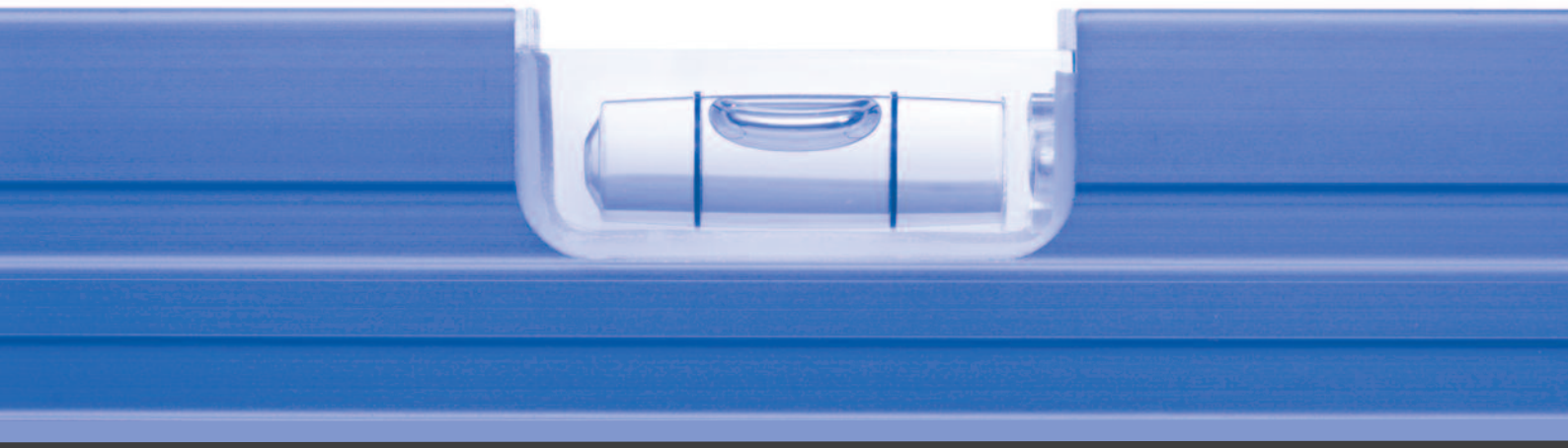

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International Arbitration In Central and Eastern Europe: A Diversity of Approaches

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Today, nearly twenty-five years after the collapse of the Soviet Union, the countries of Central and Eastern Europe play an increasingly important role in the world's economy. As the volume of global trade grows, and as the demand for the natural resources and skilled labour found in many of these nations increases, the geostrategic and economic influence of these countries should continue to rise. At the same time, the use of international arbitration as a mechanism for resolving disputes involving parties from, or doing business in, Central and Eastern Europe also likely will increase.

While companies doing business in, or with parties from, Central and Eastern European countries indisputably should consider including carefully-drafted arbitration agreements in their contracts, they also should be aware that a nuanced approach to international arbitration is required in this region, in light of differences in the approach to international arbitration taken by legislatures and courts in Central and Eastern Europe. Countries in this region are heterogeneous in many respects, with different languages, cultures, political traditions, legal systems, and approaches to business and trade. Reflecting this diversity, some countries in the region have looked west to Europe, and have become European Union Member States, while others have looked east and have joined alternative economic unions such as the Eurasian Economic Community.

When it comes to international arbitration, countries in Central and Eastern Europe often approach issues of central importance to the arbitral process in different ways. A full discussion of these differences – and, conversely, of the similarities in these countries' approaches – is beyond the scope of this chapter. Rather, by focusing on several of these differences, this chapter endeavours to highlight the heterogeneity in approaches to international arbitration that exists in the region, especially in light of recent developments. Specifically, this article focuses on four topics that are highly significant to parties' ability to effectively arbitrate disputes, namely (1) the scope of the non-arbitrability doctrine, (2) the enforcement of arbitration agreements, (3) the availability of interim measures in support of arbitration, and (4) the recognition and enforcement of arbitral awards.

As can be seen in the discussion below, recent developments in each of the four areas covered by this article confirm the heterogeneity of approaches to international arbitration taken by countries in Central and Eastern Europe. In light of this heterogeneity, companies doing business in, or with parties from, this region would be wise to consult with experienced legal counsel when drafting their dispute resolution clauses, contemplating arbitral proceedings, or attempting to enforce or set aside arbitral awards.

I. The Scope of the Non-Arbitrability Doctrine

In Central and Eastern Europe, the question of which disputes are arbitrable and which are not has no uniform answer; in recent years, different countries in the region have taken markedly divergent approaches to this question. This heterogeneity should be kept in mind by commercial parties doing business in, or with parties from, the region, as the arbitrability of disputes can affect, among other things, whether a party can be forced to litigate in a state court notwithstanding the existence of an arbitration agreement, whether an arbitral award is enforceable, and whether interim measures in support of arbitral proceedings are available.

While Article II of the New York Convention generally obligates contracting states to enforce written arbitration agreements, various exceptions to this obligation exist, including the non-arbitrability doctrine. Under this doctrine, states may preclude certain categories of disputes from being settled by arbitration, regardless of whether the parties to the dispute entered into an otherwise valid arbitration agreement, and awards that pertain to such disputes need not be recognised.

Specifically, Article II(1) of the New York Convention provides that a state is not obligated to refer to arbitration disputes that are not "capable of settlement by arbitration".[1] Likewise, Article V(2)(a) of the Convention provides that if the "subject matter of the difference is not capable of settlement by arbitration under the law" of a state where recognition of an award is sought, recognition of the award can be denied. Whether a dispute is arbitrable is, therefore, a critically important question for a party contemplating arbitration or hoping to enforce an arbitral award.

