

2015

## The Future Of International Arbitration In Central And Eastern Europe

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### Recommended Citation

Sadowski, Wojciech "The Future Of International Arbitration In Central And Eastern Europe," American University Business Law Review, Vol. 5, No. 3 (2018) .

Available at: <http://digitalcommons.wcl.american.edu/aublr/vol5/iss3/8>

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# THE FUTURE OF INTERNATIONAL ARBITRATION IN CENTRAL AND EASTERN EUROPE

WOJCIECH SADOWSKI\*

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## INTRODUCTION

Central and Eastern Europe (CEE) is an amorphous geopolitical concept, employed mostly as a collective name for the broadly conceived former Soviet bloc in Europe, and frequently extending into Albania, the former Yugoslavia, and Romania. Accordingly, neither Finland nor Greece is typically mentioned as CEE countries, although they geographically both lie east of the Czech Republic and Slovenia.<sup>1</sup> The purpose of this paper is to discuss whether there are any existing idiosyncratic considerations

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1. There are different approaches to defining CEE. See Central and Eastern European Countries (CEES), OECD (Nov. 2, 2001) (“Central and Eastern European Countries (CEECs) is an OECD term for the group of countries comprising Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania”, leaving Ukraine or Serbia outside), <https://stats.oecd.org/glossary/detail.asp?ID=303> (last visited June 7, 2016); cf. *Central & Eastern Europe*, FIN.TIMES (including Russia and Austria as well), <http://www.ft.com/intl/reports/central-eastern-europe> (last visited June 7, 2016); cf. *2013 Statistical Report*, 25 ICC INT’L CT. OF ARB, BULL. (including Turkey and Greece).

involving CEE which could help explain the current condition of international arbitration in the region. With this understanding of CEE, I will make informed predictions concerning the possible trends in dispute resolution in the future.

The central conclusion I will make in this paper is that the cycle of development of international commercial arbitration in CEE may be approaching a low mark. The forces that were driving the development of international arbitration in this part of the world before 1989, such as the East–West dichotomy and the subsequent increased commercial, legal, and political risk connected to the “emerging–economy” status of CEE countries, exhausted most of its potential, which is unlikely to rebound. At the present moment, there are no compelling reasons why international arbitration in CEE should flourish. It is clear, however, that its future development will have to respond to the changing needs and preferences of the business community and the individual CEE states, rather than the objectives immediately relied upon after the fall of Communism.

This paper starts with a brief historical note explaining the traditional motivations leading commercial parties to agree on international arbitration in the CEE–related business context, both before and after the fall of Communism in 1989. I will present the developments of the past twenty–five years that help explain the current position and potential of international commercial arbitration in CEE. Due to the significant diversity among the countries in the region, I will not offer a detailed analysis of the particular legal frameworks in each individual CEE state. The differences between various national laws within the region do not play a primary role. Instead, I will emphasize the existing and potential interests and reasons that may convince the business community across CEE to use international arbitration to resolve commercial disputes. These enticing factors do not depend as much on the legal particularities of individual CEE jurisdictions as on the broader economic and cultural considerations of the region generally.

## II. HISTORY

### A. Cold War

The genesis of the current condition of international commercial arbitration in CEE goes back to the Cold War, when Europe was divided into two opposite camps founded on conflicting ideologies.<sup>2</sup> Western

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2. Obviously, arbitration in Central and Eastern Europe existed for centuries, and most countries in the region had arbitration laws operating both before the Second World War and in the Cold–War era. See, e.g., Matthew Hodgson, *The Rebirth of Arbitration in Central and Eastern Europe*, 6 GLOBAL ARB. REV. (July 4, 2011). Those

Europe developed on the premise of the free market ideology, supported by democratic values and the rule of law. Eastern Europe struggled to implement the “socialist utopia” of centrally planned economies and authoritarian regimes that were imposed and maintained by the Soviet Union’s political and military hegemony in the region. In such a hostile environment, international commercial arbitration had clear advantages as a method of dispute resolution between the East and the West. The main rationale for selecting international arbitration was the ideological polarization of the respective political, economic, and military camps, which led to mutual distrust. Western companies had no confidence in the Eastern European legal and court systems, which—apart from political or ideological issues—were also ill-equipped to deal with issues of international trade, contractual freedom, or complex commercial relations. Most of the industry in Eastern Europe was nationalized after the Second World War. State-owned enterprises, which had little inclination to surrender to the jurisdiction of Western European state courts, contributed to the bulk of economic activity. From that perspective, East–West arbitrations in Communist times were prevalingly mixed arbitrations—disputes between states and state-owned entities from the East, and private entities from the West.<sup>3</sup>

International arbitration naturally arrived on the scene as an attractive option for resolving commercial disputes, primarily because it allowed for a certain degree of neutrality. Not accidentally, Austria (initially various regional courts, followed by the creation of the Vienna International Arbitral Centre),<sup>4</sup> Sweden (Arbitration Institute at the Stockholm Chamber of Commerce)<sup>5</sup>, and, to a lesser extent, Switzerland, were the most frequently used fora for arbitrating the East–West disputes at that time.<sup>6</sup>

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historic considerations, however important to the sense of continuity of arbitration culture, do not seem, however, to be highly relevant business or legal factors affecting the possible future development of arbitration in this part of the world. For this reason, they will not be further discussed in this paper.

3. See Kazimierz Grzybowski, *Arbitral Tribunals for Foreign Trade in Socialist Countries, Law and Contemporary Problems* 597 et seq. (vol. 37, 1972); see Thomas E. Carbonneau, *Law and Practice of Arbitration* 626 (5th ed. 2014); Andrzej W. Wiśniewski, *Międzynarodowy arbitraż handlowy w Polsce* (1st ed. 2011).

4. See Werner Melis, *The Formation of the VIAC*, 1 VIAC – SELECTED ARBITRAL AWARDS, 16–17 (Austria), [http://www.viac.eu/images/documents/05\\_Einleitung\\_en.pdf](http://www.viac.eu/images/documents/05_Einleitung_en.pdf); Gary B. Born, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 54 (4th ed. 2013).

