CEPANI 1969 - 2019

#154

February 2022

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



# *AGENDA*

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| **10 March 2022 (17:00 – 18:30)** | **CEPANI40-Fieldfisher Seminar "Arbitration in Post M&A Disputes"** |
| **31 March 2022 (08:30 – 10:00)** | **CEPANI-AFA-VIAC-NAI Morning debate: Default in Arbitration (part of Paris Arbitration Week 2022)** |
| **22 April 2022** | **SAVE THE DATE: Joint CEPANI-NAI Colloquium** |
| **9-12 May 2022** | **The royal economic mission to the UK** |
| **2-4 June 2022** | **Co-Chairs' Circle global conference organised by CEPANI40 in Brussels (Legitimacy *in* and *of* Arbitration)** |

# *SERIES: Stories from a Young Arbitrator*



# *REPORTS*



# *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 7 - SUMMARY INSIGHTS INTO SUMMARY DISMISSAL IN INTERNATIONAL ARBITRATION**

Joanna Kolber
*Partner, Strelia*

**Introduction**

Having had a more "classic" experience as an arbitrator under the NAI, CEPANI and ICC Rules, it was with somewhat of a challenge that I was recently confronted with a party's motion for expeditious determination of the other party's defence.

It proved quite a task to find any practical guidance about the precise circumstances in which such a motion could be considered and granted. This prompted me to investigate the topic of summary dismissal of claims in arbitration in more detail. I am now happy to share some of my insights with the readers of the CEPANI newsletter.

**Summary dismissal: some basics**

***What is summary dismissal?***

Summary dismissal is a procedure for speedy resolution of issues without a full procedure and without considering all the evidence. Summary dismissal is often also referred to as summary disposition, early disposition, expeditious determination or similarly, with some authors pleading to underscore in particular the phrase 'early' or 'expeditious'. This is to avoid giving the impression that summary disposition of claims would not involve sufficient scrutiny.

Historically, summary dismissal originates from common law jurisdictions. Continental lawyers are not particularly familiar with this notion, but Belgian litigators might see some distant parallels with the so-called 'short debates' before Belgian courts (pursuant to Article 735 of the Belgian Judicial Code), which allow for early and speedy resolution of specific types of claims.

Proponents of summary dismissal stress that summary dismissal may facilitate settlements, discourage parties from bringing frivolous claims and, most importantly, lead to greater efficiency and speed of arbitration. Critics argue that that summary dismissal proceedings might violate the parties' due process rights, thus endangering the validity and enforceability of arbitral awards. They also consider that motions for summary dismissal add to the complexity of arbitration proceedings because they would force parties to engage in additional rounds of arguments. Some even complain that summary dismissal leads to the Americanisation of arbitration. In Belgium, where the arbitration law includes an obligation to provide reasons for the arbitral award, some critics also add that summary dismissal might stand in the way of fulfilling this obligation.

***Is summary dismissal acceptable? Are arbitral tribunals empowered to summarily dispose of claims?***

It is debatable whether arbitral tribunals have the discretion to dispose of claims or defences, or other issues without an authorization to do so expressed explicitly by the parties or in the applicable arbitration rules. According to some authors (and the ICC; see the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (**ICC Note**), the arbitral tribunals' broad discretion to determine the procedural rules also encompasses the tribunal's discretion as regards summary disposition. Others disagree.

With the introduction of the party's right to file an objection that a claim is 'manifestly without merit' in the ICSID Rules in 2006, summary dismissal started to make its way in international commercial arbitration. Since then, several arbitral institutions included the party's right to file a motion for summary dismissal in their rules: among others, the LCIA, SCC, SIAC, HKIAC and JAMS. Others, such as the ICC, chose a middle way and, rather than including summary dismissal in their rules, provide guidance about this tool in their note of conduct issued to the parties and arbitral tribunals. Many other institutions have so far refrained from amending their rules in this respect (e.g., DIS, CIETAC). CEPANI also remains among the latter.

***Framework for summary dismissal: regulation in arbitration rules***

The way summary dismissal is addressed in arbitration rules or notes of conduct varies. Some rules speak only of summary dismissal of claims (e.g., ICSID), others also refer explicitly to defences (e.g., SIAC, LCIA), yet others to also other issues (e.g., SCC, JASM, HKIAC). Some rules specify that the claims may be dismissed if they are manifestly without *legal* merit (e.g., ICSID, SIAC), others extend it also to allegations of *fact* that are manifestly unsustainable (e.g., SCC, ICC). Some rules specify which types of issues may be subject to early disposition ruling, e.g., jurisdiction, admissibility, merits (e.g., ICSID), whereas others do not. Some rules or notes of conduct require the motion for summary dismissal to be made within a specific time limit (e.g., ICSID), whereas others do not (e.g., ICC, HKIAC, SIAC). Some rules provide for more elaborate proceedings to be followed with regards to summary dismissal (e.g., SCC, ICC), others merely include the arbitral tribunal's authorization to make early determination (e.g., LCIA).

