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

15 OCT 2018	(00.00 – 00.00)	Mediation Week (16-20 October 2018)
18 OCT 2018	(14:00 – 18:00)	CEPANI40 Half-day Academic Conference on the Annulment and Enforcement from a comparative law perspective
6 NOV 2018	(08.30 – 14.00)	CEPANI's annual Colloquium on Limits to Party Autonomy in Institutional Arbitration
17 DEC 2018	(14:00 – 17.00)	BREXIT-related Commercial Disputes and Possible ADR Solutions
21 MAR 2019	(14.00 – 18.00)	Joint Colloquium NAI - CEPANI

REPORTS

ECONOMIC SANCTIONS AND INTERNATIONAL ARBITRATION

(BRUSSELS, 7 SEPT 2018))

Samuel DELCOMINETTE
Associate
Lydian

On 7 September 2018, **ICC Belgium** organised a conference on the topic of *Challenges brought by Economic Sanctions in International Arbitration* at the Federation of Enterprises in Belgium.

Four distinguished speakers addressed these challenges from the parties', the arbitrators' and the arbitration institutes' perspective. **Niuscha Bassiri** (*Partner, Hanotiau & van den Berg, Brussels*) chaired the session and led a Q&A with **Clemens Heusch** (*Head of European Litigation, Nokia, Munich*) after each presentation, offering the audience a real insight of what the consequences of the coexisting different sanctions regimes really are in practice.

Marco Padovan (*Partner, Studio Legale Padovan, Milan*) introduced the key concepts of Economic Sanctions to the audience. He started by defining Economic Sanctions as one of the two sorts of *"restrictions on movement of persons, services, goods, capitals due to international policy reasons"*, the other being made of export control provisions. He then explained the difference between multilateral International Sanctions (i.e. pursuant to United Nations Charter Chapter VII Art. 41) and unilateral (autonomous) International Sanctions (the most famous being the US autonomous sanctions) before comparing the US and the EU sanctions regimes. On 8 May 2018, Donald Trump issued a National Security Presidential Memorandum ceasing US participation to the Joint Comprehensive Plan of Action (JCPOA). That triggered the resuscitation of the Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country. This so-called "blocking Regulation" provides that giving effects to US extraterritorial sanctions is prohibited and sanctioned in the EU for the persons referred to in Article 11 Reg. No 2271/96. Taking the ICC Institute, incorporated under French law, as an example, this gives rise to the question whether the ICC Institute can provide its services if a party is accused of non-performance on the basis of US extraterritorial sanctions listed under Reg. No 2271/96. By this example, Marco Padovan demonstrated that not only arbitral institutes, but also arbitrators and parties can be directly affected by Economic Sanctions.

At this point, Niuscha Bassiri and Clemens Heusch discussed how companies try to conduct business in this conflicting legal environment, as it illustrated perfectly how contradicting laws can trigger difficulties for companies and trouble contractual relationships.

Next, **Mathias Audit** (*Law professor Université Paris 1 Panthéon-Sorbonne and Partner, Steering Legal, Paris*) guided the audience through the contractual implications of Economic Sanctions. He started with the following presupposition: an international contract subject to an arbitration clause falls within the scope of a sanctions program. Then, he analyzed first the impact of the sanctions regime on the arbitration clause and second on the contract.

First, the impact on the arbitration clause must be assessed on the basis of the applicable domestic law. From the US case-law perspective, a contract containing an arbitration clause falling within the scope of a US sanction program can be submitted to arbitration (*BelshipNavigation Inc. v Sealift Inc, 1995 U.S. Dist.*). This contrasts with the decision of the Italian Court of cassation which ruled that an agreement governed by French law and ICC arbitration in Paris was inarbitrable *"because of the embargo declared against Iraq"* and that *"weather the clause was invalid was an issue for the court, not the arbitrators, to decide"* (*Governement and Ministries of the Republic of Iraq v. Armamenti e Aerospazio SpA et al (2015) Case no 23893*). In light of these contrasting decisions, Mathias Audit stressed that the location of the seat of arbitration is crucial considering the impact of the domestic applicable law on the arbitrability issue.

