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AGENDA

15 JANUARY 2015

CEPANI lunch debate with Ms. Nadia Darwazeh on “The Jerusalem Arbitration Centre: An innovative approach to resolving commercial disputes in a challenging political context” (the presentation will be in English)

16 JANUARY 2015

'Bruxelles, place d'arbitrage' - colloque organisé par L'Ordre français du barreau de Bruxelles et le CEPANI à l'occasion de la rentrée solennelle du barreau de Bruxelles

23-24 MARCH 2015

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5 MAY 2015

CEPANI40 debate night with Ms. Erica Stein and Ms. Hilde Van der Baan on “Appointment of arbitrators: parties v arbitral institutions”

NEWS

INTERVIEW WITH MR. DIRK DE MEULEMEESTER, PRESIDENT OF CEPANI



Ter gelegenheid van de Algemene Vergadering van CEPANI gehouden op 17 juni 2014 werd Dirk De Meulemeester benoemd tot Voorzitter van CEPANI. Dirk De Meulemeester is sinds 1994 lid van de balie te Gent, sinds 2013 lid van de balie te Parijs, voormalig gastprofessor Thomas More en sinds recent academisch consultant bij de faculteit rechten van de Universiteit Gent. In 2004 richtte hij samen met prof. Olivier Caprasse CEPANI40 op.

Voor de Newsletter hadden we een gesprek met Dirk De Meulemeester. Hierna de hoofdlijnen van datgene hij tijdens zijn voorzitterschap in het bijzonder tot CEPANI wenst bij te dragen.

In het kader van onze core business, te weten het beheer van arbitrageprocedures gevoerd onder het arbitragereglement van CEPANI, hebben we bijzondere aandacht voor 'effective case management' in de brede zin van het woord, zowel op het niveau van het Secretariaat als op het niveau van de arbiters.

Wat het eerste luik betreft werd er recent een geleding toegevoegd aan het Secretariaat, namelijk de expert-adviseurs. Het betreft leden van CEPANI die eerder een functie hebben bekleed bij het Secretariaat of in één van de organen van CEPANI. Zij kunnen door de dossierbeheerders geraadpleegd worden over vragen met betrekking tot arbitrage in het algemeen en zulks op een abstracte en anonieme basis. De experts zijn gehouden tot de hoogste mate van vertrouwelijkheid.

En ce qui concerne les arbitres à proprement parler, il convient d'attirer encore davantage leur attention sur le respect strict des délais prévus dans le règlement. Un groupe de travail a été créé à cet effet au sein du conseil d'administration afin de proposer des mesures concrètes pour encore améliorer le respect des délais dès la nomination du tribunal arbitral jusqu'à la sentence. Il est en effet incontestable qu'à côté du coût de l'arbitrage, le respect des délais est d'une importance primordiale, tant pour les parties que pour leurs conseils.

Inzake de promotie van arbitrage wordt blijvend aandacht besteed aan onze stakeholders, te weten onze arbitrage gemeenschap, de *in-house counsel*, de magistratuur, de balies en de universiteiten. Zo zal er bijvoorbeeld wat de magistraten betreft opnieuw in een ontmoeting worden voorzien, gefaciliteerd door het Instituut voor Gerechtelijke Opleiding (IGO). Voor het overige is het opvallend hoeveel leden initiatieven aandragen met betrekking tot de organisatie van seminaries, lunchdebatten, colloquia, enzovoort.

Une mission qui me tient particulièrement à cœur et qui m'a aussi été confiée lors de ma désignation comme président du centre, concerne le positionnement international du CEPANI et donc de Bruxelles comme place d'arbitrage.

En ce qui concerne Bruxelles comme place d'arbitrage, le projet "*Brussels, the European Arbitration Hub*", créé il y a trois ans déjà au sein du CEPANI, est une très belle réussite et est d'une grande importance pour la communauté arbitrale nationale et internationale. À mon sens, il faut encore aller plus loin. Pour ce faire, nous devons collaborer activement avec des partenaires et institutions fiables pour soutenir avec nous ce projet "*Brussels, the European Arbitration Hub*".

Quant au positionnement international du CEPANI, des visites aux présidents et secrétaires généraux d'institutions-sœurs ont eu lieu ces derniers mois avec la VIAC, le DIS, la NAI, l'ICC, l'AFA, institutions avec lesquelles le CEPANI collabore depuis de nombreuses années déjà, mais également les Swiss Chambers, la LCIA, l'AAA et le SCC. Par ailleurs, le CEPANI a eu des entretiens avec les présidents de SAA, ASA et DAA, Milan, Madrid, AIDC et Istanbul.

