EPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

Newsletter 96
June 2015

IN THIS NEWSLETTER

AGENDA

20 OCTOBER 2015 (13:30-18:00)
CEPANI40 Fall Conference: "What a Counsel in Arbitration can do, must do or must not do?"

27 OCTOBER 2015 (13:00-19:00)
CEPANI Arbitration Academy: Class 4 "Complex Arbitrations"

17 NOVEMBER 2015 (13:00-19:00)
CEPANI Arbitration Academy: Class 5 "Witness Evidence"

8 DECEMBER 2015 (13:00-19:00)
CEPANI Arbitration Academy: Class 6 "Enforcement & Setting Aside"

For more information on our upcoming activities, visit www.cepani.be. You can also directly register online by

clicking on the event of your choice.

NEWS

VERSLAG OVER DE ALGEMENE VERGADERING VAN CEPANI, MET UITEENZETTING DOOR MINISTER VAN JUSTITIE KOEN GEENS

Door Jan JANSSEN, *Advocaat aan de balie te Brussel (Crowell & Moring, LLP)*

De Algemene Vergadering van CEPANI, gehouden op 11 juni 2015, gaf de gelegenheid aan de Raad van Bestuur om toe te lichten hoe het afgelopen jaar de verwachtingen werden overtroffen. Na de Algemene Vergadering verwelkomde CEPANI de Minister van Justitie en voormalig lid van haar Raad van Bestuur, Koen Geens, die zijn steun betuigde voor arbitrage en voor Brussel als centrum voor arbitrage in het bijzonder.

De Algemene Vergadering

Gedurende het jaar 2014-2015 werden de resultaten van de drie jaar lange campagne om Brussel te promoten als centrum voor arbitrage meer en meer zichtbaar, dit zal verder toenemen in de loop van de komende jaren. Tijdens het afgelopen jaar kende CEPANI een aanzienlijke groei in het ledenaantal, in het aantal arbitrages en in aanwezigheden op conferenties en master classes. Ook CEPANI40 blijft groeien en telt inmiddels meer dan 250 leden en viert binnenkort haar tienjarig bestaan.

Hoewel de meerderheid van arbitrages bij CEPANI nationaal blijft, werden kosten noch moeite gespaard om de voordelen van Brussel als internationale arbitragehub te promoten. CEPANI ondersteunde de Belgische prinselijke missies in Oman en Doha en nam deel aan evenementen in onder meer Ankara, Istanbul, Bahrein, Parijs, New York, Sao Paulo. De inspanningen tot internationalisering hebben geleid tot 3 nieuwe samenwerkingsovereenkomsten met: de American Arbitration Association (AAA), de Qatar International Center for Arbitration (QICA) en de Australian Center for International Commercial Arbitration (ACICA).

Daarnaast ontving CEPANI in 2014 bijzondere aandacht tijdens de Willem C. Vis International Commercial Arbitration Moot en Pre-Moot, waar het CEPANI-arbitragereglement werd gebruikt voor de case study.

Het komende financieel jaar belooft een even geëngageerd jaar te zijn.

Uiteenzetting door Minister van Justitie Koen Geens

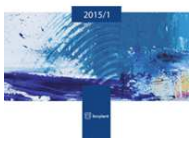
Gedurende 10 jaar was Minister van Justitie Koen Geens actief lid van de Raad van Bestuur van CEPANI, met hem aan het hoofd van Justitie heeft CEPANI een voorvechter van arbitrage in de regering. In zijn uiteenzetting benadrukte Minister Geens de rol van alternatieve geschillenbeslechting in de werking van Justitie. Alternatieve geschillenbeslechting kan het gerechtelijk apparaat ontlasten, zodat justitie kan focussen op haar kerntaken.

Minister Geens gaf een vurig pleidooi voor het gebruik van mediatie. Justitie vandaag blijft al te vaak voortbouwen op de structuur en visie uit de 19de eeuw, toen justitie voornamelijk gericht was op het bestraffen en de scheiding of afscherming van partijen. Onze maatschappij is inmiddels geëvolueerd naar een samenleving waar de focus ligt op integratie en de creatie van oplossingen in een steeds complexere wereld. De rechterlijke macht in België maakt nog te weinig werk van bemiddeling en herstelbemiddeling. Bij aanvang van een procedure worden mensen al te vaak opgesloten in het geschil, procedures zouden van bij de start meer mogelijkheden moeten geven aan partijen om tot een minnelijke regeling te komen. Om justitie toe te laten te focussen op haar kerntaken moeten middelen worden vrijgemaakt zodat routineuze taken kunnen worden geautomatiseerd en opdat een klimaat wordt gecreëerd dat mediatie en de minnelijke regeling van geschillen bevordert. Hierbij verwees Minister Geens naar de recente hervorming van de familierechtbank en naar nieuwe wetgeving die de inning van onbetwiste facturen moet vergemakkelijken. Daarnaast gaf hij zijn wil te kennen om ook de handelsrechtbanken te hervormen en zo bij te dragen tot een betere procesvoering.

