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Editors in chief: Guillaume Croisant, Marijn De Ruysscher, Iuliana Iancu and Jasmine Rayée

AGENDA

10 DEC 2020	(10:00 - 12:00)	Sovereign States & Foreign Investors: How to Mitigate (new) Risks of Disputes & Better Protect Foreign Investment
17 DEC 2020	(13:30 - 15:00)	La nouvelle loi sur les clauses abusives entre entreprises/ De nieuwe wet inzake onrechtmatige bedingen tussen ondernemingen

REPORTS

ICC BELGIUM VISIT TO THE ICC INTERNATIONAL COURT OF ARBITRATION

BRUSSELS, 13 NOVEMBER 2020

Iuliana IANCU
Partner, Hanotiau & van den Berg

On 13 November 2020, Belgian arbitration practitioners took part in a virtual visit of the ICC in Paris. The virtual format of the visit notwithstanding, the meeting was productive and allowed Belgian arbitration practitioners to learn and discuss about new developments concerning the ICC and ICC arbitration.

The visit began with a welcome address by the President of the ICC Court, Alexis Mourre. Mr. Mourre referred to the most recent amendment to the ICC Rules of Arbitration and announced that, as part of the ICC's efforts at increasing transparency, a 15-member selection committee was created for the appointment of the new President of the ICC Court. The selection committee conducted a public appointment process with pre-selected candidates and recommended the election of Ms. Claudia Salomon, partner at Latham & Watkins, as the new president of the ICC Court as of 1 July 2021. The new ICC Court will have full gender parity and there will be an increased emphasis on regional diversity. In other news, the ICC will open a new case management office in Abu Dhabi; will begin publishing ICC awards as from April 2021 (for a small subscription fee); and, in 2021, will be introducing an online case management system, which will allow the electronic service and storage of documents.

The second part of the visit focused on the work of the ICC Commission on Arbitration and ADR. Ms. Hélène van Lith, Secretary to the Commission, gave an overview of the latest reports (the Report on Resolving Climate Change Related Disputes through Arbitration and ADR; the Report on Emergency Arbitrator Proceedings; The Report on The Accuracy of Fact Witness Memory in International Arbitration; and the ICC Intellectual Property Roadmap 2020, launched on 16 November 2020). Ms. van Lith also provided updates on the work of the Commission's current task forces (the Task Force Addressing Issues of Corruption in International Arbitration; the ADR and Arbitration Task Force) and working groups (the Working Group for the Revision of the ICC Commission Report on the Use of IT in International Arbitration). In particular, the Corruption Task Force, one of the largest, with over 150 members and contributors, is working jointly with the ICC Corporate Responsibility and Anti-Corruption Commission and with the IBA. The ADR & Arbitration task force, which includes a significant number of in-house counsel, organizes weekly open-mic sessions for in-house counsel in order to exchange experience (particularly in light of the COVID pandemic). Ms. van Lith announced that, in advance of the next Commission meeting, the Commission will be publishing guidelines for its members, which will emphasize the importance of engagement with the Commission's work, diversity and will possibly introduce a mandate limit.

The third part of the virtual visit included a roundtable discussion with members of the ICC Court Secretariat. The topic of arbitral appointments figured prominently. With 207 arbitrators appointed from 2015 until today, Belgium ranks among the top 10 jurisdictions represented on ICC tribunals. The ICC Court is seeking to further diversify its pool of arbitrators both in terms of regional and age diversity. Another topic discussed was the conclusion of terms of reference in situations where one of the parties is not participating in the proceedings. The Secretariat's recommendation for such instances is that the terms of reference include no new agreements between the participating parties and should expressly indicate to bind only its signatories. Any new agreements between the participating parties and any new directions from the tribunal should be included in a separate procedural order. The impact of the COVID pandemic on arbitration was also discussed. As of the fourth quarter of 2020, some arbitrations arising directly out of the pandemic have been filed with the ICC (including, notably, an emergency arbitrator proceeding involving a State-owned hospital filing against a seller of surgical face masks and an escrow agent), but significantly more cases are expected to be registered in 2021. Additionally, due to the increased use of virtual hearings during the current pandemic, the ICC is discussing a possible cybersecurity protocol for its users.

