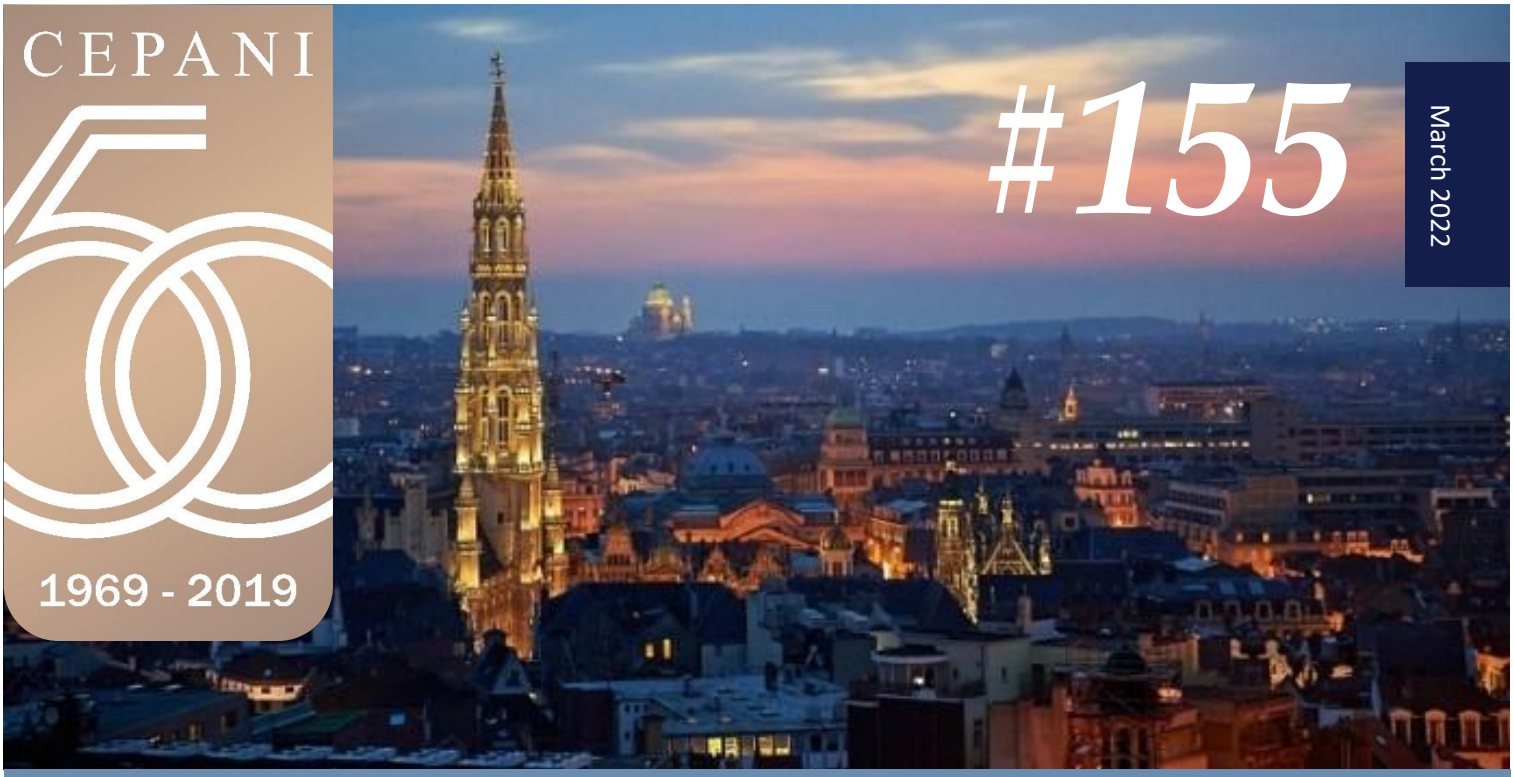
CEPANI
1969 - 2019



#155
March 2022

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

AGENDA

22 April 2022	**Joint CEPANI-NAI Colloquium: The CEPANI & NAI approach towards Topical Trends in Arbitration**
9 May 2022	**Arbitration & Digitalisation: A Perfect Match – Belgian Economic Mission to the UK**
12 May 2022	**VOB-FEB – "Evolutions et alternatives en matière de règlement des litiges - Evoluties en alternatieven inzake geschillenbeslechting"**
20 May 2022	**VPG-CEPANI Studiedag: "De advocaat en de buitengerechtelijke conflicthandeling"**
2-4 June 2022	**Co-Chairs' Circle Global Conference organised by CEPANI40 in Brussels (Legitimacy *in* and *of* Arbitration)**
15 June 2022	**SAVE THE DATE: Lunch Debate on Hardship in the new Civil Code**

SERIES: Stories from a Young Arbitrator

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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 8 – THE QUEST FOR A QUALITATIVE AWARD: WHERE THERE IS A WILL, IS THERE A (SAFE) WAY?

