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

AGENDA

15 November 2022	**Journée des juristes d'entreprise/Dag van de bedrijfsjuristen**
25 November 2022	**CEPANI Annual Colloquium on "Default in International Arbitration – Striking the balance" (9:00-17:30)**
1 December 2022	**ICC Belgium-CEPANI- IE-NET: Appropriate conflict resolution in industrial and construction projects: legal and engineering challenges**
19 January 2023	**Save the Date – 3rd edition of CEPANI40's "Meet the Experts", 19 January 2023, 6-9pm**

SERIES: Stories from a Young Arbitrator

REPORT

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NEWS FROM OUR PARTNERS

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 12 – BE YOURSELF!

Olivier van der Haegen
Partner,
Loyens & Loeff, Brussels

When I was asked to give a short testimonial on my experience as (young or younger?) arbitrator, I reflected on the handful of Cepani and ICC cases where I have been lucky to sit. I have experienced several examples of what has been witnessed by colleagues and friends in this nice and refreshing section of the Cepani newsletter. As many others, I sat in a few cases where the respondent was defaulting – which made me experience some of the challenges related to this peculiar situation well-described by Nathan Tulkens (Episode 1) and Marijn de Ruysscher (Episode 9) (I am thus also very much looking forward to Cepani's annual colloquium in relation to this acute topic in a few weeks).

As sole arbitrator, I also had to deal with a respondent defaulting in the beginning of the arbitration, then appearing in the course of the arbitration through a Swiss receiver upon the opening of parallel insolvency proceedings in Switzerland and which eventually refused to take part in the pursuit of the arbitration after I declined the receiver's request to suspend the proceedings based on the governing insolvency laws and rules (see, in this respect, Guillaume Croisant's testimonial in Episode 2).

More recently, I had the privilege to be appointed co-arbitrator in three-member tribunals, which made me experience new challenges, including voicing one's own opinions in (gentle) disagreements amongst arbitrators.

These experiences have all been extremely enriching. Sitting as an arbitrator is and remains the best way to fuel one's skills as counsel, and as lawyer generally. It makes you understand, better than through any other experience, what works and what does not in terms of advocacy. It has also taught me how to better deal with witness evidence or document production. As I sought to express it during the recent CCC conference in Brussels, on some of these issues, we, arbitration specialists, sometimes tend to follow certain patterns too bluntly, losing sight of the goal of these tools and procedures. When used in a tailor-made and case-specific fashion, they do make the proceedings more efficient and can lead to a better outcome. However, as arbitrator, I also saw how witness hearings or document production may sometimes be a waste of time and money.

An arbitrator can – and, in my view, should – consider with the parties, preferably at the outset of the proceedings, when why and how witness testimony or document production should take place, having the specificities of the case and the target in mind. For example, I once had to discuss the possibility of allowing parties to call the representatives of the other party as witnesses. Some draft procedural orders No. 1 allow for this, but often only upon authorization of the Tribunal and in very broad terms; other remain silent on it. In my case, one of the parties was represented by a US counsel and the latter was very reluctant (to say the least) to accept that the procedural rules would allow for such a possibility. However, in that case, providing a precise procedural framework for the scenario in which one party would have to call a representative of the other party was useful: the case of one party was indeed (partly) based on proving the knowledge that the other party's representative had of certain issues at the time the contract was entered into, knowledge that the other party denied.

Document production can make arbitration proceedings very efficient, but, here again, I have seen the IBA Rules on the Taking of Evidence in International Arbitration being applied too abstractly, without due regard to the specificities of the case and the goal which is, and must be, the proper determination of the factual and legal issues at hand for purposes of resolving the dispute. Document production is a topic on which the legal and cultural background of the parties and their counsel has a strong influence. An arbitrator can have an impact on when, how and for which purpose(s) a document production phase should take place. He or she can decide, for example, that a party does not need to obtain documents for the sole purpose of rebutting the other party's claim, which – in principle (although some exceptions exist) – is not the goal of document production.

A last example concerns bifurcation. I have read in this section of the Cepani's newsletter an interesting piece from Nicolas Vanderstappen (Episode 3). He explained when, in his view, an arbitrator should bifurcate proceedings. My experience tells me that an arbitrator should be extremely cautious when applying theoretical principles, general rules or precedents in respect of this issue. Bifurcation, I submit, should not be the favored procedural route to deal with every (or even many) jurisdictional or admissibility objection. It is mostly relevant and efficient when an issue truly relates to jurisdiction *and* (cumulatively) can effectively lead to disposing all or at least a substantial part of the disputed issues. Even then, regard must also be had to the consequences of potential setting aside proceedings against (ensuing) partial awards, a topic on which national arbitration laws vary considerably and which is often overlooked.

