CEPANI
THE BELGIAN CENTRE FOR ARBITRATION AND MEDIATION

#123

June 2018

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

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AGENDA

20 JULY 2018	(10:00 – 15:00)	CEPANI Intern Day
31 AUGUST 2018	(10:00 – 15:00)	CEPANI Intern Day
13 SEPT 2018	(12:00 – 14:30)	Launch of the 4th Queen Mary University of London (QMUL) International Arbitration survey
14 SEPT 2018	(08:30 – 18:00)	YOUNG ICCA - CEPANI40 Skills Training Workshop on "Cross-examination in international arbitration"
15 OCT 2018	(00.00 – 00.00)	Brussels Mediation Week (15-19 October 2018)
18 OCT 2018	(14:00 – 18:00)	CEPANI40 Half-day Academic Conference on the "Annulment and Enforcement from a comparative law perspective"

SAVE THE DATE

Dear colleagues and friends,

CEPANI is proud to be celebrating its 50 years of existence in 2019.

Please save the date so we can celebrate this milestone together!

The festivities will take place on November 13, 14 and 15, 2019.

THE FACTS

13 November 2019	20.00	CEPANI40 kick-off Cocktail *in a trendy Brussels bar*
14 November 2019	09.00-14.00	CEPANI Colloquium *CEPANI, Brussels*
	14.00-17.00	Academic Session *BOZAR, Brussels*
	18.00-23.00	Gala dinner *BOZAR, Brussels*
15 November 2019	10.00-13.00	CEPANI40 morning debate *Brussels*

Official invitation will follow.

Kind regards,

Dirk De Meulemeester,
President CEPANI

Emma Van Campenhoudt,
Secretary General CEPANI

REPORTS

COMPTE-RENDU DE L'EXPOSÉ DU PROFESSEUR FRANCO FERRARI : "LIMITATIONS TO PARTY AUTONOMY IN INTERNATIONAL ARBITRATION"

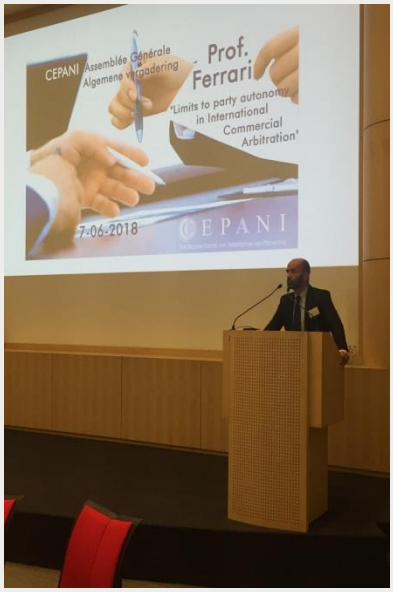
(BRUXELLES, 7 JUIN 2018)


Nicolas Delwaide
Rinaldo Saporito
Associates
Linklaters

Le 7 juin 2018, le CEPANI, à l'issue de son Assemblée Générale, nous a fait profiter de l'intervention plurilingue (en anglais, français, néerlandais et allemand !) du Professeur Franco Ferrari.

Franco Ferrari intervient comme arbitre dans diverses procédures arbitrales et est professeur, notamment, à la New York University, où il enseigne l'arbitrage commercial international et dont il dirige le *Center for Transational Litigation and Commercial Law*.

Le sujet du jour était consacré aux limites de l'autonomie de la volonté des parties dans l'arbitrage international. Après avoir rappelé le principe - l'autonomie de la volonté des parties est non seulement la source du pouvoir juridictionnel du tribunal arbitral mais en détermine également les modalités d'exercice - Franco Ferrari s'est attelé à nous exposer comment cette autonomie pouvait être limitée afin de protéger les intérêts des parties, du public, des arbitres et des institutions arbitrales.



L'intérêt des parties elles-mêmes peut justifier qu'il ne soit pas donné effet à leur volonté en toutes circonstances. En effet, les parties ne disposent pas toujours du degré de rationalité et de capacité requis pour poser des choix qui poursuivent leurs intérêts. Afin de protéger ceux-ci, il est dès lors parfois dérogé à l'autonomie de la volonté des parties. Cette protection se fait par le biais de mécanismes de contrôle *ex-ante* (par ex. contrôle direct ou indirect de la validité de la clause d'arbitrage, ce qui soulève des questions complexes de droit applicable) ou *ex-post* (par ex. sur la possibilité de restreindre ou d'étendre les motifs d'annulation de la sentence arbitrale).

