The Bulletin in Brief 1/2018

In his message, ASA President Elliott GEISINGER addresses what arbitral tribunals should expect from quantum experts and what not. He appropriately recalls that it is never the role of the respondent’s quantum expert to make the claimant’s case (“Nobody Expects the Spanish Inquisition! (Of Soft Cushions and Comfy Chairs)

Articles


Anne-Marie LACOSTE (“Corruption as a Bar to Award Enforcement in France”) critically analyses the recent decision of the French Cour de cassation in the Indagro case. The Court refused to enforce a foreign award on the ground that its enforcement was contrary to international public policy. A novel aspect of the case is that French courts based their review of the award on a French criminal court’s decision on corruption applying the principle of res judicata.

Leonid SHMATENKO and Svitlana BEVZ (“The Arbitrability of Corporate Disputes in Ukraine”) delve into a topic that is highly controversial in Ukraine: whether corporate disputes can be referred to arbitration.

Philippe HABERBECK (“The Recoverability of Lost Profits under Swiss Commercial Law”) summarises the findings of his recently published doctoral thesis for which he has made an in-depth study of the relevant Swiss jurisprudence concerning loss of profit claims under Swiss commercial law.

In annulment proceedings of international awards, the Swiss Federal Supreme Court is bound by the facts established by the arbitral tribunal. Philippe HOVAGUIMIAN (“Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA”) submits that the non-reviewability of factual findings in such cases undermines the efficacy of art. 190(2) PILA, notably, by preventing the ultimate review of arbitral jurisdiction by a judicial instance.
Decisions of the Swiss Federal Supreme Court

Decision 4A_150/2017 of 4 October 2017: Dispute between reinsurance companies. / Award set aside for lack of jurisdiction. / The secondary reinsurer was not bound by the arbitration clause in the main insurance contract between the primary reinsurer and the main insurer.

Decision 4A_668/2016 of 24 July 2017: Request to set aside arbitral award (CAS) on the ground of a conflict of interest of a party representative. / Conflict not demonstrated. / Violation of mandatory rules of a private body (FIFA) does not amount to a violation of public policy.

Decision 4A_672/2016 of 24 January 2017: An arbitration clause referring to arbitration before the “International Chamber of Commerce of Geneva” is intended to refer to ICC, and not Swiss Rules’, arbitration.

Decision 4A_302/2013 of 5 June 2014: Jurisdiction over an alleged agent (defendant) despite a contract providing that he was “acting on behalf of” a third party. / No breach of pre-arbitral negotiation requirements. / Wrong allocation of burden of proof is not a ground for challenge.

Decision 4A_377/2013 of 11 February 2014: Share purchase contract not binding upon the buyer due to the seller’s fraud. / Arbitrators’ reliance on testimony of allegedly non-neutral witnesses cannot be challenged.

Decision 4A_236/2017 of 24 November 2017: Request to set aside (ICC) award. Arbitrators’ procedural conduct not indicative of bias. / No right to a reasoned decision regarding the challenge of an arbitrator. / No violation of equal treatment when arbitrator rejected late evidence.

Decision 4A_316/2017 of 2 August 2017: The Court is bound by the arbitral tribunal’s description of the parties’ arguments, prayers and admissions made in the proceedings.

Decision 4A_40/2017 of 8 March 2017: Allegation that the arbitral tribunal had issued an ex aequo et bono (equity) award without being authorised to do so. / Wrong application of the law cannot be challenged on the ground of lack of jurisdiction.

Decision 4A_12/2017 of 19 September 2017: Validating freezing orders is not an arbitrable subject matter; it is the prerogative of the debt collection offices. / Question whether the arbitral tribunal must examine arbitrability on its own motion left open. / A party which has neither attempted to obtain a written statement from a witness nor sought the assistance of the arbitral tribunal or the juge d’appui (Article 186 PILA) to have that witness appear at the hearing cannot complain about a violation of its right to be heard.
Decision 4A_206/2017 of 6 October 2017: CAS decision about refereeing issues at the Olympics Games not an arbitral award.

Decision 4A_277/2017 of 28 August 2017: Principles governing a party’s (limited) right to request the appointment of an expert by the arbitral tribunal and the circumstances in which the arbitral tribunal can refuse to appoint an expert.

Decision 4A_384/2017 of 4 October 2017: Termination order by an arbitral chamber of TAS may be challenged like an award. / *Infra petita* can only be invoked against a failure to decide formal prayers. / ECHR not directly applicable.

Decision 4A_704/2015 of 16 February 2017: No jurisdiction over non-signatory. / Contract void for fraud. / No procedural misconduct by the arbitral tribunal. / Misconduct of both parties. / No disciplinary sanctions against the claimant for misconduct before the arbitral tribunal.