On all these points, I find the best arbitrator is the one who is not afraid of adapting models and precedents to the specificities of the case he or she is called upon to decide. Conversely, the fear of disappointing is rarely a good guide in decision-making. As others have put it, the worst arbitrator is "*the one who hates to displease the parties*" (see Y. Derains, L. Levy, *Is Arbitration only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator*, ICC, January 2011, p. 8).

My (modest) tip to fellow (young) arbitrators: be yourself (in any event, everyone else is already taken)!

REPORTS

CEPANI lunch debate ICCA & IBA Task Force on Data Protection in International Arbitration

6 October 2022

Jan Janssen
Attorney-at-law / Arbitrator
PETILLION (Brussels)

Two weeks after the ICCA-IBA Roadmap to Data Protection in International Arbitration ("Roadmap") was published, the data protection task force's co-chairs, Melanie van Leeuwen (Derains & Gharavi) and Kathleen Paisley (AMBOS Lawyers), presented the Roadmap at the CEPANI Lunch Debate of October 2022.

The key takeaway from the interactive discussion is that, whether you like it or not, the law requires personal data to be protected, and the arbitration community must comply with it. The Roadmap's purpose is to give a practical overview of principles underlying data protection rules as they apply to international arbitration and their application in arbitral proceedings. Apart from explaining data protection concepts, the Roadmap gives practical guidance, and contains checklists and templates that can be used in arbitral proceedings.

The Roadmap considers that the main participants in an arbitration (parties, counsel, and arbitrators) are either controllers or joint controllers of the personal data that is shared and processed within the context of an arbitration. The main practical advice Ms. van Leeuwen and Paisley gave was to consider data protection and cybersecurity early in the process. Otherwise, parties may use data protection compliance as a sword or a shield throughout the arbitration. Some arbitral institutions already require or strongly suggest putting data protection compliance on the agenda of the initial case management conference. Putting it on the agenda is not sufficient. The agreed-upon steps and processes for ensuring data protection compliance must be documented. Detailing the data protection measures in the terms of reference, a procedural order, or a data protection protocol will assist arbitral participants in demonstrating compliance when inquired by the authorities.

The co-chairs then presented eight issues to be addressed and documented throughout the arbitration:

The first issue is the requirement to identify a legal basis for the processing activities. As a general guideline, relying on the data subject's consent is usually a bad idea. That is because consent can be revoked at any time. When that happens, the controller no longer has a lawful basis to continue the processing. The legal basis for processing activities in an arbitration will typically be the legitimate interest of the controller or a third party, subject to the conditions of Article 6(1)(f) of the GDPR.

Article 6(1)(f) of the GDPR provides for a three-prong test for a controller to rely on legitimate interests as a valid legal basis: the legitimate interests must be identified, the processing of personal data must be necessary, and a balancing test must be performed to ensure that the legitimate interests are not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Legitimate interests that can be relied upon in arbitrations are the administration of justice, the enforcement of legal rights, and the fair and efficient resolution of disputes.

The processing of sensitive data is prohibited in principle. Sensitive data include data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, health records or data concerning a natural person's sex life or sexual orientation.

However, Article 9(2)(f) of the GDPR allows for the processing of sensitive data when necessary for the establishment, exercise or defence of legal claims or whenever courts act in their judicial capacity. We consider that such processing of sensitive data – and by extension of non-sensitive personal data – is authorised in arbitration, whenever such is necessary for resolving legal disputes. However, additional measures may be required to ensure the integrity and security of sensitive data. Ms. van Leeuwen and Paisley considered that the absence of a specific mention of legal claims for non-sensitive data was an oversight of the European legislator. We believe that the principle of *qui peut le plus, peut le moins* would apply in this context and that all personal data may be processed when such is necessary for the establishment, exercise, or defence of legal claims or whenever courts (or arbitral tribunals) act in their judicial capacity.

The second issue is the requirement for a lawful basis for data transfers. A data transfer occurs whenever personal data is sent outside the EEA. Such transfers require compliance with additional obligations and reliance on an appropriate basis for the transfer. In the context of international arbitration, it may be necessary to impose standard contractual clauses upon the non-EU participants. These standard contractual clauses were developed by the EU Commission to guarantee the same level of protection of personal data when sent and processed abroad. The Roadmap has appended the standard contractual clauses as Annex 6 and warns that, to remain valid, the standard contractual clauses must be adopted without modification.

