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Introductory note
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INTRODUCTION TO CHALLENGES AND PERSPECTIVES OF ARBITRATION IN SOUTH EAST AND CENTRAL EUROPE

Summary

This issue of Foreign Legal Life is dedicated to the challenges and perspectives of arbitration in South East and Central Europe, with contributions on 16 jurisdictions. The articles aim to highlight the positive developments, challenges and trends in their individual jurisdictions, offering pointed discussions of the most pressing matters, but also allowing for a comparative overview of broader trends. As the contributions show, arbitration is a well-entrenched phenomenon in the respective jurisdictions, with enthusiastic legal communities and broad support from the state and courts. General and jurisdiction-specific challenges do remain, however, and more needs to be done to realize the full potential that arbitration can, if properly used, bring to local communities.

Keywords: arbitration, South East Europe, Central Europe, legal reform, ADR.

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UVOD U IZAZOVE I PERSPEKTIVE ARBITRAŽE U JUGOISTOČNOJ I CENTRALNOJ EVROPI

Sažetak

Ovo izdanje Časopisa Strani pravni život posvećeno je izazovima i perspektivama arbitraže u jugoistočnoj i centralnoj Evropi. Članci imaju za cilj da istaknu pozitivne pomake, izazove i trendove arbitraže u svojim jurisdikcijama, nudeći istaknute diskusije o najhitnijim pitanjima, ali i omogućavajući komparativni pregled širih trendova. Kao što analize pokazuju, arbitraža je dobro ukorenjena pojava u obrađenim nacionalnim pravnim sistemima, i tako takva uživa široku podršku država i njihovih sudova. Ipak kako bi se ostvario puni potencijal arbitraže, potrebno je u budućnosti dalje ulagati dodatne napore u tom smeru.

Ključne reči: arbitraža, Jugoistočna Evropa, Centralna Evropa, pravna reforma, ADR.

1. Introduction – Arbitration and South East and Central Europe

Arbitration, much like the world itself, does not stand still. In particular in its international iteration, looking at resolving disputes among parties coming from different jurisdictions and of varying types, it is a flux of new legal, theoretical and technical challenges, as well as a laboratory for further development of international dispute settlements. Unlike international and national courts, arbitration - both *ad hoc* and institutional - has inherently a larger potential for adopting reforms to respond to the needs of the parties using it. Adoption of a new set of institutional rules or creativity of the parties in crafting new ways of regulating the arbitral process is vastly more suited to reform than a national legal change or adopting amendments to international legal instruments.

But for all the promise of adaptability (and taking due account of inspired delocalization theories) States do remain critical actors for international arbitration. Whether as parties to the New York Convention, or with their legal systems being *lex arbitri,* or their courts being in multifarious relationships with the arbitration process, or States themselves being parties to some of the biggest cases in history of international dispute settlements, the role of States remains critical.

To all of the above an honest observer can and should add the role of narratives surrounding arbitration, its 'brand' and image, and its public relations. When reading

law firm bulletins about international arbitration, the reader will find glowing narratives of efficiency of transnational justice and many other advantages. Reading more critical accounts, mostly academic or activist ones in particular concerning investor-State arbitration, the reader might see arbitration rather as a tool of exploitation of poorer States and subjugation of public interests to the interests of global corporations. And there are of course many more narratives in between those.

It is within this matrix of private and public, promotion and reaction, challenges and perspectives that this special issue comes in with a particular focus on South East and Central Europe. It is worth sharing a few preliminary remarks about the idea and scope of this issue, before diving more into the excellent contributions that constitute it.

For one, this issue is not aimed to be yet another country-by-country report that lays out, sometimes almost mechanically, the black letter law of arbitration in a given jurisdiction (as much as such reports do hold immense practical and comparative value). The idea is to allow a broader discretion to address the most contentious issues, provide personal perspectives (even anecdotal ones), and offer in that sense a more unique take on the respective jurisdictions, whilst also providing sufficient information and context for each country.

