CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

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Editors in chief: Maxime Berlingin, Maarten Draye, Sophie Goldman and Sigrid Van Rompaey

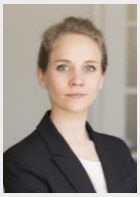
AGENDA

8 JUNE 2017	(15:00 – 16:00)	Conseil d'administration / Raad van bestuur / Board of directors
8 JUNE 2017	(16:00 – 17:00)	Assemblée Générale / Algemene Vergadering / General Assembly
8 JUNE 2017	(17:00 – 18:00)	Uiteenzetting/Exposé Julien Fouret "Le Bon, La Brute et le Truand ou trois des évolutions marquantes en matière d'arbitrage durant l'année écoulée"
13 JUNE 2017	(14:30 – 18:30)	Interactive knowledge sharing session at the ICC International Court of Arbitration®
15 JUNE 2017	(16:00 – 18:00)	Joint KCAB – CEPANI Seminar on Arbitration in Corporate Matters (Seoul)
5 OCTOBER 2017	(12:30 – 18:30)	Joint CEPANI – NAI Colloquium on Tribunal Secretaries

REPORTS

» REPORT ON THE CFA 40/CEPANI 40 JOINT COLLOQUIUM "AU SECOURS, UN ETAT DANS MON ARBITRAGE!" (11 MAY 2017)
» REPORT ON ICC BELGIUM'S ANNUAL GENERAL MEETING (22 MAY 2017)

REPORT ON CFA 40/CEPANI 40 JOINT COLLOQUIUM – "AU SECOURS, UN ETAT DANS MON ARBITRAGE!" (11 MAY 2017)



Céline Lachmann
Independent arbitration practitioner, Associate to Professor Pierre Mayer, Paris

Emmanuelle Debouverie
Associate – Hirsch & Vanhaelst, Brussels

On 11 May 2017, CEPANI 40 and CFA 40 organised a conference in Brussels on the specificities of international commercial arbitration involving State / State entities.

Five distinguished speakers addressed the specificities of international commercial arbitration involving States from different perspectives.

Keynote speaker Eduardo Silva Romero explained the sensitivity of the topic due to its connection with political issues. Indeed, disputes involving States often involve issues of public/general interest (strategic construction projects, energy, natural resources…). Mr Silva Romero brushed the historical evolution of philosophies and legal principles relevant to the topic. He identified a first movement, qualified as "mercatorist", during which principles were developed to enable States to participate in international commercial arbitrations, through the notion that States should be considered "normal" actors of international commerce. Legal concepts were developed to ensure the jurisdiction of arbitral tribunals over States (for example, subjective

arbitrability) and enhance the effectiveness of arbitral awards (for example, the acceptance of implicit waiver of State immunities).

With the increased participation of States in international commercial arbitrations and the parallel rise of investor-state arbitrations, new issues and preoccupations have emerged, precipitating the end of the "mercatorist" era in favour of a more "publicist" era.

Certain high profile cases have caught public attention, leading certain players to question the suitability of arbitration as a forum for claims involving States owing to the primacy of public/general interest aspects, notwithstanding the commercial aspects. The new trend is to reaffirm the differences between private actors of international commerce and States, justifying the application of different legal regimes and the jurisdiction of different fora for dispute resolution processes. As examples, he cited the tightening of rules concerning immunities from execution. Mr Silva Romero concluded his remarks by suggesting that a new era was in the making, placing transparency as a central consideration.

Public law expert David Renders noted that arbitration lawyers and public law practitioners rarely have the opportunity to meet and exchange ideas, as though they lived in different worlds, governed by completely different notions and concepts. He however ventured that it was possible to bridge the gap and enable domestic disputes involving States to be resolved by arbitration, despite the apparent obstacles in the law.

Mathias Audit's presentation focused on disputes concerning public tenders. These disputes arise normally when a party has submitted an unsuccessful bid in a tender and challenges the outcome of the tender process. In such cases, no contract has been formed and procedural issues can be complex. In certain cases, where an investment treaty exists, the unsuccessful bidder may seek to establish arbitral jurisdiction on the basis of the treaty. However, investment treaties normally require the showing that the bidder's bid qualifies as an "investment", which is not straight-forward, as illustrated by the *Mihaly International Corp. c. Sri Lanka* ICSID case, where the Tribunal declined jurisdiction over such a dispute. Mr Audit went on to discuss the possibility for such disputes to be resolved by way of international commercial arbitration, provided that the tender rules contain an arbitration clause. He cited one example and elaborated on the complexities that arise in respect of the applicable law(s) to such disputes (contract law, personal law, *lois de police*…). Finally, he discussed the recent Paris Court of Appeal case of *République du Kirghizistan contre Valeriy Belokon*, RG n° 15/01650 of 21 February 2017, in which the Paris Court accepted a challenge to an arbitral award rendered in a dispute concerning a tender process. In the context of its control over the award's compliance with international public policy, the Paris Court surprisingly engaged in a review of the conditions in which a tender was organized and concluded that it was illegal. On the basis of its own factual findings, the Paris court set aside the arbitral award.

Next, Sophie Lemaire guided the audience through the particularities of recourses against arbitral awards involving public entities in France. She explained that the extreme complexity of the current system stemmed from France's traditional dichotomy between administrative courts, on the one hand, and civil and commercial (*judiciaire*) courts, on the other. Should requests for the annulment and the recognition of international arbitral awards involving public entities be submitted to administrative or civil and commercial courts? The *Tribunal des Conflits* held in three recent decisions (*Inserm* in 2010 and *Fosmax* in 2016 on annulment, and *Ryanair* in 2017 on recognition) that the two court systems had concurring jurisdiction and that the allocation of cases depended on the object of the contract at stake. Sophie Lemaire explained that these jurisdictional issues are not without consequences on the outcome of cases as the level of scrutiny applied by each court system appears to vary greatly. In its 2016 decision in *Fosmax*, the *Conseil d'Etat* made clear that its review of arbitral awards would be stricter than its civil and commercial counterpart's – not only will it consider more grounds to annul or deny recognition of awards, it will also review them with the prism of French public policy and not of its toned-down international version.

