*The Commercial, Shipping & Investment*

# ARBITRATION WATCH

**April-June 2017** **Issue no. 33**

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## 1. NEWS

### California Looks to Attract More International Commercial Arbitration

California's State Supreme Court set up a Working Group to look at the merit of permitting foreign and out-of-state counsel to take part in cases held there. The report submitted by the Working Group, identified as proposal 1, looks to follow the American Bar Association Recommendation for a Model Rule on Temporary Practice by Foreign Lawyers. This will allow foreign and out-of-state counsel to represent parties set by the ABA parameters. The full report can be viewed here.

### ICC Opens Office in Singapore

The International Chamber of Commerce will become the first institution to open a case-management office in Singapore. It will be the fourth overseas office of the ICC, after New York, Sao Paulo and Hong Kong and will be based at the Maxwell Chambers Suites, an expansion of Maxwell Chambers. The expansion will have four floors and around 50 offices for disputes, due to be completed in 2019.

### Japan to Open New Arbitration Centre

Japan's public and private sectors are collaborating to create a new international mediation centre. The aim is to boost the number of international commercial arbitration cases in the country, a sector that shows no sign of slowing. Lawyer groups, corporations and other private sector operators will lead the operations of the centre, whilst the Japan Commercial Arbitration Association could use the centre for mediating international corporate disputes.

With the Tokyo Olympic Games in 2020 coming up, the centre will be geared to handle any sports-related disputes arising, such as doping.

### Third Party Funding Approved by Paris Bar

The Paris Bar Council has confirmed its support for third-party funding for international arbitration. The view is of a positive development for access to justice and does not contravene French law – current French law does not prohibit third party funding for international arbitration and counsel are still bound by the ethics on representing a funded party.

### ICSID Plan Update to Rules and Regulations

Outlined at an event in New York, ICSID Secretary General Meg Kinnear spoke of six priority areas for rule reform. These included the streamlining of the process for appointing arbitrators; updated procedures for the challenge of tribunal members by parties; adoption of a code of conduct for arbitrators; rules governing disclosure of third-party funding and its impact on security for costs; guidance on the allocation

of costs in arbitral awards; and further transparency measure including publication of decisions and orders.
The amendment process was launched in October 2016 when Member States were asked to suggest topics for consideration. This was followed in January 2017 when the public were invited to submit their suggestions. Fully, there are sixteen areas of consideration, the full list can be viewed here. This information has now been collated and background papers will be prepared and published, hopefully, by early 2018.

## New President at VIAC

The Vienna International Arbitration Centre has announced the appointment of their new President Guenther Horvath as of 1 May 2017. He has moved up from Vice-President and will Succeed Anton Baier who will remain on the VIAC-Board. The new President is a partner of Freshfields Bruckhaus Deringer, a renowned expert in international arbitration. Franz Schwarz of WilmerHale was elected as the Vice-President.

## Swiss Arbitration Association Gives Approval to Revision

The Swiss Arbitration Association has given its approval of the governments planned revisions to Switzerland's arbitration Statute. The government's goal with the revisions is to maintain its attractiveness as an arbitral hub. The proposals include – allowing English-language filings before the Swiss Federal Tribunal. It also proposes to replace references to Switzerland's code of civil procedure with provisions that can be easily referenced by foreign practitioners. Another proposal is that the revised law should codify developments in Swiss case law that have arisen in the past 30 years since the Federal Law on Private International Law was enacted.

## English Version of New Saudi Arbitration Law Released

The Qatar International Court and Dispute Resolution Centre (QICDRC) held a seminar on 'The role of the QFC Court under the new arbitration law'. This follows enactment of the new Qatar Arbitration Law in February 2017. The highlight of the seminar was the release of the approved English version of the new Law. The unofficial translation can be found here.

## ISDS Must be Signed by All Member EU States

In 2015 the EU and Singapore concluded negotiations for a Free Trade Agreement. It was assumed by the European Commission and the European Parliament that the agreement could be ratified by the EU only, however the ECJ ruled the investor-state dispute settlement (ISDS) and non-direct foreign investment was out-with the competence of the EU. The court held that the FTA was a "mixed" agreement requiring to be signed by the EU Council and Parliament, as well as individual member states.

## London Chamber of Commerce and Industry Launches New Arbitration Service

The LCCI has launched a new arbitration service, offering this as an in-house service rather than a referral point. The London Chamber of Arbitration is a resurrection of a service that played an important role in the provision of arbitration facilities for its members that had appropriate arbitration clauses in their contracts. This is a break from the tradition of referring disputes to the LCIA.

