The Bulletin in Brief

In his message, *Lessons from Echternach*, ASA President Felix Dasser looks at recent developments and observes that for every two steps forward in international arbitration, there is one step back.

Articles

Felix DASSER and Piotr WÓJTOWICZ present statistical data derived from Swiss Federal Supreme Court proceedings pursuant to Article 190(2) PILA (challenges of international arbitral awards rendered in Switzerland). It is the 6th edition of the first statistical study published in 2007 and the most comprehensive one in terms of the number of cases analysed. It also covers additional aspects such as ISDS cases and the law governing the substance of the arbitration dispute, the *lex causae*. (Felix DASSER, Piotr WÓJTOWICZ, *Swiss International Arbitral Awards Before the Federal Supreme Court. Statistical Data 1989-2019*)

In his article, Pierre-Yves TSCHANZ discusses the task of legislators with respect to international commercial arbitration and examines how they should set about to achieve a coherent set of transnational rules that afford legal predictability to international commercial transactions. (Pierre-Yves TSCHANZ, *Quelle mission pour les législateurs de l'arbitrage commercial international ?*)

James FREEMAN and Karolina LATASZ examine the options for judicial assistance in obtaining evidence in support of arbitration proceedings under sections 43 and 44 of the English Arbitration Act and the practical as well as the strategic aspects to consider when choosing between those two provisions in light of the recent decision of the English Court of Appeal in *A, B v C, D and E* [2020] EWCA Civ 409. (James FREEMAN, Karolina LATASZ, *Non-identical twins: judicial assistance for obtaining evidence under sections 43 and 44 of the English Arbitration Act*)

The international trade associations GAFTA (The Grain and Feed trade Association) and FOSFA (The Federation of Oils Seeds and Fats Association) both issue standard form agribusiness contracts providing for arbitration as a dispute resolution method under their own rules. The calculation of damages for breach of contract is specifically addressed by these standard forms in a key provision called "Default Clause" and is based on the "date of default". Jacques COVO analyses the "date of default" concept by reference to the relevant case law of the English courts. (Jacques COVO, *The "Date of default"*

Concept of the FOSFA and GAFTA Agribusiness Standard Form Contracts as Basis for Examining the Consequences of a Repudiatory Breach)

Daniela BARTSCH presents "Calderbank offers", *i.e.* dispute settlement proposals made "without prejudice save as to costs" that are intended to shift the allocation of costs, and considers their efficiency as a tool to enable parties to reduce and control costs in international arbitration. (Daniela BARTSCH, *Calderbank Offers – Powerful Weapon or Blunt Sword?*)

In the recent award rendered in Iberdrola v. Guatemala, a Geneva-based arbitral tribunal upheld the State's objection to jurisdiction on the basis that the previous decision of a first tribunal regarding the same dispute had to be given *res judicata* effect. In his article, Hanno WEHLAND assesses the findings of the second tribunal with regard to the application of the concept of *res judicata* under public international law. (Hanno WEHLAND, *Iberdrola v. Guatemala – When Do Negative Jurisdictional Awards Have Res Judicata Effect in Investment Treaty Arbitrations?*)

Despite the rejection of the Swiss Responsible Business Initiative, establishing binding due diligence obligations for multinationals and a legal basis for their liability for violations of business human rights, business human rights are likely to remain on the political agenda in Switzerland and abroad. Niklaus ZAUGG explains why arbitration could offer significant advantages to all parties involved in business human rights disputes. (Niklaus ZAUGG, Alex BARDIN, *Business Human Rights – A New Field of Activity for Arbitration?*)

Abhilasha VIJ explores the feasibility of using artificial intelligence (AI) for arbitral decision-making as well as the suitability of an Arbitrator-Robot ("ArBot") and sets out the limitations of AI based arbitral decision-making in light of its current models and use-cases as well as possible solutions to overcome these shortcomings. (Abhilasha VIJ, *Arbitrator-Robot: Is A(I)DR the Future?*)

Swiss Federal Supreme Court Decisions

4A_382/2018 du 15 janvier 2019 [Right to be heard (surprise effect) – Boilerplate language in the award]

5A_877/2018 du 25 octobre 2019 [Enforcement proceedings – Set-off defense based on an arbitral award admissible]

4A_247/2017 du 18 avril 2018 [No stay of arbitration or anti-suit injunction despite parallel court proceedings – No *res iudicata* effect of the court decisions – Equal treatment in the event of respondents' (temporary) default –

Duty to seek leave to respond to new arguments raised in simultaneous post-hearing briefs]

5A_942/2017 / 144 III 411 vom 7. September 2018 [Enforcement in Switzerland of foreign awards against a State – Immunity – Territorial link with Switzerland required – New York Convention]

4A_444/2020 vom 1. Dezember 2020 [Annulment request filed by email is not admissible]

4A_300/2020 du 24 juillet 2020 [Grounds available for challenging a partial award]

4A_416/2020 du 4 novembre 2020 [Termination order for one day delay in nomination of CAS arbitrator not excessively formalistic]

4A_505/2017 du 4 juillet 2018 [Arbitral Tribunal authorised to unilaterally change expert's terms of reference and carve out counterclaim – No prejudgment bias – Anticipated assessment of evidence]

4A_93/2020 vom 18. Juni 2020 [Right to be heard]

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