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

AGENDA

3/4 APRIL 2017	(00:00-00:00)	Brussels Pre-Moot 2017
8 APRIL 2017	(17:00-19:00)	CEPANI40 Vis Moot Networking drink
21 APRIL 2017	(12:00-14:00)	CEPANI lunch debate with Andrea Carlevaris
11 MAY 2017	(13:30-18.30)	Après-midi d'études CFA40 - CEPANI40 «Au secours, un Etat dans mon arbitrage!»
8 JUNE 2017	(16:00-18:00)	Assemblée Générale/ Algemene Vergadering/ General Assembly

REPORTS

REPORT ON THE CEPANI LONDON EVENT ON "HOW LEGAL TRADITIONS (STILL) MATTER IN INTERNATIONAL ARBITRATION "

Claire Morel de Westgaver
Litigation and arbitration lawyer
Bryan Cave

On 23 February 2017, three prominent international arbitrators shared their views and experience on the controversial question of the influence of legal traditions on arbitrators and arbitral proceedings. Juliet Blanch, Bernard Hanotiau and Pedro J. Martinez-Fraga were interviewed by Oliver Caprasse and Claire Morel de Westgaver at an event jointly organised by Belgian arbitration institution CEPANI and US law firm Bryan Cave. Dirk De Meulemeester, President of the CEPANI, and Maria Gritsenko gave the introductory notes.

Arbitrator nomination and appointment

When it comes to the arbitrator selection process, mixed perceptions exist as to the importance of legal traditions. An arbitrator's legal background may be the subject of stereotypes. A classic example of such a stereotype is the scope of document production which counsel sometimes assumes can automatically be limited through the nomination of a civil law trained arbitrator.

It was noted that counsel tends to get excessively engrossed on the question of legal backgrounds. Although an arbitrator's legal training may be relevant with junior lawyers or litigators, more experienced arbitrators tend to understand both civil and common law – notwithstanding the fact that common law can be very different depending on the jurisdiction in question. The panel agreed that more weight should be given to a prospective arbitrator's experience and qualifications. For example, it was noted that there are cases that benefit from having a non-lawyer involved as arbitrator.

Advocacy and evidence

Advocacy style can be adapted based on the circumstances including the background and experience of arbitrators. If the arbitral tribunal is composed of three QCs, English Court style advocacy might prove more effective. However, given that tribunals, and in fact arbitrators themselves, are often of mixed backgrounds, a particular style might not necessarily be any more helpful.

As regards the conduct of cross-examination, it transpired from the discussion that common law trained lawyers might be better placed than civil law lawyers who generally do not receive such training. It was said that a well-conducted "QC style" cross-examination could be "a real delight". With regard to how arbitrators approach cross-examination, it was also noted that ultimately, arbitrators cannot extract themselves from who they are: cross-examining witnesses is generally more natural in Anglo-Saxon jurisdictions, meaning that how a document is being used and what it purports to prove is not always scrutinised in the same way by lawyers from across jurisdictions.

When asked about the influence of national legal systems on evidence, it appeared from the discussions that the scope of both documentary and witness evidence tends to be overly broad across the board, civil law and common law lawyers continue to differ in how they view and interpret a document. Generally, from the perspective of a civil law lawyer "the document speaks for itself".

In contrast, a common law lawyer might feel the need to have witnesses introduce documents and examine witnesses in relation to the content of a document that would appear self-evident to a civil law lawyer. It was further advised that counsel often lose track of the two main purposes of cross-examination: impeachment and admission. In relation to bridging the gaps

between different legal traditions on evidence, the safest option remains sticking with the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

Settlements

The panel testified that it is not unusual for parties to approach arbitrators to seek their preliminary views on liability but also sometimes on quantum. If the arbitrators engage in this process, this is always on the basis that the tribunal will not be bound by such preliminary views. In fact, parties will sometimes agree in writing not to challenge the arbitrator(s) and/or the ensuing award(s) on the basis that such preliminary views were given.

The validity of such a waiver – which could in turn vary across jurisdictions – was questioned by the panelists.

Settlement in the context of arbitral proceedings is an area where the legal culture, in particular the seat of the arbitration, has an impact on the role of arbitration. The process by which arbitrators share their preliminary views on the dispute is more common in certain jurisdictions, such as Germany and Switzerland. Panel members expressed reservation about engaging in this process unless sitting in jurisdictions where such a practice is commonly accepted. In the same vein, the panelists discussed whether it is appropriate to suggest that option to parties, or whether it is preferable to consider it only when expressly sought by the parties.

Sua sponte

Another important topic, which led to very interesting discussion, was sua sponte actions by arbitrators. It emerged from the discussion that whether arbitrators may or should sua sponte raise questions of law may depend on many factors, including the seat of the arbitration, the applicable law, the legal background of the arbitrators and the public policy character of the norm. The principle of iura novit curia was cited as an example of rule relied upon by arbitrators to raise questions of law on their own initiative. Such rule tends to be inexistent in jurisdictions where parties are to prove the law.

