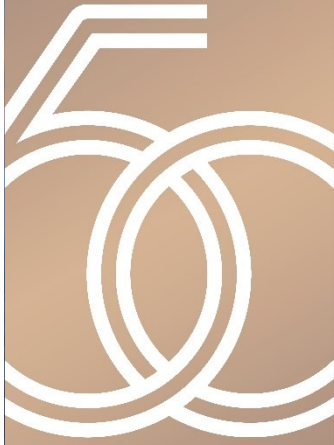


CEPANI



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#147

April 2021

Editors in chief: Guillaume Croisant, Marijn De Ruyscher, Iuliana Iancu and Claire Larue

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## AGENDA

6 MAY 2021	(16:30-19:00)	Joint webinar Osborne Clarck/CEPANI: "Emerging trends in arbitration: looking at decarbonisation and diversity"
14 MAY 2021	(13:00-14:30)	ICC YAF webinar: "Read between the lines. The unwritten rules of a career in international arbitration: the junior years"
18 MAY 2021	(17:00 - 18:30)	Joint webinar CEPANI/Associazione Italiana per l'Arbitrato (AIA): "Double Hatting : Do we need a vaccine?"
3 JUNE 2021	(16:00-17:00)	CEPANI General Assembly
17 JUNE 2021	(10:00 – 12:00)	Webinar Voka-Vlaams netwerk van ondernemingen "Dispute Resolution by Arbitration in International Trade" / "Geschillenbeslechting in internationale handel via arbitrage"

## NEW SERIES : *Stories from a Young Arbitrator*

» [FIRST EPISODE, "WHAT IF A PARTY DOES NOT PARTICIPATE IN THE ARBITRAL PROCEEDINGS"](#) (BY NATHAN TULKENS)

## REPORT

» [REPORT ON CEPANI CHECKLIST FOR REMOTE HEARINGS](#) (ENG – NL - FR)

# NEW SERIES - STORIES FROM A YOUNG ARBITRATOR

With this edition of the Newsletter, the Editors are proud to introduce 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.

In this inaugural edition, Nathan Tulkens (Clifford Chance, Brussels) will discuss the prevalent and thorny issue of defaulting parties in arbitration proceedings.

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

## EPISODE 1 - WHAT IF A PARTY DOES NOT PARTICIPATE IN THE ARBITRAL PROCEEDINGS



Nathan Tulkens  
Avocat - Advocaat  
Clifford Chance LLP, Brussels

When a claimant has initiated arbitration proceedings against a respondent, a general assumption is that the parties will actively participate in the proceedings to defend their position.

However, it can happen that one party, usually the respondent, simply refuses to participate in the proceedings, either from the beginning of the arbitration or at a later stage. There are many reasons why a party might act like this, such as for example pending insolvency or liquidation proceedings, practical impossibility to use means of communication for the time being or, simply, the desire to avoid the financial cost associated with the defence and then attempt to challenge the award at the enforcement stage.

Nowadays, tribunals are increasingly likely to encounter issues related to a non-participating party in arbitrations, as parties face higher risks of insolvency as well as trade and travel restrictions because of the Covid-19 pandemic.

If an arbitrator appointed under the CEPANI Arbitration Rules (2020) (the "2020 Rules") is faced with this situation, what can he or she do?

First of all, it is widely accepted that arbitral tribunals have an inherent power to conduct proceedings in the absence of one party, even without an express authorisation from institutional rules or national laws (G. BORN, *International Commercial Arbitration*, Vol. 3, 2nd ed., Kluwer Law International, 2014, p. 3027). In this case, the 2020 Rules expressly authorise the arbitrator to do so in article 7.2 (as do most sets of arbitration rules).