There is very little published case-law or other guidance about the circumstances in which arbitrators could consider dismissing claims expeditiously, or about what precisely constitutes a manifestly unfounded claim, defence or issue in commercial arbitration.

Some exceptions are the ICC and the SCC arbitrations. The ICC Note advises arbitrators to consider any circumstances they consider relevant, including the stage of the proceedings and the need to ensure time and cost efficiency. The SCC Rules advise to consider whether the summary procedure contributes to a more efficient and expeditious resolution of the dispute.

***Ground rule: due process and opportunity to be heard***

It goes without saying that, under all rules that explicitly provide for summary dismissal and in all circumstances, arbitrators should put the parties' due process rights and their opportunity to be heard in the foreground.

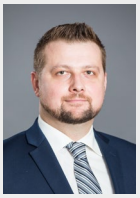
***Fast-forward to my personal experience***

In the case I handled, the claimant requested that the sole arbitrator expeditiously consider the respondent's defence as manifestly unfounded and grant the claimant's claim. The request for expeditious determination was formulated in claimant's second round of submissions, somewhat halfway through the arbitration and shortly before the respondent was about to file its last submission. In the specific circumstances of the case, the application for expeditious determination was unlikely to contribute to a speedy and cost-efficient resolution of the dispute. Among other things, several parties' submissions were filed at the time of the application, the proceedings were nearing the end and the case itself was subject to the ICC Expedited Procedure Rules, which impose tight time limits for the resolution of the dispute which in themselves help achieve a speedy result.

In the future, hopefully more practical guidance on the topic will become available. It is also with great curiosity that we await the CEPANI's future steps. It remains to be seen whether the CEPANI will change its cautious approach to summary dismissal which it expressed as recently as in the 2020 questionnaire in the UNCITRAL Working Group on Expedited Arbitrations.

# *REPORTS*

***THE CONTENTS OF B-ARBITRA 2021/2***



Maarten Draye
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Caroline Verbruggen
*Conseiller*
*Cour d'appel*
*Bruxelles*

*Editors-in-Chief b-Arbitra*

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

We are happy to inform you that b-Arbitra 2021/2 will shortly be released on paper, at Jura and at Kluwer Arbitration.

As of this edition, we will contribute to the CEPANI newsletter with a summary of the contents for each edition of b-Arbitra upon its release.

Issue 2021/2 starts off with an analysis of the possible influence of the B2B law of 4 April 2019 on arbitration and mediation by **Rafael Jafferali, Fanny Laune** and **Sander Van Look**. This B2B law entered into force on 1 December 2020. Its adoption raised some consternation among arbitration practitioners, as the *travaux preparatoires* surprisingly mentioned arbitration clauses among examples of forbidden self-administered justice clauses, a position rightly and widely criticized by numerous legal authors. In a second contribution, **Maxime Berlingin** and **Louis Atyeo** provide an overview and analysis of recent case law regarding the power of state courts to render preliminary rulings suspending the arbitration proceedings or suspending the enforceability of an arbitral award. The authors show that the power of state courts to interfere with or undermine, at least temporarily, the jurisdictional power of an arbitral tribunal is subject to strict conditions. The six decisions on which they are commenting are published in this edition of b-Arbitra.

In its decision rendered on 24 September 2020, published with a note by **Benjamin Jesuran**, the Belgian Supreme Court addressed the meaning of the obligation to raise an arbitration exception *in limine litis*. In the case at hand, the decision in first instance was taken by default, so that the defendant validly raised its objection at the level of appeal.

Next, we publish a judgment of the court of first instance of Brussels with a note by **Eric De Brabandere**, in which the court heard a setting aside application against the investment arbitration award declining jurisdiction In *R. v Mauritius*, based on the exclusion of dual nationals in the BIT between France and Mauritius.

In another judgment with a note by **Yves Herinckx**, the same court refused an application for setting aside, assessing inter alia the tasks that may be conducted by arbitral secretaries, an issue of interest to all practitioners.

Finally, fulfilling our mission to make Belgian case law relating to arbitration accessible to all, we publish several setting aside judgments from the Brussels and Liege courts of first instance, which were all rendered in domestic arbitrations. These judgments touch upon a whole range of issues, including territorial competence, the scope of review of arbitral awards, mandatory laws as public policy, the remanding of awards to the arbitral tribunal, due process, reasoning of an award, amiable composition and the validity of the arbitration agreement.