## Ecuador Terminates Remaining 16 BITs

Before his handover of power to Lenín Moreno, President Rafael Correa formally terminated the 16 remaining bilateral investment treaties. The decision follows the recommendation by the Ecuadorian Commission that audited the country's Investment Protection Treaties (CAITISA). The commission was set up in 2013 and comprised of government officials, academics, lawyers and civil society groups. Treaties were terminated with China, the Netherlands, Germany, the UK, France, Spain, Italy, Sweden, Switzerland, Canada, the US, Argentina, Bolivia, Peru, Venezuela and Chile.
Findings by CAITISA showed that Ecuador received 0.79% of global FDI that flowed into Latin America and the Caribbean – most FDI came from Brazil, Mexico and Panama, none of which held BIT's with Ecuador.

Ecuador has faced 26 cases in international tribunals based on BIT's, in 2014 Ecuador had the fifth highest number of arbitration cases in the world. Out of the 15 cases where a judgement has been made, 13 have been made in favour of the investor. Almost $1.5 billion dollars has been paid out by Ecuador on these cases – the equivalent to 62% of the health spend.

### Gurgaon Opens Arbitration Centre

The Punjab and Haryana High Court has approved the creation of India's second International Arbitration Centre in Gurgaon. The first was set up in Mumbai in October 2016, the addition of the new centre is a welcome addition for the business community. Gurgaon hosts half of the companies listed on the Fortune 500 and hundreds of large corporate firms.

### Kuala Lumpur KLRCA new rules

The Kuala Lumpur Regional Centre (KLRCA) has announced the release of its updated rules, and come into effect June 2017. Kuala Lumpur has seen a steep increase in cases and has become a very important hub for international arbitration. The new Rules will help optimize the costs and efficiency of the proceedings and to improve the quality of the awards. They will also keep the Centre up to date with international best practice, including provisions for joinder of third parties and consolidation of proceedings.

As well as provisions for joinder of third parties, other provisions include; a model arbitration clause and submission agreement; more sophisticated provisions for consolidation of disputes; a technical review of awards and a simplified fee schedule.

The revised Rules can be viewed here.

### Hong Kong Passes Third Party Funding in Arbitration

On the 14th June 2017 Hong Kong Passed the Arbitration and Mediation Legislation (Third Party Funding) Bill 2016 (the Bill). The provisions for third party funding for arbitration come in the form of a Code of Practice, with clear ethical and financial standards, and include safeguards to protect against any potential abuse.

The Bill can be viewed here.

### New South African Arbitration Bill

The South African Cabinet has approved the International Arbitration Bill 2016 and will be sent to the President for assent. Up to this point arbitration has been subject to the Arbitration Act of 1965, however this does not differentiate between domestic and international arbitration and is not based on UNCITRAL Model Law. The new Bill will clearly distinguish international arbitration and will incorporate the UNITRAL Model Law, with some amendments to provisions to allow for local circumstances.
The New Bill can be viewed here.

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## 2. Investor –State Arbitration

### Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2

The NAFTA Tribunal, comprising of Professor Albert Jan van den Berg (Chair), Sir Daniel Bethlelem and Gary Born, handed down its final award in *Eli Lilly v Canada* on 16 March 2017. The claim, instituted by Eli Lilly and Company - a US based pharmaceutical enterprise, involved revocation of two of its patents in Canada, namely Zyprexa and Strattera by the Federal Court of Canada in 2010 and 2011 respectively. These decisions were upheld by the Supreme Court of Canada in 2011 and 2012. According to the Federal Court, Eli Lilly's patent applications failed to meet the requirements of the Canadian Patent Law as they did not satisfy the "promise utility doctrine" test. According to the Claimant, the judgments by the Federal and Supreme Courts constituted a "radical departure" from Canada's traditional utility standard and those applied in the NAFTA constituency. To Eli Lilly, the promise utility doctrine was unprecedented. It

was arbitrary and discriminatory against pharmaceutical companies and products, and therefore constituted unlawful expropriation of Claimant's investments under Article 1110 of NAFTA and a breach of the minimum standard of treatment under Article 1105 of NAFTA.

