CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

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

AGENDA

19/20 FEBRUARY 2018	(00:00 – 00:00)	Brussels Pre-Moot
24 APRIL 2018	(12:00 – 14:00)	ICC – CEPANI – ICC Belgium Lunch Debate with Alexander Fessas (ICC)
7 JUNE 2018	(14:00 – 19:00)	Assemblée Générale/ Algemene Vergadering/ General Assembly

INTERVIEW AND REPORTS

INTERVIEW WITH PROFESSOR PHILIPPE LAMBRECHT, VICE-PRESIDENT AND FORMER SECRETARY GENERAL OF CEPANI

Professor Philippe LAMBRECHT,
CEPANI Vice-President

On 1 September 2017, Professor Philippe LAMBRECHT officially passed the torch of CEPANI Secretary-General to Ms. Emma VAN CAMPENHOUDT to take up his new position as CEPANI Vice-President.

Enough reasons for the editorial board of the CEPANI Newsletter (EB) to get a hold of Professor LAMBRECHT (PL) for a look back on his tenure as Secretary General.

EB: Could you give us a brief overview of your professional background?

PL: I was a member of the Brussels Bar from 1984 until 1989. Then I joined the Belgian Banking and Financial Commission (today FSMA). I worked for their legal department until 2000, when I became Deputy Director in charge of Financial Information. In 2003, I became Secretary General of the Federation of Enterprises in Belgium (VBO/FEB), a function I still hold today. In this capacity, I am responsible for the legal secretariat of the VBO/FEB (general meeting, board, strategic council, etc.), for operations (finance, human resources, facilities, IT, etc.) and for the legal department. I further am a member of different organizations where I represent VBO/FEB, including UWE, BECI, the Business Europe Legal Affairs Committee, the Belgian Corporate Governance Committee, Guberna, CEPANI, the Brussels School of Competition, ICC Belgium, Women on Board, etc. I am also a

professor at the Université Catholique de Louvain, where I teach Financial Markets Regulations, Corporate Governance and Entrepreneurship.

EB: How did you first get in touch with arbitration and how did you get involved with CEPANI?

PL: When I joined the VBO/FEB, I became a member of the board of directors of CEPANI, as director appointed by the VBO/FEB. As you may know, the VBO/FEB is one of the founding members of CEPANI. At that time, I had already learned a little bit about arbitration thanks to my friendship with then CEPANI President Professor Guy KEUTGEN, whom I know since 1992 at the Université Catholique de Louvain.

When Professor KEUTGEN stepped down as Chairman, Professor Michel FLAMÉE became his successor as President and I became Secretary-General. After the presidency of Professor FLAMÉE, Dirk DE MEULEMEESTER and I continued to work together, until we felt that Emma VAN CAMPENHOUDT – who served as Deputy Secretary General – was ready to become the new Secretary General.

EB: How do you look back on your time as CEPANI Secretary-General?

PL: I very much enjoyed working for CEPANI. The Secretary-General has quite a few tasks on his desk. To achieve those, I was first and foremost assisted by the CEPANI Secretariat. But I could also always count on the members of the Bureau and the Board of Directors. One of the great things about CEPANI in my view is that you get the chance of meeting many fantastic arbitration specialists in our Board and at different events.

As Secretary-General, I strived to develop CEPANI as an institution and to increase its exposure, not only in Belgium, but also in Europe and on the international scene.

During my tenure, we for example launched Brussels as the European Arbitration Hub. I also tried to increase awareness among businesses and company lawyers to better understand the advantages of arbitration to settle disputes.

I feel very fortunate to have had the chance to work closely with Michel FLAMÉE, Dirk DE MEULEMEESTER, but also with my colleagues of the Bureau and, of course, with Emma VAN CAMPENHOUDT.

With my colleagues Didier MATRAY and Dirk VAN GERVEN, we had the chance to meet twice with Turkish lawyers interested in arbitration. The first time we were in Turkey turned out to be quite an adventure. Mr. MATRAY and I decided to take one of these boats crossing the Bosporus to get to the National Airport in the Asiatic part of Istanbul. We then took small local cabs and busses instead of the normal road over the Bosporus bridge. I think that Mr. MATRAY had some doubts as to whether we would ever get to the airport, but, as always, he was a gentleman and did not say anything. In the end, we made it to the airport three hours earlier than if we had taken the car!

It was also in Istanbul that, thanks to Belgian Consul Henri VANTIEGHEM, we realized the potential of promoting CEPANI through Belgian diplomacy, which is a path we have continued to develop since.

EB: What do you consider the greatest accomplishment during your tenure?

PL: One is never a good judge of one's own accomplishments. I think that during my tenure CEPANI had the chance to grow into a more modern organization that looks confidently into the future.

EB: What would you like to see change in the future (for arbitration in Belgium in general or CEPANI in particular? Or both?)

