CEPANI NEWSLETTER 63

BELGIAN CENTRE FOR ARBITRATION AND MEDIATION • NPO

RESPONSIBLE EDITOR : MICHEL FLAMÉE

MARCH 2012

Agenda

23 March 2012

CEPANI40 Lunch Debate with Mrs. Vera Van Houtte on the following topic "Arbitrage in de bouwsector"

(the presentation will be held in Dutch)

3 May 2012

CEPANI40 Lunch Debate with Mr. Eric De Brabandere on the following topic "The Public-Private Divide in Investment Treaty Arbitration and the Role of the Arbitrator"

(the presentation will be held in English)

For more information on our upcoming activities, please consult **www.cepani.be**.

The CEPANI Newsletter always appreciates receiving interesting case law and legal doctrine concerning arbitration and alternative dispute resolution. Any relevant articles, awards, events and other announcements can be sent to newsletter@cepina-cepani.be. CEPANI may publish and/or edit contributions at its discretion.

News

Articles

Legislation, Doctrine & Jurisprudence

Varia

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ARBITRAGE

I. Arbitrages ingeleid in 2011

BETROKKEN SECTOREN

Voorwerp van het verzoek tot arbitrage in dalende volgorde:

- Overeenkomst tot dienstverlening/samenwerking: **41%**
- Vennootschapsrecht (aandelenoverdracht): **33%**
- Bouwrecht: **15%**
- Andere (handelsrecht, sociaal recht, banken en financiën, handelsdistributie, vervoersrecht): **11%**

TAAL VAN DE ARBITRAGE

De meeste arbitrages worden gevoerd in

het Nederlands **58%**

het Frans **28%**

gevolgd door het Engels **14%**

NATIONALITEIT VAN PARTIJEN

Nationaal/Internationaal

66,5% van de arbitrages heeft een nationaal karakter (*i.e.*, wordt uitsluitend tussen Belgische partijen gevoerd);

33,5% van de arbitrages wordt tussen internationale partijen gevoerd (*i.e.*, minstens één van de partijen is niet Belgisch);

Internationale partijen

Bij internationale arbitrage zijn de partijen hoofdzakelijk afkomstig uit **Luxemburg Frankrijk**, **Nederland** en **Zwitserland.**

ZETEL VAN DE ARITRAGE

De meerderheid van de arbitrages heeft haar zetel te Brussel **85%**

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WAARDE VAN HET GESCHIL

0 – 12.500 EUR:	**19,5%**
12.501 – 125.000 EUR:	**24%**
125.001 – 1.250.000 EUR:	**43,5%**
1.250.001 – 12.500.000 EUR:	**8,5%**
> 12.500.001 EUR:	**4,5%**

SAMENSTELLING VAN HET SCHEIDSGERECHT

Alleenzetelende arbiter :	**58%**
Drieledig scheidsgerecht :	**42%**

II. Arbitrages afgesloten in 2011

TAAL VAN DE ARBITRAGE

De meeste arbitrages werden gevoerd in

het Nederlands	**45%**
het Frans	**30%**
gevolgd door het Engels	**25%**

NATIONALITEIT VAN PARTIJEN

Nationaal/Internationaal

60% van de arbitrages had een nationaal karakter (d.w.z. werd uitsluitend tussen Belgische partijen gevoerd);

40% van de arbitrages werd tussen internationale partijen gevoerd (d.w.z. dat minstens één van de partijen niet Belgisch was);

WAARDE VAN HET GESCHIL

0 – 12.500 EUR:	**7%**
12.501 – 125.000 EUR:	**15%**
125.001 – 1.250.000 EUR:	**52%**
1.250.001 – 12.500.000 EUR:	**26%**
> 12.500.001 EUR:	**0%**

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SAMENSTELLING VAN HET SCHEIDSGERECHT

Alleenzetelende arbiter : **58%**

Drieledig scheidsgerecht : **42%**

DUUR VAN DE ARBITRALE PROCEDURE

Vanaf de inleiding van de arbitrage tot de benoeming van het scheidsgerecht

De gemiddelde termijn tussen het indienen van een verzoek tot arbitrage en de benoeming van het scheidsgerecht bedraagt **3 maanden**, terwijl het CEPINA Arbitragereglement daarvoor slechts 1 maand voorziet.