Minister Geens heeft de concrete ambitie om van België een koploper te maken in geschillenregeling. Hierbij reikte hij expliciet de hand naar CEPANI als instelling voor arbitrage en mediatie.

Klik hier voor de volledige uiteenzetting door Minister van Justitie Koen Geens.

B-ARBITRA 2015/1 OUT NOW



b-Arbitra est une revue semestrielle qui se veut la principale source d'information et de recherche belge sur l'arbitrage. Les contributions qui y sont publiées sont soumises à une relecture scientifique, suivant la procédure du peer-review.

b-Arbitra est une initiative du CEPANI. La revue entend soutenir la recherche scientifique sur des questions fondamentales en relation avec l'arbitrage et promouvoir une analyse critique et innovatrice de ces questions ainsi que des thèmes plus concrets qui sont importants pour le public de l'arbitrage.

***

b-Arbitra is een halfjaarlijks tijdschrift dat de voornaamste bron van informatie en hét forum voor onderzoek inzake arbitrage vormt in België. De gepubliceerde bijdragen worden onderworpen aan een wetenschappelijk nazicht volgens de peer-review methode.

b-Arbitra is een initiatief van CEPANI. Het tijdschrift ondersteunt het wetenschappelijk onderzoek omtrent fundamentele problemen in verband met arbitrage en promoot een kritische en innovatieve analyse zowel als meer concrete thema's van belang voor het arbitragepubliek.

***

b-Arbitra is a biannual peer-reviewed journal that is the leading source of information and for research on arbitration in Belgium.

b-Arbitra is an initiative of CEPANI. *b-Arbitra* subscribes to the objective of CEPANI to promote edifying debate and in-depth research in the field of arbitration, to provide a valuable source of pertinent information to lawyers involved in arbitration, and to bring new developments to the policy makers' attention in order to further the quality of the arbitration law and practice.

Table of Contents / Table de matière / Inhoustafel 2015/1

Click here to order / Klik hier om te bestellen / Cliquez ici afin de commander

CEPANI SCIENTIFIC COLLECTION: "COLLECTION OF CEPANI ARBITRAL AWARDS" / "RECUEIL DE SENTENCES ARBITRALES DU CEPANI" / "VERZAMELING VAN ARBITRALE UITSPRAKEN VAN CEPANI"

Dit werk, integraal gewijd aan procedurekwesties die kunnen opduiken tijdens een arbitrageprocedure, vormt het derde deel van de reeks.

CEPANI wil met deze drietalige publicatie de aandacht vestigen op het belang van een goed gevoerde arbitrageprocedure. Daarnaast koestert het Centrum ook de ambitie om de aantrekkelijkheid van arbitrage te vergroten, zowel in België als internationaal, door in te zetten op een grotere bekendheid van de arbitrale procedure en van het desbetreffende reglement.

De geselecteerde arbitrale uitspraken zijn voorzien van commentaren door ervaren vakmensen en gespecialiseerde academici in het Engels, Frans of Nederlands, inclusief een samenvatting in de twee andere talen. Een index van sleutelwoorden vergemakkelijkt de raadpleging van het werk.

U kunt een exemplaar bestellen door een e-mail te sturen aan CEPANI. Leden van CEPANI ontvangen een korting van %10.

***

Cet ouvrage, intégralement consacré aux questions de procédure susceptibles d'être rencontrées tout au long de la procédure arbitrale, constitue le troisième volume de la série.

Cette publication trilingue s'inscrit dans la volonté du CEPANI de mettre en évidence l'importance de la bonne conduite d'une procédure arbitrale. Le Centre a également l'ambition de renforcer l'attractivité de l'arbitrage, tant en Belgique qu'au niveau international, en diffusant une meilleure connaissance de la procédure arbitrale et de son règlement.

Une équipe de praticiens expérimentés et d'universitaires spécialisés commentent les décisions sélectionnées en anglais, néerlandais ou français. Un résumé est joint dans les deux autres langues. La consultation de cet ouvrage est facilitée par un index de mots clés.

Vous pouvez commander votre exemplaire en envoyant un e-mail au CEPANI. Les membres du CEPANI reçoivent une réduction du prix de 10%.

***

This work, the third volume in its series, is devoted entirely to the procedural issues that may arise during the course of an arbitration procedure.

With this trilingual publication, CEPANI wishes to highlight the importance of the proper conduct of arbitral proceedings. Furthermore, the Centre also seeks to enhance the attractiveness of arbitration, in Belgium as well as internationally, by contributing to a better knowledge of arbitral proceedings and their rules.

The selected arbitral awards come with comments from expert practitioners and academics in English, Dutch or French, including a summary in the two other languages. The work also includes an index of key words for easy reference.

Please order your copy by sending an e-mail to CEPANI. Members of CEPANI receive a 10% discount price.

