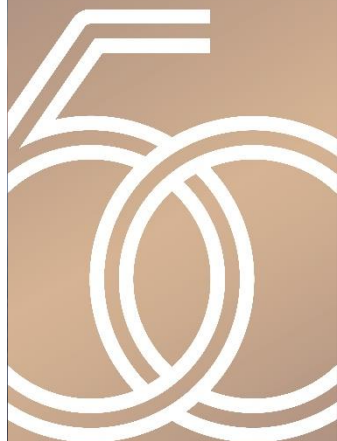


CEPANI



1969 - 2019

#169

February 2024

Editors in chief: Guillaume Croisant, Karolien Emmerechts, Iuliana Iancu and Sander Van Loock

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JURISTES D'ENTREPRISE

## AGENDA

7, 8 March 2024

7th Intersessional Meeting of UNCITRAL Working Group III on the Reform of Investor-State Dispute Settlement (ISDS)

11, 12 March 2024

CEPANI40 Brussels Pre-Moot to the Vis Moot

20 March 2024, 8:00-10:00

PAW Joint event CEPANI | AFA | NAI & VIAC: "The (Un)usual Suspects"

20 March 2024, 16:00-18:30

PAW Joint event CEPANI40 and other below-40 organisations "Arbitration, parallel proceedings and conflicts of decisions: a comparative perspective"

23 May 2024

CEPANI Annual General Meeting & 55th anniversary celebrations

## REPORTS

- » REPORT ON *THE MEETING OF UNCITRAL WG III IN VIENNA* (BY ERIC DE BRABANDERE)
- » REPORT ON THE CEPANI ROUNDTABLE *CHANGE OF CIRCUMSTANCES: A COMPARATIVE ANALYSIS UNDER BELGIAN, SPANISH AND PORTUGUESE LAWS* (BY DODO CHOCHITAICHVILI)
- » *B-ARBITRA 2023/2* (BY CAROLINE VERBRUGGEN AND MAARTEN DRAYE)

## NEWS

## NEWS FROM OUR PARTNERS

# REPORTS

*Report on the meeting of  
UNCITRAL WG III in Vienna  
22-26 January 2024*



*Eric de Brabandere  
Co-Chair, CEPANI40  
Partner, DMD Law*

UNCITRAL's Working Group III ("WG III") on Investor-State Dispute Settlement Reform met in Vienna from 22 to 26 January 2024. WG III had two main items on its **agenda**: "**Draft statute of an advisory centre**" and "**Draft provisions on procedural and cross-cutting issues**". The deliberations were a continuation of the discussions at the previous session in which the same items were discussed.

Since 2004, CEPANI is represented in UNCITRAL's Working Group II on Dispute Settlement. As of 2023, CEPANI is represented in UNCITRAL's Working Group III.

## **Advisory Centre**

The first item on the agenda of WG III related to the proposed establishment of an Advisory Centre on International Investment Law ("Advisory Centre"), and a set of provisions relating to a draft statute. The Advisory Centre would be mandated "to provide technical assistance and capacity-building with regard to international investment law and investor-State dispute settlement (ISDS) and provide legal support and advice with regard to ISDS proceedings, including representation services" (Draft Provision 2).

At the present session, much of the discussion on the establishment of an Advisory Centre had centered around organizational and structural questions such as financing, fee structure, the role and function of the Governing Committee, the appointment, role, function, and mandate of the Executive Director, and the activities of the Advisory Centre more generally.

Specific points raised included notably the required majority for decision-making by the Governing Committee, the technical assistance to be provided for by the Centre, the question whether the Advisory Centre should also be involved in state-to-state dispute settlement, the precise activities the Centre could or should be involved in (technical assistance and capacity-building), and the access of non-Members (States and regional economic integration organisations) to the Centre and its activities (as a matter of principle, or the conditions under which such access could be granted).

