

Volume 30, No. 4, 2012

ISSN 1010-9153

ASA Bulletin



Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central
and South America by *Aspen*
Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries
by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1010-9153

© 2012, Association Suisse de l'Arbitrage
(in co-operation with Kluwer Law International, The Netherlands)

This journal should be cited as ASA Bull. 4/2012

The ASA Bulletin is published four times per year.
Subscription prices for 2013 [Volume 31, Numbers 1 through 4] including postage
and handling: Print subscription prices: EUR 276/USD 368/GBP 203
Online subscription prices: EUR 256/USD 342/GBP 188
(covers two concurrent users)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.

For further information please contact our sales department
at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For Marketing Opportunities please contact marketing@kluwerlaw.com

All rights reserved. No part of this publication may be reproduced, stored in a retrieval
system, or transmitted in any form or by any means, mechanical, photocopying,
recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner.
Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th
floor, New York, NY 10011, United States of America.
E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

Printed on acid-free paper

ASA

Association Suisse de l'Arbitrage/Schweizerische Vereinigung für
Schiedsgerichtsbarkeit/Associazione Svizzera per l'Arbitrato/
Swiss Arbitration Association

COMITE EXECUTIF

Président

Michael E. Schneider, LALIVE, Geneva

Vice-Présidents

Dr Daniel Wehrli, Gloor & Sieger, Zurich
Elliott Geisinger, Schellenberg Wittmer, Geneva

MEMBRES

Bernhard Berger, Kellerhals Anwälte, Bern
Prof. Dr François Dessemontet, Lausanne
Dr Rainer Füeg, Basel
Dr Dieter Gränicher, Wenger Plattner, Basel,
Dr Bernhard F. Meyer, MME Partners, Zurich
Dr Paolo Michele Patocchi, Lenz & Staehelin, Geneva
Dr Wolfgang Peter, Python Peter, Geneva
Daniel Petitpierre, SIG Combibloc, Zürich
Thomas Pletscher, economiesuisse, Zurich
Dr Klaus Sachs, CMS Hasche Sigle, Munich
Pierre Tercier, Universität Fribourg, Fribourg
Pierre-Yves Tschanz, Tavernier Tschanz, Geneva
Dr Marcus Wirth, Homburger, Zurich

PRÉSIDENTS D'HONNEUR

Prof. Dr Pierre Lalive, LALIVE, Geneva
Dr Marc Blessing, Bär & Karrer, Zurich
Dr Pierre A. Karrer, Zurich,
Prof. Dr Gabrielle Kaufmann-Kohler, Lévy Kaufmann-Kohler, Geneva
Dr Markus Wirth, Homburger, Zurich

VICE-PRESIDENTS D'HONNEUR

Prof. Dr. Jean-François Poudret, Lausanne,
François Knoepfler, Cortaillod

Directeur exécutif

Alexander McLin (Genève)

EXECUTIVE COMMITTEE

Chairman

Vice Presidents

MEMBERS

HONORARY PRESIDENTS

HONORARY VICE-PRESIDENTS

Executive Director

ASA Secretariat

4, Boulevard du Théâtre, P.O.Box 5429, CH-1204 Geneva, Tel.: ++41 22 310 74 30,
Fax: ++41 22 310 37 31; E-mail: info@arbitration-ch.org, www.arbitration-ch.org

ASA BULLETIN

Fondateur du Bulletin ASA

Founder of the ASA Bulletin

Prof. Pierre Lalive

Conseil de direction

Advisory Board

Prof. Pierre Lalive

Prof. Piero Bernardini – Me Matthieu de Boissésou – Prof. Franz Kellerhals –
Prof. François Knoepfler – Prof. François Perret – Dr. Philippe Schweizer –
Prof. Pierre Tercier – V.V. Veeder QC. – Dr. Werner Wenger

Comité de rédaction

Editorial Board

Rédacteur/Editor
Matthias Scherer

Domitille Baizeau, Geneva – Dr. Philipp Habegger, Zurich
Dr. Cesare Jermini, Lugano – Dr. Bernhard Berger, Bern

Secrétaire de rédaction

Editorial Secretary

Angelika Kolb-Fichtler

Correspondance

Merci d'adresser toute correspondance concernant la rédaction du Bulletin, non pas au secrétariat de l'ASA, mais à l'adresse suivante:

Correspondence

Please send all correspondence regarding the Bulletin to the following address rather than to the Secretariat of ASA:

Bulletin ASA

Prof. Pierre Lalive, Matthias Scherer
Rue de la Mairie 35, CP 6569, CH-1211 Genève 6
Tel: +41 22 319 87 00 – Fax: +41 22 319 87 60
Emails: plalive@lalive.ch & mscherer@lalive.ch
(For address changes please contact
info@arbitration-ch.org/tel +41 22 310 74 30)

Recognition of international arbitration in Ukraine in figures

KONSTANTIN PILKOV*

Arbitration practitioners often put Ukraine below the average ranking of countries in terms of recognition of arbitration. Ukraine's image of a not entirely arbitration-friendly jurisdiction is "promoted" with common thought about problematic enforcement of arbitral awards in Ukraine.

