

The Bulletin in Brief

In his message “Modern and Efficient Communication”, ASA President Elliott GEISINGER explores the use of modern communication techniques, such as twitter and emoji, in international arbitration (*Modern and Efficient Communication (or: “If you can’t beat ’em, join ’em”)*).

Trust instruments are nowadays widely used for commercial purposes. In their article, *Arbitration of Trust Disputes*, Georg VON SEGESSER and Katherine BELL refer to a number of trust laws and arbitration laws of different jurisdictions.

Thomas CLAY presents the main features of recent changes to the French arbitration law (*La réforme des articles du Code civil sur l’arbitrage en France*).

Arbitral tribunals seated in Switzerland often apply EU law. Sandra DE VITO BIERI and Penelope NÜNLIST analyze whether arbitrators have discretion or a duty to apply EU law despite the parties’ choice of a non-EU governing law and whether there are sanctions against wrong applications or failures to apply EU law (*The application of EU law by arbitral tribunals seated in Switzerland*).

In the last ASA Bulletin, we published the first part of Nadia SMAHI’s report on arbitrators’ liability in Switzerland. In part II, the author elaborates on the scope of arbitrator immunity (*The Arbitrator’s Liability and Immunity under Swiss Law – Part II*).

Does the filing of a request for arbitration interrupt applicable time bars? Two authors have a look at this issue under four legal systems (Innhwa KWON, Krzysztof NOWAK, *Prescription Trap? Continuation of Freezing the Legal Prescription in International Arbitration – in Korean, Austrian, German and Swiss Context*).

In most legal systems an award creditor has to seek enforcement within a certain lapse of time. Our last paper analyses time bars on enforcement from a comparative law perspective (LE Nguyen Gia Thien, *Time limit to file petition for the recognition and enforcement of foreign arbitral award: a comparative perspective*).

The Swiss Federal Supreme Court decisions:

Decision 4A_102/2016 of 27 September 2016: (1) A CAS Tribunal allegedly exceeded its jurisdiction by conducting a *de novo* review. Challenge inadmissible. The plaintiffs had unreservedly **accepted CAS jurisdiction**. (2) Conflict between a mandatory provision in the arbitral institution’s rules (CAS) and a provision in the Australian anti-doping rules could lead to a **partial impossibility of the arbitration agreement**.

Decision 4A_136/2016 of 3 November 2016: (1) A principal refused to pay consultant’s fees, referring to corruption investigations by the US DOJ

and the UK Serious Fraud Office, its own ethical and compliance rules, and the absence of proof of the services rendered. **No corrupt practices** by the consultant established. Compliance rules not tantamount to public policy. (2) Right to be heard. **Prohibition of surprising application of the law.** The (alleged) absence of Swiss counsel no excuse for (allegedly) not having been able to anticipate how Swiss law operated.

Decision 4A_536/2016/4A_540/2016 of 26 October 2016: Excessive **penalties** violate public policy and can be reduced. 10% penalties are not excessive. Punitive damages distinguished from penalties. Left open whether **punitive damages** incompatible with public policy.

Decision 4A_310/2016 of 6 October 2016: Arbitration agreements can only be extended to **non-signatories** in specific circumstances, none of which was demonstrated.

Decision 4A_555/2016 of 10 October 2016: (1) **Excessive delays. Arbitrator replaced.** (2) Alleged failure of new arbitrator to declare the arbitration inadmissible in the absence of **compulsory pre-arbitral mediation**. (3) Arbitrator letter cannot be challenged.

Decision 4A_188/2016 of 11 January 2017: (1) **Expedited proceedings under Article 42 Swiss Rules.** Day when 6-month time limit to issue award starts to run. Arbitrator was not *functus officio*, the arbitration clause still being valid *ratione temporis*. (2) **No payment for arbitrators** for the time spent on submitting comments in the Supreme Court proceedings.

Decision 4A_214/2016 of 4 May 2016: **Filing** of a request to set aside an award **by fax not valid**.

Decision 4A_322/2016 of 28 July 2016: (1) Arbitrator appointed by the *juge d'appui*. In the absence of agreed **profile** or requirements, a party cannot insist on an arbitrator who is a construction professional. (2) Right to be heard. No right to file a **late expert** report.

Decision 4A_342/2015 of 26 April 2016: Rebuttal submission with rebuttal witness statements rejected by the arbitral tribunal on the basis of the **parties' agreement to a single exchange**.

Decision 5A_627/2015 of 2 September 2016: **Enforcement of a decision rendered** by the Court of First Instance of the Dubai International Financial Centre (**DIFC**) in Switzerland,

Decision 4A_542/2015 of 16 February 2016: Award that orders a party to take certain **actions**.

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