Die vertraging is enkel en alleen te wijten aan het talmen van de partijen om de provisie voor arbitragekosten te betalen. Overeenkomstig het CEPINA Arbitragereglement gaat de Voorzitter of het CEPINA Benoemingscomité immers slechts over tot benoeming van het scheidsgerecht zodra de volledige provisie voor arbitragekosten werd betaald.

Vanaf de benoeming van het scheidsgerecht tot het opstellen van de akte van opdracht

De gemiddelde duur die het scheidsgerecht nodig heeft voor het opstellen van de akte van opdracht vanaf haar benoeming bedraagt **2 maanden en 22 dagen**. De door het CEPINA Reglement voorgeschreven termijn bedraagt 2 maanden.

Vanaf de akte van opdracht tot de arbitrale uitspraak

Het CEPINA Reglement kent het scheidsgerecht een termijn van 4 maanden toe na het ondertekenen van de akte van opdracht teneinde uitspraak te verlenen.

Gemiddeld deed een scheidsgerecht er in 2011 **7 maanden** over om de arbitrale uitspraak te verlenen.

Die verlenging van de procedure vloeit voort uit het feit dat het scheidsgerecht, in samenspraak met de partijen, een procedurekalender opstelt die de voorgeschreven termijn overschrijdt.

De gemiddelde duur tussen de benoeming van het scheidsgerecht en de arbitrale uitspraak bedroeg 9 maanden en 21 dagen.

De totale duur van de arbitrage vanaf de inleiding tot aan de arbitrale uitspraak beliep 13 maanden.

Vermeldenswaardig is tevens dat in 35% van de ingeleide zaken een minnelijke regeling werd bereikt of de procedure op verzoek van de partijen werd afgesloten.

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DOMEINNAMEN

TAAL VAN DE PROCEDURE

40% van de domeinnaamzaken werd in het Nederlands gevoerd

37% in het Engels

23% in het Frans

NATIONALITEIT VAN PARTIJEN

Nationaal/Internationaal

77% van de procedures heeft een gemengd karakter, d.w.z. dat minstens één van de partijen niet Belgisch is;

23% van de procedures heeft een nationaal karakter;

Internationale partijen

Wanneer internationale partijen bij geschillen over een ".be-domeinnaam" zijn betrokken, zijn **66,5%** van de klachten van Europese herkomst en **33,5%** van buiten de EU afkomstig.

DUUR VAN DE PROCEDURE

De procedure duurt gemiddeld **60 dagen**, terwijl het reglement **63 dagen** voorziet.

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Articles

Report on the 56th session of UNCITRAL Working Group II ("Arbitration and Conciliation"): continuing the discussion on the preparation of a legal standard on transparency in treaty-based investor-state arbitration (NY, 6-10 February 2012)

By Herman VERBIST, ***Lawyer at the Ghent and Brussels Bars (Everest attorneys)***
Visiting Professor at the University of Ghent

The 56th session of UNCITRAL Working Group II (Arbitration and Conciliation) was held in New York from 6 to 10 February 2012. It was CEPANI's seventh session as "observer". The members present at the meeting in Vienna represented 44 countries and among the observers (of which Belgium) there were 17 countries represented. Five intergovernmental organizations and 37 non-governmental organizations (of which CEPANI) were also represented. In total, approximately 200 persons attended this session although not everyone participated actively in the discussions.

This was the fourth session of UNCITRAL Working Group II committed to the preparation of a legal standard on transparency in treaty-based investor-State arbitration. As the previous sessions on this subject, it was chaired by Mr. Salim Moollan, an arbitration specialist from Mauritius, who is also a barrister in London.

At the 55th session in Vienna in October 2011, the Working Group had done a first reading of the draft rules on transparency in treaty-based investor-State arbitration that had been elaborated by the UNCITRAL Secretariat. Those draft Rules had been elaborated on the basis of discussions held at the Working Group's 53rd session of 4-8 October 2010 in Vienna and at the 54th session of 7-11 February 2011 in New York.