L'intérêt du public en général peut également justifier qu'il soit dérogé à l'autonomie de la volonté des parties. Bien que la volonté des parties soit la source du pouvoir juridictionnel du tribunal arbitral, sa décision ne produit d'effets juridiques que parce qu'elle s'inscrit dans un système juridique qui le lui permet. Ce système doit donc être respecté par les parties. Ainsi, les parties ne peuvent pas déterminer elles-mêmes si la méthode de résolution de leur conflit peut être qualifiée d'arbitrage, ni si le litige peut être résolu par ce biais. Le contrôle de la conformité de la sentence arbitrale à l'ordre public constitue une troisième limite établie dans la protection de l'intérêt général.

La limitation de l'autonomie de la volonté des parties est par ailleurs motivée par la protection des intérêts des arbitres et de l'arbitrage en tant que mode viable de résolution des conflits. Le constat selon lequel la volonté des parties constitue la pierre angulaire de tout processus d'arbitrage ne peut avoir pour conséquence que chaque composante des pouvoirs juridictionnels des arbitres doive être préalablement soumise au consentement explicite des parties de déléguer celles-ci. Les compétences du tribunal arbitral de pouvoir se prononcer sur sa propre compétence – même lorsque celle-ci est contestée par l'une des parties – ou de prendre toutes les décisions qui sont inhérentes à sa nature juridictionnelle sont des exemples de facultés qui sont généralement exercées par les arbitres sans le consentement explicite des parties. Dans certaines situations, les arbitres devront même s'écarter de l'accord intervenu entre les parties. Tel sera notamment le cas de tous les accords qui contreviennent à l'ordre public. Hormis cette hypothèse évidente, certains auteurs plaident même pour que les arbitres soient autorisés à déroger aux conventions d'arbitrage dès lors que les procédures envisagées seraient inefficaces, pas nécessaires et moins équitable qu'une approche alternative. Ce point de vue est toutefois controversé, au motif qu'un arbitre dispose toujours de la faculté de donner sa démission en présence de telles déficiences.

Les derniers bénéficiaires de la limitation de l'autonomie de volonté des parties sont les institutions arbitrales. Afin de pouvoir administrer efficacement la conduite des procédures arbitrales, elles élaborent des règles qui définissent le cadre dans lesquelles celles-ci devront se

dérouler. Si ces règles procédurales accordent souvent une marge de manœuvre importante aux parties pour leur permettre de moduler la procédure de la façon qu'elles estiment appropriée, il n'en demeure pas moins que les institutions d'arbitrage refusent généralement d'administrer les procédures qui ne respectent pas certaines des conditions essentielles de leurs règles de procédure. Ces éléments "indérogeables" des règles de procédures, souvent protégés par les juridictions nationales lorsqu'elles sont saisies de contestations relatives à leur application, constituent la marque de fabrique de chacune de ces institutions.

En conclusion, s'il convient de reconnaitre que l'approche libérale a joué un rôle-clé dans le développement de l'arbitrage international, il est important d'admettre que sans limitations à l'autonomie de la volonté des parties, l'arbitrage ne pourra pas demeurer un mode viable de résolution des conflits.

VERSLAG VAN DE ALGEMENE VERGADERING VAN CEPANI

(BRUSSEL, 7 JUNI 2018)

Marijn De Ruysscher
Senior Associate
Lydian

Op 7 juni 2018 vond de jaarlijkse algemene vergadering van CEPANI plaats, waarop al de leden waren uitgenodigd.

Voorzitter Dirk De Meulemeester heeft het jaarverslag 2017 (te raadplegen op de website van CEPANI) voorgesteld. Hij legde de aandacht op de belangrijkste initiatieven die CEPANI en CEPANI40 het laatste jaar hebben genomen. Zo zijn o.m. de CEPANI ADR-regels vernieuwd en op 1 januari 2018 in werking getreden en is tegelijk een werkgroep opgestart om het arbitragereglement te vernieuwen tegen 1 januari 2020.

De diverse activiteiten die werden georganiseerd ter promotie van arbitrage werden toegelicht. Ruime aandacht werd ook besteed aan de statistieken van het aantal arbitrages en in het bijzonder de aanstellingen van de arbiters. Hier is de trend merkbaar dat partijen meer zelf arbiters voordragen en CEPANI hun aanstelling enkel dient te bevestigen.

De nieuwe Secretaris-Generaal, Emma Van Campenhoudt, heeft vervolgens de financiële resultaten van CEPANI in 2017 in detail overlopen.

Belangrijk te noteren is verder dat CEPANI in 2017 opnieuw een groot aantal nieuwe leden heeft verwelkomd, en dat deze trend zich in 2018 heeft doorgezet.

