CEPANI
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24 April 2013
CEPANI40 lunch debate with Prof. Herman Verbist on the topic of "Transparency in investment arbitration"

15 May 2013
Lunch debate with Mr. Jacques Levy-Morelle on the topic of "Expérience comme membre de la Cour d'arbitrage de la CCI" (Temporary title)

31 May 2013
Joint Conference CEPANI -DIS

11 October 2013
Joint Conference CEPANI -VIAC

For more information on our upcoming activities, please consult our website :
www.cepani.be

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ICDR Y&I Ninth Anniversary Program 2013, co-hosted by YAS (24 March 2013, Vienna)

News

Colloque à l'attention des magistrats. Une double source d'inspiration: la construction par la jurisprudence de la France et des Pays-Bas du droit de l'arbitrage interne et international


C. Verbruggen

Par Caroline Verbruggen,
Avocate (DLA Piper)

Le CEPANI a organisé, le 23 janvier 2013 dernier, un colloque sur invitations, adressé plus particulièrement aux magistrats, au cours duquel d'éminents hauts magistrats des Pays-Bas et de la France sont venus évoquer différents sujets liés à la construction de la jurisprudence arbitrale dans leur pays.
Comme l'ont exposé en introduction M. Michel Flamée, président du CEPANI et M. Didier Matray, vice-président du CEPANI, à l'heure où l'on réfléchit aux différents moyens à mettre en œuvre pour aider Bruxelles (et la Belgique) à se développer comme centre d'arbitrage, il était utile d'associer des magistrats à cette réflexion. En effet, l'arbitrage ne peux se développer harmonieusement que s'il bénéficie du soutien d'une jurisprudence claire des cours et tribunaux de l'ordre judiciaire, ainsi que d'un cadre législatif adéquat, sujet qui a été abordé en conclusions. Nos deux voisins, la France et les Pays-Bas, l'ont bien compris. Comme l'a indiqué aussi Me Matray, le juge et l'arbitre exercent une fonction comparable dans un contexte différent, mais le dernier mot appartient toujours au juge.

Les deux exposés de la matinée ont été consacrés au droit et à la pratique des Pays-Bas. M. Daan Asser, conseiller émérite au Hoge Raad der Nederlanden et professeur à l'Université de Leyden, a évoqué d'une part les conditions d'existence et de validité de la convention d'arbitrage, et d'autre part les mesures provisoires et conservatoires. M. Asser a évoqué le pragmatisme du droit néerlandais, à l'opposé de tout dogmatisme. Ainsi, quant à l'arbitrabilité, le critère de non-arbitrabilité est que la convention d'arbitrage ne peut pas conduire à la constatation de conséquences juridiques qui ne sont pas à la libre disposition des parties. Quant aux conditions de forme, il a évoqué la condition de l'écrit (à titre probatoire uniquement) ainsi que la problématique des clauses d'arbitrages contenues dans des conditions générales, le droit néerlandais contenant des dispositions spécifiques à cet égard.

M. Asser a enchainé avec le sujet des mesures provisoires et conservatoires. Classiquement en cette matière, les avantages et inconvénients du référé judiciaire et du référé arbitral ont été évoqués, l'arbitre d'urgence étant prévu de longue date dans le règlement de la NAI.

La deuxième session, l'après-midi, a été consacrée aux exposés des orateurs français. Comme l'a indiqué M. Guy Keutgen, Président honoraire du CEPANI, Paris est le premier siège arbitral européen, devant Londres et Genève. La jurisprudence française, notamment celle de la Cour d'appel de Paris et de la Cour de cassation de France, revêt dès lors une importance toute particulière.

M. Jean-Pierre Ancel, président de chambre honoraire à la Cour de cassation de France, a évoqué les questions éthiques liées à l'arbitrage: l'éthique de l'arbitre et l'éthique du processus arbitral. L'éthique de l'arbitre vise avant tout son indépendance et son impartialité; celles-ci sont contrôlées par le juge au niveau du recours en récusation et par le recours en annulation de la sentence (en droit français). Quant à l'éthique du processus arbitral, le Président Ancel considère que, mettant de côté les garanties du procès équitable qui sont assurées par de véritables règles juridiques, l'éthique de l'arbitrage est sanctionnée par le concept flexible de l' "estoppel" , terme emprunté au vocabulaire juridique anglo-américain, mais utilisé tel quel par la Cour de cassation de France dans un arrêt de 2005.

