

## The Bulletin in Brief

ASA President Elliott GEISINGER's Message (*Pivotal Times – But Which Way Will the Pivot Point?*) explores some critical junctures of today's arbitration landscape and what the future might bring.

Harald SIPPEL and Marieke MINKKINEN (*The New KCAB Rules*) present the new international arbitration rules of the Korean Commercial Arbitration Board (the "KCAB") – Korea's premier arbitral institution. According to the authors, the new rules are "on par" with that of other international arbitral institutions.

Christopher BOOG and Julie RANEDA (*The 2016 SIAC Rules: A State-of-the-Art Rules Revision Ensuring an even more Efficient Process*) introduce the sixth edition of the arbitration rules of the Singapore International Arbitration Centre. Their article highlights the main amendments and innovations introduced by the 2016 SIAC Rules.

Tarkan GÖKSU (*Schiedsgerichtlicher Instanzenzug – Welches Verfahren bei Rechtsmitteln an ein Oberschiedsgericht?*) explores the unusual mechanism of appeal arbitral tribunals. He focuses in particular on two legal issues: (1) which rules govern the arbitral appeal proceedings in the absence of any agreement on this, for example, as regards the time limit for the making of an appeal? and (2) which *lex arbitri* is applicable if the first and second instance arbitral tribunals are seated in different countries?

Christian Alexander MEIER (*Agency and Distribution Contracts, Choice of Law and Arbitration in Europe*) recalls some pitfalls related to forum selection and arbitration agreements as well as choice of law clauses in distribution agreements.

The Swiss Federal Supreme Court decisions reported in this issue address the following topics:

- 4A\_390/2014: **Multi-contract situations and conflicting arbitration agreements.** An ICC tribunal found that the parties had deliberately inserted two distinct arbitration agreements in two distinct contracts between them.
- 4A\_623/2014: **Right to be heard and reliance on witness testimony.** Arbitrators can rely on any information on record even if it is not specifically mentioned in the parties' submissions but only in witness testimony.
- 4A\_426/2014: **Right to be heard and alleged failure to deal with a party's subsidiary legal argument.** Arbitrators are not obliged to search for secondary legal arguments. If a

party's pleadings are unclear, it only has itself to blame if the arbitral tribunal misses a legal argument.

- 4A\_356/2015, **Prerequisites for request for annulment**. Even if an award had been enforced against a party, it is still entitled to seek to set it aside.
- 4A\_483/2015 and 4A\_502/2015: **Cost of Supreme Court proceedings**. Allocation of costs in the event of the withdrawal of a request.
- 4A\_492/2015: **Validity and scope *ratione personae* of a statutory arbitration clause**. An arbitration clause in bylaws found to be binding not only on the original parties, but also on successive owners.
- 4A\_490/2015: **No challenge of the decision of the *juge d'appui* to appoint an arbitrator in a domestic arbitration**. The appointment by the *juge d'appui* cannot be challenged, whether directly or in the framework of a challenge of the award subsequently issued by the arbitrator.
- 4A\_655/2014: **No application of default arbitrator appointment rules to experts**. A provision in a shareholders' agreement providing that the share price would be determined by an expert appointed by analogy to the nomination of arbitrators under the Federal Code of Civil Procedure is unenforceable. The CPC only applies to default appointments of arbitrators, not experts who perform an expert determination ("Schiedsgutachten"). Parties cannot expand the jurisdiction of the courts beyond what is stated in the law.
- Decision 4A\_428/2015: **Post-M&A dispute about a price adjustment mechanism**. In the absence of a detailed notice of objection against the buyer's calculation of an additional purchase price, the seller could not initiate expert determination and the result of the latter did not bind the arbitrators.
- 4A\_136/2015: **Pathologic or superseded arbitration agreement/Failure to conduct pre-arbitration negotiations/Waiver of arbitration by resorting to courts**. In 2009, a Swiss seller of pharmaceutical products, an English buyer and on-seller, and a final buyer/distributor in Russia entered into a **tripartite distribution agreement**. In a subsequent arbitration, the jurisdiction of the arbitral tribunal was challenged on a number of grounds. First, that a

subsequent contract contained a forum selection clause that superseded the arbitration clause. Second, that the parties had not conducted the negotiations contemplated in the 2009 contract. Third, that the other party **had waived its right to arbitrate by seizing the Geneva courts with a conciliation request**. In any event, the term “arbitration” in Russian meant only jurisdiction, not arbitration. The arbitral tribunal, and in its wake the Supreme Court, rejected all the challenges.

- 4A\_176/2015: **Jurisdiction *ratione materiae***. A CAS tribunal ruled that it lacked jurisdiction. The Supreme Court held that it was bound by the arbitral tribunal’s factual findings.
- 4A\_319/2015: **Foreign mandatory laws/Dissenting opinion**. Dissenting opinions do not form part of the award. Public policy nature of the foreign law provision at hand that the arbitral tribunal allegedly failed to apply not established. Incorrect application of, or failure to apply, the governing law is not a ground for challenging an award.
- 4A\_636/2014 : **Arbitral tribunal’s acceptance of a late submission**. The Supreme Court ruled that this was not tantamount to a violation of the equal treatment rule.
- 4A\_222/2015: **Definition of an arbitral award/Bifurcation/Appeal arbitral tribunal**. CAS Tribunal (acting as an appeal tribunal to an AAA panel) decision on jurisdiction recorded in a letter of the CAS Secretariat did not qualify as an arbitral award. Therefore, it could not be challenged. Save for abuse, there is no remedy against a tribunal’s decision whether or not to render a preliminary award under PILA art. 186(3) PILA.

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