Arbitration in Europe: new rules on third-party litigation funding

November 28, 2022

On September 13, 2022, the European Parliament passed a resolution to propose a directive (the "**Directive**") on the regulation of third-party litigation funding. Although not obvious at first sight, the Directive would also apply to arbitration procedures or other alternative dispute resolution mechanisms.[1]

The European Parliament recognizes that, although third-party litigation funding is "virtually non-existent in Europe, it is a booming phenomenon in investment arbitration that multiplies the number and the volume of claims of private investors against States"[2]. As it expects the practice of third-party litigation funding to expand in Europe—considering how it is already prevalent in the United States and many Commonwealth countries—the European Parliament is concerned about the potential for abuse by litigation funders, should the status quo of a regulatory vacuum be maintained. Indeed, litigation funders may be tempted to put their own economic interest over the interest of claimants and thus assume undue control over the funded proceedings.

Notwithstanding those concerns, the European Parliament notes that third-party litigation funding, if properly regulated, could enhance access to justice for claimants. Hence, the proposed Directive establishes common minimum standards on third-party litigation funding for Member States that wish to permit the practice within their territory.

The Directive mandates the creation of an independent public supervisory authority responsible for overseeing the authorisation of litigation funders and monitoring of their activities. Litigation funders would thus have to demonstrate annually that they possess adequate financial resources to pursue their activities and to observe a fiduciary duty of care[3] towards the claimants they are funding. The supervisory authority of a Member State would also be empowered to investigate complaints regarding litigation funders and to share information with the supervisory authorities of other Member States.

The Directive also sets minimum requirements with regards to third-party funding agreements. For instance, such agreements would have to be written in one of the official languages of the Member State in which the claimant and intended beneficiaries are resident.[4] Also, any agreement that would entitle the litigation funder to a share of over 40% of the total award would, absent exceptional circumstances, be deemed to null and void. Finally, unilateral termination of funding agreements by the litigation funder would also be prohibited.

The Directive further seeks to give courts and arbitral bodies more power by requiring claimants to inform the adjudicational authority of the existence of a third-party funding agreement. Such transparency would allow a tribunal to ensure that litigation funders do not get an unreasonable share of an award, to impose penalties for not respecting the Directive and to hold litigation funders responsible for adverse costs arising from unsuccessful litigation.

It is to be noted that the Directive is still in the proposal stage, and the rules relayed above must go through the European parliamentary process and implementation at the national level by each Member State before becoming law. Nonetheless, such rules go hand in hand with arbitration rules that are already in place on a global scale. Indeed, the International Chamber of Commerce’s Arbitration Rules, the

International Centre for Dispute Resolution's International Arbitration Rules, and most recently the International Centre for Settlement of Investment Disputes' Arbitration Rules, already provide for the obligation to disclose to the tribunal any funding arrangement involving a non-party to a proceeding.[5]

Given the *Comprehensive Economic and Trade Agreement* (CETA) in place between Canada and the European Union, and considering how CETA potentially allows for a degree of investor-state dispute settlement through arbitration, the Directive's solidification into law would provide for an interesting playing field where Canadian and European investors would have an enhanced financial ability to seek compensation.[6]

Author: Martin Aquilina

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[1] In the Directive, "proceedings" is described as including "any voluntary arbitration procedure or alternative dispute resolution mechanism, through which redress before a court or administrative authority in the Union is sought concerning a dispute" and "court or administrative authority" is described as "a competent court, administrative authority, arbitral body or other body tasked with adjudicating on proceedings, in accordance with national law"

[2] Paragraph F of the recitals of the European Parliament resolution of 13 September 2022.

[3] Although the Directive specifically provides for a "fiduciary duty of care", it is interesting to note that the French text of the Directive uses the term *devoir de loyauté* (duty of loyalty). The ambit of the former is of course much wider than that of the latter.

[4] "intended beneficiary" here means a person who is entitled to receive a share of an award in proceedings and whose

interests in the proceedings are represented by the funded claimant or a qualified entity (meaning an organisation representing consumers' interests (and designated as such under Directive (EU) 2020/1828)) bringing the action as a claimant party on that person's behalf.

[5] See article 11(7) of the ICC Arbitration Rules 2021 and article 14(7) of the ICDR International Arbitration Rules (2021 edition) and Rule 14 of the ICSID Arbitration Rules (July 2022 edition).

[6] CETA entered into force provisionally on September 21, 2017, but its provisions on investor-state dispute settlement only come into force when all EU Member States have completed their ratification process. To date, CETA remains to be ratified by 11 Member States (Belgium, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Ireland, Italy, Poland and Slovenia).

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Highlights of the recently published ICSID 2022 Annual Report

November 28, 2022

The International Centre for Settlement of Investment Disputes of the World Bank (ICSID) published its 2022 Annual Report on 14 October 2022.

Highlights of the report include:

- 346 cases administered by ICSID, marking the largest number of cases ever administered at ICSID in a single fiscal year.
- A record 77 concluded cases, reflecting ICSID's ongoing efforts to reduce the time of cases.
- Individuals of 42 nationalities were represented amongst the appointments made in the fiscal year. This is the second largest number of different nationalities appointed in a single year at ICSID.
- 45% of first-time appointees in FY2022 were women and 25% involved nationals of low- or middle-income economies.

