

Kluwer Arbitration Blog

The Contents of the ASA Bulletin, Volume 36, Issue 2 (June 2018)

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Saturday, August 18th, 2018

We are happy to inform you that the latest issue of the ASA Bulletin is now available and includes the following articles and cases:

ARTICLES

[Felix DASSER, Piotr WÓJTOWICZ, *Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017*](#)

Felix DASSER and Piotr WÓJTOWICZ update previously published statistical data on challenges of international arbitral awards under article 190(2) PILA and requests for revisions. The Swiss Federal Supreme Court has exclusive jurisdiction over challenges and requests for revisions. The percentage of successful challenges remains very low at around 7%. The median duration of such proceedings before the Supreme Court is roughly six months. As to requests for revisions of international awards, only three requests have been successful to date. The duration of these proceedings is even shorter than for challenge proceedings.

[Clàudia BARÓ HUELMO, *Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration*](#)

In its decision on jurisdiction, the arbitral tribunal in *World Wide Minerals v. Republic of Kazakhstan* held that Kazakhstan succeeded to the obligations of the Soviet Union with regards to its 1989 Agreement with Canada on the Promotion and Reciprocal Protection of Investments. As a result of this decision, the door could be opened for investors wishing to benefit from the protections included in bilateral investment treaties from the USSR-era. Clàudia BARÓ HUELMO examines the potential legal reasoning by which the arbitral tribunal reached this conclusion and explores the question of which (if any) obligations may have fallen upon Kazakhstan as a former Soviet Republic.

[Patrick SCHMID, *Tax Arbitration under the BEPS Convention. An Overview and Potential Pitfalls*](#)

from a Swiss Perspective

In 2017, Switzerland signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“BEPS Convention”). Once in force, the BEPS Convention will amend 14 of Switzerland’s double taxation agreements and implement, among other measures, an arbitration dispute resolution procedure. Where two contracting states are unable to reach an agreement within a certain timeframe, the affected taxpayer can initiate an arbitration procedure regarding any unresolved issues. Patrick SCHMID provides background information and gives an overview of the arbitration procedure available under the BEPS Convention while highlighting potential pitfalls from a Swiss perspective.

Fleur MALET-DERAEDT, The New French Legislation on State Immunities from Enforcement

The French legislative changes on state immunities from enforcement brought by the Loi Sapin II (France’s new anti-corruption legislation) are a compromise between the protection of state property against illegal enforcement measures and the creditors’ right to the enforcement of their claims: drafting of appropriate waiver clauses remains crucial. Fleur MALET-DERAEDT submits that section L.111-1-2 marks the end of the flexible approach allowed under the Cour de cassation’s ruling in Creighton, whereby waivers of immunity from enforcement could be tacitly inferred from the mere consent of the state to submit to arbitration.

Duarte G. HENRIQUES, The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?

Duarte G. HENRIQUES presents the Prague Rules, a new set of guidelines for the use of counsel and arbitrators in the conduct of arbitration proceedings.

Dimitra A. TSAKIRI, Application of the New York Convention to the Enforcement of Arbitration Agreements

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards contemplates not only the enforcement of foreign arbitral awards, but also the enforcement of arbitration agreements under article II (3). One of the perceived shortcomings of the Convention is the fact that it does not define which types of arbitration agreements may be enforced under it. Dimitra A. TSAKIRI reviews how certain national laws and judicial decisions grapple with this gap.

Angela CASEY, Fehlende Schiedsfähigkeit zwingender arbeitsrechtlicher Ansprüche im Binnenverhältnis. Anmerkungen zu BGE 4A_7/2018 vom 18. April 2018

Angela CASEY analyses a new landmark decision (4A_7/2018 of 18 April 2018) in which the Swiss Federal Supreme Court revisited its earlier decisions regarding the subject-matter

arbitrability of domestic employment law disputes. In line with an earlier decision, the Court held that a domestic employment law dispute cannot be brought before an arbitral tribunal if it concerns mandatory claims according to articles 361 and 362 of the Swiss Code of Obligations.

Caroline DOS SANTOS, Swiss Federal Supreme Court Confirms Independence of CAS. Note on Decision 4A_260/2017 of 20 February 2018

Caroline DOS SANTOS analyses decision 4A_260/2017 of 20 February 2018 in which the Swiss Federal Supreme Court tackled two important issues in the field of sport disputes. First, the decision confirms the Supreme Court's previous finding in the 2003 Lazutina decision regarding the independence of the Court of Arbitration for Sport. Second, the decision concerns the recently adopted – and controversial – FIFA regulations banning Third Party Ownership agreements.

DECISIONS OF THE SWISS FEDERAL SUPREME COURT

- [4A_7/2018 of 18 April 2018](#): Disputes involving domestic employment law claims are not arbitrable.
- [4A_260/2017 of 20 February 2018](#): Sport dispute / Third Party Ownership Agreements sanctioned by FIFA / CAS is an independent arbitral tribunal (confirmation of its ruling in the Lazutina decision) / No public policy violation.
- [4A_236/2017 of 24 November 2017](#): Arbitrators' procedural conduct not indicative of bias / No right to a reasoned decision from the ICC regarding the challenge of an arbitrator / No violation of equal treatment by arbitrators' rejection of late evidence.
- [4A_318/2017 of 28 August 2017](#): Legal arguments allegedly raised at the hearing and disregarded in the award / No proof of existence of argument (absence of hearing transcript) / No violation of right to be heard.
- [4A_507/2017 of 15 February 2018](#): Duty to pay Supreme Court's administrative fees despite withdrawal of annulment request.
- [4A_396/2017 of 23 November 2017](#): No security for costs required from a State that is party to the Hague Convention.
- [4A_344/2017 of 21 December 2017](#): Interpretation of arbitration clause in company bylaws / Clause not applicable to dispute among members under a separate agreement containing a forum selection clause.
- [4A_407/2017 of 20 November 2017](#): Pathological arbitration agreement (impossibility to nominate an arbitrator meeting the qualification criteria) / Gap filling by juge d'appui / Pre-arbitral mediation requirement not enforced since defendant refused claimant's proposal to appoint a mediator.
- [4A_466/2017 of 8 November 2017](#): Termination order / Ruling on defendant's legal fees.
- [4A_510/2017 of 9 November 2017](#): Annulment request abusively filed in English to obtain an extension of time (article 42 of the Law on the Federal Supreme Court).
- [4A_444/2016 of 17 February 2017](#): 30-day time limit to file for annulment triggered by receipt of reasons, not by the earlier notification of the award's operative part.
- [4A_716/2016 of 26 January 2017](#): Prohibition on the taking of parties by surprise by entirely unsuspected legal reasoning.
- [4A_53/2016 of 13 July 2016](#): Request to set aside a decision labelled an award issued by a public

arbitral tribunal established by statute rather than by the parties / Not an arbitral award.

- [4A_475/2016 of 28 March 2017](#): Waiver of right to challenge award in domestic arbitration is admissible, if made after the award is rendered.
- [4A_206/2016 of 20 May 2016](#): Supreme Court establishes the plaintiff's domicile on its own motion / Plaintiff's residence when signing the arbitration agreement outside Switzerland / Not a domestic arbitration / No challenge for alleged arbitrariness of the arbitral award.


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