REPORT ON THE CEPANI-VIAC COLLOQUIUM ON "ARBITRATION AND M&A TRANSACTIONS" (BRUSSELS, 15 JUNE 2015)

By Werner EYSKENS, *lawyer at the Brussels Bar (Allen & Overy)*

CEPANI and its Viennese sister organisation VIAC organised a joint colloquium on the arbitration aspects of M&A transactions on 15 June 2015. The colloquium was co-chaired by **Mr. Dirk De Meulemeester**, the CEPANI President, and by **Mr. Anton Baier**, the VIAC President. This year, CEPANI and VIAC celebrate 22 years of friendship, which was consolidated by a recent co-operation agreement that provides i.a. for the organisation of joint seminars. This colloquium on the intersection between arbitration and M&A transactions, which was expertly moderated by **Prof. Didier Matray**, Vice President of CEPANI, and **Mr. Günther Horvath**, the VIAC Vice President, was one of these joint seminars under the co-operation agreement.

Ms. Alice Fremuth-Wolf (who stepped in for Manfred Heider, the VIAC Secretary General, prevented from attending) made an introductory presentation of the arbitration landscape in Austria. The Austrian arbitration law is based on the UNCITRAL model law, with a few modifications. Ms. Fremuth-Wolf explained that ca. 20% of the VIAC case law concerns M&A transactions.

Mr. Dirk Van Gerven, CEPANI Vice President, echoed her presentation by describing the Belgian arbitration landscape and commenting on the Belgian 2013 arbitration law and the new 2013 CEPANI rules. He presented statistical information which clarified that, whereas the large majority of the CEPANI case law are arbitration proceedings with a seat in Brussels and with Belgian parties, 20% of the proceedings are conducted in English. Mr. Van Gerven noted that set aside (court) proceedings against Belgian CEPANI awards however need to be conducted in Dutch or French and that this may be an area where efficiency improvements could be made if there is a willingness to deviate from the normal rules on use of language in court proceedings.

The next presentations focused on Share Purchase Agreements (SPAs). **Prof. Olivier Caprasse** commented on the traditional view that inserting an arbitration clause in an SPA guarantees confidentiality but that, as was demonstrated during a 2014 CEPANI seminar on this subject, it is wrong to expect that, as a general rule, all aspects of any arbitration proceeding are confidential. He further discussed the various consequences of combining ADR mechanisms in an SPA, including the contractual formalism of notification requirements and deadlines, multi-tiered dispute escalation clauses and the co-existence of third party decisions and subsequent arbitration proceedings. Mr. Caprasse also discussed the (im)possibility to attract claims by and against the target company in arbitration proceedings between the parties to an SPA. He finished his presentation with a teaser on the obligations of the parties to an SPA and the question as to whether or not their liability is limited to the representations and warranties in the SPA.

Mr. Wulf-Gordian Hauser presented Austria's view on SPAs. He observed that because M&A litigation is so dominated by arbitration, there is regrettably little published state court case law on the topic. He explained that typically, the parties' liability is limited to representations and warranties, other than in the event of intentional or gross negligence, and that these liabilities are further limited by de minimus provisions, baskets, caps and time limits. Mr. Hauser also explained how material adverse change clauses, when submitted to fast track proceedings, may lead to a "quick and dirty" solution, but the challenge is to avoid a contamination of the subsequent arbitration merit proceedings on further claims under the SPA.

Ms. Françoise Lefèvre and **Ms. Irene Welser** led by example and brought a fully merged presentation on representations and warranties. Notable points of their presentation included Ms. Lefèvre's clarification that, for shares, the default sales agreement provisions in the

Belgian Civil Code only affect their (valid) existence and normal statutory features (e.g. voting rights) but that for all other seller undertakings, representations and warranties will be required - hence the importance of a properly drafted SPA to avoid buying a "cat in a bag". Ms. Lefèvre further explained that the interplay between representations, warranties, indemnities and price reduction mechanisms make an SPA in reality a risk management tool. Ms. Irene Welser warned for the risk of having pre-hearing referees determine certain facts as they will affect subsequent arbitration proceedings, which will need to deal with the legal implications of these findings. Ms. Lefèvre went on to discuss the possibility to set aside a third party binding decision on factual matters in the framework of representation and warranty claims and which would be the particular standard for a manifest error in this regard. Ms. Lefèvre and Ms. Welser then discussed among themselves their views on "sandwich situations" of successive sales of the same target company and the possibility of a target company, if it benefits from certain provisions under the SPA, to bring itself arbitration proceedings, even though it is not formally a party to the SPA. They warned for the frequent practical problem of large auditor firms being appointed as independent third party price adjustors under an SPA, when these firms become, by the time they are called upon to start the adjusting, the auditors of one of the parties.

The final topic was the matter of pricing in M&A transactions. **Mr. Peter Callens** expertly presented the Belgian legal framework for sales agreements and possible price determination mechanisms in SPA's. He observed the increasingly important role for auditors in the determination of the equity value and warned for the tax and financing consequences of leaving too much working capital in a sold company, requiring the purchaser to pay "cash for cash". Mr. Callens finished his presentation with a few comments on typical warranty claims, including the possible classification of a warranty claim as a price reduction (including its tax impact) and, if not excluded contractually, the possible application of a multiple to compute the damage caused by a warranty breach.