Turning to the impact of the sanctions regime on the contract, Mathias Audit distinguished the scenarios where a sanctions regime belongs to the applicable law, meaning that the arbitrators must apply the sanctions as their regime belongs to the *lex contractus*, and the situations where a sanctions regime does not (i.e. EU or domestic regimes). Under this second scenario, one can ask what the possible legal basis for the arbitrator to apply a sanctions regime could be, as it does not belong to the applicable law. Treating the sanctions as mandatory rules, or as part of the transnational public order or even a *force majeure* exception were contemplated as solutions.

The following question put by Niuscha Bassiri to Clemens Heusch reminded us that one difficulty is added on top of these legal variations: during the drafting phase of a contract, the contracting party with more bargaining power will only focus on applying the substantive law it wishes. However, one thing remains crucial for both parties to the contract: it will very often be crucial for them to choose a place of arbitration which is relatively unaffected by Economic Sanctions.

In his presentation, **Emmanuel Jolivet** (*General Counsel, ICC International Court of Arbitration, Paris*) focused on practical impediments and gave the audience a concrete insight of the ICC's approach to the issue, and more specifically on procedural issues that may arise. For example, when a payment is affected by a sanctions regime, a formal clearance must be obtained from the relevant authorities. To identify such issues, the ICC has created the ICC Dispute Resolution Services Compliance System which *"is bound to operate in conformity with applicable sanctions regulations such as those imposed by the United Nations (UN), European Union (EU) and Office of Foreign Assets Control (OFAC)."* The Compliance System aims to review all cases from a compliance perspective. When necessary, administrative measures are implemented to avoid breach of compliance for companies involved in a contract and having opted for ICC arbitration. The Compliance System is accompanied by transparent communication to parties and arbitral tribunals on the measures taken to ensure compliance with obligations imposed on ICC by the relevant authorities.

During Q&A, it emerged that the so-called "blocking regulation" could very easily conflict with the applicability of an OFAC sanctions regulation. Another key thought was that the arbitrator's task to issue an enforceable award, everywhere or in one specific country (taking into account the Economic Sanctions applicable), remains difficult to assess at the start of the arbitration process. Most of the time, the practicalities of enforcement only arise after the award has been issued. The discussion therefore illustrates perfectly how difficult International Economic Sanctions are to manage because of their inconsistent and changing nature.

2018 INTERNATIONAL ARBITRATION SURVEY LAUNCH

(BRUSSELS, 13 SEPT 2018)

Emily HAY
Senior Associate
Hanotiau & van den Berg

On 13 September 2018, White & Case Brussels hosted the launch of the 2018 International Arbitration Survey, entitled "*The Evolution of International Arbitration*". A diverse panel analysed a number of important results of the Survey, expertly moderated by **Nathalie Colin** of White & Case Brussels. **Dirk De Meulemeester**, Chairman of CEPANI, brought the institutional perspective; **Patrick Baeten**, Deputy Group General Counsel at ENGIE, represented arbitration users; **Niuscha Bassiri**, Partner at Hanotiau & van den Berg spoke on behalf of arbitrators; and **Dipen Sabharwal** represented the point of view of counsel, also drawing on his insider involvement with the Survey.

The speakers were not let off the hook lightly. Faced with the result that cost continues to be seen as arbitration's worst feature, and lack of speed another downside, Dirk De Meulemeester was asked about the institutional role in improving these perceived drawbacks. He noted that most of the costs relate to counsel and not the institution or the arbitrators, which is not within the institution's control. Nonetheless, the institute can play a role in terms of timing by following up the case.

Panelists debated the evolution of most preferred seats, with Dipen Sabharwal bringing our attention to the fact that Singapore overtook Hong Kong as third most preferred (after London and Paris) since the previous Survey. Conversation inevitably turned to efforts to promote Brussels as a seat of arbitration, in particular given the perceived opportunity to benefit from any post-Brexit impact on London (70% of respondents think that Paris will most benefit from Brexit). While Dirk De Meulemeester emphasised that commitment at government level has been crucial to Singapore's success, Patrick Baeten also highlighted the challenge of overcoming user habits in concluding contracts, where the instinct to stick with the devil you know prevails.

Since 26% of Survey respondents felt that more publicly available information about arbitrators would be one of the factors having the most significant impact on the future evolution of international arbitration, the panel discussed a number of new initiatives to give greater access to such information. While welcoming these innovations, and in particular the gathering of reports by parties on arbitrators, Niuscha Bassiri doubted whether they could ever fully replace the traditional and less transparent methods of gathering information on potential arbitrators.