(https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-2022-annual-report)

Other notable report highlights in the Report are as follows:

- ICSID administered **18 cases governed by non-ICSID rules** in FY2022 with the majority (13 cases) applying the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). (p. 14 of the Report)
- Distribution of cases registered in FY2022 **by region**:
    - 22%: South America
    - 20%: Eastern Europe and Central Asia
    - 12%: Central America and the Caribbean
    - 12%: Middle East and North Africa
    - 12%: Sub-Saharan Africa
    - 8%: South and East Asia and the Pacific
    - 8&: Western Europe
    - 6%: North America (Canada, Mexico, and the US)

(p. 15 of the Report)

- Basis of **consent to establish jurisdiction** in FY2022:
  - 56%: Bilateral Investment Treaty
  - 13%: Investment Contract between the Investor and the Host-State
  - 11%: Energy Charter Treaty
  - 4%: U.S.-Mexico-Canada Agreement
  - 4%: North American Free Trade Agreement
  - 4%: Investment Law of the Host State
  - 2%: Dominican Republic-United States-Central America Free Trade Agreement
  - 2%: Colombia-El Salvador, Guatemala and Honduras Free Trade Agreement
  - 2%: Central America-Panama Trade Promotion Agreement

(p. 15 of the Report)

- Distribution of cases registered in FY2022 **by economic sector**:
  - 24%: Electric Power and Other Energy
  - 22%: Oil, Gas and Mining
  - 12%: Construction
  - 10%: Information and Communication
  - 8%: Other Industry
  - 8%: Water, Sanitation and Flood Protection
  - 6%: Finance
  - 6%: Transportation

(p. 16 of the Report)

- Top three distribution of cases registered in FY2022 **by country**:
  - Peru: 5
  - Romania: 4
  - Spain: 3

(p. 16 of the Report)

- **91% of hearings or sessions were conducted remotely** in cases administered by ICSID during FY2022 using ICSID audio/video conferencing services. (p. 18 of the Report)
- **77 proceedings concluded in FY2022**: 56 original arbitrations, 20 post-award proceedings, and one conciliation proceeding. (p. 19 of the Report)
- Of the 56 original arbitration proceedings that concluded in FY2022, **27 were settled or otherwise discontinued**, and 29 were decided by the tribunal. (p. 19 of the Report)
- **Outcomes of arbitration proceedings** under the ICSID Convention and Additional Facility in FY2022:
    - 25%: Award upholding claims in part or in full.
    - 23%: Proceeding discontinued at the request of both parties.
    - 14%: Award dismissing all claims.
    - 14%: Proceeding discontinued at the request of one party.
    - 11%: Award declining jurisdiction.
    - 9%: Proceeding discontinued for lack of payment of the required advances.
    - 2%: Settlement agreement embodied in an award at parties' request.
    - 2%: Award deciding that the claims are manifestly without legal merit.

(p. 19 of the Report)

Link to the Report in English: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR.EN.pdf

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2022 ICSID Arbitration Rules: Seven key takeaways

November 28, 2022

On 01 July 2022, the 2022 ICSID Rules and Regulations for resolving international investment disputes came into effect.

This is the first amendment to the ICSID Arbitration Rules since 2006 aimed at modernizing the ICSID procedures.

Here we cover seven key takeaways:

- Key steps in ICSID procedures will require **mandated case management** conferences with precise deadlines to make procedures more efficient. Tribunals must convene one or more case management conferences to identify uncontested facts, clarify and narrow the issues in dispute, or address any other procedural or substantive issue related to the resolution of the dispute.
- The Rules now provide for **expedited arbitration** procedures reducing case time in half and permitting a tribunal of one or three arbitrators.
- Any **third-party funding** arrangements must be disclosed to the Secretary-General upon registration of the request for arbitration, or immediately upon concluding a third-party funding arrangement after registration.
- The 2022 ICSID Institution Rules now require that at the request for arbitration filed with the Secretary-General include a description of the investment and of its

ownership and control. Previously, no requirement was in place to describe the **control of the investment**. This creates a new consideration for claimants with complex investment structures.

- Consent to **publish awards, orders, and submissions** is now the default position unless one of the parties expressly objects to such publication within 60 days after the dispatch of the document.
- There is now an express provision governing **security for costs** under Rule 53 of the new ICSID Arbitration Rules which provides a procedural timetable for security for costs applications and the considerations that must be made by the tribunal.
- ICSID has also introduced its **2022 ICSID Mediation Rules** for investment-related disputes and its **2022 ICSID Fact-Finding Rules**.
    - The new Mediation Rules provide for an avenue for parties to resort to mediation under ICSID with or without a prior party agreement.
    - The new Fact-Finding Rules offer parties the option to constitute a committee to inquire into and report on relevant circumstances in the pre-dispute phase and provide an impartial assessment of facts arising in the dispute between the parties.

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Lebanon Pushes for Activation of Medical Cannabis Law

November 28, 2022

On 20 April 2020, the Lebanese Parliament passed a law permitting the cultivation, trade, research, and use of medical cannabis.

As a result of multiple factors, including the socioeconomic health of the nation, progress on the legalization of the cultivation of cannabis has been stagnant in Lebanon. The law establishes an authority named the Regulatory Authority for the Cultivation of Cannabis Plants for Medical and Industrial Use (the "Authority") which would oversee all cannabis-related operations in Lebanon; however, the Authority has been inactive to date and has yet to approve any applications for the license types provided for in the law.