In relation to the question whether non-Member non-States ((M)SMEs) could access the Centre, the proposal made was to remove assistance with regard to ISDS proceedings. However, even the access of (M)SMEs to technical assistance and capacity-building (Draft provision 6 (4)) created disagreement among the States in WGIII. It was in the end agreed that the Executive Director could allow Non-Members to participate in technical assistance and engage in capacity-building activities, and that other persons or

entities ((M)SMEs) could also participate in a limited set of the Centre's activities, such as those relating to the holding seminars and conferences, the functioning as a forum for the exchange of information and sharing of best practices, and functioning as a repository of information and related resources (Draft provision 6 (1) (c)-(e)).

Discussions, finally, also addressed the financing of the Centre, the fees to be charged, and the classification of member States.

The Working Group agreed that the remaining articles and the Annexes would be addressed at the next session, including overarching questions such as location of the Centre and its position within the United Nations system.

## **Draft provisions on procedural and cross-cutting issues**

The second item on the agenda of WG III were the "**Draft provisions on procedural and cross-cutting issues**". These draft provisions were not discussed, as most of the session revolved around the proposed establishment of an Advisory Centre. It was however decided that the Secretariat should classify the draft provisions into those that could supplement the UNCITRAL Arbitration Rules, those that could function as model provisions for States to include in their investment treaties, and those that were truly cross-cutting in nature.

## **Belgium hosts the 7th Intersessional Meeting of UNCITRAL WG III on 7 and 8 March 2024**

Belgium is hosting the **7th Intersessional Meeting of UNCITRAL WG III**, on 7 and 8 March 2024 at the Egmont Palace in Brussels. The theme of the Intersessional Meeting is "Improving Access to Justice for All".

The programme is available [here](#), and features (TBC) opening remarks by the Belgian Minister of Foreign Affairs **Hadja Lahbib**, UNCITRAL Secretary **Anna Joubin-Bret**, and UNCITRAL WG III Chair **Shane Spelliscy**. The intersessional will cover various topics, and is divided into four panels. Panel I covers "Access to Justice in the context of ISDS", Panel II addresses the "Standing Mechanism", Panel III focuses on the "Establishment of an Advisory Center", and finally, Panel IV will tackle the "Procedural Rules Reform".

Registrations for the public session on 7 March are **open** (until 23 February 2024).



Dodo Chochitaichvili  
Partner, Ariga

The CEPANI round table held on 6 February 2024, titled "*The Change of Circumstances in Dispute Resolution: Lessons from Abroad on the Revision of Contracts*," provided an insightful discussion on the legal concept of "*hardship*". Distinguished legal experts from Belgium, Spain and Portugal explored their respective legal frameworks, highlighting the nuances, practical implications and comparative aspects of handling changes of circumstances. Despite sharing several common features, the legal frameworks of these countries are not identical.

Mr. **Benoît Kohl**, President of the CEPANI and Professor at the University of Liège, opened the session by emphasising the notable reform in the Belgian Civil Code regarding the notion of "*hardship*." The round table then unfolded through three panels, addressing the criteria of application, clause drafting and the effects of changes of circumstances on contracts.

The first panel, moderated by Mr. **Kohl**, presented the legal frameworks of each country. Ms. **Florence George** (lawyer; Professor at the University of Namur) highlighted the inclusion of hardship in Article 5.74 of the Belgian Civil Code, moving beyond the traditional confines of force majeure and abuse of right. The Belgian regime now allows contract adaptation subject to certain conditions (*i.e.*, it must be in line with what the parties would have reasonably agreed on) or termination. In case of failure of negotiations, the parties can also seize a judge to adapt or terminate the contract. There is no hierarchy between adaptation and termination of the contract. The new concept raises questions, namely about negotiation obligations and the role of judicial intervention in adapting or terminating contracts (the judge being bound by the *ultra petita* limitation) as well as whether the debtor would be able to invoke the change of circumstances if it did not ask the creditor to renegotiate the contract and is in breach of contract.