PL: In my opinion, arbitration should be mindful of Anglo-Saxon practice, which may render arbitration slower than it should. Arbitration is especially meaningful for businesses if it offers a faster, more reliable and more expert solutions to settling disputes than litigation before the state courts. If arbitration cannot keep its particularity, this may jeopardize its future.

I further feel that the public opinion should look at arbitration in the same manner than it looks at a court of justice. There is no such thing as "private justice". An arbitral award settles the dispute just like a judgment does.

EB: What would be your advice to the new Secretary-General?

PL: I wish Emma VAN CAMPENHOUDT lots of success as the new Secretary-General. I would advise her to keep up the good job she has been doing in her previous roles at CEPANI. She is a very clever person with a fantastic network in the arbitration world. She is also the first woman to become Secretary-General of CEPANI. I am certain that she will continue to develop her qualities in this new challenge.

I could advise her to continue her efforts in making sure that the Belgian arbitration community keeps on developing itself within CEPANI. Our goal should further be to increase the role of Brussels in international dispute resolution.

EB: What do you hope to achieve as Vice-President?

PL: I feel that Brussels has many assets that can be developed further. Brussels is the seat of the European Institutions, of NATO and of many other international organizations. Our place in the legal business, and more particularly, in international dispute settlement should be more widely recognized. Although Brexit is a lose-lose operation for both the United Kingdom and for Europe, I believe that we could bring part of the legal business of London to Brussels. In my new role, I will do my best to convince the business community, the public authorities and the legal community to seize this opportunity.

EB: Many thanks Professor, we wish you the best of luck in your new role.

REPORT ON THE JOINT KCAB - CEPANI COLLOQUIUM ON ARBITRATION IN CORPORATE MATTERS

(BRUSSELS, 25 OCTOBER2017)

José Rafael MATA DONA
Arbitrator, Lawyer and Accredited Mediator, Brussels

On 26 October 2017, shortly after the sixth anniversary of the EU-South Korea Free Trade Agreement, CEPANI and the Korean Commercial Arbitration Board (**KCAB**) held a joint colloquium in Brussels. The event followed the signature of a cooperation agreement earlier in June within the Belgian Princely Mission to South Korea.

The floor was opened with a word of welcome from CEPANI Vice President Dirk VAN GERVEN and KCAB President Sung BAE JI. On the Program were (i) the Korean international arbitration landscape and (ii) the enforceability of South Korean awards in Belgium.

Korean arbitration landscape.

Ji Ho KIM, Executive Director of the KCAB gave an overview of the arbitration framework of South Korea (officially the "Republic of Korea"), today the world's 15th-largest economy.

The Republic of Korea accessed the New York Convention in 1973 with a reciprocity reservation and declared that it would apply the Convention only to differences arising out of legal relationships, which are considered as commercial under its national law. The Korea Arbitration Act (**KAA**) was originally enacted in 1966. In 1999, the KAA was amended for the first time to fully adopt the 1985 UNCITRAL Model law and, for the second time, recently in 2016 to incorporate the amendments of the Model Law as of 2006.

In a nutshell, the total number of the KCAB arbitration cases was 413 in 2015, 381 in 2016 and 287 until Sept. 2017. Last year, the duration of International Arbitration proceedings was on average 11 months and the average claim amount for international cases was USD 2.9 mio, for a total claim amount of over USD 1.6 bio. During the past three years, China was number one in the KCAB ranking of countries in international arbitration cases, followed by the USA, Vietnam, Indonesia, Malaysia and France. The KCAB has built up an international reach, with offices in Shanghai, Seoul, Busan and Los Angeles in the U.S. It has an International Arbitration Committee, which includes some of the biggest names in arbitration such as Bernard Hanotiau, Gary Born, Lucy Reed, Jan Paulsson and Neil Kaplan, and manages a wide spectrum of arbitration cases by industry. Based on the cases it has administered, the most commonly arbitrated disputes were Construction (36 %), others (26%), trade (11%) and IT and entertainment (6%).

Interestingly, CEPANI and the KCAB were established very close in time during the second half of the last century. 2016 was a jubilee year for the KCAB. CEPANI will commemorate its 50th anniversary in 2019.

Next speakers were Young SEOK LEE, Secretary General of the Seoul International Dispute Resolution Center (**IDRC**) and Kay-Jannes WEGNER,

Senior Foreign Counsel at Kim & Chang, Seoul. The former referred to South Korea as a noteworthy arbitration-friendly jurisdiction with a high-quality level judicial system. While in 2016 the Korean judicial system ranked 2nd in enforcing contracts, one year after the same source ranked it 1st (see Doing Business 2017 report of World Bank, published on October 26 2016) with 290 calendar days required to enforce a contract. To a large extent, Korea is evaluated as the best in expeditious procedure and low litigation cost.