But that does not mean that the arbitrator may automatically progress towards an award favourable to the participating party (most of the time, the claimant), as the principle whereby the absence of a party is interpreted as an acceptance of the allegations that have been made against it is usually not applicable in arbitration, and certainly not in CEPANI proceedings. On the contrary, arbitration rules often provide that the tribunal must consider all the evidence before making its award (see article 24, §2 of the 2020 Rules and article 1699 of the Judicial Code). Thus, even if one party fails to appear in the arbitration to contest the claims brought against it, the tribunal must still proceed with the case and be satisfied that the claimant has proved its entitlement before making the award. It cannot "short circuit" the procedure by rendering a "default award" (jugement par défaut/berechting bij verstek), which does not exist under the Rules. On the contrary, it must scrutinise the evidence presented by one party while simultaneously ensuring procedural fairness for the other absent party.

In practice, the tribunal will inevitably face a number of issues resulting from the non-participation of a party. Without being exhaustive, we will try to explore some of these issues and to provide a few practical tips for arbitrators – young or not – to navigate them, with due regard to the 2020 Rules.

- **Should I verify whether I have jurisdiction to hear the case?** Yes, you should. According to article 6 of the 2020 Rules, if the respondent fails to submit an answer to the request for arbitration within the deadline, the President shall conduct a prima facie review of the existence of an arbitration agreement. Notwithstanding this prima facie analysis by the President, article 7, §3 of the 2020 Rules states that if a party against which a claim has been made does not submit an answer, the arbitral tribunal shall itself rule on its jurisdiction.

- **Should I keep attempting to communicate with the non-participating party?** Yes, absolutely, at all stages of the proceedings. The rule whereby all communications must be sent to all parties simultaneously (article 8, §1 of the 2020 Rules) is not affected by the fact that a party is not participating. To minimise the risk of challenge of the award, the non-participating party must have received a fair and reasonable opportunity to present its case throughout the proceedings. You should therefore continue to properly notify that party of every procedural document, every procedural step and every deadline. As a matter of good practice, you should keep a record of each and every attempt to communicate with the absent party, as this documentation might become necessary in the context of a subsequent challenge of the award.
- **What if the absent party has not even notified me of its contact details?** The 2020 Rules provide that "communications shall be validly made if sent to the last address of the addressee, as notified either by the latter or, as the case may be, by another party." (article 8, §4).
- **What if three arbitrators were foreseen and the absent party had the right to appoint an arbitrator?** The CEPANI Appointments Committee or the President will appoint the arbitrator in the place of the non-participating party (article 15, §3 of the 2020 Rules).
- **How can I prepare the terms of reference in the absence of a party?** You should prepare them with the input of the participating party and, when the terms of reference are ready for signature, the Secretariat will fix a time limit for obtaining the missing signature of the non-participating party, after which the proceedings may continue (article 23, §2 of the 2020 Rules).
- **Who will pay the advance on arbitration costs?** The participating party will need to substitute payment on behalf of the other party in order to proceed. This is made possible by the 2020 Rules, which provide "any party shall be free to pay the whole of the advance on arbitration costs should the other party fail to pay its share" (article 38, §3).
- **What if a party does not show up to the hearing?** You must first verify that the non-appearing party was duly summoned to the hearing and that there is no valid reason for its absence. Once that is established, you may proceed with the hearing (article 24, §5 of the 2020 Rules).
- **Should I proactively raise arguments that the non-participating party might have made?** On the one hand, you must be satisfied that the claims presented to you are well-founded in fact and in law and you should therefore not simply accept the contentions of the participating party without enquiry. The burden of proof should remain the same for the participating party, but do not hesitate to ask questions to the participating party about its submissions or request it to submit additional facts and evidence. In addition, you should of course always proactively raise objections which relate to the public order. On the other hand, keep in mind that you have no duty to, and should not, act as de facto counsel or representative of the party who has chosen not to participate. You should hence avoid the natural tendency to fill the vacuum created by the absence of one party.
- **Should I order the non-participating party to bear the full arbitration costs and parties' costs?** Not necessarily, as you can still freely allocate how these costs shall be borne by the parties, but note that one of the criteria you may take into account in your decision is "the manner in which the parties have cooperated in handling the case" (article 39, §4 of the 2020 Rules).