On 28 October 2021, more than a year and a half after the enactment of the law, the Lebanese Ministry of Agriculture confirmed that the cultivation of cannabis will be implemented in Lebanon very soon. Lebanese Minister of Agriculture, Mr. Abbas Al-Hajj Hassan, stipulated that:

"Today I would like to talk about Lebanon as a whole and the Baalbek-Hermel region and the Bekaa in particular, which is the subject of cannabis and is central and essential today for many reasons; we all know that the law exists and is approved, and therefore we await the executive decrees of the cabinet"

Minister Hassan added that "*Prime Minister Najib Mikati promised good things and has begun communicating with the ministries concerned, so that the law can be implemented.*"

Minister Hassan stated that the cultivation of cannabis in Lebanon will "*save the Lebanese economy and the deprived areas of Kekar and Baalbek-Hermel*", stressing that "*this will have internal and external positives, but the interior positive is the revitalization of the region*". Minister Hassan concluded his remarks by emphasizing that "*the cultivation of cannabis will take us* [Lebanon] *far and will be presented at the international stage as an auxiliary solution on the subject of global health security, and we* [Lebanon] *will be strongly present in the international stage as a country that helps the international community in this context*".

Over the past year, Lebanon has seen some drastic events that have deteriorated the health of the nation. With that being said, there is a strong belief within the nation that the legal cultivation of cannabis will be Lebanon's saving grace. The area currently planted with plants producing hashish – the illegal form of cannabis – in the area of Baabalk-Hermel is estimated at 5,000 dunams (1,200 acres), located within the Bekaa Valley; the production of cannabis in the area, which is equivalent to $10,000 per plant, is the most expensive quality cannabis in the world.

With the legalization and regulation of cultivated cannabis in Lebanon, the nation will seek to take advantage of the prosperous geological factors which make the production of cannabis in Lebanon the cheapest and highest quality cannabis currently available in the international markets.

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Are Arbitral Awards Truly Confidential: Recent Court Judgment Proves Otherwise

November 28, 2022

Arbitration is a dispute resolution mechanism that enjoys a multitude of benefits and advantages; one of the prime benefits being the confidentiality that befalls the proceedings and the subsequent arbitral awards. This is because parties do not see any upside to the publicity as disputes do not look good. And no one wants the world to know confidential information about how one operates their business, much of which may be disclosed in litigation. Despite the consensus that arbitral awards enjoy the utmost confidentiality, a recent judgment has proven otherwise, leaving individuals and companies scavenging for possible determents that could protect their confidentiality.

FACTS

In early 2021, the United States Court of Appeal for the Third Circuit warned that arbitration might not be as confidential as the parties to disputes probably think it is and want it to be. But in their decision, the Court provided some easy measures to preserve the much-desired confidentiality of arbitration.

The case developed when two insurance companies encountered a dispute. The parties took the matter to arbitration where one of the companies won. Accordingly, the arbitrator issued an

award in favor of that company. It is important to note, a winner in arbitration does not automatically have the legal right to enforce an arbitral award against the loser. Instead, the winner needs to go to court, file the award in court, and ask the court to issue a regular court judgment based on the award. This is often referred to as the "enforcement of the arbitral award". That judgment is just like any other judgment issued by a court. The holder of the judgment, the "judgment creditor," can use it against the loser's bank accounts and other property to claim the amount they have been awarded.

The company that won the arbitration did exactly that. It filed the arbitration award in court and requested the court issue a judgment in order to enforce the contents of the award. Furthermore, the company asked the court to seal the court papers, to preserve the confidentiality of the arbitration award. This is when another insurance company, curious about how the arbitration turned out, filed papers asking the court to unseal the award "*under the common-law right of access*".

The Court ruled in favor of the curious third party asking for the Court to unseal the award, declaring that the filing of the award was a judicial record, and therefore should be open to the public. The court ordered it unsealed and the third party got to see the award and whatever secret information it disclosed.

This demonstrates an inconsistency with the structure of arbitration and puts parties in an awkward position: if the party wants to enforce the award by obtaining a court judgment, the party is faced with the risk of losing the confidentiality which may have been a reason the party opted for arbitration in the first place.

WHY THIS IS SIGNIFICANT TO THE UAE?

Despite the jurisdiction of the case in question being the

United States, individuals and companies in the UAE need to be weary as they could face similar difficulties.

In the UAE, after an award is rendered by an arbitrator, the winning party must submit an application to the local courts requesting the enforcement of the award's contents. Article 48 of UAE Federal Law No. 6 of 2017 on Arbitration states:

"The arbitrators' awards shall be confidential, and they may not be published in whole or in part, unless with the written approval of the Parties. The publication of the judicial judgments which cover the arbitration award shall not be considered a violation of this principle."

Hence, UAE legislation acknowledges that arbitral awards are confidential in principle, however, the publicity of the local courts judgment enforcing the contents of the award do not violate the principle of the awards confidential. Therefore, the details of such award can be made public.

Furthermore, in its ruling for case no. 32/23 issued on 08 June 2003, the UAE Federal Supreme Court stipulated that:

"It is sufficient that the arbitrators' award includes a copy of the arbitration agreement, a summary of the statements and documents of the parties, the grounds on which the award is based, its ruling, date, and location of issuance and the signatures of the arbitrators. The court ratifying such an award must verify the fulfilment of such conditions without broaching the subject matter, except of the dispute matters related to the public order."

Thus, for the local courts in the UAE to enforce the arbitral award, the application must include details of the dispute, which the parties may want to keep confidential. This would arguably mean that third parties could have access to said details by being privy to the court judgment for the enforcement of the award.

PROTECTIVE MEASURES TO MAINTAIN CONFIDENTIALITY

There are a number of measures that a party can take to ensure that an arbitral award issued in their favor maintains its illustrious confidentiality.

The first is setting a time limit for the opposing party to comply with the contents of the award. The party can request that when the arbitrator(s) issue(s) an award, the opposing party has a set number of days in which to comply, or to agree to comply within a short time following its issuance. If the time limit for the opposing party's compliance was in place, then there would be no need to file the award with the court and risk a breach of confidentiality.