According to Article 37(6) of the KAA, the party applying for the enforcement of an arbitral award must submit the authentic copy or a copy of the arbitral award. If an arbitral award is written in a foreign language, it must be accompanied by a translation to Korean.

A Belgian arbitral award will be enforced unless there exist any of the grounds for refusal of enforcement under the New York Convention, which are largely identical to those found under Article 36(2) of the KAA. Some of the main takeaways of Mr. LEE's speech can be summarized as follows:

- In Korea, it is possible to enforce a foreign arbitral award with pending challenge proceedings in the foreign State where the decision is granted;
- Before the amendment of the KAA in 2016, the enforcement of interim measures was not allowed at all. With the incorporation of the 2006 UNCITRAL Model Law, there can be an argument that Korean courts may alter a granted relief in international arbitration with respect to interim awards, but this has not yet been tested before the Korean courts;
- When the relief sought is a specific performance, the enforcement might not be as prompt as expected. It depends on how the relief is drafted in the award. In Korea, it is more complicated to enforce an order for specific performance than an order to pay;
- If the provisions of a contract, e.g. a distribution contract, have been held valid under the substantive law governing the arbitration, its enforcement should not pose problems in Korea.

Next, Kay-Jannes WEGNER shared his views on (i) the harmonization of the practice of International Arbitration in Korea (ii) the pitfalls of contracts not issued in the language of the governing law and (iii) the "traditional" national approach to disputes in general.

Enforceability of South Korean awards in Belgium

As explained by Niuscha BASSIRI, a partner at Hanotiau & van den Berg in Brussels, Belgium has ratified the 1958 New York Convention with a reciprocity reservation. However, a party seeking enforcement of a South Korean award may always base its request on the provisions of the Belgian Law on Arbitration (**BLA**) if it considers that these rules are more favourable (Article VII New York Convention). Though it retains a number of specificities and has added a number of features, the BLA largely adopts the UNCITRAL Model Law of 1985, with amendments adopted in 2006.

The enforcement procedure is set out in Articles 1719 to 1721 of the Belgian Judicial Code (**BJC**). Ms. BASSIRI structured her speech around the following five referential questions:

1) Where do enforcement proceedings commence?
2) What is arbitrable in Belgium?
3) How to determine the competent court?
4) What is the language of the procedure?
5) How to enforce?

1. Ms. Bassiri explained that if the intervention of the courts is required for the enforcement of a South Korean award, the claim will fall under the jurisdiction of the Court of First Instance whose seat is that of the Court of Appeal in whose jurisdiction the place of arbitration is fixed. In practice, this means that only the following specialized Courts of First Instance have subject-matter jurisdiction in case one party has sought leave to enforce the arbitral award (exequatur): the two Courts of First Instance of Brussels and the Courts of First Instance of Antwerp, Ghent, Mons and Liège.

2. Importantly, Ms. BASSIRI commented on the arbitrability of a dispute because the Court of First Instance may refuse to enforce a South Korean arbitral award if it finds that the subject matter of the dispute was not capable of settlement by arbitration. Belgian courts address the arbitrability question by reference to the *lex fori*. Moreover, the arbitrability question incidentally also applies to the enforcement of South Korean tribunal-ordered interim and conservatory measures, which follow a distinct enforcement proceeding (see Articles 1696-1697 BJC).

Thus, after commenting on the legal capacity of the contracting parties to conclude arbitration agreements, Ms. BASSIRI raised the principle governing the question of whether a dispute can be submitted to arbitration considering the restrictions of mandatory Belgian law and public policy. Briefly, any dispute involving an economic interest may be arbitrable in Belgium. This criterion must be interpreted broadly and without prejudice to the exceptions provided under *lex specialis* provisions. Yet, claims regarding disputes that do not involve an economic interest with regard to which a settlement agreement may be made may also be submitted to arbitration.

3. Ms. BASSIRI made clear that the Court of First Instance with territorial jurisdiction is determined by reference to the person against whom enforcement is sought. Thus, in case of a natural person, the determining factor is the domicile or, in absence of a domicile, the usual place of residence. For a legal entity, this is the registered seat or, failing this, the place of business or branch office. Should the party against whom enforcement is sought have no domicile, residence, registered seat, establishment or branch in the country, the court with territorial jurisdiction over the place where enforcement is sought is competent to hear the application for enforcement.

4. Next, Ms. BASSIRI explained that award creditors may seek leave of enforcement of South Korean awards in a) Dutch, or in French, before one of the two Courts of First Instance of the district of the Court of Appeal of Brussels, b) in Dutch before the Courts of First Instance of Antwerp and Ghent, c) in French before the Court of First Instance of Mons, and d) in French before the Court of First Instance of Liège. All issues pertaining to the language of the enforcement proceedings are regulated by the Act of 15 June 1935 concerning the use of languages in judiciary matters, which is mandatory.