Acting as arbitrator in a case where a party is refusing to participate is like being the referee of a game of tennis where only one player is on the court. It is a very challenging task, and a frustrating one too as you are deprived of the benefits resulting from the adversarial nature of normal proceedings. But as long as you did everything you could to safeguard the due process rights of non-participating party at all stages of the proceedings, you should be confident that you complied with your duty to render a valid and enforceable award.

As a very useful reference tool, have a look at the 2015 practice guidelines on party non-participation published by the Chartered Institute for Arbitrators (CIArb) , which offer some practical tips on how to conduct proceedings when faced with a party (claimant or respondent) who does not participate.

# REPORT

## CEPANI CHECKLIST FOR REMOTE HEARINGS

ENG - NL - FR

BRUSSELS, 28 APRIL 2021

*Report on CEPANI checklist for remote hearings*  
*Verslag CEPANI checklist voor hoorzittingen op afstand*  
*Compte-rendu checklist CEPANI pour les audiences à distance*



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Attorney at the Brussels Bar  
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The Covid-19 pandemic has imposed new habits on arbitration practitioners, including **holding hearings remotely**. While some may have already experienced it, others perhaps not yet.

Like several arbitration institutions and centres, CEPANI has also developed a checklist for remote arbitration hearings. This checklist is a practical tool to ensure that hearings run smoothly. Arbitrators and parties can use it as a guide.

In addition to general considerations, the checklist is divided in three successive stages of the arbitration procedure: the case management conference, the drafting of the Terms of Reference and the start of the hearing. For each stage, issues to be addressed such as time, duration and conduct of the hearing and measures to be taken such as the selection of an electronic platform or the prior exchange of documents are specified, or recommendations are made. The checklist also contains online etiquette rules to be observed during the hearing.

The checklist moreover proposes in annexes a clause to be inserted in the Terms of Reference on data protection and two clauses to be inserted in a Procedural Order, one dealing with the organisation of a virtual hearing and the other dealing with confidentiality, privacy and security (cyber-protocol).

The practice of holding remote arbitration hearings will certainly continue after the health crisis. It can be expected that each participant in an arbitration will henceforth consider whether the hearing can be conducted online, as a remote procedure offers time and cost savings, especially in international arbitrations.

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De Covid-19 pandemie heeft nieuwe gewoonten opgelegd aan wie beroep doet op arbitrage, waaronder het houden van hoorzittingen op afstand.

Sommigen hebben dit al ervaren, anderen misschien nog niet.

Zoals verschillende andere arbitrage-instellingen en -centra, heeft ook CEPANI een checklist ontwikkeld voor arbitragezittingen op afstand. Deze praktische checklist is bedoeld om de hoorzittingen vlot te laten verlopen. Arbiters en partijen kunnen deze als leidraad gebruiken.

Naast de algemene beschouwingen is de checklist onderverdeeld in drie opeenvolgende fasen van de arbitrageprocedure: het overleg voor het management van de procedure, het opstellen van de opdrachtakte en het begin van de zitting. Voor elke fase worden aspecten opgelijst die best in acht genomen worden, zoals het tijdstip, de duur en het verloop van de hoorzitting, de te nemen stappen, zoals de keuze van een elektronisch platform of de voorafgaande uitwisseling van documenten, en worden aanbevelingen gedaan. De checklist bevat ook gedragsregels die tijdens de hoorzitting in acht moeten worden genomen.

Voorts stelt de checklist in een bijlage een bepaling voor de bescherming van gegevens voor die in de opdrachtakte kan worden ingevoegd. Ook stelt deze bijlage twee bepalingen voor die in een procedure-agenda kunnen worden opgenomen, namelijk een bepaling over de organisatie van de hoorzitting op afstand en een bepaling over vertrouwelijkheid, privacy en veiligheid (cyber-protocol).

