

The Bulletin in Brief

In his message *From Licence to Licence to Licence Points? (Yet Another Revolutionary Idea)*, ASA President Elliott GEISINGER, inspired by the *gilets jaunes* and the French driving licence system, proposes a revolutionary idea to deal with parties' excessive and unacceptable behaviour in international arbitration. What if there were a "procedural points capital" for each party to use for its procedural requests? Points could then be deducted for unreasonable procedural conduct and parties required to pay an additional advance on costs once their procedural points capital is exhausted.

Articles

Matthias SCHERER and **Lea MURPHY** provide an updated inventory of the arbitration proceedings based on Swiss Bilateral Investment Treaties (BITs). Their paper includes a useful table with basic information about all known arbitration based on Swiss BITs (*Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties (BIT) (Update 2018)*).

Robert L. ROM looks at the interaction and cooperation between in-house counsel and external counsel in international arbitration and possible areas for improvement in the light of the experience he gained as senior Group Legal Counsel to large Swiss multinational corporations for over nearly 20 years (*Practical Aspects of the Cooperation between Arbitration Counsel and In-House Counsel through Different Stages of International Arbitration Procedures*).

Gordon BLANKE addresses the hotly-debated question of whether the conclusion reached by the CJEU in its recent Achmea ruling applies to the Energy Charter Treaty (ECT) (*Trends in International Energy Arbitration: Can ECT Claims be Arbitrated?*).

Michel NARDIN questions whether there is a future for tribunal-appointed experts or whether arbitrators should instead merely rely on their own expertise and experience. NARDIN analyses the advantages and disadvantages of each approach from a practical perspective (*Is there a Future for Tribunal-Appointed Experts?*).

Luis BRAVO ABOLAFIA examines the long-debated issue of the law applicable to the arbitration agreement and its effect on non-signatories from a common law and civil law perspective and proposes a novel approach to this issue based on the parties' implied choice and the conflict-of-law rules indirectly chosen by them (*Implied Choice of the Law Applicable to the*

Arbitration Agreement: The Effect on Non-Signatories in International Arbitration).

Sorin DOLEA addresses the arbitrability of disputes arising out of procurement contracts concluded by municipally-owned companies in the Russian Federation and how the Supreme Court of the Russian Federation has dealt with this issue up to now (*Arbitrability of Disputes Arising out of Procurement Contracts Concluded by Municipally Owned Companies in the Russian Federation*).

In his article *Damages for Non-Material Harm in Investment Treaty Arbitration*, **Subhiksh VASUDEV** explores the concept of moral damages in the field of investment treaty arbitration and provides an overview of how various arbitral tribunals have dealt with this issue. VASUDEV also provides a critical analysis of three key issues faced by arbitral tribunals in practice when dealing with moral damages.

Catherine Anne KUNZ comments on a case where the Swiss Supreme Court had to decide whether the arbitral tribunal had violated a party's right to be heard in relation to allegations of contract simulation (*Fact or Fiction? How to Deal with Allegations of Simulation, Case Note on Swiss Supreme Court Decision of 1 October 2018, 4A_550/2017*).

Caroline DOS SANTOS (*European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned*) reports on the recent decision of the European Court of Human Rights (ECHR) of 2 October 2018 in the Mutu and Pechstein v. Switzerland case which puts an end to this well-known saga. ECHR condemned Switzerland for not setting aside the CAS' award on the ground that the CAS' refusal to grant Ms Pechstein's request for a public hearing violated the ECHR Convention.

Swiss Federal Supreme Court

4A_550/2017 of 1 October 2018: No violation of the right to be heard – Arbitral tribunal did not disregard allegations of contract simulation and was entitled to reject requests for the taking of evidence based on an anticipatory assessment of evidence – Forfeiture of the right to object to the manner in which the witnesses were heard (written questions submitted prior to the hearing).

4A_76/2018, of 8 October 2018: Award rendered out of time – Annulled – Liability of arbitrator for damages, including legal fees a party incurred in successful annulment proceedings in excess of costs awarded by the Supreme Court.

4A_522/2016 of 2 December 2016: Swiss Rules arbitration – No adverse inference despite destruction of documents – Pacta sunt servanda – No violation of public policy – No review of allocation of burden of proof – Inconsistency of reasons is not a ground for challenge.

4A_525/2017 of 9 August 2018: ICC Tribunal reduces damages claim equitably based on Algerian law.

4A_430/2017 of 30 November 2017: Post M&A dispute – Invalid early termination of shareholders’ agreement – No violation of right to be heard established.

4A_432/2017 of 22 January 2018: Pathologic dispute resolution clause referring to two football bodies (FIFA and Argentine football association) but also to the jurisdiction of the courts in Buenos Aires – No agreement to arbitrate. Award annulled for lack of jurisdiction.

5A_1056/2017 of 11 April 2018: Award against shell company - Enforcement against its owner – Lugano Convention.

4A_491/2017 of 24 May 2018: Cost allocation in an international award cannot be challenged – Ruling that certain claims will be decided in a future award cannot be challenged even if in the body of the partial award certain legal and factual issues relevant for the claims yet to be decided are already determined.

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

4A_18/2019 vom 7. Februar 2019: Request for legal aid in the Supreme Court annulment proceedings rejected for lack of chance of success of the annulment request – Request dismissed – A party cannot challenge an arbitral award on the ground that the right to be heard of the other party has been violated.

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