The Bulletin in Brief

In its message *It's the People, Stupid*…, ASA President Elliott GEISINGER reflects on the most important decision in an arbitration. Is it the selection of the arbitrator? That of the presiding arbitrator? Of counsel? Of experts? GEISINGER concludes that its all of these choices together. Arbitration is not about law and processes only, but about people.

Articles

According to the New York Convention, enforcement of a foreign arbitral award may be refused if the subject matter of the dispute is non-arbitrable. Insolvency matters are not entirely arbitrable. **Karin GRAF** and **Brigitte UMBACH-SPAHN** (*Berücksichtigung ausländischer Schiedsurteile in der Insolvenz – Lehren aus den Bundesgerichtsentscheiden in Sachen Swissair* [Recognition and Enforcement of Foreign Arbitral Awards in Swiss Insolvency Proceedings – lessons learnt from the decisions of the Swiss Federal Supreme Court in the Swissair case]) explore when a foreign arbitral award can be enforced in Swiss insolvency proceedings against an insolvent defendant, based on their experience with the spectacular bankruptcy of the Swiss national carrier Swissair.

Bernhard BERGER in his paper *Insolvenz und Schiedsvereinbarung in der Schweiz* [Insolvency and arbitration agreements in Switzerland] analyses how insolvency affects arbitration agreements in Switzerland. He revisits the notorious Vivendi case and how the Swiss Federal Supreme Court nuanced its controversial ruling in a subsequent decision (138 III 714). BERGER advocates that provisions of a national bankruptcy law which aim to invalidate arbitration agreements should be disregarded in cross-border transactions. This must reasonably apply both in the arbitration and in subsequent enforcement proceedings.

Mahutodji Jimmy Vital KODO (*Aperçu général de l'actuel régime de l'arbitrage OHADA*) provides a general overview of the current OHADA Arbitration legal framework. He presents the regime governing arbitral agreements, the arbitral proceedings and the award, emphasizing the particularities of both the institutional arbitration governed by the Regulation of the CCJA on Arbitration and the Uniform Act on Arbitration.

The UAE have finally modernised their arbitration framework by promulgating Federal Arbitration Law No 6 of 2018. **Sami TANNOUS, Matei PURICE, Mohamed KHANATY,** *The New UAE Federal Arbitration Law: was it worth the wait?* explore the new Law. The authors consider that despite ambiguities and a number of missed opportunities, the Federal

Arbitration Law is a positive development which will strengthen the UAE's position as a leading regional hub for arbitration.

The Swiss Society of Engineers and Architects (SIA), Switzerland's leading professional association for construction, technology and environment specialists, has issued new arbitration rules for construction disputes. The SIA Standard 150:2018 entered into force on 1 January 2018. It features state-of-the-art procedural rules including through the use of a mandatory instruction hearing at which the arbitral tribunal provides the parties with a preliminary assessment of the case. **Bernd EHLE** (*SIA 150:2018 – Modern Swiss Arbitration Rules For Construction Disputes*) presents the most remarkable innovations namely the arbitral tribunal's power to appoint a technical expert as a consultant, and the possibility for the parties to agree on a procedure for an urgent determination of specific legal issues.

In his article *The Limitations of Soft Law Instruments and Good Practice Protocols in International Commercial Arbitration* **Daniel GREINEDER** considers the value of "soft law" instruments in international commercial arbitration. The article identifies three difficulties for soft law: (1) that it is utopian in aspiring to create a transnational legal order; (2) that it is practically unworkable, because it is open to abuse and misunderstanding; and (3) that it is superfluous in stating the painfully obvious

In the judgment *SAAD Buzwair Automotive Co v. Audi Volkswagen Middle East Fze LLC*, the Paris Court of Appeal set aside an ICC arbitral award on the grounds of irregular composition of the arbitral tribunal under Article 1520 para. 2 CPC. It found that a co-arbitrator had failed to disclose that his law firm had a relationship with the party's affiliate company in an ongoing dispute. **Stavroula ANGOURA** (*Interface between arbitrators' disclosure and parties' investigation duties*) analyses the judgment and what it means in terms of arbitrators' duty to disclose

Caroline DOS SANTOS (*The RFC Seraing's saga goes on: arbitration clause contained in FIFA's statutes held invalid under Belgian law*) reports on a decision of the Brussels Court of Appeal of 29.8.2018 in the RFC Seraing v FIFA saga. The Belgian football club challenges the legality of FIFA's ban on Third Party Ownership ("TPO") agreements. In its decision, the Court reached the conclusion that the arbitration clause enshrined in the FIFA's Statutes is overly broad and therefore illegal in the eyes of Belgian law.

Swiss Federal Supreme Court

4A_578/2017 of 20 July 2018: Unlawful contract termination – Jurisdiction over bankrupt defendant – Applicable test for demonstrating due process violation before the Supreme Court.

4A_220/2017 of 8 January 2018: Contractual claim rejected as contract formed part of a group of interdependent contracts that had not yet been entirely performed – Right to be heard and prohibition to take the parties by surprise.

4A_518/2017 of 21 February 2018: Annulment request struck off – Failure to pay cost advance.

4A_546/2016 of 27 January 2017: Neither the decision of the SCAI appointing an arbitrator nor the arbitrator's letter calling for cost advances can be challenged before the Supreme Court.

4A_532/2016 of 30 May 2017: Concession agreement – Impossibility to perform following legislative changes – Force majeure – Stabilization clauses – State entitled to revoke concession it had previously granted in a contract to which it is a party – No abuse of law – Public policy – Right to be heard – Award annulled.

4A_34/2016 of 25 April 2017: Group of contracts (different parties and arbitration clauses) – Jurisdiction – Right to be heard – A party that has not properly explained why an alleged fact is relevant cannot complain about a violation of its right to be heard if the arbitral tribunal does not deal with this fact.

5A_701/2017 of 14 May 2018: Unsuccessful challenge of a judge based on Facebook "friendship" – Critical level of intensity of friendship or hostility required.

4A_473/2016 du 16 février 2017 : Extension to non-signatories – Tortious interference.

4A_473/2016 of 16 February 2017 : Extension of arbitration clause to a non-signatory denied – No interference in contract demonstrated

4A_30/2018 of 8 February 2018: Arbitrators' direction on the taking of evidence cannot be challenged before the Supreme Court.

5A_889/2016 of 30 March 2017: Decision of the Court of First Instance of the Dubai International Financial Centre (DIFC) enforced as a court judgment rather than an arbitral award – Notice requirement.

4A_298/2018 of 22 August 2018 and 4A_300/2018 of 22 August 2018: Reasons not a requirement for validity of award and not a prerequisite for challenging it – Plaintiff's duty to point in its annulment request to specific pleadings in the arbitration that support the request.

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