5. With respect to Stockholm, reference is usually made to an agreement between the American Arbitration Association and the USSR Chamber of Commerce and Industry to regard the SCC as the neutral place for resolution of US–USSR commercial disputes. See *About Arbitration in Sweden*, SWISS ARB. ASS’N, <http://swedisharbitration.se/about-arbitration-in-sweden/> (last visited Apr. 7, 2016).

6. In particular with respect to contracts made with Yugoslavian entities, see

This is due in large part to the fact that these three states were not aligned with the East or the West. Indeed, none have ever become NATO members.<sup>7</sup> Austria and Sweden joined the European Union only in 1995, shortly after the fall of Communism in Europe.

It would be inaccurate, however, to associate commercial arbitration behind the Soviet bloc with exclusively East–West interactions. Communist legislatures envisaged arbitration to be useful for domestic commercial arbitration as well as within the CMEA (Council for Mutual Economic Assistance), pursuant to the 1972 Moscow Convention. This led to the creation of a number of arbitration institutes within CEE in the 1950s and 1960s, most of which have continued to operate to this present day. However, the experience those institutions gained before 1989 has held only limited relevance in the new political, economic, and legal reality of the post–1989 era. Accordingly, many of those institutions had to undergo deep transformations in order to re–adapt to their new legislative and economic models. As it will be shown, most CEE arbitration cases are today still managed by these institutions.

### *B. Transformation (1989–2015)*

After the fall of Communism in 1989–1990 and the announcement by the former members of the Soviet Bloc of their intention to transform into market economies, CEE became one of the most attractive locations in the world for investment. Beginning in the 1990s, both international companies and international law firms began to establish offices in the major cities of the region, including Budapest, Prague, and Warsaw. The economic transformation and the influx of foreign direct investment have brought a radical transformation to region’s economic, legal, and political landscape since the fall of the Communism. It would be far beyond the limits of this paper to provide a comprehensive analysis of this unprecedented phenomenon, even if limited solely to the evolution of international arbitration. For this reason, the following analysis is, by necessity, simplified and selective.

In any event, the most important feature of the post–1989 period in CEE is the increasing lack of homogeneity between the paths that the various CEE states adopted and pursued, resulting in stark differences between their current political and economic conditions.<sup>8</sup> The CEE region includes, on the one end of the transformation spectrum, Slovenia—a small, well–

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Michael Wietzorek, *Arbitration in Serbia*, in *Austrian Arbitration Yearbook 2009* 357, 360 (Gerelad Zeiler et al. eds., 2009).

7. *NATO Member Countries*, N. ATLANTIC TREATY ORG. [http://www.nato.int/cps/en/natolive/nato\\_countries.htm](http://www.nato.int/cps/en/natolive/nato_countries.htm).

8. Wietzorek, *supra* note 6, at 358.

developed economy that is closely integrated with Northern Italy and Southern Austria, a member of NATO and the European Union, maintaining a per capita GDP of \$24,002 (USD) (2014).<sup>9</sup> On the other end of the spectrum is Belarus—an authoritarian regime, closely integrated with Russia, with a per capita GDP of \$8,040, and the only European state that has not become a party to the European Convention of Human Rights. Other countries from the CEE region are placed between these two extremes.

The second critical issue is the scale of the development that has occurred in CEE since 1990 and how CEE states now compare against other world economies. For example, the gross domestic product of Poland in 1990 was \$64.7 billion, while the GDP of Norway in the same year was nearly \$120 billion.<sup>10</sup> By 2014, however, Poland's GDP reached ca. \$545 billion and has surpassed Norway's current GDP of \$500 billion.<sup>11</sup> However, the GDP per capita in Poland in 2014 was still only \$14,337, compared to e.g. \$47,774 in Germany.<sup>12</sup> This basic economic analysis is essential for two reasons. First, it proves that CEE-based clients are on average less affluent and hence will be more sensitive to the costs of international arbitration than their Western European counterparts. Second, the scale of economic development of CEE countries should be kept in mind when assessing the growth of related arbitration disputes over the last twenty-five years. Nevertheless, such analysis should not solely be made by reference to absolute figures. The analysis should be considered in proportion to the overall economic development of the region. As I will discuss below, even though the number of CEE arbitrations continues to grow, this growth is disproportionately low in relation to regional economic growth. This suggests that international arbitration remains underused in CEE.

The undisputed economic growth of the region is inexorably linked to the transformation and development of political and legal systems, both domestic and international. Domestically, CEE states combined the growing sophistication of lawmakers, regulators, and courts with increasing effectiveness of law enforcement and respect for the rule of law. Internationally, the accession of most CEE states to the Council of Europe and the European Convention of Human Rights—and submission to the jurisdiction of the European Court of Human Rights—prompted a giant

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9. *GDP Per Capita (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited June 8, 2016).

10. *GDP at Market Prices (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD/countries?page=5> (last visited June 8, 2016).

11. *Id.*

12. *GDP Per Capita (Current US\$)*, *supra* note 9.

leap in the region's development. The integration process of most CEE countries into the European Union (EU) in three subsequent enlargements of the EU in 2004,<sup>13</sup> 2007,<sup>14</sup> and 2013<sup>15</sup> was another great step forward, which has led to the contraction of the legal, economic, and civilizational gap between Western and Eastern Europe.