Lily Kengen
Associate,
Tossens Goldman Gonne (Brussels)

One may argue that an arbitrator is entrusted with the mission to render a complete, informed and reasoned award, in accordance with the applicable rules and contractual provisions, which entails the duty for the arbitrator to do everything within his/her powers to fully investigate the dispute, both in fact and in law. In that context, an arbitrator may in certain circumstances be tempted to supplement the parties' legal argumentation to substantiate the upcoming award. It is especially the case when the arbitrator bears – at it is often the case – a 'double-hat', and also (and, sometimes, primarily) acts as counsel. The same may go when facing an insufficient defence or a mismatch between the parties' respective positions, leading to an overall unbalanced debate. That "*déformation professionnelle*" legal practitioners acting as arbitrators may already have struggled with, necessarily raises the following question: to which extent, in the quest for a qualitative award, is an arbitrator allowed to intervene in the arbitration proceedings, notably with a view to "fill a gap" in the legal argumentation?

The fundamental rule in arbitration is that the primary control rests with the parties. The latter have, in principle, command not only of the procedural aspects of the arbitration proceedings as provided by Article 1700 of the Belgian Judicial Code, but also of the substantive matters presented to arbitration. Does that mean that arbitrators are bound hand and foot by the parties, who can – as the case may be – take their decider down with them if they fail to adequately present their case? Of course, it does not.

In this short contribution I identify certain tools which, as a young arbitrator, I have come to find useful to draw the parties' attention to legal and factual issues relevant to their dispute or to supplement any potential shortcomings in their case, and briefly highlight the basic principles which I believe should be kept in mind or complied with in doing so.

First and foremost, when it comes to ensuring a smooth and complete arbitration process, '*prevention is better than cure*' and the taking of prior procedural measures is therefore key. In particular, once an arbitrator is seized with a new matter, it may be useful – depending for example on the content and quality of the first submissions – to hold a **preparatory conference call** (or in-person meeting) with the parties at the outset of the arbitration proceedings. Such conference may be a good opportunity to provide a thorough explanation of the procedure and applicable rules, as well as to make sure that the parties adequately prepare themselves and, as a consequence, provide sufficient substance for an arbitrator to render a satisfactory award. In presence of an unrepresented party, an arbitrator may also take that opportunity to recall the possibility to be represented by counsel (or, as the case may be, *pro bono* counsel), which will generally lead to more qualitative and comprehensive submissions.

That being said, it should be reminded that a party is never under the obligation to be represented by counsel in arbitration proceedings and that arbitrators should refrain from inadvertently suggesting otherwise (see, *i.a.* Article 24(7) of the CEPANI Arbitration Rules and Article 26(4) of the ICC Arbitration Rules).

Procedural orders as such are also a subtle method to "raise a flag" when one or both parties seem to overlook an important and relevant point. Young arbitrators in particular should not be shy to **ask questions** and require parties or their counsel to answer them in their upcoming submissions. This strategy proves very useful in guiding the parties towards factual or legal issues they may not have thought of in the preparation of their initial arguments, or – as the case may be – in pointing out missing evidence or a potential miscalculation in a party's financial claim. This initiative nonetheless requires that the arbitrator fully embrace the matter from the start and carefully analyse the request for arbitration, the respondent's reply and the related exhibits.

Alternatively, arbitrators may also question the parties during a case management conference, or at the occasion of the hearing, with the parties answering either directly or by means of a post-hearing brief. In that context, however, arbitrators should be careful to raise their questions in such a way that these are not perceived as biased or deliberately leading (*e.g.*, to the extent possible, by directing them to both parties, by adopting a neutral wording, *etc.*).

