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Editors in chief: Guillaume Croisant, François Cuvelier, Iuliana Iancu and Sander Van Loock

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30 August 2022	**SAVE THE DATE: CEPANI40 Summer Drinks**
6 October 2022	**CEPANI lunch debate ICCA & IBA Task Force on Data Protection in International Arbitration with Kathleen Paisley and Melanie van Leeuwen**
25 November 2022	**Default in international arbitration – bending over backwards? (9:00-17:30)**

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SERIES - STORIES FROM A YOUNG ARBITRATOR

With the April 2021 edition of the Newsletter, the Editors introduced a new series of short, topical posts written by young arbitrators. The authors will be sharing practical tips and insights from their experience as arbitrators, from dealing with defaulting parties or with non-represented parties to managing multi-language proceedings, from addressing falsified evidence and the interplay between the burden of proof and the standard of proof, to deciding jurisdictional challenges and evaluating the credibility of witnesses.

We hope you will enjoy this new series and, please, do not hesitate to reach out should you wish to participate.

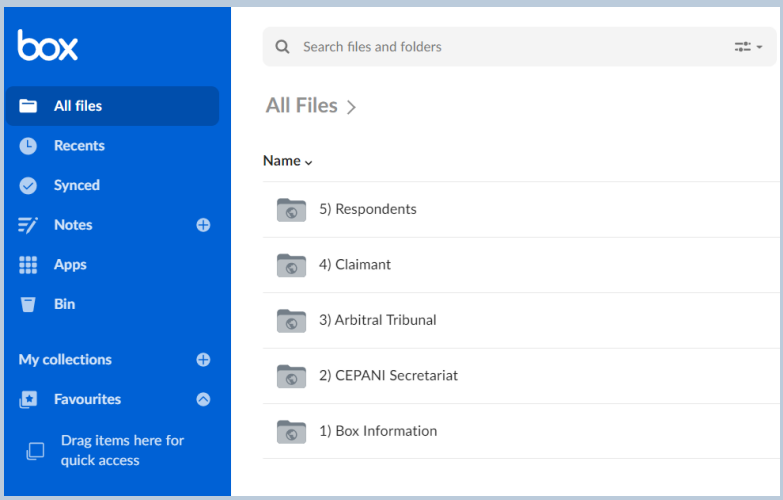
EPISODE 10 – HOW PANDEMICS CAN ALSO CREATE OPPORTUNITIES FOR YOUNG ARBITRATORS

Lauren Rasking
Senior Associate,
Allen & Overy (Belgium) LLP

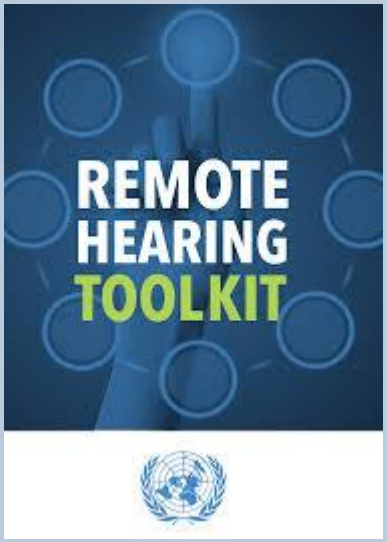
Many articles have been written about the impact of the ongoing COVID-19 crisis on the practice of commercial arbitration. One trend that all commentators seem to agree on, is the development and acceleration of the use of innovative technologies and online platforms to enable electronic filing, document exchange, communications, and even fully virtual or hybrid hearings. This accelerated digitalisation creates challenges, but also opportunities for young arbitrators. I believe that the next generation is well placed and has an important role to play in promoting and adopting new technologies, and in implementing new ways of conducting dispute resolution.

Thankfully, they are not alone and can find support in many arbitral institutions that have almost universally adopted guidelines and detailed protocols on how to conduct remote proceedings. In this post, I would like to focus on a few tools that I, both as a young arbitrator and as a counsel, have found to be particularly useful when traveling, attending physical meetings, and even sending hard copy letters, all became more difficult, and in some cases even impossible.

The first tool that I would like to focus on is one that both arbitrators and the parties can benefit from, and this from the very beginning of the arbitral proceedings: the use of a secure online platform for document exchange between the parties, the arbitrator and the CEPANI secretariat, better known as “the Box”. The **CEPANI Box** was introduced years before there was any inkling of a global pandemic that would change the way arbitration proceedings are usually run. Many readers of this newsletter were probably already persuaded by the advantages of a platform that allows for the centralised, easily accessible and economical exchange of documents and file management. However, in times of remote working, where both the arbitrators and the parties had to access documents online and where sending physical letters – let alone voluminous bundles of written submissions and supporting evidence – became both more burdensome and less effective, the availability of this type of secure platform can only be encouraged.



Another tool I would like to mention is the publication of a **checklist for remote hearings**, which derives from initiatives taken by many arbitral institutions to support their users and arbitrators. Inspired by notes, checklists and protocols of other institutions such as ICC, HKIAC, VIAC, CIArb and NAI, CEPANI also published a checklist with practical guidance on how to organise a remote or virtual hearing. Unless the parties have agreed for the dispute to be decided on the basis of documents (article 24.4 and 29.3 of the CEPANI Arbitration Rules), the tribunal may summon the parties to appear at an oral hearing. It is up to the tribunal to decide, after consulting with the parties, whether to hold a physical hearing or rather a virtual/hybrid hearing via videoconference, teleconference or any other appropriate means of communication (article 24.3 of the CEPANI Arbitration Rules).



