The Bulletin in Brief

This second issue of the Bulletin for 2014 contains three articles, and eleven court decisions, including ten from the Swiss Federal Supreme Court.

Patrick Dumberry's article analyses the concept of **denial of Justice** as a breach of the host state's **fair and equitable treatment** obligation under **NAFTA Article 1105** in the light of 20 years of case law, and examines in particular how NAFTA tribunals have interpreted and applied the exhaustion of local remedies rule.

Romain Dupeyré then examines the increasingly topical issue of the **liability of arbitrators and arbitral institutions**, how the French courts currently seek to address it and how best to deal with the use of claims against arbitrators and arbitral institutions as part and parcel of a party's procedural tactics.

In the last article, *Heike Wollgast* and *Ignacio de Castro* review the key features of the **newly adopted WIPO Mediation, (Expedited) Arbitration and Expert Determination Rules**, as well as WIPO new tailored model agreements for companies involved in the telecom industry to refer a dispute concerning the **fair, reasonable and non-discriminatory (FRAND) terms** to WIPO Mediation and (Expedited) Arbitration.

A summary of the court decisions published in this issue is set out in the Introduction to the **Case Law** Section (p. 297), including the following decisions:

- A Supreme Court decision rejecting an application to set aside a CAS/TAS award where the applicant, in part because it had defaulted in the arbitration, had **failed to raise the jurisdictional objection and other procedural defects during the arbitral proceedings**;
- Two Supreme Court decisions recalling certain basic rules regarding the **thirty-day time limit within which a party may apply to set aside an arbitral award**: the time limit is only met if the submission is posted at a Swiss (and not foreign – here French) post office or handed over to the Supreme Court clerk within the required period from the day of notification of the award; the trigger is **the notification of the full award**, not the notification of its operative part only, although if filed before the full reasons are notified subsequently, the application will be admissible;
- A Supreme Court decision on the **enforcement of an award** in Switzerland under the New York Convention rejecting the breach of **public policy** defence raised by the losing party based on the fact

that its **challenge against an arbitrator had been rejected by the ICC without the ICC providing any reasons**;

- A Supreme Court decision rejecting as **inadmissible a challenge against a procedural order issued by an ICC arbitral tribunal** ordering the plaintiff to produce documents pursuant to the IBA Guidelines on the Taking of Evidence;
- A Supreme Court decision annulling an award in which the **arbitral tribunal had failed to consider two arguments** which were relevant to the outcome of the dispute, but rejecting the plaintiff's argument that it had been **taken by surprise by a legal argument** which the other party had invoked only in its post hearing submission and discussing the scope of the ***iura novit curia*** principle.
- A decision of the Austrian Oberster Gerichtshof rejecting the application to set aside an award based on the **arbitrator's alleged bias** based on circumstances which post-dated the issue of the award and commenting on the **IBA Guidelines on Conflicts of Interest**, with a note from *Harald Sippel* ("Erstmaliger Bezug des österreichischen OGH auf die IBA Guidelines on Conflicts of Interest in International Arbitration")

Also included in this issue are news about ASA.

As always, if you have critical remarks or suggestions as to how the Bulletin could be further improved, or wish to provide materials for possible publication, please do not hesitate to contact us.

For the Editorial Board

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