As for the confidentiality of arbitral proceedings, which was rated as "very important" by 40% of respondents and "quite important" by a further 33%, Patrick Baeten cautioned against overstating its importance for users, given the potential need to disclose aspects of the arbitral proceedings in corporate filings and court proceedings both during and after the arbitration.

Another topical issue raised was progress made, and still to be made, in terms of diversity in international arbitration. The Survey reports a wide spread of responses to the question whether diversity in a tribunal has an effect on the overall quality of its decision-making. Noting this divergence of opinions, Niuscha Bassiri was skeptical whether the impact of diversity on decision-making could be measured among the many other factors coming into play in a tribunal's decision.

Looking to the future, Nathalie Colin queried whether arbitral institutions should take the lead in shaping the future of arbitration. Niuscha Bassiri's view was that institutions play a fundamental role in standard-setting and spearheading new developments, highlighting also the impact of increasing competition between institutions to attract cases. On the other hand, Dipen Sabharwal argued that we should not underestimate the role of other actors who shape the system, including parties themselves and external counsel.

As this lively debate and the many follow-up questions to the panelists demonstrated, the International Arbitration Survey gives practitioners, users and institutions plenty food for thought, and will certainly serve as inspiration for many more conversations about the future of international arbitration.

YOUNG ICCA & CEPANI40 SKILLS TRAINING WORKSHOP ON CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

(BRUSSELS, 14 SEPT 2018)

Flavia MARISI
Phd Researcher
Ghent University

On 14 September 2018, Young ICCA and CEPANI40 jointly organized a Skills Training Workshop on Cross-examination in International Arbitration, which was hosted by Jones Day at its Brussels offices. The Workshop was organized by a Steering Committee composed of **Audrey Goessens**, *CEPANI, Brussels*; **Sophie Goldman**, *Tossens Goldman Gonne, Brussels,* and *CEPANI40 Co-President*; **Sigrid Van Rompaey**, *Matray Matray & Hallet, Brussels,* and *CEPANI40 Co-President*; and **Kevin Ongenae**, *Ghent University, Belgium,* under the guidance of **Nhu-Hoang Tran Thang**, *LALIVE, Geneva,* and *Young ICCA Co-Chair*, and **Panos Chalkias**, *Hanotiau & van den Berg, Brussels,* and *Young ICCA Global Events Director*. The Workshop was generously sponsored by *Jones Day, Hanotiau & van den Berg, Liedekerke Wolters Waelbroeck Kirkpatrick,* and *Quinz,* and was kindly supported by ICCA.

The Workshop was structured in two parts: the morning session hosted experienced practitioners who presented and discussed the essentials of cross-examination in international arbitration, while the afternoon session featured a mock cross-examination exercise, in which participants, divided into eight teams, put their newly-learned skills to the test.

The morning panel on cross-examination of witnesses, moderated by **Vanessa Foncke**, *Jones Day, Brussels*, gathered four experts in the field of international arbitration. **Matthias Kuscher**, *De Brauw Blackstone Westbroek, Amsterdam,* shared an introduction to the witness hearing process presenting the five Ws of cross-examination; **Michelle Glassman Bock**, *Wilmer Cutler Pickering Hale, Brussels,* listed and commented on the DOs and DON'Ts of cross-examination; **Sean Aughey**, *11KBW Chambers, London,* explained how to conduct a cross-examination; and **Lorraine de Germiny**, *LALIVE, Geneva,* advised the audience on the role they could play, as junior lawyers, in preparing a cross-examination.

The presentations shared real-life examples on how the speakers dealt with challenging situations that can potentially arise in a cross-examination context and were followed by a lively discussion involving the participants. The dialogue touched upon the topics of the fundamental purpose of cross-examination, the importance of questioning whether cross-examining a certain witness would be truly useful in a certain case, the difference in ethical rules between US- and UK-trained lawyers, the use of contradicting or supporting documents, and the role of industry experts as witnesses. Before closing the session, the panellists addressed the order of questions, the value of psychology – both in maintaining a calm attitude when cross-examining, and getting to know the witness' temperament, the function of flexibility, the emphasis produced by silence, the defences against difficult witnesses, the essence of timing, and the importance of volunteering to gain a more solid experience in cross-examination.

After the coffee break, Panos Chalkias, *Hanotiau & van den Berg, Brussels*, announced the division of participants into eight teams of 4/5 lawyers each, while both speakers and organizers offered to coach the teams in preparation of the cross-examination exercise.