In my recent experience, a remote hearing can have significant advantages. By eliminating any travel time and requiring a higher degree of focus, remote hearings tend to be more time-efficient and cost-effective for the parties. It also allows the parties and arbitrators to bring up documents promptly on screen, to read and comment on transcripts, to follow simultaneous translations and to create links within a counsel team or between members of a tribunal, live during the hearings, by having all data and participants present on one online platform. However, this requires some preparation, and this does not only include having an IT support team on stand-by. As set out in the CEPANI checklist, it is important to have a clear agreement between the parties on organising a fully virtual or hybrid hearing, to set out the ground rules during a case management conference and to document these in a procedural order and cyber protocol (some suggested wording can be found in the annexures to the checklist). You want to avoid any successful challenges of an award on the basis of a violation of the rights of defence of a party that feels it was unable to make its arguments properly in a virtual setting.

Finally, when first appointed as an arbitrator, expect your electronic **ID-reader and guidance note** in the post to allow you to validly sign certain communications using a qualified electronic signature. This includes Terms of Reference of Procedural Orders, but excludes – at least under the current rules (i.e. article 34.2 of the CEPANI Arbitration Rules) – the Award. Although the parties and arbitrators are not obliged to make use of the electronic signature, they are encouraged to do so (see article 8.2 of the CEPANI Arbitration Rules). As you can avoid the administrative burden and time spent meeting in person to merely sign a document or arranging for couriers to transport originals to collect the required wet ink signatures, one can only support such development. Although this option is not yet available for the Award, some changes introduced by other arbitral institutions might entail a welcome move in this direction (see, for example article 26.2 of the 2020 LCIA Rules, or the ICC Guidance note dated 1 January 2021).

The above tools and developments fit with the broader innovations that the practice of commercial arbitration needs to embrace to face other challenges, such as climate change, the need for more transparency, diversity, and cost-effective and swift decisions. We can take comfort in the fact that the next generation of young arbitrators has some of the tools at their disposal, and will undoubtedly drive further innovation, so that they are well equipped to meet these challenges.

REPORTS

CEPANI'S GENERAL ASSEMBLY AND 4TH GLOBAL CONFERENCE OF THE CO-CHAIRS' CIRCLE – LEGITIMACY IN *AND* OF *ARBITRATION*

2-4 JUNE 2022

On the first week of June, Brussels was not only the centre of the EU but also of the (arbitration) world, welcoming the 4th edition of the Global Conference of the Co-Chairs' Circle ("CCC Conference"). After Berlin in 2014, Helsinki in 2016 and Rome in 2018, the event was organised in Brussels in 2022 (after a break due to the pandemic), thanks to the tireless efforts of the co-chairs of **CEPANI40**, **Sophie Goldman (Tossens Goldman Gonne)** and **Sigrid Van Rompaey (Matray Matray Hallet)**, assisted by their Steering Committee and the CEPANI Secretariat.

The CCC Conference takes place every other year. It is organised and hosted by one of the member organisations of the Co-Chairs' Circle (an informal organisation which gathers the main young arbitration associations), with the support of the other below40 organisations. This year's event was attended by around 200 participants from half a dozen countries.

The Conference was preceded, on 2 June, by the annual General Assembly of CEPANI, where its President, **Benoît Kohl**, and its Secretary General, **Emma Van Campenhoudt** presented the activities and budget of the organisation for the past year and the main projects for 2022, including greater collaboration with the other BeNeLux arbitral institutions and the return to full-scale in-person events.

The CEPANI has had a tradition for many years of inviting a prestigious speaker at the end of its annual general meeting. This year, **Prof. Olivier Caprasse** held the audience (including many international guests present for the CCC Conference) spellbound on the theme of silence and arbitration (see the full text of his keynote speech below).

After a cocktail at the FEB/VBO, the CCC Conference then kicked off with a "walking dinner with a view", on the splendid 24th floor rooftop terrace of **Freshfields Brussels**, under the patronage of **Nathalie Colin**.

The academic programme of the conference, focused on legitimacy *in* and *of* arbitration, started on 3 June with a keynote speech by Prof. **Bernard Hanotiau (Hanotiau & van den Berg)**. Our very own Belgian "Pope" (or "Brad Pitt", in his words to his daughter) of the arbitration world set the scene on the legitimacy concerns in international arbitration.

Prof. Hanotiau's keynote speech was followed by two panels. The first one, composed of **Maude Lebois (GBS Dispute, Paris), Diana Paraguacuto-Maheo (Foley Hoag', Paris)** and **Olivier van der Haegen (Loyens & Loeff, Brussels)**, and moderated by **Jonathan Lim (Wilmer Hale, London)**, focused on the legitimacy *of* arbitration, discussing the challenges to resolving disputes through arbitration in times of geopolitical turmoil and protectionism as well as the key characteristics which render commercial arbitration legitimate and sought after.

The second panel, composed of **Michelle Bock (Squire Patton Boggs, Brussels and Washington DC), Prof. Niek Peters (Simmons & Simmons, Amsterdam)** and **Dorothée Vermeiren (Clifford Chance, Brussels)**, and moderated by **Raphael Kaminsky (Teynier Pic, Paris)**, tackled the questions of legitimacy *in* arbitration, in particular issues of legitimacy surrounding the taking of, and weight of, evidence.

