

Kluwer Arbitration Blog

The Contents of the ASA Bulletin, Volume 37, Issue 1 (March 2019)

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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

[Elliott GEISINGER, *From Licence to Licence to Licence Points? \(Yet Another Revolutionary Idea\)*](#)

In his message, ASA President Elliott GEISINGER, inspired by the gilets jaunes and the French driving licence system, proposes an innovative system to deal with parties' excessive 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.

[Matthias SCHERER, Lea MURPHY, *Inventory of Arbitration Proceedings Based on Swiss Bilateral Investment Treaties \(BIT\) \(Update 2018\)*](#)

Switzerland's Bilateral Investment Treaties (BIT) have given rise to over twenty investment arbitrations. This inventory provides basic information about these cases.

[Robert L. ROM, *Practical Aspects of the Cooperation between Arbitration Counsel and In-House Counsel through Different Stages of International Arbitration Procedures*](#)

A close cooperation between outside lawyers and in-house counsel is essential throughout the arbitration proceedings. Robert L. ROM looks at the interaction and cooperation between in-house 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 Swiss multinationals.

[Gordon BLANKE, *Trends in International Energy Arbitration: Can ECT Claims be Arbitrated?*](#)

The ruling of the Court of Justice of the European Union (CJEU) in the case C-284/16 – Slovak Republic v. Achmea BV raises major concerns about the compatibility of obligations to arbitrate entered by Member States within the framework of bilateral investment treaties for infra-EU investment with EU law. Gordon BLANKE discusses whether the Achmea ruling extends to the

operation of the arbitration mechanism contained in the Energy Charter Treaty (ECT) or whether – given the EU’s membership of the ECT – it remains unaffected by the CJEU’s findings for now.

Michel NARDIN, Is there a Future for Tribunal-Appointed Experts?

The settlement of complex disputes arising in industry or in construction requires an exceptional understanding of the various issues addressed in such procedures. One main challenge for the arbitrators is to be capable of seeking specialized knowledge and then to integrate it into their decision-making process. Michel NARDIN takes stock of the options available to arbitral tribunals.

Luis BRAVO ABOLAFIA, Implied Choice of the Law Applicable to the Arbitration Agreement: The Effect on Non-Signatories in International Arbitration

The law applicable to the arbitration agreement has a decisive impact on the validity, scope and extension of the arbitration clause to non-signatory third parties. 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.

Sorin DOLEA, Arbitrability of Disputes Arising out of Procurement Contracts Concluded by Municipally Owned Companies in the Russian Federation

The arbitrability of disputes arising out of procurement contracts concluded by municipally-owned enterprises in the Russian Federation is hotly debated among arbitration practitioners in the region. The author analyses the approach taken by the Supreme Court of the Russian Federation in a number of cases concerning the arbitrability of procurement disputes.

Subhiksh VASUDEV, Damages for Non-Material Harm in Investment Treaty Arbitration

Investment treaty arbitration has witnessed a significant rise in claims for moral damages. Subhiksh VASUDEV provides an overview of how various arbitral tribunals have dealt with this issue. The author also provides a critical analysis of key issues faced by arbitral tribunals in practice.

Catherine Anne KUNZ, Fact or Fiction? How to Deal with Allegations of Simulation. Case Note on Swiss Supreme Court Decision of 1 October 2018, 4A_550/2017

Contract simulation is one of the tools used to perpetrate or conceal a criminal activity, such as fraud or money laundering. Catherine Anne KUNZ comments on a decision of the Swiss Supreme Court of 1 October 2018 (4A_550/2017) in which Switzerland’s highest court had to decide whether an arbitral tribunal had violated a party’s right to be heard in relation to allegations of contract simulation.

Caroline DOS SANTOS, European Court of Human Rights Rules upon Sports-Related Decision: Switzerland Condemned

Caroline DOS SANTOS reports on the decision of the European Court of Human Rights of 2 October 2018 in the case opposing two athletes, Mutu and Pechstein, and Switzerland. The athletes argued without success that their right to a fair trial pursuant to Article 6 § 1 of the ECHR Convention had been violated on the basis that the Court of Arbitration for Sport (CAS) lacked independence and impartiality as a consequence of its appointment mechanism. The ECHR

however 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 Article 6 § 1.

DECISIONS OF THE SWISS FEDERAL SUPREME COURT

- [4A_550/2017 of 1 October 2018](#) [Contract simulation – Right to be heard – Anticipatory assessment of evidence]
- [4A_76/2018 of 8 October 2018](#) [Liability of arbitrator for damages, including legal fees a party incurred in successful annulment proceedings]
- [4A_522/2016 of 2 December 2016](#) [No adverse inference despite destruction of documents – Public policy – Inconsistency of reasons not a ground for challenge]
- [4A_525/2017 of 9 August 2018](#) [ICC Tribunal reduces damage claim equitably based on Algerian law]
- [4A_430/2017 of 30 November 2017](#) [Early termination invalid]
- [4A_432/2017 of 22 January 2018](#) [Pathologic arbitration clause – Award annulled]
- [5A_1056/2017 of 11 April 2018](#) [Award against shell company – Enforcement against its owner – Lugano Convention]
- [4A_491/2017 of 24 May 2018](#) [Challenge of cost allocation inadmissible]
- [4A_473/2016 of 16 February 2017](#) [Extension to non-signatories – Tortious interference]
- [4A_18/2019 of 7 February 2019](#) [No challenge of award based on violation of opposing party's right to be heard]

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