De praktijk om arbitrale zittingen op afstand te houden, zal na de gezondheids crisis ongetwijfeld worden voortgezet. Het kan worden verwacht dat eenieder die aan een arbitrage deelneemt voortaan zal nagaan of de arbitrage online kan worden gevoerd. Een procedure die online gevoerd wordt laat immers toe om tijd en kosten te besparen, met name in internationale arbitrages.

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La pandémie de Covid-19 a imposé de nouvelles habitudes aux praticiens de l'arbitrage, dont celle de tenir des audiences à distance. Certains en ont déjà fait l'expérience, d'autres peut-être pas encore.

Comme plusieurs institutions et centres d'arbitrage, le CEPANI s'est lui aussi doté d'une checklist pour les audiences d'arbitrage à distance. Pratique, elle vise à assurer le bon déroulement de ces audiences. Les arbitres et les parties peuvent s'en servir comme d'un guide.

En plus de considérations d'ordre général, la checklist est divisée selon trois étapes successives de la procédure arbitrale : la conférence sur la gestion de la procédure, la rédaction de l'acte de mission et le début de l'audience. Pour chaque étape sont précisées les questions à aborder telles que l'heure, la durée et le déroulement de l'audience et les mesures à prendre telles que la sélection d'une plateforme électronique et l'échange préalable de pièces, ou des recommandations sont faites. La checklist fait également état de règles de bienséance à adopter lors de l'audience.

La checklist propose par ailleurs, dans des annexes, une clause relative à la protection des données à insérer dans l'acte de mission et deux clauses à insérer dans une ordonnance de procédure, l'une relative à l'organisation

de l'audience à distance et l'autre relative à la confidentialité, vie privée et sécurité (« cyber-protocol »).

L'habitude de tenir des audiences arbitrales à distance perdurera certainement après la crise sanitaire. Il est désormais probable que chaque participant à un arbitrage se posera la question de savoir si l'audience peut se tenir à distance, grâce aux économies de temps et de coûts que la procédure virtuelle présente, surtout dans les arbitrages internationaux.

## NEWS

### BELGISCHE ECONOMISCHE MISSIE, VOORGEZETEN DOOR H.K.H. PRINSES ASTRID EVENT IN LONDEN OP MAANDAG 6 SEPTEMBER 2021

Geachte Collega's

We laten u graag weten dat er van 5 tot 8 september 2021 een Belgische economische missie, voorgezeten door H.K.H. Prinses Astrid, naar het Verenigd Koninkrijk gaat.

In het kader van die missie worden er verschillende individuele en gezamenlijke activiteiten georganiseerd. Ook CEPANI zal aanwezig zijn en organiseert een seminar in samenwerking met hub.brussels en de London Court for International Arbitration (LCIA) over arbitrage en digitalisering. Dat seminar gaat ter plaatse door (voor zover de coronasituatie dat toelaat) **in de residentie van de Belgische ambassadeur in Londen op maandag 06/09/2021 van 16.00 u. tot 18.00 u.** (BST).

Het voorlopige programma ziet er als volgt uit:

- Welkomstwoord:
  - Pascal Smet, Brussels Staatssecretaris voor Buitenlandse Handel
  - Benoît Kohl, voorzitter van CEPANI
- Discours 'Arbitration & Digitalisation; a perfect match', door Dirk De Meulemeester, erevoorzitter van CEPANI
- Debat/getuigenis over thema's als nieuwe technologieën in internationale arbitrageprocedures, cybersecurity in de context van COVID, digitalisering in internationale handelsbetrekkingen ...
- Slotwoord door Jacomijn van Haersolte-van Hof, Director General of LCIA
- Uitwisseling en networking met Britse collega's en tegenhangers

Buiten het seminar over arbitrage en de algemene receptie van de missie, zal er nog een specifieke activiteit worden georganiseerd voor de deelnemers van de CEPANI-groep. Details volgen nog.

