

The Bulletin in Brief

In his first message *Of Lighthouses and Rocks* new ASA President Felix DASSER points out the challenges and opportunities ASA faces during his term and sets priorities.

Articles

Revision is an extraordinary means of recourse that aims at correcting a decision or an arbitral award that is already final and binding (*res judicata*). Catherine A. KUNZ has prepared a survey of the decisions rendered by the Swiss Federal Supreme Court on revision requests over the period 2009-2019. The main finding is that the chances of success are very slim. From 1992 when the Supreme Court first accepted the availability of revision for arbitral awards until the end of 2019, revision was requested in some 40 cases; it was granted in only three. Revision remains, however, a very effective remedy in certain cases. (Catherine KUNZ, *Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera? A Review of Decisions Rendered by the Swiss Supreme Court on Revision Requests over the Period 2009-2019*).

Investor-state arbitrations seated in Switzerland have been on the rise in recent years, as reflected by an increasing number of investment treaty awards against which setting aside is sought before the Swiss Federal Supreme Court. Bernhard BERGER explores the case law of the Court, with a particular focus on the limited grounds of annulment available. The article provides useful guidance on the do's and don'ts, pitfalls and challenges associated with conducting arbitral proceedings before investment treaty tribunals seated in Switzerland. The second part of the survey will be published in Bulletin no. 2/2020 (Bernhard BERGER, *Die Schweiz als Schiedsort für Investitionsstreitigkeiten – Erkenntnisse aus der neueren Rechtsprechung des Bundesgerichts – Teil I*).

Marco STACHER critically assesses the case law of the Swiss Federal Supreme Court with respect to whether it properly draws the line between jurisdictional and non-jurisdictional issues. Indeed, DFT 4A_287/2019 and 4A_413/2019 suggest that the Swiss Federal Supreme Court may abandon its previous case law and adopt a stricter approach when drawing the line between jurisdictional and non-jurisdictional issues (Marco STACHER, *Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope*).

The validity and enforceability of arbitration clauses in the articles of an association or a corporation is not addressed explicitly by Swiss law.

There is some uncertainty as to whether members of an association or shareholders of a stock corporation who have not expressly agreed to the arbitration clause are bound by it. The draft for a revision of Chapter 12 PILA (which governs international arbitration) and in the draft for a revision of Swiss stock corporation law will address this uncertainty. In their paper VOGT/SCHMIDT explain the validity and binding effect of such arbitration clauses as illustrated by a decision of the Swiss Federal Supreme Court of 22 July 2019 (5A_1027/2018). In addition, the first part of the article sets out the procedural and substantive requirements which an arbitration clause in the articles of an association must meet. It addresses, in particular, arbitrability as a prerequisite for the admissibility and binding effect of such an arbitration clause. It concludes that disputes which have their basis in the legal relationship created through an association or corporation are arbitrable. (Hans-Ueli VOGT, Patrick SCHMIDT, *Schiedsklauseln in Vereinsstatuten. Bemerkungen zum Bundesgerichtsurteil 5A_1027/2018 vom 22. Juli 2019 und zur Revision des 12. Kapitels des IPRG und des Aktienrechts – Teil I*).

Swiss Federal Supreme Court

4A_662/2018 of 14 May 2019 [Revision – Authenticity of evidence disputed]

4A_506/2017 of 3 October 2017 [Revision – Date of discovery of ground]

4A_412/2016 vom 21 November 2016 [Revision – New evidence of corruption]

4A_645/2014 of 20 February 2015 [Revision – New facts not material]

4A_247/2014 of 23 September 2014 [Revision – Facts occurring between signature and notification of award – Corruption allegations]

4A_231/2014 of 23 September 2014 [Corruption allegations – Risk of non-compliance with FCPA and UK Bribery Act – Public policy]

4A_688/2012/4A_126/2013 of 9 October 2013 [Revision – Standing – New facts]

4A_666/2012 of 3 June 2013 [Revision of award refused – Dies a quo of 90-day time limit for revision request – Addendum to award – New evidence corroborating existing evidence – Procedural fraud]

4A_750/2011 of 21 August 2012 [Revision – New facts not material to outcome]

4A_570/2011 of 23 July 2012 [Revision – New facts not material]

4A_212/2010 of 10 February 2011 [Revision – New facts were foreseeable]

4A_284/2009 of 24. November 2009 [Requests for set aside and revision]

4F_16/2018 of 31 August 2018 [Request for revision of Supreme Court decision on request to set aside arbitral award – Composition of Supreme Court (single judge)]

4F_8/2013 of 10 December 2013 [Request for revision of Supreme Court decision on request to set aside arbitral award – No inadvertent omission]

4A_413/2019 of 28 October 2019 [Conflict of counsel – Late filing of appeal to CAS – Issues of admissibility, not jurisdiction]

4A_287/2019 of 6 January 2020 [Late commencement of arbitration (appeal to CAS) – Issues of admissibility, not jurisdiction – No repetition of procedural acts after replacement of a challenged arbitrator]

5A_1027/2018 of 22 July 2019 [Arbitration clause in by-laws of an association – Subject-matter scope]

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