Finally, Hakim Boularbah addressed the difficulties of seeking to enforce an arbitral award against a public entity in France or Belgium. The two countries' legislations recently aligned on several grounds. On the issue of foreign states' immunity from enforcement, the Belgian *Cour Constitutionelle* annulled on April 27, 2017 the legal requirement that a waiver be not only "express" but also "specific" on the ground that neither the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property nor customary international law imposed it. Similarly, in France, the new *Sapin II* legislation codified the 2015 *Cour de Cassation* decision in *Commisimpex* rejecting the specificity requirement. Belgium and France's enforcement procedures also aligned with respect to the necessity to obtain a preliminary court order before foreign states' assets be attached.

The conference was introduced by Vanessa Foncke and Benoît Kohl from CEPANI 40. The afternoon ended with questions from the audience to the panelists, concluding remarks by Clément Fouchard and Damien Devot from CFA 40, and a cocktail where participants and speakers had the chance to mingle and continue discussions.

REPORT ON THE ICC ANNUAL GENERAL MEETING (22 MAY 2017)

Jan Janssen
Associate – Crowell & Moring, Brussels

This year's Annual General Meeting of ICC Belgium again took place at the occasion of the European Business Summit (EBS), which ICC Belgium helped to organize. A running theme during the EBS was how European businesses can respond to current challenges to open trade. ICC Belgium shares this message.

For almost 100 years, ICC has been a beacon for the global economy, creating opportunities for international trade to prosper in a responsible and peaceful manner. Last year was no different. The Brussels terror attacks and the current rise in protectionist and economic nationalist movements ask for an even greater commitment of ICC Belgium in supporting the global market and the investment climate in Belgium. ICC Belgium has lived up to this task throughout its activities. For example, ICC Belgium was one of the foreign chambers of commerce actively taking part in the #Yes2Belgium campaign initiated by Amcham Belgium and re-affirming Belgium as an ideal place to live and work.

ICC also continues to be the go-to institution for complex and high-value disputes. Preliminary statistics reveal a record number of 966 new arbitration cases were filed with the International Court of Arbitration in 2016 involving 3,099 parties from 137 countries and territories. There is a 15% rise in cases involving parties from Latin America and a 22% rise in parties from South and East Asia. ICC Belgium and its members continue promoting Belgium as

an attractive jurisdiction for international arbitration, spurred by its central location, modern arbitration laws and top rank practitioners.

The year ahead promises to be a busy one, with ICC Belgium playing a pivotal role in supporting the global economy by building a climate of trust and opportunity for international business.

ICC Belgium's annual report 2016 can be downloaded here.

NEWS

» **CEPANI PRESENTS ITS 2016 STATISTICAL REPORT**

In keeping with a long standing yearly tradition, CEPANI published its yearly statistical report for 2016. This report provides a statistical overview of CEPANI arbitration in 2016 and highlights the evolution in comparison with past years. Statistics featured in the report include *inter alia* the origin of the parties, language of the arbitration, constitution of arbitral tribunals, women in arbitration and average duration of CEPANI arbitration proceedings.

The full report can be consulted here.

» **CEPANI TO SIGN COOPERATION AGREEMENT WITH THE KOREAN COMMERCIAL ABITRATION BOARD**

On 14 June 2017, during a signing ceremony in Seoul, CEPANI Vice-President Mr. Dirk Van Gerven and Mr. Sung Bae Ji of the Korean Commercial Arbitration Board (KCAB) will be signing a cooperation agreement. Through this agreement, CEPANI and KCAB will confirm to become more closely involved, which will enable a close collaboration between both organizations. Both institutions are convinced that the use of commercial arbitration, mediation and other forms of alternative dispute resolution through fair and expeditious procedures lends confidence and stability to international trade. The cooperating institutions have therefore pledged to cooperate in the advancement of arbitration, mediation and other forms of alternative dispute resolution as a means of settling disputes arising out of international commercial transactions.

To mark the occasion, a joint KCAB-CEPANI Seminar on Arbitration in Corporate Matters will be held in Seoul on 15 June 2017. More details will follow.

» **ICCA 2018 SYDNEY PRESENTS THE PRELIMINARY PROGRAMME FOR THE 24TH ICCA CONGRESS TO BE HELD IN SYDNEY, AUSTRALIA FROM 15 – 18 APRIL 2018. THE THEME FOR THE 24TH CONGRESS IS "EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION**

The theme for the 2018 Congress has been chosen to highlight arbitration as a "living" organism which has proven adaptable in the past to new substantive and practical challenges, and that today – under attack from various quarters – will need to demonstrate its adaptability again. Under this theme, a range of programs will be developed to address the evolving needs of users (both commercial and investor-State), the impact of the rapidly changing face of technology on the practice of arbitration, the expectations of the public, and the convergence or divergence of legal traditions and cultures.

For more information, click here

VARIA

» 27 June 2017: 3rd ICC Asia Conference on International Arbitration (Singapore)

» On 22 June 2017, CEPANI President Dirk De Meulemeester will participate in a "Deep Dive Seminar" on arbitration, organized by the Instituut voor Bedrijfsjuristen/Institut des Juristes d'Entreprise. For more information on the event, which is open to IBJ/IJE members only, please see here.

» 30 June 2017: ICC YAF Event on Cost Allocation – Selected Issues (Zürich, Switzerland)

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