Decision making process

Reference was made to the Spanish Supreme Court in the Puma case (Spanish Supreme Court 102/2017, 15 February 2017) where an award was set aside and two of three arbitrators were found professionally liable for excluding their fellow arbitrator from the deliberations. The panel noted that there were sometimes cultural differences in how arbitrators approached the decision-making process, including the deliberations. In this case, it remained to be seen what evidence of the exclusion of the third arbitrator had been adduced in the ensuing litigation.

In this context, it was noted that it is not uncommon in investment treaty cases to have an arbitrator seeking to further his or her appointing party's agenda – whether consciously or not. Only a minimal number of dissenting opinions come from arbitrators appointed by the successful party. It could, however, be argued that dissenting opinion statistics demonstrate effective selection of arbitrators, thereby proving that cultural background might indeed play a role in the arbitrator selection process. The panel however was adamant that the issue was more likely one of personality or honest belief in different legal theories.

This article by Claire Morel de Westgaver and Sebastien Krier also appeared on the KluwerArbitrationBlog (click here)

REPORT ON THE CEPANI COLLOQUIUM ON "THIRD PARTY FUNDING IN ARBITRATION"

Bart DE BOCK
lawyer
Allen & Overy (Antwerp)

On 9 March 2017, CEPANI hosted a colloquium on third party funding in arbitration. The successful turnout not only emphasises that this is a new and "hot" topic in arbitration, but most definitely was due to the esteemed speakers willing to share their knowledge and experience with the audience.

Apart from the Belgian legal experts Didier Matray, Peter Callens, Françoise Lefèvre, Dirk Van Gerven and Dirk De Meulemeester, there were also the well-known French arbitrator, Hamid Gharavi, and the Dutch president of LCIA, Jacomijn van Haersolte van Hof, which gave the event an international dimension. In addition, CEPANI was pleased to welcome Chris Bogart, CEO and co-founder of Burford Capital LLC, an investment firm specialised in "litigation and arbitration finance" and a frequent funder of arbitration proceedings.

What is third party funding in arbitration? - The colloquium first looked at clarifying the rather broad concept of third party funding in arbitration and then looked to shed light on the many mysteries, uncertainties, superstitions and challenges surrounding third party funding.

It was Didier Matray, Vice-President of CEPANI and experienced attorney-at-law and arbitrator, who gave a general introduction by explaining that to him, third party funding in arbitration meant that a third party funder bears the costs of a party's arbitration proceedings in return for a substantial share in the amount awarded in those proceedings, if and when that party is successful.

For Chris Bogart from Burford Capital LLC, third party funding in arbitration is a much broader concept, capable of encompassing a specialty corporate finance product focused on arbitration claims as financial assets (contingent liabilities), and open to investors.

For Peter Callens, third party funding could take the form of a silent partnership or even an alternative investment fund between the third party and the party to the arbitration. However, Françoise Lefèvre qualified the arrangement as a *sui generis* contract, with elements of a partnership, a services agreement and a loan agreement.
Everyone agreed that it is definitely not just a loan, assignment of debts or claims, legal expense insurance, game/bet or a *pactum de quota litis*.

Ethical issues - One of the recurrent themes of the colloquium was the many ethical issues that arise in relation to third party funding in arbitration.

Although third party funding in arbitration is perceived as making it easy for all persons to access justice, critics highlight that it may encourage unfounded litigation that is tainted by business incentives. However, the speakers all agreed that the concept of third party funding is (or should be) generally accepted from an ethical perspective.

The speakers shared the pros and cons of the need to disclose to the arbitral tribunal that a party to the proceedings is being funded by a third party. Such disclosure could potentially lead to discussions with the arbitral tribunal and the opposing party about conflicts of interests, influence of the arbitral tribunal, interference with the arbitral proceedings, disclosure of the funding terms etc. Dirk Van Gerven emphasized that it is best to communicate the terms of the third party funding arrangement to the arbitration institute or the other party. An alternative solution is that counsel to the funded party in the arbitral proceedings should make a judgment call, taking into account the risk of annulment of the arbitral award in case of non-disclosure.

The confidential nature of arbitral proceedings and the professional secrecy rules applicable to counsel become relevant when the third party funder wishes to perform a due diligence exercise to assess the merits of the claim (and consequently, the viability of the investment).

The speakers also discussed the interaction between (counsel of) a funded party and (counsel of) the funder. Will the third party funder play an active role in the arbitration and case management? Are there potential conflicts of interests between the funder and the funded party, for example when a funded party receives a settlement offer? Chris Bogart from Burford Capital LLC shared the view that the third party funder should not interfere (or if it did, on a very limited basis) with the case handling of the funded party.

Practical experiences - The colloquium concluded with Hamid Gharavi and Jacomijn van Haersolte van Hof sharing their practical experiences of third party funding in arbitration. This gave the audience a very interesting insight into third party funding.

