EPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

Newsletter
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AGENDA

9 JUNE 2015 (13:30-17:00)
Après-midi d'étude Studipolis: "Arbitrage: La nouvelle loi sur l'arbitrage en pratique"

11 JUNE 2015 (16:00-18:00)
CEPANI General Assembly, followed by a lecture by the Belgian Minister of Justice Koen Geens

18 JUNE 2015
Studienamiddag Studipolis: "Arbitrage: de nieuwe arbitragewet in de praktijk"

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

NEWS

INTRODUCTION: WHAT IS THE MOOT COURT?

As you certainly know, the Willem C. Vis Moot is a prestigious international commercial arbitration competition for law students from all countries.

The Moot always involves a dispute arising out of a contract of sale between two countries that are party to the United Nations Convention on Contracts for the International Sale of

Goods (CISG Convention). The contract usually provides that any dispute that might arise is to be settled by arbitration in Danubia, a country that has enacted the UNCITRAL Model Law on International Commercial Arbitration. The arbitral rules to be applied rotate yearly among the arbitration rules of co-sponsors of the Moot. This year ICC rules applied.

Thus, the students competing in the Moot face the challenge of being in the role of attorneys in the context of international commercial arbitral proceedings. The competition runs from October to April and is divided in two phases: first, the writing of memoranda for the claimant and the respondent and, second, the hearing of oral arguments based upon the memoranda, both settled by arbitral experts. There is no selection of the teams based on the quality of their memoranda: every participating team is allowed to proceed to the oral argument phase.

Oral arguments take place in Vienna over a whole week. They begin with a formal Opening Reception on Friday. Then, General Rounds take place from Saturday to Tuesday at the Law Faculty of the University of Vienna and several nearby law firms. During these sessions each team pleads four times. In the pairings of teams for each General Round, every effort is made to have civil law schools argue against common law schools - so that each team may learn from other legal cultures and approaches. Similarly, the teams of arbitrators judging each round are from both common law and civil law backgrounds. The General Rounds conclude on Tuesday afternoon with the announcement of the 64 highest-ranking teams which can move on to the 'Elimination Rounds'. Then, the Elimination Rounds take place from Tuesday night to Thursday, and culminate with the final argument. The Moot closes with an awards banquet that follows the final argument.

This year, 330 teams from over 66 countries participated to the oral arguments in Vienna, from 27 March 2015 to 2nd April 2015. The winning team was the University of Ottawa.

Importantly, the 'Vis Moot' is not a mere student competition: most of all it is a community. During the whole week in Vienna, networking events, conferences and fancy receptions are taken place where students, coaches and hundreds of expert scholars and arbitrators mix and share their experience and passion for the Moot and for international arbitration.

You will find in this newsletter reports on various experiences lived in Vienna during the Moot, from student, coach, and arbitrator.

MY EXPERIENCE AS "MOOTIE"

By Céline GREGOIRE, *student at the University of Liège*

As a former participant, I personally think that attending the Willem Vis International Commercial Arbitration Moot is the most valuable learning process that a future lawyer could go through. But if it seems, at first sight, to be mainly about acquiring professional skills, looking back on the experience as a whole makes you realise it equally affected many aspects of your personal life.

As a future lawyer...

The Rules of the Moot requires each team to write two sets of conclusions, being alternatively in the suit of the counsel of each disputing party.

Assessing a certain point from the two perspectives requires you to counter-argument your own findings. It is a strange feeling to be at the same time the two parties of a debate that never ends. From the moment you find a strong argument for the claimant, you start thinking about how to refute it from the respondent's side, and this Ping-Pong carries on.

This schizophrenic experience requires you to constantly challenge yourself. Being aware at each step of the strengths and weaknesses of the counter-argumentation on a certain point enables you to go deeper into each party's argumentation, so that it becomes as precise and accurate as possible. I personally think it is the most efficient way for students to acquire the reflex of anticipating the other party's arguments when drafting your own conclusions.

As a person…

The most fundamental point was learning to trust the other team members for the purpose of achieving our common goal. This team spirit created a dynamism that we would not have had by working separately, what made me realize the added value of long-lasting team working.

During our attendance at the CEPANI Pre-Moot, we had the great chance to be introduced to professionals active in the arbitration field. It has been a valuable opportunity for us to test the suitability of our argumentation before a real arbitral tribunal. We took as much advice as we could from them and brought them to Vienna, where they turned out to be very useful.