Ms. **Heidi Lopez Castro** (lawyer) presented Spain's approach, where since 1940 hardship has been governed by the doctrine of *rebus sic stantibus*. This doctrine, while not codified, has evolved to address extraordinary and unforeseeable circumstances affecting long-term contracts. It has been developed at the intersection of the principles of good faith, *pacta sunt servanda* and the disappearance of the cause. Courts apply this doctrine restrictively, requiring an event of extraordinary and unforeseeable nature beyond the control of the parties. Such doctrine has been considered as a subsidiary remedy, which must be requested by a party. One particular aspect is that the parties do not have the duty to renegotiate. As regards the remedy, adaptation seems to be the main and favoured remedy and termination is a subsidiary remedy, with the *ultra petita* limitation. The Spanish courts are cautious about the application of the doctrine. The 2008 economic crisis justified the application of *rebus sic stantibus* although the criteria of application remained

strict. Whether Covid-19 satisfies the change of circumstances criteria has not yet been decided by the Supreme Court.

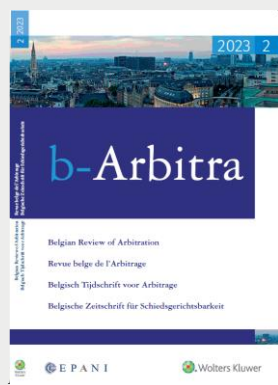
Ms. **Lurdes Vargas** (Assistant Professor at Universidade Lusofona, Researcher of CEAD) discussed the conditions under Article 437 of the Portuguese Civil Code for invoking a change of circumstances. The criteria include: an abnormal change; the performance of the obligations affects the principle of good faith and does not fall under the risks inherent to the contract. The injured party has the right to terminate the contract or to adapt it, except when that party was in default at the time the change of circumstances occurred. In addition, courts intervention is not mandatory for invoking this change or seeking remedies. The presentation highlighted the importance of good faith and fairness in contract adjustments, aiming for an equitable distribution of risk between the parties in order to restore balance.

The second panel, moderated by Ms. **Vargas**, was composed of Ms. **Heidi Lopez Castro** (Partner, Uria Menéndez, Madrid), Mr. **Ignace Claeys** (Partner, Eubelius, Brussels; Professor at the UGent), Mr. **Alexandre Mota Pinto** (Partner, Uria Menéndez, Lisbon) and Mr. **Rafaël Jafferli** (Partner, Simont Braun, Brussels; Professor at the Free University of Brussels). It tackled several practical questions, including the future challenges of hardship, considerations for clause drafting, examples of change of circumstances, the relevance of international instruments and the burden of proof. The debate also covered the assessment of what constitutes an abnormal or extraordinary event and the evaluation of the risk assumption by the debtor, particularly in complex contracts, along with the causal link between the change of circumstances and the contractual obligations.

The third panel, moderated by Mr. **Jafferli** was composed of Ms. **Dorothee Vermeiren** (Partner, Clifford Chance, Brussels), Ms. **Lopez Castro**, Mr. **Sander Van Loock** (Associate, Simont Braun, Brussels) and Mr. **Antonio Pedro Pinto Moreto** (Associate Professor at the Autonomous University of Lisbon, lawyer). It explored various interesting questions, such as the obligation to continue fulfilling contractual duties post-change of circumstances, the possibility of seeking interim relief and provisional measures in court and the arguments for contract adaptation or termination. The panel also indicated that in practice parties have some preference not to empower judges or arbitrators to decide on changes of circumstances, favouring contract termination in the event of unsuccessful negotiations. Finally, the applicability of changes of circumstances to arbitration clauses, especially for a party under financial difficulties (e.g., impecuniosity) was debated, questioning whether such scenarios would invalidate arbitration clauses.

Mr. **Denis Philippe** (lawyer, Professor at the Catholic University of Louvain) offered concluding remarks, highlighting the restrictive criteria for the application of hardship, and noting that often the parties themselves reject the hardship clause. He emphasised the importance of parties maintaining control over their destiny and suggested the involvement of observers or experts to facilitate dispute resolution. With creativity and careful drafting, hardship clauses can be effectively utilised.

The introduction of the concept of hardship in Belgian law brings both apprehension and excitement, as noted by Mr. **Jafferli**. The comparative analysis of Belgian, Spanish and Portuguese laws during the round table offered valuable insights for legal practitioners facing the complexities of hardship clauses in contract law.