In case those preventive measures and incentives do not suffice to wind up the legal debate, arbitrators may still encourage the parties by raising remaining issues 'head-on'. Under Belgian law for instance, certain specific rules must, because of their very nature, be raised *ex officio* by arbitrators. This is the case of **public policy rules**, which arbitrators are bound to apply, even when the parties fail to invoke them in support of their position (*e.g.*, prohibition of corruption, nullity of certain non-compete clauses, *etc.*). It is also sometimes held that a decider must raise **mandatory provisions** of Belgian law when applicable to the dispute at hand (*e.g.*, rules on unfair contract terms, rules on commercial leases protecting the lessor or the lessee, *etc.*). Even in the absence of public policy and mandatory provisions it may still however be argued that the arbitrator should feel free to draw the parties' attention to **other legal or contractual provisions** that may be relevant to the dispute and, therefore, to its upcoming decision. Making sure that the legal debate is complete and exhaustive is indeed a prominent element of the quest for a qualitative award.

When engaging in a more proactive role, arbitrators should nonetheless be particularly mindful to fully embrace the duty to **treat the parties equally and to ensure due process**. This is why, in practice, it is recommended that an arbitrator raising a new point (of law or of fact), whatever its nature, do so in the most impartial way possible and, in any event, always give both parties the opportunity to comment in accordance with the adversarial/contradictory principle.

In addition to the above, it should also be borne in mind that certain provisions of Belgian law specifically enable judges (and arbitrators) to decide discretionarily on certain issues, even in the absence of any argument made in that respect by any party. It is notably the case when ruling on **interests and penalty clauses**, where the decider may play a moderating role or correct a potentially unfair situation, notwithstanding the parties' respective views (or, as the case may be, absence thereof), in accordance with Articles 1153, 5th indent and 1231, §1 of the old Belgian Civil Code.

Finally, arbitrators are entrusted with the power to decide on the **costs of the arbitration proceedings**. The extent of this power depends on the applicable arbitration rules, but it is often described as discretionary (*e.g.*, ICC, CEPANI). When deciding on costs, arbitrators thus enjoy a dedicated space where they can operate (almost) freely. I would encourage arbitrators to make the most of that possibility, notably by thinking outside the box or displaying a certain degree of creativity in their reasoning. Indeed, apart from the general "*costs follow the event*" rule, which should not necessarily be automatically applied, other various (less known) formulas (*e.g.*, leaving each party support its own costs irrespective of the outcome, where appropriate) and criteria (*e.g.*, the parties and their counsel's conduct during the proceedings, the reasonableness of the costs incurred, the disparities between the parties' respective costs, *etc.*) for apportioning and allocating arbitration costs should be considered, for the purpose of rendering an all-the-way-reasoned and fair award.

Overall, arbitrators may be encouraged to oversee and conduct the arbitration process proactively, both from a procedural and a substantive perspective, including by making (a careful and wary) use of the many tools at their disposal, for the sake of rendering the best possible award. In that context, a decider should not be afraid to put his/her personal legal knowledge, creativity and experience to the service of the full investigation of the case to be resolved. Ultimately, an arbitrator's own qualities are their best asset and, usually, the very reason they have been entrusted with the mandate in the first place. Of course, playing an active role in the arbitration process may prove to be a little riskier, but is it not worth it?

REPORTS

CEPANI40-FIELDFISHER SEMINAR: "ARBITRATION IN POST M&A DISPUTES"

10 MARCH 2022

Sophie Bourgois
Counsel
Stibbe, Brussels

Le 10 mars dernier, Fieldfisher s'est associé au CEPANI40 pour donner une conférence sur l'arbitrage dans le cadre des litiges post-M&A. Cet événement, modéré par **Maxime Berlingin** (Fieldfisher, Belgique), a réuni plus de 90 personnes et a offert un aperçu de plusieurs particularités de ce type de litiges.

Tout d'abord, **Marily Paralika** (Fieldfisher, France) a exposé les difficultés procédurales qui peuvent se poser notamment en raison du caractère multipartite des litiges post-M&A. En effet, il est courant que ces litiges impliquent non seulement l'acheteur et le vendeur, mais également la société-cible et d'autres tiers. A cet égard, les conditions auxquelles le règlement du CEPANI permet les demandes d'intervention et la jonction de plusieurs arbitrages ont été examinées. Marily Paralika a également abordé la question de la bifurcation et de la date de commencement de l'arbitrage. L'attention des praticiens a été attirée sur le fait que, selon l'article 3(3) du règlement CEPANI, l'arbitrage commence uniquement lorsque les frais d'enregistrement ont été payés. Cela peut avoir une importance pour le respect des délais prévus au contrat de cession d'actions.