Ms. van Leeuwen and Paisley also explained that courts could rely on a legal claims exemption because courts cannot enter into an agreement with the data subject or controller. By contrast, arbitration is a contractual form of dispute resolution, and thus, arbitrators can enter into agreements regarding the transfer and processing of personal data and adhere to the requirements imposed by the standard contractual clauses. Hence, it is doubtful that the legal claims exemption would apply to arbitrators analogous to courts. Therefore, arbitrators should specify a lawful basis when transferring data and enter into an agreement that includes the standard contractual clauses.

The third issue to be tackled and documented is the impact that data protection may have on the disclosure of documents. Within this context, data protection is often used as a sword or a shield by a party that seeks to complicate the production of documents. Discussions about the production and the redaction of documents containing personal data may be similar to discussions about legal privilege that we have encountered in international arbitration. As parties and counsel in international arbitration may not be subject to the same ethical and data protection obligations, it is important to create an equal level playing field early in the process. That is why it is advisable to address data protection issues in the terms of reference or procedural order No. 1.

The fourth issue is the need to adopt a data security and a data breach protocol. Law firms practicing international arbitration tend to have adequate data security measures and policies in place. However, sole practitioners may sometimes be more lenient when it comes to security. Some participants may favour convenience over security and use a public Internet connection, exposing their infrastructure to leaks. It only takes one weak link to have a potential data breach. Even with good security measures in place, data breaches or ransomware attacks cannot be excluded. If that occurs in the context of joint controllership, it is critical that the other controllers are informed in time. The controller that is at the source of the breach is also interested in involving the joint controllers, as that may create a duty to cooperate in mitigating the data breach. Hence, the importance of agreeing on an adequate data security and data breach protocol, which may be revised from time to time to ensure continued protection as technology evolves.

The fifth issue is the need to manage the data subjects' rights. For example, what happens if a witness asks for access to its personal data that the other side or the arbitrator is processing? Who will handle the request and how? Such requests could impact the arbitration process, and considerations of legal strategy or professional secrecy may be incompatible with the data subjects' claimed rights. Hence, the advice is to discuss how to handle the requests at the outset.

The sixth issue is the notification. Who is responsible for notifying the data subject, and how specific should the notification be? In most cases, the parties submitting personal data are best positioned to ensure that adequate notice is being given to the data subject. Therefore, the recommendation is that the parties to an arbitration represent that adequate notice has been given, so it gets documented who is responsible.

The seventh issue is to document data protection compliance. Participants in an arbitration are encouraged to document who does what and in what form. Documenting how compliance is being achieved should be available to the regulators. As this may impact the confidentiality of the arbitral proceedings, participants in an arbitration are encouraged to agree on the level of detail in documenting compliance efforts.

The eighth and final highlighted issue is the use of online case management platforms. The co-chairs advocated that using online platforms may benefit security in transferring data, minimising personal data, and making the redaction or pseudonymisation of personal data more manageable. They recognised that using online case management platforms might impact participants' reactivity, as it may take more time to log into the platform and apply all security measures than simply sending an email. However, that is a small price to ensure data protection compliance.

Ms. van Leeuwen and Paisley concluded their presentation by reminding the audience of potential pressure points of ensuring data protection in international arbitration: stay away from invoking consent as a legal basis; most data protection issues will be raised during disclosure, so arbitrators must get acquainted with data protection laws and be able to decide what is reasonable and what not; data breaches must be avoided and handled correctly if they occur; the possibility for a data subject to enforce its rights must be taken into account to avoid negative impacts on the arbitral process. Ensuring compliance may not be fun, but it is the law. Quite frankly, the arbitration community has an exemplary role to play. We deal with complex legal issues on a daily basis. It would be embarrassing if we fail to show that we can comply with sometimes annoying, but rather straightforward, data protection compliance rules.

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» **INSTITUT DES JURISTES D'ENTREPRISE**

JOURNÉE DU JURISTE D'ENTREPRISE
Les juristes d'entreprise et les responsabilités de l'entreprise
Vers une responsabilité sans fin des entreprises ?

15.11.2022

L'Institut des juristes d'entreprise vous invite à sa 33e **Journée des juristes d'entreprise ayant pour thème « Les juristes d'entreprise et les responsabilités de l'entreprise. Vers une responsabilité sans fin des entreprises ? »**. Cette rencontre sera consacrée aux responsabilités de l'entreprise au sens large, considérées depuis la perspective des juristes d'entreprise.

