

The rebirth of arbitration in central and eastern Europe

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Drawing on data from institutions across the region, Matthew Hodgson of Allen & Overy in Prague says arbitration in Europe's former communist countries is flourishing

Commercial arbitration has had a long and surprisingly continuous existence throughout central and eastern Europe (CEE), in this context taken broadly to mean central Europe, the Balkans and the Baltic states. It continued throughout the various imperial and socialist regimes that permeated the region, albeit in a form adapted to suit the prevailing ideologies.



Central and eastern Europe

The transition to market economies beginning in the early 1990s required arbitration to adapt once again to meet the needs of modern commercial parties doing business in the region. This process is now well underway, with CEE parties, most notably those from Bulgaria, the Czech Republic, Poland and Romania, frequently participating in both international and domestic arbitration proceedings.

Drawing on a survey of practitioners across 17 CEE jurisdictions and statistics provided by international and local institutions, this article considers key trends and themes in the recent development of arbitration in the CEE.

CEE arbitration before the 1990s

Having existed in various forms throughout the CEE for several hundred years, arbitration gained more formal recognition during a period of intense legal codification in the late 19th and early 20th centuries. During this period, laws regulating arbitration were adopted across the Austro-Hungarian empire, as well as in Poland, Bulgaria, Romania and in the provinces of Croatia.

During the tumultuous 20th century, arbitration proved remarkably versatile, surviving even the onset of communism. Arbitration commissions in the Soviet Union existed at least as early as 1922 and were followed by an arbitration decree in 1931. The Soviet and Yugoslav-influenced regimes adapted and used arbitration in line with their ideologies. Arbitration came to be used to settle disputes arising between socialist organisations

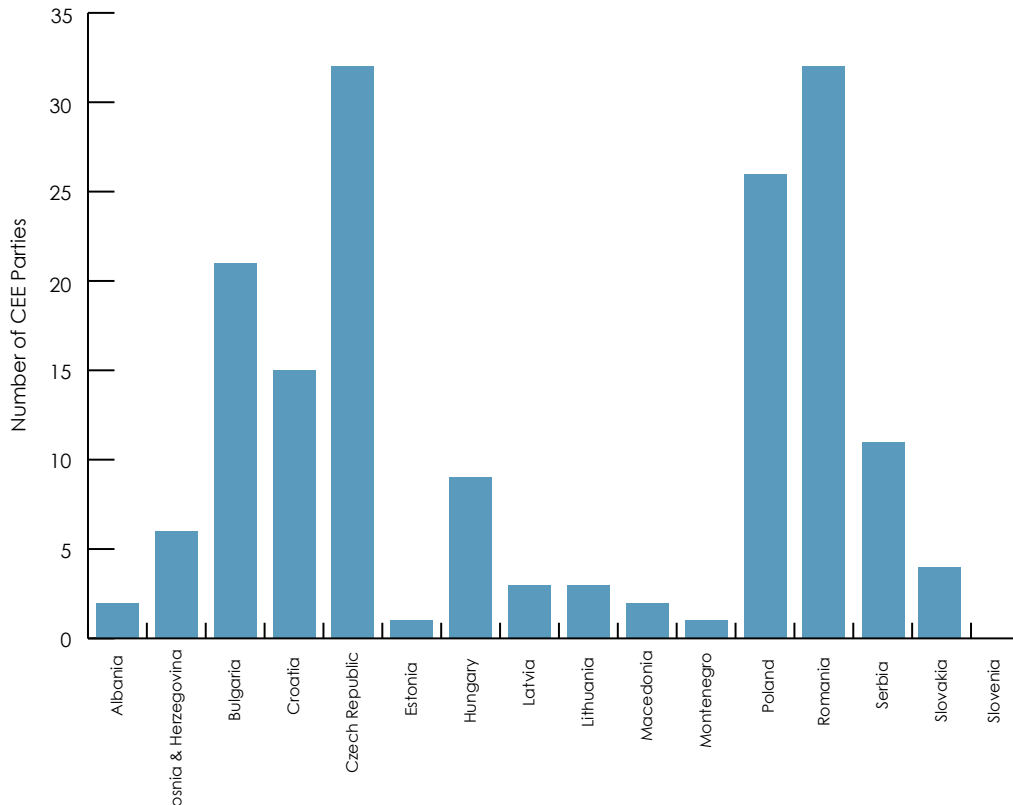
and for international commercial disputes between socialist organisations and foreign companies, although the submission of domestic disputes to arbitral tribunals was also possible in the former Yugoslavia.