Interestingly, Eli Lilly's Chapter 11 claims were not limited to a denial of justice, despite having been based on liability of Canada for Federal and Supreme Court decisions. Eli Lilly introduced alternative arguments, claiming that judicial measures as such could amount to indirect expropriation "when they result in a substantial deprivation and violate a rule of international law". It also asserted that Canada violated the doctrine of legitimate expectations when its judiciary dramatically changed the Canadian utility requirement beyond the acceptable margin of change that every investor must anticipate, adversely effecting its investment decisions in relation to Zyprexa and Strattera patents. Whilst, the Tribunal dismissed Eli Lilly's Article 1110 and 1105 claims, its decision is largely based on factual inquiries and the lack of evidence that there has been a dramatic or fundamental change in the Canadian Patent Law. In its reasoning, the Tribunal did not clearly articulate the legal standards that were invoked by the Claimant nor did it reject Eli Lilly's lines of legal argumentation. The structure of the reasoning in the Final Award in *Eli Lilly* might therefore indicate that jurisprudential shifts in NAFTA countries, if 'dramatic' enough, may amount to violation of legitimate expectations and, in some cases, even indirect expropriation.

### Eiser Infrastructure Ltd v. Spain (ICSID Case No. ARB/13/36)

Between 2009 and 2013 the Spanish Government offered incentives relating to the generation of electricity for both photovoltaic (PV) and concentrated solar power (CSP). In 2010 and later in 2013 and 2014, due to the costs associated with the incentive program,, the regulatory framework was continually modified, resulting in incentives that were significantly scaled back. Eiser Infrastructure Ltd, a UK based investor, and Energia Solar Luxembourg brought an investment treaty arbitration (ITA) against Spain, under the Energy Charter Treaty (ECT), after their investment of €935 million in 3 CSP plants that came online in 2007 suffered major losses.

The tribunal, which consisted of John Crook (Chair), Stanimir Alexandrov and Campbell McLachlan, found in favour of the Claimant's due to the 'devastating effect' that the government's regulatory changes had on the investment. The tribunal concluded that Spain, by depriving the Claimants of fair and equitable treatment breached of Article 10 of the ECT. The Claimants were awarded €128m plus interest, short of the €300 million originally claimed.

This is the first case that has gone against Spain since the scaling back of its solar power incentivization programmes. In January 2016 a Stockholm Chamber of Commerce (SCC) arbitration ruled in favour of Spain in a case brought by Charanne B.V. and Construction Investments, where the tribunal concluded that the modification of the regulatory framework did not affect the legitimate expectations of the investors severely. In contrast, the tribunal in Eiser held that they suffered a much broader modification of the regulatory environment, with far more severe economic consequences. Consistently, with the analysis of the tribunal in Charanne, the tribunal indicated that while Eiser could not reasonably expect a static regulatory environment, the effects of the measures did affect the Claimants legitimate expectations.

This case will have far reaching significance for both Spain, which has 29 ECT arbitrations pending, and Italy that also had tariff cuts and pending ITA cases.

## 3. COURT CASES

### Spain

**Liability of arbitrators. Award signed only by two arbitrators. Wrongful exclusion of the third arbitrator in the deliberation of the award. Breach of the principle of arbitral collegiality. Annulment of the award.**

The Spanish Supreme Court condemned the arbitrators, Mr. Ramallo and Mr. Temboury, to

pay 750,000 Euros to Puma for reckless arbitration.

This case is about an arbitration agreement regarding a distribution contract between the company Puma and a Spanish distributor (Estudio 2000). The defendants, Mr. Ramallo and Mr. Temboury, were the arbitrators appointed by the Spanish distributor and the President of the arbitral Tribunal. Puma appointed another arbitrator.

The arbitral Tribunal issued an award ordering Puma to pay the Spanish distributor 98.19 millions of Euros as compensation. The arbitral award was only signed by the defendants-arbitrators, but not by the third arbitrator who was appointed by Puma. This was in breach of the principle of arbitral collegiality and comprised an infringement of the right of defence.

For the reasons stated above, the arbitral award was annulled. Puma then started legal proceedings against the defendants-arbitrators trying to recover fees paid by Puma to them, which amounted to 750,000 Euros for each defendant as they acted in bad faith and recklessly causing damages and losses to Puma. Puma had a direct action against the defendants-arbitrators and was able to claim for compensation against them. The defendants-arbitrators were found guilty and liable due to the fact that the arbitral award was issued recklessly. The Court stated that they could not issue an arbitral award without the third arbitrator appointed by Puma. This was a serious and inexcusable mistake. The Supreme Court confirmed the liability of the arbitrators and ordered them to indemnify Puma.