The radical developmental changes that took place in CEE had a tangible impact on the use of international commercial arbitration. Trends in CEE-related international arbitration panels during the past twenty-five years have been dynamic. In the years immediately following 1989, arbitration was still the preferred dispute resolution method for Western (particularly U.S.-based) corporations and individuals doing business in CEE. However, unlike in the pre-1989 era, when external forces limited the choice of dispute resolution due to the need for neutrality, after 1990 arbitration was preferred by the Western parties in their business contracts with CEE parties because of the weakness of the CEE state organizations. Accordingly, the underdevelopment of the legal and judicial systems of CEE states, their vulnerability to various types of fraud and abuse, and the perceived or actual risk of corruption that mandated the transfer of CEE-related dispute resolution before international arbitral tribunals. In short, the position of international business in the first years after 1989 was conducive to arbitration with CEE parties. However, such arbitrations were frequently seated outside CEE, in countries, which were known for their pro-arbitration approach.<sup>16</sup> Enforcement of foreign arbitral awards in CEE was then perceived as a risk, especially due to the frequent discretionary use of the public policy exception by state courts. However, most CEE countries were parties to the New York Convention<sup>17</sup> and, eventually, successfully enforcing foreign arbitral award became more

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13. *EU Member Countries*, EUROPA EU (April 11, 2015), <http://europa.eu/about-eu/countries/member-countries/> (adding Czech Republic, Cyprus, Hungary, Malta, Poland, Slovakia, Slovenia, Latvia, Lithuania, and Estonia).

14. *Id.* (adding Bulgaria and Romania).

15. *Id.* (adding Croatia).

16. Wietzorek, *supra* note 6, at 360.

17. *See Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, U. NATIONS COMMISSION ON INT'L TRADE L. (noting that the NYC entered into force with respect to the following states: Albania (25 September 2001), Belarus (13 February 1961), Bulgaria (8 January 1962), Czech Republic (1 January 1993), Croatia (8 October 1991), Estonia (28 November 1993), Hungary (3 June 1962), Latvia (13 July 1992), Lithuania (12 June 1995), Poland (1 January 1962), Romania (12 December 1961), Russia (22 November 1960), Moldova (17 December 1998), Serbia (27 April 1992), Slovakia (1 January 1993), Slovenia (25 June 1991), Macedonia (17 November 1991), Ukraine (8 January 1961)), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.htm](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.htm) 1 (last visited on Apr. 8, 2016).

predictable in most states in the CEE region.<sup>18</sup>

In the post-1989 era, Stockholm and Vienna remained, for historic reasons, important arbitral institutions for CEE. Both private-public deals included arbitration clauses, such as privatization agreements, as well as joint-venture agreements with CEE-based companies and individuals. Disputes emerged in both types of transactions and exposed the CEE-based private companies to their first practical experiences with international arbitration. This in an important point because the state ownership of parties to the pre-1989 East-West arbitrations meant that on the Eastern side, chiefly state and state-owned entities were involved. Thus, due to the overall scarcity of exchangeable currency, the principal problem was the availability of funds and not the risk-benefit analysis of arbitration versus other forms of dispute resolution management. Therefore, following the transformation of 1998, there was not only very little institutionalized knowledge of arbitration among CEE states, but also the available knowledge was much dispersed and partially inadequate.

As time progressed, the situation began to change. Foreign entities grew accustomed to doing business in CEE and the perceived commercial risk began to wane. On the other hand, arbitration standards in the region were constantly increasing. As a part of wider process of legislative reforms, all CEE states have amended their respective arbitration laws. In general, the present national arbitration laws in the region reflect the provisions of the UNCITRAL Model Law, albeit some important distinctions among the arbitration laws of various countries. Stockholm and Vienna gradually began to lose ground to other centres of international arbitration. By 2009, the ICC was already the most frequently chosen arbitral institution. However, the Russian and Ukrainian companies would also often choose arbitration in accordance with the LCIA arbitration rules.<sup>19</sup>

The arbitration disputes that ensued, involving multiple parties from the region, help explain the dynamics of this dispute resolution method to the CEE business and legal community. The conclusions drawn from those cases were not always encouraging. A relevant example is the *Elektrim* case, which took place in Poland and became notorious because of the problem of possible extra-territorial application of Polish bankruptcy laws and its impact on foreign-seated international arbitration proceedings

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18. See generally Illeanu M. Smeureanu, *Five Facts About Recognition and Enforcement of Foreign Awards in Central and Eastern Europe*, KLUWER ARB. BLOG (June 26, 2014), <http://kluwarbitrationblog.com/2014/06/26/five-facts-about-recognition-and-enforcement-of-foreign-awards-in-central-and-eastern-europe/>.

19. The fact is well-known across international arbitration community in Europe. See Dmitry Davydenko, *Every Third LCIA Case Involves a CIS-related Party*, CIS ARB. FORUM (Nov. 3, 2015), <http://www.cisarbitration.com/2015/11/03/each-third-lcia-case-involves-a-cis-related-party/>, for written sources.



involving a bankrupt party.<sup>20</sup> The point here, however, is that apart from revealing idiosyncrasies of the Polish legal system, the dispute itself was essentially a ten-year battle over control of a leading Polish mobile communications company. The dispute produced staggering legal representation costs and, for some time, kept the company in a conundrum that prevented it from fully exploiting its business potential. Another Polish example is the case of PZU, the biggest Polish insurance company and CEE's largest financial institution, which from 2001 to 2010 was hostage to a shareholders' dispute known as the *Eureko* case.<sup>21</sup> The commercial wisdom gained from such cases in the region was that international arbitration comes at a high price and does not always lead to commercially satisfactory results.