The categories of disputes that are not arbitrable vary from country to country, with many nations deeming disputes of purported public importance – such as those concerning bankruptcy, real estate, and domestic relations – non-arbitrable.[2] In recent years, however, the trend in most developed jurisdictions has been for courts to be increasingly reluctant to deem disputes to be non-arbitrable. As one commentator has explained:

"The non-arbitrability doctrine was frequently invoked during the 20th century. National courts concluded that a variety of claims were non-arbitrable, applying expansive, sometimes ill-defined, conceptions of public policy. More recently, courts in most developed jurisdictions have materially narrowed the non-arbitrability doctrine, typically applying it only where statutory provisions expressly require."[3]

In Central and Eastern Europe, this trend has not taken hold to the extent that it has in some other developed jurisdictions. To the

contrary, the types of disputes that are arbitrable continue to vary widely from country to country in the region.

For example, in 2012, the Lithuanian parliament adopted a new pro-arbitration law on Commercial Arbitration that supplemented the country's prior arbitration law that was adopted in 1996.[4] Lithuania's new Law on Commercial Arbitration, which was drafted with the input of arbitration practitioners and scholars and was the subject of lengthy discussions and commentary, was designed to be even more pro-arbitration than the country's prior arbitration law, including with respect to the arbitrability of disputes.[5] To this end, Lithuania's new Law on Commercial Arbitration expressly provides, for instance, that certain disputes pertaining to competition law matters and certain disputes involving insolvent parties are arbitrable.[6] In addition, under this new law, parties may agree to submit to arbitration disputes arising out of employment or consumer agreements, provided that their decision to do so is made after the dispute arises.[7] Similarly, this new law provides that disputes involving a state or municipal enterprise, institution or organisation may be submitted to arbitration, provided that the founder of the enterprise, institution or organisation consents to arbitration.[8] Finally, this new law provides that the Lithuanian government, or an authorised institution of it, may enter into arbitration agreements relating to commercial contracts.[9] In all of these respects, Lithuania's approach to arbitrability evidences the country's developing pro-arbitration stance.

Other Central and Eastern European countries also reflect a pro-arbitration bias when it comes to the arbitrability of disputes, or at least a desire to move in this direction. For instance, in 2014, new arbitration legislation was proposed in the Slovak parliament that would expand the scope of arbitrable matters to include all disputes that are capable of settlement by the parties, including disputes about the validity of legal acts and claims for declaratory relief.[10] One of the purposes of this legislation is to ensure that a handful of Slovak court decisions, which have suggested that the validity of contracts only can be determined by state courts and not by arbitrators, will not be used to determine, in a restrictive manner, the arbitrability of disputes in Slovakia.[11] Likewise, in the Czech Republic, Article 1(1) of the Czech Arbitration Act provides that nearly all disputes relating to property are arbitrable, including most disputes involving claims of a financial or monetary nature, while only a limited universe of disputes – such as those regarding divorce, inheritance, the care of minors, and insolvency – are non-arbitrable.[12]

Notwithstanding the pro-arbitration trend in some Central and Eastern European countries with respect to the scope of arbitrable disputes, in other such countries recent developments have significantly narrowed the scope of arbitrable disputes in those countries, reflecting a disturbing anti-arbitration bias. The highest profile example of this in recent years has been in Russia, where courts' increasingly narrow approach to the arbitrability of disputes has been the subject of much discussion and concern.

Under the Russian Law on International Commercial Arbitration, any civil law dispute may be referred to arbitration, unless the federal laws of Russia provide otherwise.[13] One of these relevant federal laws is the Russian Arbitrazh (Commercial) Procedure Code (the "APC"), which vests jurisdiction over corporate disputes – defined broadly to include all disputes relating to the ownership of shares in a company, challenges to the validity of transactions by a company, and suits by shareholders of a company for damages – with Russian arbitrazh courts.[14] In 2012, in the highly-publicised decision of *Maximov v. NLMK*, Russia's highest commercial court – the Supreme Arbitrazh Court – held that a dispute arising out of a share purchase agreement was not arbitrable, in light of Articles 33 and 225.1 of the APC, which vest jurisdiction over corporate disputes with Russian arbitrazh courts.[15] In other cases, Russian courts have refused to enforce awards pertaining to disputes that involved the sale of shares, although this practice has been mixed.[16]

Russian courts have also recently held that disputes relating to public procurement contracts are non-arbitrable. For instance, in one recent decision, the Supreme Arbitrazh Court held that disputes arising out of a services contract with a governmental agency – pursuant to which a contractor had to ensure that fire escape routes existed in municipal hospitals – are non-arbitrable.[17] In so holding, the court emphasised that public procurement contracts of this sort are not typical civil law contracts, but involve important public interests, and thus determined that disputes regarding them may not be submitted to arbitration.[18]

Commentators reacting to these developments have noted that they likely will have a serious impact on transactions involving shares in Russian companies, as well as on public procurement transactions.[19] Among other things, these developments – if followed by other Russian courts – mean that corporate disputes (defined broadly) and disputes regarding public procurement contracts will be heard by Russian Arbitrazh courts even if the parties included in their contract an arbitration agreement to the contrary, arbitral awards regarding such disputes will not be enforced by Russian courts, and interim measures will not be available from Russian courts in support of arbitrations involving these matters.[20]

While the Ministry of Justice of the Russian Federation has proposed draft legislation that would recognise the presumptive validity of arbitration agreements and would provide that all matters falling within the jurisdiction of the Russian Arbitrazh courts are arbitrable unless there is express legislation to the contrary,[21] consideration of this legislation has been suspended. In any event, this draft legislation also would provide that certain enumerated disputes shall remain non-arbitrable in Russia, including disputes regarding the incorporation of companies, disputes involving companies that have "strategic significance for securing the defence capacity of the state and the security of the government," and insolvency matters.[22] Moreover, this proposed legislation further would provide that other types of disputes are only "conditionally arbitrable," including nearly all corporate disputes not expressly deemed non-arbitrable.[23] According to the draft legislation, "conditionally arbitrable" disputes of this sort only would be arbitrable if all relevant parties have (a) agreed to arbitration, and (b) designated an arbitral institution to hear their dispute that has adopted a special set of rules pertaining to the arbitration of corporate matters.[24]

An anti-arbitration bias with respect to the scope of arbitrable disputes is also evident in Ukraine, where certain corporate disputes also are non-arbitrable. In 2007, the Higher Commercial Court stated, in recommendations that it made to lower Ukrainian courts, that corporate disputes involving Ukrainian companies should be deemed non-arbitrable.[25] However, the court also stated that the term "corporate disputes" should be construed narrowly, such that it only encompasses disputes arising out of corporate governance relations and does not include disputes related to the purchase of shares in Ukrainian companies.[26] Subsequently, in 2009, the Ukrainian Code of Commercial Procedure was amended to expressly exclude corporate disputes from being referred to arbitration.[27] While the exact scope of non-arbitrable corporate disputes following this legislative amendment in Ukraine remains unclear, there can be no doubt that Ukraine, like Russia, generally has taken a restrictive position with respect to the arbitrability of corporate disputes.

