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

AGENDA

9 FEB 2021	(12:30 - 14:30)	CEPANI 40 webinar: meet the experts!
25 FEB 2021	(17:00 - 19:00)	CEA Belgian Chapter. VI. Annual Conference “Arbitration: an insurance policy”
8 & 15 MAR 2021	(11:00 - 12:30)	Virtueel colloquim / colloque virtuel FEB-VBO / IJE-IBR “Gérer l’incertitude par une meilleure rédaction de vos contrats“
18 MAY 2021	(13:30 - 15:00)	Joint webinar CEPANI/Associazione Italiana per l’Arbitrato (AIA): “Double hatting : might it spread to commercial arbitration?”

REPORTS

CEPANI40 WEBINAR ON THE B2B ACT AND ARBITRATION

BRUSSELS, 17 DECEMBER 2020

Samuel DELCOMINETTE
Associate (Lydian)

On 17 December 2020, CEPANI40 and Simont Braun organized a webinar on the very actual topic of the Law of 4 April 2019.

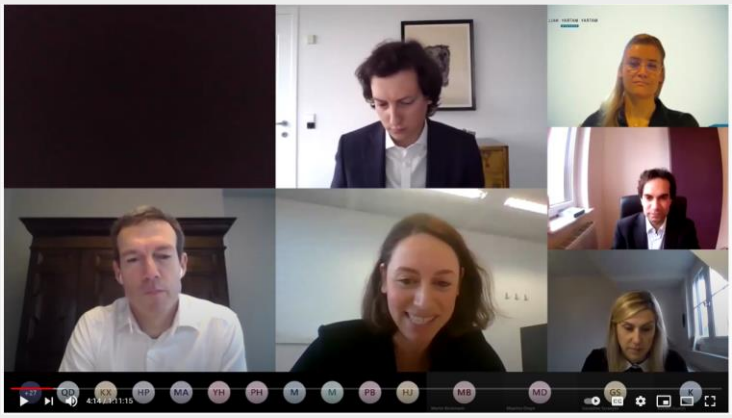
In April 2019, the Belgian Parliament adopted a new law prohibiting (i) unfair market practices in B2B relationships, (ii) the abuse of economic dependence, and (iii) the use of unfair contract terms (the B2B Act). This act of 4 April 2019 was published in the Belgian official Gazette and will have important consequences on contracting and on business practices. While businesses have started to adapt their (standard) contracts to limit the risk of sanctions and uncertainties, the purpose of this webinar was to assess the impact of the B2B Act on the arbitration and mediation practices.

Four speakers from the law firm Simont Braun (Brussels) addressed the challenges related to the important impact of the B2B Act for arbitration, more specifically, its foreseen consequences related to the will of the Belgian legislator to construe it as a mandatory law. They also discussed its possible threatening character on the validity of arbitration clauses and, finally, addressed its consequences on mediation as an alternative dispute resolution means.

As explained by Steven Callens who introduced the webinar's topic, the webinar only intended to focus on the third aspect of the law, namely the prohibition of the use of unfair contract terms. He set the scene by highlighting the important impact of the B2B Act, which could be explained by its broad scope of application (to all types of contracts, all undertakings, etc.) and second considering the mandatory nature (loi de police) nature that the Belgian legislator gave to the new law.

Rafaël Jafferali as keynote speaker, raised the question whether the B2B Act should indeed be constructed as a mandatory law, pursuant the Belgian legislator's wish, therefore imposing it to the international arbitrator. His very structured speech started by reminding us that a public order legislation is applicable regardless of the applicable law (chosen by the parties) and that the Belgian legislator has clearly expressed in the preparatory work the mandatory law nature of the B2B law. Interestingly, he questioned such qualification and its impact for arbitration. For him, the principle remains that the arbitrators shall in principle apply the law chosen by the parties and is therefore not bound by the mandatory (Belgian) law. Nevertheless, such principle suffers some exceptions, such as if the seat of arbitration is located in Belgium (in order to avoid the annulment of its award) and if the contract must be executed in Belgium. As he reminded us, among the best international authors, some of them also consider that the arbitrator may also be bound by a mandatory (Belgian) law when the dispute is closely connected to Belgium or if the award must be enforced in Belgium under specific circumstances. One must always remember that an arbitrator must always prioritize the validity and enforcement of his award to safeguard the efficiency of the arbitral award. That being said, an award could never apprehend all the mandatory law applicable in the world, such statement leaving the pleaders with the opportunity to be creative in their briefs and the arbitrators with uncertainties to be expected.

Next, Sander Van Loock chose to challenge the audience' minds by asking whether arbitration clauses are still valid between undertakings. His presentation was a very powerful illustration of how a quickly adopted law can trigger questions and legal problems for businesses and practitioners, even if its initial goal of protecting the former was understandable. The question he raised was indeed relevant since preparatory works gave as example of black listed clauses the "clauses forcing the counter-party to accept arbitration" therefore threatening arbitration clauses of being void. "Une petite phrase qui tue l'arbitrage !" according to Sander Van Loock! He demonstrated that this example from the preparatory works could only be interpreted by a mistake of the Belgian legislator since arbitration cannot be construed as renouncing to all dispute resolution means as clearly expressed by Article VI.91/4, 3° of the Belgian Code of economic law and the ECHR case law. However, this does not necessarily mean that an arbitration clause will never be challenged through other provisions of the B2B Act, such as the general prohibition laid down under Article VI.91/3 §1 of the Belgian Code of economic law, should a party be able to demonstrate the existence of a great imbalance (*kennelijk onevenwicht*) between the rights of the parties. According to him, this could be the case if a disproportionate burden is placed on a party in terms of costs and place of the arbitration proceedings, but only under exceptional circumstances.