Le CEPANI prévoit d'étoffer sa délégation pour le Working Group II de CNUDCI et participera activement avec l'IFCAI. Ceci permettra d'envisager ultérieurement l'organisation d'autres réunions "entre institutions" pour échanger les points de vue sur l'un ou l'autre thème "commun".

Een laatste dimensie die voortvloeit uit de promotie van arbitrage zijn de Arbitration Classes die we vanaf 2015 organiseren onder de brede vlag van de "*Brussels School of Arbitration*". De nadruk ligt hierbij op kennisoverdracht en in het bijzonder het overbrengen van skills. De kennis en ervaring inzake arbitrage die in onze rangen aanwezig is, vraagt om ontsloten te worden in de vorm van gespecialiseerde opleidingen.

Er staat een volle agenda klaar voor de komende jaren met beloftevolle uitdagingen zowel op nationaal als internationaal vlak. Samen met de vicevoorzitters Didier Matray en Dirk

Van Gerven, alsook Secretaris-generaal Philippe Lambrecht en Adjunct Secretaris generaal, Emma Van Campenhoudt, ben ik er van overtuigd dat we succesvol werk kunnen verrichten.

REVIEW OF THE RECENT CHANGES TO THE LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) RULES



By Charles PRICE, Lawyer at the Brussels bar (Cruyplants Eloy Wagemans & Partners)

The LCIA Rules have recently been amended and the new modified rules have been in force since October 1, 2014. The changes are designed to improve the speed and efficiency of the arbitral process and, for example, now provide for electronic filings of the Request and the Response as well as an express power of the arbitral tribunal to take into account parties' conduct in the arbitration when deciding on costs. Other changes include the possibility of having an arbitral tribunal of more than three arbitrators as well as the introduction of a power for the LCIA Court to revoke on its own initiative any arbitrator who does not act with reasonable efficiency. The new Rules also provide for an emergency arbitration procedure pending the formation of the normal arbitral tribunal.

With regard to complex arbitrations, there is no change to the rules on joinder of parties but the arbitral tribunal, with the approval of the LCIA Court, is now empowered to order consolidation of various arbitrations, even where all the parties do not agree on consolidation, where there are multiple arbitrations involving the same parties and the same or compatible arbitration agreements and where only one or the same tribunal has been appointed at the time that consolidation is ordered.

The new Rules also clearly state that, unless the parties provide otherwise, the law of the arbitration agreement as well as the law of the arbitration is that of the seat of the arbitration.

Arguably the most interesting innovation in the new Rules is the introduction of a new Annex to the rules setting out enforceable guidelines that apply to all legal representatives of the parties. These guidelines, to which the parties are required to have their legal representatives agree, include the following duties:

- not to engage in activities intended unfairly to obstruct the arbitration or jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment;
- not to make false statements to the arbitral tribunal or LCIA Court and not knowingly procure false evidence;
- not to conceal documents ordered by the tribunal ;
- not to initiate unilateral contact with the tribunal without disclosure.

In the event of a complaint by another party or on its own initiative, the arbitral tribunal has power to decide that a legal representative has violated these duties and impose sanctions in the form of (i) a written reprimand (ii) a written caution as to future conduct in the arbitration and (iii) any other measure deemed appropriate.

The guidelines are broadly similar the IBA's Guidelines on Party Representation in International Arbitration, published in 2013. It remains to be seen how LCIA arbitral tribunals will make use of these apparently quite extensive powers, which, without introducing into arbitration the notion of contempt, reflect a wish to give some teeth to the rules applying to the conduct of legal representatives.

CEPANI LUNCH DEBATE WITH NADIA DARWAZEH ON "THE JERUSALEM ARBITRATION CENTRE: AN INNOVATIVE APPROACH TO RESOLVING COMMERCIAL DISPUTES IN A CHALLENGING POLITICAL CONTEXT" (15 JANUARY 2015)

CEPANI has the pleasure of inviting you to its upcoming lunch debate on 15 January 2015 with Ms. Nadia Darwazeh, Secretary General of the JAC, on the topic of "The Jerusalem Arbitration Centre: An innovative approach to resolving commercial disputes in a challenging political context".