As a second protection, the parties might agree that they will direct any arbitrator to issue as short and simple and award as possible – ideally just stipulating the amount that the opposing party must pay. Such an award minimizes any loss of confidentiality, as opposed to a "reasoned" award, in which the arbitrator might explain the basis for the award and, in doing so, go into details that the parties might want to keep private.

Finally, the parties might mix and match, directing the arbitrator to issue two awards. One would require payment of a certain amount and could be the basis for a judgment in that amount, although that judgment would inevitably become a public document. The second award would explain the reasoned basis for the award.

CONCLUSION

In his analytical work on arbitration and the confidentiality that they possess, Francois Dessemontet, a Professor of law at the Universities of Lausanne and Fribourg in Switzerland, stipulated that *"the cloak of confidentiality that surrounds the arbitral proceedings puts the parties, their counsel and the arbitrators in a somewhat awkward position in many*

instances."

This statement is highlighted by the inconsistency that sometimes befall the arbitral proceedings. However, parties can realign those inconsistencies by putting in place protective measures that maintain the confidentiality of their disputes. Every individual or company that is subject to arbitration proceedings, must keep these measures in mind and implement them prior, throughout, and following the conclusion of the proceedings.

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ICC Issues Guidance on Arbitration During COVID-19

November 28, 2022

On 9 April 2020, in light of the COVID-19 pandemic the International Chamber of Commerce ("ICC") assured that the International Court of Arbitration (the "Court") remains operational and continues to progress pending arbitrations and accept new cases, and issued a guidance note on possible measures aimed at mitigating the effects of the COVID-19 pandemic.

The guidance note addresses various issues including mitigating COVID-19 related delays, modification of the procedural timetable or adoption of appropriate procedural

measures, guidance on virtual hearings, cyber-protocol, and sample clauses.

Here we outline some of the highlights of the ICC's guidance note.

Mitigating COVID-19 related delays

The guidance note ensures consistency and compliance with Article 22(1) of the ICC Arbitration Rules (the "Rules") which require tribunals to conduct any arbitration in an expeditious and cost-effective manner and Article 25(1) of the Rules which requires tribunals to proceed with as short a time as possible to establish the facts of the case by all appropriate means.

The ICC advocated that the pandemic should not create an unnecessary delay to tribunals' deliberations or draft awards as such can be conducted remotely, with the time-limits for submission of draft awards to the Court as well its policy to reduce arbitrator fees in cases of unjustified delays remain in effect.

Notwithstanding, the ICC will take into consideration specific cases where delays are genuinely attributable to specific COVID-19 caused situations, such as the illness of an arbitrator.

The ICC has also noted that it will be accountable for any hardship faced due to COVID-19 in assessing advances for fees.

Modification of the procedural timetable or adoption of appropriate procedural measures

The guidance note provides a non-exhaustive list of procedural options that parties, counsel, and tribunals may adopt in line with Article 24(3) of the Rules to mitigate potential delays caused by COVID-19 such as:

- Identifying whether the entirety of the dispute or discrete issues may be resolved on the basis of

documents only, with no evidentiary hearing.

- Considering whether site visits or inspections by experts can be replaced by video presentations or joint reports of experts.
- Using either audioconference or videoconference for conferences and hearings where possible and appropriate.
- Considering whether and how the number and size of submissions can be limited.
- Considering whether the parties would agree to opt-in to the ICC Expedited Rules Provisions.

As of 17 March 2020, new requests for arbitration must be filed in electronic format, and the ICC encourages tribunals and parties to conduct the arbitration digitally as is reasonably possible, including the electronic signing of terms of reference, counterparts to an award signed separately and assembled in a single electronic file, and submitting all exhibits in electronic format.

Guidance on virtual hearings

The guidance note clarifies that the language of Article 25(2) of the Rules which requires that a tribunal "shall hear the parties together in person if any of them so requests" should not be misconstrued to permit virtual means of the appearance, but should be read in that it refers to parties having an opportunity for a live, adversarial exchange in person.

However, Section 15 of the guidance note also states that:

"While tribunals have often erred on the side of caution and decided to hold at least one face-to-face hearing on the merits if a party so requires, the COVID-19 pandemic may mean that it is not possible to hold a face-to-face hearing in a reasonable time and that waiting until it becomes possible would produce unwarranted and even prejudicial delay. Accordingly, a tribunal may, in appropriate circumstances, adopt different approaches as it exercises its authority to

establish procedures suitable to the particular circumstances of each arbitration and fulfills its overriding duty to conduct the arbitration in an expeditious and cost-effective manner."

The guidance note encourages parties and tribunals to be appreciative of restrictions on travel, and health and safety concerns, but where the tribunal determines that convening in a single physical location is vital but not currently possible, efforts should be made to reschedule the hearing or convene in a way that mitigates delay.

If it is an absolute necessity to convene in a single physical location, the guidance note advises that specific rules and guidance on the location and appropriate sanitary measures should be put in place to ensure the safety of the participants.

Cyber-protocol and sample clauses

The guidance note emphasizes that virtual hearings require the creation of a cyber-protocol (implementing measures) subject to consultation between the tribunal and the parties. Sample clauses provided for by the guidance note include:

- How parties, counsel, the tribunal, witnesses, expert, transcribers, other participants, and support staff and technicians take part in the virtual hearing including detailing their log-in locations and points of connection.
- Minimum system specifications and technical requirements, and hardware, equipment, and any location-specific requirements, and test runs to ensure connectivity.
- Confidentiality, privacy, and security including no recording of any part of the hearing and inclusion of support or technical staff or consultants as participants.