Alexandra Underwood (Fieldfisher, UK) a ensuite fait une présentation de l'assurance représentations et garanties. Cette assurance a pour but de protéger une partie des pertes financières résultant de représentations et garanties inexactes. Après un aperçu des caractéristiques principales d'une telle assurance, son impact sur la conduite de la procédure arbitrale a été expliqué notamment par rapport à la notification des claims, l'obligation de déclaration du risque à l'assureur, la désignation du tribunal arbitral, etc. Alexandra Underwood a également souligné l'importance d'avoir des clauses d'arbitrage identiques dans le contrat de cession d'actions et la police d'assurance, afin de faciliter la jonction et l'intervention.

Enfin, la conférence s'est clôturée par un exposé de **Koen Van den Broeck** (Fieldfisher, Belgique) sur deux sujets fondamentaux ; l'évaluation du dommage et la production de documents. Sur le premier sujet, il a notamment été question de la définition du dommage, de la différence entre la valeur totale d'une entreprise et la valeur des actions et des méthodes de valorisation. Le deuxième sujet a mis en lumière les difficultés pour le vendeur d'obtenir des documents appartenant à la société-cible. A cet égard, Koen Van de Broeck a examiné la procédure prévue à l'article 1708 du Code judiciaire qui permet à une partie, avec l'accord du tribunal arbitral, de demander la production de documents au président du tribunal de première instance.

Le débat sur ces questions passionnantes s'est prolongé lors d'un cocktail, qui été l'occasion pour les participants d'enfin se retrouver en personne.

CEPANI-AFA-VIAC-NAI MORNING DEBATE: "DEFAULT IN ARBITRATION"

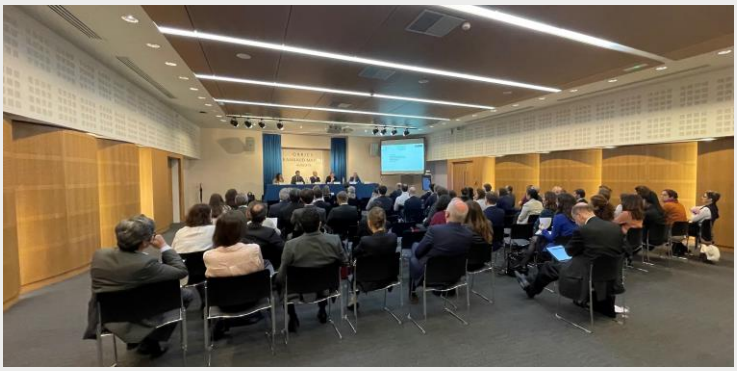
31 MARCH 2022

Emma Van Campenhoudt
Secretary General
CEPANI

EN

At the occasion of the eagerly awaited in-person return of the Paris Arbitration Week (28 March – 1 April), L'Association Française d'Arbitrage (AFA) and CEPANI, together with the Netherlands Arbitration Institute (NAI) and the Vienna International Arbitral Centre (VIAC), hosted a morning debate on default in arbitration at the Paris office of Orrick.

The speakers brilliantly met the challenge to grab the audience's attention despite an early start at 8:30 am, six hours after the end of the Young Arbitration Cruise the night before.



After a moving overview of the situation of arbitration in Ukraine by **Olena Perepelynska** (President, Ukrainian Arbitration Association), **Marc Henry** (President, AFA), introduced the speakers and topics of discussions, starting his welcoming words by the well-known quote of Lamartine, "*un seul être vous manque, et tout est dépeuplé*".