De nombreuses obligations pèsent, toujours plus, sur les entreprises : lanceurs d'alerte, protection des données (personnelles), rapportages…. Nous ferons le point sur les **(nouvelles) responsabilités découlant de la loi**. Nous nous intéresserons aussi au rôle particulier des juristes d'entreprise dans ce cadre et débattrons des risques et opportunités liés à cette tendance croissante touchant les entreprises.

Nous aborderons la question de la **responsabilité** individuelle de l'entreprise dans un cadre **contractuel** ou en **dehors de tout contrat**. Nous aborderons les impacts concrets de la **réforme du Code civil** sur ces questions, afin de partager des bonnes pratiques et de débattre sur l'orientation sociétale où nous mènent ces nouveaux textes. Nous interrogerons aussi l'impact des **crises** (Covid, Ukraine, réchauffement climatique…) sur la manière de prévoir ou revoir les responsabilités dans nos contrats.

Ce programme a pour ambition d'élargir vos horizons au départ d'un thème à la fois intemporel, et d'une grande actualité. Il vous formera aux dernières évolutions juridiques et vous apportera des conseils et idées pour notre pratique quotidienne. Des éclairages et tendances d'experts de différents horizons (**professeurs, chercheurs, avocats, magistrats…**) seront couplés à ceux de la pratique (**juristes d'entreprise, CEO**).

Cet événement sera aussi l'occasion de se revoir dans le cadre magnifique des Musées Royaux des Beaux-Arts de Belgique.

Nous vous invitons à d'ores et déjà noter la date de cet événement. Vous retrouverez bientôt le programme complet et toutes les informations pratiques sur notre site internet (www.ije.be).

Nous nous réjouissons de vous y accueillir !

Plus d'infos et s'inscrire ici.

» **INSTITUUT VOOR BEDRIJFSJURISTEN**

DAG VAN DE BEDRIJFSJURIST
Bedrijfsjuristen en bedrijfsverantwoordelijkheid
Naar eindeloze aansprakelijkheden voor ondernemingen?

15.11.2022

Het Instituut voor bedrijfsjuristen nodigt u uit op zijn 33ste Dag van de bedrijfsjuristen met als thema "Bedrijfsjuristen en bedrijfsverantwoordelijkheid. Naar eindeloze aansprakelijkheden voor ondernemingen? ".

We bestuderen de bedrijfsverantwoordelijkheid in de breedste zin van het woord, bekeken vanuit het perspectief van bedrijfsjuristen.

Ondernemingen zijn in toenemende mate onderworpen aan talrijke verplichtingen: klokkenluiders, bescherming van (persoons)gegevens, reporting.... Wij maken de balans op van de **(nieuwe) verantwoordelijkheden die uit de wet voortvloeien**. Wij kijken ook naar de bijzondere rol van bedrijfsjuristen in deze context en bespreken de risico's en opportuniteiten die verbonden zijn aan deze groeiende trend die ondernemingen treft.

We behandelen de individuele **aansprakelijkheid** van ondernemingen **in een contractuele en buitencontractuele context**. Wij maken de balans op van de concrete gevolgen van de **hervorming van het Burgerlijk Wetboek** voor deze vraagstukken, teneinde best practices uit te wisselen en te debatteren over de maatschappelijke impact die deze nieuwe wet teweegbrengt. Wij gaan ook na welke gevolgen de **crisissen** (Covid, Oekraïne, opwarming van de aarde, enz.) hebben voor de wijze waarop wij de verantwoordelijkheden in onze contracten regelen of herzien.

We bieden u een rijkgevuld programma aan met als doel uw horizon te verbreden vanuit een thema dat zowel tijdloos als zeer actueel is. U wordt op de hoogte gebracht van de laatste juridische ontwikkelingen en u krijgt tips en ideeën voor uw dagelijkse praktijk. De inzichten en tendensen van experten uit verschillende werelden (**professoren, onderzoekers, advocaten, magistraten, enz.**) worden gecombineerd met die uit de praktijk (**bedrijfsjuristen, CEO's**).

Dit evenement is bovendien een mooie gelegenheid om elkaar opnieuw te ontmoeten in het prachtige kader van de Koninklijke Musea voor Schone Kunsten van België voor een uniek networkingmoment.

Noteer alvast de datum in uw agenda. Het volledige programma en alle praktische informatie vindt u binnenkort op onze website.

We kijken ernaar uit om u te mogen verwelkomen!

Meer info en inschrijven hier.