After a sunny lunch at the mythic Chaloupe d'Or on the Grand Place, which allowed foreign guests to discover *garnaalkroketten* (for those who had not had the chance to catch one at Freshfields already), the afternoon continued in three parallel breakout sessions, allowing for greater interactions and debates with the audience.

The first one discussed how to gain ground in international arbitration, with one's firm, vis-à-vis the arbitration community at large and towards clients. It was moderated by **Guillaume Croisant (Linklaters, Brussels)**, and composed of **Victor Bonnin Reynes (VB Arbitration, Madrid), Clément Fouchard (Reed Smith, Paris), Anya George (Schellenberg Wittmer, Zurich)** and **Catherine Anne Kunz (Lalive, Geneva)**.

The second session, moderated by **Vanessa Foncke (Jones Day, Brussels)** focused on the legitimate responses when facing guerrilla tactics. It was composed of **Ander Forss (Castrén & Snellman, Helsinki), Giulio Palermo (Archipel, Geneva), Jan Erik Spangenberg (Manner Spangenberg, Hamburg)** and **Gallina Zukova (Zukova, Paris)**.

Finally, in the third session **Laura Alakija (Primera Africa Legal, Lagos), Thomas Granier (Asafo & Co, Paris), Melanie Riofrio Piché (Madrid International Arbitration Centre)** and **Gabriele Ruscalla (Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels)**, moderated by **Saadia Batthy (Gide Loyrette Nouel, London)**, covered what is expected from arbitral institutions in order to improve the legitimacy of arbitration.

After a report on the three sessions to the wider group by **Ulrich Kopetzki (Kopetzki, Vienna), Evelina T. Wahlström (Stockholm Chamber of Commerce)** and **David Zygas (Freshfields, Brussels)**, and the closing remarks of Sophie and Sigrid, a German group of improv comedy, **die Affirmative**, conquered the audience with their depiction of the arbitration, and broader legal, world seen with humour through the lenses of outsiders.

The event finished on a high note with further networking activities, first at the **Jeux d'Hiver** on Friday eve (with the party continuing until 3am and, as per the rumour, even 5am for a few survivors at the infamous Barabar).

A glorious sun allowed said survivors to have an excuse to wear sunglasses during the closing brunch at the **Chalet Robinson** on Saturday. The participants to the guerrilla tactics session (and the others) even had the opportunity to put into practice their discussions by trying to raid the rowing and paddle boats of the other attendees.

***Merci* Sophie & Sigrid**, as well as all the organisers and generous sponsors, for this successful and wonderful event! As a foreign participant put it: "*It had been a very long time since I had so much fun and enjoyed an event the way I enjoyed this one. As soon as I set foot in Rotterdam yesterday night I was missing Brussels already. CEPANI40 raised the bar to insurmountable heights!*"

The next CCC Conference should take place in Frankfurt in 2024. *Bis bald!*

The pictures of the event are available at:
https://gallery.k-pture.com/fourthglobalconferenceofthecochairscircle/

Silence and Arbitration

Keynote speech of Olivier Caprasse

Following the CEPANI General Assembly

Ladies and Gentlemen, Dear Colleagues, Dear Friends,

Before coming to my presentation, please allow me to say a few words about two persons: our past chair Dirk De Meulemeester and you Mr. Chair. Indeed, since your election as chair of our beloved institution, it is the very first time that we are able to meet in person following the general assembly. I thought that we all owed you both a few words today, not behind screens, but in the heat of our in person meeting.

I have to be brief, knowing that so many other things should be said. I will do that in your respective mother tongue.

Dames en Heren,

Dirk De Meulemeester heeft onze instelling gedurende zes jaar geleid. Hij heft dit gedaan dat met een werkethiek, charisma en een diplomatische ingesteldheid die bewondering verdienen. Zijn verwezenlijkingen zijn talrijk: de arbitrage-academie, nieuwe regels, het Box-systeem, de herziening van de arbitrale uitspraken, het delen en ontwikkelen van de passie voor arbitrage, de positionering van onze instelling en haar leden op een echt internationaal niveau, en niet te vergeten de perfecte organisatie van het 50-jarig bestaan van Cepani. Zijn creativiteit, zijn durf en zijn sterke zijn voor mij altijd zeer indruwekkend geweest.

Mesdames, Messieurs,

Benoît Kohl, quant à lui a pris la suite, il y a deux ans déjà. Il le fit dans les temps les plus troubles et intenses de cette terrible crise Covid. Tous, nous avons immédiatement compris qu'il serait à la hauteur. Empathique, travailleur, toujours disponible lui aussi, il a non seulement assuré la continuité mais a déjà apporté de nouveaux développements. Je ne citerai que l'importante création du C-Sar, le centre d'arbitrage pour le sport et la finalisation en cours d'une réforme de notre code judiciaire. Sa force de travail et son calme en toutes circonstances m'ont toujours fasciné.

Bien sûr tout cela, Dirk et Benoît n'ont pu le faire que grâce aux équipes qui les ont toujours entourés. Je pense plus particulièrement bien sûr à notre Secrétaire Générale Emma Van Campenhoudt et à son équipe Camille Libert et Astrid Moreau.

Dames en Heren,

Mesdames, Messieurs,

Après deux ans d'attente, je vous remercie de vous joindre à moi pour remercier notre président d'honneur et notre président. Many thanks for all they did and do.