Director Secretary General  
Cepani

b-Arbitra is the Belgian Review of Arbitration, issued biannually, with publication of judgments, notes and commentaries on arbitration related topics.

This second edition of 2023 follows celebrations in Brussels to mark ten years of b-Arbitra. As co-editors-in-chief, we want to use this occasion to again congratulate our predecessors **Maud Piers**, **Jean- François Tossens** and **Annet van Hooft** for their vision in creating this review, and for entrusting the undersigned to carry it forward with the invaluable help of the members of our editorial board. We also want to thank CEPANI, our editor Kluwer and the many contributors of the journal for their input. Finally, we want to thank the judges in the specialized arbitration chambers of the competent courts of first instance for sharing their judgments. This allows us to publish more Belgian case law than ever, to the benefit of the Belgian arbitration community and – through Kluwer arbitration – beyond. As co-editors-in-chief, we hope that b-Arbitra may continue to benefit from the same support in the next decade.

In the doctrine section, **Koen Van den Broeck**, **Beatrice Van Tornout** and **Nicolas Celis** explore M&A Arbitration involving climate change issues. This contribution offers an interesting look into how climate change issues will shape M&A transactions and how this may impact arbitration proceedings in this field. Next, **Ignace Claeys** and **Heleen Van Cauwenberge** discuss arbitration clauses in general conditions on the basis of six recent judgments from the Courts of First Instance of Ghent and Brussels. The authors explore the question whether and under which conditions such clauses are valid, bearing in mind the changes brought by the entry into force of Book 5 of the Belgian Civil Code. They further analyze the impact when consumers are involved. Last but not least, **Benoît Allemeersch** and **Hannah Carlota Osaer** look at the CJEU's judgment of 2 March 2023 in *Norra Stockholm Bygg* (C-268/21) regarding GDPR and document production orders in state court proceedings, and explore whether and how the CJEU's reasoning can be applied to document production in arbitration proceedings.

In the jurisprudence section, we start with three judgments of the Belgian Supreme Court. In the first one, the Court confirmed the legality of so-called “binding third party decisions” (“*bindende derdenbeslissing*”/“*tierce décision obligatoire*”). This is a dispute resolution process by which parties decide to settle a dispute by appointing a third party whom they agree will render a decision that binds the parties like a contract. The second one is the landmark *Thibelo* case, in which the Belgian Supreme Court reversed its own

long-standing jurisprudence, when holding that disputes about the termination of exclusive distribution agreements can be settled through arbitration, even where the contract is governed by a foreign substantive law and regardless of whether such foreign law offers similar protection than the provisions of the Belgian Code of Economic Law. In his note, **Alexander Hansebout** gives a historical overview of Belgian jurisprudence on this matter, analyzes the Supreme Court's decision in *Thibelo* as well as the expected impact on the arbitrability of agency disputes and disputes regarding the precontractual phase of commercial cooperation agreements. The third judgment raises important preliminary questions with the CJEU in the context of the application of EU competition law and a CAS award rendered in Switzerland. We then cross the Channel, with the publication of an extract of the famous UK Supreme Court judgment in *Halliburton v. Chubb* concerning questions of disclosure and impartiality and independence of an arbitrator in case of repeat appointments in related cases where only one party is involved in repeated cases. In his note, **Karel Daele** critically analyzes this judgment and its impact from an English law perspective and draws the comparison with aspects of Belgian law. Turning back to Belgium, in addition to the six cases that form the basis for the contribution by Ignace Claeys and Heleen Van Cauwenberge, we publish further cases from the Courts of Brussels and Ghent on a variety of issues, including the need for the possibility for external control of compliance with a deadline to render the arbitral award (if any), the conditions for suspension of the enforceability of the award and the question of extension of the arbitration agreement to non-signatory third parties in the framework of enforcement under the New York Convention.

