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

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17 May 2022	**CJBB: Midis de formation "Pensez à l'arbitrage", with O. Caprasse and M. Berlingin**
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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 9 – DO NOT LET A NON-RESPONDING PARTY SPOIL YOUR ARBITRATION!

Marijn De Ruysscher
Counsel,
Lydian (Brussels)

You finally have that long-awaited arbitrator appointment. You note that the respondent does not (yet) have a lawyer, but at least you have an e-mail address so you can easily contact them. You send your initial e-mail to the parties, inviting them for a short case management conference and asking them to provide their input for the draft terms of reference. Of course, as you have seen so many times before as counsel, you provide a short deadline to make sure that your arbitration gets off to a good start. You will make sure that your arbitration is a speedy one and improves the statistics!

When the deadline is finally there, Claimant's counsel is asking for some additional days, as it seems you were a bit optimistic with the tight deadline. Finally, you get the required input from Claimant's side. From the Respondent's side, however, you receive no reply at all. You still are so optimistic to assume it is a mistake, so you send Respondent a reminder, giving them another day or two to get back to you. Again, no reply. The same goes for another reminder. What to do next? Should you send Respondent a registered letter inviting them to a case management conference? Should you continue sending e-mails although there is no reaction? And why is Claimant's counsel not really helpful and sending you a suggestion what to do, assuming you as arbitrator will solve this situation?

This hypothetical scenario shows that being an arbitrator yourself may be very different to what you are used to when being counsel in an arbitration. You may be used to arbitrations where both parties are represented by professional lawyers, fighting on the subject matter of the case, but cooperating in a professional way on the procedural points of the case.

The most likely situation where a party does not cooperate is where a Respondent, for whatever reason, refuses to respond. It may be an intentional strategy, it may be for financial reasons, but it may also be a lack of understanding of the legal consequences of an arbitration. You are in the end 'only' a lawyer and not a court so how binding can it be if they get an e-mail from you?

However, it is not to be excluded that as arbitrator you also get limited input and support from Claimant's side. This will likely be caused by limited arbitration experience by Claimant's lawyer who may expect the Arbitral Tribunal 'to do the necessary' once the claim is filed, perhaps not always realizing that arbitration is typically tailored to the choices and preferences of the parties and not of the Arbitral Tribunal.

We will focus here on the situation of a non-responding or non-cooperative Respondent. The most difficult and tricky situation is when a party is not responding at all to any communication. When a party is fully ignoring any communication you send, they may later in annulment proceedings try to deny that they were aware of the arbitration and that they were not able to exercise their rights of defense (article 1717, § 3a, ii Judicial Code).

If a party is merely non-cooperative during the arbitration, things could be easier. The situation could for example be that a Respondent is willing to sign the Terms of Reference, or has engaged a lawyer, but is merely not providing (sufficient) input afterwards, not filing submissions or not attending a hearing, for whatever reason. In that case, Respondent cannot just claim it was not aware of the arbitration.

Luckily the applicable arbitration rules typically provide for solutions for an Arbitral Tribunal to advance the arbitration. If the CEPANI Arbitration Rules are applicable, article 8.4 determines that communications can be validly made to the last address of the addressee. If the non-responding party is a Belgian company, you could also do your own check in the Cross-Roads Bank of Enterprises in order to check the actual seat of the company.

Article 23.4 foresees the situation where a party does not sign the Terms of Reference. In case of a non-responding party, it will be the other party that will have to advance the arbitration costs in full, otherwise the arbitration cannot start. In case of an ad hoc arbitration where you may have agreed on another way of remuneration (for example an hourly rate), you should make sure that the party cooperating is sufficiently provisioning your work.

In general, it is important as arbitrator to remain professional and make sure you keep offering the non-responding or non-cooperative party the possibility to participate in the arbitration, even though you may know after a while there will be no response. It is also important to carefully consider how you should send communications to this party and to keep a record of such communications in your file. Finally, also make sure that you set out all these facts in the arbitral award itself, so that it becomes clear for a court when reviewing the award in the framework of potential annulment proceedings that you as an arbitrator took all reasonable measures to make sure this party could participate in the arbitration and could exercise its rights of defense, but that it was actually the proper choice of this party not to do so. You should indeed anticipate throughout the handling of such case that at any time in the future, there could be annulment proceedings being initiated that will review your work. For that reason, it is essential that you not only remain independent and impartial and respect all parties' rights of defense, but also that this clearly follows from the communication that is on record. And in the end, you should not let this non-cooperative or non-responsive party spoil your arbitrator appointment and enjoy the experience!