The Working Group session of October 2011 in Vienna had ended with a discussion on the question whether the rules on transparency should be implemented in the context of both existing and future treaties and whether an international convention should be prepared with a view to promoting the application of a legal standard on transparency to investment treaties. As no consensus had been reached on this issue

in October 2011 in Vienna, the question was further discussed during about the entire session of the Working Group in New York from 6 tot 10 February 2012.

At the three previous sessions of the Working Group on this topic, it already had become clear that the opinions of the various delegations on the form of the legal standard on transparency and the structure of the draft rules differed considerably. Some delegations had proposed that the legal standard on transparency take the form of guidelines. A number of delegations had requested that a set of rules on transparency be drafted, but whilst some delegations had asked that those rules would only become applicable where there was an express reference to them ("opt-in" solution), other delegations took the position that a reference to the generic UNCITRAL Arbitration Rules should imply automatic application of the new rules on transparency, unless the parties expressly agreed otherwise ("opt-out" solution). Moreover, the opinions among the delegations differed as to whether the rules on transparency were to be applied only in proceedings conducted under the UNCITRAL Arbitration Rules or also in arbitration proceedings conducted under other arbitration rules.

Having regard to those different positions, the UNCITRAL Secretariat had elaborated a few options and variants so as to assist the delegations in making their choice between the different possibilities (see Note by UNCITRAL Secretariat A/CN.9/WG.II/WP.169).

Given the complexity of the matter and the important policy implications of either an "opt-in" or an "opt-out" approach for the proposed draft transparency rules, no consensus could be reached during the discussion at the February 2012 session in New York. Although, in a spirit of compromise, the positions of many delegations had moved from their original position, it emerged from the discussion that the proposals of a choice to be made between an "opt-in" and an "opt-out" solution had contributed to a polarization of the debate and it was felt better to avoid such choice.

The majority of the delegations could not accept that the transparency rules would become applicable on investor-State treaties signed before the transparency rules are adopted. The UNCITRAL Secretariat has been asked to propose new formulations so as to provide that the transparency rules will only become applicable on future treaties. For existing investment treaties, the transparency rules would only apply where the parties have expressly consented thereto. However, the discussion has not yet been closed about the question whether the language of some of the existing treaties may provide a basis for a dynamic interpretation so that a reference to the UNCITRAL Arbitration Rules in already existing treaties might possibly give cause to consider that the transparency rules are made applicable. The discussion has neither been closed on whether

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the transparency rules in the future shall be considered as "stand alone" rules on which parties to a treaty need to consent expressly to or whether they can be considered to form an appendix to the arbitration rules so that a reference to the UNCITRAL Arbitration Rules would automatically imply the application of the transparency rules. The delegations have discussed the question whether consent needs to be given expressly or whether it can also be obtained tacitly. No consensus could be reached on this issue either. The majority expressed the view that in any event the new transparency rules should not contain rules of interpretation, as the matter of interpretation of a treaty is regulated by the Vienna Convention on the Law of Treaties of 1969.

In addition to the discussion on form and structure of the transparency rules, the Working Group also argued about the mandatory effect of the rules on transparency. The position emerged that the parties to the dispute, i.e. the private investor and the State, should not be allowed to derogate from the rules, but an adaptation of the rules by the arbitral tribunal should be possible in circumstances that would need to be further considered by the Working Group.

Moreover, it was held that when the transparency rules provide that the arbitral tribunal should exercise discretion in conducting the case, it should do so while taking into account a balance between (a) the public interest in transparency in treaty based investor-State arbitration and (b) the disputing parties' interest in a fair and efficient resolution of their dispute.

There was not sufficient time left for a second reading of the substance of the transparency provisions. However, the Working Group reached agreement that all disputing parties should have the obligation to send the notice of arbitration to the registry and that the registry should publish promptly the names of the disputing parties, as well as information regarding the economic sector and the treaty under which the claim arose. The majority view was that such information should only be made available, after the arbitral tribunal is constituted to allow the parties to pursue an amicable settlement before the information on the dispute is made public.