- Online etiquette and due process considerations such as muting microphones when not speaking, avoiding the use of equipment that interferes with connectivity, and mechanisms for objections.
- Presentation of evidence and examination of witnesses and experts in a clear and visible manner on screen, coordination towards the connection time and duration for each witness or expert, virtual sequestration of witnesses and experts, permissibility or prohibition of synchronous or asynchronous communications, whether witnesses or experts will be giving testimony whilst alone or with the assistance of anyone on location, and other matters.

The guidance note also emphasizes adherence to data privacy controls and regulations in the application of a cyber-protocol and virtual hearings.

Rights of the content referenced above are reserved to the International Chamber of Commerce.

To access the guidance note, click here.

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Land and Costs for Investing in Lebanon's Medical Cannabis

Industry under the new Medical Cannabis Law

November 28, 2022

In April of 2020, the Lebanese Government legalized the use of cannabis for medical purposes. In this article, we discuss some of the practical expectations regarding the investment dynamics in the current Lebanese environment and under the new Law.

The currently fertile land in Lebanon for the growth of cannabis is expected to be between 5,000 to 6,000 acres. It is also expected that the landmass for the legal cultivation of cannabis would increase beyond 6,000 acres as the cultivation of medicinal and industrial cannabis expands in Lebanon.

The cost of setting up factories for the manufacturing of cannabis varies from country to country. No factories are currently established and/or operational for the manufacturing of medicinal cannabis in Lebanon, given the fact that the legislation was passed a few months ago and no licenses have yet to be granted by the Authority for Cannabis Cultivation for Medical and Industrial Use (the authority that will be overseeing the industry in Lebanon). However, we can make a distinct comparison with factories that have been newly established in countries that have recently legalized medical and/or recreational marijuana. For instance, a 55,000 square foot laboratory with 24 heat-adjusted production halls in the Canadian province of Québec costs approximately USD 31.6 million. Another plant in Canada, consisting of 14,600 square feet with 11 farming halls that are capable of producing approximately 4,500 kilograms of cannabis per year, costs approximately USD 12 million.

According to a recent study, Lebanon is expected to make a revenue of USD 1 billion by 2025 from the export of cannabis products for medical use. It is expected that Lebanon will be one of the leading competitors in cannabis cultivation due to the excellence of its land and climate and will perhaps produce the best quality medicinal and industrial cannabis in the near future.

When comparing the cost of producing a gram of cannabis, the cost in Canada is USD 1; in Europe, more than USD 0.50; whilst in Lebanon, the cost is expected to fall between USD 0.18 and USD 0.20. The conditions and natural factors of the climate, land, and soil in areas like Baalbek-Hermel are optimal for the production of cannabis and increase the quality significantly. Lebanon will without a doubt be one of the competing countries in cost, production, and quality.

Currently, there are around a dozen pharmaceutical plants in Lebanon. With the passing of Lebanon's Medical Cannabis Law, some of these plants may be enticed to enter the market for the production of medicinal materials made from the cannabis plant, and other cannabis-related goods. However, as per Article 18(1) of the Lebanese Medical Cannabis Law, these pharmaceutical companies must obtain prior approval from the Ministry of Public Health in order to obtain a license. Similarly, for a farmer/owner/tenant to obtain a license for the cultivation of cannabis, they must abide by the requirements set out in Article 18(5) of the Lebanese Medical Cannabis Law. This Article stipulates that the individual must be a Lebanese natural person residing in Lebanon, who is at least twenty-one years old. Both the farmer/owner/tenet and the pharmaceutical companies must obtain a Good Agriculture and Collection Practices Certificate ("GACP Certificate") and a Good Storage Practices Certificate ("GSP Certificate"); additionally, the pharmaceutical company will also have to obtain a Good Manufacturing Practices Certificate ("GMP Certificate").

Along with the pharmaceutical companies and the Lebanese farmers/owners/tenets, there are four other classes that are eligible for one of the nine licenses that will be made available at the start of 2021. Article 18 of the Lebanese Medical Cannabis Law specifies these other classes like the following: (1) Lebanese industrial companies approved by the Ministry of Industry for the manufacture of fibers for industrial use, oils, extracts, and preparations in which the cannabis is included (i.e., cosmetic products, tires, etc.). (2) Foreign companies specialized in the field of agriculture, industry, storage, export, marketing, or that have a license from the country to which they belong to carry out the operations specified in the license they obtain, and who shall undertake foreign investment into Lebanon through local manufacturing. (3) Agricultural cooperatives duly established in Lebanon, which have the capacity to respond and adapt to the licensing requirements specifically for the agricultural aspect; these cooperatives will also have to obtain a GACP and a GSP Certificate. (4) Recognized research centers, laboratories, and institutes, provided they have the professional and scientific qualifications that require specialization to use the substances under supervision.

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First Arab Medical Cannabis Law (Lebanon)

November 28, 2022

On 20 April 2020, the Lebanese Parliament passed a law permitting the cultivation, trade, research, and use of medical cannabis. The Lebanese government began first studying the legalizing of medical cannabis in 2018 where projected government revenue was expected to amount to USD 1 billion per annum.

Lebanon is not the first country in the extended region to legalize cannabis for medical use. Turkey passed laws in 2016 permitting doctors to prescribe certain cannabis-based medicine, and regulated cannabis cultivation in 19 out of its 81 provinces for medical and scientific purposes. In 2019, President Erdogan announced that soon all Turkish provinces should be allowed to cultivate cannabis for industrial use, i.e. for manufacturing textiles, foods, paper, personal care products, plastics, and building materials.