Decision 4A_131/2017 of 21 September 2017: Arbitration agreements must be construed more restrictively than forum selection clauses as they embody a waiver of the parties’ constitutional right to bring the dispute before municipal courts.

**MATTHIAS SCHERER**
**EDITOR IN CHIEF**

The Bulletin in Brief 2/2018

In his message *Let’s Get Rid of Arbitration!*, ASA President Elliott GEISINGER reports a fictitious conversation between Sir Reginald Muddle, QC and Maître Paul-Philibert Confus, Avocat à la Cour, with a provocative conclusion.

**Articles**

Felix DASSER and Piotr WÓJTOWICZ present the long-awaited update of data on the main features of annulment proceedings before the Swiss Federal Supreme Court (Felix DASSER, Piotr WÓJTOWICZ, *Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017*).

Clàudia BARÓ HUELMO analyses State successions with regard to bilateral or multilateral investment treaties, as illustrated by the award in *World Wide Minerals v. Republic of Kazakhstan* (Clàudia BARÓ HUELMO,
Is Kazakhstan a State successor to the USSR? A perspective from investment treaty arbitration.

Once in force, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“BEPS Convention”) will allow for arbitration proceedings. Patrick SCHMID explains the relevant framework (Patrick SCHMID, Tax Arbitration under the BEPS Convention. An Overview and Potential Pitfalls from a Swiss Perspective).

Fleur MALET-DERAEDT presents the French legislative changes on State immunities from enforcement introduced by the Loi Sapin II (Fleur MALET-DERAEDT, The New French Legislation on State Immunities from Enforcement).

Duarte G. HENRIQUES presents the Prague Rules, a new set of guidelines for use of counsel and arbitrators for the conduct of arbitration proceedings (Duarte G. HENRIQUES, The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?).

Dimitra A. TSAKIRI elaborates on how the New York Convention is used not only for the enforcement of awards but also of arbitration agreements (Dimitra A. TSAKIRI, Application of the New York Convention to the enforcement of Arbitration Agreements).

Angela CASEY summarizes a new landmark case of the Swiss Federal Supreme Court confirming that in domestic matters, employment law disputes are generally not arbitrable (Angela CASEY, Fehlende Schiedsfähigkeit zwingender arbeitsrechtlicher Ansprüche im Binnenverhältnis. Anmerkungen zu BGE 4A_7/2018 vom 18. April 2018).

Caroline DOS SANTOS abstracts Supreme Court decision 4A_260/2017 which confirmed that the CAS is an independent arbitral tribunal, not dependent on FIFA (Caroline DOS SANTOS, Swiss Federal Supreme Court Confirms Independence of CAS).

**Decisions of the Swiss Federal Supreme Court**

Decision 4A_7/2018 of 18 April 2018: Disputes involving domestic employment law claims are not arbitrable.

Decision 4A_260/2017 of 20 February 2018: Sport dispute / Third Party Ownership Agreements (“TPO”) sanctioned by FIFA / CAS is an independent arbitral tribunal (Confirmation of ruling in the Lazutina case) / No public policy violation.
Decision 4A_236/2017 of 24 November 2017: Arbitrators’ procedural conduct not indicative of bias / No right to a reasoned decision from the ICC regarding the challenge of an arbitrator / No violation of equal treatment by arbitrators’ rejection of late evidence.

Decision 4A_318/2017 of 28 August 2017: Legal arguments allegedly raised at the hearing and disregarded in the award / No proof of existence of argument (absence of hearing transcript) / No violation of right to be heard.

Decision 4A_507/2017 of 15 February 2018: Duty to pay Supreme Court’s administrative fees despite withdrawal of annulment request.

Decision 4A_396/2017 of 23 November 2017: No security for costs required from a State that is party to the Hague Convention.

Decision 4A_344/2017 of 21 December 2017: Interpretation of arbitration clause in company bylaws / Clause not applicable to dispute among members under a separate agreement containing a forum selection clause.

Decision 4A_407/2017 of 20 November 2017: Pathological arbitration agreement (impossibility to nominate an arbitrator meeting the qualification criteria) / Gap filling by juge d’appui / Pre-arbitral mediation requirement not enforced since defendant refused claimant’s proposal to appoint a mediator.

Decision 4A_466/2017 of 8 November 2017: Termination order / Ruling on defendant’s legal fees.

Decision 4A_510/2017 of 9 November 2017: Annulment request abusively filed in English to obtain an extension of time (art. 42 Law on the Federal Supreme Court).

