

## The Bulletin in Brief

In his message, ASA President Elliott GEISINGER addresses what arbitral tribunals should expect from quantum experts and what not. He appropriately recalls that it is never the role of the respondent's quantum expert to make the claimant's case ("*Nobody Expects the Spanish Inquisition! (Of Soft Cushions and Comfy Chairs)*").

### Articles

On 1 March 2018, the **revised Arbitration Rules of the German Institution of Arbitration (DIS)** entered into force. Christopher BOOG and Philip WIMALASENA present the significant changes ("*The 2018 DIS Rules: New Rules for a Renewed Institution*").

Anne-Marie LACOSTE ("*Corruption as a Bar to Award Enforcement in France*") critically analyses the recent decision of the *French Cour de cassation* in the **Indagro case**. The Court refused to enforce a foreign award on the ground that its enforcement was contrary to international public policy. A novel aspect of the case is that French courts based their review of the award on a French criminal court's decision on corruption applying the principle of *res judicata*.

Leonid SHMATENKO and Svitlana BEVZ ("*The Arbitrability of Corporate Disputes in Ukraine*") delve into a topic that is highly controversial in Ukraine: **whether corporate disputes can be referred to arbitration**.

Philippe HABERBECK ("*The Recoverability of Lost Profits under Swiss Commercial Law*") summarises the findings of his recently published doctoral thesis for which he has made an in-depth study of the relevant Swiss jurisprudence concerning **loss of profit claims under Swiss commercial law**.

In annulment proceedings of international awards, the Swiss Federal **Supreme Court is bound by the facts established by the arbitral tribunal**. Philippe HOVAGUIMIAN ("*Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA*") submits that the non-reviewability of factual findings in such cases undermines the efficacy of art. 190(2) PILA, notably, by preventing the ultimate review of arbitral jurisdiction by a judicial instance.

## Decisions of the Swiss Federal Supreme Court

Decision 4A\_150/2017 of 4 October 2017: Dispute between reinsurance companies. / **Award set aside for lack of jurisdiction.** / The secondary reinsurer was not bound by the arbitration clause in the main insurance contract between the primary reinsurer and the main insurer.

Decision 4A\_668/2016 of 24 July 2017: Request to set aside arbitral award (CAS) on the ground of a conflict of interest of a party representative. / Conflict not demonstrated. / **Violation of mandatory rules of a private body** (FIFA) does not amount to a violation of public policy.

Decision 4A\_672/2016 of 24 January 2017: An arbitration clause referring to arbitration before the “**International Chamber of Commerce of Geneva**” is intended to refer to ICC, and not Swiss Rules’, arbitration.

Decision 4A\_302/2013 of 5 June 2014: Jurisdiction over an alleged agent (defendant) despite a contract providing that he was “**acting on behalf of**” a third party. / No breach of **pre-arbitral negotiation requirements.** / Wrong allocation of burden of proof is not a ground for challenge.

Decision 4A\_377/2013 of 11 February 2014: Share purchase contract not binding upon the buyer due to the **seller’s fraud.** / Arbitrators’ reliance on testimony of allegedly **non-neutral witnesses** cannot be challenged.

Decision 4A\_236/2017 of 24 November 2017: Request to set aside (ICC) award. **Arbitrators’ procedural conduct** not indicative of bias. / No right to a reasoned decision regarding the challenge of an arbitrator. / No violation of equal treatment when arbitrator rejected late evidence.

Decision 4A\_316/2017 of 2 August 2017: The **Court is bound by the arbitral tribunal’s** description of the parties’ arguments, prayers and admissions made in the proceedings.

Decision 4A\_40/2017 of 8 March 2017: Allegation that the arbitral tribunal had issued an *ex aequo et bono* (equity) award without being authorised to do so. / **Wrong application of the law cannot be challenged** on the ground of lack of jurisdiction.

Decision 4A\_12/2017 of 19 September 2017: **Validating freezing orders is not** an **arbitrable** subject matter; it is the prerogative of the debt collection offices. / **Question whether the arbitral tribunal must examine arbitrability on its own motion left open.** / **A party which has neither attempted to obtain a written statement from a witness nor sought the assistance of the arbitral tribunal or the *juge d’appui* (Article 186 PILA) to have that witness appear at the hearing cannot complain about a violation of its right to be heard.**

4A\_206/2017 of 6 October 2017: CAS decision about refereeing issues at the Olympics Games **not an arbitral award**.

4A\_277/2017 of 28 August 2017: Principles governing a **party's (limited) right to request the appointment of an expert** by the arbitral tribunal and the circumstances in which the arbitral tribunal can refuse to appoint an expert.

4A\_384/2017 of 4 October 2017: **Termination order** by an arbitral chamber of TAS **may be challenged like an award**. / *Infra petita* can only be invoked against a failure to decide formal prayers. / **ECHR** not directly applicable.

4A\_704/2015 of 16 February 2017: **No jurisdiction over non-signatory**. / Contract void for fraud. / No procedural misconduct by the arbitral tribunal. / Misconduct of both parties. / No disciplinary sanctions against the claimant for misconduct before the arbitral tribunal.

4A\_131/2017 of 21 September 2017: **Arbitration agreements must be construed more restrictively than forum selection clauses** as they embody a waiver of the parties' constitutional right to bring the dispute before municipal courts.

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