Secondly, and relatedly, the idea is thus to take stock of both 'good' and 'bad', of both pressing challenges/inadequacies, but also perspectives, positives and opportunities for or accounts of already happening reform. The contributions do not promote arbitration in general or their respective jurisdictions as panaceas to all dispute related ills, nor do they put the inevitable issues front and centre to the extent that no reasonable person would ever think of concluding an arbitration agreement ever again. Whilst the breadth and depth of challenges and positives inevitably vary across the countries in this issue, the honest approach taken is, or so the editor and contributors hope, a refreshing take in sometimes extremely polarised set of views on international arbitration.

Finally, the freedom and discretion to address contentious issues has extended to the concept of arbitration being understood as broadly as possible for the purposes of this issue. In that light, contributions variously address both international and domestic regimes, as well as subfields of arbitration ranging from typical commercial arbitration, consumer arbitration, labour arbitration, and investor-State arbitration.

Why South East and Central Europe? To an extent, this choice is dictated by the need to draw a boundary somewhere (lest the special issue turns into a global encyclopaedia of international arbitration), and the logical focus of Foreign Legal Life as the review of the Institute of Comparative law in Belgrade. But the reasons go beyond these more general ones. For one, the 'borders' of the issue do not extend more to the West as there is no real lack of accounts of arbitration in Western

Europe, from various angles and using varied approaches and methodologies. They do not extend to the East as in the current situation of tragic and ongoing warfare, the challenges and perspectives are fundamentally different and are likely deserving of a special issue of their own.

But South East Europe and Central Europe deserve closer attention for their own reasons. Some of the countries discussed are, for example, at the very forefront of cutting-edge developments in international (investment) arbitration (such as Czechia and Poland). All across these jurisdictions, arbitration is on the rise more generally, with new arbitration centres being formed and efforts put in to promote this method of dispute settlement. In some jurisdictions, such as Bosnia and Herzegovina, arbitration faces unique challenges that are hardly replicated elsewhere in Europe. At the same time, one cannot resist the feeling that there are not enough open-access and generally accessible materials (in English) on these jurisdictions, written also by local experts. Rectifying this has been one of the aims of this special issue, and in that sense, the authors have delivered a fantastic set of contributions.

Before providing a more granular introduction to these contributions, it is possible to identify further cross-cutting features that characterize all or a group of individual jurisdictions. To take it in this order – one general feature, already mentioned above, is that in virtually all the jurisdictions there is at least nominally an arbitration-friendly approach in legislation (mostly based on the UNCITRAL Model Law on International Commercial Arbitration), attempts by the courts to try and support arbitration, and an enthusiastic community of arbitral practitioners. This is coupled with another general feeling – that more could be done to popularize arbitration, to raise awareness about its benefits, and to move (as much as possible) the seats of international arbitrations from the more established (Western) centres eastward and southward.

A number of submissions, across a range of jurisdictions (Albania, Romania, Croatia, Hungary) have an interesting focus on legal history of arbitration, offering valuable insights into its development over time. In particular, these submissions show how for many jurisdictions the modernization and reform of arbitral legal frameworks was a facet of the transition from (usually) communist legal orders into market-based and Western-focussed legal and economic systems. It is indeed fascinating to see how arbitration can be seen both as a tool in facilitating this transition, but also a reflection of it, with the causes and effects remaining deeply intertwined.

Moving into the present, however, is another aspect of transition and/or arbitration that cuts across a number of these jurisdictions. Protection of foreign investments, usually accompanied by providing foreign investors a possibility to arbitrate on an international plain when claiming alleged wrongdoings by the state, has also been a marked feature of the post-Cold War transition. However, today that is a

pressing matter for a large number of countries in Central and South East Europe that have found themselves at the forefront of high-value investment arbitration claims. The importance is such that the contributions concerning Croatia and Montenegro indeed primarily focus on investor-State arbitration issues, both from the perspective of intense and costly engagement with it (Croatia) and through the lens of particular standards and possibilities for reforming investment (arbitration) policies (Montenegro). Investor-State arbitration is also a large part of discussions in Czechia, Poland and Albania.

Equally valuable insights come from jurisdiction-specific, sometimes quite idiosyncratic, issues and trends in individual jurisdictions. These will be briefly addressed now, without keeping to any particular alphabetic or other order of the countries themselves.

