

Kluwer Arbitration Blog

The Contents of the ASA Bulletin, Volume 36, Issue 4 (December 2018)

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Friday, January 25th, 2019

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

Karin GRAF, 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 Causa Swissair]

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 explore when a foreign arbitral award can be enforced in Swiss insolvency proceedings against an insolvent defendant. The spectacular bankruptcy of the Swiss national carrier Swissair has spawned a series of decisions of the Swiss Federal Supreme Court, which the authors apply to arbitration.

Bernhard BERGER, *Insolvenz und Schiedsvereinbarung in der Schweiz* [Insolvency and Arbitration Agreements in Switzerland]

This paper presents the Swiss practice concerning insolvency and how it affects arbitration agreements in the international context. About ten years ago, on 31 March 2009, the Swiss Federal Supreme Court ruled in the Vivendi case that foreign insolvency statutes might affect the validity of an arbitration agreement in an international arbitration in Switzerland. A few years later, the Court nuanced this controversial finding (Decision of 16 October 2012, 138 III 714). The risk remains that the issue of insolvency and arbitration agreements rises (again) at the stage of recognition and enforcement of an arbitral award, particularly where enforcement is sought in the country of the *lex concursus*. BERGER advocates that the 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* [Overview of the OHADA Arbitration Regime]

The author provides a general overview of the current OHADA Arbitration legal framework by

presenting the regime governing arbitral agreements, the arbitral proceedings and the award and emphasizing the particularities of both the institutional arbitration governed by the Regulation of the CCJA on Arbitration and the Uniform Act on Arbitration.

Sami TANNOUS, Matei PURICE, Mohamed KHANATY, *The New UAE Federal Arbitration Law: Was it Worth the Wait?*

The UAE has finally modernised its arbitration framework by promulgating Federal Arbitration Law No 6 of 2018. While the Federal Arbitration Law is largely based on the Model Law, certain changes have created unnecessary ambiguities and uncertainties. A welcome development is the broad powers granted to arbitral tribunals, including the power to issue interim and conservatory measures, and to rule on their own jurisdiction.

The authors consider that despite all the 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.

Bernd EHLE, *SIA 150:2018 – Modern Swiss Arbitration Rules for Construction Disputes*

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 which evidently strive towards efficiency and emphasize settlement facilitation, including through the use of a mandatory instruction hearing at which the arbitral tribunal provides the parties with a preliminary assessment of the case. EHLE 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, e.g., whether the employer has the right to order a variation or whether the contractor is entitled to an extension of time for the performance of the works.

Daniel GREINER, *The Limitations of Soft Law Instruments and Good Practice Protocols in International Commercial Arbitration*

This article considers the value of "soft law" instruments in international commercial arbitration. It starts from the practical uncertainty arising from the procedural freedom afforded to parties and arbitrators under liberal arbitration legislation. While good practice guidelines may help to overcome this uncertainty and manage parties' expectations, the article identifies the following three difficulties for soft law in achieving this goal: (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. The article concludes by recommending limiting soft law to areas where it is strictly necessary and where a meaningful international consensus can be reached.

Stavroula ANGOURA, *Interface between Arbitrators' Disclosure and Parties' Investigation Duties*

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 ground 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 another ongoing dispute. S ANGOURA 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

Caroline DOS SANTOS reports on a decision of the Brussels Court of Appeal of 29 August 2018 in the RFC Seraing v FIFA saga. RFC Seraing, a Belgian football club, challenged the legality of FIFA's ban on certain Third-Party Ownership ("TPO") agreements. In its decision, the Court while deciding upon its own jurisdiction over the matter, 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.

DECISIONS OF THE SWISS FEDERAL SUPREME COURT

- [4A_578/2017 of 20 July 2018](#) [Bad faith contract termination – Jurisdiction over bankrupt defendant – Applicable test for demonstrating due process violation]
- [4A_220/2017 of 8 January 2018](#) [Prohibition to take the parties by surprise – Group of interdependent contracts]
- [4A_518/2017 of 21 February 2018](#) [Annulment request struck off – Failure to pay cost advance]
- [4A_546/206 of 27 January 2017](#) [No remedy against arbitrator nomination by SCAI or arbitrator's call of cost advances]
- [4A_532/2016 of 30 May 2017](#) [Illegality of concession agreement following legislative changes; force majeure; stabilization clauses – No abuse of law by State – Award annulled (Right to be heard)]
- [4A_34/2016 of 25 April 2017](#) [Jurisdiction in group of contracts – Duty to properly plead relevancy of alleged facts]
- [5A_701/2017 of 14 May 2018](#) [Challenge of a judge based on Facebook "friendship"]
- [4A_473/2016 du 16 February 2017](#) [Extension to non-signatories – Tortious interference]
- [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](#) [DIFC decision not an arbitral award but still enforced in Switzerland]
- [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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