*102/2017 Judgment of February 15, 2017 Madrid Supreme Court.*

## Turkey

**Turkish Supreme Court finalises domestic recognition proceedings six years after an ICC Tribunal rendered its award in electricity license dispute**

On 6 October 2016, the 11th Civil Chamber of the Turkish Supreme Court ruled that refusal of the Respondent's 'technical examination request' by the arbitral tribunal does not constitute a violation of the public policy exemption under Article V of the New York Convention on the Recognition of Foreign Arbitral Awards of 1958 (New York Convention). The challenge before the Turkish Supreme Court arose from an electricity license agreement, whereby the Respondent party allegedly defaulted in making payment for the licenses and the Claimant party refused the transfer of its know-how. Article 21 of the license agreement between the Parties stipulated that any disagreement be resolved by an arbitral tribunal, comprising of three arbitrators and under the Rules of the International Chamber of Commerce (ICC). Article 19 of the Agreement provided for Italian Laws and regulations as the applicable law. On 3 August 2010, the arbitral tribunal ruled in favor of the Claimant. The Claimant instituted recognition and enforcement proceedings under the New York Convention before the Civil Court of First Instance, whereby the Court upheld the award rendered by the ICC tribunal.

Counsel for the Respondent challenged the Court of First Instance's decision arguing that the ICC tribunal dismissed its technical examination request, which might have revealed specifications that are important to the product and to public health safety. The ICC tribunal's final verdict on its request, argued the Respondent, violated its right to a fair hearing, the tribunal's duty to conduct proceedings fairly and proportionally, and the peremptory norms and rules embedded in the Competition Laws and Regulations in Turkey. Consequently, the arbitral award, according to the Respondent, was against public interest and, as such, the Court of First Instance erred when it recognized and enforced the award.

In its verdict, the Turkish Supreme Court cited the Court of First Instance's decision in length, noting that domestic courts' competence does not extend to a review of matters related to substance of the dispute, including, in this case, the ICC tribunal's refusal of the 'technical examination request'. According to the Supreme Court, the Respondent failed to present convincing evidence that the arbitral tribunal failed to consider public interest in violation of

the New York Convention and the Turkish International Private and Procedural Law (MOHUK). The Supreme Court ruled that the Turkish Competition Law is not binding since the Agreement provided for Italian Laws as the applicable law. After more than six years of domestic proceedings, the Supreme Court's decision finalised the recognition and enforcement of the ICC award in favour of the Claimant party**.**

*(Decision by the 11th Civil Chamber of the Turkish Supreme Court, Case No: 2016/725, 2016/7777 dated 06.10.2016).*

## Israel

### Compulsory Or Agreed Arbitration?

A package of diamonds with a value of US$ 681,810 was sold by its former owners both to the Applicants and to the Second Respondent, all, members of the Israeli Diamond Exchange (the First Respondent). Under the parties' consent, the President of the Diamond Exchange (DE) was given the Diamonds to be held until the matter of ownership was resolved. After receiving the Diamonds, the President invited the parties to an "agreed arbitration external to the Israeli DE arbitral tribunals". This arbitration took place without the presence of the Applicants who refused to participate. The arbitrators ordered, in an award, that the Diamonds should be passed onto the Second Respondents as the owners. The President handed the Diamonds to the Second Respondent, even knowing that the Applicants had commenced proceedings before the competent Courts. The Applicants argued that they were rightful owners of the Diamonds, and that the Israeli DE had breached its fiduciary duties when transferring the diamonds to the Second Respondents. The Applicant filed a claim against both the DE and Second Respondent, seeking compensation for the value of the Diamonds. The Magistrates Court held that the Applicants should have participated in the arbitration and that its award binds the Applicants, dismissing the claim. The Applicants appealed to the District Court which held that, indeed, according to article 97 of the DE Regulations, "any claim based on disputes between a member… and another member…shall be brought to arbitration as set forth in these regulations… and this clause is deemed as a binding arbitration agreement". However, the Court also referred to article 106 which states: "the arbitrators, according to these regulations, can also be nominated by the mutual consent of the parties". The Court distinguished between a compulsory arbitration (regulation 97) and external agreed arbitration (regulation 106), which was the one which took place in the current matter. The authority of an Arbitrator under an agreed arbitration is established by both parties' consent, and without such consent, a party cannot be compelled to take part in the arbitration. The District Court ordered to remit the case to the Magistrates Court, which should decide on the ownership of the diamonds and should ignore the arbitration award, as it has no effect.