Laws regulating arbitration were entered into by many CEE states in the 1950s and 1960s and are, unsurprisingly, reflective of communist ideology. The purpose of Hungarian Decree 51/1955 concerning 'arbitration commissions and arbitration proceedings' was, for example 'to decide civil disputes between Socialist organisations of the People's economy, to strengthen Socialist legality, contractual and plan discipline, and business accountability by means of disclosing insufficiencies, to protect social property and to increase individual responsibility' (translation by Z N Mihaly). The entry into force of the 1972 Moscow Convention had the effect of interconnecting the arbitration courts at the chambers of commerce in the participating states into a single international network functioning under uniform rules of jurisdiction and prescribed arbitration as the obligatory dispute mechanism arising from contracts between foreign trade organisations. Well before the break-up of the socialist system, Hungary, Poland, Romania, Bulgaria, the former Yugoslavia and the former Czechoslovakia had all ratified the 1958 New York Convention and the 1961 Geneva Convention. Indeed, between 1986 and 1992, 32 Czechoslovakian entities were parties to disputes under the auspices of the Vienna International Arbitration Centre.

The granting of independence to many of the countries in today's CEE has seen arbitration laws reformed and modernised to bring them in line with the UNCITRAL Model Law and western European models. The 1990s brought a sharp increase in the development of arbitration with the transformation from centrally planned economies to market economies leading to an increase in the number of disputes for which commercial arbitration was appropriate. New consolidated arbitration laws were introduced in more than half of the CEE jurisdictions in the 1990s, although often these first attempts at regulation proved deficient and required subsequent modification. Further progress was made in the first decade of the 21st century with a raft of new laws introduced in many CEE countries. Interestingly, in Bulgaria the International Commercial Arbitration Act was adopted in August 1988, prior to the regime change, and remains in force, albeit following certain amendments. New and updated provisions are still needed and expected in Albania, Latvia, Lithuania and Montenegro.

International arbitral institutions

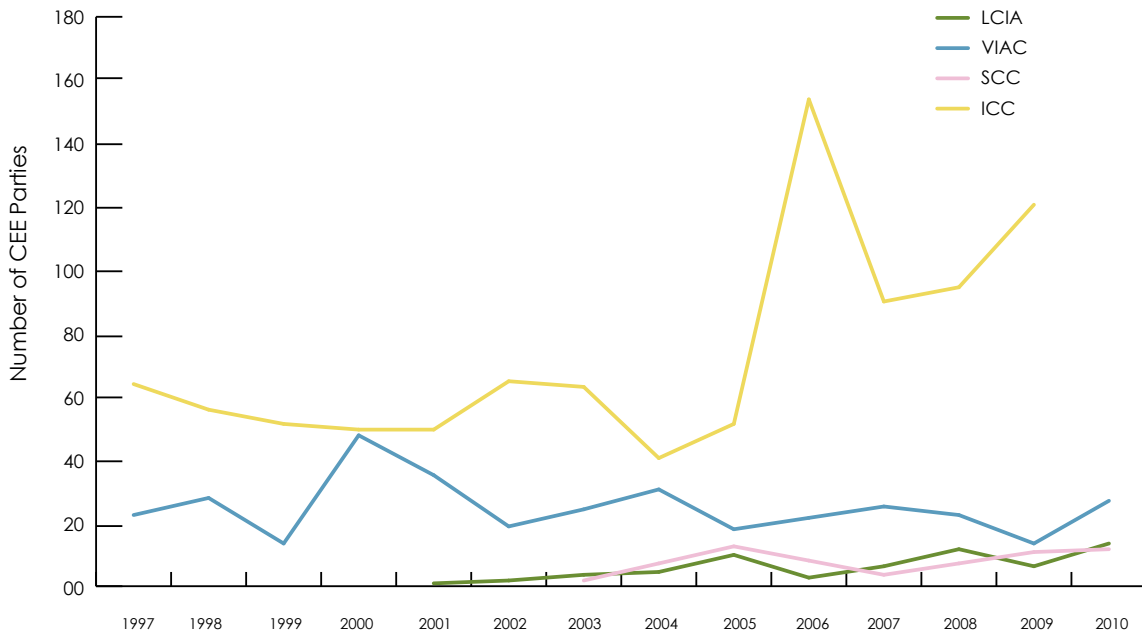
Information provided by the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC) and the International Arbitration Centre of the Austrian Federal Economic Chamber (VIAC) does not uniformly date back to the 1990s and there are also discrepancies in the types of information recorded. Nonetheless, it is possible to identify certain high-level trends. Most of the statistics show that within the CEE, arbitration is increasingly being used by CEE parties and that parties from Bulgaria, Czech Republic, Poland and Romania are making most use of it, followed by those from Croatia, Hungary and Serbia. This can be seen from the following graph.



