CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

#116

October 2017

AGENDA

7 NOVEMBER 2017	(17:30 – 19:30)	Colloquium on CEPANI's ADR Rules
23 NOVEMBER 2017	(17:30 – 20:00)	Cepani40 Debate Night on "The new generation of arbitrators: Challenges and Opportunities"

APPOINTMENT OF THE NEW CEPANI40 CO-CHAIRS

The Cepani has appointed two new co-chairs of its below 40 organization, **Sophie Goldman** and **Sigrid Van Rompaey**. The official handover took place at the CEPANI General Assembly in June. The new CEPANI40 co-chairs succeed Vanessa Foncke (JonesDay) and Benoît Kohl (Stibbe), whose enthusiastic efforts during their four-year term were praised in an address by the CEPANI President, Dirk De Meulemeester.

Sigrid Van Rompaey, Partner at Matray, Matray & Hallet, served as Counsel at the CEPANI Secretariat from 2011-2014 and was later appointed Expert Advisor to the Secretariat. Sophie Goldman is a founding Partner of the law firm Tossens Goldman Gonne and is actively involved in CEPANI's activities.

The new co-chairs put together an auspicious Steering Committee consisting of Maarten Draye (Hanotiau van den Berg), Olivier van der Haegen (Liedekerke), Gautier Matray (Matray, Matray & Hallet), Claire Morel de Westgaver (BryanCave), Marijn De Ruyscher (Lydian), Maxime Berlingin (FieldFisher), Kevin Ongenae (JonesDay) and Emma Van Campenhoudt (Secretary General Cepani).

The exciting Cepani40 program of events will kick of the 23rd of November with a debate night on "The Next Generation of Arbitrators: Challenges and Opportunities". The event, free of charge, is co-organised with ICC Belgium and YAWP and hosted by NautaDutilh.

An internationally renowned panel of speakers will guide the audience through an interactive session on the challenges and common pitfalls young arbitrators are faced with from their authority within the tribunal to the drafting of the award, but also the opportunities for this generation. Cepani40 is honored to welcome following international field experts on the debate night, Florence Richard (ICC), Olivier Caprasse (Caprasse law firm), Claire Morel de Westgaver (Bryan Cave), Mélanie Van Leeuwen (Derains & Gharavi) and Dirk Van Gerven (NautaDutilh). Each presentation will include a Q&A session and interactive discussion amongst the participants. All participants are encouraged to share their experience. Afterwards, a networking cocktail is kindly offered by NautaDutilh.

The new co-chairs will continue to strive to create opportunities for young professionals to debate all aspects of the practice of arbitration and to enable them to further engage in their area of interest. "*We will build upon the great work of our predecessors with various projects aimed at developing and showcasing the talent of the young arbitration community in Belgium and beyond*."

INTERVIEW AND REPORTS

INTERVIEW OF MRS EMMA VAN CAMPENHOUDT – NEW SECRETARY GENERAL OF THE CEPANI

Emma Van Campenhoudt
Secretary General of the CEPANI

As of 1 September 2017, Ms. Emma Van Campenhoudt (EVC) is the new Secretary General of the CEPANI, taking over from Professor Philippe Lambrecht, who remains on board as CEPANI vice-president. At this occasion, the editorial board (EB) of the CEPANI Newsletter got in touch with Ms. Van Campenhoudt to discuss her career path and to look forward to the projects she intends to undertake as CEPANI's Secretary -General.

EB: Congratulations, Mrs. Van Campenhoudt on your recent appointment as Secretary-General of CEPANI!

EVC: Thank you very much. Before going on, let me pay tribute to Professor Philippe Lambrecht for his work as Secretary-General of CEPANI and add my gratitude to that already expressed by the President in the previous issue of this Newsletter.

EB: How did you end up at CEPANI?

