

The Bulletin in Brief

At the end of 2014, the IBA Arbitration Committee approved a revision version of the **IBA Guidelines on Conflicts of Interest** in International Arbitration. Nathalie VOSER and Angelina M PETTI provide an in-depth analysis of the new provisions and the guidelines in general. The authors focus in particular on the duties of disclosure and enquiry incumbent upon arbitrators, administrative secretaries and parties, relationship-based conflicts (including third-party funding), issue conflicts, and waivers of conflicts of interest (including advance waivers).

Bernhard F. MEYER and Jonatan BAIER, in their paper “*Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations*”, relate an interesting experience with what they dub “arbitrator consultants”, a **special assistant providing technical or commercial expertise to the arbitral tribunal** “upon demand”. Given the ever-increasing technical complexity and staggering amounts that characterise many arbitration proceedings, it is indeed foreseeable that arbitral tribunals will have to resort to innovative solutions to ensure that their awards meet the parties’ expectations.

Özge TOSUN elaborates on the **prohibition of *révision au fond* in Turkish arbitration practice**. His article provides a case-based analysis and discussion of the position of the Turkish Supreme Court.

Finally, the undersigned presents a summary of **cases under Swiss Bilateral Investment treaties** (Matthias SCHERER, *Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties (BIT)*).

In the case law section (page 80), we report a number of interesting decisions from the Swiss Supreme Court:

- Decision 140 III 520/4A_6/2014 where the Swiss Federal Supreme Court examined, on its own motion, the legal nature of a CAS award setting aside a decision of a lower body. It found that many of the annulment grounds raised by the plaintiff were not available as it was not a final award, but only an incidental one (*décision incidente*).
- Decision 4A_90/2014 and Decision 4A_74/2014, both on the interpretation of pathological or split arbitration clauses providing for a general mechanism to resolve a dispute by arbitration, and a different mechanism, also arbitration, for certain specific types of disputes. The Court analysed unclear clauses in six share purchase contracts containing conflicting dispute resolution agreements. Some provided for arbitration,

some referred to the local courts in the target companies' countries and some contained no arbitration provision at all. The arbitral tribunal found that, although the contracts that referred to local courts were entered into after the ones containing arbitration clauses, they were not meant to supersede the latter. The finding was left intact by the Supreme Court.

- Decision 4A_118/2014 where the Supreme Court stayed setting aside proceedings in Switzerland pending a court decision abroad on certain issues that were relevant to the arbitration.
- Decision 140 III 267/4A_35/2014 of 28 May 2014 on domestic arbitration and Article 390(1) of the Swiss Federal Act on Civil Procedure (FCPC). The Court established the prerequisites for valid waiver agreements referring jurisdiction to the cantonal courts in lieu of the Supreme Court.
- Decision 4A_544/2013 recalling the rule that Arbitral tribunals can apply the law on their own motion (*iura novit curia*), and the limits of such rules (prohibition of taking the parties by surprise by applying a rule of law that neither of them pleaded or could reasonably have expected to be relevant). The plaintiff failed to establish surprise. In passing, the Court rejected the argument that arbitral tribunals should be more transparent if the parties are not represented by Swiss counsel.
- A remarkable decision (4A_450/2013) in which the Supreme Court partially set aside a 750-page arbitral award. The arbitral tribunal had wrongly found that it lacked jurisdiction over a non-signatory parent company. In the light of the parent's acts and conduct, the plaintiff was entitled to consider that the parent company had actually taken over the contractual relationship and become a party to the contract.

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.

MATTHIAS SCHERER