REPORTS

CEPANI-NAI JOINT COLLOQUIUM ON THE CEPANI AND NAI APPROACH TOWARDS TOPICAL TRENDS IN ARBI-TRATION, ROTTERDAM

22 APRIL 2022

Tetyana Makukha
Foreign Associate
NautaDutilh, Amsterdam

The CEPANI-NAI Colloquium took place in Rotterdam, in a newly opened Depot Boijmans Van Beuningen, the world's first publicly accessible art storage facility. Approximately a hundred participants gathered at the event to discuss practices of the major Belgian and Dutch arbitration institutions.

Mr. **Gerard Meijer**, president of NAI, opened the Colloquium announcing the focus of the event, namely topical developments in international arbitration and their reflection in the new CEPANI Arbitration Rules 2020 and the new NAI Arbitration Rules, expected to come into force on 1 July 2022. Gerard also mentioned that it was the last joint conference of CEPANI and NAI, as the Luxembourg arbitration community will join the following Benelux arbitration events.

The first panel of the Colloquium discussed the perspectives of both arbitration institutions. Ms. **Emma Van Campenhoudt**, Secretary General of CEPANI, and Ms. **Camilla Perera-de Wit**, Secretary General of NAI, presented the most significant revisions recently implemented in their arbitration rules regarding, inter alia, e-arbitration, confidentiality, data protection and expedited procedures. In particular, both rules now have clear and detailed provisions to enable users to have virtual hearings. The NAI is also currently developing an online digital platform. Ms. Van Campenhoudt and Ms. Perera-de Wit further provided useful statistics on the pending and new arbitrations, languages used and appointments made demonstrating that both institutions have seen a steady increase in the number of new cases over the last years.

The next speaker was Mr. **Rogier Schellaars**, partner at Van Doorne in Amsterdam, who presented the new NAI rules on expedited arbitral proceedings currently subject to discussion. NAI plays the role of "an intelligent follower" using best practices of other institutions on expedited procedures. Following empirical research, the drafters of the new rules set the threshold of two million EUR for the expedited proceedings rules to apply. The rules are expected to include an opt-out mechanism and are designed to operate on a stand-alone basis. Thus, they do not require the seat of arbitration to be in the Netherlands. A sole arbitrator will be appointed by default, and the tribunal should play a gatekeeper role, so that it can consult and decide if the case remains in the expedited proceedings or moves to normal proceedings. The award in principle should be rendered in five months after the case management conference. Mr. Schellaars has also stressed that for the proper application of the rules, it is important to develop the relevant guidance note or commentary.

After the lunch break, Mr. **Werner Eyskens**, partner at Allen & Overy in Brussels, and Mr. **Gerard Meijer**, president of NAI and partner at Linklaters in Amsterdam, discussed several topical issues, such as virtual hearings, early determinations, third party funding and tribunal secretaries. The speakers made presentations on the Belgian and Dutch perspectives, which were followed by live polls addressed to the audience. In particular, the speakers mentioned that the new CEPANI and NAI Rules provide for virtual or hybrid hearings and tribunals should have discretion in this respect. Early determinations, although not expressly provided for in the rules, could potentially be granted under other provisions ensuring efficient and timely proceedings, such as Articles 21(1),(3) and (4) of NAI Rules and Article 24(2) of CEPANI Rules. While third party funding issues become more topical in the region, the Dutch and Belgian markets remain small compared to some common law jurisdictions. Neither the NAI, nor the CEPANI Rules provide for the disclosure of third party funders. Finally, both speakers agreed that no delegation of the decision-making powers to the tribunal secretary could be allowed. However, Mr. Meijer mentioned that the rules of the Dutch institution, Arbitration Board for the Building Industry, provide for an advisory vote of the secretary.