EVC: After my studies, I worked in a Brussels a law firm for three years before joining the CEPANI Secretariat full-time in 2007. During my time as a lawyer, I had already started working at the Secretariat for a progressive number of days: first one, then two and then three days a week at the CEPANI. The decision to join the CEPANI Secretariat full-time was therefore easily made.

Since joining the Secretariat, I have held all the posts of the Secretariat. When working part-time, I started as case manager, overseeing a number of cases. When joining full-time in 2007, I became deputy counsel then counsel and responsible of the secretariat, overseeing more cases and actively preparing board meetings and keeping up with the budget and finance. In 2014, I became deputy Secretary General, and, recently, Secretary General of the CEPANI. As Secretary-General, I manage the day-to-day operations of the CEPANI Secretariat and keep in contact with the President and the various organs of CEPANI regarding the many operations of the Institute.

EB: What would you like to achieve during your tenure as Secretary-General?

EVC: First of all, I would like to build on the various recent initiatives we started in recent years. A number of these recent projects include the formal scrutiny of arbitral awards, the "box" system for the filing of documents, the development of the new CEPANI ADR Rules, the promotion of "Brussels Place of Arbitration" and the online platform "Brussels Arbitration Hub", which helps arbitration users to find arbitration facilities in Brussels. We are very excited about these projects, which obviously contribute to promotion and development of arbitration and in general and at the same time, of course, help CEPANI to develop further.

EB: Are there any new projects in the pipeline?

EVC: We're always looking to develop new projects that can develop arbitration, make arbitration more known to potential users and to promote CEPANI. One of the things we're keen to explore, is to see how we can increase our use of new technology. One idea we're looking into is to make video capsules which will be posted on YouTube and other platforms to raise awareness of arbitration and reach out to those who do not know this efficient way of resolving disputes. In this connection our promotion of arbitration, also our working group has done some remarkable work and will set up a proactive road show.

EB: CEPANI has always been very active in providing education on arbitration through seminars and publications, is this something you intend to develop?
EVC: Absolutely. I think education and training have been key roles that CEPANI has been playing over the years, and this is something that we wish to continue building up. But this is something we're also doing more generally: we are constantly looking into ways to improve the quality of services rendered by CEPANI and the efficiency of the services of the Secretariat. As you may know, CEPANI has recently teamed up with Kluwer for its publications, we have had another successful session of our intern training days and we keep adding new colloquia and lunch debates to our calendar.

EB: 2019 will mark the 50th anniversary of CEPANI, is this something you plan to celebrate?

EVC: Half a century is an anniversary we don't want to let go by unnoticed! Without wanting to give away too much yet, we are currently working very hard on a revision of the Rules, which we want to introduce in 2019. We also have a team that is already working on the organization of an important event to celebrate CEPANI's 50th anniversary, but you will hear more of that in due course.

For now, let me thank people who work with me on a daily basis to develop arbitration in Belgium and beyond: CEPANI President Dirk De Meulemeester, whose dynamism, creativity, professionalism and profound knowledge of arbitration is very valuable. I also want to add a special mention for honorary president of CEPANI Professor Guy Keutgen, with whom I had the privilege of working closely for over 10 years. Professor Keutgen has always supported me and taught me most of what I know on arbitration today. Another person I should mention is honorary president Professor Michel Flamée. Last but not least, I obviously thank the team of CEPANI that allow CEPANI and myself to accomplish all that we are accomplishing, as well as its members, the Belgian committee of the ICC, the in-house counsels (IJE) and the city of Brussels who is very active in supporting CEPANI promote Brussels as a place for arbitration..

Thanks for your time – and best of luck with your new function!

The Editorial Board of the Newsletter

BRUSSELS PROHIBITS ARBITRATION CLAUSES IN RESIDENTIAL LEASES

Yves Herinckx
Lawyer and Solicitor
(England & Wales)

A new ordinance of the Brussels Region invalidates arbitration clauses in residential leases. Parties are free to opt for arbitration once a dispute has arisen, but they may not do so upfront. Arbitration clauses in retail or office leases remain valid.