Mr. Christian Aschauer gave a presentation on the interplay between third party expert decisions and arbitral awards in price adjustment arbitrations. He noted that there is a multitude of accounting and reporting practices, which does not improve the clarity of the relevant accounting standards. He gave some examples of the differences between contract independent experts and, for example, dispute adjudication boards whose decisions may be reviewed by a tribunal. Mr. Aschauer explained that the relevant substantive law can have far-reaching consequences for contractual experts, and he gave the example of English law which doesn't require contractual experts to reason their decisions. Mr. Aschauer clarified that if an SPA provides for the appointment of a third party expert by the parties or a designated institution, his view is that an arbitral tribunal may not be substituted to such appointing authority. He finally observed that contractual experts do not enjoy a "Kompetenz-Kompetenz" authority and that any legal issue preventing their price determination will need to be resolved prior to the start of their activities.

This afternoon of insightful observations on the frequent intersections between arbitration and M&A transactions ended with a few welcome drinks offered by CEPANI to the Austrian and Belgian attendees.

FOLLOW-UP REPORT ON PING AN V. BELGIUM

By Govert COPPENS, *Affiliated Researcher at the University of Leuven and Junior Academic Visitor at the University of Oxford*

As reported in last month's Newsletter, the Belgian State prevailed in the case brought against it by Ping An (Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) of China, Limited) before an ICSID tribunal (ICSID Case No. ARB/12/29). The award of 30 April 2015 in which the Tribunal declined jurisdiction was published by ICSID on 26 May 2015, revealing the arguments of the parties and the reasoning of the Tribunal (Lord Collins of Mapesbury, President, Professor Philippe Sands QC and Mr. David A.R. Williams QC, Arbitrators).

As predicted by commentators, the crux of the case was the interplay (or lack thereof) between the two bilateral investment treaties between China and Belgium. Specifically, it concerned the BIT signed in 1984, which entered into force in 1986 and the BIT signed in 2005, which entered into force on 1 December 2009. The latter treaty contained more comprehensive standards of protection and had the distinct procedural advantage of an ICSID arbitration clause.

Ping An, claiming around 1 billion euros in compensation, relied on the 1986 BIT for its

substantive protection but necessarily had to rely on the 2009 BIT to invoke the ICSID arbitration clause. In response, Belgium submitted several objections to jurisdiction. The first of these objections was that the 2009 BIT only applied to disputes arising after its entry into force on 1 December 2009 and that the dispute before the Tribunal had arisen before this date. Consequently, the Tribunal lacked jurisdiction ratione temporis, it was argued.

The Tribunal restated the general principle of non-retroactivity of a treaty, as laid down in Article 28 of the Vienna Convention on the Law of Treaties. However, it concluded that this rule applied only to the substantive provisions of a treaty and that the application of a new dispute settlement mechanism to acts which may have been unlawful when they were committed is not in itself the retroactive application of law. As the case before it concerned a dispute resolution clause, it ruled that this principle was not relevant.

The 2009 BIT did explicitly 'substitute and replace' the 1986 BIT and applied to all qualifying investments 'whether made before or after the entry into force of this Agreement'. The 2009 BIT also specified that it did not apply to any dispute 'which was already under judicial or arbitral process' before its entry into force.

It was not in dispute between the parties that Claimant had notified the Belgian State of the dispute before the entry into force of the 2009 BIT. However, the notification of the dispute cannot simply be equated with being 'under judicial or arbitral process'.

As a result, the 2009 BIT did not expressly deal with the fate of disputes arising before 1 December 2009 that had been notified under the 1986 BIT but were not then the subject of judicial or arbitral process in the sense that such proceedings had been formally initiated.

The Tribunal then asked itself whether it was possible to infer the intention of the parties with regard to disputes which had been notified under the 1986 BIT but which had not matured into judicial or arbitral proceedings. It answered this affirmatively and held that there was nothing in the wording of the 2009 BIT to justify on the basis of its express language, or on the basis of any implication or inferences, that the more extensive remedies under the 2009 BIT would be available to pre-existing disputes that had been notified under the 1986 BIT but had not yet become subject to arbitral or judicial process. As a result, the 2009 BIT could not be invoked by the Claimants.

Since this ratione temporis objection to jurisdiction prevailed, there was no need for the Tribunal to address Belgium's other objections. As to the costs, the Tribunal decided that each party should bear its own fees and expenses and share the costs of the Tribunal equally between them.

However, the Tribunal explicitly did not take any position on whether remedies may remain available to the Claimants either under the 1986 BIT or before Belgium's domestic courts. The 1986 BIT allows for both investor-State arbitration and inter-State proceedings, though the latter have become a rare occurrence in investment arbitration. It remains to be seen whether Ping An will acquiesce in the decision or will resort to any of the remaining remedies outside ICSID.

PECHSTEIN SAGA: MORE FEAR THAN HARM FOR SPORT ARBITRATION?