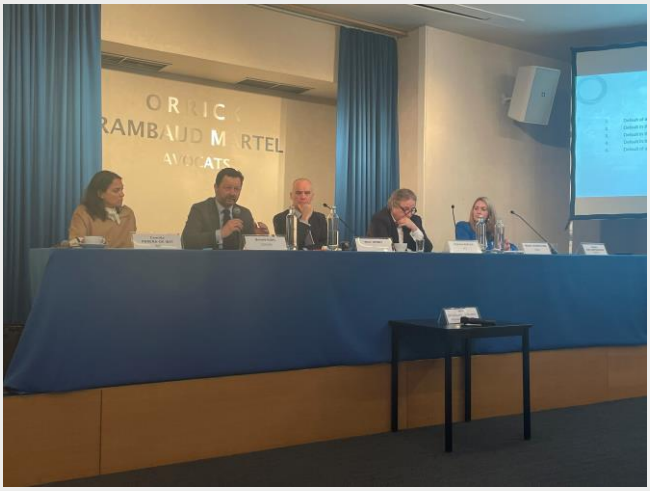
The speakers shared the arbitration institutions' applicable rules and practice, as well as topical case law and personal war stories, on five key themes. **Charles Kaplan** (President, AFA Arbitration Committee and Partner at Orrick) introduced the discussion on default of a party in general, before examining in more detail the default of a party in the payment of advances on costs. **Benoît Kohl** (President, CEPANI) led the debate on the default of a party in the constitution of the arbitral Tribunal, followed by **Niamh Leinwather** (Secretary General, VIAC) on default in the proceedings and **Camilla Perera-de Wit** (Secretary General, NAI) on the default of arbitrators.

Benoît Kohl concluded the morning debate by stressing the close ties between the organising institutions. The participants then had the opportunity to continue the discussions over a proper Parisian breakfast, with croissants and café au lait.

NL

Ter gelegenheid van de langverwachte fysieke terugkeer van de Paris Arbitration Week (28 maart - 1 april), organiseerden L'Association Française d'Arbitrage (AFA) en CEPANI, samen met het Nederlands Arbitrage Instituut (NAI) en het Weens Internationaal Arbitraal Centrum (VIAC), een ochtenddebat over verstek bij arbitrage op het kantoor van Orrick in Parijs.

De sprekers slaagden er glansrijk in de aandacht van het publiek vast te houden, ondanks de vroege start om 8u30, zes uur na het einde van de Young Arbitration Cruise de avond voordien.



Na een aangrijpend overzicht van de situatie op vlak van arbitrage in Oekraïne door **Olena Perepelynska** (voorzitter, Oekraïense Arbitrage Vereniging), introduceerde **Marc Henry** (voorzitter, AFA) de sprekers en discussieonderwerpen. Hij begon zijn welkomstwoord met het bekende citaat van Lamartine: "*un seul être vous manque, et tout est dépeuplé*".

De sprekers deelden de toepasselijke regels en praktijken van de arbitrage-instellingen, evenals actuele rechtspraak en persoonlijke ervaringen, over vijf hoofdthema's. **Charles Kaplan** (voorzitter, AFA Arbitration Committee en partner bij Orrick) leidde de discussie in over verstek van een partij in het algemeen, alvorens nader in te gaan op verstek van een partij bij de betaling van voorschotten op de kosten. **Benoît Kohl** (voorzitter, CEPANI) leidde het debat over verstek van een partij bij de samenstelling van het scheidsgerecht, gevolgd door **Niamh Leinwather** (secretaris-generaal, VIAC) over verstek in procedures en Camilla Perera-de Wit (secretaris-generaal, NAI) over verstek van arbiters.

Benoît Kohl sloot het ochtenddebat af door de nauwe banden tussen de organiserende instellingen te benadrukken. De deelnemers kregen vervolgens de gelegenheid om de discussies voort te zetten onder het genot van een echt Parijs ontbijt, met croissants en café au lait.

ASA-CEPANI40-CFA40-ICC YAF-YCAP-ICDR Y&I: "CRYPTOCURRENCIES IN ARBITRATION: THE FUTURE IS NOW"

31 MARCH 2022

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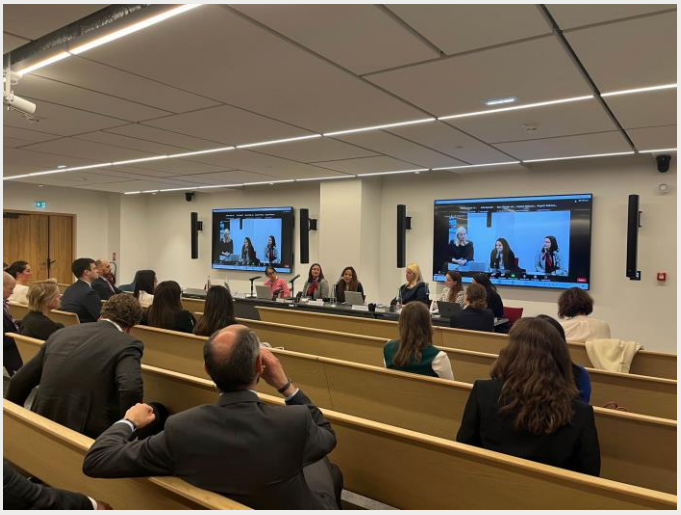
Joya Cherfan
Master student in Arbitration
Université Paris-Saclay

Lors du quatrième jour de la *Paris Arbitration Week* qui s'est déroulée du 28 mars au 1er avril, l'ASA, CEPANI40, CFA40, International Centre for Dispute Resolution (ICDR) Y&I, Young Canadian Arbitration Practitioners (YCAP) ont organisé une conférence dans les bureaux du cabinet August Debouzy sur le sujet suivant : « *Cryptocurrencies in arbitration : The Future is Now* ».