With that I was sure that whatever the quality of my presentation there would in any case have been applause during my speech…I am also grateful to them for that.

Since people came from abroad, including participants to the Co-Chair Circle Conference, we decided that I would make my presentation in English. In this respect, I take the advantage of this introduction to congratulate the organizers of the CCC Conference, which will undoubtedly be a great success. I wish them all the best.

Now, it is time for me to come to my presentation and to enter the Sound of Silence to take the title of that old song by Simon and Garfunkel. Let us start with a bit of poetry. Yes, poetry, here in the Cepani. In the Sound of Silence by Simon and Gartfunkel, there are the following lines. I quote, as we lawyers say :

"*…In the naked light, I saw*
Ten thousand people, maybe more,
People talking without speaking,
People hearing without listening
People writing songs that voices never shared
And no one dared
Disturb the sound of silence".

End of quote.

Beautiful isn't? Beautiful, but challenging: do I really have something to say that deserves breaking the sound of silence?

Then, came to my mind from decades ago (yes I turned fifty this year) an essay I had to write during my Greek studies on Euripide's advice – I quote again:

" *Speak if your words are stronger than silence, or remain silent*".

End of quote.

So, listening to Simon and Garfunkel, as well as to Euripide (you see my sources of inspiration can be quite diverse), I asked myself whether I should really say something today on silence and arbitration, the title I have chosen for this conference

To tell you the truth, I am sure that right now, some of you are silently but clearly telling to themselves: 'oh yes, please Olivier, remain silent and let's go party'.

However, you know I won't do that. First, I promised my chair to deliver that speech. Second, those among you who know me, do know that remaining silent is not my first quality.

So please allow me to share with you some considerations on silence and arbitration.

My thesis is that we must be aware that silence can play a crucial role in arbitration, sometimes similar to the role it can play before courts, sometimes, specific.

I will try to pick up illustrations of the importance of silence from the arbitration agreement itself to the very situation of the arbitral community as a whole.

Questions are numerous, so that it is not possible to provide you with a thorough analysis of them all. There are issues for which I will limit my presentation to mentioning the possible role of silence, and others for which I will try to go deeper and propose personal considerations.

The idea is to pose the question, do I, do you, do they, do we, have to speak, in different circumstances and what are the effects of not speaking whatever our role: counsel, parties, arbitrators, institution.

In this context, I will not deal with what is a form of silence, and in fact more than that, an absence: arbitration with a defaulting party. This is indeed a topic in itself.

The existence of an arbitration agreement

Can a party who has not reacted to the sending of a document containing an arbitration clause be bound by it; can non-signatories companies of an agreement be bound by a clause depending on certain circumstances including their silence when receiving letters that should have been sent to other members of their group?

The answer to those questions depends on the applicable law (with some case law like French case law being very liberal) and is often very fact specific.

These issues are of great importance but have been dealt with quite often so that I will limit myself here to remind us of the possible role of the sound of silence as the origin of an arbitration.

The constitution of the Arbitral Tribunal

Here again, we can hear the sound of silence.

I am referring to the disclosure obligations of arbitrators in order to avoid conflict of interests and enable the parties to evaluate whether they should oppose the confirmation of an arbitrator or challenge him

or her. How far should the arbitrators speak? What could they legitimately keep silent? That is one of the most difficult questions in debate today before institutions, courts and among arbitrators.
I would like to stop for a minute to share with you the following thoughts:

i) Of course, at first look everyone tend to answer: speak, tell everything, this is transparency.
My point is that this should be considered in a more nuanced way: unlimited obligations of disclosure may damage the process of arbitration itself, giving an impression of a permanent suspicion about its actors.
Charles Jarrosson, wrote quite interestingly in this regard that: (I quote) "*duty to disclose must be kept in reasonable limits. Perverse effect of a hypertrophy of the disclosure obligation are numerous. First, doubt create a snowball effect: ignoring whether a secondary fact must be revealed, one should disclose. But, once it has been revealed once, one would not understand why it should not be the case again in the future. This way, step by step, what was a superfluous precaution, will transform into an ardent obligation and everything, which will come close to a situation which gave rise to a disclosure will, by extension, open the road for disclosure…*" (Ch. JARROSSON, note under Cass., (Fr.) 10 October, 2012, Rev. arb., 2013, p. 134 (free translation)).

(ii) Moreover, one should not forget that the disclosure obligation is ongoing during the arbitration, which means that the disclosure questions might be raised whereas interim awards have been rendered. If something must be disclosed, it must be disclosed, whatever the stage of the arbitration. However, the question is precisely what must be disclosed. Answering that absolutely anything should be revealed, may create problems in cases where the process is already ongoing from some time and when one party has already lost on some points. Mentioning circumstances that should not necessarily be disclosed could damage the process taking into account the fact that we should not exclude that a party might be ready to have recourse to dilatory tactics, through challenge for instance, and try to take benefit of unnecessary disclosures.

(iii) Finally, I think it is not the best solution to have different international soft law guidelines in this regard. I am referring for instance to the ICC Note to the Parties and Tribunal that came with new concepts, requirements, compared to the IBA guidelines on the conflict of interests. I would favor having recourse to a unique body, in this case the IBA guidelines.

The instruction of the case

A. Irregularities in the instruction

This is probably the topic most you expected to be presented today under the reference to silence and arbitration. It is quite clear, indeed, that, depending on the applicable law, keeping silent can lead to the impossibility of raising issues latter on. That has to do with fairness.
In Belgium, article 1679 of the Judicial Code reads as follows: "*A party that, knowingly and for no legitimate reason refrains from raising, in due time, an irregularity before the arbitral tribunal is deemed to have waived its right to assert such irregularity*".