COMPTE-RENDU SUR L'ÉVÉNEMENT DU CEPANI40: "DU NEUF EN MATIÈRE DE MARC !/ NIEUWIGHEDEN OP HET GEBIED VAN ADR ! »

(BRUXELLES, 19 JUIN 2018)

Pierre Vermeire
Associé
Hanotiau & van den Berg

Le Cepani40 a organisé le 19 juin 2018 une nouvelle présentation-débat, qui portait cette fois sur la nouvelle loi sur la Médiation, ainsi que sur les règlements « ADR » récemment révisés du CEPANI.

L'attrait pour l'évènement a été tel que la présentation a eu lieu à l'hôtel Steigenberger Wiltcher's, où les participants ont pu profiter d'un cadre magnifique.

Dans un premier temps, Monsieur Patrick Van Leynseele nous a brillamment présenté les dispositions touchant à la médiation de la loi fraichement adoptée du 18 juin 2018 (M.B. 2 juillet 2018). La loi apportera de nombreuses modifications au Code Judiciaire, en faveur de la médiation, à partir du 1er janvier 2019.

On retiendra notamment que le juge aura l'obligation de favoriser en tout état de la procédure un mode de résolution amiable des litiges, et qu'il entrera dans sa mission de concilier les parties.

Parmi les mesures les plus innovantes, on notera que le juge pourra interroger les parties sur leurs tentatives de règlement amiable de leur litige, informer les parties sur les MARC, remettre l'affaire pour permettre aux parties d'analyser la suggestion de recours aux MARC, ou encore ordonner la comparution personnelle des parties. Le juge disposera même du pouvoir d'ordonner d'office une médiation, même sans l'accord des parties, mais après les avoir préalablement entendues.

Dans un deuxième temps, Messieurs Herman Verbist et Benoit Kohl nous ont offert de très belles présentations des règlements « ADR » récemment révisés du CEPANI, à savoir les règlements organisant les procédures (i) de médiation, (ii) de mini-trial, (iii) d'expertise technique et (iv) d'adaptation des contrats. Pour recevoir un aperçu des nouveautés dans ces règlements, je me permets de vous renvoyer à la note de Monsieur Herman Verbist dans la précédente Newsletter.

Enfin, les présentations ont été suivies d'une très belle réception offerte par le cabinet Daldewolf.

REPORT ON THE SEMINAR ON THE DRAFT LAW FOR THE CREATION OF THE BRUSSELS INTERNATIONAL BUSINESS COURT (BIBC)

(BRUSSELS, 26 JUNE 2018)

Dorothée Vermeiren
Counsel
Clifford Chance

On 26 June 2018, the VBO/FEB and Larcier Group jointly organised a seminar on the draft law for the creation of the Brussels International Business Court (BIBC) which was approved by the government and submitted to parliament on 15 May 2018.

Mr. Geens first took the floor, emphasising that the creation of the BIBC is one of the ten "construction yards" of the government. The government is convinced of the need for a specialised state court to settle international trade disputes in the English language in light of the recent national and international economic developments. The expectation is notably that the Brexit will lead to an increase of international commercial disputes. Given the importance of Brussels within Europe and internationally, and the number of international companies established in Brussels, it is crucial that these actors can submit their disputes to a state court. The combination of professional and layman judges specialised in international trade law will enable the BIBC to rule in first and last instance, which will only increase the efficiency of the proceedings and the value of its judgments. The draft law is based on the UNCITRAL model law on international arbitration of the United Nations Commission on international trade law. The procedural rules therefore deviate to an important extent from the standard provisions of the Judicial Code. The draft law should in principle be budget-neutral, with the contributions to be paid by the participants constituting a special fund within the treasury.

After some brief words of Mr. Alain Courtois, first deputy of Brussels, who welcomed the creation of the BIBC which responds to the needs of Brussels and only increases its attractiveness, professor Behrendt examined the interaction between the BIBC and the constitution. He discussed the constitutionality of the BIBC, and the fact that the proceedings before the BIBC will be conducted in the English language. The Council of State has validated this approach in its advice, provided that only truly international disputes are submitted to BIBC and that English is the language which is normally used between the parties. As far as opposition proceedings by a third party against the judgments of the BIBC are concerned, these will be conducted in the Dutch, French or English language. Likewise, any appeal before the Court of Cassation or preliminary reference proceedings before the Constitutional Court will need to be conducted in one of the official languages.