The rule was published in the Moniteur / Staatsblad of 30 October 2017. It is now set out in Article 233, §2, of the Brussels Housing Code, inserted by the Ordinance of 27 July 2017 on the Regionalisation of Residential Leases (Ordonnance visant la régionalisation du bail d'habitation / Ordonnantie houdende de regionalisering van de woninghuurovereenkomst). The date of its entry into force must still be fixed by the Brussels Government. The target date appears to be 1 January 2018.

The ordinance aims at ending a practice that the Government regards as abusive. Arbitration clauses frequently appear in standard lease contracts sponsored by landlords associations. Tenants do not understand what they sign up to, lose access to the Justice of the Peace and are exposed to extra costs.

The legislative history makes it clear that arbitration clauses contained in current leases will become invalid as soon as the new ordinance enters into force. It is silent as to the effect on arbitration proceedings that will be pending at that time.

The Council of State objected that the Brussels Region lacks competence to legislate on the subject. Parliament overruled the objection, on the grounds that the matter is ancillary to housing policy. The question may eventually end up before the Constitutional Court.

REPORT ON NAI - CEPANI JOINT COLLOQUIUM ON TRIBUNAL SECRETARIES

(ROTTERDAM, 5 OCTOBER 2017)

Samuel Delcominette
Lawyer at Lydian

On 5 October 2017, CEPANI and NAI organised a joint colloquium in Rotterdam on the topic of Tribunal Secretaries in arbitration proceedings.

Five distinguished speakers addressed the challenges related to Tribunal Secretaries. They discussed which tasks Tribunal Secretaries could be entrusted with and the extent to which they should be regulated by the arbitration institutes or even under national arbitration acts. They also discussed the difficult balance to be reached between the importance of confidentiality through the arbitration process and the increasing demand for more transparency, an issue which is surely impacted by the role of Tribunal Secretaries.

Keynote speaker Constantine Partasides (Three Crowns, London) set the scene by discussing the increasing demand for transparency in modern arbitration. He started his pragmatic speech with an important warning to both practitioners and arbitration institutes: the absence of transparency necessarily creates a gap, which tends to be filled by misinformation. On the other hand, an excess of transparency can also lead to the same result. According to Partasides, the general tendency of 'implied confidentiality' should be reevaluated. He concluded by providing the audience with shining examples of previous accusations made toward secretaries in previous arbitration proceedings, such as the '4th arbitrator' argument raised by the Russian Federation in the famous Yukos case. In light of this, the role of the Tribunal Secretary should be clarified between the actors as from the beginning in order to avoid weakening the legal certainty.

Next, Jan Schaefer (King & Spalding, Frankfurt) addressed the tasks of the Tribunal Secretary from an economic point of view: "Time is money" and arbitrators' work must be perceived as a business. Therefore, "appropriate resource allocation should play a role in arbitration work". He reminded the audience that arbitrators do not only have to issue an award, this only being the final step which is preceded by many others that do not necessarily have to be performed by the arbitrators themselves. With regards to these tasks, it is possible to ask counsels to sort things out themselves or to opt for the services of a Tribunal Secretary. Schaefer explained that working with a Tribunal Secretary is the most beneficial of these two approaches for all actors involved in the arbitration process. It is also the most cost effective for the parties. Indeed, a true service approach would imply that logistical tasks should not be dealt with by cooperation among counsels because this leads to increased costs. A consequence of this point of view is that these savings justify a reimbursement of the Tribunal Secretary's costs, while many arbitration institutions adopting the fee schedule approach currently require the arbitrator(s) to pay for the Tribunal Secretary using the arbitrator fee budget.