Consequently, if, as counsel, you face a problem, you have to speak, and in dure time.

Three considerations in this respect:
(i) First, choose your fights. Raising objections and objections and objections can be useless and damaging the perception of your case;
(ii) Second, faced with the threat of objections related to due process irregularities, arbitrators should not fall into due process paranoia. Otherwise, you will always grant extension, permission to add documents, etc. That is inefficiency. Being an arbitrator implies not being afraid of one's shadow;
(iii) Third, and on a more anecdotical point of view, I do not ask anymore at the end of hearings whether the parties are satisfied with the way the procedure was conducted. I used to do it and know many excellent arbitrators who still do it. I find that most of the time it is useless, and I consider that just before entering into deliberations, it is putting Counsel under undue pressure. It can even provoke temptation for them to raise something they would not have raised, just because they are asked that specific question.

B) Objections to documents production

More and more arbitrations involve requests for documents production, be it organized in a specific phase or not, with recourse to technique of the Redfern Schedule or not. In this context, I wanted to remind us that there exist legitimate causes to refuse the communication of a document or of categories of documents. In other words, to remain silent…
This is confirmed, *inter alia*, by article 9.2, b) and e) of the IBA Rules on the Taking of Evidence, which refer to the applicable rules of legal privilege or confidentiality.

I wanted to insist on the importance in this context of article 9.2.4, which explains that:
"*4. **In considering issues of legal impediment or privilege** under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, **the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties** and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.*"

I like the way an award referring to the principle underlying English law (but without applying English law) explained that "*A party should not be required to disclose to its opponent communications between it and those directly involved in the litigation with it expressing its position about the claims it seeks to make against its opponent and defences against claims made by the opponent. That potentially extends to its insurers. Privilege in this understanding obviously includes communications between a party and its lawyers. However, it also must include communications in which a party communicates to a third party directly involved in the litigation with its understanding of a claim made against it. The notice which the party gives to its insurers/brokers about the possible risk of a claim that may be made by a third party against it falls into this category*" (See O. Caprasse, «Les documents en arbitrage », Rev. Arb., 2018, p. 536).

C) Silence and advocacy

I am presently facing many great counsel so that I would not pretend telling what good advocacy in arbitration is. I just wanted to insist on

the efficiency for counsel to be able to remain silent. I am not speaking about not interrupting your opponent, etc. I am speaking about Counsel not having to re-argue their whole case in every single details during oral submissions.

This is a difficult exercise. Counsel can legitimately be afraid that the tribunal has not sufficiently read their submissions, or that if a point is not made orally that would prove that they consider it as not important. Yet, experience reveals that during hearing, quite often, time is lost in debates on questions for which the written submissions are clear, complete so that leaving more room for oral submissions and interactive debates on other issues should be considered.

The solution probably comes from a dialogue beforehand between counsel and arbitrators. I recognize that this is a delicate exercise. I am mentioning it because it is such a pity when arbitrators enter their breakout room and one of them say: "well we have lost a day…"

Silence of parties on the application of certain rules and the role of arbitral tribunals

The question is the following: rules of law have been chosen by the parties, a contract in the file of the case at the basis of most of the parties' consideration but the arbitrators consider that the parties do not address certain rules or contractual provisions that according to them are relevant.

In other words, if the parties are silent on a legal question (consciously or not) can or must the arbitrators speak, which means concretely asking questions to the parties to enable a contradictory debate?

Views on that vary *inter alia* depending on the origin of the arbitrators (common law lawyers being more reluctant to raise questions of that kind for instance).

We also know what the difficulties are in this context, I mention two:
(i) Duty of the arbitrators to do their best to render an award that is enforceable;
(ii) Need for respect for due process.

I submit to you the following considerations.
(i) If the arbitrators are convinced that a public policy norm is at stake, they should raise it (we have seen that with the Eco Swiss case law with respect to Competition law). There is also a growing trend in this direction in cases involving corruption, money laundering, etc., including in investment arbitrations (as demonstrated in the *Metal-Tech v Uzbekistan* Icsid award);
(ii) In his wonderful article ("Must Justice be a Goal for the Arbitrator?", *Arbitration international*, 2021, p. 507) Pierre Mayer writes that: "*Jurisdictional truth must bear as much resemblance as possible to the actual truth*".
That is the reason why, Pierre Mayer considers, rightfully I think, that arbitrators should also not remain silent when a party or both parties overlook a contractual provision.
Let us assume for instance that both parties develop their case on the basis of a certain clause of the contract but that the arbitral tribunal is convinced that the answer lies in another clause. The tribunal has received the mission to decide on the basis, *inter alia*, of the contract. Will it say nothing and apply a provision, which could not be the correct one?
With Pierre Mayer, in such a case, I consider that the tribunal should ask the question. It will receive an answer and maybe realize that it was wrong in its evaluation, but then it will know.

Giving the parties the possibility to answer, arbitrators should not remain silent even beyond the classic case of public policy issue.