The third and last speaker was Fanny Laune who guided the audience through the impacts of the B2B Act on mediation as an alternative dispute resolution method. She divided her presentation into the three mediation phases. The first phase being related to the possibility to mediate, she raised the interesting question whether a contract containing an abusive clause could be subject to mediation. She answered positively since such nullity does not prevent mediation, and does not trigger the nullity of the mediation clause. The second phase being the mediation process itself, she asked what a mediator confronted to the dispute of the validity of a contract containing an abusive clause should do. She reminded the audience that the mediator cannot issue a legal opinion (and that not all mediators are lawyers), but could provide the parties with objective legal information. This should be made carefully and to a broader extend, it should refer such question to the counsels of the parties. Finally, as for the agreement reached by the parties, what if such agreement would contain an abusive clause? She reminded us that a mediator cannot accept a solution which would be contrary to the public order, that being laid down under article 1733 lid 2 of the Judicial code. According to her, the mediator could first try to identify whether the clause would fall under the black or the grey list of abusive clause. The mediator must raise the abusive character in the first case, while he should only draw the attention of the parties on the issue in the second. She concluded by reminding us how important it is for the mediator to pay particular attention during the drafting process of the agreement, even if the mediation process gives a primary role to the parties.

The webinar was introduced by Sophie Goldman and closed by Sigrid Van Rompaey, both Co-Chairs of CEPANI40. Both agreed on the fact that sharing views on such a topical law was the best way to avoid the potential

risks of uncertainties created by the B2B Act with regards to arbitration and mediation proceedings.

This first online seminar of the CEPANI 40 was a great success. In case you missed it, it was recorded and is available online via this link.

CEPANI GUIDANCE ON QUALIFIED ELECTRONIC SIGNATURE OF TERMS OF REFERENCE

Emma VAN CAMPENHOUDT
Secretary General CEPANI

Since CEPANI has introduced BOX, a secured electronic platform to allow parties, arbitrators and the Secretariat of CEPANI to file and exchange documents in the course of an arbitration, CEPANI has continued to be at the forefront of promoting digitalization in arbitral proceedings. The current article 24(3) of the arbitration rules, introduced on 1 July 2020 to mitigate the effects of the current pandemic, will also have a lasting effect by granting the arbitral tribunal, after consulting the parties, the power to decide whether a hearing will be held physically or rather via electronic means.

As a further step to encourage the digitalization of arbitral proceedings, CEPANI is as from now issuing a guidance note to arbitrators on how to validly sign terms of reference (or other documents), using a qualified electronic signature. When using electronic terms of reference, there is no need to meet in person or to send around originals by post or courier service for signature.

CEPANI does not oblige parties and tribunals to work this way, but is it an option that it encourages.

It should be noted that arbitral awards cannot be issued solely by electronic means under the current CEPANI arbitration rules. Article 34 of the rules requires a specified number of hard-copy originals with handwritten signatures. Arbitrators may, however, additionally also sign the award using a qualified electronic signature which can then serve as an unofficial copy of the award that the Secretariat of CEPANI can send by e-mail to parties.

The guidance note contains a very detailed step-by-step plan to help arbitrators and parties to electronically sign a document. Hopefully many arbitrators and parties will opt for this new method of signing terms of reference, which should allow this formality to be dealt with in a faster and more efficient way.

NEWS

» CEPANI IS HIRING A LEGAL ATTACHÉ TO JOIN THE CASE MANAGEMENT TEAM

- Le CEPANI cherche un(e) collaborateur/trice bilingue, enthousiaste et méticuleux/se pour venir renforcer plein-temps son équipe.

Vous pouvez trouver la description complète via ce lien.

- CEPANI is op zoek naar een enthousiaste en nauwgezette tweetalige medewerk(st)er om voltijds haar team te komen versterken.

U kunt meer informatie vinden via deze link.

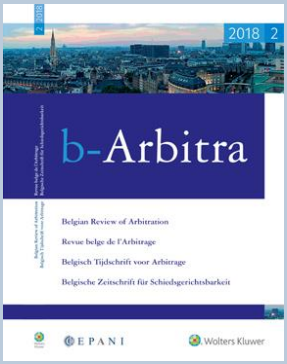
» **ARBITRATION CAPSULES – STRAIGHT TO ARBITRATION**

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.

VARIA

» CEPANI recommends the colloquium "Le citoyen et l'administration face au juge et au médiateur institutionnel" organised by the UCLouvain (4-25 February 2021).

More information on the programme and how to register can be found here.

» CEPANI recommends the webinar "Le temps des MARCS" on 10 February 2021, organised by the Conférence du Jeune Barreau.

More information on the programme and how to register can be found here.

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