Developments in Hungary regarding the arbitrability of disputes also could be interpreted to reflect an anti-arbitration bias. In 2011,

the Hungarian parliament adopted legislation that banned the arbitration of disputes regarding rights, claims or demands arising from civil law agreements pertaining to "national assets" located in Hungary.[28] The definition contained in the Hungarian Act on National Assets of what constitutes a "national asset" encompasses any asset under the ownership of the Hungarian state or of local municipalities, such as company shareholdings, rights with quantifiable value, and the airspace above the territory of Hungary.[29] In addition, a 2012 ruling of a Hungarian regional court of appeal held that an insolvent claimant should not be permitted to arbitrate disputes, as this potentially could contravene the aims of the insolvency proceeding and the creditors' interests.[30]

Similarly, in Serbia, only "pecuniary disputes" are arbitrable, and then only to the extent that they pertain to rights that are freely disposable by the parties.[31] While some practitioners and academics originally understood this limitation as only rendering disputes over property rights in Serbian real estate to be non-arbitrable, the Serbian Supreme Court – reflecting an anti-arbitration bias – has taken a different view, holding that the effect of this limitation is that any dispute arising out of the privatisation process in Serbia is non-arbitrable.[32] The Serbian Supreme Court reasoned that because the Serbian Privatization Agency does not dispose of property freely during the privatisation process, but instead disposes of property pursuant to a legal mandate, disputes related to the privatisation process are non-arbitrable under Serbian law.[33] In light of the Supreme Court's holding, legislation has been proposed in Serbia to clarify the position of the Serbian Privatization Agency.

Finally, other Central and Eastern European countries also have held a variety of disputes to be non-arbitrable. To take one example, in Bulgaria, disputes regarding the decisions of corporate bodies, intellectual property, insolvency, competition matters, employment relationships, real estate, and other matters have been deemed to be non-arbitrable.[34]

Accordingly, a wide variety of approaches to arbitrability currently exists in Central and Eastern Europe. A commercial party doing business in, or with parties from, this region should be aware of these differences and should plan accordingly, lest they unexpectedly discover that a dispute that they thought was arbitrable in fact is not.

II. The Enforcement of Arbitration Agreements

Heterogeneity also exists in the approaches taken by Central and Eastern European countries to the enforcement of agreements to arbitrate, with some countries' practices in this regard diverging significantly from standard arbitral practice in most developed jurisdictions.

Article II(3) of the New York Convention requires courts of contracting states to refer parties to a dispute to arbitration, provided that certain conditions are met. Among these conditions is that the arbitration agreement on the basis of which the referral is sought is not null and void, inoperative or incapable of being performed. While in recent years there have been many decisions by courts in Central and Eastern Europe on the enforceability of arbitration agreements, a unified approach to interpreting Article II(3) has not emerged in the region, with different countries taking differing approaches to the enforcement of arbitration agreements.

While many issues pertaining to the enforcement of arbitration agreements exist, most of which are beyond the scope of this chapter, one that recently has received a considerable amount of attention by courts in Central and Eastern European countries is the enforceability of asymmetric arbitration clauses. Asymmetric dispute resolution clauses generally grant more rights to one of the parties by, for example, empowering one party to decide whether to bring claims to arbitration or to litigation, while granting no such choice to the other party, or by giving only one party the right to unilaterally select the sole arbitrator for a dispute. While some courts have found clauses of this sort to be void for unconscionability or for lack of mutuality, the "weight of authority" now "takes a contrary view and upholds asymmetrical arbitration clauses."[35]

However, countries in Central and Eastern Europe do not always follow this trend. In Bulgaria, for instance, the Bulgarian Supreme Court of Cassation ruled in 2011 that asymmetrical arbitration clauses contravene the doctrine of good faith under Bulgarian law.[36]

Similarly, in Poland, Article 1161 of the Polish Code of Civil Procedure states that any provision in an arbitration agreement that authorises only one of the parties to choose between submitting a claim to arbitration and litigation is ineffective.[37] Commentators have noted that it is unclear from the language of Article 1161 whether, as a consequence of this article, both parties to a contract containing an ineffective asymmetrical arbitration clause have the right to commence disputes in both fora or whether the litigation option is foreclosed to the party that otherwise was given the choice between both fora.[38] Commentators in Poland also have stated that the exact scope of Article 1161 is unclear, and this provision has been criticised in legal writings and is viewed by some as a possible deterrent to business in Poland.[39] Notably, however, the recognition or enforcement in Poland of a foreign arbitral award cannot be refused on the ground of it being based upon an arbitration agreement contravening the requirements of Article 1161, unless the award in question could be construed as violating Polish public policy.[40]