Finally arriving in Vienna, the first feeling is relief, as you finally reach the consecration of something you have been spending so much energy on. At no point we felt in competition with other teams. With a simple look, you understand each other. You respect them for the work they went through in order to be there because you went through the same. You know the late nights they spent searching for a certain case, or reading articles to identify the weaknesses of a certain doctrine. Altogether, you are bound by something stronger than just being at the same place at the same time.

Picture of the Liège team:

MY EXPERIENCE AS COACH

By Sophie BRENARD, *Lawyer at the Brussels Bar (Strelia)*

I had the chance to participate in the 22nd edition of the Vis Moot as one of the coaches of the team of the Catholic University of Louvain-la-Neuve. Coaching the team was an exciting challenge. Indeed, as a coach I had to make the students push their ambitions to the limit, but also help them gain self-confidence.

During the first part of the Moot, the team has to write the memoranda for Claimant and Respondent. During this period, the coach has to guide the students to find sources and to help them consider all the possible answers to the questions raised.

The second part of the Moot allows the students to work on their oral skills. Considering that each of them has only fourteen minutes to convince the tribunal, preparation is essential to make a good pleading. As a coach I discussed the most relevant arguments with them and we put together a lot of fake pleadings. I acted as an arbitrator notably to help them not to be destabilised by the tribunal's questions.

After all this preparation and hard work, it was time for the real competition in Vienna. Our students were more than ready to plead and enjoy the experience. We met a lot of friendly and welcoming teams and arbitrators and had the chance to attend several sumptuous receptions.

It is really easy and pleasant to meet people during the Moot because everyone has the same goal in mind: to enjoy the experience and to share knowledge in international commercial arbitration. It is also very impressive to realise that each person - student or arbitrator - has a different perspective on the case. No matter how many hearings you attend, you cannot fail to gain new insights.

MY EXPERIENCE AS ARBITRATOR

By Sophie GOLDMAN, lawyer at the Brussels Bar (Strelia) and teaching assistant at ULB

This year was my second experience as an arbitrator in Vienna. I had the opportunity to arbitrate two excellent teams – New Vision University (Georgia) v. Wuhan University (China) – together with rather experienced arbitrators from United States and Italy.

The Moot Court hearings are always intense: while each team (made of two students) is meant to plead 30 minutes, the length of their pleadings is generally largely extended, due to the numerous questions asked by the arbitral tribunal.

At the end of the hearing, all members of the tribunal give the students feedback on the way they plead and on their knowledge of the factual and legal issues, to help them improve for the next round.

In the New Vision University (Georgia) v. Wuhan University (China) case, all four students did very well: they were very eloquent and knew the case as well as a counsel would in real life. They never felt destabilised by the tricky questions that the arbitrators asked them.

Arbitrating at the Vis Moot Court is definitely a great learning experience for young arbitrators. It is a playful way to learn how to act as a co-arbitrator or even as a chairperson. Furthermore, the Moot case usually raises complex issues of arbitration law. Thus, the competition offers a great opportunity for young practitioners to discuss those issues with other arbitrators.

But make no mistake: the Moot court is extremely valuable to experienced practitioners as well. Hundreds of experienced arbitrators and renowned scholars happily take part in the game and enjoy the whole "Vis Moot experience" for a week. They attend the many networking events with other practitioners - from all countries and of all ages - who share the same passion for international arbitration law.

In sum, as an arbitration practitioner, young or senior, attending the Moot Court in Vienna is a worthwhile experience that you should live at least once in your career.

THE CEPANI40 NETWORKING DRINK AT THE OCCASION OF THE MOOT

By Maarten DEVINCK, *Lawyer at the Gent bar (Lexlitis) and teaching assistant international commercial arbitration at the UGent*

Last year, at the 21st Willem C. Vis International Commercial Arbitration Moot, CEPANI played a very prominent role as the 2013 CEPANI Arbitration Rules were applicable to the Moot problem. In light of this, CEPANI40 organised a coffeehouse debate and networking drink at the Café Landtmann on 12 April 2014.

At the 22nd Willem C. Vis Moot, CEPANI40 decided to continue this tradition and, along with CMS DeBacker, invited the Belgian mooties and coaches as well as Belgian and international arbitration practitioners to a networking drink on 28 March 2015 at the Daun-Kinsky palace in the heart of the historical city centre of Vienna.