Aggregate figures for ICC, LCIA, SCC and VIAC (2009)

The vast majority of local law firms confirmed the ICC as the international arbitral institution of choice for CEE parties requiring an international institution. This is also born out by the actual number of disputes. As can be seen in the graph below, since around 2005 the ICC has accounted for more than half of the total CEE parties. VIAC is the second most popular choice of institution, with the SCC and LCIA sharing similar numbers.

In 2009, the ICC reported a 30 per cent growth in cases involving CEE parties compared with 18 per cent in cases from northern and western Europe. Such cases have increased as a percentage of total ICC arbitrations in the last few years, albeit with occasional exceptions. From a 2004 low of 2.67 per cent, in 2009 CEE parties constituted a record 6.34 per cent of ICC disputes. When considered in absolute terms, the increase is even more explicit. In 2009, there were 134 parties from CEE countries involved in ICC arbitration (compared with 105 in 2008, and 62 in 1998). State parties feature prominently in arbitrations with a CEE element. Some 9.5 per cent of ICC global disputes in 2009 involved a state party, and the majority of these came from either the CEE or sub-Saharan Africa. This perhaps reflects a lack of confidence in the courts' independence from the executive.



International institutional arbitration involving CEE parties

Entities from the Czech Republic, Poland, Romania and Bulgaria were the most common CEE parties in ICC arbitrations. Interestingly in 2009, with the exception of the Czech Republic, the clear majority of CEE parties featured as respondents as opposed to claimants.

The figures in the LCIA director general's annual reports are a little more erratic. Eastern Europe was included as a separate category in 2004, with 4.5 per cent of disputes involving an eastern European party. This percentage was repeated in 2005. It dropped to 1.5 per cent in 2006, rose to 5.5 per cent in 2008 but fell back to 1.5 per cent in 2009. Despite this, surveyed lawyers from some CEE countries such as Poland singled out the LCIA as first choice for specific disputes, in particular banking disputes, perhaps attributable to London's status as an international financial centre. Additionally, as with the ICC figures, the number of CEE parties involved in LCIA arbitrations between 2000 and 2010 appears to be increasing in absolute terms. In 2000, no CEE party was involved in a LCIA arbitration. In 2010, there were 17 CEE parties. From 2000 to 2010, parties from the Czech Republic, Romania and Poland accounted for the majority of CEE claims (14 Czech, 16 Polish and 12 Romanian).

The SCC figures from 2008 to 2009 show only a marginal increase in CEE representation among parties bringing their disputes to arbitration from 3.04 per cent to 3.78 per cent. Between 2003 and 2010, perhaps for reasons of geography, Polish and Estonian parties were by far the largest proportion of CEE parties in SCC arbitrations (20 and 15 respectively) with the Czech Republic following with one, and Latvia with eight.

Some 70 cases are currently pending before VIAC. Out of a total of 155 parties in these pending cases, 60 (39 per cent) derive from a CEE jurisdiction, the highest percentage share of any of the international institutions. The number of CEE parties breaks down as follows: 15 from the Czech Republic; 11 from Poland; seven each from Croatia and Slovakia; six each from Hungary and Romania; four from Bulgaria; two from Serbia; and one each from Estonia and Slovenia. The year 2000 saw 53 CEE parties involved in VIAC arbitrations, the highest figure for the period from 1985 to 2009. Since 2000, numbers decreased with an average of around 26 CEE parties per year between 2001 and 2010.

Local arbitral institutions

All CEE countries, including most recently Kosovo, have local arbitral institutions. As with international institutions, domestic arbitral centres vary as to the extent they publish statistics. Czech, Hungarian, Croatian and Lithuanian arbitral bodies publish the most detailed figures. These point to increases, in some cases dramatic ones, both in domestic and international arbitral disputes in these jurisdictions. The increases in purely domestic disputes are most pronounced, demonstrating that the increasing use of arbitration is not simply at the insistence of international parties wary of the local courts. This view was echoed by local law firms from the vast majority of CEE countries who note that arbitration is increasingly being used, including by domestic parties.