Likewise, in Russia, the Supreme Arbitrazh Court held in 2012, in *CJSC Russian Telephone Company v. Sony Ericsson*, that an asymmetrical arbitration clause was ineffective.[41] In this case, which related to a distribution agreement between Sony Ericsson Mobile Communications Rus and the Russian Telephone Company ("RTC"), the parties' dispute resolution provision provided that any dispute between the parties was to be resolved by International Chamber of Commerce arbitration in London but that this arbitration clause did not limit Sony Ericsson's right to refer disputes relating to debt for the products supplied to any court having jurisdiction. The Supreme Arbitrazh Court found that this asymmetrical arbitration clause, which put Sony Ericsson in a privileged position by giving only it the right to choose whether to commence arbitration or litigation, was ineffective.[42] When the dispute arose, RTC filed a claim with the Moscow Arbitrazh Court, rather than filing a request for arbitration with the International Chamber of Commerce, but the Moscow Arbitrazh Court refused to hear RTC's claim, finding that RTC was bound by the parties' arbitration agreement.[43] However, in 2012, the Supreme Arbitrazh Court held on appeal that the parties' arbitration agreement was invalid, in light of its asymmetrical nature, and it thus remanded the case to the Moscow Arbitrazh Court.[44]

While some Central and Eastern European countries have found asymmetrical dispute resolution clauses to be ineffective, the opposite conclusion, consistent with the weight of authority elsewhere, has been reached in other countries in the region. For instance, in Ukraine, the Kiev Regional Commercial Court in 2011 addressed the validity of an asymmetrical dispute resolution clause that, in addition to providing for arbitration, stipulated that the "seller shall have the right to submit any dispute… to the competent Ukrainian court according to the Code of Commercial Procedure of Ukraine".[45] The Kiev Regional Commercial Court upheld this

dispute resolution provision, notwithstanding its asymmetrical nature, and the Kiev Appellate Commercial Court subsequently upheld this decision. [46]

In addition to finding asymmetric arbitration agreements to be ineffective, courts in some Central and Eastern European countries also have been willing to deem arbitration agreements invalid because of minor formal defects, such as slight errors in the name of the specified arbitral institution. An example of this is a decision by the Ukrainian Supreme Court in a case where the arbitration clause in question provided for arbitration at the "International Commercial Arbitration Court at the Trade and Industry Chamber in Kiev".[47] On the basis that no arbitral institution in Ukraine had this name, the Supreme Court upheld a lower-court decision setting aside the arbitral award.[48] The Supreme Court reached this decision notwithstanding the fact that one of the only international commercial arbitral institutions in Ukraine at the time – which also was the institution that rendered the award in question – was called the "International Commercial Arbitration Court at the Trade and Industry Chamber in Ukraine" and was located in Kiev.

Similarly, Russian courts have found arbitration agreements to be invalid on the basis that the arbitral institutions in question were not specified with sufficient precision,[49] although several recent decisions by Russian courts suggest that this trend may be reversing and that Russian courts may be becoming more willing to enforce arbitration clauses even when they are not precisely drafted.[50]

While the validity of arbitration agreements can be challenged on many grounds other than those set forth above, the examples above typify how some Central and Eastern European countries' approaches to the enforcement of arbitration agreements differ from standard arbitral practice in other developed nations. Companies doing business in, or with parties from, this region should be mindful of this reality when selecting their dispute resolution mechanisms.

III. The Availability of Interim Measures

The availability of interim measures is another area where heterogeneous approaches exist within Central and Eastern Europe, and where practices of some countries in the region differ from generally accepted norms in other developed jurisdictions.

In most Central and Eastern European nations, arbitral tribunals and courts are empowered to issue interim measures in support of arbitral proceedings. For instance, in Poland, arbitral tribunals are authorised to issue legally enforceable interim measures under Articles 1181 and 1182 of the Polish Code of Civil Procedure, provided that the Tribunal first hears both parties' views on the issue and that the assets of third parties are not implicated.[51] In Poland, an arbitral tribunal also may, within the limits of public policy, go so far as to order interim measures that exceed those that could be ordered by a state court, such as by issuing an order to sell perishable goods or an order to issue a bank guarantee.[52] It is doubtful, however, that these types of interim measures are capable of being directly enforced by a court; rather, non-compliance with these measures could result in an award of liability for damages or in the arbitral tribunal issuing further sanctions against the non-compliant party.[53] While there is some debate in Poland as to whether an arbitral tribunal can issue an order to preserve evidence, most practitioners are of the opinion that even though the power to preserve evidence is within the state courts' jurisdiction pursuant to Articles 310-315 of the Polish Code of Civil Procedure, arbitral tribunals also have the power to issue preservation orders, as an exercise of their power to issue interim measures under Article 1181.[54]

The new Lithuanian Law on Commercial Arbitration, enacted in 2012, also provides that arbitral tribunals have the right to issue enforceable orders for interim measures.[55] Under this new law, if an interim measures order is not voluntarily complied with, an application may be made to the Vilnius Regional Court for the enforcement of the tribunal's order.[56] Moreover, Article 26 of the new Lithuanian Law on Commercial Arbitration provides for the recognition and enforcement of foreign arbitral orders regarding interim measures.[57]

Likewise, in Serbia, unless the parties agree to the contrary, parties may request interim measures in support of arbitrations from courts or from arbitral tribunals.[58] However, unlike in Lithuania, interim measures granted by a foreign arbitral tribunal will not be enforced by the Serbian courts, as only final foreign arbitral awards are enforceable in Serbia.[59]

In the Czech Republic, a much more restrictive approach to interim measures exists than in the jurisdictions discussed above. The Czech Arbitration Act, unlike the arbitration legislation of most other Central and Eastern European jurisdictions, does not permit arbitrators to order any interim measures. However, Article 22 of the Czech Arbitration Act does provide courts with the power to order interim measures in support of an arbitral proceeding if, during the pendency of the proceeding or before the proceeding begins, circumstances arise that are likely to jeopardise the enforcement or execution of a resulting arbitral award.[60]

In Belarus, an arbitral tribunal may – unlike in the Czech Republic – order interim measures.[61] However, interim measures issued by an arbitral tribunal in Belarus are not enforceable until an appropriate request made by either the tribunal or a party to the arbitration is granted by a Belarussian commercial court.[62]

In Russia, the availability of interim measures in support of arbitral proceedings has been subject to dispute. In 2010, the Supreme Arbitrazh Court held that Russian arbitrazh courts have the power to grant interim measures in support of arbitral proceedings.[63] Subsequently, in a non-binding practice review issued in 2013, the Supreme Arbitrazh Court reaffirmed the power of Russian courts to grant interim measures in support of foreign arbitral proceedings and stated that they can be granted by courts where the debtor, or the debtor's property, is located.[64] Notwithstanding this pro-arbitration trend in Russia, Russian courts' narrow approach to the scope of arbitrable disputes, which is discussed above, means that the availability of interim measures in support of arbitration in Russia likely remains more limited than in many other Central and Eastern European jurisdictions, where the scope of arbitrable disputes is broader than in Russia.