In parallel to the big-ticket arbitrations common in London, Paris, Geneva, Zurich, Vienna, and Stockholm, thousands of CEE commercial cases in both the domestic and international context were referred to state courts and domestic arbitration institutes. This trend had a colossal impact on the development of the legal systems in CEE, as it helped to build a body of case law that ultimately improved legal predictability and filling some of the existing lacunae. It also helped to shape and reinforce the arbitral practice at the national level in CEE. In terms of volume, leading national arbitral institutions in CEE countries have had much larger inflow of cases than most of the recognized international centres, such as the LCIA, VIAC, and SCC. For example, in 2014 the VIAC registered only fifty-six cases, whereas, in Poland alone, each of the two arbitral courts (Lewiatan and the Court of Arbitration at the Polish Chamber of Commerce) have a larger yearly intake of cases.<sup>22</sup> Most of these disputes,

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20. Deyan Draguiev, *The Effect of Insolvency on Pending International Arbitration: What Is and What Should Not Be*, 32 J. INT'L ARB., 511, 537 (2015); see *Elektrim SA v. Vivendi Universal SA*, [2007] EWHC (QB) 571 (Eng.) reprinted in INTERNATIONAL ARBITRATION: CASES AND MATERIALS 800–10 (Gary Born, 2d ed. 2015). See generally Elizabeth Williamson, *Deutsche Telekom Strives for Key Role In Poland Stake in Elektrim Units*, WALL ST. J. (Dec. 19, 2000, 12:00 AM), <http://www.wsj.com/articles/SB977173664332936144>; *Deutsche Telekom Enters into an Agreement to Secure Undisputed Ownership over Polish Mobile Operator PTC*, DEUTSCHE TELEKOM (Dec. 15, 2010), <https://www.telekom.com/media/company/69124>.

21. See *Eureko B.V. v. Republic of Poland, Partial Award (Encouragement and Reciprocal Protection of Investment Trib. 2005)*, [http://www.italaw.com/sites/default/files/case-documents/ita0308\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf). The ten-year dispute inclusively served as a case study for Harvard Business School, see Francesca Gina ET AL., *Poles Apart on PZU (A)*, in HBA CASE COLLECTION 912–013 (2012, revised 2014).

22. In Poland, for example, the Court of Arbitration at the Polish Chamber of Commerce resolved approximately 350 disputes in 2013, with an aggregate value of PLN 1 billion (EUR 200 million). According to the President of the Court of Arbitration, the inflow of cases to the Court is rather stable and varies between 300 and 400 annually, PULS BIZNESU (last visited June 8, 2016), <http://www.pb.pl/3650342,955>

however, are either small or very small in size.

Another essential point that should be taken into consideration in the context of CEE-related international arbitration is the frequent appearance of states and state agencies as parties to disputes. This phenomenon is driven by three major categories of matters: privatization disputes, investment treaty disputes, and infrastructure disputes. While privatization disputes are now largely considered a historic category, both investment treaty and infrastructure disputes continue to play a central role in the development of international arbitration in CEE.

Between 1987 and 2000, CEE countries concluded hundreds of bilateral investment treaties, in particular with more developed Western economies.<sup>23</sup> The relevance of bilateral treaty arbitrations in this context is due to the fact that most of the significant arbitration disputes involving CEE in the last twenty-five years were either petitioned on the basis of bilateral investment treaties or developed into bilateral investment treaty disputes. Although ICSID adjudicated most of these disputes, the inclusion of the SCC in the arbitration provisions of the Energy Charter Treaty and some other bilateral investment treaties allowed Stockholm to remain one of the most significant venues for resolution of investment treaty disputes.

The emergence of infrastructure disputes is due primarily to CEE states' vast needs for all sorts of infrastructure: roads, highways, railways, airport, and seaport facilities. From around the year 2000, both the European Commission and most multilateral development banks that provide funds for large infrastructure projects began to promote FIDIC conditions for construction contracts as the model imposed on developing states, in particular in CEE. This led to the inclusion of an ICC arbitration clause (the default dispute resolution clause) in many infrastructure-related FIDIC construction contracts, usually with the participation of states, state agencies, or municipalities as employers. As a consequence, a number of arbitration proceedings ensued, which sometimes left the state parties defeated.

CEE and other states' involvement in international arbitrations have gradually led some of those states to adopt a less favourable approach to

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95,sad-arbitrazowy-przy-kig-rozpatrzyl-ok-350-spraw-wartych-1-ml-d-zl-w-2013-r.; there were 280 cases registered by that Court in 2014, including 35 international cases. The Lewiatan Court of Arbitration registered 56 new cases in 2013 and 58 new cases in 2014, Działalność Sąduw 2014 roku [Proceedings in 2014], LEWIATAN, <http://www.sadarbitrazowy.org.pl/pl/podstrony/dzialalnosc-sadu-w-2014-roku.html> (last visited June 8, 2016).

23. In particular, the Czech Republic currently has 79 bilateral investment treaties, Slovakia – 54, Romania – 82, Bułgaria – 67, Poland – 61; Ukraine – 73, Lithuania – 54; Latvia – 44, Estonia – 27. *International Investments Agreements Navigator*, INV. POL'Y HUB (last visited Apr. 1, 2016), <http://investmentpolicyhub.unctad.org/IIA>.

arbitration as a matter of policy. For example, the Polish state agency responsible for construction of highways and motorways decided to amend the standard FIDIC contract terms following a few arbitration disputes with foreign contractors in way so as to replace ICC arbitration with exclusive jurisdiction of the Polish state courts. From that state agency's perspective, this was not an unreasonable step, because the Polish rules of litigation before state courts are crafted in such way that it is very hard for contractors to establish their case. Accordingly, the statistics of road construction disputes before state courts are usually very favourable to public employers. In Hungary, Article 4 of the Arbitration Act provides that disputes where the subject matter qualifies as a national asset (within the meaning of the Act CXCVI of 2011 on National Assets) within the boundaries of Hungary including the rights, claims, and privileges related to such asset are not arbitrable. This essentially excludes all state property from arbitration. Romania, following the *Micula*<sup>24</sup> award and the response adopted by the European Commission against the enforcement of the award, has found itself between Scylla and Charibdis. This may lead Romanian authorities to take a more cautious approach to arbitration in the future.