2. Arbitral Journey Across the Regions – Individual Contributions

To start with, the contribution on Moldova by Octavian Cazac illustrates how adopting a Model Law and implementing it in practice are two different prospects. For one, different laws govern international and domestic arbitration, although a draft law is in preparation to "unite" them. The enforcement of arbitral awards, however, seems to be affected by the courts imposing an ad valorem stamp duty on recognition and enforcement of foreign arbitral awards, increasing expenses and limiting attraction of foreign arbitration. But the courts seem to be on the right side of another contentious issue – recognition of validity of asymmetrical (arbitration/litigation) dispute settlement agreements in international financing contracts. The author's extensive and comparative discussion of this issue offers useful lessons beyond just the context of Moldovan law.

The article on Slovenia, by Nastja Merlak and Nejc Humar, focusses on concession agreements and a somewhat recent turbulence about allowing arbitration as a method of dispute resolution for these arrangements. Slovenian legislator, using a considerably controversial tool of "authentic interpretation," has sought to restrict arbitrability of concession disputes, something that was hardly controversial for a long time. Although the officially stated rationale is that arbitration leads to "lower legal certainty" than litigation, it seems that the true reasons might be rather found in negative (in terms of outcome) experiences that the Slovenian state and its local entities had with such arbitration disputes. As arbitration is generally seen as a good choice for concession disputes for those interested in concluding concession agreements, one can hope that the backlash by (among others) arbitration community should lead to rethinking this recent development.

Albania, discussed by Jola Gjuzi, is an example of a jurisdiction where the general support for arbitration by the law and the arbitral community is not always matched by the expertise of courts or the popularity among businesses/citizens. Whilst Albania has, as noted, experienced quite a streak of investor-State arbitral claims (winning and losing a number of them), on the internal front one noticeable issue is the capacity of courts and judges. Foreign arbitral awards can face years or rarely even decades of waiting for enforcement, and limited experience of judges is sometimes also compounded by the still murky relationship of the law on arbitration and the law of civil procedure. It is to be hoped that initiatives for legislative clarification and capacity/awareness raising concerning arbitration will lead to further improvements in due course.

The article on Serbia, contributed by Jelena Vukadinović Marković, focuses on the ever-important issue of arbitrability. In particular, it highlights the "grey areas" of intellectual property (IP) law, competition law and law of insolvency whose interplay with arbitration continues to cause dilemmas. In particular, there seems to be lack of clarity and certainty concerning the scope of disputes concerning IP and competition law breaches. There is a general academic consensus that disputes concerning registration of IP should not be arbitrable, nor should determinations whether a breach of competition law occurred. On the other hand, commercial disputes about the use and disposing of IP rights, as well as about damages arising from competition law breaches, should be within the scope of arbitrability. Providing official legal clarity through relevant legislation on these points would be welcome. The same goes for clarifying the destiny of both a previously agreed arbitration agreement in cases where insolvency proceedings are open against one of the parties, and of ongoing arbitration proceedings involving such entities.

The contribution on Montenegro, written by Nikolina Tomović, focuses on the topical issue of investor-State arbitration, its ubiquitous and critical standard of fair and equitable treatment that serves as a basis for investor claims, and the experience and prospects of Montenegro in this field. Noting the importance that such high-value claims (potentially involving hundreds of millions of US dollars) can have on smaller states with more limited budgets, the article also connects the situation in Montenegro with broader EU trends concerning investment protection. Montenegro, as an EU candidate country well advanced on its path in that sense needs to rethink its policies, and in particular, as suggested by the author, the prospects for rephrasing and limiting the impact of clauses such as the fair and equitable treatment.

The situation in Turkey, addressed in a piece by Őzge Variş, is characterized by abundant potential for development of arbitration and its constant rise over the years that is contrasted with some pressing issues in terms of court interventions

and the arbitral community itself. One of the key issues to note is the sometimes overly intrusive attitude of the courts towards the arbitration process and arbitration awards, going beyond what is in the otherwise well-drafted arbitration legislation. In particular, lax use of public policy exceptions to address "national security" concerns and inconsistencies in approach between different courts are problems that need to be tackled first. In a broader sense, there are ongoing efforts to promoting arbitration and training of both judges and arbitrators. As for the latter, a somewhat limited pool of arbitrators with expert knowledge in particular sectors has also been identified as an obstacle to remove in further propelling arbitration growth in a such a major economy as Turkey.