In 2000, there were 40 international and 152 domestic disputes heard before the Arbitration Court of the Economic Chamber of the Czech Republic (CEECR). By 2010, these had increased by around 280 per cent and 780 per cent respectively, to 112 international disputes and 1,182 domestic disputes. Even this high figure was slightly down on 2009 when 131 international disputes were heard in addition to a remarkable 2,250 domestic claims. Despite these high figures, many Czech practitioners informally express serious reservations about the quality and integrity of the CEECR.

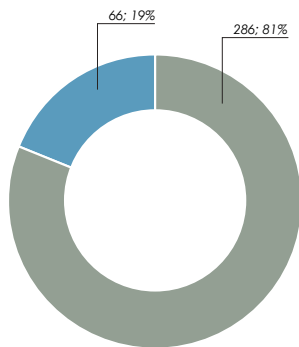
Disputes before the Hungarian Chamber of Commerce (HCC) were more variable, with 168 commenced in 1994 and 269 in 2010 though there was a substantial rise and fall in between. While from 1994 to 2000 there was a period of relative equality between disputes involving both domestic and international parties, post-2000 there has been a significant increase in the proportion of domestic disputes. Of the 590 disputes commenced in 2003, there were 453 domestic cases and 137 involving an international party. In 2005, out of 1,417 disputes only 62 involved an international party. HCC domestic disputes reached a peak in 2005 with 1,356 disputes out of 1,417 being between domestic parties. These particularly high figures can be partially attributed to two major companies including arbitration clauses in their general terms and conditions (later revoked following a change in legislation expediting the order for payment procedures). There has been a gradual decrease in disputes being heard at the HCC since 2005, although they are still higher than in 2001.

The number of disputes before the Permanent Arbitration Court of the Croatian Chamber of Commerce has also increased over the last 20 years or so. In 1992, it handled eight domestic commercial disputes and seven with an international counterparty. Between 2000 and 2010, there were in the range of 29 to 40 domestic disputes each year with

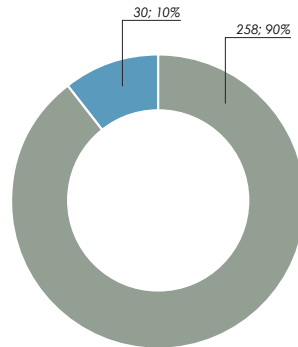
2009 being an exception (93 disputes). Likewise in that period there have been between 10 and 14 disputes each year involving international counterparties. Other states have also experienced domestic arbitration increases. Over the last 10 years in Bulgaria, 1,350 international and 708 domestic disputes have been heard at the Arbitration Court at the Bulgarian Chamber of Commerce in Sofia. In its counterpart court attached to the Polish Chamber of Commerce, 440 (100 international, 340 domestic) cases were heard in 2010, an increase from 352 in 2009 (66 international, 286 domestic) and 260 in 2008 (47 international, 213 domestic).

One factor that may go some way to explaining why some CEE states feature less in the statistics of international institutions than others is that their local respective arbitration laws forbid two domestic parties from choosing a foreign seat. In practice, the selection of the seat and the choice of arbitral institution are often made together. Bulgaria, Hungary, Macedonia, Montenegro and Romania are examples of jurisdictions which restrict the ability of domestic parties to choose a foreign seat.

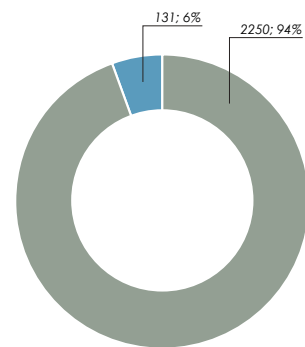
Poland



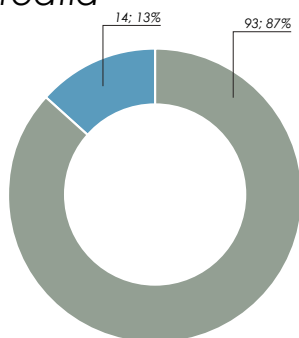
Hungary



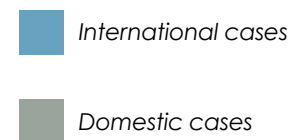
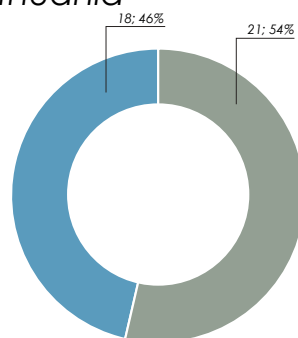
Czech Republic