In the documents section, **Maud Piers** and **Hannah Carlota Osaer** look both to the past – with a report on the Conference on Blockchain, Metaverse, Web3 in Ghent in May 2023 – and to the future, with a summary of the takeaways and the expected impact of these and other disruptive technologies on the world of international arbitration. Finally, **Marijke Roelants** reviews the book on *Arbitrage, bemiddeling en andere vormen van conflictafhandeling: vandaag en morgen*, which collects the contributions of a seminar series on ADR organized by CEPANI and Vlaams Pleitgenootschap, which features various contributions on ADR and Arbitration, including on binding third party decisions, GDPR in arbitration, emergency arbitration and the setting aside of arbitral awards under Belgian law. **Fabrice Mourlon Beernaert** reviews Steve Griess and Charles Markowicz's book on conflicts between shareholders.

For more details, please see the table of contents [here](#).

We continue to extend our invitation to Belgian arbitration practitioners to reach out with interesting arbitration related cases. We further encourage anyone who is interested in contributing to b-Arbitra or has comments or suggestions to get in touch at [b-Arbitra@wolterskluwer.com](mailto:b-Arbitra@wolterskluwer.com).

The Editors-in-Chief  
**Caroline Verbruggen** and **Maarten Draye**

>> CEPANI 55TH ANNIVERSARY CELEBRATIONS

# CEPANI

May 23rd  
2024

## 55<sup>th</sup> Anniversary Celebrations

### PROGRAMME:

17:00: Start of the Annual General Meeting (for CEPANI members only)

18:00: Keynote Speakers Session

19:15: Website Reveal: Unveiling new features!

19:30: Walking Dinner & 55th CEPANI Anniversary Celebrations

Your presence will add to the success of this memorable evening. We look forward to welcoming you at The Merode for an evening of legal insights, networking, and festive celebrations.

### Practical information:

**When:** 23.05.2024 as from 18.00

**Where:** The Merode, Pl. Poelaert 6, 1000 Brussels

**Price:** CEPANI member = € 275,00 excl. VAT; Non-member = € 325,00 excl. VAT.

The final RSVP deadline for the event is May 9, 2024

All cancellations must be communicated to CEPANI at least 3 working days before the day of the event in order to be taken into consideration.

Register [here](#).

## >> PERSBERICHT

LUC DEMEYERE GEEFT NIEUWE KIJK OP CONFLICTMANAGEMENT

**Op 8 december 2023 lanceert Luc Demeyere zijn boek 'Hoe commerciële conflicten managen? Denken en doen'. Na een succesvolle carrière deelt de voormalig topadvocaat zijn kennis, ervaring en persoonlijke inzichten met juristen, advocaten, magistraten en bedrijfsleiders. Het doel? Vanuit ethiek, vertrouwen en kennis buiten of binnen de rechtbank commerciële conflicten oplossen.**

Het pad naar oplossingen

Waar menselijke relaties zijn, ontstaan soms conflicten. Waar zakelijke relaties zijn, ontstaan soms commerciële conflicten. Zeker in een **geglobaliseerde wereld**. Je kan je maar beter **voorbereiden**. Als juridische of zakelijke professional kan dat nu met het boek van Luc Demeyere.

Het boek is niet enkel een juridisch referentiewerk, maar vooral een **volledige leidraad** voor wie in een commercieel conflict terechtkomt. Met deze achtergrondkennis kunnen partijen doordacht zoeken naar een voor hen rechtvaardige oplossing, indien mogelijk buiten de rechtbank. Luc Demeyere toont de lezer de verschillende **trajecten en invalshoeken** die kunnen leiden tot de afhandeling van zo'n conflict. Dat doet hij door juridische **concepten, casussen**, persoonlijke en geschiedkundige **anekdotes** en inspirerende **citaten** te bundelen.