C'est ensuite M. Dominique Hascher qui a pris la parole au sujet des voies de recours. M. Hascher a travaillé à la CCI avant de devenir magistrat. Il a été conseiller à la Cour d'appel de Paris, président de la Cour d'appel de Reims, et est actuellement devenu conseiller à la Cour de cassation de France. Dans son exposé, le conseiller Hascher a souligné l'importance du rôle du juge dans le contentieux de l'annulation et de l'exécution des sentences. Le juge agit comme une autorité de régulation du processus, sanctionnant les sentences uniquement lorsque c'est nécessaire: notamment par un contrôle plein et entier sur la compétence des arbitres, la constitution du tribunal, le respect de leur mission par les arbitres, le principe du contradictoire et le respect des droits de la défense. Mais le juge ne doit pas revenir sur le fond du litige, ni contrôler l'application des règles de droit. La seule réserve est lorsque la sentence viole l'ordre public, de manière flagrante, effective et concrète. Il a conclu par un véritable plaidoyer, appelant les juges à développer une expertise sur le sujet et à dialoguer avec les praticiens de l'arbitrage, pour développer une véritable politique en faveur de l'arbitrage.

Les conclusions de la journée ont été dressées par M. Albert Fettweis, président de chambre à la Cour de cassation de Belgique, qui s'est interrogé sur la question de savoir si les juges français et néerlandais ont réussi à favoriser l'arbitrage, et si oui, comment ? Ces questions sont importantes pour les praticiens belges, alors que devrait être prochainement discuté au Parlement un projet de loi modifiant la sixième partie du Code judiciaire. Parmi les pistes avancées pour améliorer l'efficacité du processus arbitral figurent un certain nombre de modifications aux interventions du juge étatique. On le sait, l'arbitrage a ceci de paradoxal qu'il est choisi par les parties pour échapper au juge étatique, mais qu'il ne peut se développer harmonieusement qu'avec l'aide de celui-ci, dont les interventions doivent cependant être prévues de manière parcimonieuse par le législateur.

Report on the CEPANI40 lunch debate with Prof. Olivier Caprasse on "Document production in national and international arbitration" (31 January, 2013)


Frédéric henry

By Frédéric Henry,
Lawyer (Claeys & Engels),
Assistant at the ULg University

On the 31st of January 2013, Prof. Dr. Olivier Caprasse, Professor at the ULg and ULB Universities and lawyer at Hanotiau & van den Berg, inaugurated the 2013 session of the CEPANI40 lunch debates with a presentation on "document production in national and international arbitration".

During his interactive presentation to a large panel of young arbitration practitioners, Prof. Caprasse first insisted on the crucial importance of the issue, recalled the basic rules governing the question of admissibility of evidence and insisted on the broad definition given to "documents" by the 2010 IBA Rules on the Taking of Evidence.

He highlighted that the production of documents has to reflect the parties' will to benefit from a procedure "à la carte". Therefore the arbitrator's main preoccupation is to ensure the flexibility of document production and to avoid "*rendering complex what would otherwise be simple*".

Such general guidelines are, however, not always sufficient to avoid problems related to document production and the arbitrators often have to decide upon the merits of requests for documents to be produced.

Confronted with such kind of requests, the arbitral tribunal is of course guided not only by the principles provided by Articles 3 and 9 of the IBA Rules on the Taking of Evidence but also by the need to balance the parties' legitimate interests: while one party is often arguing that the production of a document is of crucial importance for resolving the case, the other party is opposing the request on the grounds that this would imply an unreasonable burden. In most cases the problem raised by the confidential nature of the requested documents can be circumvented by allowing the requesting party to study the documents without having the possibility of obtaining a copy, or by appointing a third expert to study the documents and to disclose only the relevant information to the arbitral tribunal and the requesting party.

In this context Prof. Caprasse insisted on the fact that arbitrators should refuse to grant any request for documents as a way to build (and not only to demonstrate) a case (prohibition on "fishing expeditions").

The arbitrators may also be confronted with situations where a party refuses to comply with an order to produce a document. The arbitral tribunal can respond to such failure to comply with the decision of the tribunal:

- by deciding to take the refusal into consideration when deciding on the allocation of costs, notwithstanding the decision taken on the merits of the case;
- by assuming, if certain conditions are fulfilled (e.g., the arbitral tribunal should grant the requested party sufficient opportunity to produce evidence prior to drawing adverse inferences against it, the inference must be 'reasonable', consistent with facts in the record and logically related to the probable nature of the evidence withheld, ...) that the evidence contained in the document would be in the other party's favor ("adverse inference") if the principle of due process is thereby not infringed.

Some common practical issues related to document production were also discussed during the debate such as:

- the way to deal with pleading notes that in some circumstances can be considered as demonstrative exhibits and, therefore, forbidden by the arbitrator. In this context, it is important to insist on the cultural differences between the judicial cultures of the parties (for instance, Dutch attorneys always use pleading notes while this is obviously not the case in Belgium);
- the opportunity to resort to the transcription of the arbitration hearing: such transcription can be very useful to provide the arbitrator with a supplementary tool to draft the award in particular in international arbitration proceedings;
- the translation of documents that are not drafted in the language of the proceedings: an unofficial translation can be provided by the producing party and it should be up to the other party to challenge the quality of the translation if such party would not agree.