### III. PRESENT SITUATION

The current situation of international commercial arbitration in CEE is undoubtedly impacted by the overall economic and political crisis affecting Europe, as well as the relative stability of the region. CEE is no longer the most promising world market, nor is it such a risky place where international arbitration should be considered as the only reasonable dispute resolution method. The historic reasons why disputes involving CEE states were referred to neutral arbitration fora are no longer relevant. This change of paradigm is well reflected in the transformation that has happened in recent years by the two international arbitration centres that were traditionally associated with the resolution of East–West disputes; the SCC and the VIAC. The SCC managed to readjust to the changing posture of international arbitration by opening itself to investment arbitrations under the Energy Charter Treaty and commercial disputes involving Ukraine, Russian Federation, and China. In contrast, the VIAC has failed to find its own niche, and instead purported to capitalize on the historic position of Vienna as the former capital of the Austro–Hungarian Empire and a cultural regional centre for Southern Poland, Czech Republic, Slovakia, Hungary, Slovenia, and Croatia. However, these efforts have had

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24. *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013).

limited success and the VIAC has gradually decayed to the position of a reputable national arbitration institution with limited international significance.<sup>25</sup>

In 2011, M. Hodgson reported that international arbitration was flourishing in CEE.<sup>26</sup> However, that growth appears to have slowed since 2011. The plain truth is that for many reasons, international arbitration is no longer as attractive in this part of the world as it was in the years immediately following the Cold War. For example, the potential to rely on the New York Convention in order to enforce both the arbitration agreement and the arbitral award in most states is regarded as the most important advantage of international commercial arbitration.<sup>27</sup> Without a doubt, the New York Convention has been one of the most significant successes in the treaty-making practice of the United Nations. There is no similar global instrument to enforce court decisions. Within the European Union, however, the benefits of the New York Convention are dwarfed by the now much stronger and robust system of judicial cooperation in civil and commercial matters in the European Union. Since the European Commission launched a law-making offensive in this arena, starting in December 2000 with the enactment of the Regulation 44/2001 (Brussels I Regulation), EU member states now benefit from a number of regulations that have to be applied directly in a uniform manner across Europe.

The key advantage of the presently binding Brussels I Regulation on jurisdiction and enforcement of judgments in civil and commercial matters (Regulation 1215/12)<sup>28</sup> over the New York Convention is that judicial decisions, which are issued and enforceable in a Member State of the European Union, are automatically enforceable in all other Member States of the European Union without requiring any declaration of enforceability.<sup>29</sup> A Member State can only refuse to enforce a judgment

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25. It is remarkable that the 2015 QMUL Arbitration Survey does not even mention Vienna as a preferred forum for international arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, WHITE & CASE (2015), [http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015\\_0.pdf](http://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf).

26. Hodgson, *supra* note 2.

27. See *2015 International Arbitration Survey*, *supra* note 25 (mentioning enforceability as the most important perceived advantage of international arbitration among users).

28. Council Regulation 1215/2012 of December 12, 2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1 (EU) (known as Brussels I Regulation 'recast') (replacing Council Regulation No 44/2001 of the European Parliament of December 22, 2000, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

29. Council Regulation 1215/12, art. 39, 2012 O.J. (L 351) 1.

upon an application of the interested party and only on the basis of a few narrowly crafted grounds that are subject to interpretation of the Court of Justice of the European Union. Therefore, even though Regulation 1215/12 provides for a theoretical possibility to refuse enforcement on public policy grounds, the practical scope of application of this exception is very narrow.<sup>30</sup> The territorial application of the Brussels I Regulations is further extended by virtue of the Lugano Convention<sup>31</sup> onto certain non-EU countries, such as Switzerland, Iceland, and Norway. As a result, almost all of Europe is covered by highly efficient tools to enforce international judgments. At present, that territorial scope covers most of the geographic reach of CEE business entities.

Furthermore, while Regulation 1215/12 provides for a generally applicable framework in civil and commercial matters in the European Union, other instruments provide alternative possible advantages to litigants. Regulation 805/2004 introduced the European Enforcement Order for uncontested claims in order to facilitate cross-border enforcement in situations where defendants do not oppose the claims but merely refuse to pay.<sup>32</sup> Regulation 1896/2006 introduced the European Payment Order Procedure,<sup>33</sup> which is a standardized procedure ideally suited for vindication of outstanding liabilities. Regulation 861/2007 was designed to deal with small claims,<sup>34</sup> which is also very important for small and medium enterprises. Those regulations are supported with secondary Regulations on taking of evidence, service of documents, and European Account Preservation Order.

As a result of the foregoing, companies operating in CEE have a strong

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30. See, e.g., Case C-681/13, *Diageo Brands BV v. Simiramida-04 EOOD*, 2015 E.C.R. I-350 (“*In accordance with the Court’s settled case-law, while the Member States in principle remain free, by virtue of the proviso in Article 34(1) of Regulation No 44/2001, to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the public policy of a Member State, it is none the less required to review the limits within which the courts of a Member State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another Member State (see judgment in flyLAL–Lithuanian Airlines, C-302/13, EU:C:2014:2319, paragraph 47 and the case-law cited).*”).

31. Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007 [hereinafter *Lugano Convention*].

32. Council Regulation 805/2004, 2004 O.J. (L 143) 15 (creating a European Enforcement Order for uncontested claims).

33. Council Regulation 1896/2006, 2006 O.J. (L 399) 1 (creating a European order for payment procedure).

34. Council Regulation 861/2007, 2007 O.J. (L 399) 1 (establishing a European Small Claims Procedure).

reason to reconsider using arbitration as the preferred route of resolution for cross-border disputes. Statistically, in the vast majority of cases, intra-EU court litigation could be an attractive alternative to these companies, especially in terms of cost effectiveness and the speed of the proceedings.