The Jerusalem Arbitration Centre, an ICC joint venture, was launched just a year ago. The JAC is specifically tailored to resolving disputes between Israeli and Palestinian parties. It is founded upon the traditional model of the ICC International Court of Arbitration, but has been adapted to deal with some of the specific challenges in the region. For instance, it has a highly innovative approach to the seat of the arbitration and to the holding of hearings. The JAC will provide a neutral commercial dispute resolution service to local parties, and it is anticipated that it will serve as a milestone for increasing trade between the parties. Nadia Darwazeh, Secretary General of the JAC, will present the distinctive features of the Centre.

Please find all practical information and the registration form at <http://www.cepani.be/en/node/720>.

COLLOQUE SUR "BRUXELLES, PLACE D'ARBITRAGE" (16 JANVIER 2015)



BARREAU
DE
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L'Ordre français des avocats du barreau de Bruxelles et le CEPANI organiseront, à l'occasion de la rentrée solennelle du barreau de Bruxelles, un colloque intitulé "Bruxelles, place d'arbitrage" qui sera exceptionnellement ouvert aux entreprises et au monde des affaires. La nouvelle loi sur l'arbitrage a pour objectifs d'accueillir en Belgique et, plus particulièrement à Bruxelles, des arbitrages commerciaux internationaux mais aussi d'offrir toutes les garanties de souplesse et d'efficacité à des procédures arbitrales nationales.

Un cadre légal favorable, des spécialistes internationalement reconnus, des inter-prètes compétents, des infrastructures de qualité et peu coûteuses, un accès aisé depuis les grandes villes du monde et une situation au coeur de l'Europe imposent Bruxelles comme place d'arbitrage pour les litiges internationaux.

A l'occasion du colloque, les questions suivantes seront notamment abordées: pourquoi recourir à l'arbitrage? Pourquoi choisir Bruxelles comme lieu de l'arbitrage? Quel est le rôle de l'avocat dans l'arbitrage? Quel rôle joue un centre d'arbitrage tel que le Centre belge d'arbitrage et de médiation?

Le colloque se tiendra le 16 janvier 2015 de 9.30 à 12.30 dans la salle des audiences solennelles de la cour d'appel au Palais de Justice de Bruxelles. L'entrée est libre.

Programme

8h45-9h30 Accueil des participants

9h30 Introduction par **Stéphane Boonen**, bâtonnier de l'Ordre français des avocats du barreau de Bruxelles

9h50 Les modes alternatifs de règlements des conflits – tour d'horizon, par **Françoise Lefèvre**, avocat au barreau de Bruxelles

10h10 Pourquoi recourir à l'arbitrage ?, par **Olivier Caprassé**, avocat au barreau de Bruxelles, professeur à l'ULg et à l'ULB

10h30 Pourquoi choisir Bruxelles comme lieu de l'arbitrage ?, par **Guy Keutgen**, professeur émérite de l'UCL, président honoraire du CEPANI et président de Francarbi

10h50 Pause

11h10 L'avocat et l'arbitrage, par **Marc Dal**, avocat au barreau de Bruxelles

11h30 Le Centre belge d'arbitrage et de médiation (CEPANI), par **Dirk De Meulemeester**, avocat au barreau de Gand et président du CEPANI et **Philippe Lambrecht**, secrétaire général de la FEB, professeur à l'UCL, et secrétaire général du CEPANI

12h00 Les grands enjeux de l'arbitrage international, par **Bernard Hanotiau**, avocat au barreau de Bruxelles et professeur émérite de l'UCL

12h30 Fin

Inscription auprès de Mme Rose-Lyne Jamme: rose-lyne.jamme@barreaudebruxelles.be.
(entrée libre)

MR. PASCAL HOLLANDER APPOINTED AS NEW CHAIR OF THE IBA ARBITRATION COMMITTEE'S SUB-COMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

CEPANI is proud to announce that, effective 1 January 2015, CEPANI board member Pascal Hollander will become the new Chair of the IBA (International Bar Association) Arbitration



Committee's Sub-Committee on Recognition and Enforcement of Arbitral Awards. The IBA is the world's largest professional association of lawyers, with a membership of 55,000 individual lawyers and 206 bar associations and law societies spanning all continents. The IBA Arbitration Committee is one of the largest specialised committees within the IBA and its Sub-Committee on Recognition and Enforcement of Arbitral Awards conducts scientific projects addressing mostly issues arising under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

REPORT ON THE CEPANI 40 LUNCH DEBATE WITH RÉMY GERBAY ON 'MERE "ADMINISTRATORS" VS. "ANCILLARY DECISION MAKERS. MYTHS AND REALITIES OF THE FUNCTIONS OF ARBITRAL INSTITUTIONS'



By Ségolène GEERAERT, Lawyer at the Brussels Bar (Matray, Matray & Hallet)

On Monday 24 November 2014, CEPANI 40 hosted a lunch debate on the nature of the role of arbitral institutions in the institutional arbitration process. Mr. Rémy Gerbay, of Counsel at Enyo Law LLP and Lecturer at Queen Mary University, shared his interesting views on this controversial topic.

