Kluwer Arbitration Blog

2020 in Review: Despite a Global Pandemic, Europe Saw Some Action-Packed Arbitration Developments

Boris Praštalo (Assistant Editor for Europe) (Brunel University London) and Leila Kazimi (Assistant Editor) · Wednesday, December 23rd, 2020

Although the Old Continent has suffered tremendously at the hands of the COVID-19 pandemic, the world of arbitration still managed to find a way to keep on going. In this post, we are going to provide an overview of the most pivotal arbitration developments that occurred on the European soil in 2020. Among others, these include the updated or new rules of several arbitral institutions, significant legislative developments as well as advances in case law that have made some heads turn. So, without further ado, let us examine these one by one!

Updated Rules and a New Star on the European Sky

In 2020, updating arbitration rules has been on the agenda of several arbitral institutions. For instance, the International Court of Arbitration (ICC Court) has released a draft version of its 2021 Rules of Arbitration. The revisions were made against the background of the ICC Court's relentless mission to increase efficiency, flexibility and transparency of arbitral proceedings organised under their auspices. In the update process, the ICC Court focused, among other things, on the provisions on party representation, multi-party arbitrations, disclosure of external funding and the powers of the ICC Court to appoint all arbitrators in arbitral proceedings to prevent unequal treatment of the parties. Furthermore, in light of the COVID-19 pandemic, the 2021 Rules of Arbitration reaffirm that the tribunal may decide, after conducting consultations with the parties, to have virtual hearings through remote means of communication.

The London Court of International Arbitration (LCIA) is another arbitral institution that sought to update their Rules this year. The new LCIA Rules have already entered into force on 1 October, meaning that they will be applied to arbitrations from that date onwards. Striving to bring their Rules in line with the realities of contemporary arbitration as well as to ensure that they reflect the best practice of their tribunals, the LCIA entertained a wide array of topics in the update process, including early determination and multiple proceedings and claims. Moreover, just like the revised ICC Rules, the updated LCIA Rules as well took note of the COVID-19 pandemic by making it clear that hearings may also take place "virtually by conference call, videoconference or [by] using other communications technology with participants in one or more geographical places (or in a combined form)".

While the well-established institutions such as the ICC Court and the LCIA sought to update their existing rules, there are those that had to start from scratch. More precisely, that was the case with the London Chamber of Arbitration and Mediation (LCAM), an arbitral institution that was established in May this year. Only time will tell whether this new star on the European arbitral sky will manage to shine bright or not. Looking at their Rules and the overall approach, the LCAM seems to be vying for a particular niche of the arbitration market involving smaller businesses and modest claims. The indication of this is the fact that the LCAM will be placing emphasis on its extensive institutional case management competences, and it will also aim to provide for a rather fixed, affordable and somewhat predictable approach to costs.

To Revise or Not to Revise Arbitration Laws, That Is the Question

In 2020, we have approached the crowning moment of Switzerland's efforts to revise Chapter 12 of its Private International Law Act (PILA) that contains the country's law on international arbitration. The final draft of the bill was approved in June this year, with the entry into force expected to take place sometime in 2021. There were four aims that ran as leitmotifs through the revision process:

1. Alignment of the legislative text with the case law of the Federal Supreme Court of Switzerland;
2. Clarification of the matters not been expressly tackled in Chapter 12 of PILA;
3. Buttressing the role of party autonomy; and
4. Making Chapter 12 of PILA more user-friendly.

What is interesting to note is that the final draft of Chapter 12 of PILA foresees the option for parties to submit applications in English both for setting aside and revision of arbitral awards, something that has stirred debate and provoked somewhat of a backlash. Nevertheless, some have characterised this as a positive development with the potential to enable counsel to represent the interests of their clients in a more effective manner.

Luxembourg is another jurisdiction that has taken steps towards overhauling its arbitration law. Namely, a draft bill has seen the light of day in September. It draws its inspiration from the work done by UNCITRAL in the area of arbitration as well as the French Code of Civil Procedure. The aim, unsurprisingly, is to modernise the country's arbitration law. The ball is now in the court of Chamber of Deputies, the legislative body of Luxemburg, to transform the draft bill into law.

In contrast to the Swiss timely efforts and the Luxembourgish draft bill, still there are those countries that, in spite of having numerous scholars and practitioners calling for reform for years, have failed to take any meaningful action. Bosnia and Herzegovina (BiH) is a quintessential example of this laid-back approach. This year we have again heard pleas from experts that it is high time to tackle the country's ineffective arbitration framework, and it remains to be seen whether BiH's legislative bodies will continue to remain deaf in this respect.

The Rich Harvest from the International Case Law's Soil

The year 2020 was rich for precedent cases. The ones that stole the spotlight are highlighted below, noting that the precedents for the proper law of the arbitration agreement will be discussed in a

separate year in review post.