Could non-CEE parties seriously consider litigation in CEE as a reasonable option? It is beyond contention that CEE state courts cannot be compared with some of the most reputable Western European courts, such as the London courts. However, measured against courts in other parts of the European Union, such as Spain, Belgium, or Greece, the outcome of the comparison is not readily obvious. For many years, observers viewed corruption as the largest problem with the CEE judiciary. To an extent, corruption continues to be a major challenge in some CEE states and it concerns both national courts and arbitral institutions.<sup>35</sup> However, this notion is not necessarily true in the broad-brush sense. For example, Estonia is ranked twenty-sixth in the Transparency International 2014 Corruption Perceptions Index, *ex aequo* with France, and ahead of Spain, Portugal, Italy, and Greece. Other CEE countries, such as Lithuania, Poland, and Slovenia also received relatively high marks.<sup>36</sup>

Secondly, most of the CEE region has been a part of the European Union since 2004. The legal regimes within individual EU member states are required to have some degree of uniformity and the degree to which the EU integration process has managed to harmonize large parts of business law across Europe should not be underestimated. Vast areas of CEE were dominated until 1918 by either the German Empire or the Austro-Hungarian Empire. Hence, the core of the private law systems in the CEE countries is strongly influenced by the great Austro-German codifications of the 19th and 20th centuries. For these reasons, there are clearly demarcated division lines within the region, most noticeably between those states that joined the EU in 2004 and those that have not yet joined the EU, such as Serbia, Montenegro, Albania, Moldova, Kosovo, and Macedonia.

The foregoing provides evidence that, with respect to the CEE states that are members of the EU, there are strong arguments in favour of using harmonized tools of cross-border litigation in civil and commercial matters

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35. N. Eastwell, J. Logesova, ET AL., GUERRILLA TACTICS AND HOW-TO-COUNTER THEM IN NATIONAL LITIGATION: [H] EXCURSUS: COMPLIANCE AND CORRUPTION IN THE CEE/SEE AND TURKEY, IN GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 229 (S. Wilske & G.J. Horvath eds., 2013); Stephen Wilske, Lars Markert, & Laura Bräuninger, *Chapter IV: Investment Arbitration, Pertinent Issues in Investment Arbitration against Romania: A Case Study in Challenges and Pitfalls of Investment Disputes in Central and Eastern Europe*, in AUSTRIAN ARBITRATION YEARBOOK 2015 476, 493 (Christian Klausegger et al., eds. 2015).

36. 2014 *Corruption Perceptions Index*, TRANSPARENCY INT'L (Apr. 3, 2016, 4:38 PM), <http://www.transparency.org/cpi2014/results>.

over resorting to arbitration. This may be one of the reasons why arbitration seems to be still underused in CEE. In this respect, the current state of play is reflected in the recent statistics of the arbitral institutions traditionally selected to resolve CEE commercial disputes, such as the VIAC, SCC, LCIA, and ICC. Apart from the ICC, none of these institutions appear to expand their CEE-related dockets.

In the VIAC, the annual intake of new cases fell from seventy-five in 2011 to fifty-six in 2014 (with seventy new cases in 2012 and fifty-six new cases in 2013). This appears to be a long-term trend. CEE states rarely include dispute resolution clauses providing for arbitration under the VIAC. Local Austrian and German companies are now the principal users of the VIAC. Of the seventy newly registered cases in 2012, forty-eight parties were Austrian, while twenty-nine parties were German. The third-most frequent party nationality was Romanians with nine cases. Overall, the CEE states, Cyprus, Malta, and the Russian Federation were parties to fifty-seven cases registered by the VIAC. In 2014, parties from these same states were parties in only thirty-four cases before the VIAC. This could be construed as proof that CEE cases occupy an important share of the VIAC docket. However, fifty-six cases per year is not an impressive result *per se* and it is certainly not commensurate to the growth of economic exchange by the CEE parties between 1990 and 2015.

The yearly intake of new cases in the SCC is more significant. Domestic Swedish cases constitute around 50–60% of the volume. With respect to international cases (that are defined as cases in which at least one party is non-Swedish), the volume has remained at a relatively constant level since 2008, varying from seventy-five to eighty-five new cases per year. The principal non-Swedish users of the SCC have been a relatively stable group of states, including Russia, Germany, China, the UK and the US, Denmark, Norway, and Finland. CEE companies appear before the SCC much less than the aforementioned states. In eighty-three international cases registered by the SCC in 2013, only eight parties were from the Baltic states, two from Ukraine, and one from Belarus, Czech Republic, Poland and Romania each. These are not impressive figures by any standards.

The LCIA Registrar report for 2013 indicated that 290 arbitration cases were initiated in that year. In terms of the percentage of users from CEE, Russian entities appeared in 3.4% cases, whereas other CEE parties totalled 3.6%. The combined 7% was lower than the use of LCIA arbitration by US or BVI entities (7.1% each). In 2012, the figures were similar with Russian cases making up 3.25% of the LCIA docket, and CEE cases amounting to an aggregate of 4%. Admittedly, some Eastern European cases may be hidden among cases with Cypriot involvement (3.8 to 4.5% cases). Nevertheless, the volume in which CEE entities use LCIA is very low. The 7.1% of 290 is roughly equal to twenty cases.

The ICC Court of Arbitration is the unquestionable leader among international institutions dealing with CEE arbitration. According to ICC statistics, 275 CEE parties were involved in cases in 2014. Even without Greece and Turkey in this category (totalling ninety parties), the remaining countries from CEE would amount to 185 parties. Among those, Bulgaria, Russia, Romania, Cyprus, and Hungary are the most frequent users.<sup>37</sup> These figures show that the ICC Court of Arbitration is the most popular arbitral institution. The preference for ICC arbitration likely results from the juxtaposition of various considerations, such as promotion of the ICC Court of Arbitration in the FIDIC contract conditions. Additionally, the structure of the Court of Arbitration is a factor, which includes the role of its National Committees and the interactive approach of the Secretariat in developing good working relations with arbitration practitioner communities in the CEE countries. Still, the CEE parties' (including Turkey and Greece) case volume in the ICC Court of Arbitration corresponds to only 40% of the cases from Northern and Western Europe (30% cases excluding Turkey and Greece). Remarkably, the percentage of states and parastatal parties in all cases from CEE (7.6%) was significantly higher than the same ratio with respect to Northern and Western Europe (0.4%).