Accordingly, approaches to interim measures vary considerably within Central and Eastern Europe, with some jurisdictions adopting approaches that differ significantly from how most other developed nations approach the availability of such measures. Companies doing business in, or with parties from, this region should be mindful of this reality when selecting their dispute resolution mechanisms and when contemplating the commencement of arbitral proceedings.

IV. The Enforcement of Arbitral Awards

Courts' willingness to recognise and enforce arbitral awards is another area of divergence within Central and Eastern Europe. While Western companies might fear unpredictable interpretations of public policy in countries of Central and Eastern Europe, courts in many of these countries have been reluctant in recent years to set aside, or refuse to enforce, arbitral awards on the basis of an expansive conception of public policy. However, courts in other

countries in the region have at times liberally denied the enforcement of arbitral awards, often on the basis of surprising and unpredictable understandings of public policy.

On a positive note, in recent years, some countries in Central and Eastern Europe have taken steps to facilitate the prompt enforcement of arbitral awards, reflecting both a pro-arbitration bias and a desire to increase foreign direct investment through pro-business legislation. A good example of this is Austria, where legislation came into force in 2014 that amends Articles 615 and 616 of the Austrian Code of Civil Procedure to state that the Austrian Supreme Court is now the first and last instance court to decide challenges to arbitral awards.[65] Both the Austrian Bar Association and the Austrian Federal Economic Chamber supported this legislation, in light of its potential benefits to arbitration and business in Austria.[66]

In Latvia, no recent legislation of this sort has been necessary, as Article 528(2) of the well-established Latvian Civil Procedure Law states that arbitral awards are final and may not be appealed or challenged in any way.[67] The Supreme Court of Latvia has recognised this impossibility of challenging arbitral awards in Latvia – and Latvia's unique position in this regard – writing that "[u]nlike a great number of states, in Latvia … the law does not envisage the possibility of … requesting an abrogation/challenge of the arbitral award".[68]

In Lithuania, the Lithuanian Supreme Court has issued numerous decisions supporting the recognition and enforcement of arbitral awards. For instance, in a typical case involving a challenge to an arbitral award on the basis that one of the parties allegedly did not sign the contract containing the arbitration agreement, the Lithuanian Supreme Court found that one of the annexes to the contract was sealed by that party (even though it was not signed) and that this sufficiently evidenced the party's intent to arbitrate.[69] The Lithuanian Supreme Court also has ruled that if there is any doubt as to the existence of an arbitration agreement, the agreement must be interpreted in favour of its validity.[70]

In other Central and Eastern European countries, however, idiosyncratic challenges to the enforcement of arbitral awards have arisen. For instance, in Moldova – a signatory to the New York Convention – an appellate court refused enforcement of an award issued by an arbitral tribunal of the Estonian Chamber of Commerce on the basis that no special agreement existed between the ministries of justice of Moldova and Estonia regarding the recognition and enforcement of foreign arbitral awards.[71] Fortunately, the Moldovan Supreme Court overturned the Court of Appeal's decision and clarified that, in keeping with the New York Convention, additional inter-governmental agreements or bilateral treaties are not necessary to assure the mutual recognition of foreign arbitral awards between states that are signatories to the convention.[72] Likewise, courts in Serbia have requested proof of reciprocity between Serbia and the country where an arbitral award was rendered, even when both countries are signatories to the New York Convention.[73]

In Croatia, an unusual situation has arisen whereby the country's Constitutional Court will entertain challenges to arbitral awards. Provided that all other remedies have been exhausted, parties to arbitral awards may plead before the constitutional court breach of their fundamental rights by public authority, including their right to property and fair trial, in an effort to set aside an arbitral award. In 2004, the Croatian Constitutional Court confirmed that it will entertain such claims, on the basis that an arbitral award should be classified as an individual legal act affecting the rights and obligations of the parties, which is within the Constitutional Court's jurisdiction.[74]

In Russia, the public policy exception has been used on numerous occasions as the basis for denying the enforcement of arbitral awards, often as a result of unusual understandings of Russian public policy. For instance, Russian courts have refused to enforce arbitral awards in disputes that involved foreign law concepts that are alien to the Russian legal system, such as liquidated damages.[75] Similarly, a Russian court refused enforcement of an International Chamber of Commerce arbitral award because, among other things, enforcement of the award could lead to the defendant's insolvency, which could "negatively impact on the social and economic situation in [the Russian city of] Nizhny Novgorod".[76] Likewise, other Russian courts have denied the enforcement of arbitral awards that purportedly would contradict existing court judgments on related matters, on the basis that enforcing such awards would violate Russian public policy.[77]

A similar body of anti-enforcement precedent exists in Ukraine, where Ukrainian courts have denied the enforcement of arbitral awards for highly technical and formalistic reasons. In one case, Court of Appeals of the Dnipropetrovsk Oblast reversed the decision of the district court enforcing a Vienna International Arbitral Center award because it concluded, among other things, that web page printouts from a courier service technically are not "electronic documents" within the meaning of Ukrainian law and therefore cannot be used as evidence that the appointment of the sole arbitrator and the award had been duly communicated to the defendant.[78] In another case, the Prymorsky District Court refused to enforce an award of the Ukrainian International Commercial Arbitration Court on the ground that it was not proven that the defendant had been duly informed of the arbitration proceedings because notices sent by regular mail were not sent to the defendant's address indicated in the contract and the relevant postal receipts did not specify the name and position of the person who received the notices.[79]

However, not all Ukrainian courts have exhibited an anti-enforcement bias of this sort when considering the enforcement of arbitral awards. For instance, in 2011, the Ukrainian Supreme Court, in a case involving the enforcement of a Stockholm Chamber of Commerce award against Naftogaz Ukrainy (Ukraine's largest oil and gas company), enforced the arbitral award, notwithstanding Naftogaz Ukrainy's argument that enforcement would violate Ukrainian public policy because the amount of natural gas to be transferred under the award was more than half of the amount of natural gas extracted on a yearly basis in Ukraine and more than half of Ukraine's annual demand for natural gas.[80] Finding that the case did not involve any matters concerning core principles and fundamental elements of the Ukrainian legal order, the Ukrainian Supreme Court concluded that the enforcement of the award would not violate public policy.