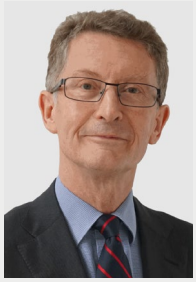
In the document section, the reader will find comments by **Olivier van der Haegen** on ICCA's research project on "Does a Right to a Physical Hearing Exist in International Arbitration?" Last but not least, **Patrick Baeten** reviews Guy Block's treatise on Arbitration and Protection of Investments in Energy and Infrastructure Sectors.

For more details, please see the table of contents here.

We invite 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.

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

## *AWARD NOTIFICATIONS SHOULD EXPLAIN HOW TO SEEK ANNULMENT*



Yves Herinckx

*Avocat (Brussels) / Solicitor (England and Wales)*

The CEPANI Secretariat will from now on, when notifying an award to the parties and their counsel, explain in its cover letter how and by when an action for annulment of the award may be filed. This will be done by quoting Article 1717, §§1, 2 and 4 of the Judicial Code.

This new practice is a consequence of the Constitutional Court's judgment 23/2022 of 10 February 2022. The judgment deals with a preliminary reference from the Mons Court of Appeal, where an appellant had missed the deadline for filing its appeal. The appellant pleaded that the deed of service (*signification* / *betekening*) of the first instance judgment was defective in that it did not state that it constituted the starting point of the time period after which an appeal would no longer be admissible. The Court of Appeal referred the argument to the Constitutional Court. Technically, the Court of Appeal noted a difference in treatment between notifications of certain judgments by the court's clerk under Article 792 of the Judicial Code, where details of the available legal remedies (*voies de recours* / *rechtsmiddelen*) must be indicated, and deeds of service by bailiffs where they need not be. This was the "discrimination" hook on which the Court of Appeal hung its preliminary reference.

The Constitutional Court built a reasoning based entirely on the right of access to a court, as enshrined in Article 6 of the European Convention on Human Rights. The Court stated that, in order for the right of access to a court to be guaranteed, the rules regarding legal remedies and their time limits must be clearly defined and, furthermore, these rules must be explicitly brought to the attention of the parties. The Court referred to the caselaw of the ECtHR which, in certain particular circumstances, has required that an express explanation about available remedies be included with the notification of the judgment. That caselaw is highly fact-specific and relates for instance to criminal convictions ordered against a defaulting defendant or civil judgments involving a litigant in person without legal representation. The Constitutional Court, however, considered that the requirement applies generally for the benefit of all litigants: "*ces exigences essentielles relatives au droit d'accès au juge, qui constitue un aspect du droit à un procès équitable, valent de manière générale à l'égard de tout justiciable* / *gelden die wezenlijke vereisten inzake het recht op toegang tot de rechter, dat een aspect van het recht op een eerlijk proces vormt, op algemene wijze ten aanzien van iedere rechtzoekende*". The Court stated that a mention, in the deed of service of a judicial decision, of the availability of legal remedies is an essential aspect of the general principle of the proper administration of justice and of the right of access to a court.

The Court concluded that Article 43 of the Judicial Code, which lists the mandatory statements that must appear in any deed of service of a judgment, is invalid to the extent that it fails to include in the list a statement about the availability of legal remedies, the applicable time limits and the designation and the address of the competent appellate court. The Court, however, deferred until 31 December 2022 the effectiveness of its judgment so as to protect legal certainty in respect of non-compliant deeds of service. This can only mean that the Court considered that a deed of service that does not include a description of the available remedies is ineffective, so that the calculation of the time limit for filing an appeal does not start. The Court expressly referred to Article 47*bis* of the Judicial Code, pursuant to which a deed of service that misses a mandatory statement does not start the clock running.

The judgment only deals with Article 43 of the Judicial Code and the service of State court judgments. It says nothing about arbitration and the communication of awards. Given its reasons, however, and the sweeping statement by the Court about the general application of the information requirement it imposes, it seems inevitable that the communication of arbitral awards must also comply. The CEPANI Secretariat wisely decided to do so with immediate effect.

## *CEPANI LUNCH DEBATE ON THIRD PARTY FUNDING*

***17 FEBRUARY 2022***

Quentin Declève

*Associate, Van Bael & Bellis*

On 17 February 2022, CEPANI held a lunch debate on third-party funding. The event took the form of an informal discussion between Mr Dirk De Meulemeester (former President of CEPANI) and Ms Olivia de Patoul (Senior Legal Counsel at Deminor Recovery Services, a Belgium-based litigation funder).

Third party litigation funding is a practice originating in common law jurisdictions. It enables a third party (a so-called funder) to provide financial resources to a claimant enabling that claimant to initiate court or arbitration proceedings. Typically, a litigation funder pays for all the costs that the claimant would normally bear (including legal fees, expert costs, arbitrator's fees, provision to arbitral institutions, etc…) and obtains a share of the proceeds if the claim eventually succeeds or is successfully settled. If, on the contrary, the case is unsuccessful, the funder bears the financial loss and the claimant does not have to pay any fee (so-called "no cure, no pay" rule). In continental Europe, this practice offers an interesting solution to the impossibility for lawyers to charge their services on the basis of a contingency fee.

