan.

Comment le groupe d'étude CEPANI va-t-il réaliser toutes ces idées? Y-a-t'il des directives qui ont été développées ? Y-a-t'il quelques sujets sur lesquels il va se concentrer?

Les avantages offerts par Bruxelles ne sont pas suffisamment connus, notamment sa grande facilité d'accès. Bruxelles jouit d'un réseau de relations directes avec tous les pays européens que ce soit par train ou par avion. Même pour des destinations hors Europe, les connexions de l'aéroport de Bruxelles sont bien plus nombreuses que ce qu'on croit habituellement.

Un de nos premiers projets serait de préparer, en collaboration avec le BIP, le Visitor Center de la Région de Bruxelles Capitale, un document qui serait spécifiquement destiné au milieu de l'arbitrage et qui illustrerait tous les avantages que peut offrir Bruxelles, non seulement en termes de facilités d'accès ou de séjour, mais aussi en termes de services (transcripts, interprètes, …). Bruxelles jouit incontestablement d'un grand savoir en matière de tenue de manifestations internationales et cette spécificité doit être mieux connue à l'extérieur de la Belgique.

Un autre projet est de réaliser une enquête auprès d'entreprises belges et étrangères , ainsi qu'auprès juristes d'entreprise ou d'avocats internationaux afin de mieux identifier les motifs de leur choix d'un lieu d'arbitrage ainsi que leur perception de Bruxelles comme lieu possible d'arbitrage. Il faut savoir que le lieu de l'arbitrage est très souvent fixé dans la convention d'arbitrage et que c'est donc au moment de la négociation du contrat que la décision sur le siège de l'arbitrage est prise. Sauf circonstances exceptionnelles, ce choix est rarement remis en question. Les grandes

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entreprises et les « transactional lawyers » seraient donc des interlocuteurs privilégiés pour la réalisation de cette enquête.

D'autres mesures sont envisagées. Parmi celles-ci, on peut citer :

- la création d'un point de contact unique et centralisé auprès duquel toutes les personnes qui souhaitent organiser un arbitrage à Bruxelles recevraient toutes les informations dont elles ont besoin, comme par exemple, les hôtels qui disposent de salles adaptées au besoin d'un arbitrage, les services de secrétariats, les bureaux d'interprète, les sténotypistes, ou de façon générale, toutes les entreprises dont l'objectif est d'assister à la tenue de réunions internationales, etc…

- l'établissement d'une liste de tous les types d'arbitrages qui se déroulent en Belgique. Certains types de procédures, comme les arbitrages sectoriels, ne sont pas suffisamment connus. Même si leur enjeu n'est pas toujours aussi important que celui de certains différends soumis aux grands centres d'arbitrage comme la CCI, la LCIA ou le Cepani, leur existence doit être soulignée car elle témoigne du fait que Bruxelles offre un accueil intéressant pour des procédures de différents types.

- l'organisation de manifestations en commun avec les centres d'arbitrages établis dans d'autres pays afin de développer une collaboration fondée notamment sur l'échange d'expériences ;

- un groupe d'étude du CEPANI travaille sur une révision du règlement d'arbitrage. La CCI elle-même vient d'adopter un nouveau règlement qui est entré en vigueur le 1 janvier 2012. Le mouvement d'idées auquel a donné lieu cette adoption est certainement une source d'inspiration pour le Cepani, notamment en ce qui concerne la façon d'aborder la prise de mesures provisoires par un arbitre chargé d'intervenir en extrême urgence ou encore la manière de résoudre le plus efficacement possible le problème difficile des arbitrages multipartites.

The CEPANI study group "Brussels, place of arbitration" is constituted by Mr. Jean-Pierre BUYLE, Mr. Peter CALLENS, Mr. Marc DAL, Prof. Dr. Johan ERAUW, Mr. Jean-Pierre FIERENS, Prof. Dr. Bernard HANOTIAU, Prof. Dr. Guy KEUTGEN, Prof. Philippe LAMBRECHT, Mr. Dirk VAN GERVEN, Mrs. Vera VAN HOUTTE and Ms Emma VAN CAMPENHOUDT, presided by Prof. Didier Matray. The CEPANI Newsletter is engaged in keeping its readers informed about the activities of and initiatives taken by the study group.

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Legislation, Doctrine & Jurisprudence

References

Legislation

- Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes ("Regulation on consumer ODR") of 29 November 2011, doc. 2011/0374 (COD), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0794:FIN:EN:PDF
- Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC ("Directive on consumer ADR") of 29 November 2011, doc. No. 2011/0373 (COD), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0793:FIN:EN:PDF

Jurisprudence

- Liège 22 octobre 2010, *DAOR* 2012, p. 501-504

  (Tierce décision obligatoire – Arbitrage – Critère de distinction – Force obligatoire)

  (Bindende derdenbeslissing – Arbitrage – Criteria voor onderscheid – Bindende kracht)

  The distinctive criterion between a jurisdictional arbitration and a binding third party decision lies in the nature of the authority conferred by the parties to the third party. A jurisdictional arbitration and a binding third party decision both imply the resolution of a legal dispute through the intervention of a third party. The result from a legal point of view is, however, very different: the arbitral award can be granted the court's formal exequatur; the binding third party decision is valid and binding between the parties as an agreement and can only be enforced accordingly.

Doctrine

- N. VOSER, "Overview of the most important changes in the revised ICC Arbitration Rules", *ASA Bulletin* 2011/4, p. 783-820

CEPANI always appreciates receiving interesting and relevant case law and legal doctrine concerning arbitration and alternative dispute resolution. Any relevant articles, awards, events and other announcements can also be sent to the CEPANI Newsletter at the following e-mail address: newsletter@cepina-cepani.be.

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Varia

Annual VIAC / UNCITRAL Seminar 2012 (29-30 March 2012, Vienna).

On 29-30 March 2012 VIAC and UNCITRAL are hosting their annual seminar on "The UNCITRAL Digest of Case Law: enactments of the UNCITRAL Model Law on international commercial arbitration and their application by state courts". The full program as well as the registration form can be retrieved at http://news.wko.at/Media/9240a453-6945-44e3-ab00-a41fcf3354ac/2012_programme_16.1.2012.pdf.

Eight Annual Leading Arbitrators' Symposium on the Conduct of International Arbitration (2 April 2012, Vienna).

Leading international arbitrators and practitioners will discuss four topics of importance to counsel, arbitrators and business people who are involved in the resolution of international commercial disputes through arbitration. These topics are of critical importance to those interested in how international arbitrations can be effectively and fairly conducted. Audience questions and interactions with the various panels is encouraged. More information can be found at http://www.jurisconferences.com/wp-content/uploads/downloads/2012/01/LAS-8th-Annual-Schedule.pdf.

AIJA Annual Arbitration Conference (24-26 May 2012, Venice).

More details, as well as the registration form can be retrieved at http://www.aija.org/modules/events/index.php?id=324.

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