Croatia



Lithuania



Domestic institutions (2009)

Reasons for choosing arbitration

The principal reasons why parties choose to resolve their disputes by arbitration differ across the region but certain considerations stand out by comparison with parties from

states where modern commercial arbitration is more established.

With the exception of Slovenia, parties from the former Yugoslavia predominantly select arbitration for the neutrality and fairness it provides compared with their national courts. However, scepticism about domestic courts features throughout the CEE. One manifestation of this is the relatively few instances of parties selecting a CEE jurisdiction as the seat in an international institutional arbitration. An exception to this is Poland, which has been the seat of arbitration for a number of ICC disputes involving a Polish party (seven cases in 2009) though it is still far more common for such cases to be seated outside of Poland.

Respondent lawyers from Poland, the Czech Republic and Hungary, jurisdictions where arbitration is widely used, cited the expertise of the arbitrators as the main attraction. This would put parties from these countries more in line with the opinions of those from more mature arbitration markets as reflected in the international arbitration survey completed by Queen Mary, University of London in 2008.

Law firms from seven CEE states (Romania, Slovakia, Albania, Bulgaria, Latvia, Lithuania and Estonia) considered that speed was the decisive factor. This runs contrary to criticisms increasingly levelled at arbitration in the global setting. In the jurisdictions analysed, first-instance proceedings were typically estimated to take around 12 to 18 months but the estimate increased to between three and five years when appeals were taken into account. Local law firms routinely commented on the high caseload of judges, which ranged from 100 to 800 cases a year. At the extreme end, unofficial statistics suggest that, in 2009, one Lithuanian judge from the Second Vilnius District Court had to hear 1,200 cases (approximately six a day). There were also many complaints about the expertise and sometimes also the integrity of the local courts.

Attitudes of national courts towards arbitration

The attitude of local courts to arbitration, while cautious, has been generally positive and procedures for enforcing foreign and domestic awards are reasonably straight forward. All of the CEE countries except Kosovo are signatories to the New York Convention. Fourteen CEE states are parties to the 1961 European Convention on International Commercial Arbitration.

Interestingly, in the early 1990s, attitudes towards arbitration in both Slovakia and Latvia were coloured by the appearance of a large number of independent arbitrators and domestic arbitral institutions (often established by a single law firm or group of practitioners), some of which gained a reputation for lack of professionalism, partiality and abuse of process. Latvian counsel estimate that around one-third of domestic Latvian arbitral awards are refused enforcement by the local courts due to procedural defects in the arbitration. Surprisingly, this does not appear to have reduced the amount of claims taken to arbitration in Latvia. In Slovakia, on the other hand, such concerns do appear to have kept numbers lower than in other countries. While the Latvian courts have been reasonably restrained in their response to those concerns, the Slovakian legislature and courts have intervened to restrict the scope of arbitration. This may contain a useful lesson to other

developing jurisdictions, that the uncontrolled proliferation of arbitration services may prove self-defeating.

There is no doubt that the use of arbitration is increasing across the CEE. The region holds substantial opportunities for further growth and development of arbitration. There is almost uniform criticism of the national courts as slow, overstretched, insufficiently expert in commercial matters and, in some cases, unable to provide a fair and impartial outcome. While not a panacea for all of these ills, arbitration can certainly offer a substantially improved dispute resolution service. On the other hand, there are also serious challenges. In particular, a lack of expertise and, in some cases, basic integrity among certain arbitrators and even domestic institutions operating in the CEE region risks creating a backlash against arbitration among national courts, legislatures and the users of arbitration themselves.

However, there is reason to be optimistic. The increased use of arbitration in the CEE is focusing greater attention on region-specific issues. This is reflected by the number of international arbitration conferences hosted in the region in the last two to three years. With this attention should come further transparency and, it is hoped, a gradual development in line with global standards of arbitration practice.

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