The mock cross-examination exercise took place in parallel sessions: the first Arbitral Tribunal was composed by **Maarten Draye**, *Hanotiau & van den Berg, Brussels*; **Katherine Jonckheere**, *Three Crowns LLP, London*; and **Alexander G. Leventhal**, *Quinn Emanuel Urquhart & Sullivan, LLP, Paris*; and the second Arbitral Tribunal was formed by **Nadja Al Kanawati**, *Schellenberg Wittmer Ltd, Zurich*; **Valentine Chessa**, *CastaldiPartners, Paris*; and **Jan Spangenberg**, *Manner Spangenberg, Hamburg*.

The witnesses, masterfully performed by **Guillaume Croisant**, *Linklaters LLP, Brussels and London*; **Bruno Hardy**, *Liedekerke Wolters Waelbroeck Kirkpatrick, Brussels*; **Benjamin Jesuran,** *Hanotiau & van Berg, Brussels*; and **Marine Koenig**, *Meyer Fabre Avocats, Paris*,, have tested the dexterity and preparedness of the teams before the patient ears of the Arbitral Tribunals.

At the end of each session, the Members of the Arbitral Tribunals carefully analysed the performance of the speakers of each team, assessing their level of preparation and quick thinking, providing personalized advice on how to improve their line of questioning in future occasions, and recalling the crucial points to focus on both while preparing and performing.

The Workshop ended with the closing remarks by the organizers and panellists, which marked the moment to leave for the cocktail reception at *Kwint Brussels*, on top of the scenic Mont des Arts.

NEWS

» **B-ARBITRA 2018/1 OUT NOW**

The first edition of b-Arbitra for 2018 is out now. To consult its contents, please check here. It can be ordered via Kluwer Law.

» **CEPANI ANNUAL REPORT**

CEPANI released its Annual Report, listing the Institute's accomplishments and events for the year 2017.

VARIA

» Le 9 octobre 2018, le groupe de recherche sur les modes de gestion des conflits de l'Université Saint-Louis – Bruxelles organise une après-midi d'étude sur ***"La loi du 18 juin 2018 portant des dispositions en vue de promouvoir des formes alternatives de résolution des litiges: un nouveau souffle pour les modes amiables ? (médiation, droit collaboratif)"***

Le programme détaillé et les informations relatives à l'inscription sont disponibles ici.

» Op 18 oktober 2018 verzorgen CEPANI en b-Mediation een workshop tijdens de Mediation week. **Patrick Van Leynseele** en **Charlotte De Muynck** zullen spreken over de **Caucus: de bemiddelaar en het geheim verkregen achter gesloten deuren.** Tijdens de workshop wordt een korte omschrijving van de techniek met demonstratie gegeven en komen volgende thema's aan bod: Voordelen en valkuilen. Waarom werkt het? Moet men er schrik voor hebben?

Het volledige programma en informatie om in te schrijven vindt u hier.

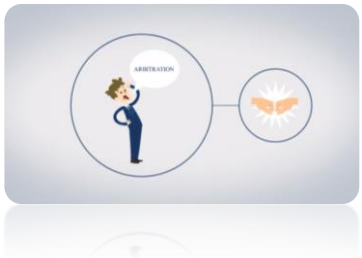
» Le 18 octobre 2018, le CEPANI et b-Mediation organiseront un atelier pendant la Mediation Week. **Patrick Van Leynseele** et **Charlotte De Muynck** parleront du **Caucus : le médiateur et le secret obtenu derrière portes closes**. Après une courte description de la technique avec mise en scène montrée, les orateurs discuteront les thèmes suivants: Avantages et pièges? Pourquoi cela marche? Faut-il en avoir peur?

Pour plus d'informations et registration, cliquez ici

» On 22 November 2018, the Belgian Federal Public Service of Foreign Affairs, Foreign Trade and Development Cooperation is organizing a **High Level Event on the Reform of Investment Protection.** The objective of this event is to gather relevant stakeholders to discuss the state of play of Investor-State-Dispute Settlement (ISDS) reform and the perspectives for a Multilateral Investment Court (MIC). The event comes at an important juncture in the ongoing debates in different fora. Besides high level introductory and closing speeches, the event will bring together civil society and academia, as well as business and arbitration experts.

For a full programme and registration, click here.

CEPANI ARBITRATION



Check out the video here.

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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