

CEPANI



1969 - 2019

#146

March 2021

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**FURTHER DEVELOPMENTS
FROM THE CONSTITUTIONAL
COURT
ON THE NONARBITRABILITY
OF RESIDENTIAL LEASE
DISPUTES**



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BRUSSELS, 4 MARCH 2021

A third judgment of the Constitutional Court closes the series of challenges against the three regional decrees that prohibit arbitration clauses in residential leases. The Court's judgment 37/2021 of 4 March 2021 dismisses most of the challenge relating to the **Walloon Decree**. Similar challenges against the **Brussels** and **Flemish Decrees** were already dismissed by two earlier judgments of 12 and 26 November 2020, as reported in the **November issue** of this *Newsletter*.

The Court's response to the first plea for annulment is merely a repeat of the two earlier cases: even though the regulation of civil proceedings is a federal matter, the provisions in dispute are ancillary to the Regions' competence in respect of residential leases and could therefore validly be adopted by the Regions.

The analysis of the second plea, however, is new. The applicant raised the argument that the difference in treatment between parties to a residential lease and parties to other types of agreements constitutes an unjustified discrimination. The argument had not appeared at all in the Brussels Decree case. It had been raised in the Flemish Decree case, but in a way that was doomed to fail – the applicant was then complaining about the difference between the federal and the regional rules, to which the Constitutional Court of course responded that having divergent rules at federal and regional levels is exactly the point of the country's federal structure. In this Walloon Decree case, the argument was expanded to catch the difference in treatment between the various types of leases that belong to the competence of the Regions, *i.e.*, residential leases and retail leases (*baux commerciaux / handelshuur*). This was a more delicate question and its outcome was doubtful (*see*, F. Van Den Abeele and D. Willems, "Woninghuur voelt zich niet thuis bij arbitrage", *R.W.*, 2020-21, p. 922). The Constitutional Court dismissed the plea. The reasons for this dismissal are somewhat cryptic but the conclusion is unambiguous and leaves no residual uncertainty about the validity of the impugned provisions.

On a minor point, a third plea challenged the provision of the Walloon Decree that gave some retroactive effect to its new nonarbitrability rule. The rule took effect on 1 March 2019 whilst the Decree was only adopted on 2 May and published on 28 May 2019. No explanation for the retroactivity was given in the legislative history and, unsurprisingly, the Constitutional Court annulled this specific provision.