Mr. Gerbay pointed out that there is actually very little written knowledge about one of the key players in the arbitration procedure, the institutions. Intrigued by this vacuum, he started to gather information and focused his research on the precise role of arbitral institutions around the globe and found that their legal nature is far from clear.

The primal paradox on this topic is built upon the presumption that arbitral institutions are conventionally considered to be 'mere administrators' of the disputes that are arbitrated under their auspices. Nevertheless, Mr. Gerbay demonstrated, on the bases of ample examples, that it cannot be denied that in reality some of these decisions, labeled as 'administrative', have the potential to impact the outcome of the arbitral process.

Subsequently, Mr. Gerbay started with sharing his findings regarding the impact, function and role the arbitral institutions currently fulfill. According to the majority view, the institutions have a decision making function which does not go beyond what is considered to be 'mere administrative'. This implies, on the one hand, that arbitral tribunals make the jurisdictional decisions, while on the other hand, the role of the institution goes no further than providing administrative decisions. Therefore they believe there is no need to impose the same stringent due process requirements upon the latter. The second view, which is actually an extension of the first one, is founded upon the premise that the role of arbitral institutions does go beyond a mere administrative one. This view, according to the findings of Mr. Gerbay, relates the most to reality. Thereby taking into account that there are many aspects within the arbitral procedure that flirt with the thin line between what is labeled as administrative or as jurisdictional. The third and final group believes that arbitral institutions are acting solely in name and on behalf of the parties. This rather extreme view is based upon the assumption that institutions cannot undertake independent actions.



Even though Mr. Gerbay believes the time has come to change our 'cemented views' on what the role of the arbitral institutions embodies, he also acknowledged that issues such as increasing delays and additional costs are factors to be kept in mind when asking arbitral institutions to follow the same stringent due process requirements as the arbitrators. Nevertheless, he is strongly convinced that maintaining the rigid image of 'a mere administrative organ' imbedded in the arbitral rules, is not consistent with reality and shall therefore no longer be sufficient.

He observed that arbitral institutions do not have a pure administrative power, which implies that in practice they have the potential to influence the ultimate outcome of the procedure. In addition, he emphasizes that it is unattainable to hold on to the image of a unified concept of 'the arbitral institution'. Especially in an exponentially growing arbitration world where globalization and diversity are struggling to find their balance, labeling the role of arbitral institutions as 'mere administrative' does not correspond with today's reality. Moreover, one could even say that it forms a mythical and imperfect representation of their role and functioning.

Furthermore, Mr. Gerbay is convinced that due process should no longer be seen as an undividable concept, since it contains the inherent possibility to be applicable gradually, according to the needs of particular situations and cases. He feels that the time has come for a more open-mind-set towards accepting the idea of asking the arbitral institutions to comply with requirements of due process when making their decisions.

Mr. Gerbay suggested that if the arbitral institutions incorporated into their Rules the possibility for parties to agree upon certain due process requirements for the institutions to abide by, this shall result in a well functioning tailored solution. He thereby stressed that the actual foundation of the arbitration procedure consists of providing for a tailored dispute resolution mechanism to fit the parties' needs. By assessing the impact of their decision upon the final award, the arbitral institutions should be able to decide - case by case- upon their required level of due process.

In conclusion, requirements of due process are not a priori irreconcilable with the current nature of the role of the institutions within the arbitral process.



REPORT ON THE ICC YAF SEMINAR ON "BRUSSELS, EUROPE AND THE FUTURE OF ARBITRATION"



By Sophie GOLDMAN, lawyer at the Brussels Bar (Strelia) and teaching assistant at ULB

On 4 December 2014, an ICC YAF seminar was held at Dechert LLP (Brussels) on "Brussels, Europe and the future of arbitration". This was the first ICC YAF event to ever take place in Belgium.

After a brief introduction, the moderator **Ms. Erica Stein** (special Counsel at Dechert LLP, Brussels) led the seminar in the form of "questions and answers" with the members of the panel.