*"Een degelijk en duurzaam geleid bedrijf hoeft niet om de haverklap in de rechtbank te verschijnen. Dit prachtige boek van Luc Demeyere is ook in dit verband een eyeopener."*

John Dejaeger, voormalig CEO van BASF Antwerpen

Professionele bagage

Luc Demeyere was 45 jaar lang advocaat aan de Antwerpse en Brusselse **balie**, onder meer bij Braun Claeys Verbeke Sorel, Loeff Claeys Verbeke, Allen & Overy en contrast European & Business Law. Hij was bovendien bestuurder bij Cepani vzw. Hij is expert in **geschillenbeslechting** in het ondernemingsrecht en werkte op nationale en internationale zaken als advocaat of arbiter.

Met deze professionele bagage als basis stippelt hij een weg uit voor zowel **juridische experts als CEO's** die moeten omgaan met een commercieel conflict. Dit boek is het eerste in ons taalgebied dat dit onderwerp zo breed en diep benadert én hier een **concrete aanpak** voor biedt.

Uitgever

Het boek is vanaf 8 december 2023 verkrijgbaar via LeA Uitgevers: <https://www.lea-uitgevers.be/shop/product/commconfl-hoe-commerciele-conflicten-managen>

Voor vragen over deze boeklancering: [info@lea-uitgevers.be](mailto:info@lea-uitgevers.be)



**We need your expertise for the 8<sup>th</sup> Brussels Pre-Moot on 11 and 12 March 2024!**

We have the pleasure to launch the call for arbitrators for the 8<sup>th</sup> edition of the Brussels Pre-Moot to the Willem C. Vis International Commercial Arbitration Moot.

This year again, we have the pleasure to welcome 20 teams coming from Belgium and all over the world (The Netherlands, France, the UK, Italy, Finland, India, North America, Australia and Indonesia).

The Pre-Moot needs a significant number of volunteers to act as arbitrators for each session of 90 minutes. As an arbitrator, you will not only see the young participants in action, but you will also have a great opportunity to connect with arbitration practitioners from Benelux and abroad during your session as well as the networking luncheons (on both days) and the networking reception (on 11 March).

**Interested in a thrilling experience as an arbitrator? Please complete the form in this [link](#) by 1 March 2024.**

You will be offered the possibility to indicate the most suitable timeslot(s) for your session(s) after having selected the option “Yes, I will be able to attend”.

If you have any questions, please do not hesitate to contact **Carmen Steeno**

>> *CEPANI goes to Norway!*



**hub.brussels, in collaboration with CEPANI,**  
requests the pleasure of your company for a seminar on the occasion of the  
Princely Mission to Oslo  
at  
**Radisson Blu Plaza Hotel**  
Sonja Henies plass 3, 0185 Oslo  
on  
17 June 2024 from 9.00 am to 12.00 am

### **Background information**

This year, the Belgian Princely Mission will come to Oslo (16-19 June 2024) and for this mission hub.brussels and CEPANI (The Belgian Centre for Arbitration and Mediation) would like to organize an event within arbitration.

The event would aim to bring together legal professionals, business leaders, and experts in the field of arbitration to exchange insights, discuss recent developments, and explore opportunities for collaboration.

We believe that such an event can significantly contribute to the growth and knowledge-sharing within our respective communities.

**Hereunder you will find a draft programme of the proposed event.**

## Programme

09.00	Guests arrive – welcome coffee & breakfast
09.30	Welcoming words, by H.E. Jan Bayart - Ambassador of Belgium to Norway
09.40	Welcoming words, Prof. Benoît Kohl, President of CEPANI and representative of the Nordic Offshore and Maritime Arbitration Association (NOMA)
09.45	Welcoming words by a representative from Brussels Agency for Business Support (hub.brussels)
10.00	Keynote speech (subject tbc) by Dirk De Meulemeester
10.45	Testimonies: Chair of the panel, Ms. Vanessa Fonckew <ul style="list-style-type: none"><li>• A Norwegian arbitrator (Ms. Nina Lauber-Thommesen)</li><li>• A Belgian arbitrator (Mr. Marco Schoups)</li><li>• In-house counsel (Mr. Patrick Baeten)</li></ul>
11.30	Closing notes by a representative from Ans Persoons, State Secretary of the Brussels-Capital Region (TBC)
11.45	Q&A
12.00	End