By Iris DEMOULIN, *Avocat au barreau de Liège (Matray, Matray & Hallet)*

In 2009, the German speed skater, Claudia Pechstein, was found guilty of doping by the International Skating Union (hereinafter "ISU"). Consequently, the ISU Disciplinary Commission banned her from competition for two years. The athlete set an appeal against the decision of the ISU before the Court of Arbitration for Sport (hereinafter "the CAS"). Indeed, an arbitration clause enshrined in the contract entered into by Claudia Pechstein and the Association for Speed Skating gave competence to the CAS. The CAS confirmed the ISU decision.

Miss Pechstein challenged the CAS decision before the Swiss Federal Tribunal, the latter being competent under CAS arbitration rules to set aside CAS awards in very limited circumstances. The Swiss Federal Tribunal held it has no power to review the CAS award since the award was not contrary to Swiss public order.

Miss Pechstein filed a petition before the regional court of Munich. The ice skater argued that the German court had jurisdiction because the arbitration agreement included in her athletic contract with the National Association for Speed Skating was invalid: if she had refused to

sign the athlete contract with the National Association for Speed Skating, she would have been prohibited to take part in international competitions.

In a nutshell, the regional court of Munich dismissed the claim on the merits but raised concerns on the ability of athletes not to enter into CAS arbitration clause. The German regional court dodged the issue by judging that even if the validity of the arbitration clauses was questionable, in the case at stake, Miss Pechstein had only contested the validity of the arbitration agreement after the arbitral tribunal has rendered an award in her disadvantage. In other words, Miss Pechstein should have contested the competence of CAS when the arbitral proceeding was pending. Therefore, the award had a res judicata effect.

The sportwoman did not give up and lodged an appeal against the local court judgment before the Higher Regional Court of Munich. The latter court released its judgment on 15 January 2015. The decision of the Higher Regional Court in the "Pechstein Case" was long awaited by the arbitration area. It was much feared that the judicial body questioned the validity in itself of sport arbitration system. This is all but the case. To the contrary, the Higher Regional Court recognises that "a uniform competence and procedure can preclude that similar cases be decided differently, and therefore safeguard the equal opportunities of athletes during the competitions".

However, even if the Court of appeal did not put into question sport arbitration in itself, it criticises the composition of the CAS panel, casting doubt on its impartiality. The court emphasises that at the time Claudia Pechstein entered into the arbitration agreement with the Association for Speed Skating, the CAS rules obliged the athletes to choose an arbitrator amongst the list of CAS arbitrators.

The criticism of the Higher Regional Court relating to the impartiality of CAS panel of arbitrators should be relativised as highlighted by the CAS in its statement about the Munich Appeals Court judgment: "the findings of the Munich Appeals Court are based on the CAS rules and organisation in force in 2009, when Claudia Pechstein appealed before CAS, and do not take into account the changes leading to the current organization, with amended procedural rules regarding the nomination of arbitrators (…) and the appointment of new CAS Members not active in or connected to sports-bodies".

In the same report, the CAS emphasised the need of stakeholders in international sport to have rapid decisions and that contradictory decisions could lead to athletes authorised to compete in some countries but not in others. Interestingly, the reading of the CAS statement gives the impression that the arbitral institution is aware that their rules were not perfect and still need to be improved.

The CAS rules' reform was more than welcome knowing that the Higher Regional Court of Munich rules that the CAS award was contrary to the German public order and therefore could not be recognised. Indeed, according to the German court, the fact that the athletes were obliged to enter into a contract with the ISU including a CAS arbitration agreement in order to compete, was an abuse of dominance. Therefore, the CAS award infringed competition law. Fundamental rules of competition law are part of German ordre public.

In conclusion, the Munich court of appeal did not jeopardise the reason of being of sport arbitration and is not an open door for athletes to contest the future awards of CAS, However, it leads to a soul-searching of the CAS functioning.

The German Supreme Court will have the final say in the Pechstein case. To be continued…

REPORT ON THE CEPANI40 DEBATE EVENING WITH MS. ERICA STEIN AND MS. HILDE VAN DER BAAN ON "APPOINTMENT OF ARBITRATORS: PARTIES V ARBITRAL INSTITUTIONS" (5 MAY 2015, BRUSSELS)

By Iuliana IANCU, ***lawyer admitted in Bucharest and registered in Brussels (Hanotiau & van den Berg)***

The 5th of May 2015 marked the debut of CEPANI40's first evening Oxford-style debate, on the topic of "Appointment of arbitrators: parties versus arbitral institutions". The event was kindly hosted by Dechert LLP Brussels and featured two prominent speakers, **Ms. Erica Stein**, Special Counsel – Arbitration at Dechert LLP Brussels, and **Ms. Hilde van der Baan**, Counsel at Allen & Overy LLP in Amsterdam.

The structure of the event was ingenious. Not only were the speakers advocating diametrically opposite positions – with Ms. Stein taking the view that arbitral institutions should in all circumstances appoint arbitrators, and Ms. Van der Baan replying that, to the contrary, it is the parties who should always appoint arbitrators – but the participants themselves were asked from the outset to likewise take a position – and a seat in one of the two sections of the room corresponding to that position. Should a speaker successfully change a participant's opinion, the participant would need to move to the opposite side of the room at the end of the debate. The initial allocation of seats showed that the debaters would be neck-in-neck in their effort to persuade, as the attendees seemed to be equally divided on the matter.