The passing of the law by Lebanon creates an opportunity for leading medical cannabis companies, such as those in the US and Canada, that have globalized their business in the past years.

For example, the legalization of medical cannabis in Germany resulted in substantial market entry to the German local cannabis cultivation market by Canadian companies controlling substantial market share.

In this brief, we focus on the highlights of Lebanon’s recent medical cannabis legislation.

How is cannabis defined?

Cannabis is defined in the law as a controlled plant that has psychoactive properties. It includes the fertilized or unfertilized buds and the seeds of the hemp plant, for medical and industrial use, that contains tetrahydrocannabinol (THC) by a percentage not exceeding 1% of its content and other medicinal materials other than the anesthetic of the cannabinoids in different proportions including the

cannabidiol (CBD).

The percentages and contents of the plant are identified pursuant to the methods approved by the Authority.

Cannabis products are defined as every product including fibers for industrial use, and oils, extracts and compounds used for medical and pharmaceutical purposes

Overseeing authority?

The law establishes an authority named the Regulatory Authority for the Cultivation of Cannabis Plants for Medical and Industrial Use (the “Authority”).

The Authority is responsible for issuing licenses, and among other things:

- Entering into agreements with public authorities, or private sector entities, whether domestic or foreign, for the execution of the provisions of the law, including for purposes of knowledge transfer.
- Identifying the geographic parameters where cultivation of cannabis may take place, and other details such as soil types, investment, light accessibility, and so on.
- Identifying the permitted percentage of THC and CBD in industrial, medical, pharmaceutical products.
- Overseeing research and development centers, and laboratories, that are renowned and have the professional and academic skillsets for cannabis cultivation for the permitted uses.
- Establishing rules on production waste and the administrative and security measures to avoid illicit use of waste including that of cannabis stems or any other illicit activity resulting from cannabis cultivation waste management.

- Establishment of central test facilities or contracting with a private sector test facility to ensure compliance with the law.
- Ensuring anti-dumping and anti-trust compliance.

A committee is also established pursuant to the law responsible for the review of licensing applications and compliance with the law and any instructions by the Authority.

Licenses

There are nine licenses that shall be available as follows:

1. License to import seeds and seedlings
2. License to establish a cannabis plantation
3. Cannabis harvesting operations license
4. Manufacturing license
5. Research centers and laboratories license
6. Export license
7. Transport and storage license
8. Sales and distribution license
9. License to import related chemicals

There are six classes of applicants:

1. Foreign companies licensed in their home jurisdiction.
2. Renowned research and development centers, laboratories, and academic institutions.
3. Lebanese companies approved for the manufacture of medicines by the Ministry of Public Health.
4. Lebanese companies approved for industrial activities by the Ministry of Industry.
5. Lebanese agricultural cooperatives.
6. Lebanese natural persons.

Globally

The law clearly addresses the globalization of medical cannabis trade and industry. In addition to Lebanon, countries

that have legalized the medical use of cannabis include Australia, Brazil, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Italy, Jamaica, Luxembourg, North Macedonia, Malta, the Netherlands, New Zealand, Peru, Poland, Portugal, Sri Lanka, Thailand, the United Kingdom, and Uruguay.

In the United States, the use of cannabis for medical purposes is legal over 30 states and the District of Columbia, and although medical use of cannabis has not been legalized at a Federal level, prosecuting individuals acting in accordance with state medical cannabis laws is prohibited.

As for international law governing global medical cannabis trade and industry, Schedule IV of the United Nations' Single Convention on Narcotic Drugs addresses cannabis making it subject to special restrictions. Article 2 of Schedule IV provides as follows:

"A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party."

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Major League Baseball's Salary Arbitration: A Homerun ADR System

November 28, 2022

Baseball is the second most-watched sport in the US (tucked behind American football and in front of basketball) and the seventh most watched sport in the world. Major League Baseball ("MLB") is the American professional baseball organization and the oldest of the major professional sports leagues in the US and Canada.

Unlike their counterparts, baseball players make insurmountably more money than any other sport because they have a stable union, and there's no maximum limit amount on the money they can earn; and unlike the NBA (professional basketball) and the NFL (professional American football), baseball has no salary cap, nor is player compensation tied in any way to overall league revenues. Under virtually every previously conceived circumstance, MLB contracts are fully guaranteed. For instance, last year the Los Angeles Angels gave Mike Trout a 12-year, USD 426.5 million contract extension – all of which is fully guaranteed. So how does the MLB maintain the highest paying sporting contracts whilst simultaneously avoiding disputes?

History of the System

The origins of salary arbitration are rooted in the reserve system that was created at the inception of baseball. When professional baseball was born in the 1870s, players were held to one-year contracts; this allowed them to switch teams continuously. As a result, a handful of the team owners made a

“gentlemen’s agreement” that would allow each owner’s team to protect five of their own players. These players became “reserved” to their current team and out of reach of other teams.

By the 1880s, this reserve system disseminated to every team in the league and each player had a reserve clause inserted into their contract, which bound the player to the original team they had signed with, preventing the player from leaving the team until their retirement. In essence, whichever team the player signed with originally, became their home for the rest of their career.

The reserve system first came to a legal battleground in 1922 during the case of *Federal Baseball Club v. National League of Professional Clubs* (the “FBC case”). In the FBC case, the US Supreme Court created an antitrust exemption for baseball. According to Chief Justice Holmes, baseball was exempt from the antitrust laws – which are statutes developed by governments to protect consumers from predatory business practices and ensure fair competition – because they did not constitute interstate commerce. Therefore, baseball did not fall within the scope of the Sherman Act, which outlaws every contract, or conspiracy in restraint of trade, and any monopolization attempted monopolization, or conspiracy to monopolize. Thus, the US Supreme Court upheld the reserve system.