5. Finally, as to the enforcement procedure, Ms. BASSIRI specified that the party applying for the enforcement of a South Korean arbitral award shall enclose with his request the original or certified copy of the arbitral award, a translation of which may be requested by the court. The application for exequatur is filed *ex parte* with the court, and only in writing, by means of a unilateral request with must fulfil the conditions set forth in Articles 1026 et seq. BJC. Additionally, it triggers a 3% registration duty in accordance with the Registration Duties Code.

In practice, enforcement orders are normally rendered within one month from the date the request is filed. The petitioner must elect domicile in the jurisdiction of the competent Court of First Instance and typically parties elect domicile at the offices of the lawyer involved. Prior to the enforcement proceedings, a party may proceed to a conservatory attachment of the assets of its debtor based on a South Korean arbitral award containing an order to pay.

The Court of First Instance will only control the award by reference to the exhaustive list of grounds for refusal of enforcement of the arbitral award listed in Article 1721 BJC, which generally adopts Article 36 of the UNCITRAL Model Law and is also generally similar to Article V of the New York Convention. Ms. BASSIRI accompanied her presentation with comments on some practical cases. For complementary information, the author of this note vividly recommends the Practitioner's Guide of Niuscha Bassiri & Maarten Draye "Arbitration in Belgium" published by Wolters Kluwer in 2016.

The Joint Colloquium KCAB-CEPANI elicited a lively session of Q&A.

All the above was stated under the clear disclaimer that the speakers' presentation pursued general informational purposes only, and must not be used as a substitute for consultation with professional advisors in the respective jurisdictions.

REPORT ON THE CEPANI 40 EVENING DEBATE ON "THE NEW GENERATION OF ARBITRATORS: CHALLENGES AND OPPORTUNITIES"

BRUSSELS, 23 NOVEMBER 2017

Inès VAN CAYZEELE
Attorney-at-Law
Monard Law, Brussels

On Thursday 23 November 2017, CEPANI40 held its evening debate 'The new generation of arbitrators: Challenges and Opportunities'.

It is the first event organized by Ms. Sophie GOLDMAN (Tossens Goldman Gonne) and Ms. Sigrid VAN ROMPAEY (Matray, Matray & Hallet) as new co-chairs of CEPANI40. Support was given by ICC Belgium and Young Arbitral Women Practitioners (YAWP).

The purpose of the event was to give its participants some practical insights into the opportunities and, perhaps even more so, the challenges young arbitrators face when venturing into arbitration. Special attention was given to the advancement of women in arbitration.

After an introductory note by Mr. Dirk VAN GERVEN (NautaDutilh, Brussels), Ms. Florence RICHARD (ICC Paris) took the stage as the first out of five panellists. Ms. Richard focused on the criteria the ICC uses when selecting arbitrators and the scrutiny young arbitrators may face.

With a very spirited intervention, Mr. Olivier CAPRASSE (Caprasse law firm, Brussels) depicted arbitration as an "old boys' club", whose authority should not be feared but challenged.

Specific challenges first-time arbitrators might encounter such as non-representation, non-appearance and non-participation were handled more in depth by London-based Ms. Claire MOREL DE WESTGAVER (Bryan Cave, London).

Ms. Mélanie VAN LEEUWEN (Derains & Gharavi, Paris) elaborated on how to avoid having an arbitral award challenged, thereby giving her audience some key insights into how to structure awards.

Mr. Dirk VAN GERVEN concluded by highlighting the importance of equal representation in arbitration.

The evening ended with an exquisite cocktail party, courtesy of NautaDutilh, generous host of the evening.

NEWS

» **ONE YEAR ANNIVERSARY OF CEPANI'S COMMITMENT TO THE PLEDGE**

On November 10, 2016, the CEPANI Board of Directors signed the pledge for equal representation in arbitration. By doing so CEPANI confirmed its will to take all the steps reasonable to it to ensure equal representation in arbitration.

The full signed document can be consulted here.

» **SAVE THE DATE: BRUSSELS PRE-MOOT 2018 ON 19 AND 20 FEBRUARY 2018**

In preparation of the Willem C. Vis Moot on International Commercial Arbitration, the Brussels Pre-Moot 2018 will take place on 19 and 20 February 2018. The 2018 edition will be organized and sponsored by Tossens Goldman Gonne, Linklaters and Jones Day. More details can be found here. For any questions or to be included on the arbitrator mailing list (for those who have not participated in the past), please contact brussels.premoot@gmail.com.

The Vis Moot will take place from 23-29 March 2018 in Vienna.

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

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

For more information, click here

VARIA

» ANGOLA became the 157th Contracting State to the New York Convention. The Convention entered into force in the country on 4 June 2017. The full list of Contracting States can be consulted here.

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