As can be seen from these examples, approaches to the enforcement of arbitral awards in Central and Eastern Europe vary considerably, with some jurisdictions adopting approaches that differ significantly from how most developed nations approach the enforceability of arbitral awards. Companies doing business in, or with parties from, this region should be mindful of this when considering what dispute resolution mechanisms to select and when considering the commencement of arbitral proceedings.

V. Conclusion

While this chapter highlights some of the heterogeneity that exists within Central and Eastern Europe regarding matters related to international arbitration, the examples set forth in it are only the tip of the iceberg, as numerous other differences beyond the scope of this article also exist. Accordingly, one cannot yet speak of a

"Central and Eastern European approach" to international arbitration, but rather must speak of the multiplicity of disparate approaches that exist in the region regarding issues of significance to the arbitral process.

The heterogeneity of approaches to international arbitration in Central and Eastern Europe means that companies doing business in, or with parties from, the region, should seek the advice of experienced international arbitration counsel when drafting their dispute resolution clauses, contemplating the commencement of arbitral proceedings, and attempting to enforce or set aside arbitral awards. If they do so, they can avoid many pitfalls that they otherwise might encounter as a result of this regional heterogeneity.

Endnotes

1 For a comprehensive discussion of the non-arbitrability doctrine, see G. Born, *International Commercial Arbitration*, 2009, pp. 1,728-1,732.

2 G. Born, *International Arbitration: Law and Practice*, 2012, pp. 82-86.

3 G. Born, *International Arbitration: Law and Practice*, 2012, p. 82.

4 *See* Lithuanian Law on Commercial Arbitration (2012); D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

5 *See* D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

6 *See* Lithuanian Law on Commercial Arbitration 2012, Arts 3, 49; D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

7 *See* New Edition of the Law on Commercial Arbitration, Art. 12(2); D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2014, Global Arbitration Review, 2014*.

8 *See* Lithuanian Law on Commercial Arbitration 2012, Arts. 2(3), 2(4).

9 *See* Lithuanian Law on Commercial Arbitration 2012, Art. 12(2). *See also* D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2014, Global Arbitration Review, 2014*.

10 *See* J. Gyárfáš, M. Magál, 'Slovakia', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

11 *See* J. Gyárfáš, M. Magál, 'Slovakia', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

12 *See* Czech Arbitration Act 1994, Art. 1(1).

13 *See* Law on International Commercial Arbitration, Arts. 1(2), 1(4); Arbitrazh Procedural Code of the Russian Federation, Arts. 4(6), 27(1), 148(1) para. 1, 5, 6; Civil Procedural Code of the Russian Federation, Arts. 3(3), 135(1).

14 Russian arbitrazh courts, notwithstanding their confusing denomination, are a system of state courts having jurisdiction over commercial disputes. *See* Arbitrazh Procedural Code of the Russian Federation, Art. 27(1) ("Arbitrazh courts have jurisdiction over economic disputes and other disputes related to business and other economic activities…"). Article 33 of the Arbitrazh Procedural Code, which sets forth the special subject matter jurisdiction of arbitrazh courts, specifies certain categories of disputes that are within the jurisdiction of arbitrazh courts. Among these disputes are insolvency disputes and corporate disputes. Article 33 refers to Article 225.1 of the Arbitrazh Procedural Code, which sets forth a wide range of corporate disputes, which are subject to the jurisdiction of arbitrazh courts. Initially, the objective of these rules was to draw a line between the spheres of competence of arbitrazh courts and courts of general jurisdiction. *See,* e.g., *D. Davydenko, Arbitrability of Real Estate and Corporate Disputes under Russian law: the problem and its context, in Arbitration in CIS Countries*. Current issues, 2012, p. 99.

15 *See*, Ruling of the Arbitrazh Court of Moscow in *Maximov v. NLMK*, dated 28 June 2011 (setting aside the award), confirmed by the Judgment of the Federal Arbitrazh Court of Moscow Region dated 10 October 2011 and by the Ruling of the Supreme Arbitrazh Court dated 30 January 2012, Case No VAS-15384/11.

16 *See S. Usoskin, Corporate Disputes' Arbitrability in Russia: A New Opportunity*, (2013); S. Strembelev, Y. Kryvoi, *Arbitrability of corporate disputes in Russia: To Be or Not to Be?*, CIS Arbitration Forum Working Paper 1/2014.

17 Decision of the Supreme Arbitrazh Court, dated 28 January 2014, Case No. VAS-11535/13.

18 Decision of the Supreme Arbitrazh Court, dated 28 January 2014, Case No. VAS-11535/13.

19 *See,* e.g., D. Kurochkin, V. Melnikov, *Supreme Arbitratzh Court declares non-arbitrability of corporate disputes* (2012).

20 *See* D. Kurochkin, V. Melnikov, *Supreme Arbitratzh Court declares non-arbitrability of corporate disputes* (2012).

21 *See* Draft Federal law on amending certain laws of the Russian Federation in connection with adopting the Federal law on arbitration in the Russian Federation (2014); Draft Federal law on arbitration in the Russian Federation (2014).

22 *See* Draft Federal law on amending certain laws of the Russian Federation in connection with adopting the Federal law on arbitration in the Russian Federation, Art. 1(5) amending Art. 33 of the Code, Art. 1(11) amending Art. 225.1 of the Code.