What seems to be important, however, is that these reputable arbitral institutions serve only a share of all arbitration cases resolved in CEE. As noted above, many disputes in both a purely domestic and mixed (domestic versus foreign party) context are referred to the national arbitral centres that exist in most CEE states. Some of them have international ambitions, including the Court of Arbitration at the Polish Chamber of Commerce, the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, Court of Arbitration at the Hungarian Chamber of Commerce and Industry or the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania in Bucharest.<sup>38</sup> However, none of these national arbitral institutions has managed to rise to the level of an arbitral centre for its surrounding region. This could be due to various possible reasons, three of which I shall present here.

First, no CEE state has focused on making an international arbitration an institution of commercial and political strategy. Development of an arbitral

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37. 2014 ICC Dispute Resolution Statistics, ICC DISP. RESOL. BULL. 2015/No. 1, p. 6.

38. See Grigore Florescu & Christina Florescu, *Part I: International Commercial Arbitration, Chapter 5: The Latest Developments in Commercial Arbitration in Romania*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 95, 109 (S. Köll ET. AL, eds., 2011).



institution clearly involves a combination of factors, ranging from an adequate hearing centre, appropriate marketing and funding, organization of a quality, and pro-arbitration approach of the legislatures and courts. So far, no CEE state has managed to offer this to the international community.

Second, the newly created legal systems of the CEE states have been overtly or covertly suspicious of arbitration. In part, this is the result of the initial weaknesses of the state institutions, which were abused and exploited in many unethical ways, especially at the beginning of their transformation process. Back then, CEE-seated arbitration was not a synonym for professional ethics and integrity, but secretive private courts which could rule in contempt of the law to support murky business interests. This was the reason, for example, why Polish bankruptcy law of 2003 provided that initiating bankruptcy proceedings terminates *ex lege* all arbitration clauses of the bankrupt party and discontinues all pending arbitration proceedings. Latvia is the most recent example of this problem. There, a new arbitration law entered into force on January 1, 2015, aiming to radically reduce the number of arbitration courts. The problem the law attempted to address was the reality in which more than 120 arbitration courts operated in a country populated by approximately two million people. Most of those courts were shabby, non-transparent organisations that rendered services of dubious quality and dissuaded businesses from using arbitration.

Third, horizontal ties between various CEE states are very weak and insufficient. Most CEE states would rather look to Western European countries or to the United States to engage in international relations than purport to engage in an exchange or initiative with their neighbouring states. To a large extent, these problems are due to historical reasons, including past dominance of certain countries in the region over the territories of others. In these surroundings, there is no obvious candidate for leadership, even as a regional centre of international arbitration.

However, there may be no need for such a centre in the first place. It is likely that national arbitral institutions will continue to resolve most CEE-related disputes at a domestic level, and refer other cases to the existing reputable institutions, such as the ICC. For the present time, such scenario has two important advantages for the users. First, local arbitration is often less expensive than international arbitrations before the most recognized institutions. This responds to the critical feature of the CEE-based businesses, which is cost-sensitivity. Domestic arbitration also tends to be quicker, and in the majority of cases, the quality provided is commensurable to the value and complexity of the case. Second, the legal and language differences between various CEE states also play an important role in individual cases, and circulation of arbitrators and lawyers among various CEE jurisdictions is seriously hindered.

## IV. PERSPECTIVES

The problem with international arbitration in CEE is that its past growth occurred in response to some important deficit—whether that was ideological neutrality, corruption, or lack of adequate rule of law. Even recently, increases in the number of arbitration cases from certain countries in CEE were caused by grave problems of the judicial systems in those countries. However, barring these types of emergency situations that are unlikely to persist, what edge does international arbitration over other forms of dispute resolution?

As I have demonstrated, enforcing arbitral awards is no longer its clear advantage, at least in the EU context. Time and money seem tugging at the hearts of commercial actors in today's economy. However, both CEE-based arbitration under the rules of some local arbitral institution and domestic court proceedings are likely to provide the party with a cheaper, and possibly faster decision, sometimes granted *ex parte*. These considerations are of paramount practical importance. Although CEE-based businesses have much more limited resources than Western European businesses, they have to compete both in the European Union and beyond. Hence, they put strong emphasis on cost-cutting and dispute management, which has often evolved from dispute resolution to dispute aversion. At the beginning of the transformation process, a number of international law firms opened their offices in CEE. These firm's applicable hourly rates at that time were exorbitant compared to the local fee arrangements that domestic lawyers and law firms used. Nonetheless, CEE clients honoured and accepted these international firms both as the risk premium for acting on unstable and unpredictable markets, and as consideration for superior quality of legal work.

With time, however, many skilled partners and associates established their own legal firms and boutiques, providing clients with legal services of international quality for a fraction of what international legal brands would charge. As the business conditions in CEE became more stable, domestic companies began to prefer these less expensive law firms with increasingly established reputations over the big and expensive brand name firms. Even if such small domestic law firms or boutiques do not have brand recognition for international arbitration, or even the know-how to conduct an international arbitration, they can provide cost-efficient, good-quality advice, and representation before the domestic courts. The saturated legal market prompted aggressive competition and low pricing. To explain the scale of this problem, in CEE, a typical budget for a court representation in a fairly complex commercial dispute by a well-regarded local law firm could still be lower than the proposal a US or UK-based service provider would make merely for management and storage of electronic files related

to the same matter. Hence, cost efficiency is a highly pragmatic consideration that should not be underestimated.

The next major problem with international arbitration in CEE is the lack of trust the private sector has for non-state judicial business. This is partially a legacy of the communist mentality and post-1989 abuses. Businesses in this part of the world generally have little trust, and this approach is even more acute with respect to institutions they ignore, and cannot always be linked to ostensible forms of judicial authority, such as court buildings, gowns, wigs, etc. Research conducted in 2005 in Southern and Eastern Europe confirmed that ignorance and distrust were the two most important factors limiting the use of arbitration by lawyers and parties in some CEE states.<sup>39</sup> A related problem is that, with respect to international arbitrations in key institutions, CEE parties do not feel that they own the process. This is evidenced, for example, in the number of appointments of CEE arbitrators in those disputes. The ratio of appointments of CEE arbitrators is dramatically low and corresponds to only a fraction of CEE cases handled by the arbitral institutions. This is to a large extent the result of the scarcity of international arbitrators with established reputations in CEE, and by the fact that much international arbitration involving CEE are still handled by international law firms' Paris, London or U.S. offices. This is changing and will need to change even more in the future if CEE is to play larger role in the development of international arbitration.