THE CONSTITUTIONAL COURT VALIDATES THE NON-ARBITRABILITY OF RESIDENTIAL LEASE DISPUTES

BRUSSEL, 26 NOVEMBER 2020

Yves HERINCKX
Avocat (Brussels) / Solicitor (England and Wales)

Readers of the CEPANI Newsletter will recall that the three Regions, after the sixth State reform package that transferred to them the competence to regulate residential lease agreements, decided to prohibit arbitration clauses in residential leases: Brussels did so with effect from 1 January 2018, Flanders from 1 January 2019 and Wallonia from 1 March 2019. The Council of State expressed strong reservations about the Regions' powers to touch on matters of civil proceedings, and annulment challenges were brought before the Constitutional Court against each of the three decrees.

The Flemish decree was handled first and the Constitutional Court rendered its judgment 145/2020 on 12 November 2020. The Brussels decree followed two weeks later with judgment 156/2020 of 26 November 2020. In both cases the Court dismissed the challenge. The challenge against the Walloon decree remains pending, with docket numbers 7312, and judgment can be expected in the very near future.

The Court notes in the first place that, even though residential leases belong to the competence of the Regions, the regulation of civil proceedings and the delineation of the jurisdiction of the courts belong to the Federal State. However, Article 10 of the Special Institutional Reforms Act of 8 August 1980 allows the Regions to overreach, and to deal with Federal matters, in certain circumstances. According to the Court, three conditions must be satisfied in order for such an overreach to be tolerated: so doing must be necessary for the exercise of the Region's own powers, the matter concerned must lend itself to a differentiated regime and the impact of the overreach on Federal powers must be marginal only.

The prohibition of arbitration clauses in residential leases meets the three conditions. Legislative history shows that the Parliaments' objective, in Flanders as well as in Brussels, was to facilitate access to justice with regard to lease disputes, considering the higher cost of arbitration proceedings compared to proceedings before a Justice of the Peace. It was therefore a reasonable assessment by the Parliaments, according to the Court, to consider that the rule in dispute is necessary in the context of their powers to regulate residential leases. As to the second condition, the Court notes that Article 1676, §4, of the Judicial Code expressly states that any matter having an economic interest (*toute cause de nature patrimoniale* / *ieder geschil van vermogensrechtelijke aard*) is arbitrable, save to the extent that the law provides otherwise (*sous réserve des exceptions prévues par la loi* / *behoudens waar de wet anders voorziet*). This demonstrates that a differentiated regime is possible. Eventually, the encroachment on Federal powers is regarded as marginal because the rules being challenged only apply to residential leases.

The rationale of the judgments should presumably lead to a similar dismissal of the annulment proceedings relating to the Walloon decree. The three decrees are not entirely identical, however. They differ with regard to the possibility to agree to arbitration once the dispute has already arisen – this is permitted in Brussels and in Wallonia but not in Flanders – and with regard to the impact of the new non-arbitrability rule on pre-existing agreements – current leases are caught in Brussels, they are not in Flanders, and their treatment is unclear in Wallonia. It seems unlikely that these fairly minor variations could lead to a divergent assessment by the Constitutional Court in the remaining third challenge.

Another arbitration law question is currently pending before the Constitutional Court. On a request for a preliminary reference from the Francophone Court of First Instance of Brussels, the Court must assess the validity of Article 1717, §4, of the Judicial Code to the extent that it bars a party, when an arbitral award was obtained by fraud, from seeking the annulment of an award once a three-month time limit has expired, and that it does not provide for anything equivalent to the *requête civile* / *herroeping van het gewijsde* that may be raised against State court judgments for a period of six months counted from the discovery of the fraud. The case is pending under docket number 7232.

CEPANI COLLOQUIUM
ARBITRAGE EN FRAUDE

BRUSSEL, 26 NOVEMBER 2020

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Ludmilla DE POTTER D'INDOYE
Associate, Hanotiau & van den Berg

Op 26 november 2020 organiseerde CEPANI een colloquium omtrent Arbitrage en Fraude.

Vooreerst verwelkomde professor Benoît KOHL (voorzitter CEPANI) de deelnemers van het Colloquium en introduceerde hij de voorzitter van de zitting professor Didier MATRAY.

Na een korte inleiding en presentatie van professor MATRAY (MATRAY, MATRAY & HALLET) werd het woord gegeven aan de eerste spreker.

De eerste spreker, de heer Simon GREENBERG (CLIFFORD CHANCE), sprak over de verschillende soorten van fraude in arbitrage. Zijn uiteenzetting was onderverdeeld in twee delen: het eerste deel betrof de verschillende soorten fraude in internationale arbitrage. Het tweede deel ging over de evoluties of innovaties die ontstonden om fraude in arbitrage tegen te gaan.