23 *See* D. Kurochkin, V. Melnikov, *Supreme Arbitratzh Court declares non-arbitrability of corporate disputes* (2012).

24 *See* Art. 225.1(3) in the version proposed by Art. 1(11) of the Draft Federal law on amending certain laws of the Russian Federation in connection with adopting the Federal law on arbitration in the Russian Federation. The proposed Article 225.1(5) also provides that corporate disputes cannot be resolved by *ad hoc* arbitration.

25 *See* Recommendations of the Higher Commercial Court of Ukraine *On Application of Legislation in Resolving Disputes Arising out of Corporate Relations*, Recommendation No 04-5/14, 28 December 2007.

26 *See* Recommendations of the Higher Commercial Court of Ukraine *On Application of Legislation in Resolving Disputes Arising out of Corporate Relations*, Recommendation No 04-5/14, 28 December 2007. *See also* Ruling No 13 of the Supreme Court *On the Court Practice of Resolving Corporate Disputes*, dated 24 October 2008.

27 *See* Ukrainian Commercial Procedure Code, Art. 12, which also provides a definition of corporate disputes.

28 *See* Hungarian Act CXCVI of 2011 on national assets.

29 *See* Hungarian Act CXCVI of 2011 on national assets; G. Bárdosi, Chapter IV: The Award and Courts, Hungary: New Rules on Arbitration Related to National Assets, in Austrian Yearbook on International Arbitration 2013, 182 (C. Klausegger, P. Klein, *et al.* (eds.), 2013, pp. 181-188.

30 *See* Szegedi Ítélőtábla Gf. I.30 014/2012, published at BDT/7-8/130.

31 *See* Serbian Arbitration Act 2006, Art. 5(1), Official Journal of the Republic of Serbia, No. 46/2006.

32 *See* Decision of the Supreme Court of Serbia 350/08, dated 1 October, 2008, revising the Decision of the Higher Commercial Court P/1776/07 of 12 June 2007.

33 *See* Decision of the Supreme Court of Serbia 350/08, dated 1 October, 2008, revising the Decision of the Higher Commercial Court P/1776/07 of 12 June 2007.

34 *See* D. Draguiev, A. Georgiev, 'Bulgaria', *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

35 G. Born, *International Commercial Arbitration: Law and Practice* (2012), p. 78.

36 *See* Decision No. 71 of Second Commercial Chamber of the Bulgarian Supreme Court of Cassation, dated 2 September 2011, Case No 1193/2010.

37 *See* Polish Code of Civil Procedure, Art. 1161.

38 *See, e.g.*, A.W. Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), International Handbook on Commercial Arbitration, Kluwer Law International 1984, Supplement No. 72, December 2012.

39 *See* M. Tomaszewski, in A. Szumański (ed.), System Prawa Handlowego, Vol. 8: Commercial Arbitration, 2010, pp. 268-269; A.W. Wiśniewski, International commercial arbitration in Poland. The legal status of arbitration and the arbitrators, 2011, pp. 402-413.

40 See A.W. Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International 1984, Supplement No. 72, December 2012, p. 2.

41 *See* Decision of the Supreme Arbitrazh Court, dated 19 June 2012, Case No. 1831/12.

42 *See* Decision of the Supreme Arbitrazh Court, dated 19 June 2012, Case No. 1831/12.

43 *See* Decision of the Moscow Arbitrazh, dated 8 July 2011, Case No A40-49223/11.

44 *See* Decision of the Supreme Arbitrazh Court, dated 19 June 2012, Case No. 1831/12; M. Yaremenko, *RUSSIA: Optional arbitration clause declared invalid*, Global Arbitration Review Volume 7 – Issue 5 (2012); D. Foster, *Asymmetric Arbitration Agreements: Are they Worth the Risk?*, The European, Middle Eastern and African Arbitration Review 2014, Global Arbitration Review, 2014.

45 Decision of the Kiev Regional Commercial Court, dated 26 April 2011, Case No. 16/033-11.

46 *See* Decision of the Kiev Regional Commercial Court, dated 26 April 2011, Case No. 16/033-11.

47 Decision of the Supreme Court of Ukraine, dated 13 October 2010, Case No. 6-5668sv10.

48 *See* Decision of the Supreme Court of Ukraine, dated 13 October 2010, Case No. 6-5668sv10.

49 *See, e.g.*, Decision of the Arbitrazh Court of the City of Moscow, dated 11 January 2012, Case No. A40-21119/11-68-183 and No. A40-29251/11-68-256.

50 *See* Decision of the Supreme Arbitrazh Court, dated 16 July 2013, Case No. 2572/13; Decision of the Federal Arbitrazh Court of the Dalnevostochniy District, dated 3 March 2014, Case No. F03-141/2014. See also M. Samoylov, *Supreme Commercial (Arbitrazh) Court of Russia upholds pathological ICC arbitration clause* (*Bosch v Avtosped*), Lexis®PSL (2014).

51 *See* Polish Civil Code, Arts. 1181, 1182; A.W. Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International 1984, Supplement No. 72, December 2012, p. 35; M. Jochemczak and K. Kempa, in K. Nairn and P. Heneghan (eds.), *Institutional & Jurisdictional Comparisons*, Arbitration World, 4th ed., 2012, at p. 650. With respect to whether *ex parte* orders of interim measures may be granted, some other Central and Eastern European countries are moving towards less restrictive approaches than Poland, as is evidenced by draft Slovak arbitration legislation that would make *ex parte* interim measure orders available. See J. Gyárfáš and M. Magál, 'Slovakia 'in *The European, Middle Eastern and African Arbitration Review 2014*, Global Arbitration Review, 2014.

52 *See* A.W. Wiśniewski, *National Report for Poland* 2012, Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), International Handbook on Commercial Arbitration, Kluwer Law International 1984, Supplement No. 72, December 2012, p. 36.

53 *See* A.W. Wiśniewski, *National Report for Poland* 2012, Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International 1984, Supplement No. 72, December 2012, p. 36.