*Civil Appeal 17048-04-16 Namdar Vs. The Israeli Diamond Exchange Ltd and Others. Tel-Aviv District Court, 28 May 2017.*

## Germany

### German Federal Court of Justice on arbitrability of intracompany disputes

In a decision dated 6 April 2017, the Federal Court of Justice revisited the issue of arbitrability of intracompany disputes. It found that a dispute about a resolution adopted in a general meeting of partners in a limited partnership is not automatically arbitrable. The Federal Court of Justice has issued several decisions on German limited liability companies, setting out minimum requirements with regard to the arbitrability of applications to set aside corporate resolutions adopted in a general meeting of shareholders in a German limited liability company. In the present case, the partners in a German limited partnership had excluded several partners from the partnership by revoking their shares in a partners' meeting. The excluded partners initiated arbitration to have this corporate resolution set aside. The Federal Court of Justice held that the minimum requirements for arbitrability developed for German limited liability companies also apply to German limited partnerships. It held that the partners in a partnership have the same interest as shareholders in a limited liability company to

avoid being deprived of legal protection or disadvantaged in any way. Therefore, the partners in a German limited partnership (i) must be made aware of the arbitration proceedings and must be given an opportunity to join; (ii) must be able to influence the selection of the arbitrator; and (iii) all issues with regard to the disputed resolution must be put before one arbitral tribunal. Since the arbitration agreement in the present case did not fulfill these criteria, the court found that the dispute was not arbitrable.

*German Federal Court of Justice, Docket No. I ZB 23/16, Decision of 6 April 2017.*

### United States

**District court confirms arbitration award despite objection regarding scope of discovery.**

Al Maya Trading Establishment (Al Maya), a distributor of food products in the United Arab Emirates, petitioned the Southern District of New York to confirm an arbitral award in its favor against Global Export Marketing Co., Ltd (GEMCO), a New York-based exporter of foodstuffs and related products, pursuant to the Federal Arbitration Act (9. U.S.C. § 1 *et seq*.) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. § 201 *et seq*.). GEMCO, in turn, moved to vacate the award, prompting Al Maya to move for sanctions under Federal Rule of Civil Procedure 11. The court confirmed the award and denied both GEMCO's motion to vacate and Al Maya's motion for sanctions.

At issue was the scope of discovery. At the beginning of the arbitration proceedings, the parties agreed to focused disclosure of documents in order to reach a speedy and efficient resolution of their dispute. Nevertheless, when Al Maya produced profit and loss statements after being compelled to do so by the arbitration panel, GEMCO sought to obtain additional information. GEMCO argued that it did not have the ability to verify the accuracy or completeness of the allocations contained in the profit and loss statements and thus requested supporting documentation. The panel denied GEMCO's request.

According to GEMCO, in making that decision, the panel refused to hear evidence that was pertinent to the controversy, which is ground for vacatur. The court rejected GEMCO's arguments, finding that procedural questions are left to the discretion of the arbitrator. The court further reasoned that there was no fundamental unfairness since the parties had agreed to limited discovery at the beginning of the arbitration.

While the court disagreed with GEMCO's position, it did not find that the motion to vacate was frivolous or was made for an improper purpose. The court thus declined to issue sanctions.

*Al Maya Trading Establishment v. Global Export Marketing Co., Ltd*, No. 16-CV-2140 (S.D.N.Y. Mar. 17, 2017).

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## 4. CONTRIBUTORS:

- Behn, Daniel – *AACNI* (United Kingdom)
- Batonga, Marilyn - *Baker & McKenzie* (United States)
- Bräuninger, Laura – *Gleiss Lutz* (Germany)
- Harris, Yoav (Adv) – *Prof.Bein &Co. Law Offices,* (Israel).
- Iraola, Borja – *AACNI* (Spain)
- Krapfl, Claudia – *Gleiss Lutz* (Germany)
- Mirmi, Dolores – *AACNI* (Spain)
- Ozgur, Erman – *AACNI* (United Kingdom)
- Zaslowsky, David – *Baker & McKenzie* (United States)

*This is a non-exhaustive review. Do not rely on its contents without seeking legal advice from experts in the relevant jurisdiction. New contributors are aways welcome in the upcoming issues. We thank those who*

*contributed to the present edition. Editors: Albert Badia and Ana Maria Daza-Clark.*

*The Commercial, Shipping & Investment*
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