# Kluwer Arbitration Blog

## 2019 in Review: Legislative and Case Law Developments in Europe

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The year 2019 has seen some important legislative and case law developments in the European jurisdictions and Kluwer Arbitration Blog, as always, has been closely monitoring the developments on the ground.

### I. Summary of Important Legislative Developments

#### *a) Sweden: Aligning Arbitration Law with International Developments and Eliminating Duplicate Proceedings*

In March 2019, a revision of the Swedish arbitral law that is significantly reliant on the UNCITRAL model came into force. Amongst other changes, the revised law adopts a mechanism to resolve impasses in arbitrator appointments in multi-party arbitration, allows oral evidence to be given in English, and eliminates the previously existing risk of duplicate proceedings by way of disallowing parallel litigation once the arbitration has begun.

#### *b) Poland: Making an Attempt to Improve the Legal Environment for Arbitration*

The amendments to the Polish Code of Civil Procedure ('CCP') have come into effect in the second half of 2019. Some of these amendments have been directed at the Polish arbitration law (which is contained in the CCP). The changes made to this end have been done with the aim to clarify several uncertainties that have arisen over the course of time. For instance, the arbitrability of matters such as patrimonial rights and validity of shareholder resolutions in limited liability and joint-stock companies has long loomed in the air, with diametrically opposing views being espoused both in the scholarly arena and among the practitioners.

Other amendments to the CCP have made significant changes to the procedural rules before the Polish courts, with these alterations providing a very good illustration of why sometimes the road to hell is paved with good intentions. Namely, while, at least in theory, seeking to make the civil

procedure in Poland more effective, in practice, the said changes possess the potential to greatly backfire. Among other things, the Polish legislature has introduced a shorter time limit for the submission of counter-claims and has made the regime for the introduction of evidence much stricter. Thus, in the future "[a newly improved] framework for arbitration, against the backdrop of increased difficulty in safely navigating through procedural pitfalls in court litigation, […][could potentially] provide arbitration with more traction in Poland".

## II. Case Law Highlights

### *a) Germany: Maintaining a Pro-Enforcement Stance while Safeguarding the Integrity of the Arbitral Proceeding*

The very beginning of the year saw Bundesgerichtshof ('BGH') finally put an end to a six-year-long saga before the German courts. Namely, after a few 'ping-pong' exchanges between the BGH and its lower counterpart – Oberlandesgericht Karlsruhe – the BGH finally delineated which circumstances would lead to the annulment of the award if the tribunal-appointed expert (or an arbitrator) were to fail to disclose circumstances having the potential to bring into question their independence and impartiality. While the duration of the proceedings before the German courts can hardly be characterised as pro-arbitration – it did, after all, take six gruelling years to bring the whole affair to an end – the decision itself has overall been warmly received by the members of the arbitration community.

The BGH declared the award in question to be enforceable, and in the process, it clarified that the mere failure on the part of the tribunal-appointed expert (or an arbitrator) to disclose a pertinent fact will only lead to the annulment of the award if the said non-disclosure in and of itself showcases the expert's or the arbitrator's bias. However, as noted by the BGH, it is only in cases of intentional non-disclosure that this high threshold would be satisfied. In other cases, it would be upon the appropriate state court to carry out the analysis with the aim of determining whether the non-disclosure by a tribunal-appointed expert or an arbitrator would have given rise to justifiable doubts regarding their independence and impartiality had the disclosure occurred in a timely manner.

The approach espoused by the BGH in this case ensures that, on the one hand, the threshold for challenging the award as a result of non-disclosure of pertinent circumstances by an arbitrator or a tribunal-appointed expert is high enough to discourage frivolous attempts at setting-aside. On the other hand, the decision of the BGH leaves open the possibility to set aside the award in serious cases of non-disclosure. The final outcome is the reiteration of the pro-enforcement stance while at the same time maintaining in place a mechanism that safeguards the integrity of arbitrations seated in Germany.

### *b) Greece: A Door Opens for a More Permissive Enforcement of Punitive Damages*

The general approach by courts in Greece has been to refuse the recognition and enforcement of foreign arbitral awards that provide for punitive damages. However, the Judgment no. 722 of 2019

of the Single Member Civil Court of Piraeus ('Piraeus Court') could very well prove itself to be a game-changer in this regard. While the judgement in question dealt with the recognition and enforcement of a US court decision, its approach and conclusions would equally be applicable to an arbitral award providing for punitive damages.

The Piraeus Court departed from the analysis and the approach followed by its counterparts. Namely, the enforcement of foreign judgements and arbitral awards awarding punitive damages, as per the test developed by the Greek Supreme Court, is only allowed in Greece when such damages do not contradict Greek public policy per se, and when they, as established by in concreto analysis, are not seen as disproportionate or excessive. In practice, Greek courts would refuse enforcement when punitive damages would not be considerably lower as compared to the actual loss suffered by the aggrieved party. In contrast, the Piraeus Court in the case at hand allowed the enforcement of punitive damages in the amount of USD 10 million although they were higher than the actual loss incurred by the aggrieved party (USD 7.8 million). In arriving at this outcome, the Piraeus Court opined that the correct manner in assessing the punitive damages is not to presume that they ought to be substantially lower, but that they should not be considerably higher than the actual loss. In essence, if the analysis of the Piraeus Court were to be adopted by other Greek courts as well, that would mean that the pool of enforceable arbitral awards in Greece would be somewhat expanded.

### *c) Switzerland: Opting Out of the International Arbitration Regime and into a Domestic One Made Somewhat Less Formalistic*

While Switzerland has two separate arbitration regimes with two separate legal instruments governing international and domestic arbitrations, it allows the parties, through the exercise of party autonomy, to opt out of the international arbitration regime and into the domestic one, and vice versa. In other words, parties to an international arbitration seated in Switzerland can opt out of Chapter 12 of the Swiss Private International Law Act ('PILA'), which is the default lex arbitri for international arbitrations, and opt into Section 3 of the Swiss Civil Procedure Code ('CPA'), the latter being the arbitration law for domestic arbitrations. To do so, the Federal Supreme Court of Switzerland clarified this year that the wording of the arbitration clause to this end need not specifically state that the parties are opting out of either PILA or CPA, but that a general 'opting-out' language such as the following one will suffice: "[…] to the exclusion of any other procedural law."

### *d) United Kingdom: Hearing Takes Place before the Supreme Court in the Case of Halliburton v Chubb*

The hearing in the case of *Halliburton v Chubb* before the UK Supreme Court was held on 12 and 13 November this year. The decision, once rendered, will certainly have important implications regarding repeat appointments of arbitrators. At issue in this particular case is whether, and to what extent, an arbitrator is allowed to accept appointments in multiple references (with only one common party) that concern either exactly the same or merely overlapping subject matter without, as a result of it, giving rise to an appearance of bias. Furthermore, a question arises whether an arbitrator may accept such appointments without disclosure. The answers by the UK Supreme Court to these pressing issues can be expected sometime next year.

**Concluding Remarks**

This year there has only been a limited number of legislative efforts in Europe regarding arbitration, with Sweden and Poland leading the way. As for the judicial realm, in 2019 Europe has seen a number of impactful court decisions dealing with arbitration matters, including those rendered by courts in Germany, Greece and Switzerland. The UK Supreme Court has also not been idle when it comes to arbitration this year, but its final decision in the case of *Halliburton v Chubb* is expected to see the light of day sometime in 2020. On the whole, it is safe to conclude that 2019, while not being overly exciting, has been characterised by several developments on the old continent that the arbitration community will certainly continue to discuss in the coming year as well.

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