Poland, discussed by Filip Balcerzak, is another major player in the investor-State arbitration field, despite never having ratified the globally widespread Convention on the International Centre for Settlement of Investment Disputes (ICSID). In other arbitration fields, however, there are interesting issues as well. One is that post-arbitral proceedings (including recognition and enforcement) can be quite lengthy as the possibility to exhaust a range of legal avenues against an award (including a cassation appeal to the Supreme Court) prolongs the proceedings to a very considerable extent. Another unwelcome development has been the decision of all public authorities from several years ago to stop concluding arbitration agreements and focus only on state court litigation, something likely motivated (as in Slovenia and Hungary) by a less than ideal outcome record before arbitral tribunals. In any case, there are renewed efforts by arbitral institutions to popularize arbitration and put Poland as a potential seat to a role that it would deserve bearing in mind its position, economy and population.

The situation in Hungary, written about by Dániel Dózsa, Lili Hanna Fehér and Balázs Muraközy, illustrates well a number of trends across the broader region. On the one hand, a developed legislative framework and a long tradition are still not enough to lead to a wholesale embrace of arbitration by the business community, as many Hungary-related matters remain arbitrated in the neighbouring Austria. Clear efforts to make arbitration cost-effective, and in particular a safe choice in light of rule of law backsliding issues, are then somewhat countered by issues concerning arbitrability limitations, introduction of additional grounds for annulment of awards that deviate from the Model Law, and possibilities for retrial in light of new evidence that is not commonly found in international context. Despite (the now reversed) rejection of arbitration agreements by public authorities doing harm to this method of dispute settlement, the efforts of bringing arbitration "on the map" in full sense of the word persist.

Czechia, already mentioned in the investor-State context, and discussed by Petr Bříza and René Cienciala, exhibits strong fundamentals in terms of legislation

and pro-arbitration approach of courts, but with some lingering issues. One relates to a comparatively well-known issue of arbitral tribunals being unable to issue interim measures on their own accord. Beyond that, one issue more specific to Czechia is the link between arbitration law and code of civil procedure, where the provisions of the latter can be "appropriately" used by arbitrators and/or courts when the situation requires it. This has, however, lead to inappropriate overreliance in some situations, as well as to a thorny issue of whether arbitrators are required (as judges would be) to provide legal assistance and instruction to the parties. Recent judgments by the courts, however, seem to indicate a positive approach to resolving these issues.

North Macedonia, analysed in the article by Toni Deskoski and Vangel Dokovski, exhibits a number of unrelated but fascinating examples of challenges that may arise from legislation, court practice, and arbitral institution practice. For one, the authors provide an intriguing look into whether arbitration can be an answer for disputing civil defamation and insult cases after they were removed from the domain of criminal law. At the same time, the piece describes a worrying example where trying to make arbitration (too) affordable can backfire – fixation of arbitrators' remuneration at low levels with the Permanent Arbitration in Skopje has lead to limited and decreasing interest of potential arbitrators. Finally, by using a case study from the local courts, the authors describe how foreign awards should *not* be enforced, raising the call for the vibrant local arbitration community to help with further training and specialization of judges and arbitrators.

The contribution on Croatia, by Mirela Župan and Paula Poretti, focuses in considerable and illuminating detail on the practice of the state in (now quite numerous) investor-State arbitrations. Apart from insightful substantive detail, the article raises important questions about the high cost of representation, effects this has on the access to justice, and the potential need to rethink alternative settlement methods (such as mediation and conciliation) to avoid constant burdens to the budget. Equally, however, the piece raises a hard dilemma of whether promoting more alternative methods that are shrouded in secrecy would ultimately entail unexpected and unacceptable transparency and legitimacy costs – while increasing that same transparency might reduce the readiness of the parties to actually settle. In that sense, challenges and lessons are the same for a large number of countries, in the region and elsewhere, involved with the international regime of investment protection.