Another important feature of Central and Eastern Europe is the short history of business organizations—the potential users of international arbitration. Many companies opened only within the last twenty-five years and are still run by their founders. This means that key decisions are still taken by people with strong entrepreneurial spirit, who were most likely brought up in a different environment when CEE was not as open to the world as it is today. Those decision makers do not have the inclination to look abroad to find solutions to their problems. The short track record of these new companies also implies that they do not rely on procedures and internal policies as much as Western organizations do, with a longer history and more sophisticated internal corporate structures. This implies that it is rather unlikely to find a CEE-based company that would agree to international arbitration in all of its commercial contracts because of its internal policies against international arbitration. Rather, the analysis of pros and cons will be done on a case-by-case basis, leading to sometimes chaotic results.

The conclusion is that future international commercial arbitration in CEE

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39. Bruno Schönfelder, *The Puzzling Underuse of Arbitration in Post-Communism – A Law and Economics Analysis*, FREIBERG WORKING PAPERS, no. 7, 2005, at 19.

will have to respond to different needs than in the past, and it will have to be managed differently. The model CEE arbitrating party is a risk-averse and cost-sensitive client, who has achieved success on the domestic market with relatively limited experience in international operations and international dispute settlement mechanisms.<sup>40</sup> For such user, international commercial arbitration could be a reasonable choice in three types of matters.

The first type of matter that would benefit from international arbitration is high-value agreements that are likely to provoke fact-intense and issue-complex disputes on close technical questions. Construction, infrastructure, and IT-related contracts are the typical representatives of this matter. The same would also apply to financial disputes, including M&A transactions, which may require commercially oriented approach and financial expertise. In this respect, the key advantages of international commercial arbitration—regardless of the geographic origin of the parties—will include the possibility to appoint a knowledgeable tribunal, provide party-appointed witness-expert reports and obtain documents from the other party in the course of document production. Court litigation in Europe, and in CEE in particular, does not and will not respond to these needs in the foreseeable future because they are all civil law systems.

The second category includes matters in which arbitration may be chosen in negotiations as a way to ensure a level playing field for the parties. This would include the cliché scenario of neither party being ready to concede to the jurisdiction of the courts of the opposing party, and where neither party has the bargaining strength allowing it to impose its will in this respect on its opposing party. Such arbitration agreements are most frequently leading to surprising and/or unwanted results. This is because the deals over arbitration clauses in such situations are generally struck for psychological and unmeritorious reasons, and are unsupported by any previous transactional analysis that would refer to the most probable adverse scenarios in the light of the applicable substantive and procedural laws. These “midnight” clauses then lead to excessively costly and redundant arbitrations over matters that should have been rather referred to state courts, even in the opposing party’s jurisdiction. On top of that, incidental inclusion of arbitration clauses by non-trained parties often leads to pathological arbitration clauses, generating even more costly, protracted, and redundant disputes. Nonetheless, the limited lack of experience with international dispute settlement, including limited trust in foreign judicial

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40. *See generally id.* (providing an interesting insight into the possible reasons of underuse of arbitration in South-Eastern Europe before 2005, suggesting legal illiteracy coupled with a specific approach to business acquired during communism, were the two main factors).

systems on the part of many CEE businesses, is likely to be responsible for midnight arbitration clauses to continue to be inserted into multiple international contracts in the years to come.

The third category of matters includes transactions between CEE parties and their business partners from states that are perceived as representing an increased political, legal or commercial risk. In recent years, many CEE-based entities have been expanding into new markets, including the African and Asian markets, still largely unknown to them and which present increased risks. In this new reality, CEE companies entering international markets will need international arbitration to protect their commercial interest in the same manner as the Western European and the U.S. companies sought to protect their CEE interests after 1990. As a part of this wider trend, there seems to be an ever more visible division between the states that joined the European Union in 2004 and those CEE countries that have not joined the EU to date. The distinction manifests itself primarily in the appearance of a number of investment treaty arbitrations, such as Czech entities as claimants against Southern European states. Such cases are a recent phenomenon and are indicative of the increased legal, political, and commercial risk of doing business in the southern part of Central Europe. The same risk, although with lower visibility, is also present on the commercial side of arbitration.

#### CONCLUSION

What will be the position of international commercial arbitration in CEE in ten years from now? This question may be difficult to answer, as it cannot be taken for granted that arbitration will generally have the same status as it has now. The changes permeating within both the economy and human behaviour may demand that arbitration evolve into a cheaper, faster, and more standardized procedure. With this caveat, it is reasonable to assume that CEE parties will follow the prevailing worldwide trend.

Based on the changing landscape, experts can predict two regional trends. First, CEE states' involvement in international arbitrations is likely to decrease. This will involve investment treaty arbitration, as the European Commission is likely to intensify its efforts to cause the Member States of the European Union to terminate the intra-EU bilateral investment treaties. Within 20 years this should lead to a radical decrease in the number of bilateral investment treaty arbitrations involving the CEE countries. Additionally, states' involvement in significant arbitrations from infrastructure disputes is also expected to drop.

The second trend should involve an increasingly more sophisticated use of international arbitration by CEE entities in an international context. This will be a consequence of the increasing presence of such entities on

international markets and, inevitably, before various dispute resolution fora. However, loyalty to international arbitral institutions is not to be expected too soon, if ever. Rather, the selection of an arbitration clause is likely to be preceded with a detailed SWOT analysis in each individual case, as a result of which arbitration may be chosen for those disputes, where it can most clearly show its advantages over other forms of dispute resolution.