Finally, Prof. Caprasse shared with the participants his practical experience and also provided numerous examples of standard clauses that are very useful to include in procedural orders or calendars for the exchange of documents.

Limitation of liability for arbitrators and CEPANI in the new 2013 CEPANI Rules of Arbitration

Charles Price

By Charles Price,
Lawyer at the Brussels Bar (Cew & Partners),
Member of the Board of Directors of CEPANI,
Member of the CEPANI Study Groups for the Revision of the CEPANI Arbitration Rules and for the Revision of Part 6 of the Belgian Judicial Code

Amongst the changes introduced in the new CEPANI Rules of Arbitration, which are in effect as of 1 January 2013, is a new article 37, entitled "Limitation of liability" and drafted as follows:

"1. Except in the case of fraud, the arbitrators shall not incur any liability for any act or omission when carrying out their functions of ruling on a dispute.

2. For any other act or omission in the course of an arbitration proceeding, the arbitrators, CEPANI and its members and personnel shall not incur any liability except in the case of fraud or gross negligence."

This is the first time that a clause providing for any limitation of liability has been included within the CEPANI Rules of Arbitration. The change brings the CEPANI Rules broadly in line with the arbitration rules of most other international arbitration bodies, almost all of which now include a limitation of liability clause. This is the case, for example, for the ICC (Art. 40), UNCITRAL (Art.16), ICDR (Art. 35), WIPO (Art. 77), SCC (Article 48), LCIA (Art 31.1), SIAC (Art 34), VIAC (Art 8) and the HKIAC (Article 40) as well as the rules of many other national and international arbitration bodies and organizations. The new article itself is very similar to the rule contained in the DIS Arbitration Rules (Section 44).

The question of the liability of arbitrators and of arbitral institutions and their agents or employees is by no means a theoretical one. The doctrine and case law in Belgium, France and elsewhere in Europe recognizes that both the arbitrators and the arbitral institution have a contractual liability vis-à-vis the parties for the manner in which they organize and administer the arbitration. This approach differs from the method applied in common law countries, such as the USA and England, where both the arbitrator and the arbitral institution are often considered to exercise a judicial or quasi-judicial function. The consequence of this latter approach is that the arbitrators and the arbitral institution are deemed to be protected by a form of judicial

immunity, which offers them a large protection from any liability.

Contrary to the situation that prevails in some jurisdictions, in Belgium there is no statutory provision covering the question of arbitrator's liability. In particular, the Belgian Judicial Code does not contain any provision dealing with the matter.

The new article operates a clear distinction between the liability arising from the judicial functions exercised by an arbitrator and the liability of an arbitrator or CEPANI and its members or personnel arising from the exercise of other non-judicial functions.

In respect of the former, except in the case of fraud, any and all liability of the arbitrator is excluded. The question of what amounts to the exercise of a judicial function will be determined on a case by case basis but, basically speaking, the arbitrator will not incur any liability (except in the case of fraud) when he/she is carrying out a decision-making function related to the dispute which is the object of the arbitration. Thus, for example, if, in the course of ruling on a dispute submitted to arbitration under the CEPANI Rules of Arbitration, an arbitrator makes a mistake in law or as to the facts the new article has the effect of excluding any liability of the arbitrator to the parties in respect of the mistake.

This exclusion of liability for the arbitrator when exercising a judicial function is compatible with the existing rule in Belgian law identified by the majority of the case law and the doctrine according to which the arbitrator, when exercising a judicial function, does not engage his/her liability as a result of a mistake that he/she makes as to the law or the facts. It is however to be noted that the new article has the effect of exempting the arbitrator exercising a judicial function from liability even in the case of gross negligence (faute lourde/ zware fout). Under the terms of the new article, the exclusion of liability is however not effective in the case of fraud (dol / bedrog), given the unanimous opinion in Belgian case law and doctrine that a contractual exclusion of liability cannot validly cover such a case.

With respect to non-judicial functions, whether exercised by the arbitrator or by CEPANI or its members or personnel, the new article provides for a more limited exclusion of liability. For these cases, the exclusion of liability is inapplicable not only in the case of fraud but also in the case of gross negligence. Non-judicial functions are all those activities which do not involve the decision making process by which the dispute is resolved or settled and include, for instance, acts such as the failure by CEPANI to apply its own Rules or to notify an award to the parties. In such cases liability may be incurred if the act or omission amounts to fraud or gross negligence and provided the

claimant is able to establish damage and causality in accordance with the normal civil law liability rules.