The next speakers, Mr. Philippe Lambrecht, Secretary-General of the VBO/FEB and Mr. Ivan Verougstraete, examined in further detail the particularities of the draft law. Mr. Lambrecht discussed the proposed organisation of the BIBC, with two alternating presidents belonging to different language roles within the Markets Court of the Brussels Court of Appeal. The President is to be a Belgian magistrate, designated by an independent selection committee within the Superior Council for Justice, based on his knowledge of English and international commercial law. The layman judges will be Belgian or foreign specialists in international commercial law who will likewise be appointed by an independent selection committee for a renewable mandate of five years. As an enterprise court, the BIBC will be competent to resolve international disputes between enterprises (within the meaning of the Code of Economic law) who have elected to submit their dispute to its jurisdiction. The international nature of the dispute between the parties is assessed based on various criteria, notably (i) the fact that the parties are established in different states, (ii) that the place of performance of their obligations or of the object of their dispute is located outside of their place of establishment and (iii) that the relevant elements for the resolution of their dispute are to be found in foreign law. One common condition is that the language used by the parties cannot be Dutch, French or English. The BIBC will assess its own competence and will in principle be free to determine the rules governing the proceedings, subject to certain limits in order to safeguard the rights of due process. The rules of the Judicial Code are in principle disapplied. The procedure will be partly electronic and partly in writing, with certain aspects (such as notably notifications, docket duties, judgments in absentia, provisional measures, usage of languages, judicial costs and appeals) being regulated specifically.

Mr. Baeten, deputy general counsel of Engie, subsequently discussed the challenges in terms of legal risks which a group such as Engie faces all over the world. Arbitration is the preferred adjudication method in international business, however with a few weaknesses. Subject to a few questions which arise in relation to the neutrality of the forum, and the swiftness of the proceedings, he concluded that the BIBC may offer a good alternative to arbitration in terms of enforceability of the award in the European Union, and in terms of assurances on the independence, impartiality and competence of the tribunal and regarding the rigorousness and equitable nature of the proceedings.

Mr. Dirk Demeulemeester, president of CEPANI, then entertained the audience with a more in-depth analysis of the differences between arbitration and the BIBC. He emphasised that the BIBC was not perceived by CEPANI as a "competitor" to arbitration but is just another means of dispute resolution. Arbitration proceedings and proceedings before the BIBC are alike in that they are based on the consent of the parties. For arbitration, the arbitrability of the dispute is key, whereas the nature of the parties and the dispute are of paramount importance for the BIBC. Both arbitration and BIBC proceedings will be based on the UNICTRAL model law, with the parties having a certain autonomy in terms of the usage of languages and their communication. This autonomy is however more important for arbitration, which, contrary to BIBC proceedings, is also confidential. Disputes can in both cases be dealt with by experts,

their nationality not being an issue. Whereas an arbitral panel can be composed by the parties, this will not be the case for the composition of the BIBC. The parties will bear the costs and the proceedings are intended to be self-sustaining both in case of arbitration and BIBC proceedings. Appeals against a final arbitral award can only be based on limited grounds, and for BIBC rulings are limited to a Cassation appeal on legal grounds. The recognition and enforcement of rulings rendered by the BIBC will be based on the Brussels Ibis, the Hague and Lugano regulations/conventions, whereas for arbitration the Convention of New York applies.

The representatives of the French-speaking bar association, Mr. Jean-Pierre Buyle, and the Dutch-speaking bar association, Mr. Edward Janssens, then presented the audience with their views on the draft law. Both speakers stressed that they had been advocating the creation of an international court for trade law disputes for some time. The BIBC is regarded as an opportunity, even if some open questions and potential issues remain. Mr. Jean-Pierre Buyle notably deplored the lack of prior concertation with the bar associations on the draft law. He raised doubts about the fact that the BIBC will be a commercial/enterprise court within the Court of Appeal, which is already overburdened. The President also questioned whether the creation of the BIBC would not create a certain inequality between citizens having access to it and those who do not and whether the appointment of judges would offer sufficient guarantees in terms of their independence. He concluded that the BIBC will need to take its place in Europe and will need to become known abroad to be successful, the publication of its judgments and the confidence in the outcome of the proceedings being key. Mr. Janssens stressed that the independence and impartiality of the judges, and their knowledge and experience in trade law are of paramount importance. It will not be an easy feat to determine objective and quantifiable quality criteria for this and the question is whether sufficient manpower will be found for each sector, as there tend to be different practices and standards between e.g. the energy, telecoms and capital goods sectors. One important distinction between the two bar associations' positions is that, whereas the French-speaking bar association welcomes the opportunity for lawyers to apply to become a judge in the BIBC, the Dutch-speaking bar association considers that lawyers should not be layman or temporary judges.