The next panel consisting of Ms. **Bregje Korthals Altes-van Dijk**, partner at Ysquare in Amsterdam, and Ms. **Sophie Goldman**, partner at Tossens Goldman Gonne in Brussels, talked about diversity and inclusion in international arbitration. Ms. Altes-van Dijk presented a strong business case as to why there should be more inclusiveness in the field. This, for instance, results in the enlargement of the talent pool, fosters representativeness and legitimacy, contributes to better decision-making and out of the box thinking. Furthermore, the moral duty to foster diversity should be a driver in and of itself. Ms. Goldman provided a short background of the Pledge on Equal Representation in Arbitration. She referred to the concrete mechanisms that proved to be successful over the past 15 years, such as appointing a fair representation of women, ensuring that governing bodies, committees and conference panels have such fair representation, collecting gender statistics for appointments and others. It was reported, for example, that the average percentage of women appointments increased from below 5% in 2005 to above 20% in 2020. However, the speakers stressed that the arbitration community should do more to close the still existing gap in gender diversity and to work on other elements of diversity, such as race, age or background.

The final panel discussed how the arbitration community could make arbitrations greener. Ms. **Pauline Ernste**, senior associate at NautaDutilh in Amsterdam, presented on the current initiatives, such as the Green Pledge, and stressed that arbitration institutions should play an important role in making arbitrations more sustainable. Ms. Ernste made several specific proposals, such as adopting a model procedural order that would include green language, for example, ordering the parties to refrain from using hard copies or to offset emissions for flights. Mr. **Flip Petillion**, partner at PETILLION in Brussels, stressed that the CEPANI Rules and Belgian law allow conducting arbitrations digitally and even without a hearing, if parties so wish and agree "to be green and keep it on screen". Thus, party autonomy remains the cornerstone. Both rules however do not provide for the electronic signature of an award or an e-award, mainly due to the enforceability concerns.

At the end of the day, Mr. **Benoît Kohl**, president of CEPANI, thanked the speakers and organizers and closed the event stressing that the comparison of the arbitration institutions' practices as discussed during the Colloquium is extremely useful and helps to continue improve arbitration rules.

ARBITRATION & DIGITALISATION, A PERFECT MATCH

MISSION ECONOMIQUE DE LA BELGIQUE AU ROYAUME-UNI

9 MAI 2022

Guillaume Croisant
Managing Associate
Linklaters, Brussels

La mission économique de la Belgique au Royaume-Uni a été l'occasion pour le CEPANI d'organiser, avec Hub Brussels (l'Agence bruxelloise pour l'Accompagnement de l'Entreprise / *het Brussels Agentschap voor Bedrijfsondersteuning*), un événement visant à promouvoir l'arbitrage, en particulier sa flexibilité et son adaptabilité aux nouvelles technologies, auprès des décideurs économiques belges et britanniques.

Le séminaire a été introduit par Mme **Isabelle Grippa**, CEO de Hub Brussels, qui a mis en exergue les nombreux atouts de la capitale de l'Europe comme place d'arbitrage, bien connus des membres du CEPANI : caractère international, arbitres et conseils expérimentés et multilingues, infrastructures et services de qualité, localisation centrale,... Sans oublier la gastronomie !

Mme Grippa a ensuite laisse la parole à M. **Benoît Kohl**, Président du CEPANI, qui a introduit son prédécesseur et le "*key note speaker*" du séminaire, M. **Dirk De Meulemeester** (Associé, DMDB Law, Bruxelles).

Au cours d'une présentation pleine d'énergie et d'humour, M. De Meulemeester a remis en perspective avec brio la digitalisation croissante de nos sociétés en général, et de l'arbitrage en particulier, tout en dressant le panorama des principales avancées accomplies et des défis encore à relever.

M. De Meulemeester a ainsi lancé parfaitement le panel composé de Mme **Kathleen Paisley** (Associée, Ambos law, Bruxelles), M. **Alexander Uff** (*Barrister*, Quadrant Chambers, Londres) et Mme **Claire Morel de Westgaver** (Associée, Bryan Cave Leighton Paisner, Londres). Cette dernière a modéré avec adresse le retour d'expérience des trois panélistes, qui ont partagé avec les participants à la conférence leurs « *war stories* » et perspectives sur les évolutions technologiques de l'arbitrage, notamment à la suite de la crise causée par la pandémie.