The rationale of the differing effects of the exclusion of liability between judicial and non-judicial functions is that there is a perceived greater need to protect arbitrators from liability when they carry out judicial functions. The effect of the article is to grant arbitrators a quasi-immunity from liability when they are performing their function of ruling on the dispute. However, contrary to the situation in certain jurisdictions, notably in the USA, the immunity is not absolute and does not cover the case of fraud.

Last but not least, the new article does not concern, and has no effect with regard to, the rules relating to the annulment of an award.

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  (for a summary also see Y. VAN COUTER and S. DE SMEDT in CEPANI Newsletter no. 68, October 2012, p. 13-15)

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- J. ROSENGREN, "Contract Interpretation in International Arbitration", Journal of International Arbitration 2013/1, p. 1 - 16
- C. VANLEENHOVE, "Cybersquatting uitdrukkelijk financieel gesanctioneerd" (noot onder Gent 26 maart 2012), RABG 2012/20, p. 1416-1418

Varia

ICC YAF Conference on Confidentiality in Arbitration (22 February 2013, Munich).

The ICC Young Arbitrators Forum is hosting a seminar in Munich on 22 February 2013 on the topic of "Confidentiality in Arbitration". More information on this conference is available on

http://www.iccwbo.org/Training-and-Events/All-events/Events/2013/ICC-YAF-Conference-in-Munich-on-Confidentiality-in-Arbitration/.

UNCITRAL / VIAC / YAAP Joint Conference (21-22 March 2013, Vienna).

The annual UNCITRAL / VIAC / YAAP Joint Conference will take place on 21 and 22 March 2013 in the premises of the Vienna Economic Chamber. The topics will include: Organization of Arbitral Proceedings from an arbitrator's, the parties' and institutions' perspective; Arbitrability and public policy – how to reach harmonization; and Liability of players in arbitration. More information can be found at http://news.wko.at/Media/9240a453-6945-44e3-ab00-a41fcf3354ac/viacuncitralyaapconference2013savethedate.pdf.

MAA Conferences (21-22 March 2013, Vienna).

On 21 March 2013, the Moot Alumni Association of the Willem C. Vis Arbitration Moot of Vienna and Hong Kong (MAA) is hosting the Annual MAA Peter Schlechtriem CISG Conference on Boundaries and intersections. On 22 March 2013 MAA is organizing a conference on "Generations in Arbitration X: The Value of Oral Hearings in International Arbitration. The full program and registration form for both conferences can be found at http://www.maa.net/index.php?option=com_eventlist&view=categoryevents&id=3&Itemid=164.

ICC YAF / YAAP Joint Conference (23 March 2013, Vienna).

On 23 March 2013 (the second day of the Willem C. Vis International Commercial Arbitration Moot Competition), the Young Austrian Arbitration Practitioners (YAAP) and the ICC Young Arbitrators Forum (ICC YAF) are jointly organizing a conference designed to bring together experienced arbitration practitioners of 40 years and under to have an in-depth look into substantial topics such as Case Management Challenges, Res Judicata and Conflict of Laws, and Quantification of Claims. The seminar is free of charge and will take place from 9:30 a.m. to 4 p.m. It will be hosted by the Vienna University. The complete program and registration form can be retrieved at http://www.iccwbo.org/Training-and-Events/All-events/Events/2013/ICC-YAF-YAAP-Conference-in-Vienna,-Austria-23-March-2013/.

ICDR Y&I Ninth Anniversary Program 2013, co-hosted by YAS (24 March 2013, Vienna).

On 24 March 2013 (the third day of the Willem C. Vis International Commercial Arbitration Moot Competition), the International Centre for Dispute Resolution Young & International (ICDR Y&I) is organizing its Ninth Anniversary Program 2013, co-hosted by Young Arbitrators Stockholm (YAS) at Palais Daun-Kinsky in Vienna. The program, "Barista's Choice: Universal Blend vs. Single Estate", will once again take the form of a coffeehouse debate on the question "when in international arbitration, should arbitrators apply lex mercatoria or transnational commercial law when there is not an explicit choice of law and, when it does not conflict

with the parties' choice of law, to interpret and fill gaps in national law and/or the contract?". More information and the registration form can be found at http://www.adr.org/aaa/faces/aoe/icdr/icdryoungintl?_afrLoop=13262171589064&_afrWindowMode=0&_afrWindowId=aur622ls7_1#%40%3F_afrWindowId%3Daur622ls7_1%26_afrLoop%3D13262171589064%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18txppxwqn_14.

The CEPANI Newsletter always appreciates receiving interesting case law and legal doctrine concerning arbitration and alternative dispute resolution. Any relevant articles, awards, events and other announcements can be sent to newsletter@cepina-cepani.be. CEPANI may publish and/or edit contributions at its discretion.