**BRUSSELS**



# NEWS FROM OUR PARTNERS

» *ACOLAD LEGAL*

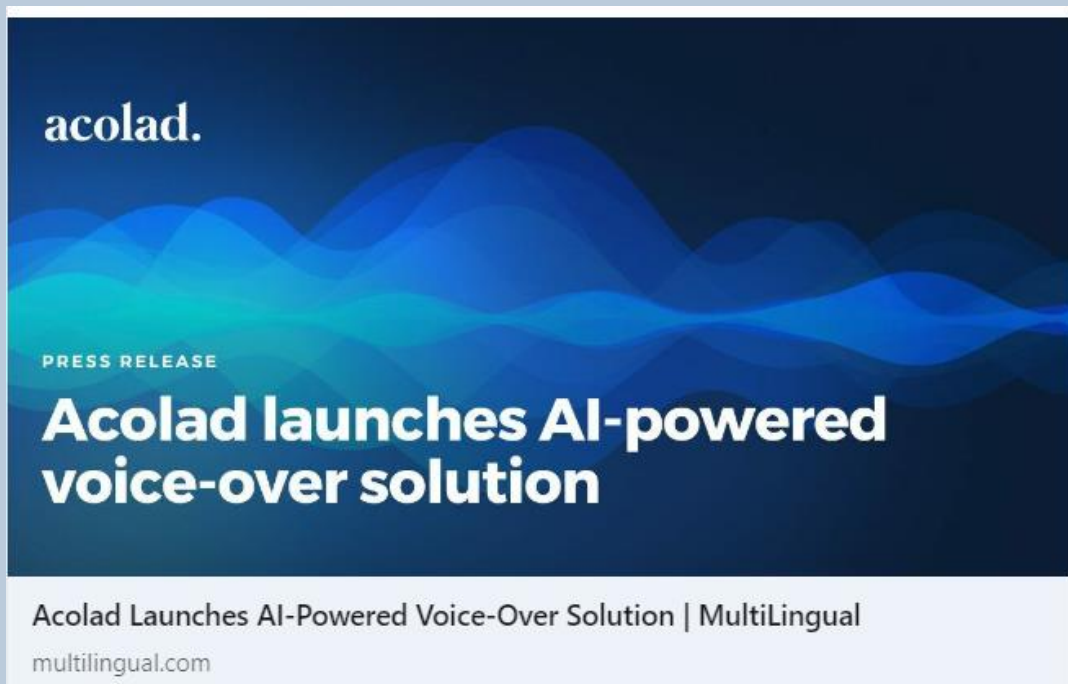
## **Acolad launches AI-Powered Voice-Over solution!**

Explore the groundbreaking AI-powered solution, revolutionizing narration, learning, gaming, and more.

What are typical use cases for AI voice-over? 🌐 Unleash the potential of AI voice-over in scenarios where human voiceover has not been considered or is not an option.

1. Elevate Learning: AI voice-over enhances educational content, making it dynamic and engaging.
2. Spice Up Presentations: Say goodbye to static presentations! AI voice-over can transform presentations into captivating video content. Tailor your message for different audiences, making your content memorable and impactful.

Discover more here: [Acolad Launches AI-Powered Voice-Over Solution | MultiLingual](#)



## **Wolters Kluwer webinar panel session - Investment Arbitration and Climate Change**

**Date:** Thursday, March 7, 2024

**Time:** 4:00 PM CET

What happens when a state's effort to tackle climate change has a negative impact on foreign investors? Legislative and regulatory measures designed to meet state obligations under international climate law have already triggered claims under international investment law, and more such claims are to be expected. In many ways, these are cases of first impression, and existing jurisprudence may fall short on guidance for the lawyers and arbitrators involved.

In this webinar, contributors to the recently published volume *Investment Arbitration and Climate Change* will discuss procedural and substantive aspects of climate-related investment disputes, including the roles of science and counterclaims, the valuation of fossil assets in light of global decarbonization, and the balance between the state's right to regulate and the investor's legitimate expectations of regulatory stability.

[\*\*Register now\*\*](#)