In the well-known case "*Regent Company v. Ukraine*", the European Court of Human Rights (in its decision of April 3, 2008) found violations by Ukraine of Part 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol due to the failure of the Ukrainian state authorities to enforce an arbitral award. There have been also Ukrainian court decisions where courts narrowed the jurisdiction of the arbitration, pointing out that the law does not grant any international commercial arbitration court the power to recognize agreements void. We hope that sort of decisions would never become a common judicial practice.

However, in general Ukrainian legal system demonstrated significant progress in adherence to the arbitration-friendly approach. That progress had been measured during the study resulted in the research paper "Ukraine. Arbitration-friendly jurisdiction: 2011-2012 statistical report". The paper has been prepared by the Arbitration team of Cai & Lenard Law firm and issued in English, Ukrainian and Russian. It was the first statistical report with the focus on recognition of international arbitration in Ukraine ever made.

In general, as shown by the practice analyzed in the study, Ukrainian courts (they are the bodies authorized to decide on enforcement of arbitral awards) do not create barriers for arbitration agreements to be recognized and arbitral awards to be recognized and enforced.

Despite the dominance of the share of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in the number of cases involving Ukrainian entities, local courts also deal with the awards rendered by other arbitration institutions or in *ad hoc* arbitration.

Ukrainian local common courts rarely refuse to grant the leave for enforcement of arbitral award (about 10% of the requests in 2011 and 6% of

* Konstantin Pilkov, MCI Arb is the Managing Partner at Cai & Lenard Law firm, Kyiv, Ukraine, he is the head of the firm's arbitration practice, Chairman of the Court of Arbitration at PFTS Stock Exchange.

the requests in 2012). Compared to the refusal of the enforcement of arbitral awards, more common are situations in which a request for enforcement is left without consideration because required documents have not been provided, or because of the provision of documents which do not comply with the law or other procedural mistakes.

Usually Ukrainian courts do not interfere in arbitration. In 2011 – 2012, some claims were filed to Ukrainian courts in order to compel arbitration institutions to resume arbitral proceedings. The vast majority of these claims have been submitted due to the difficult situation for the parties, in whose favor awards were rendered, when the awards were set aside or courts refused the enforcement. Arbitral tribunals refuse to restore proceedings as the restoration is not envisaged by the rules. The courts also believe that they have no legal grounds for interference with arbitration.

On the other hand, Ukrainian common courts are not inclined to help in securing the enforcement of arbitral awards. In the period covered by the study, there was not any court decision on interim measures found (either before or during arbitral proceedings or pursuant to an order of an arbitral tribunal on interim measures, or at a stage of enforcement).

Another important aspect of arbitration-friendliness of a particular jurisdiction is the attitude to setting aside arbitral awards. It has to be said that the quantity of applications for setting aside arbitral awards considered by courts is insignificant if we compare it to the quantity of the awards of the ICAC at the UCCI left for enforcement (1 arbitral award set aside per 49 awards left for enforcement). Ukrainian courts generally refuse to set aside awards, which are challenged on grounds of violation of the public policy, and inconsistencies of arbitration proceedings with an arbitration agreement (improper notification of the party). However, in most cases such claims were not met. Setting aside an arbitral award occurs in exceptional cases. Even if a local court sets aside an award the court of appeal carefully reviews the case and usually cancels the decision on setting aside the award.

Thus, Ukraine significantly developed its attitude to the enforcement of arbitral awards during recent years, though the approach of economic courts (these courts consider commercial cases and often take formalistic approach in matters related to recognition of arbitration agreements) still remains rather unfriendly to arbitration.

While preparing the report, it was not the aim to provide any guidance or recommendations to arbitration practitioners. We believe our colleagues are aware of the risks and specific aspects of the enforcement procedure in Ukraine. The data presented in the report may only help in assessment of the materiality of those risks.

Konstantin PILKOV, *Recognition of international arbitration in Ukraine in figures*

Summary

Arbitration practitioners often put Ukraine below the average ranking of countries in terms of recognition of arbitration. Ukraine's image of a not entirely arbitration-friendly jurisdiction is "promoted" with common thought about problematic enforcement of arbitral awards in Ukraine. However, in recent years Ukrainian legal system demonstrated significant progress in adherence to the arbitration-friendly approach. That progress had been measured during the study resulted in the research paper "Ukraine. Arbitration-friendly jurisdiction: 2011-2012 statistical report".

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).