When Parties' Right to be Heard May or May not be Violated

Saying 'no' to parties may be risky, but the Vienna International Arbitration Court (VIAC) tribunal did it and was right. Following respondents' unsuccessful attempt to challenge the tribunal before the VIAC based on its decision to conduct an evidentiary hearing by videoconference over the respondents' objection, the case had landed at the Austrian Supreme Court's (OGH) doorstep. In holding that such a setting may not in fact violate due process, the OGH established that, *inter alia*, procedural errors are not enough to successfully challenge arbitrators. It could have been successful had the arbitrators' case management decisions resulted in violations of the parties' right to be treated equally and their right to be heard. Here, however, neither of the rights were violated as covered in the Blog post here. As result, OGH's landmark decision found its relevance not only for the Vis Problem this year, but also for practitioners all over the world facing the challenges created by the global pandemic.

While in contrast to the decision above, the Swedish Supreme Court (SC) dealt with a procedural error which *had* affected the parties' right to present their case which in turn affected the outcome of the case. The tribunal, in a dispute over royalty payments under pharmaceutical license, established in the Procedural Order its "final" position on respondent's conditional entitlement to royalty payments and declared it would not deviate from this position "*without informing the parties in advance and providing them with an opportunity to comment on the issue*". The tribunal has however never informed the parties that it decided to change its position and therefore deprived the parties of an opportunity to address this issue. Although the matter was reopened by the claimant, the SC concluded that the respondent was deprived of the opportunity to *fully* argue its case as a result of the procedural error created by the tribunal itself. Thus, the tribunal walked on thin ice when it declared it will ensure the parties' opportunity to address a specific matter, but the weight of such a declaration turned out to be heavier than the 'ice' could actually hold.

Why Staying Quiet in Austria and Dissenting in Germany are Both Against Ordre Public

In a case decided by the OGH, the arbitrator appointed by the respondent was excluded from the deliberations on the merits, thereby prevented from the general decision-making process, and from influencing the decision-making of other arbitrators. Naturally, the arbitrator raised concerns as to his/her involvement in the deliberations, while, the presiding arbitrator merely referred the prior to the possibility of a dissenting opinion. Arbitrator's concerns were justified, as the OGH held that, *inter alia*, it is preferable for all arbitrators to be physically present during the deliberations on the merits of the case. Otherwise, the award is considered to be against Austrian *ordre public*, which was the case at hand. The decision therefore demonstrated which consequences "ghosting" arbitrators may have on the enforceability of the award.

But what if the minority arbitrator did issue his/her dissenting opinion? Had it happened in Germany, such an action would have been against *ordre public*. With a place of arbitration in Frankfurt am Main, the award rendered, from the German perspective, was domestic. As the Frankfurt Court of Appeals held, disclosure of a dissenting opinion is inadmissible in domestic arbitral proceedings as it will violate the confidentiality of the tribunals' deliberations. Although

German legal commentators are of the position that attaching a dissenting opinion to the award is "*predominantly considered permissible*" as it is subject to party autonomy, the court had taken a strict position in holding that in domestic arbitral proceedings a dissenting opinion will be against German *ordre public*.

The Legendary Comeback: Revival of the Yukos Awards

The Yukos Awards' saga had taken a new turn when on 18 February 2020 the Court of Appeal (CA) in The Hague reversed the lower court's decision annulling the awards rendered against the Russian Federation in Veteran Petroleum Ltd., Yukos Universal Ltd., and Hulley Enterprises Ltd. cases. The CA therefore followed a pro-investor approach by holding that, *inter alia*, although the Russian Federation had signed the Energy Charter Treaty (ECT) but had not ratified it, under the Limitation Clause of the ECT, each State that signed the treaty will apply the treaty in a provisional way. It thus concluded that Contracting States accepted to comply with obligations found in the preamble of the ECT to establish conditions for investment immediately upon the signing of the treaty. The newly revived awards will therefore be subject to prompt enforcement, while, on the other hand, the issue of whether annulled awards shall be enforced or adjourned is in particular of issue in this Blog post.

A Word on Investment Arbitration in Europe

In the realm of investment arbitration, the highlight of the year in Europe has certainly been the enforcement of arbitral awards rendered in the intra-EU setting. More precisely, Europe is still dealing with the aftermath of the *Achmea* case. In this context, probably the most discussed development on the Old Continent has been the case of *Micula and others v. Romania* in which the UK Supreme Court held unanimously that the "UK's enforcement obligations under the ICSID Convention could not be affected by the EU duty of sincere co-operation […], as the UK's ratification of the ICSID Convention preceded its accession to the EU". The holding of this case has served as a 'told you so' moment for those who argued that post-Brexit the UK may serve as a convenient spot for enforcing intra-EU arbitral awards stemming from investment arbitrations. Another relevant development in the field was the signing of the Agreement to terminate intra-EU BITs, whereby, according to our contributor, the Commission and most EU Member State are testing the principle of good faith under international law. This development will be discussed in more detail in another year in review post highlighting developments in investment arbitration.

---

uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

This entry was posted on Wednesday, December 23rd, 2020 at 8:00 am and is filed under 2020 In Review, Europe, ICC Rules, Investment Arbitration, LCIA Rules, Legislation, Ordre Public, Right to be heard, Yukos
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.