At the following Working Group session in October 2012 in Vienna the discussion will be continued on the matter of form and structure of the transparency rules. It is also expected that the second reading of the substance of the transparency provisions shall be continued.

For reports on the previous sessions of UNCITRAL Working Group II ("Arbitration and Conciliation"), please consult:

H. VERBIST, "Report of the 53rd session of UNCITRAL Working Group II ("Arbitration and Conciliation") in Vienna, 4-8 October 2010", CEPANI Newsletter No. 50, November 2010, p. 4-7;

H. VERBIST, "Report of the 54th session of UNCITRAL Working Group II ("Arbitration and Conciliation") in New York, 7-11 February 2011: Discussion on the legal standard for transparency in treaty-based investor-State arbitration", CEPANI Newsletter No. 54, April 2011, p. 4-10; and

H. VERBIST, "Report of the 55th session of UNCITRAL Working Group II ("Arbitration and Conciliation") in Vienna 3-7 October 2011: Preparation of a legal standard on transparency in treaty-based investor-state arbitration", CEPANI Newsletter No. 60, December 2011, p. 7-11.

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Summary of the judgment of the Brussels Court of First Instance of 2 February 2012

By Vanessa FONCKE, ***lawyer at Jones Day Brussels***

Vordering tot nietigverklaring van arbitrale uitspraken – Artikel 1697, al. 3 Ger.W. en de valtermijn van drie maanden na kennisgeving van de arbitrale uitspraak in artikel 1707, al. 1 Ger.W. – Arbitrale uitspraak geveld na de datum voor einduitspraak vastgesteld door de arbiter – Voorafgaande toetsing van de arbitrale uitspraak door het ICC Hof maakt geen schending van het recht op een eerlijk proces uit

Demande d'annulation des sentences arbitrales – Article 1697, par. 3 du Code judiciaire et le délai de forclusion de trois mois à partir de la notification de la sentence arbitrale dans l'article 1707, par. 1 du Code judiciaire – Sentence arbitrale rendue après la date fixée par le tribunal pour rendre la sentence finale – L'examen préalable de la sentence par la Cour CCI ne constitue pas une violation du droit à un procès équitable

Request for annulment of arbitral awards – Article 1697, par. 3 of the Belgian Judicial Code and the procedural deadline of three months upon notification of the arbitral award in Article 1707, par. 1 of the Judicial Code – Arbitral award rendered after the date set by the arbitrator for rendering a final award – Scrutiny of the award by the ICC Court does not amount to a violation of the right to a fair trial

The dispute pertains to an agreement for the management by defendant of a hotel to be constructed by plaintiff. Defendant contested the termination of that agreement by plaintiff and subsequently initiated an ICC arbitration. The sole arbitrator rendered the following three awards:

- Award 1 on 28 May 2008 (as notified to the parties on 3 June 2008) in which the arbitrator, amongst others, confirmed the validity of the arbitration agreement and his competence and ruled that defendant's representative disposed of a valid proxy for executing the management agreement on behalf of defendant;

- Award 2 on 8 June 2009 (as notified to the parties on 10 June 2009) whereby the arbitrator decided upon the applicability of German law and held plaintiff contractually liable for unlawfully terminating the management agreement;

- Award 3 on 1 February 2010 in which the arbitrator ruled on the damages, interests, arbitration costs and lawyers' fees further to the unlawful termination of the management agreement by plaintiff;

By writ of summons of 10 September 2009 plaintiff submitted a request for annulment of Awards 1 and 2 with the Brussels Court of First Instance. This was followed by the writ of summons of 30 April 2010 in which plaintiff requested the annulment of Award 3 and the joinder with the preceding request for annulment of Awards 1 and 2. Plaintiff invoked, based on Article 1704 of the Belgian Judicial Code

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("**BJC**"), various grounds of annulment vis-à-vis the three awards. The Court's most relevant legal considerations can be summarized as follows:

(i) Late filing of the request for annulment of Award 1 in view of the procedural deadline set forth in Article 1707, par. 1 BJC

The Court declared plaintiff's request for annulment of Award 1 inadmissible to the extent it was based on the grounds of annulment set forth in Article 1704, par. 2, c°-j° BJC given that Award 1 was notified to the parties on 3 June 2008 and plaintiff only introduced its request for annulment by writ of summons of 10 September 2009, *i.e.* not within the prescribed procedural deadline of three months upon notification of the award.

