

The Bulletin in Brief

In his message, *Another Day in the Life*, ASA President Elliott GEISINGER recounts, with humour and perspicacity, a typical day in the life of a fictional arbitrator. Any resemblance to actual persons is entirely unintended.

Articles

Employment agreements are among the very few areas where access to arbitration is restricted in Swiss domestic arbitration, international arbitration being more liberal as a result of the broad definition of subject-matter arbitrability in Art. 177 PIL Act. Angela CASEY, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, elaborates on the distinction of domestic and international regimes, focusing on sport-related employment disputes and disputes involving managers or directors.

Economic crimes such as corruption, money laundering, or fraud may affect an investment or a contract. Kathrin BETZ (*Economic crime in international arbitration*) examines the impact of emerging ‘soft law’ and international conventions on international arbitration, if and how they are to be applied by arbitrators and what standards of proof arbitrators should apply when assessing allegations of criminal conduct.

Earlier this year the long-awaited **new Qatari Arbitration Law** came into force. Mohamed H. NEGM looks at the results in *The New Qatari Arbitration Law: Convergence Towards Finding Rhythm in Inconsistent Drumbeats*.

Niklaus ZAUGG’s paper *Objective scope of res judicata of arbitral awards – Is there room for discretion?* analyses the ongoing debate among scholars as to whether arbitrators have some discretion in establishing the objective **scope of res judicata** of a foreign arbitral award or instead cannot go beyond the determinations contained in its operative part.

Two Iranian authors elaborate on potential conflicts between **Iran’s Investment Protection Treaties** and its constitution which submits arbitration to approval by Ministers and the Parliament (Ali DARZI-NAFTCHALI, Sajad SOLTANZADEH, *Article 139 of Iranian Constitution and Foreign Investment Disputes Settlement*).

Hatem ALABD in his paper *La Cour Arabe d’Investissement : vers une Cour régionale plus efficace* presents a largely unknown instrument, the Unified Agreement for the Investment of Arab Capital in the Arab States

(UAIAC) establishing the **Arab Investment Court (AIC)**, which is referred to in some BIT concluded by Arab countries.

Decisions of the Swiss Federal Supreme Court

4A_618/2015 and 4A_634/2015 of 9 March 2016: The Court declared **null and void** two domestic awards that had been rendered without any arbitration agreement by an **arbitrator who had usurped his powers**.

4A_446/2014 of 4 November 2014: One of three directors of the claimant stated that the **arbitration had been initiated without his knowledge and consent**. The arbitral tribunal refused to stay the arbitration. The tribunal's order was challenged before the Supreme Court. The Court confirmed that **orders can be challenged** if they are tantamount to an award, which was not the case here. The order did not provide a final ruling on jurisdiction.

4A_69/2015 of 26 October 2015: An arbitral tribunal ordered **damages for a court action commenced in violation of an arbitration agreement**. The award was challenged unsuccessfully on the grounds that the arbitral tribunal had overlooked certain decisive arguments.

4A_678/2015 of 22 March 2016: A party challenged an award on the grounds of the arbitral tribunal's alleged failure to decide an issue. The Court found that it was evident from an **interpretation in good faith of the award** that this point was adequately covered in the award. The Court also ruled that it was not *ultra petita* for an arbitral tribunal to **rule a prayer on a different or partly different legal basis than pleaded by the parties**.

4A_82/2016 of 6 June 2016: Under an umbrella agreement, the rights and obligations of a business were transferred to a buyer, including a **guarantee undertaking containing an arbitration agreement**. The buyer argued that this was merely a comfort letter-type of commitment which could not have been transferred. The arbitral tribunal found that the guarantee was effective, that it was transferred with the related arbitration agreement. The Court rejected the challenge filed against the award with a reminder that **arbitration agreements can bind non-signatories**, for instance in the case of the assignment of a contract or a claim.

4A_459/2016 of 19 January 2017: Three companies entered into a **consortium agreement** and retained an external company (E) to run their business. In a subsequent arbitration procedure, one of the partners tried to join E. The arbitral tribunal declined jurisdiction finding that although E was an affiliate of one of the partners it was not meant to be a partner itself. The Supreme Court confirmed the award.

4A_490/2016 of 6 March 2017: Two Libyan parties had entered into a **FIDIC contract** containing an ICC arbitration clause and into a public works contract providing for jurisdiction of the Libyan courts. **The arbitral tribunal found that the public works contract was an artifice (simulated), designed to obtain tax benefits.** It admitted jurisdiction under the FIDIC contract. The Supreme Court rejected the annulment request.

In 4A_587/2015 of 15 February 2015, the losing party unsuccessfully challenged the award on the grounds that **the arbitral tribunal had failed to wait for the outcome of parallel criminal proceedings.**

4A_544/2014 of 24 February 2015: At the end of the hearing before a CAS tribunal, plaintiff's counsel stated, "We are very satisfied with how we were treated by the Panel here; thank you very much, Mr. President!". The Court found that, in light of this statement, the player was estopped from arguing that he had not been treated fairly.

4A_492/2016 of 7 February 2017: The **Court confirmed that the CAS can be the second-level appeal tribunal for FIFA** decisions regarding transfer of players.

4A_515/2012 of 17 April 2013: The Swiss Federal Supreme Court addressed the issue of **subject-matter arbitrability of domestic employment law disputes.** The Court confirmed its jurisprudence and found that only claims arising out of non-mandatory provisions of the Code of Obligations can be subject to arbitration.

4A_32/2016 of 20 December 2016: A football player signed two employment contracts with two different clubs for the same time period. The CAS found that the player and his current club were jointly liable to indemnify the club the player had initially signed. Before the Swiss Federal Supreme Court, the club (not the player) invoked **Article 27(2) of the Civil Code and alleged a violation of the club's personality rights.** However, the Court ruled that only in the most outrageous cases can Article 27(2) be relied upon as a violation of public policy.

4A_110/2016 of 3 August 2016: The challenge of the award in a post M&A dispute before the Court was basically limited to the question of **whether the arbitral tribunal had properly applied Swiss law on contract interpretation,** and whether the award was arbitrary.

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