The issues revolving around the reverse system were once again brought into play in 1972 in the case of *Flood v. Kuhn* (the “Flood case”), in which Curtis Flood attempted to bring an antitrust claim against the MLB for the reserve system. However, the court upheld the decision of the FBC case and ruled that Congress had several opportunities to abolish baseball’s antitrust exemption but choose not to do so. As a result, the court determined that the reserve system was acceptable.

With all the problems that the reserve system created, the players – through the assistance of the National Labor Relations Board – developed a union bargaining status and created a salary arbitration provision with the team owners. Shortly after the decision of the Flood case, a new Collective Bargaining Agreement ("CBA") was signed. The CBA created a process for salary arbitration from the fragments of the reserve system.

The Salary Arbitration System

Baseball's salary arbitration is significantly more different than that of conventional arbitration used in labor negotiations. The distinctiveness of salary arbitration in baseball comes from the final offer format, which is referred to as the high/low format. The high/low format means that each party (the player and the team owner) submits a salary proposal to an arbitrator. Subsequently, the arbitrator must choose either the amount proposed by the player or the amount proposed by the team owner. The arbitrator makes their decision based on a set of evidence which is provided by either party pursuant to the criteria outlined in Article VI (F)(12) of the CBA.

As per Article VI (F)(12)(a) of the CBA, the following evidence may be introduced in the arbitration hearing:

- Quality of the player's contribution to the team during the past season including, but not limited to, the player's overall performance, special qualities of leadership, and public appeal;
- The length and consistency of the player's career contribution;
- The player's record of previous compensation and comparative baseball salaries;
- The existence of any physical or mental defects on the

part of the player; and

- The recent performance record of the club including, but not limited to, its league standing and attendance as an indication of public acceptance.

According to Article VI (F)(12)(b) of the CBA, the following evidence is not admissible in the hearing:

- The financial position of the player and the team;
- Press comments, testimonials or similar material bearing on the performance of either the player or the team, and any recognized annual awards for excellence of performance;
- Offers made by either the player or the team prior to the arbitration;
- The cost to the parties of their representatives, attorneys, etc.; and
- Salaries in other sports and occupations.

In January of 1999, the CBA was modified to include Article XX. This Article set forth the requirement that reserved players with greater than three years, but less than six years of service, may demand salary arbitration.

The Problems with the Salary Arbitration System

The provisions of the CBA leave an open space for problems that may arise between the players and the team. However, there are three issues that are quite prominent in the fundamentals of this system.

The High/Low Format

The first issue is rooted in the high/low format of the system. In this format, the arbitrator cannot reach a compromise or a middle ground for the offer; they must either

choose the player's salary proposition or the owners. Thus, owners believe this issue is the root of the extraordinarily high salaries in baseball.

If the team owner was to present an amount that is significantly low, the arbitrator will tend to favor the player and choose the higher amount. In the pursuit of preventing this from occurring, owners often present an amount that is higher than they would like.

The Effect on the Ongoing Relationship

The second issue is embedded in the evidence which both parties present and whether this may affect the ongoing relationship between the player and the team. Looking at Article VI (F)(12)(a) of the CBA which outlines the criteria for evidence that may be introduced throughout the proceedings, the team can essentially present evidence that may degrade the player and his accomplishments. However, since the player will likely be returning to the same team the following year, the team may tend to hold back sensitive information that may offend the player.

During an interview with a prominent arbitrator who handles the proceedings for the New York Yankees, most teams tend to hold back degrading and malicious information about some of their players, out of fear of the repercussions that may occur during the following year.

For instance, during the salary arbitration proceedings between the owner of the New York Islanders, a National Hockey League team, and their then goalie, the owner introduced humiliating evidence into the hearing about the goalie. The goalie felt so betrayed by his team and the whole process that he refused to return to the Islanders the following season. Thus, the goalie was traded because of his refusal to play, which was the direct result of the salary arbitration proceedings.

A Sense of Betrayal

The other major problem that occurs is what happens after either party wins. In the event the owner wins, the player may feel betrayed sensing they had played well in the previous season and that they are owed a salary increase. Thus, the player may avoid playing up to their full potential during the following season as a point of resentment towards the team. With that being said, there is also the possibility that the player may play even better the following season with the intention of being scouted by other teams and not re-signing with his present team.

On the other hand, if the player wins the salary arbitration, the owner may choose to reduce his playing time or change where he bats in the line-up, thus affecting his offensive output. For instance, if the player is a pitcher, the team may put him in a more mediocre role, which may affect the player's ability to negotiate for a higher salary in the future during free agency.

Conclusion

The salary arbitration system has become a crucial component of baseball. From a legal perspective, the system is quite straightforward and astute. However, the fans may become exasperated with the politics and the business of the game. And since the fans are the ones that bring the money into baseball, whether it be through attendance or through purchasing merchandise, they may be reluctant to follow the sport, should the players and the owners continue to quarrel over labor issues and initiate more work stoppages. At the end of the day, the loss of fans means the economic prosperity that baseball has enjoyed for so long and its unwavering position as the second most profitable sport in the world, will soon cease to exist.

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Choosing the Best Arbitrator for your Case

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The opportunity to select your own arbitrator is one of the attractions of arbitration. Your chosen arbitrator can be the defining factor in a victory for your case. In a recent survey done in 2018, almost half of in-house counsel surveyed stated that they had insufficient information to make an informed choice about the appointment of arbitrators. Considering a search for information on arbitrators can be difficult, due to the general confidentiality of arbitration proceedings, how can you go about selecting the best arbitrator?