Ms. Stein was the first to speak. She began by challenging the prevailing practice of the parties appointing the arbitrators by looking into its rationale: why is it this practice is considered essential? Her position was that, first, the parties view it as an instrument which allows them to control the arbitral process, and second, the parties want to have an arbitrator who would look favorably upon their cause. With respect to the former, she countered that parties can and do exercise control over the arbitral process by virtue of the arbitration rules, and not by virtue of the appointment of an arbitrator. With respect to the latter, she pointed out that being partial to a party's position is the role of counsel. To the contrary, arbitrators should at all times be independent and impartial. It is here where the system of party appointment of arbitrators fails. Ms. Stein referred to statistics showing that 100% of all ICSID dissenting opinions were authored by the arbitrator appointed by the party who lost. Although no official statistics exist, it seems that this is the case in commercial arbitrations as well. This shows that party-appointed arbitrators are in fact biased in favor of the party who appointed them. Arbitrating has thus become a business and the arbitrator a service provider for his/her client, as opposed to an independent officer providing justice. Ms. Stein argued that this paradigm would shift if institutions appointed arbitrators in all circumstances. In this scenario, arbitrators would be less inclined to favor the appointing party and arbitral workings and deliberations would become more collegial. Appointment by institutions would also dis-incentivize arbitrators to issue dissenting opinions, thus strengthening the chances of an award being enforced. Institutions, moreover, are better placed than the parties to find suitable arbitrators. Having access to a wider network of resources, institutions are also more likely to find suitable candidates from a greater pool of arbitrators, thus increasing diversity.

Ms. van der Baan criticised this position, and highlighted that to this day the appointment of arbitrators by the parties remains one of the hallmarks of arbitration. The Queen Mary - White & Case arbitration survey of 2012 unmistakably showed that the users of arbitration, despite being aware of the risk of bias, still view the right to appoint an arbitrator as essential. Ms. van der Baan opined that the current system works. Even if one arbitrator is biased in favor of the appointing party, the chairman will ultimately ensure that a neutral decision will be taken. She added that dissenting opinions do not impede or hinder the enforcement of an award: they attest to the fact that a real debate has taken place, that a party's arguments were heard but were ultimately unsuccessful. Ms. van der Baan further argued that appointment by institutions would be impractical as appointment is made at a time when the institutions know very little about a case and are thus unlikely to identify the most suitable candidates. Such a system would be perceived as un-transparent by the parties, thus creating the perception that the arbitrators do not have legitimacy. It would also not solve the problem of arbitrators being service providers, as the institution itself would become the new beneficiary of those services. One further inconvenient is that under the majority of current arbitration rules, the institutions are tasked with solving challenges to arbitrators; this role would be difficult to reconcile with the new role of ensuring appointment. Summing up, her view was that the solution to the problem of arbitrator bias was an effective challenge mechanism and not a fundamental change of the appointment mechanism.

After a brief rebuttal from both speakers, the participants were asked to cast their final votes – again, via the selection of a seat within the corresponding area of the conference room. With no changes of votes registered, Ms. van der Baan was declared the winner of the debate and the participants were given the opportunity to ask questions. Due to the polarizing nature of the debate, questions were numerous and the discussion continued over a cocktail reception, which closed the event for the evening.

REPORT ON THE CEPANI ARBITRATION CLASSES (26 FEBRUARY, 26 MARCH AND 28 APRIL 2015)

By Barbara DEN TANDT, *lawyer at the Brussels Bar (Eubelius)*

An excellent initiative has been launched by CEPANI this year: the CEPANI Arbitration Classes, in the framework of the CEPANI Arbitration Academy. Expert practitioners **prof. Benoît Allemeersch**, **prof. Olivier Caprasse** and **Prof. Jean-François Tossens** enthusiastically co-hosted three interactive sessions, each organised in the afternoon from 1 till 7 pm at the CEPANI offices. The arbitration classes were interesting for both starting and experienced counsels and arbitrators in national and international arbitration proceedings. Indeed, all aspects and (pre-) stages of arbitration proceedings were covered, with a focus on practical tips and tricks, illustrating the theoretical know-how. In order to be accessible to a large public of practitioners, the courses were given in English.

The arbitration classes made a good start with a pleasant and jovial meeting in a well-known wine bar in Brussels, where speakers and participants had the chance to get acquainted and network.

On 26 February, prof. Benoît Allemeersch presided the first class, "From the arbitral clause to the constitution of the tribunal". The first topic regarded the period before the request for arbitration. The subject dealt with the typology and content of arbitration clauses, how to deal with clauses that do not cover certain elements and non-exclusive, hybrid and pathological arbitration clauses. **Mr. Dirk Van Gerven** gave a video testimony on what should be covered in an arbitration clause. The second topic handled, was the request and the answer. More specifically the strategy of drafting the request and the answer, and delay tactics in the start-up phase of the arbitration. Furthermore, **Mr. Jean-Pierre Fierens** gave a testimony on what to consider when drafting the request. The third topic covered the constitution of the arbitral tribunal, namely the selection and appointment of the arbitrators. In this framework, **Ms. Françoise Lefèvre** gave a testimony on how to choose an arbitrator and what kind of strategies one must think of.

