

## The Bulletin in Brief

In his Message in ASA Bull. 1/2015 ASA President Elliott Geisinger took the reader on an allegorical journey into the world of arbitration. The journey continues in this Bulletin and should be read with great attention by those who seek to regulate arbitration (Elliott GEISINGER, *The Cup Of The Nineteen Jewels – The Journey Continues*).

### Articles

If one party does not cooperate in setting up the arbitral tribunal or in the taking of evidence, the other party or the arbitral tribunal can turn to the courts at the place of arbitration (the “juge d’appui”) for assistance. Sophie THORENS-ALADJEM, who is sitting as a “**juge d’appui**” in Geneva, provides valuable **insight and reports** on relevant decisions issued by her court (Sophie THORENS-ALADJEM, *Le juge d’appui en matière d’arbitrage interne et international*).

In many contractual relationships, a party needs documents from its opponent in order to substantiate its claim. If the claimant has a substantive claim for information including accounting, it may combine an auxiliary claim for information with an initially unquantified main claim. Based on the information received through that auxiliary claim, the claimant will be able to quantify its main claim. Olivier Luc MOSIMANN discusses such cases in his article, *The Action by Stages* (Stufenklage / action échelonnée) in *International Arbitrations in Switzerland*.

On 21 February 2017, the **Paris Court of Appeal annulled an arbitral award** rendered in France against the Kyrgyz Republic in favour of a Latvian owner of a Kyrgyz bank. The Court held that the investor had used the bank for large-scale **money laundering** activities. Louis Christophe DELANOY, *Un jour noir pour le blanchiment : l’arrêt République du Kirghizistan (Cour d’appel de Paris) du 21 février 2017*, identifies the singular aspects of this case and describes the fluctuations in French case law regarding the extent to which awards can be interfered with on the basis of their non-compliance with international public policy.

When **arbitrators act as settlement facilitators**, due process rights have to be observed. Hansjörg Stutzer analyses the arbitral tribunal’s powers and its limits when performing this function, focusing on a procedure often practised by the Zurich Commercial Court in the arbitration context in which the court summons the parties after the first round of written submissions to a so-called “Referentenaudienz”, **sharing their preliminary views on the case** (Hansjörg STUTZER, *Settlement Facilitation: Does the Arbitrator have a Role? The “Referentenaudienz” – the “Zurich-Way” of settling the Case*).

## Decisions of the Swiss Federal Supreme Court

4A\_119/2017 (Procedural Order) of 13 June 2017: A new test for ordering the stay of enforcement of an award. **It is sufficient for obtaining a stay of enforcement that the defending party has its seat outside Switzerland.**

4A\_132/2016 of 30 June 2016: The Supreme Court's **restricted scope of review** (*Kognition; Prüfungsbefugnis*) is not a violation of **ECHR article 6**.

**Violation of mandatory law provisions** (*in casu*: employment law) does **not** automatically amount to a **public policy violation**.

4A\_156/2016 of 23 August 2016: **Forfeiture of right to object to arbitral jurisdiction** over non-contractual claims when proceeding on the merits.

4A\_173/2016 of 20 June 2016 and case 4P.108/1999 of 8 September 1999: **Early case assessment does not create arbitrator bias** / Right to challenge arbitrator after case assessment conference forfeited.

4A\_202/2016 of 3 August 2016: The **arbitral tribunal, deciding *ex aequo et bono*, had applied Swiss law** even though the parties had exclusively pleaded the law of another country X where all the parties were established. The Supreme Court found that this was not unpredictable at all, as the arbitral tribunal had referred in a procedural order to Swiss law potentially being applicable.

4A\_692/2016 of 20 April 2017: President of the Appeals Arbitration Division of the CAS **terminated an arbitration after party's failure to pay costs** in substitution of the other party within time. No excessive formalism. **Decision of an arbitration institution can be challenged before the Supreme Court** in the same manner as an arbitral award can be where that decision puts an end to the arbitration.

4A\_690/2016 of 9 February 2017: Late payment of deposits. Arbitration terminated. **Not formally excessive. Legal aid** is available for setting aside proceedings before the Supreme Court.

4A\_405/2016 of 2 March 2017: Arbitral tribunal allowed a statement of **claim filed one day after the time limit** set in the procedural timetable. No violation of the other party's right to be heard.

4A\_570/2016 of 7 March 2017: Arbitral tribunal issued **cost order without having heard** the party against which costs were ordered. Award set aside.

4A\_470/2016 of 3 April 2017: The Supreme Court found that, despite the fact that the Olympic Games in Rio were over, a banned sport federation still had a **legitimate interest** in challenging the award, The Court recalled that **procedural or evidentiary rules established in the ECHR or**

**applicable in criminal proceedings**, such as the presumption of innocence, **are not applicable in arbitration**.

4A\_524/2016 of 20 September 2016: An arbitration resumed after the annulment of a first award. The arbitrators stated in a procedural order that their earlier procedural orders remained applicable and were not affected by the award having been set aside. The first-mentioned **procedural order could not be challenged** before the Supreme Court.

4A\_116/2016 of 13 December 2016: Enforcement of Third Party Ownership Agreements (“TPO”) not against public policy despite FIFA ban in 2015. The Court left open **whether the club was entitled to raise the personal rights of a third party, the player**, at all.

4A\_520/2015 of 16 December 2015: An ICC arbitral tribunal refused to apply **allegedly mandatory banking regulations** to the extent that a transaction had been approved by several authorities in the bank’s home country. No public policy violation.

4A\_65/2015 of 28 September 2015: **The refusal of a *juge d’appui* to appoint arbitrator** can be challenged directly before the Supreme Court. A *juge d’appui* should not assess the validity of an arbitration agreement in detail.

4A\_214/2012 of 10 January 2013: A ***juge d’appui*** ordered a third party to disclose documents in an arbitration.

4A\_620/2015 of 1 April 2016: Request deemed inadmissible for want of **legitimate current interest** in the annulment of the award.

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