La conférence était animée par un panel entièrement féminin comprenant **Dora Grunwald-Kadar** (*Osborne Partners*), **Aija Lejniece** (independant practicioner) et **Ekaterina Oger Grivnova** (*Allen & Overy*) et modéré par **Anastasia Davis Bondarenko** (*Fortress Investment Group*) et **Vasuda Sinha** (*Freshfields*). Les oratrices ont abordé quatre sujets : une introduction aux crypto-monnaies, une présentation de leurs principaux usages et des litiges qui peuvent survenir en conséquence, la quantification du préjudice, ainsi que les méthodes d'exécution des sentences arbitrales rendues en matière de crypto-actifs.



La conférence a été ouverte par une brève introduction et définition des crypto-monnaies, de la *blockchain*, des monnaies et de leurs dérivés (en ce compris les dérivés de dérivés – « *tokens* »). Les crypto-monnaies sont essentiellement utilisées pour le commerce, et leur principale caractéristique est la volatilité de leur prix. En outre, les NFT (« *Non-Fungible Tokens* ») ont été définis par les oratrices comme des identifiants numériques uniques que l'on peut trouver sur la *blockchain* et qui ne peuvent pas être échangés contre autre chose. Les « *smart contracts* » ont, pour leur part, été décrits comme des contrats codés qui s'exécutent automatiquement. Quant au Métavers (ou « *Metaverse* »), qui est rapidement devenu le centre d'attention de la *Paris Arbitration Week* cette année, celui-ci a été défini comme un monde numérique parallèle qui pourrait se révéler d'une grande utilité pour les praticiens de l'arbitrage à l'avenir. À titre d'exemple, le panel a évoqué la possibilité que les audiences arbitrales, en ce compris l'audition des témoins et des experts, puissent se tenir dans le Métavers.

En ce qui concerne les crypto-arbitrages, les panélistes ont évoqué quatre litiges possibles liés aux crypto-monnaies, à savoir : les arbitrages relatifs aux « *smart contracts* » (déclarations frauduleuses, erreurs de codage, illégalité, (in)capacité à les conclure), les arbitrages relatifs aux consommateurs (AAA, Jams, ICC, HKIAC, CPR et ad hoc), les arbitrages commerciaux (contrats commerciaux entre crypto-acteurs, crypto-monnaies ou actifs liés aux crypto-monnaies en tant qu'objets d'un contrat, crypto-monnaies en tant que paiement) et les arbitrages relatifs aux traités d'investissement. Les questions de quantification des préjudices liés aux crypto-actifs ont également été discutées, notamment les pertes découlant de la fermeture d'une plateforme en ligne et les pertes occasionnées par le comportement défectueux des « tokens », ces questions étant source de nombreuses difficultés pour les experts chargés d'évaluer les préjudices à indemniser (recours à la théorie de la perte d'une chance, valorisation des crypto-actifs, etc).

Le dernier point qui a été abordé par les intervenantes concernait les méthodes d'exécution de sentences arbitrales rendues à la suite d'un crypto-arbitrage. En principe, il ne semblerait exister aucune restriction à la mise à exécution d'une telle sentence, sauf si l'ordre public de l'État requis l'interdit. Afin de faire exécuter une sentence rendue en crypto-monnaie, plusieurs facteurs doivent être pris en considération lors du choix du siège de l'arbitrage, notamment en ce qui concerne le statut de la crypto-monnaie dans le droit national en question (en tant bien), les pouvoirs du juge de l'exécution et les recours ouverts aux parties : ordonnances de gel et injonctions patrimoniales, ordonnances de divulgation.

NEWS

» **CEPANI 40 – CALL FOR APPLICATIONS**

The CEPANI40 Co-Chairs, Sophie Goldman and Sigrid Van Rompaey, will step down from their mandates on the 1st of September 2022.