Conclusion – Reference is made to Didier Matray's statement at the beginning of the colloquium, when he predicted that third party funding will become a key feature in (international) arbitration. It is fair to assume that after this colloquium everyone agreed that this will undoubtedly be the case. In that regard, an interesting point was made by Dirk Van Gerven, who suggested that the arbitration institutes should issue a policy in relation to third party funding.

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° Distribution Contracts and Antitrust Law in International Arbitration – The Arbitrators' Challenge
Karl von Hase, Anne C. Wegner & Miroslav Georgiev

° The jurisdiction ratione temporis of international investment tribunals – Some observations on the Decision of the Tribunal in Ping An v Belgium
Eric De Brabandere & Saskia Lemeire

° Back to the CJEU's Gazprom judgment: anti-suit injunctions, arbitration and Brussel I(bis) regulations
Olivier van der Haegen

° When arbitrators miss the deadline for notifying the award… and how easily avoid this nightmare (Case note on Swiss Federal Supreme Court decision 140.III 75 of 28 January 2014)
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° De quelques récents arrêts du tribunal fédéral suisse
Laurent Hirsch

Rechtspraak/Rechtsprechung/Case Law/Jurisprudence

Nederlandstalige rechtbank van eerste aanleg Brussel (24e kamer) 3 november 2014
Cour de cassation, chambre civile 1 15 janvier 2014

Informatie en documenten/Informationen und Dokumenten/Information and documents/ Information et documents

Aanpassing van de Belgische arbitragewet door de wet van 25 december 2016
Herman Verbist

Boekbesprekingen/Buchbesprechungen/Book reviews/Recensions

N. Bassiri, M. Draye, Arbitration in Belgium – A practioner's guide
Damien Devot & Philippine Gaudoux

NEWS

» 4TH BRUSSELS PRE-MOOT

The 4th Brussels Pre-Moot will be held on 3rd and 4th April 2017.

The Brussels Pre-Moot is a pre-competition for the popular Willem C. Vis International Commercial Arbitration Moot on International Sales Law and International Arbitration in Vienna and Hong Kong. The Pre-Moot will help the teams to improve their pleading skills just before the official Moot in Vienna. This year's edition of the competition is based on the CAM-CCBC Rules (Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada).

For more information and to enroll as an arbitrator, please go to www.brusselspremoot.be.

» CEPANI 40 EVENT DURING THE VIS MOOT IN VIENNA

The 24th edition of Willem C. Vis International Commercial Arbitration Moot will take place from 6 to 13 April 2017 in Vienna. The traditional CEPANI 40 networking drink (co-hosted by Lydian) will be held on Saturday 8 April 2017 from 17:00 to 19:00 PM at Planter's Club. For more information and registration, see here.

» ICCA PROGRAMME FOR 24TH ICCA CONGRESS ON "EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL ARBITRATION"

The theme for the 2018 Congress, which will be held in Sydney, Australia from 15-18 April 2018, 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 programmes 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

» INTERACTIVE KNOWLEDGE SHARING SESSION AT THE ICC INTERNATIONAL COURT OF ARBITRATION ON 13 APRIL 2017

On 13 April 2017, the ICC will host a special interactive knowledge sharing session at its Paris headquarters for Belgian arbitration practitioners. Mr. Alexis Mourre, President of the ICC International Court of Arbitration, will introduce the afternoon by a speech at 14:30, which will be followed by a round-table discussion with other members of the Court's Secretariat. This event is on personal invitation only. For more information, click here.

» DISPUTE RESOLUTION IN M&A TRANSACTIONS CONFERENCE ON 18-19 MAY 2017 IN WARSAW

For the fourth time, the Lewiatan Court of Arbitration hosts the Dispute Resolution in M&A Transactions conference which will take place on 18-19 May 2017 in Warsaw (Polonia Palace Hotel). The programme promises an extensive two-day conference with the participation of world-class experts to ensure thought-provoking discussions on cutting-edge practical issues in arbitrating M&A disputes, mainly focusing on pre-closing M&A disputes, non-monetary relief, and M&A disputes in a publicly listed companies environment.

For more information, please visit the website or e-mail at conference@arbitrationcourt.org.pl

VARIA

- 6 APRIL 2017: a half-day seminar co-hosted by YIAG and the Moot Alumni Association will be held during the Vis Moot in Vienna. The topics are "Security for Costs" and "Time limits and commencement of arbitration".

- 8 APRIL 2017: ICC YAF and YAAP are organizing their joint annual conference during the Vis Moot in Vienna, on the topic: “Young approaches to arbitration”.

- 24 APRIL 2017: The first 1st ICC European Conference on International Arbitration will be held in Paris.

- 25 APRIL 2017: the next ICC Commission on Arbitration and ADR will be held in Paris.

- 26 APRIL 2017: ICC Institute Training for Tribunal Secretaries in Paris.

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