54 *See* Polish Code of Civil Procedure, Arts. 310-315, 1181; A.W. Wiśniewski, *National Report for Poland* (2012), in J. Paulsson (ed), *International Handbook on Commercial Arbitration*, Kluwer Law International 1984, Supplement No. 72, December 2012, p. 35.

55 *See* D. Foigt-Norvaišienė, 'Lithuania' *in The European, Middle Eastern and African Arbitration Review 2013*, Global Arbitration Review, 2013.

56 *See* The Republic of Lithuania Law on Commercial Arbitration, Arts. 20(1), 25(2); D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2013*, Global Arbitration Review, 2013.

57 *See* The Republic of Lithuania Law on Commercial Arbitration, Art. 26; D. Foigt-Norvaišienė, 'Lithuania', *The European, Middle Eastern and African Arbitration Review 2013*, Global Arbitration Review, 2013.

58 *See* Serbian Arbitration Act 2006, Arts. 15, 31, Official Journal of the Republic of Serbia, No. 46/2006.

59 *See* Serbian Arbitration Act 2006, Arts. 64-65, Official Journal of the Republic of Serbia, No. 46/2006. *See also* Article 86 of the Serbian Private International Law Act, Official Gazette of the Serbian Arbitration Act 2006, Arts. 64-65, Official Journal of the Republic of Serbia, No. 46/2006. *See also* Article 86 of the Serbian Private International Law Act, Official Gazette of the SFRY 42/82, 72/82 and Official Gazette of the FRY 46/96. 42/82, 72/82 and Official Gazette of the FRY 46/96.

60 *See* Czech Arbitration Act 1994, Art. 22.

61 *See* C. Liebscher, A. Fremuth-Wolf (eds.) in *Arbitration Law and Practice in Central and Eastern Europe*, Belarusian report, BEl-1-72 (2006).

62 *See* C. Liebscher, A. Fremuth-Wolf (eds.) in *Arbitration Law and Practice in Central and Eastern Europe*, Belarusian report, BEl-1-72 (2006).

63 *See* Decision of the Supreme Arbitrazh Court of the Russian Federation, dated 20 April 2010, Case No. A40-19/09-OT-13.

64 *See* Information letter No. 158 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, dated 9 July 2013, para. 29.

65 *See* Austrian Code of Civil Procedure, Arts. 615, 616.

66 *See, e.g.,* M. Nueber, *Amendments to Austrian Arbitration Law Abbreviate the Proceeding to Challenge an Arbitration Award*, Kluwer Arbitration Blog, dated 24 October 2013.

67 *See* Latvian Civil Procedure Law, Art. 528(2); I. Kačevska, 'Latvia' in *The European, Middle Eastern and African Arbitration Review*, Global Arbitration Review, 2013.

68 Judgment of the Constitutional Court of the Republic of Latvia, dated 17 January 2005, Case No. 2004-10-01.

69 *See* Decision of the Supreme Court of the Republic of Lithuania in *Szolmar v UAB Ukmede*, dated 25 November 2005, Case No. 3K-7-999/2003.

70 *See* Decision of the Supreme Court of the Republic of Lithuania in *Szolmar v UAB Ukmede*, dated 25 November 2005, Case No. 3K-7-999/2003; Ruling of the Supreme Court of the Republic of Lithuania in "*Main Bridge, L.L.C" v UAB "Lokvita*", dated 27 March 2002, Case No. 3K-3-681/2002.

71 *See* Decision of the Civil College of the Supreme Court of Justice of the Republic of Moldova, dated 21 April 1999, Case No. 2r/a-47/99, 2000 SJP 251.

72 *See* Decision of the Civil College of the Supreme Court of Justice of the Republic of Moldova, dated 21 April 1999, Case No. 2r/a-47/99, 2000 SJP 251; Alexandr Svetlicinii, *Enforcement of Foreign Arbitral Awards in the Republic of Moldova*, 24(3) Journal of International Arbitration (2007) pp. 249-264.

73 *See, e.g.*, Decision of the Higher Commercial Court, dated 9 March 2006, Case No. 128/2006(2), in *Sudska praksa trgovinskih sudova, Bilten br.* 2/2006; Decision of the Higher Commercial Court, dated 9 May 2007, Case No. 293/2007 in *Sudska praksa trgovinskih sudova, Bilten br.* 2/2007.

74 *See* Decision of the Constitutional Court of the Croatian Republic, dated 27 October 2004, Case No. U-III-669/2003, NN 157/04.

75 *See* Decision of the Federal Arbitrazh Court of the Volgo-Viatsky Region, dated 25 May 2006, Case No.A82-10555/2005; Information letter No. 156 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, dated 26 February 2013, para. 6.

76 Decision of the Federal Arbitrazh Court of the Volgo-Vyatsky Region, dated 17 February 2003, Case No. A43-10716/02-27-10.

77 *See Ciments Français v. Holding Company Sibirskiy Cement OJSC*, XXXVIII Y.B. Comm. Arb. 453-455 (Supreme Commercial Arbitrazh Court of the Russian Federation, 27 August 2012) (2013); Decision of the Federal Arbitrazh Court of the Urals Region, dated 12 October 2005, Case No. F09-2110/05-C6.

78 *See VA Intertrading Aktiengesellschaft v. Hekro Pet Ltd.*, XXXVIII Y.B. Comm. Arb. 468 (Court of Appeal, Dnipropetrovsk Region, 28 March 2011) (2013).

79 *See Rangedale Limited v. South Airlines Limited Liability Company*, XXXVI Y.B. Comm. Arb. 473 (Prymorskyi District Court, Odessa City, 16 August 2012, confirmed by the Appellate Court of Odessa Region, 24 October 2012 and the High Court of Ukraine for Civil and Criminal Cases, 11 February 2013) (2013).

80 *See National Joint Stock Company Naftogaz Ukrainy v. RosUkrEnergo* AG, XXXVI Y.B. Comm. Arb. para. 42 (Court of Appeal, City of Kiev, 17 September 2010 and Supreme Court of Ukraine, 24 November 2010) (2011).

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