The following speaker was Filip De Ly (Erasmus School of Law, Rotterdam) who guided the audience through rules and case law on Tribunal Secretaries. He started by highlighting that national legislators have remained silent on the issue of Tribunal Secretaries in arbitration, with few exceptions such as the Dutch Arbitration Act. Most rules on Tribunal Secretaries can however be found in rules and guidelines of arbitration institutions. According to De Ly, the key is to know exactly what tasks Tribunal Secretaries are really doing and to avoid obscurity with regard to the scope of their tasks. The speaker identified the pros and cons of, on the one hand, the opt-out system where it is acknowledged that the Tribunal Secretaries' work goes beyond administrative and secretarial tasks and where the parties can agree to restrict the role to such tasks (e.g. paragraph 3.4 of the HKIAC guidelines), and, on the other hand, the opt-in system which adopts the contrary principle: an obligation to consult with the parties on the tasks which can be performed by the Tribunal Secretary (e.g. Article 24 (2) of the SCC Rules). According to Filip De Ly, the latter has the merit of providing more certainty while the opt-out system may lead to greater uncertainty because the parties will not have clarified the scope of what substantive versus non-substantive tasks may be performed by the Tribunal Secretary before the start of the proceedings.

Françoise Lefèvre's (Linklaters, Brussels) presentation focused on the legal status of Tribunal Secretaries in Belgium. The Belgian Arbitration Act does not contain any provision about Tribunal Secretaries but some indications can be found in the Act about what the arbitrators must do themselves and must not delegate. It is for instance impossible for an arbitrator to rely on summaries prepared by the Tribunal Secretaries, or to let a Tribunal Secretary question a witness. The CEPANI also provides the practitioners with guidelines. Françoise Lefèvre concluded with a pragmatic observation: Tribunal Secretaries are useful (if not necessary) to improve the quality of the arbitration services provided and to lower the costs of arbitration. She clearly advocates that the Tribunal Secretaries' duties should be permitted to go beyond merely administrative tasks, but must take care to not compromise the quality of the process. Arbitration institutes will have to adapt in order to meet this challenge in the future and provide clients with cost-efficient dispute resolution services.

Martijn Scheltema (Pels Rijcken & Droogleever Fortuijn, The Hague), as last speaker, addressed the question of who is better placed to take up the role of

Tribunal Secretary. Basically, the Tribunal Secretary could be appointed by the litigants, the arbitrator or the arbitration institute. Under Dutch law, Article 1035a of the Civil Code of Procedure (Wetboek van Burgerlijke Rechtsvordering) provides for a legal framework if the arbitral tribunal is assisted by a Tribunal Secretary. Interestingly, Article 7 of the arbitration board for the building Industry (Raad van Arbitrage) also states that an ex officio Tribunal Secretary is automatically appointed and has an advisory role, which may raise some issue in terms of challenge grounds, disclosure and even potential liability. The conclusion of Martijn Scheltema is clear: the role of a Tribunal Secretary is in need of a legal framework.

Finally, a roundtable with Sophia von Dewall (Derains & Gharavi, Paris), Maarten Draye (Hanotiau & van den Berg, Brussels), Paul di Pietro (Deputy Counsel ICC) and Jean-Pierre Fierens (Strelia, Brussels) and moderated by Luc Demeyere (Contrast, Brussels) added great value to the issues raised by the five speakers. Before gathering the reactions from the audience, they mainly debated on the margins of appreciation which could be granted to the arbitrators in the choice of the Tribunal Secretary and to which extent arbitration institutes should frame this aspect (or not).

The colloquium was introduced by Willem van Baren, Chairman of the NAI and closed by Dirk De Meulemeester, Chairman of the CEPANI. Both agreed on the fact that sharing views on role of Tribunal Secretaries is the best way to lead us to the development of best practices with regards to Tribunal Secretaries.

Note of the author: the Note for Arbitrators issued by the LCIA in late October 2017 requires parties to specifically consent to the tasks a Tribunal Secretary (article 7.4.). This clearly reflects the use of an opt-in system.