L'événement a été conclu par M. **Pascal Smet**, Secrétaire d'Etat bruxellois pour le commerce extérieur. Il s'est fait l'écho aux propos de Mme Grippa, en soulignant les atouts de Bruxelles comme place d'arbitrage, et en affirmant la volonté de la Région de soutenir de manière ambitieuse les efforts du CEPANI à cet égard. Affaire à suivre…

Les participants au séminaire ont ensuite eu l'opportunité de se rendre à la réception organisée par la *City of London* à la *Guildhall* pour les participants à la mission économique. Ils ont notamment pu y entendre – tout en dégustant des spécialités belges bien connues – SAR la **Princesse Astrid**, figure de proue de la délégation belge, mentionner l'arbitrage dans son discours de remerciement !

NEWS

» **LEZING "SILENCE AND ARBITRATION" DOOR O. CAPRASSE NA DE ALGEMENE VERGADERING CEPANI, 2 JUNI 2022 – EXPOSÉ « SILENCE AND ARBITRATION » PAR O. CAPRASSE APRÈS L'ASSEMBLEE GENERALE DU CEPANI, LE 2 JUIN 2022**

De Algemene Vergadering zal om 17 uur worden gevolgd door een uiteenzetting van Olivier Caprasse, Professor aan de Universiteit van Luik (ULiège) en Brussel (ULB), Advocaat aan de balie van Brussel en lid van het ICC Hof, omtrent "Silence and Arbitration". De uiteenzetting zal in het Engels worden gehouden.

Wij twijfelen er niet aan dat u zeer talrijk zult aanwezig zijn op deze uiteenzetting. U kunt iedere persoon die geïnteresseerd is in arbitrage, ook niet-leden van CEPANI, hiervoor uitnodigen.

Deze uiteenzetting zal gevolgd worden door een question-time en een drink vanaf 18u00.

Om organisatorische redenen, verzoek ik u om Emma Van Campenhoudt (evc@cepani.be) vóór 25 mei 2022 te laten weten of u deze vergadering al dan niet zal bijwonen.

Met de meeste hoogachting,
Benoît Kohl
Voorzitter

* * *

L'assemblée générale sera suivie à 17.00 heures par un exposé d'Olivier Caprasse, Professeur aux Universités de Liège (ULiège) et de Bruxelles (ULB), Avocat au barreau de Bruxelles et membre de la Cour de la CCI, sur le thème « Silence and Arbitration». L'exposé se tiendra en Anglais.

Nous ne doutons pas que vous serez nombreux à vouloir assister à cet exposé. Vous pouvez également convier à l'exposé toute personne même non membre du CEPANI intéressée par l'arbitrage.

Cet exposé sera suivi d'un question-time et d'un drink à partir de 18.00 heures.

Pour des raisons d'organisation, je vous serais reconnaissant de bien vouloir informer Emma Van Campenhoudt (evc@cepani.be) avant le 25 mai 2022 si vous comptez assister à cette réunion.

Nous vous prions de croire, Chère Membre, Cher Membre, en nos sentiments très distingués.

Benoît Kohl
Président

» **EVOLUTIES EN ALTERNATIEVEN INZAKE GESCHILLENBESLECHTING (12 MEI 2022) / EVOLUTIONS ET ALTERNATIVES EN MATIÈRE DE RÈGLEMENT DES LITIGES (12 MAI 2022)**

Geen enkele onderneming zit te wachten op een conflict of geschil. Geschillen zijn duur, tijdrovend en leiden af van de corebusiness. In het beste geval worden geschillen dan ook vermeden of in een vroeg stadium ontmijnd.

Is dat niet mogelijk, dan moet het geschil worden beslecht. Daar bestaan verschillende alternatieven voor, elk met voor- en nadelen. Wie die voor- en nadelen goed doorgrondt, kan het meest geschikte instrument kiezen, ook preventief.

Tijdens de studienamiddag zoomen specialisten vanuit diverse invalshoeken in op diverse aspecten om geschillen te voorkomen, te beheersen en te beslechten. Geen theorie om de theorie, wel praktisch en pragmatisch. Met aandacht voor de psychologie van geschillen en geschillenbeslechting in een digitale wereld.

De studienamiddag richt zich tot iedereen die vroeg of laat met een bedrijfsgeschil in aanraking komt, zoals bedrijfsjuristen, advocaten, magistraten …

* * *

Aucune entreprise ne souhaite un conflit ou un litige. Les litiges sont coûteux, chronophages et ils détournent l'entreprise de son activité principale. Dans le meilleur des cas, les litiges sont donc évités ou désamorcés à un stade précoce.