Decision 4A_444/2016 of 17 February 2017: 30-day time limit to file for annulment triggered by receipt of reasons, not by the earlier notification of the award’s operative part.

Decision 4A_716/2016 of 26 January 2017: Prohibition to take the parties by surprise by entirely unsuspected legal reasoning.

Decision 4A_53/2016 of 13 July 2016: Request to set aside a decision labeled award issued by a public arbitral tribunal established by statute rather than by the parties / Not an arbitral award.

Decision 4A_475/2016 of 28 March 2017: Waiver of right to challenge award in domestic arbitration is admissible, if made after the award is rendered.

Decision 4A_206/2016 of 20 May 2016: Supreme Court establishes the plaintiff’s domicile on its own motion / Plaintiff’s residence when signing
the arbitration agreement outside Switzerland / Not a domestic arbitration / No challenge for alleged arbitrariness of the arbitral award.

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The Bulletin in Brief 3/2018

In its message, the ASA Board raises concerns regarding the CJEU’s decision in the Achmea matter. Achmea appears to outlaw investor state arbitration based on intra-EU BITs to the extent those arbitrations are seated, or resulting awards are enforced, in EU territory. The ASA Board anticipates that in the future sophisticated investors might make their investments into what they perceive as ‘riskier’ EU jurisdictions through entities situated in non-member states.

Articles

Stay applications are frequent in international arbitration. Luka GROSELJ analyses a number of unpublished arbitral decisions (now reported in the ASA Bulletin’s case law section). He concludes that the most widely relied upon reason for a stay application is the existence of on-going parallel (court or arbitral) proceedings or criminal investigations. Pending enforcement of partial awards, payment of security for costs or clarification of the opposing party’s representation or solvency have also been invoked (Luka GROSELJ, Stay of arbitration proceedings – Some examples from arbitral practice).

The new OHADA Rules of Arbitration grant arbitral tribunals the power to suspend the arbitral proceedings, if a party rightfully claims noncompliance with a mandatory pre-arbitral procedure, as may be imposed by a multi-tier dispute resolution clause. Michael W. BÜHLER and Anne-Sophie GIDOIN explore the novel provisions and compare them to diverging positions taken by the French and Swiss courts (Michael W. BÜHLER, Anne-Sophie GIDOIN, L’« étape préalable » dans le nouveau droit de l’arbitrage et de la médiation OHADA).

Indian courts have struggled with the issue of multi-party arbitration. Harshad PATHAK maps relevant case law by Indian courts over the past decade, including the Supreme Court of India’s latest exposition on this issue in its judgment in Rishabh Enterprises. (Harshad PATHAK, India’s Tryst with Non-Signatories to an Arbitration Agreement in Composite Economic Transactions).
Hui WANG explains why in China “soft” rules are not embraced as easily as in other jurisdictions and makes suggestions as to how the arbitration community could enhance their significance. (Hui WANG, *Multidimensional Thinking about the ‘Soft Laws’ Phenomena in International Commercial Arbitration: A Chinese Perspective*).

**Arbitral Decisions**

Extracts from 15 rulings by arbitral tribunals (ICC, Swiss Chambers, LCIA, ad hoc) upon applications for a stay of the arbitration.

**Swiss Federal Supreme Court**

4A_322/2015 of 27 June 2016: Annulment proceedings / Dissenting opinions do not form part of the arbitral award / Comments filed by the presiding arbitrator in his own name disregarded by Supreme Court / No surprise application of the law by arbitral tribunal (iura novit curia).

4A_250/2013 of 21 January 2014: Enforcement of an arbitral award rendered in Teheran (Oil delivery from Iran to Israel) / Iran sanctions not a bar to enforcement.

5A_862/2017 of 9 April 2018: Enforcement of an arbitral award rendered in England / Notification of arbitration to party’s agent considered to be proper for the purpose of the New York Convention / US sanctions (Crimea) no bar to enforcement.

4A_50/2017 of 11 July 2017: Alleged acts of bribery, threat of regulatory sanctions and violation of compliance rules not demonstrated / Ultra petita (declaratory ruling not based on any prayer) / Award confirmed.

4A_448/2013 of 27 March 2014: Arbitral tribunal’s reliance on evidence obtained illegally (video) not sanctioned by Supreme Court.

4A_314/2017 of 28 May 2018: Arbitration clause in sport federation’s bylaws can be invoked by non-members / CAS had ratione personae jurisdiction.

4A_356/2017 of 3 January 2018: Belated expert report rejected by arbitral tribunal / No absolute right to a double exchange of submissions.

4A_136/2018 of 30 April 2018: Annulment request late / Decisions by an arbitral tribunal on its composition or jurisdiction must be challenged immediately.

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