The merits

Silence can be decisive or at least an important factor when deciding on the merits of a case. This is not specific to arbitration.
Considering the importance of the role of silence in that regard but also the fact that it is not specific to arbitration, I just wanted to mention different questions where the fact that a party has spoken or not might be relevant:
(i) Are you supposed to have accepted a proposal if you do not answer anything in a certain period of time?
(ii) What about not objecting when a contract is not performed as provided? Are you supposed to have accepted an implicit modification of this contract? What about the effects of 'no oral modification clauses' in this regard? What about the different approaches under different legal systems?
(iii) In post M&A disputes, we all know the questions parties may debate on what are the duties of the sellers in terms of speaking and what are the duties of the buyers in terms of asking *(i.e*. investigating)?

The arbitral community

That leads me to my last but not least reference to silence: silence and the arbitral community. How would it be possible to end this presentation without speaking of one of the great challenges of these years: increasing diversity (in terms of age, origins, gender etc.)?

There has been too much silence on that. I am happy that this is not the case anymore. Diversity is good. Diversity is good.

In my personal path, I have been lucky to benefit from the first signs of inclusiveness, in my case in terms of age, receiving a first appointment as arbitrator at 29, thanks to the then President of Cepani, Guy Keutgen, something, I will never forget.

Cepani, with many others, is working on diversity, inclusiveness. That is good. We have to find the right balance.

We must exchange, speak, have the courage of the nuances (to take the title of a wonderful book by Jean Birnbaum (*Le courage de la nuance*, Seuil, 2021), supporting what is good to increase global and good inclusiveness and having the courage to challenge what is not.

In this context, we must speak and not remain silent, remembering the word of the great Martin Luther King, who knew something about diversity: "*At the end we will not remember the words of our enemies but the silences of our friends*".

I must conclude

Silence and arbitration are not strangers to one another. We have seen some examples of the relationships that exist between silence and arbitration.

There are other direct or indirect points of contact between silence and arbitration that could be explored: should awards be published; are dissenting opinions acceptable under Belgian law; what must an arbitrator do when he or she realizes that a co-arbitrator is not disclosing something he or she should disclose; just to name a few…

But now it is time for me to return into the Sound of Silence.
I thank you very much for your attention.

TRIBUTE TO CEPANI40'S CO-CHAIRS AND APPOINTMENT OF THEIR SUCCESSORS

Emma Van Campenhoudt
Secretary General
CEPANI

Thank you Sophie and Sigrid!

CEPANI40 has been very active in the last few years. In this respect, I would like to thank **Sophie Goldman** and **Sigrid Van Rompaey** for their tireless investment in the development and the notoriety of CEPANI40, as their mandate as CEPANI40 co-chairs ends at the end of this summer. We are very grateful for the many initiatives and remarkable events that were organised and for having taken the international reputation of CEPANI40 to the next level. Under their presidency, CEPANI40 hosted, among others, its first events at the prestigious Paris Arbitration Week. Yet, the highlight of the mandate of the two outgoing co-chairs, Sophie Goldman and Sigrid Van Rompaey, was the Global Conference of the Co-Chairs' Circle organised in Brussels on 2, 3 and 4 June on the theme "Legitimacy in and of Arbitration". We are truly grateful for their unfailing commitment to the development of CEPANI and its young arbitration practitioners' community and we wish them all the best for their future endeavours!

Merci Sophie et Sigrid !

Le CEPANI40 n'a pas manqué d'être très actif ces dernières années. A cet égard, je tiens à remercier Sophie Goldman ainsi que Sigrid Van Rompaey pour leur investissement sans relâche dans le développement et la notoriété du CEPANI40, leur mandat de présidentes se terminant à la fin de cet été. Nous leur sommes très reconnaissants pour les nombreuses initiatives et les événements remarquables qui ont été organisés et pour avoir porté la réputation internationale du CEPANI40 à un niveau supérieur. Sous leur présidence, le CEPANI40 a notamment organisé ses premiers événements dans le cadre de la prestigieuse Paris Arbitration Week. Le point culminant du mandat des deux co-présidentes sortantes, Sophie Goldman et Sigrid Van Rompaey a été la Global Conference of the Co-Chairs' Circle organisée à Bruxelles les 2, 3 et 4 juin sur le thème "Legitimacy in and of Arbitration". Nous leur sommes très reconnaissants de leur engagement sans faille pour le développement du CEPANI et de sa communauté de jeunes praticiens de l'arbitrage et nous leur souhaitons tout le meilleur pour la suite !

Bedankt Sophie en Sigrid!

CEPANI40 is de afgelopen jaren zeer actief geweest. In dit verband, wens ik Sophie Goldman en Sigrid Van Rompaey van harte te bedanken voor hun onvermoeibare investering in de ontwikkeling en de bekendheid van CEPANI40, aangezien hun mandaat als co-voorzitsters van CEPANI40 eind deze zomer afloopt. We zijn hen erg dankbaar voor de vele initiatieven en evenementen die werden georganiseerd, en om de internationale reputatie van CEPANI40 naar een hoger niveau te hebben getild. Onder hun voorzitterschap organiseerde CEPANI40, onder andere, haar eerste evenementen tijdens de prestigieuze Paris Arbitration Week. Echter, was hét hoogtepunt van het mandaat van de twee vertrekkende co-voorzitsters, Sophie Goldman en Sigrid Van Rompaey, de Global Conference of the Co-Chairs' Circle, georganiseerd te Brussel op 3 en 4 juni rond het thema "Legitimacy in and of Arbitration". We prijzen hun niet-aflatende inzet voor de ontwikkeling van CEPANI en voor de jonge arbitragebeoefenaars. Veel succes voor de toekomst!