Si cela n'est pas possible, le litige doit être tranché. Il existe plusieurs alternatives à cet effet, chacune ayant ses avantages et ses inconvénients. Une bonne compréhension de ces avantages et de ces inconvénients permet de choisir l'instrument le plus approprié, y compris à des fins préventives.

Au cours de cet après-midi d'étude, des spécialistes aborderont, sous différents angles, les différents aspects de la prévention, de la gestion et du règlement des litiges. Plutôt que théorique, leur approche sera pratique et pragmatique. Une attention particulière sera consacrée à la psychologie des litiges et au règlement des litiges dans un monde numérique.

Cet après-midi d'étude s'adresse à toute personne susceptible d'être concernée un jour ou l'autre par un litige d'entreprise, tels que les juristes d'entreprise, les avocats, les magistrats, etc.

In samenwerking met / En coopération avec:

IBJ IJE INSTITUUT VOOR BEDRIJFSJURISTEN INSTITUT DES JURISTES D'ENTREPRISE

EPANI The Belgian Centre for Arbitration and Mediation / Le Centre Belge d'Arbitrage et de Médiation / Het Belgisch Centrum voor Arbitrage en Mediatie / Das Belgische Zentrum für Schiedsgerichtsbarkeit und Mediation

Confederatie Bouw Bouw, energie & milieu

.AGO

VBO FEB Verbond van Belgische Ondernemingen Fédération des Entreprises de Belgique

Responsible publisher: B. Kohl

SAVE THE DATE!

» **CO-CHAIRS' CIRCLE GLOBAL CONFERENCE ORGANISED BY CEPANI40 IN BRUSSELS (LEGITIMACY IN AND OF ARBITRATION)**

CEPANI40 is very pleased to host the next Co-Chairs' Circle (CCC) Conference in Brussels on 2nd, 3rd and 4th June 2022!

The CCC Conference is organized as a joint effort by 40 groups of young #arbitration associations from around the world and aims to bring the future generation of arbitration practitioners together.

This event is an amazing opportunity to meet international colleagues!

2 June: Walking Dinner on the rooftop terrasse of Freshfields Bruckhaus Deringer
3 June: all-day Conference on "Legitimacy in and of Arbitration" followed by a dinner and a party
4 June: brunch and social events

Full programme and all practical information (including registration) are available on our website: **www.cccbrussels2022.com**

» **CEPANI – LUNCH-DEBATE 15 JUNE 2022 "THE CHANGE OF CIRCUMSTANCES IN THE NEW BELGIAN CIVIL CODE", WITH RAFAËL JAFFERALI**

» **CEPANI40: Summer Drink**

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 to the new ones.

SAVE THE DATE!

» **8 JUIN 2022 : DÎNER DÉBAT DE L'ASSOCATION FRANÇAISE D'ARBITRAGE "L'INCIDENCE DES OBLIGATIONS DÉONTOLOGIQUES SUR LES PROCÉDURES D'ARBITRAGE INTERNATIONAL"**

Discussion animée par Julie BEDARD et Mathias AUDIT

Les procédures d'arbitrage international, commercial comme d'investissement, impliquent des conseils et des arbitres relevant très fréquemment de juridictions différentes. C'est l'une des grandes richesses de cette matière et de sa pratique, mais c'est aussi une source potentielle de conflits de normes peu explorés jusqu'ici. Il s'agit des règles déontologiques auxquelles les intervenants sont soumis. Celles-ci peuvent prévoir des principes différents en matière de devoir de loyauté, de préparation des témoins ou d'échange ex parte avec le tribunal par exemple. Ces différences pourraient même aller jusqu'à créer une inégalité des armes entre les parties, ou d'autres difficultés dans la conduite de la procédure. Ce sont ces questions que le panel entend présenter et analyser lors du dîner-débat de l'AFA.

Pour plus d'informations, cliquez-ici

Responsible publisher: B. Kohl

NEWS FROM OUR PARTNERS

» **WOLTERS KLUWER**

Kluwer Arbitration User Forum – watch the replay
On Tuesday 26 April the first Kluwer Arbitration's inaugural User Forum took place. We walked users through Kluwer Arbitration's newest features, highlighted important content and provided a sneak preview of what is coming soon.

Not been able to participate in the live session on the 26th of April? Simply register your details and you will receive a link to watch the replay.

Watch the replay now (link to https://know.wolterskluwerlr.com/LP=2874)

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