» **IE-NET Deelgroep Ingenieur-Deskundigen & Bemiddelaars (in collaboration with ICC Belgium, CEPANI, BVBR-ABDC, VBO-FEB)**

Disputes arising from industrial and construction projects are usually complex and expensive. The best way to resolve disputes is to avoid their occurrence in the first place by inter alia drafting a clear specification, implementing an effective project management plan, and adhering to the project plan together with effective contract management.

However, this is not always sufficient, and disputes can nonetheless arise. Although this is something where engineers do not feel themselves at ease, their involvement in the resolution is non neglectable. The conference will highlight the role engineers can play in multi-tier dispute resolution procedures (litigation, arbitration, adjudication and mediation).

The following early identification methods will be highlighted:

Conflict Avoidance Panel (CAP)
Early Neutral Evaluation (ENE)
Project based Dispute Board (DB)
Evaluative Mediation

Finally, the ICC Dispute Board Rules will be explained with a focus on the role of engineers.

Programme

16:30 | Registration with coffee
17:00 | Welcome

Introduction by prof. Dr. ir. Didier De Buyst, coordinator of the event
Moderator: Mr Niki Leys, judge in the Commercial Court of Brussels
Each presentation takes approx. 30 minutes.

- "Project uncertainty, project risk and allocation of that risk" by Mr Gaëtan Auvray, Besix
- "Procurement processes and forms which provide co-operation and good faith behavior" by Mr Luc Imbrechts, Imbrechts & Van den Nest
- "Early identification of potential for claim and dealing with it: practical cases" by Mr Kris De Langhe, Orientes

18:30 | Break with sandwiches/drinks and networking

- Workable multi-tier dispute resolution procedures" by prof. Dr. Benoît Kohl, Cepani
- The ICC Dispute Board Rules: cost, speed, enforceability, flexibility, degree of control etc." by Mr. Marco Schoups, Schoups
- Conclusion by prof. Dr. ir. Didier De Buyst & Mr. Marco Schoups with Q&A by attendees (approx. 30 minutes)
- 20:00 | Adjourn

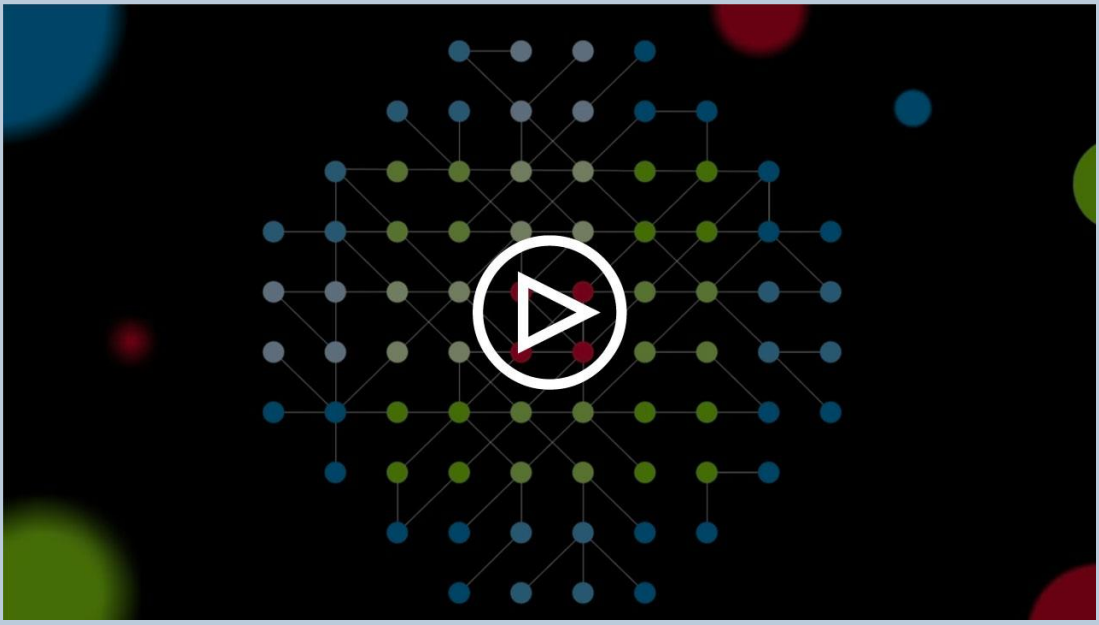
Register here!

NEWS FROM OUR PARTNERS

» **KLUWER ARBITRATION**

Now available: **Kluwer Arbitration refreshed interface**

We are excited to announce a refreshed user interface for Kluwer Arbitration along with several new features. Watch the video to get an impression of all that the new Kluwer Arbitration has to offer.



*Watch the **video***

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