The Bulletin in Brief

ASA President Elliott GEISINGER dispels the myth that arbitrators have a propensity to "split the baby" (*No Solomon Please, We're Arbitrators*).

Catherine A. KUNZ provides an overview of the Swiss Supreme Court's jurisprudence on enforcement of arbitral awards since 2000 (*Enforcement of Arbitral Awards under the New York Convention in Switzerland – An overview of the current practice and case law of the Swiss Supreme Court*).

Hilmar RAESCHKE-KESSLER elaborates on particular issues arising when arbitrators are appointed in cases where a party is under receivership (*The Arbitrator nominated by an Insolvency Receiver or Liquidator and Conflicts of Interest*).

Nadia SMAHI's paper comprehensively addresses arbitrators' liability and immunity. The second part of her paper will be published in the next ASA Bulletin (*The Arbitrator's Liability and Immunity Under Swiss Law – Part I*).

Mladen STOJILJKOVIĆ critically comments on inconsistent approaches regarding the availability of court review in connection with issues of arbitral jurisdiction (*Arbitral Jurisdiction and Court Review: Three Swiss Federal Supreme Court Decisions to Reconsider*).

Werner WENGER comments on a case where the Swiss Supreme Court construed a statutory arbitration agreement (*Polyvalente Schieds(gutachtens)klauseln – Anmerkungen zu BGE 142 III 220*).

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

Decision 4A_510/2015 of 8 March 2016: Press articles foreshadowing the award. **Alleged partiality of the arbitral tribunal**. The Supreme Court rejected the challenge of the award as it had not been established that a member of the arbitral tribunal had breached the **confidentiality rule**.

Decision 4A_598/2014 of 14 January 2015: The fact that, twelve years before the arbitration, the arbitrator had represented a client in court proceedings against a company whose director was a party in the arbitration does not create an appearance of bias.

Decision 4A_422/2015 of 16 March 2016: **Costs decision** included in a termination order **set aside**. The Supreme Court found that arbitral decisions on costs are final awards and that the parties must be heard. **The**

arbitral tribunal had failed to grant the parties an opportunity to comment on the allocation of costs.

Decision 4A_42/2016 of 3 May 2016: Defendant insisting on a partial award on liability before addressing the opponent's damages calculation by offering an alternative calculation to the arbitral tribunal. Arbitral tribunal issues its final award without bifurcation, accepting the calculation submitted by the claimant. **Defendant's challenge of the award rejected. The Supreme Court found that it was not for a party to dictate to the arbitral tribunal how to run the arbitration proceedings**. The arbitral tribunal had not unduly precipitated the decision, but had invited the defendant to challenge the claimant's calculations.

Decision 4A_84/2015/142 III 239 of 18 February 2016: The Swiss Supreme Court confirmed an award finding jurisdiction under an **arbitration clause in a draft contract**. The parties had negotiated a framework agreement containing an arbitration clause (Swiss Rules). Ultimately the **contract was not signed**. However, the arbitral tribunal found that the parties had agreed on the arbitration clause. The Supreme Court applied the separability doctrine. The Swiss PIL Act does not require arbitration agreements to be in a signed contract even if the validity of the contract is contingent upon it being signed by the parties. It left open whether the parties could agree on stricter form requirements for the arbitration clause than the minimal requirements in Article 178(1) PILA.

Decision 4A_628/2015/142 III 296 of 16 March 2016: **Arbitral tribunal should suspend the arbitration to allow the parties to comply with the pre-arbitral condition.** Defendant's insistence on pre-arbitral mediation (ICC ADR) was not abusive. Defendant in the arbitration had consistently insisted that the mediation take place and not waited until the outcome of the arbitration.

Decision 5A_409/201415 of 15 September 2014: Enforcement of awards under the **New York Convention**. **Proper notice** under Article V(1)(b). **Binding award** within the meaning of Article V(1)(e) NYC, unless it is set aside or expressly suspended by the competent courts (as opposed to an automatic stay of its enforceability by operation of the law).

Argument that the enforcement of the award would be contrary to **Swiss substantive public policy (Article V(2)(b) NYC)** on the basis that it gave effect to a ***pactum de quota litis*** which did not comply with the foreign law applicable on the merits rejected. *Pactum de quota litis* not contrary to Swiss public policy simply because it was a type of fee arrangement which did not exist under Swiss law. Rather, a violation of

Swiss public policy required the result of such a fee arrangement to be blatantly incompatible with Swiss conceptions of justice. In this case, the Court agreed with the lower court that a success fee representing 2% of the amounts awarded was not incompatible with Swiss public policy.

Decision 5A_627/2015 of 2 September 2016: What rules apply to the **enforcement of a decision rendered by the Court of First Instance of the Dubai International Financial Centre (DIFC)** in Switzerland?

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