REPORT ON 67TH SESSION OF THE UNCITRAL WORKING GROUP II (ARBITRATION AND CONCILIATION)

(VIENNA, 2-6 OCTOBER 2017)

Maxime Berlingin
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Lecturer at Saint-Louis University - Brussels

The 67th session of the Working Group II (Arbitration and Conciliation) was held in Vienna from 2 until 6 October 2017. CEPANI was represented by Emma Van Campenhoudt, Sophie Goldman, Sigrid Van Rompaey and Maxime Berlingin. The Belgian observer seat was taken by Mr. Jean-Christophe Boulet (advisor at the Belgian Ministry of Justice).

During this 67th session the Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation. The aim of the instrument is to promote conciliation and provide for an easy and fast enforcement which would further contribute to the development and promotion of conciliation.

At the beginning of the meeting, the President recalled the consensus that was reached at the 66th session of the working group, which was based on five key elements:
- the instrument would not speak of the "acknowledgment" of the settlement agreements, which the EU delegations did not want, but of the possibility of invoking those agreements to prove that the dispute was resolved;
- the settlement agreements entered into in the framework of judicial or arbitral proceedings would be excluded from the instrument;
- a possibility would be provided for States to declare that the Convention shall apply only to the extent that the parties to the settlement agreement have agreed on this application (opt-in system);
- a ground for refusing the enforcement would be linked to the case where the conciliator breached the generally accepted standards of conduct;
- the instrument would take the form of both an International Convention and an amendment to the 2002 Model Law on International Commercial Conciliation.

The first four Articles of the Draft Convention, which constitute its essential substantive provisions (i.e. Article 1 – Scope of application; Article 2 – Definitions; Article 3 – Application; Article 4 – Grounds for refusing to grant relief), were then examined successively by the working group.

With respect to Article 2, extensive discussions took place on the notion of "international settlement agreement".

On the Application of the Convention, the attention of the working group focused in particular on paragraph 3 which sets out the documents to be produced before the Court by the party who "rely on a settlement agreement under this Convention".

The working group also addressed the question whether the States should be given the opportunity to extend the application of the Convention and the Model Law to agreements other than conciliation agreements. The EU and the EU Member States opposed this proposal, notably on the grounds that it exceeded the mandate received by the working group. The President therefore decided to leave the question of the possibility of extending the application of the Model Law open, but not that of the Convention.

Finally, Article 4 discusses the very sensitive questions of the grounds that may be invoked to oppose an application for the enforcement of a settlement agreement. There was a discussion between, on the one hand, the delegations, particularly the EU, which were inclined to extend these grounds, at the risk of weakening the scope of the right, granted by the Convention, to invoke a settlement agreement and, on the other hand, the delegations, particularly the USA, which were anxious to ensure the effectiveness of the Convention and therefore not to unduly extend the list of grounds for refusal. The different grounds for refusal were then examined successively by the working group.

As noted above, one of the elements of the compromise reached by the working group at its 66th session was that the instrument would take the form of both an international Convention and an amendment to the Model Law on International Commercial Conciliation. In the context of the review of the Model Law, a new proposal was presented to amend the Model Law in order to incorporate the provisions relating to the implementation of the Settlement Agreements. Two questions were put to the attention of the Working Group by the President during the review of this document. The first question was whether, in connection with this modification of the Model Law, the word "conciliation", which had become somewhat outdated, should be replaced by the now more widely used word "mediation". The working group expressed itself mainly in favour of this change. The second question concerned possible technical issues raised by the incorporation of the Convention in the Model Law.
We look forward to the continued discussion in New-York during the 68th session in February 2018.

NEWS

» L'ASSOCIATION FRANÇAISE D'ARBITRAGE (AFA) VIENT D'ÉLIRE SON NOUVEAU PRÉSIDENT EN LA PERSONNE DE MARC HENRY.