Appointment of CEPANI40's new Co-Chairs

CEPANI is delighted to announce the appointment of two new Co-Chairs of its below-40 organisation, Katherine Jonckheere and Guillaume Croisant. They will serve for a term of three years.

Guillaume Croisant is a managing associate at Linklaters (Brussels). He is an all-round litigator specialising in international arbitration and related state court proceedings. He has been appointed as an arbitrator and tribunal secretary under a variety of rules. Guillaume has been very involved in CEPANI's and CEPANI40's activities over the past years. Among others, he has assisted with the organisation of a number of editions of the Brussels Pre-Moot and, since 2019, has been a member of the Steering Committee of CEPANI40 (assisting with the organisation of the CCC Conference) and one of the editors of the CEPANI newsletter. Guillaume is also involved in academic. He lectures on oral advocacy in international arbitration and private international law at the Université libre de Bruxelles (ULB), and he is the co-editor in chief of the Belgian business law journal R.D.C/T.B.H.

Katherine Jonckheere is a Belgian lawyer based in London, who has worked exclusively in the field of international arbitration for eight years. She recently joined LALIVE, after having worked as an associate at Three Crowns and as a legal counsel at the Singapore International Arbitration Centre. While currently qualified as an English solicitor and New York attorney, she originally trained as a Belgian lawyer at the Brussels Bar. Despite the distance, Katherine has always been an active member of CEPANI40, assisting in person to our events in Belgium and abroad as well as virtually in the most recent years. She also serves on the events team for Young ICCA, demonstrating her interest and in-volvement in below40 arbitration associations. She frequently travels from London to Belgium and will do so even more in her new capacity!

The new Co-Chairs will continue, with their new Steering Committee, to strive to create opportunities for young professionals to debate all aspects of the practice of arbitration and to enable them to further engage and network in their area of interest.

Veel succes & tout le meilleur à eux deux et au CEPANI40!

The official handover will take place at the CEPANI40 Summer Drinks on Tuesday 30 August 2022. We are looking forward to seeing many of you on this occasion!

ARBITRATION LUNCH MATCH

9-13 MAI 2022

Laura Savonet
Associate
Linklaters, Brussels

Du 9 au 13 mai 2022, plus de 950 femmes pratiquant l'arbitrage se sont rencontrées dans 32 villes différentes et 20 pays du monde entier, dont quatre groupes à Bruxelles cette année.

Ce projet « Arbitration Lunch Match », qui a débuté en Allemagne au printemps 2020, vise à rassembler des femmes pratiquant l'arbitrage autour d'un déjeuner. La particularité ? Les noms des autres participantes ne sont pas dévoilés à l'avance, *it's a blind date!*

On rappellera que le Conseil d'administration du CEPANI a pris l'initiative de créer un groupe de travail en charge des politiques de diversité et d'inclusion au sein du CEPANI, coprésidé par Sophie Goldman et Werner Eyskens. Ce groupe de travail se donne pour objectif de dresser un état des lieux de la diversité au sein des différents domaines d'activité du CEPANI, de l'analyser en comparaison avec d'autres organisations et de formuler des propositions concrètes pour améliorer la diversité au sein du CEPANI, si nécessaire.

Le groupe de travail récemment mis sur pied par le CEPANI a pour objectif d'aborder la diversité dans sa conception la plus large possible, sans se limiter à une compréhension de la « diversité » comme faisant uniquement référence à la diversité des genres. C'est la raison pour laquelle le groupe de travail a décidé de se nommer « Diversité et Inclusion ». Cela signifie, d'une part, que les travaux du groupe se concentreront sur différents types de diversité, en ce compris, mais pas exclusivement, le sexe et l'âge et cela implique, d'autre part, que le groupe de travail abordera la diversité et l'inclusion non seulement en ce qui concerne les nominations d'arbitres, mais aussi au sein de l'organisation même et des activités du CEPANI.

CEPANI LUNCH DEBATE:

THE CHANGE OF CIRCUMSTANCES IN THE NEW BELGIAN CIVIL CODE: UNRAVELING THE MEANING OF ARTICLE 5.74 IN A COMPARATIVE PERSPECTIVE

15 JUNE 2022

Ysaline le Paige
Associate
Clifford Chance, Brussels

As is usual for the setting of CEPANI's lunch debates, the event took place in the FEB/VBO's salon, which allowed for a pleasant and somewhat informal setting consisting of several round tables.

Benoît Kohl, the President of CEPANI, welcomed the audience for an interesting and instructive presentation of the speaker of the day, **Rafaël Jafferali** (Partner, Simont Braun, Professor for the Chair of Law of Obligations at the Université Libre de Bruxelles (ULB) and Affiliated Senior Researcher at the KU Leuven).

After a networking lunch, Rafaël Jafferali then gave an insightful presentation on the doctrine of the change of circumstances (a.k.a. hardship or *imprévision* / *imprevisie*), which found its way into the New Belgian Civil Code in the context of the reform of the Belgian law of obligations. The preparatory works of Article 5.74 reveal that the text is directly inspired by French law as well as international instruments of contract law such as the Principles of European Contract Law (PECL), Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law) (DCFR) and Unidroit Principles, which may thus serve as guidance.

