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THE CONSTITUTIONAL COURT VALIDATES THE NON-ARBITRABILITY OF RESIDENTIAL LEASE DISPUTES

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Readers of the CEPANI Newsletter will recall that the three Regions, after the sixth State reform package that transferred to them the competence to regulate residential lease agreements, decided to prohibit arbitration clauses in residential leases: Brussels did so with effect from 1 January 2018, Flanders from 1 January 2019 and Wallonia from 1 March 2019. The Council of State expressed strong reservations about the Regions' powers to touch on matters of civil proceedings, and annulment challenges were brought before the Constitutional Court against each of the three decrees.

The Flemish decree was handled first and the Constitutional Court rendered its judgment 145/2020 on 12 November 2020. The Brussels decree followed two weeks later with judgment 156/2020 of 26 November 2020. In both cases the Court dismissed the challenge. The challenge against the Walloon decree remains pending, with docket numbers 7312, and judgment can be expected in the very near future.

The Court notes in the first place that, even though residential leases belong to the competence of the Regions, the regulation of civil proceedings and the delineation of the jurisdiction of the courts belong to the Federal State. However, Article 10 of the Special Institutional Reforms Act of 8 August 1980 allows the Regions to overreach, and to deal with Federal matters, in certain circumstances. According to the Court, three conditions must be satisfied in order for such an overreach to be tolerated: so doing must be necessary for the exercise of the Region's own powers, the matter concerned must lend itself to a differentiated regime and the impact of the overreach on Federal powers must be marginal only.

The prohibition of arbitration clauses in residential leases meets the three conditions. Legislative history shows that the Parliaments' objective, in Flanders as well as in Brussels, was to facilitate access to justice with regard to lease disputes, considering the higher cost of arbitration proceedings compared to proceedings before a Justice of the Peace. It was therefore a reasonable assessment by the Parliaments, according to the Court, to consider that the rule in dispute is necessary in the context of their powers to regulate residential leases. As to the second condition, the Court notes that Article 1676, §4, of the Judicial Code expressly states that any matter having an economic interest (*toute cause de nature patrimoniale* / *ieder geschil van vermogensrechtelijke aard*) is arbitrable, save to the extent that the law provides otherwise (*sous réserve des exceptions prévues par la loi* / *behoudens waar de wet anders voorziet*). This demonstrates that a differentiated regime is possible. Eventually, the encroachment on Federal powers is regarded as marginal because the rules being challenged only apply to residential leases.

The rationale of the judgments should presumably lead to a similar dismissal of the annulment proceedings relating to the Walloon decree. The three decrees are not entirely identical, however. They differ with regard to the possibility to agree to arbitration once the dispute has already arisen – this is permitted in Brussels and in Wallonia but not in Flanders – and with regard to the impact of the new non-arbitrability rule on pre-existing agreements – current leases are caught in Brussels, they are not in Flanders, and their treatment is unclear in Wallonia. It seems unlikely that these fairly minor variations could lead to a divergent assessment by the Constitutional Court in the remaining third challenge.

Another arbitration law question is currently pending before the Constitutional Court. On a request for a preliminary reference from the Francophone Court of First Instance of Brussels, the Court must assess the validity of Article 1717, §4, of the Judicial Code to the extent that it bars a party, when an arbitral award was obtained by fraud, from seeking the annulment of an award once a three-month time limit has expired, and that it does not provide for anything equivalent to the *requête civile* / *herroeping van het gewijsde* that may be raised against State court judgments for a period of six months counted from the discovery of the fraud. The case is pending under docket number 7232.