In order to carefully select their successors, they invite all interested candidates to apply for the position by sending a motivation letter and an up-to-date *curriculum vitae* to info@cepani.be by the **April 30, 2022, at the latest**.

The candidates must be under the age of 40 for a mandate of minimum 3 years and be:
- a member of CEPANI40;
- highly motivated and interested in promoting the work of CEPANI and CEPANI40;
- active in the field of arbitration;
- dynamic, committed, and motivated;
- Fluent in English (in addition to French/Dutch);
- based in Belgium;
- available to serve for a term of (minimum) three years.

The position is open to all arbitration and ADR practitioners: lawyers, in house counsel, professor, PHD students, etc.

Extra consideration will be given to the current involvement of the candidates in CEPANI40 activities.

Candidates are also invited to express their interest in joining the steering committee of CEPANI40; the composition of which will be decided by the new co-chairs.

As it has been the case in the past, the new CEPANI40 co-chairs will be selected by the current ones, with the prior approval of the CEPANI President and the CEPANI Secretary General.

The official announcement of the new CEPANI40 co-chairs will be made at the General Assembly, taking place on June 2nd, 2022, and they will start their mandate on the 1st of September 2022.

We invite you to pin down the next CEPANI40 Summer Drink in your agenda! It will be taking place on the 30th of August 2022 and will mark the official handover from the current co-chairs Sophie and Sigrid to the new ones.

We are looking forward to receiving your application!

Responsible Publisher: *B Kohl*

NEWS FROM OUR PARTNERS

» **WOLTERS KLUWER**

Webinar panel session
'Tensions, Turning Points, and Tactics: Making Choices about the Evidence in International Arbitrations'

Please join us for a webinar hosted by Wolters Kluwer, 'Tensions, Turning Points, and Tactics: Making Choices about the Evidence in International Arbitrations'

As any lawyer knows, most cases are won and lost on the facts–but not all the facts, just those that become part of the record. Our expert panelists will examine this facet as it plays out in international arbitrations. They will explore areas of tensions between different legal traditions, identify the key turning points in the evidence-gathering process, and provide actionable guidance on matters such as controlling the scope of document production, when to employ expert witnesses, and how to address evidentiary matters in the terms of reference or first procedural conference.

Date: Thursday 7 April 2022
Time: 6.00 pm CET
Register now at: https://know.wolterskluwerlr.com/LP=2866

Co-Moderators:

Joshua Karton
Associate Professor and Associate Dean at Queen's University, Canada and General Editor, Practical Insights - Kluwer Arbitration Practice Plus

Kiran Nasir Gore
Professorial Lecturer in Law, The George Washington University Law School, USA and General Editor, Practical Insights - Kluwer Arbitration Practice Plus

Expert Panelists:

Milena Szuniewicz-Wenzel
Partner International Arbitration Group at Clyde & Co LLP, United Kingdom

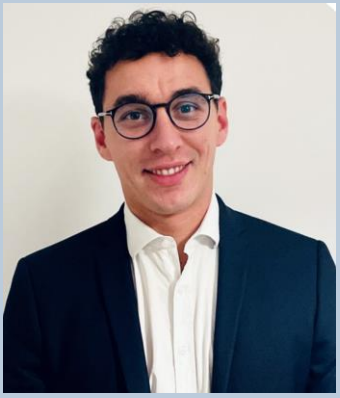
Kabir Duggal
Lecturer-in-Law, Columbia Law School; Senior International Arbitration Advisor, Arnold & Porter, USA and Contributor, Practical Insights - Kluwer Arbitration Practice Plus

Gustavo Scheffer da Silveira
Partner at Tauil & Chequer Advogados, Associado a Mayer Brown, Brazil and Contributor, Practical Insights - Kluwer Arbitration Practice Plus

» **ACOLAD**

As partner of CEPANI, Acolad. will be delighted to assist you with all your legal translations, incl. with exotic languages.

Acolad's Brussels team is happy to announce that it has recently been joined by Mr. Alexandre Boule, who will be the new dedicated contact for our lawyer clients in Brussels.



Alexandre joined the team at the beginning of February. He is already putting all his energy into serving our clients. Dedicated to his work, he will accompany you in all your translation and interpretation projects.

Alexandre can be reached at aboule@acolad.com

Please do not hesitate to contact Acolad. with any questions or requests at brussels@hltrad.com

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