The second class on 26 March 2015, presided by prof. Jean-François Tossens, concerned "From the Terms of Reference to the Hearing". This class covered two topics. On the one hand, the Terms of Reference (with a video testimonial of **Prof. Didier Matray** on how to achieve good Terms of Reference) and the Procedural Order were discussed, as well as particular issues such as applicable law, language, confidentiality and the list of disputed issues. On the other hand, the participants learned about the elements necessary for good case management, such as the procedural timetable and organising submissions and evidence (including document production, witnesses, experts and submissions).

The third and final class on 28 April 2015 was presided by prof. Olivier Caprasse and covered everything practitioners need to know "From the hearing to the award". This class also comprised two topics, namely the hearing and the post-hearing stage. Regarding the hearing, we discussed, a.o., the organisation of the hearing (the type of questions to anticipate, schedule …), the oral submissions by the counsel, the witnesses of fact, the experts and ancillary questions (presence in the room, demonstrative exhibits, recording/court reporter, and interpreters). A first video testimony of **Ms. Vera Van Houtte** laid out which five crucial points parties and/or arbitrators should take into account when organising the hearing. A second video testimony by **Mr. Pascal Hollander** taught why, when and how to have recourse to witnesses in domestic and international arbitrations. Regarding the post-hearing stage, the correction of transcripts, post hearing briefs and how to deal with the costs of procedure were discussed. Finally, a third video testimony of **Prof. Georges-Albert Dal** treated the do's and don'ts in post hearing briefs.

Before each class, CEPANI also provided the participants with documentation, which could be downloaded from an online platform. During the classes, the aspects of each theme were explained and discussed using a wide range of documentation (for instance arbitration rules, examples of procedural acts made anonymous …) and slides which were prepared by the speakers. The many discussions between the participants and the speakers gave the opportunity to exchange real life experiences and know-how, which could immediately be put into practice, and cannot be found in books or articles. Even though every session was quite intense and a large amount of useful information was given, all participants had the impression that time flew by as the courses were given in a relaxed and pleasant atmosphere.

The CEPANI Arbitration Classes definitely helped to improve my practical skills and knowledge about international and national arbitration proceedings. As an attorney specialised in commercial litigation, I experienced that the benefits are multiple and immediately applicable in practice. The Arbitration Classes are definitely recommended for practitioners who act as counsel or arbitrator.

Due to the success of the CEPANI Arbitration classes, a second set of classes will be organised this fall. Definitely something to look forward to!

For more information on the CEPANI Arbitration Classes: "Expert" level (Fall 2015), see below or visit www.cepani.be.

CEPANI ARBITRATION ACADEMY: LEVEL EXPERT

It is a well-known truism of arbitration that the quality of arbitration proceedings is only as good as the quality of the arbitrators conducting them. When it comes to our Arbitration Academy, we could flip the phrase to explain that CEPANI is its own first stakeholder: for the quality of an arbitration institution is only as good as the quality of the arbitrators it appoints or confirms.

The world of arbitration is fueled not only by theoretical knowledge but by the ability to turn said knowledge into outstanding practice in the field. CEPANI strives not only to enforce the skills and qualities of arbitrators and experts in general, but to enlarge the pool of arbitrators. As the main centre for arbitration in Belgium, CEPANI understands the need for a high standard training.

Through tailored courses enhanced by case studies, multimedia materials and interactive discussions, the CEPANI Arbitration Academy offers you the knowledge and practical skills necessary for pursuing a career in arbitration.

The curriculum of the CEPANI Arbitration Academy has been conceived by renowned arbitration practitioners and academics and aims to cover all aspects of national and international arbitration.

We invite you to take a look at the full programme and all practical information on our website by clicking here. You can register by filling out the form at the bottom of the page.

We look forward to welcoming you at the CEPANI Arbitration Academy!

▲ TOP

REFERENCES

Case Law

- Belgian Supreme Court of 10 January 2014, *R.W.* 2015/33, p. 1310

Arbitrage – Arbitrageovereenkomst – Vernietiging – Uitspraak buiten termijn – Gevolg – Eerdere tijdige uitspraken

Arbitration – Arbitration agreement – Annulment – Arbitral award after expiry of the deadline– Consequence – Previous awards within the deadline

Arbitrage – Convention d'arbitrage – Annulation – Sentence hors délai – Conséquence – Sentences antérieures dans les délais

Arbitrage – Convention d'arbitrage – Annulation – Décision après délai – Conséquence – Décisions antérieurs dans les délais

Books

• G. KEUTGEN et G.-A. DAL, *L'arbitrage en droit belge et international. Tome I - Le droit belge, 3ème édition revue et augmentée*, Bruxelles, Bruylant, 2015, 816 p.