Professional Expertise

A deep range of knowledge regarding the nature of the dispute can be very beneficial to the arbitration. There is a common notion that the arbitrator must be expert in legal affairs. However, if your matter has a very niche nature, you will benefit from selecting an arbitrator who has experience in your specific industry.

This will save you time explaining industry concepts and terms as they will be familiar with the issues being discussed which will subsequently save you costs. For example, you have an industrial patent infringement dispute. Selecting an arbitrator with prior experience in this industry will avoid

the need for you to explain from scratch the meaning of defensive patenting.

Relevant individuals should be approached to deal with a possible dispute of specific nature. Candidates, or the institution to which they are most known, will provide personal descriptions in the form of a curriculum vitae that you may use to nominate a well-suited arbitrator for your matter. It is not only key to nominate an arbitrator who is familiar with the relevant industry, but it is also essential to understand the potential arbitrator's convictions, in order to determine their impact on the dispute. Thorough knowledge of the sector can be invaluable, but ultimately a party's interests will not be served if the nominated arbitrator has certain convictions about a matter that are diametrically opposed to the nominating party's arguments.

Are they available?

A busy arbitrator can be a major impact in the time it takes to obtain an award. An advantage of arbitration is the flexibility of the process and the management of this flexibility can have a significant impact on the length, efficiency and ultimate success. Choose an arbitrator who can commit in devoting enough time and attention to the matter and make sure their schedule allows them to take on the case. A highly sought out arbitrator will have a busy schedule, and this can lead to scheduling conflicts which may ultimately delay the proceedings. A personal conversation with the arbitrator that you wish to nominate can provide a sense of clarification. However, a conversation usually goes no further than providing reassurance as to the candidate's availability and knowledge. The chair of the International Bar Association (IBA) Arbitration Committee has recently stressed the need for arbitrators to be genuinely available, and an interview may reveal factors affecting a candidate's availability.

Personality

Looking for an arbitrator who has knowledge in the subject matter should be considered but also look for one with good people management skills. A good arbitrator must strike an appropriate balance between observing and actively steering the proceedings. The flexibility of managing the arbitration procedure, if not managed properly, can lead to protracted disagreements which will result in more costs and time being spent on a granular issue.

Choose an arbitrator who is as good at managing people as they are the procedure. In a study conducted by Ponak et al in 2010 regarding Personality and Time Delay Among Arbitrators, the study found that conventional, case-based coding can explain about 30 percent of the variance in time delay, whilst another 30 percent is likely due to the personality predispositions of arbitrators. Ponak and his colleagues found that characteristics of the arbitration process that predicted faster decision time were: fewer pages of written decision (a proxy for complexity), the use of legal counsel, and the use of a sole arbitrator rather than a three-person panel. The study also examined one job-related characteristic of the arbitrator– his or her workload–and found that the busiest arbitrators took longer to render their decisions. Will your selected arbitrator be adapted to dealing with cultural differences and tensions that will eventually run high? Their management of the parties is a substantial factor in the efficiency of the case, and it must be done with sterling judicial demeanor.

When we talk about cultural differences, keep in mind that in disputes between parties of different nationalities, some arbitral institutions such as the Dubai International Arbitration Centre (DIAC), permit the arbitrator from having the same nationality as any of the parties. As per DIAC Arbitration Rule 10.3:

“Where the parties are of different nationalities, a sole arbitrator or chairman of the Tribunal shall not have the same

nationality as any party unless the parties who are not of the same nationality as the proposed arbitrator, all agree otherwise in writing."

The International Chamber of Commerce (ICC) follows a similar standard pursuant to Article 13(1) of the ICC Rules:

"In confirming or appointing arbitrators, the Court [International Court of Arbitration] shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules."

The Language of the Arbitrator

Arbitrators and participants of the procedures will be of different nationalities in most circumstances; therefore, it is not uncommon that they will speak different languages. This brings about another factor of great importance – the language of the arbitrator. The language in which the procedure is conducted is a dominant characteristic for the consensual resolution of the dispute itself. The choice of language with respect to the arbitration proceedings in the agreement will play a significant role as communications will most likely be made in the language indicated in the arbitration agreement. This bears the questions, is an "implicit agreement" of the parties regarding the language of the arbitration, a *facta concludentia* (i.e. the use of the same language for the contract, the arbitration agreement, the correspondence etc.), allowed if it is absent from the agreement? The choice of the "wrong" language may result in the need for translation and interpretation for the majority of the proceedings, which can severely impact the cost and duration of the proceedings.

If the arbitration is conducted in English, but in a country where English is not the official language, such as the UAE,

it would be advantageous to have an arbitrator who speaks both English and Arabic, to address their ability to deduce and analyze parties' submission on application of legislation to the dispute, and the legislator's intent in the drafting of a law, or provisions therein, as the parties present.

Therefore, determining what language or languages shall be used in the arbitration is decisive on three dimensions: party equality, the composition of the arbitral tribunal, and the interaction with national laws. The latter being necessary in a country such as the UAE where the first language is Arabic but the majority of arbitrations are conducted in English; when it comes to the proceedings of arbitration, the choice between these languages can be a vast factor in the interpretation of the law and facts.

Conclusion

At the end of the day, much relies on choosing the most suitable arbitrator. Make sure to vet the arbitrator you wish to nominate accordingly and enhance your chance of success for your arbitration before it even begins.

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