L'Association Française d'Arbitrage (AFA) a annoncé l'élection de son nouveau Président en la personne de Maître Marc Henry. Docteur en droit de l'Université Paris I Panthéon-Sorbonne, auteur d'une thèse primée et publiée sur le devoir d'indépendance de l'arbitre, Marc Henry est associé du cabinet Hughes Hubbard à Paris, où il dirige son département de contentieux et arbitrage. Il a prêté serment en 1988. Il est spécialisé en contentieux des affaires et en arbitrage et s'est toujours employé à maintenir une activité doctrinale. Son élection reflète la transition générationnelle que son prédécesseur, Maître Bertrand Moreau, a souhaité accélérer au cours de son mandat.

L'AFA fête en 2017 ses 60 ans d'existence. Avec le soutien du conseil d'administration très largement renouvelé ces dernières années dans une démarche de diversité, Marc Henry entend redynamiser l'institution d'arbitrage et convaincre les acteurs économiques de l'intérêt de soumettre leurs différends à l'arbitrage institutionnel et à la médiation.

A cette fin, le nouveau Président de l'AFA déclare : « Je compte promouvoir les valeurs d'indépendance, de confidentialité, de souplesse et de mesure qui, depuis l'origine, caractérisent l'institution que j'ai dorénavant l'honneur de présider. Ces valeurs continueront d'inspirer les organes de l'AFA constitués de praticiens parmi les plus réputés de la place (avocats, juristes d'entreprise et professeurs d'universités) ».

» ICC COURT REVISES NOTE TO INCLUDE EXPEDITED DETERMINATION OF UNMERITORIOUS CLAIMS OR DEFENCES

The International Court of Arbitration of the International Chamber of Commerce (ICC) has announced an update to its practice note to parties and arbitral tribunals.

Approved by the Bureau of the Court on 25 October 2017 and discussed at the Court's annual Working Session from 26-27 October 2017, the new note provides guidance on the immediate dismissal of manifestly unmeritorious claims or defences.

The note stresses that such a case management tool is available under Article 22 of the 2017 ICC Rules. Any party may thus apply to the tribunal for the expeditious determination of one or more manifestly unmeritorious claims or defences. Applications must be made as soon as possible in the arbitration, the tribunal has full discretion as to whether they should proceed, and it will decide them as promptly as possible after giving to the parties a proper opportunity to be heard. The Court will scrutinise any award made on an application for the expeditious determination of a claim or defence in principle within one week of receipt by the Secretariat

» LCIA HAS UPDATED ITS NOTES FOR ARBITRATORS

The LCIA has updated its Notes for Arbitrators to implement changes to its tribunal secretaries processes. These changes maintain the flexibility of LCIA arbitration, clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries.

The key change to the processes is the strengthening of consent requirements. The LCIA now requires parties to specifically consent to the tasks a tribunal secretary may carry out, their remuneration, and their identity. These consent requirements are designed to ensure a productive discussion between parties and arbitrators, reducing the risk of challenges or other issues.

» CEPANI BEVEELT DE INFONAMIDAG VAN 30 NOVEMBER 2017 OVER SPORTRECHT AAN

Op 30 november 2017 van 14.00 tot 17.00 uur organiseert het Belgisch Arbitragehof voor de Sport een colloquium betreffende de Arbitrage in sportzaken, in de lokalen van het BAS, Boechoutlaan 9 te 1020 Brussel.

Meer info: klik hier

» **DAG VAN DE BEDRIJFJURIST – JOURNÉE DU JURISTE D'ENTREPRISE**

Op 9 november 2017 vindt de 28e editie van de Dag van de bedrijfsjurist plaats met als ontwerp "Het economische recht in beweging". De hoogdag voor bedrijfsjuristen met jaarlijks meer dan 200 deelnemers gaat dit jaar door in de Kanselarijstraat 1, 1000 Brussel.

Le 9 novembre 2017 aura lieu la 28e édition de la Journée du juriste d'entreprise avec pour thème le droit économique en mouvement. Il s'agit de la plus grande journée de l'année pour les juristes d'entreprise avec plus de 200 participants. Celle-ci aura lieu rue de la Chancellerie 1 à 1000 Bruxelles.

Meer info/Plus d'informations : cliquez ici

» **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.

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