Articles

• I. BAMBUST, "L'historique linguistique arbitrale en confrontation avec la détermination de la langue de la procédure", *b-Arbitra* 2015/1, p. 201-208

• M. BERLINGIN, "L'extension de la convention d'arbitrage à des tiers participant à l'exécution du contrat au regard du droit belge", *b-Arbitra* 2015/1, p. 131-149

• B. DE BOCK, "The emergency arbitrator in the 2013 CEPANI Arbitration Rules", *b-Arbitra* 2015/1, p. 67-87

• B. HANOTIAU, "Les grands enjeux de l'arbitrage commercial international", *b-Arbitra* 2015/1, p.7-15

• Y. HERINCKX, "Arbitrage, mesures provisoires et responsabilité du demandeur", *b-Arbitra* 2015/1, p. 89-121

• R. JAFFERALI, "Les parties à un arbitrage international peuvent-elles choisir la langue de la procédure en cas de saisine du juge belge?", *b-Arbitra* 2015/1, p. 209-240

• R. JAGTENBERGg en S. VOET, "When it takes thousands to tango. Over de buitengerechtelijke collectieve afwikkeling van massaschade in Nederland en België", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2015/19, p.6-32

• W. JAHNEL, D. SYKORA and N. GLATTHARD, "Arbitration in matters of succession with special consideration of the Regulation (EU) No. 650/2012", *b-Arbitra* 2015/1, p. 41-66

• J.KNIEPER en C. MONTINERI, "The Belgian law on Mediation, in light of the UNCITRAL Conciliation and of the UNCITRAL projects on enforceability of settlement agreements", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2015/19, p.59-67

• M. PIERS en M. STORME, "Overzicht van Belgische rechtspraak. Arbitrage (2006-2014)", *T.P.R.* 2014/2

• M. E. SCHNEIDER, T. GIOVANNINI ET J-P VULLIÉTY, "Hommage à Pierre Lalive (1923-2014), Un (trop bref) regard sur la carrière d'un juriste hors normes", *b-Arbitra* 2015/1, p. 17-39

• A. STIER "The Jurisdiction of the arbitral tribunal in intra-EU investment treaty disputes after the decision in Electrabel v. Hungary", *LCIA* 2015 vol.31, nr. 1, p. 163-170

• B. VAN ZELST, "Dissenting opinions in arbitrage", *TvA* 2015/02, p. 21-33

• S. VOET, "Nieuw Belgisch kader inzake ADR en consumentengeschillen", *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2015/19, p. 33-44

• M. WIETZOREK, "The Recognition and Enforcement of Court Decisions on the Validity of Arbitration Agreements", *b-Arbitra* 2015/1, p. 181-188

• G. ZEYEN, "Indépendance et impartialité d'un arbitre: entre doutes "légitimes" (Belgique) et doutes "raisonnables"" (France)', *b-Arbitra* 2015/1, p. 157-167

▲ TOP

VARIA

ICC Summer Course on International Commercial Arbitration (6 – 9 July 2015, Paris)

The ICC International Court of Arbitration along with the College of Law and Business (CLB) in Ramat Gan are organizing their annual intensive introductory four day course on International Commercial Arbitration. It is designed to provide outstanding law students, with a particular interest in international arbitration, an opportunity for in-depth training in international arbitration as well as learn about the ICC International Court of Arbitration's work.

The course will cover both theoretical and practical aspects of international arbitration in general, as well as arbitrations conducted under the ICC Rules of Arbitration. Students will acquire a practical understanding of how to conduct an international arbitration under the ICC Rules of Arbitration, and the skills required to conduct a successful international arbitration.

The programme is open to graduate law students who have completed a first course in international commercial law, to LLM students, as well as to young practitioners in the field of international law who would like to extend their expertise in the area of international commercial arbitration. For more information visit http://www.iccwbo.org/Training-and-Events/All-events/Events/2015/ICC-Summer-Course-on-International-Commercial-Arbitration/

The "Cologne Academies" on international dispute resolution from 30 August to 3 September 2015

The Center for Transnational Law (CENTRAL) at Cologne University, Germany in cooperation with the German Institution of Arbitration (DIS) will once again host its highly successful "Cologne Academies" on international dispute resolution from 30 August to 3 September 2015:

- the 13th Academy on International Arbitration and
- the 10th Academy on International Business Negotiation & Mediation

The Cologne Academies are addressed to students and young practitioners. They are well known for their highly interactive teaching & training approach which involves both the law and the practice skills required for a successful career in international dispute resolution.

For detailed information on the Academy program, the distinguished faculty, statements of Alumni, the fees as well as an online application form please visit www.cologne-academies.com.

***

Responsible publisher
Dirk De Meulemeester

Editorial board
G. Keutgen, S. Van Rompaey
M. Berlingin, P. Callens, G. Coppens, V. Foncke, M. Dal, M. Draye C. Price, E. Stein, P. Wautelet

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@cepani.be. CEPANI may publish and/or edit contributions at its discretion.

▲ TOP