The reception was opened with a welcome speech by Vanessa Foncke and Benoit Kohl, the co-presidents of CEPANI40, and provided a great opportunity for all invitees to network and talk in a casual and fun atmosphere.

The networking drink was another successful CEPANI40 event in Vienna. Hopefully the tradition will be sustained for many years to come.

PING AN V. BELGIUM: ICSID TRIBUNAL RULES IT DOES NOT HAVE JURISDICTION

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

In an award of 30 April 2015, the Tribunal in the Ping An v. Belgium case (Lawrence Collins, President; David A.R. Williams, appointed by Claimant, and Philippe Sands appointed by Respondent), or at least a majority of the arbitrators, held that it did not have jurisdiction to hear the case. Belgium thus avoids what could have been a financially very substantial decision against it.

In September 2012, Ping An Life Insurance Company of China Limited and Ping An Insurance (Group) Company of China Limited, two entities of the Chinese insurance and financial services giant, filed a Request for Arbitration against Belgium with the ICSID Secretariat. The dispute concerned the loss incurred by Ping An as a result of the 2008 intervention of the Belgian Government in Fortis Bank & Insurance, which found itself on the verge of bankruptcy in the wake of the financial crisis, and the subsequent breakup and partial sale of the group to BNP Paribas. As one of the largest shareholders with almost 5% to its name, Ping An lost around two billion euros. It was one of the largest acquisitions by a Chinese company in the European financial services sector.

The Belgium-Luxemburg Economic Union ('BLEU') and China first entered into a bilateral investment treaty in 1984, which entered into force in 1986. In line with China's treaty practice at the time, this BIT includes only a rather narrow standard of protection compared to most contemporary investment treaties.

However, in 2005, a new BIT was concluded between China and the BLEU, which 'substituted and replaced' the 1984 treaty (Article 10(1)). The 2005 BIT significantly increased both the substantive protection and the procedural options available to covered investors. For example, the new agreement introduced specific rules applicable in case of expropriation for reasons of public purpose, security or national interest and added a consent clause to ICSID

arbitration. The treaty had not yet been ratified by all regional parliaments at the time of the nationalisation of Fortis and it eventually entered into force on 1 December 2009. Nonetheless, this BIT is generally applicable to investments regardless whether they are made before or after its entry into force.

Since the award itself is not public at present, neither the arguments of the parties, nor the Tribunal's reasoning are known. However, a source intimately involved in the case stated that the Tribunal had declined jurisdiction because it was of the opinion that the claim arose at a time when it was neither covered by the 1984 BIT, nor by its 2005 successor.

One possibility is that this reasoning included Article 10(2) of the 2005 BIT, which carves out an exception to the general retroactivity of the treaty. It stipulates that the treaty will apply to all covered investments made before or after the entry into force of this Agreement 'but shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before its entry into force.' In 2008, Ping An had instituted proceedings before the Brussels commercial courts concerning the legality of the allegedly forced sale of Fortis. In case the Tribunal deemed these proceedings to be the same 'dispute' or 'claim' as the one before it, Article 10(2) determines that such disputes continue to be settled by the 1984 BIT. As mentioned above, this earlier treaty has a lower standard of protection than its successor and, crucially, does not include a consent clause to ICSID arbitration.

In any event, the legal analysis will have to wait until the publication of the award, which will be reported in the CEPANI Newsletter.

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REFERENCES

Articles

• M. Berlingin, Bibliographie de M. Fontaine et D. Philippe (dir.), 'Contrats internationaux et arbitrage - International Contracts and Arbitration', JT, p. 411-412.

• G. Keutgen, 'La genèse d'une nouvelle loi sur l'arbitrage' dans *Contestation, Combats et Utopies,* Liber Amicorum Christine Matray, Larcier, 2015, p.303 et suiv.

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• CEPANI at the European Business Summit: Alternative Dispute Resolution and Brussels as a Hub for Arbitration

On May 6, CEPANI President Dirk De Meulemeester and Board Member Marc Dal held a presentation on CEPANI and arbitration in Brussels at the European Business Summit's "Meet the experts". The European Business Summit (EBS) is Europe's key annual meeting place and debating platform for business leaders and decision makers. Every year, the event attracts over 2000 participants. After their presentation, Mr. De Meulemeester and Mr. Dal discussed these topics further with an audience eager to learn more about arbitration and ADR in Belgium.

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