Plaintiff counterargued that Award 1 merely would have pertained to the arbitrator's competence and, therefore, pursuant to Article 1697, par. 3 BJC, only could be challenged together with the final award on the merits. The Court, however, established that Award 1 contained still other rulings than on the competence of the arbitrator so that the exception in Article 1697, par. 3 BJC to the three months procedural deadline did not apply in the case at hand and, consequently, plaintiff's request for annulment of Award 1 (based on grounds of annulment set forth in Article 1704, par. 2, c°-j° BJC) should be declared inadmissible.

(ii) Award 2 was rendered after the deadline set by the arbitrator

Plaintiff further invoked that Award 2 was only rendered on 8 June 2009 although the arbitrator had explicitly stated in that award that a final award would be rendered at the latest by 31 May 2009. As a consequence, the arbitrator, pursuant to Article 1698, par. 3 BJC, would have been without jurisdiction to rule upon the dispute, which, pursuant to Article 1704, par. 2, d° BJC, would call for the annulment of Award 2.

The Court, however, established based on the facts of the case that, upon setting the deadline for rendering a final award on 31 May 2009, there were multiple prolongations of that deadline that were, on the one hand, approved *ex officio* by the ICC and, on the other hand, never contested *in tempore non suspecto* by the parties. Consequently the Court rejected the corresponding request for annulment of Award 2 as being unfounded.

(iii) The ICC Court's scrutiny of Award 2 does not amount to a violation of the right to a fair trial

Plaintiff raises that the arbitrator, by email of 16 April 2009, had notified the parties that he had been invited by the ICC Court to clarify certain points in the draft Award 2 and therefore would amend the draft and resubmit it to the ICC Court's approval. The ICC's direct intervention in the arbitrator's decision powers would amount to a violation of the ICC Court's powers pursuant to Article 27 of the ICC Rules of Arbitration and of plaintiff's right to a fair trial pursuant to Article 6 ECHR which, in turn, would justify the award's annulment pursuant to Article 1704, par. 2, a°-d°-g° BJC.

The Court, however, decided that there are no elements in the file establishing that the ICC Court would have effectively influenced the arbitrator's liberty of decision. Furthermore the Court confirmed that the scrutiny of arbitral awards constitutes a common feature of ICC arbitration to which the parties have agreed to submit their dispute. Therefore, this scrutiny does not amount to a violation of the right to a fair trial and cannot be withheld as a ground for annulment of Award 2.

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Varia

UNCITRAL / VIAC Joint Conference (29-30 March 2012, Vienna).

On 29-30 March 2012 VIAC and UNCITRAL are hosting their annual seminar on "The UNCITRAL Digest of Case Law: enactments of the UNCITRAL Model Law on international commercial arbitration and their application by state courts". The full program and the registration form can be retrieved at http://news.wko.at/Media/9240a453-6945-44e3-ab00-a41fcf3354ac/2012_programme_16.1.2012.pdf.

Institute in International Commercial Law & Dispute Resolution 2012 Summer Law Program (15 July – 11 August 2012, Croatia).

The University of Pittsburgh School of Law Center for International Legal Eduction, the University of Zagreb and the Touro Law Center are co-hosting the third annual Institute in International Commercial Law and Dispute Resolution in Zagreb and Zadar. The four weeks summer program on international commercial law and arbitration includes three weeks of doctrinal instruction enhanced by a final week of skills training, applying students' newly acquired legal expertise to the arbitration of a simulated dispute. More information can be found at http://www.tourolaw.edu/summerprograms/pages/Home.aspx.

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