The first member of the panel to be questioned by Ms. Stein was **Ms. Alina Leoveanu** (Deputy Counsel at ICC International Court of Arbitration, Paris). She was invited to comment on the place of Europe in Arbitration from an institutional perspective.

According to the ICC recent statistics, seven out of the "top 10" places designated by the ICC Court as seat of arbitration are European cities. Among the factors that the Court

takes into account in order to choose the place of arbitration (in absence of Parties' choice), Ms. Leoveanu pointed out the Parties' nationalities, the applicable law, and the existence of a safe and modern arbitration law (i.e. based on UNCITRAL Model law) in force at the foreseen seat of arbitration. This last aspect is obviously favorable to Brussels, since the new Belgian Arbitration Law has come into force.

Ms. Leoveanu also stressed that 60 percent of the arbitrators designated by ICC worldwide are European. The percentage of parties coming from Europe has recently decreased to 45 percent but, according to Ms. Loeveanu, the decrease is explained by the fact that ICC has recently expanded its activities in other parts of the world.

She concluded, from the ICC perspective, that Europe currently occupies a significant place in international arbitration.

Then, **Mr. Petro Ortolani** (Senior Research fellow at Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg) gave an overview of the interactions between judicial and arbitral proceedings within the European Union, which are to be expected under the recast Brussels I Regulation (Regulation 1215/2013 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which will come into force on 10 January 2015) from an academic perspective. Mr. Ortolani first described the minimalistic approach chosen by the European Union in order to resolve the insufficiency of Brussels I on that aspect. Further, Mr. Ortolani demonstrated the problematic interactions between EU law and arbitration, which have unfortunately not been resolved as such by the recast Regulation. He particularly discussed the cases where an arbitral tribunal would disregard a state court's judgment and, inversely, where a state court would deny the existence of an arbitral award rendered on the same case. He also addressed the legal bases that are likely to be used in order to object to the enforcement of so rendered sentences/judgments.



During the third testimonial, **Ms. Marily Paralika** (Senior Associate at White & Case, Paris), dealt with investment arbitration in Europe from the private practitioner's perspective. Through the interesting "Romania case" (Micula Brothers vs Romania before the ICSID Court of Arbitration), she illustrated the kind of complex interactions between EU law and investment arbitration, which are likely to arise. Among others, the Romania case raises the question of how reconciling on one hand, Romania's obligation under the ICSID Convention to respect the award by which it was condemned to pay damages in compensation of the cancellation of fiscal incentives, and on the other hand, its obligation under EU law not to provide state aid. There is an ongoing investigation regarding the question whether the payment of the said damages should be deemed state aid. Investment arbitration practitioners are very much looking forward to the result of this investigation.

Finally, **Mr. Arno Gildemeister** (in-house counsel, Head of dispute Resolution of TÜV Rheinland Group, Cologne) spoke about the future of arbitration in Europe and in Brussels from the user's perspective. Regarding the choice of the seat of arbitration, he confirms that the parties also take into consideration the application of a modern and safe arbitration law. In this regard, Mr. Gildemeister stressed the fact that Belgium, thanks to

its new arbitration law, is likely to be perceived as a “good place” by parties. Mr. Gildemeister also addressed the question of the future of arbitration between European parties, in view of the Recast Brussels I Regulation, which provides for an automatic enforcement of judgments rendered by courts among European countries. In that respect, Mr. Gildemeister was confident: if enforcement is indeed important, arbitration offers to parties other advantages such as a neutrality and equality between parties on procedural language, legal culture, the place of the proceedings, etc.

Overall, this seminar gave a positive overview of the future of arbitration for Europe in general and Brussels in particular.

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Arbitration – Objection to jurisdiction – Not raised in due time

Doctrine

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VARIA

• 18th Annual IBA International Arbitration Day (26-27 February 2015, Washington)

On 26 and 27 February 2015 the International Bar Association (IBA) Arbitration Committee and the International Centre for Settlement of Investment Disputes (ICSID), supported by the IBA North American Regional Forum will hold a joint conference. Topics include:

- Retrospective: Drafting the Convention and ICSID's Early Years
- In What Ways Does Investment Arbitration Fulfill (or Not) the Purposes of BITs?
- Procedural Issues in Investment Arbitration
- The Future of Investment Arbitration

For more information on this promising event and to register, please consult <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0243e4fc-6e2c-4c95-b9c3-ba29d7409cb1>

• 13th IFCAI Biennial Conference (Bahrain, March 2015)

The tentative theme of the 13th IFCAI Biennial Conference is the legitimacy of international arbitration from an institutional perspective.

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