Article 5.74 will be applicable by default to contracts formed as from 1 January 2023. The new rule deserves our attention, not in the least because practitioners will have to actively consider whether or not to exclude and/or modulate the application of the provision when drafting contracts. To name one choice you may want to consider, the Belgian rules provide for summary proceedings ("procédure comme en référé"/"procedure zoals in kort geding"), but never intended to exclude the possibility of arbitration. This and the interplay with other rules (such as the rules on unfair terms) will give rise to interesting questions, of which the audience was eloquently made aware.

NEWS

» **Le SPF Economie publie le « Guide pour la Résolution Alternative de Conflits en Matière de Propriété Intellectuelle »**

Vous trouverez le 'Guide pour la Résolution Alternative de Conflits en Matière de Propriété Intellectuelle' sur le site web du SPF: https://economie.fgov.be/fr/nouveautes/reglement-alternatif-des

Il s'agit d'un guide pratique qui a comme objectif d'informer les fournisseurs d'un produit ou service qui peut être protégé par des droits de propriété intellectuelle (DPI), les opérateurs économiques et les consommateurs des possibilités et de la manière de résoudre les litiges en matière de DPI en dehors des tribunaux, en utilisant des Méthodes Alternatives de Résolution des Conflits (MARCs). Le guide fait le point sur ces méthodes, leur finalité et la ou les procédure(s) disponible(s).

Les mots 'alternatif' et 'résolution' sont entendus au sens large et couvrent toutes les méthodes qui conduisent à la résolution d'un litige en dehors d'une procédure judiciaire ordinaire. Il s'agit notamment des méthodes générales de règlement extrajudiciaire des litiges (de la négociation à l'arbitrage), ainsi que des méthodes qui existent dans le contexte de procédures administratives, par exemple dans le cadre de la demande d'un DPI.

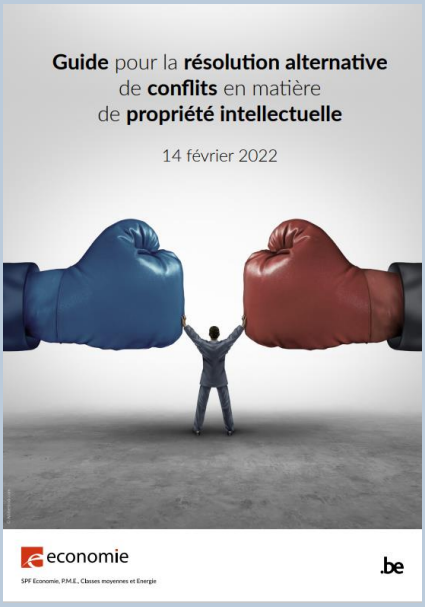
En résumé, le guide est axé sur le règlement extrajudiciaire des litiges :

- concernant l'octroi et la validité du DPI, et
- concernant les infraction et les exploitations dans le cadre contractuel ou extracontractuel.

Ce guide est le résultat d'un contrat de service public intitulé 'Etude juridique sur les modes alternatifs de règlement des conflits dans le domaine de la propriété intellectuelle', confié à PETILLION par le SPF Economie et est basé sur un projet de manuel qui fut déjà entamé par PETILLION.

Le CEPANI et ses services sont présentés en détail dans ce guide.

Le 2 juin, le SPF a tenu un webinaire au cours duquel le guide fut commenté. Le webinaire peut être consulté gratuitement: https://economie.fgov.be/fr/themes/propriete-intellectuelle/respect-de-la-pi/reglement-alternatif-des



» **FOD Economie publiceert "Leidraad voor de Alternatieve Beslechting van Geschillen over Intellectuele Rechten"**

Op de website van de FOD Economie is de 'Leidraad voor de Alternatieve Beslechting van Geschillen over Intellectuele Rechten' verschenen: https://economie.fgov.be/nl/nieuws/alternatieve

De leidraad is een praktische gids en heeft tot doel om de aanbieders van producten en diensten die met Intellectuele Eigendomsrechten (IE-rechten) worden beschermd, economische operatoren en consumenten te informeren over de vraag of en hoe ze geschillen over IE-rechten kunnen laten beslechten buiten rechtbanken om met Alternatieve Geschillenbeslechtingsmethoden (AGB-methoden). De gids zoomt in op deze methoden, hun doelstelling, en de beschikbare procedure(s).

De woorden 'alternatief' en 'beslechten' worden ruim opgevat en betreffen alle methoden die naar een oplossing van een geschil leiden buiten de gewone rechter. Ze omvatten zowel de algemene AGB-methoden (van onderhandeling tot arbitrage), als de methoden die bestaan in het kader van administratieve procedures, zoals naar aanleiding van de aanvraag van een IE-recht.

Samengevat gaat de aandacht in deze gids naar het buitengerechtelijk beslechten van geschillen:
- over de toekenning en de geldigheid van IE-rechten, en
- over inbreuken en exploitaties in de contractuele en buitencontractuele sfeer.

Deze gids is het resultaat van een openbaredienstovereenkomst met als titel "Juridische studie over methodes van alternatieve geschillenbeslechting op het vlak van intellectuele eigendom", toevertrouwd aan PETILLION door de FOD Economie en is gebaseerd op een ontwerp van handboek waaraan PETILLION reeds werkte.

CEPANI en de CEPANI-diensten komen in deze gids uitvoerig aan bod.

Op 2 juni heeft de FOD Economie een webinar georganiseerd waarop de gids werd toegelicht. Het webinar kan gratis bekeken worden: https://economie.fgov.be/nl/themas/intellectuele-eigendom/naleving-van-de-intellectuele/alternatieve

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