The session was closed by Mr. Lipszyc, justice adviser to Mr. Charles Michel, who emphasised that the draft law is no doubt still imperfect and was not subject to extensive prior consultation with certain interested parties, but that it is to be considered an accomplishment that the draft law has been approved by the government and submitted to parliament. It is now up to parliament to do its work, taking into account the comments and concerns of the relevant actors. Let the fine-tuning of the draft law begin!

NEWS

» **CEPANI SIGNED COOPERATION AGREEMENT WITH ARGENTINEAN BUSINESS MEDIATION AND ARBITRATION CENTRE**

On June 26, the Belgian Centre for Arbitration and Mediation (CEPANI) and the Argentinean Business Mediation and Arbitration Centre (CEMA) signed an international cooperation agreement at the Alvear Hotel in Buenos Aires. The ceremony occurred within the framework of the official visit of Princess Astrid, who arrived in Argentina accompanied by 137 businessmen in order to promote the commercial relationship between the two countries.

Representatives of both institutions participated in the signing ceremony, along with Princess Astrid of Belgium and a large part of her delegation.

The signed commitment establishes the exchange of resources, sharing infrastructure to hold hearings or meetings in both countries, arbiter lists and also the results of investigation works. In addition, it contemplates the organization of conferences and events looking forward to promote both centers in Europe and Latin America.

Dirk Van Gerven, vice-president of CEPANI, highlighted the importance of joining forces to achieve greater visibility: "We need to work together in order to make ourselves more noticed and make sure companies and businesses know about us so that they more easily go for arbitration."

"The agreement signed with CEPANI provides us a tool to incorporate foreign criteria and experiences in the administration of mediation and arbitration. It should be noted, the special importance of adding a new international extension that allows us to expand even more", concluded Paul Richards, secretary of the Argentinean Business Centre for Mediation and Arbitration.

Natalia Alonso

» **CEPANI40 WILL HOST THE NEXT CO-CHAIR'S CIRCLE GLOBAL CONFERENCE!**

We have the pleasure to announce that during the CCC retreat in Rome (gathering the co-chairs of around 40 groups of young arbitration practitioners), CEPANI 40 was selected to host the next Co-Chair's Circle Global Conference! The 4th edition of this event will take place in Brussels in May 2020.

The CCC Global Conference is an international arbitration conference organized as a joint effort by the 35 different below 40/45 groups, including CEPANI 40. Over 190 young arbitration practitioners from 20 countries attended the last CCC Conference in Rome.

More details will follow In due course.

» **CEPANI ACADEMIC PRIZE 2018**

One of CEPANI's goals is to actively promote the knowledge and use of arbitration, among others by encouraging the study of arbitration on a national and international level. Without a doubt, our young professionals take up a central spot in the elaboration of this mission.

To support this young talent, CEPANI takes great pride in organizing an Academic prize which rewards an outstanding paper in the field of national or international arbitration. The goal of this competition is to offer young professionals with an interest in the field the chance to gain recognition among their peers. CEPANI's Academic Prize, which amounts to € 5.000, is awarded every three years. The competition is open to anyone who is under the age of 40 on the 1st of September of the year in which the prize is awarded, i.e. 1st of September 2018.

» CEPANI INTERN DAYS

Following the three previous editions that encountered a great success, CEPANI has the pleasure of organizing the fourth edition of its "Intern Days": a unique opportunity for law students as well as newly qualified lawyers to take a look behind the scenes and spend a whole day at the CEPANI offices in the heart of Brussels. Interns will receive a full tour of the CEPANI offices, presentations on the CEPANI ADR Rules and on arbitration in Belgium by successful practitioners and arbitration experts, a welcome pack and lunch with a couple of CEPANI members.

The Intern days will be held on the 20th of July and on the 31th of August 2018. There are already fully booked!

» **CEPANI RELEASES BROADCAST**

As part of its mission to promote the use of ADR, CEPANI released a broadcast. In 90 seconds, this broadcast explains briefly but clearly what arbitration is and highlights its many benefits for users.

The result can be seen here.

VARIA

» Erasmus School of Law, the Max Planck Institute for Procedural Law Luxembourg and the Montaigne Center for Rule of Law and Administration of Justice (Utrecht University) will hold a seminar on "Innovating International Business Courts: a European Outlook". Philippe Lambrecht will speak about the proposal for the Brussels International Business Court (Rotterdam, 10 July 2018). For more information, see here.

» ICC Belgium organizes a seminar on Economic Sanctions and International Arbitration on 7 September 2018. For more information, see here.

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