In case of Bulgaria, discussed by Tsvetelina Dimitrova, we can find the examples of long-standing issues being resolved, and some persisting and waiting for future action. On a more positive note, a recent pro-arbitration decision by the Supreme Court of Cassation affirmatively resolved an uncertainty as to whether

an assignment of rights under a contract included the assignment of an arbitration agreement. But on a more challenging side of matters, recognition and enforcement of foreign awards, even under the New York Convention regime, remains burdened by formalities of dubious legality. Primarily, the need to provide a certificate that an award entered into force (something arbitral institutions are quite unfamiliar with), obtain certification of documents from the relevant ministry, as well as certification of signatures/capacity of persons issuing awards from a notary public are all cumbersome rules that arguably contravene the spirit of the New York Convention. In light of recent pro-arbitration judgments, the hope is these matters would be tackled next.

Greece, on which Eirini Roussou contributes, is interesting as an example of a recent modernization reform that put it into not just regional, but global spotlight. Going beyond, and arguably improving on a range of issues in the UNCITRAL Model Law, Greece now has some of the most innovative provisions on issues such as multiparty proceedings, validity of arbitration agreements, interim measures, and setting aside of arbitral awards. At the same time, Greece as an EU Member State is part of the uncertainties brought about by the attempts to end intra-EU investment arbitration and how (and if) that will reflect on Greece remains to be seen.

Slovakia, the jurisdiction analysed by Pavel Lacko and Michal Hrušovský, demonstrates considerable potential for growth in its dedicated arbitral community, but also faces constraints on several fronts that can be recognized across the region. One set of these is the need to enhance the public awareness of arbitration, improve transparency of the work of arbitral institutions, and ensure integrity of appointment processes. One the side of legal framework, ambiguities remain concerning appointment and challenge of arbitrators, conduct of proceedings, and setting aside of awards. However, as recent pro-arbitration court decisions concerning judicial intervention show, coupled with other initiatives to raise capacity and knowledge, the opportunities for growth and improvement are there for the taking.

In Romania, as Cristina Alexe and Oana Șoimulescu write, generally positive arbitration environment faces some general and some sector-specific challenges. In more general terms, complications surround arbitrations that have *in rem* rights as their subject matter, as there is both a need to authorize arbitration agreements before a public notary in these cases, and additional scrutiny of awards arising from these cases – making the whole process cumbersome and more expensive. In terms of specific sectors, the authors focus in particular on the construction industry as generally a large generator of arbitral (and other) disputes, and highlight a number of important developments and challenges arising in this sector. Again, similarly to some other larger jurisdictions in the region, there is a sense that there is certainly large untapped potential for further growth.

Bosnia and Herzegovina, discussed by Fahira Brodlija, is perhaps the most curious case of all the presented countries. Reflecting the complex governmental structure and legal compromises involved within it, it exhibits fragmented regulation of arbitral proceedings at different levels, fairly short legislation embedded within the codes of civil procedure, and numerous (sometimes striking) deviations from Model Law norms. These include a very strict understanding of what an arbitral agreement is, and a possibility for the court to retroactively terminate arbitration agreements in cases where the parties cannot agree on arbitrators, appointed arbitrators cannot/refuse to act, or there is no agreement of arbitrators on an award. However, these legislative oddities are coupled with extensive investor-State arbitration practice, including an innovative model bilateral investment treaty that can serve as an inspiration to many other jurisdictions. In light of the efforts of its vibrant and dedicated arbitration community, it is a hope that necessary reforms will not be long in coming.

3. Conclusion – Remembering the Past, Thinking about the Future

To reiterate from the beginning of this introduction, as arbitration changes with the world around it, there might never be a true 'conclusion' to its development, narratives about it, and its everyday practice. South East and Central Europe jurisdictions show how the challenges come in various forms, but also how readiness to reform and improve can help tackle them. As the global economic and geopolitical outlook becomes ever more complex, it is to be expected that reverberations will be felt in both the international arbitration system and individual jurisdictions. Readiness to adapt and overcome, the strength of the arbitration communities and their enthusiasm – demonstrated by the jurisdictions discussed in this issue – give hope that there will not be a final 'conclusion' after all.