We zouden u er graag bij hebben voor deze belangrijke post-COVID- en post-Brexit-opportunititeit.

Hebt u interesse? Laat het ons dan zeker weten door op deze mail te antwoorden (of via het invulformulier). **Schrijf u ook in voor de missie via uw gewestelijke organisatie (deadline 3 mei 2021!!).**

- Brussel: <https://hub.brussels.nl/events/belgische-economische-missie-in-het-verenigd-koninkrijk/>
- Vlaanderen: [Groepszakenreis 'Verenigd Koninkrijk onder leiding van Prinses Astrid' | Flanders Trade \(flandersinvestmentandtrade.com\)](#)
- Wallonië: [Royaume-Uni - Mission économique présidée par SAR la Princesse Astrid - Wallonia.be - Export Investment \(awex-export.be\)](#)

Neem zeker contact met ons op voor bijkomende inlichtingen.

Met vriendelijke groeten,

Benoît Kohl & Emma Van Campenhoudt

## MISSION ECONOMIQUE BELGE PRÉSIDIÉE PAR SAR LA PRINCESSE ASTRID, ÉVÈNEMENT À LONDRES LE LUNDI 6 SEPTEMBRE 2021

Chers Collègues,

Nous avons le plaisir de vous informer qu'une Mission Economique Belge, présidée par SAR Princesse Astrid, se rendra au Royaume-Uni du 5 au 8 septembre 2021.

Différentes activités individuelles et collectives seront organisées dans le cadre de cette mission. Dans la foulée de ces activités, CEPANI organisera un séminaire en collaboration avec hub.brussels et la London Court for International Arbitration (LCIA) sur le thème de l'arbitrage et la digitalisation. Ce séminaire aura lieu en présentiel (pour autant que la situation Covid le permettra) **à la Résidence de l'ambassadeur de Belgique à Londres le lundi 06/09/2021 de 16h00 à 18h00 (BST).**

Le programme provisoire comprendra les points suivants :

- Mots de bienvenue :
  - Pascal Smet, Secrétaire d'Etat Bruxellois au Commerce Extérieur
  - Benoît Kohl, Président du CEPANI
- Allocution « Arbitration & Digitalisation ; a perfect match », par Dirk De Meulemeester, Président honoraire du CEPANI
- Débat/témoignage sur des thèmes tels que l'usage de nouvelles technologies dans les procédures d'arbitrage international, cyber-sécurité dans le contexte du Covid, application de la digitalisation dans les transactions commerciales internationales...
- Mot de clôture par Jacomijn van Haersolte-van Hof, Director General of LCIA
- Echange et networking avec les collègues et homologues britanniques

A part le séminaire 'Arbitrage' et la réception générale de la mission, une activité spécifique sera organisée pour les participants du groupe Cepani. Les détails suivront en temps utile.

Nous serons ravis de vous compter parmi nous à cette importante opportunité à la fois post-Covid et post-Brexit.

Si vous êtes intéressés, nous vous invitons à nous le signaler par retour de mail **et de vous inscrire parallèlement à la mission via votre organisme régional (deadline 3 mai 2021 !!)**

- Bruxelles : [Mission économique belge au Royaume-Uni | hub.brussels](#)
- Flandre : [Groepszakenreis 'Verenigd Koninkrijk onder leiding van Prinses Astrid' | Flanders Trade \(flandersinvestmentandtrade.com\)](#)
- Wallonie : [Royaume-Uni - Mission économique présidée par SAR la Princesse Astrid - Wallonia.be - Export Investment \(awex-export.be\)](#)

N'hésitez pas à nous contacter pour de plus amples renseignements.

Bien à vous,

Benoît Kohl & Emma Van Campenhoudt

**Responsible publisher:** B. Kohl

**Editorial board:** G. Keutgen, S. Van Rompaey, M. Berlingin, M. Draye, V. Foncke, S. Goldman, O. van der Haegen