During the lunch debate, Ms de Patoul explained that – as a litigation funder – Deminor only funds a particular case after having conducted an in-depth due diligence of the case. This due diligence includes examining the amount in dispute, conducting KYC (Know Your Client) checks on the parties in dispute, examining the litigation strategy and legal issues raised by the dispute, as well as assessing the enforcement possibilities. On average, Deminor only finances 2 out of 10 cases advanced by claimants to Deminor for litigation funding. Deminor usually finances only cases for which the amount in dispute is 10 million euros or higher. If Deminor agrees to finance a case, it enters into a funding agreement with the claimant. In terms of returns, Deminor aims to get a multiple of the funding provided or approximately 30% of the money recovered.

Among the advantages of litigation funding, Ms de Patoul also explained that having a litigation funder on its side usually sends a tough and clear message to the defendant that the claimant is serious about a case. The fact that a litigation funder has accepted to finance a case is also proof of the seriousness of the claims in dispute.

In terms of involvement, Deminor's role may be twofold. Either Deminor's role is limited to funding (in such a case, Deminor only offers passive support to the client but remains nevertheless involved in all major strategic decisions of the case) or Deminor is involved in the management of the case and is then typically involved in the engagement of lawyers, in reviewing submissions or preparing important hearings.

The discussion took a lively turn when members of the audience started to ask specific questions relating to the relationship and conflicting interests at stake between a claimant, the lawyer and a funder. Although admittedly, there could be a divergence of interest between those parties (for instance if a funder wishes to settle a dispute whilst the claimant wants to pursue the case), Ms de Patoul insisted on the importance of building a strong and reliable relationship with all stakeholders. It is therefore important to have a smooth interaction with all parties involved and to ensure that such relationships are built on trust. She also stressed that a funder is not a lawyer and therefore no privilege applies between a funder and its client. Instead, a non-disclosure agreement is agreed with the client in order to safeguard the confidentiality of all the information shared with the funder.

## » CEPANI DIVERSITY AND INCLUSION SURVEY

CEPANI President Benoît Kohl has set up a Diversity and Inclusion Working Group with a view to chart the current diversity status at CEPANI and suggest ways to improve diversity and inclusion at CEPANI as an organisation.

Emma Van Campenhoudt
*Secretary General, CEPANI*

One of the initiatives taken by the Working Group is to carry out a survey with the wider CEPANI community in order to better understand and measure the ways in which diversity and inclusion is perceived. The idea is also to grasp which are your expectations and aspirations in this regard. Your participation is crucial to help CEPANI properly understand your views and/or concerns. On behalf of the Working Group, I would be very grateful if you were to spare a few minutes to respond to this survey.

Your participation is of course confidential and will not take any longer than 5 to 10 minutes of your time. To start the survey, please click here.

If you have any questions in this regard, please feel free to reach out to me, Werner Eyskens or Sophie Goldman, Co-Chairs of the Diversity and Inclusion Working Group.

» **CEPANI40–FIELDFISHER JOINT EVENT ON "ARBITRATION IN POST-M&A DISPUTES"**

*10 March 2022, 17:00-18:30*

***CHANGE OF VENUE***

*The event will take place in person at "La Chaufferie" Rue des Pères Blancs 6, 1040 Brussels*

Arbitration has become a prominent alternative to litigation for the resolution of corporate disputes arising from M&A deals.

During this seminar, Koen Van den Broeck, Maxime Berlingin, Alexandra Underwood and Marily Paralika will discuss the following topics:

- Procedural issues that may arise in M&A arbitrations;
- The advantages of using arbitration to resolve M&A disputes;
- Damage valuation;
- Interim measures requested in M&A arbitrations; and
- Special issues in connection with warranty and indemnity insurance.

Join us for an evening of insightful presentations, interactive discussions and networking!

The seminar will be held from 17:00 to 18:30 with a cocktail reception to follow.

Please RSVP to the event here!

# *NEWS FROM OUR PARTNERS*

» **ACOLAD.**

**New Acolad.com website and stronger brand**

Did you hear the news? Amplexor is now officially Acolad. Our combined forces span 25 countries, three continents, and the biggest specializations — including legal & finance, ecommerce, manufacturing, life sciences and the public sector. As one key part of the rebranding, we launched our new global website, where you can find out more about our expertise, what kind of clients we work with and more.

Read more about our **legal translation expertise**.

Read more about **Amplexor rebranding to Acolad**.

*"Acolad is always our first choice for legal translation, they offer a speedy and efficient service with clear pricing choices." Olivier Morel, Head of International, Cripps LLP*

» **KLUWER ARBITRATION**

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