De tweede uiteenzetting werd gepresenteerd door professor Filip DE LY (ERASMUS UNIVERSITY SCHOOL OF LAW). De titel van deze presentatie was de vaststelling van fraude gepleegd voorafgaand aan de inleiding van de arbitrage. In zijn uiteenzetting maakte hij drie verschillende stellingen. De derde stelling bracht hem tot de roadmap voor het oplossen van fraude gepleegd voorafgaand aan de inleiding van de arbitrage.

Na een korte pauze ging de heer Sébastien RYELANDT (STRELIA) over tot het presenteren van zijn uiteenzetting nopens het gebruik van arbitrage voor frauduleuze doeleinden. Hij gaf hiervan bepaalde voorbeelden in de rechtspraak van verschillende landen. De heer RYELANDT gaf ook uitleg over de aan te nemen attitude door de arbiter die wordt geconfronteerd met het gebruik van arbitrage voor frauduleuze doeleinden.

De heer Maarten DRAYE (HANOTIAU & VAN DEN BERG) besprak de fraude die gepleegd kon worden gedurende de arbitrageprocedure. Hij somde hiervan meerdere concrete situaties op en gaf mogelijke remedies voor het tribunaal alsook voor de partijen tijdens en na de procedure. Ten slotte besprak de heer DRAYE de situatie van de omkoping van de arbiters en wat de remedies hiertegen waren voor de partijen alsook voor de andere arbiters die in dezelfde zaak zetelen.

Na de lunchpauze en een korte introductie van de voorzitster van de zitting, mevrouw Jacomijn VAN HAERSOLTE-VAN HOF (Director General LCIA), werd het woord gegeven aan de heer Thierry TOMASI.

De heer TOMASI (HERBERT SMITH FREEHILLS) besprak fraude en de internationale normen die deze bestrijden. Zijn presentatie was onderverdeeld in twee delen namelijk (i) het multilateraal juridische kader en de relevantie ervan voor de internationale arbitrage en (ii) het omgaan met fraude in een investeringsarbitrage.

Mevrouw Vanessa FONCKE (JONES DAY) lichtte bepaalde procedurevragen toe die in het kader van arbitrage en fraude rijzen. Haar focus lag op de bevoegdheden van het scheidsgerecht sensu lato. Deze bespreking werd onderverdeeld in drie delen, zijnde de arbitreerbaarheid, de onderzoeksbevoegdheden- en plichten (ex officio) en, ten slotte, de meldingsplicht van de arbiters.

De heer Gauthier MATRAY (MATRAY, MATRAY & HALLET) gaf de laatste presentatie met betrekking tot fraude die wordt ontdekt na de uitspraak van de sententie. Hij gaf hiervan voorbeelden in de rechtspraak. De heer MATRAY gaf vervolgens meerdere mogelijkheden om de uitvoering van sententies, waar de fraude achteraf werd ontdekt, tegen te gaan.

Ten slotte werd er een kort debat gevoerd over fraude en arbitrage waar de deelnemers ook vragen konden stellen aan de presentators. Dit debat werd voorgezeten door mevrouw Maude LEBOIS (SHEARMAN & STERLING) en mevrouw Jacomijn VAN HAERSOLTE-VAN HOF.

NEWS

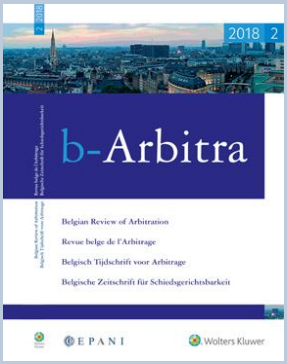
» **ARBITRATION CAPSULES – STRAIGHT TO ARBITRATION**

CEPANI will be publishing on social media a number of capsules of well-known practitioners promoting arbitration.

You will have the opportunity to watch:

- Patrick Baeten, on why parties should choose arbitration;
- Olivier Caprasse, presenting arbitration's key advantages;
- Erica Stein, discussing why she favours arbitration;
- Hakim Boularbah, on the enforcement of arbitral awards;
- Dirk De Meulemeester, explaining the basics of the arbitration process; and
- Françoise Lefèvre, discussing why going to arbitration is effective.

» **B-ARBITRA 2020/1 AVAILABLE**



The latest edition of the Belgian Review of Arbitration b-Arbitra is out now.

The table of contents can be consulted here.

Subscriptions are available at Wolters Kluwer and the review can be consulted on Kluwer Arbitration as well.

An annual subcription is included in the membership fee of CEPANI. Click here for more information on becoming a member.

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