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The International Comparative Legal Guide to:

# International Arbitration 2018

## 15th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

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URL: www.glgroup.co.uk

**GLG Cover Design**
F&F Studio Design

**GLG Cover Image Source**
iStockphoto

**Printed by**
Ashford Colour Press Ltd
July 2018



**ISBN** 978-1-912509-24-9
**ISSN** 1741-4970

**Strategic Partners**

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# International Arbitration in Central and Eastern Europe

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## I. Introduction

1. Numerous countries in the Central and Eastern European ("**CEE**") region and in the Commonwealth of Independent States ("**CIS**") have made continuous efforts to modernise their arbitration laws, making them compliant with prevailing international arbitration practices and responding to the needs of arbitration users.[1] By considering a variety of jurisdictions, this chapter presents key trends and developments that took place over the past year, including legislative changes and amendments to institutional rules, enforcement of arbitration agreements, as well as enforcement and annulment of arbitral awards. Notable investor-state and state-to-state disputes are discussed in the final section of the chapter.

## II. Reforms of National Arbitration Laws

2. The past year has generated numerous developments in the states of the CEE region. Some countries have amended their legislations (like Bulgaria, Lithuania and Poland), some have seen amendments to institutional arbitration rules (like Austria and Russia), and some have done both (like Hungary and Ukraine).

3. The major changes to the Law on International Commercial Arbitration ("**LICA**")[2] and the Civil Procedure Code ("**CPC**")[3] of **Bulgaria** concern the arbitrability of consumer disputes (discussed in more detail further below in section III), "tacit" consent to arbitration (discussed in section IV), minimum professional requirements for arbitrators, and grounds for setting aside domestic awards (discussed in section V).[4] A body supervising and controlling the work of arbitral institutions has also been introduced.[5] The amendments took effect on January 28, 2017.[6]

4. One of the amendments to the LICA affects the way arbitrators and arbitral institutions operate in Bulgaria by presenting some new specific requirements that were absent in the old law. This change was triggered by the fact that certain arbitrators and institutions had questionable qualifications and reputations. Therefore, the amended Article 11(3) of the LICA requires that anyone wishing to serve as arbitrator must: (i) be a legally capable citizen, who has not been sentenced for a premeditated publicly indictable offence; (ii) have higher education; (iii) have at least eight years of professional experience; and (iv) possess high moral qualities.[7]

5. In addition, the law also provides for control and supervision over arbitrators and arbitral institutions exercised by the Ministry of Justice through a special Inspectorate.[8] The mandate of the Inspectorate entails the examination of arbitrators' and arbitral institutions' compliance with the LICA. The inspectors may scrutinise the work of arbitral institutions and provide compulsory instructions to achieve compliance with the law, as well as fine arbitrator(s) who fail to comply with such instructions.[9]

6. Finally, in order to increase transparency in arbitration proceedings, the amended law provides that parties have the right to access their case files and verify the necessary information on the website of the arbitral institution.[10] In turn, each arbitral tribunal must archive all the documentation for completed cases for a period of 10 years. After this period, only the awards and the settlements must be kept.[11]

7. The changes that took place in **Poland** in 2017 resemble those that occurred in Bulgaria. A new set of rules for consumer arbitration was introduced, the goal of which is to reinforce and further protect consumers' rights in arbitration. The rules cover issues such as the form of an arbitration agreement, grounds for challenging an arbitral award and recognition and enforcement of an arbitral award.[12] These are further discussed in sections IV and V.

8. As of July 1, 2017, amendments to the **Lithuanian** Law on Commercial Arbitration apply.[13] Some notable amendments concern provisions on the enforcement of awards.[14] Additionally, modifications address confidentiality when arbitration-related matters are heard before the courts: certain cases are now deemed confidential by default (e.g. assistance with the taking of evidence, injunctive relief, and challenge of arbitral awards).[15]

9. The second group of countries is comprised of those in which arbitral institutions have reformed their arbitration rules. **Austria** is one of the leading hubs of international arbitration in Europe, with a particular focus on the CEE and CIS regions.

10. Following a legislative change,[16] as of January 1, 2018, the Vienna International Arbitral Centre ("**VIAC**") is now permitted to administer domestic disputes in addition to its significant international case-load. To encourage parties to resolve disputes of lower value in a VIAC arbitration, registration and administrative fees have been reduced for disputes valued under EUR 25,000 and under EUR 75,000.[17]

11. The new Rules also aim to improve time- and cost-efficiency in various ways. First, they introduce an electronic case management system for administering proceedings. Second, the Rules explicitly state that arbitrators, parties and counsel shall conduct the proceedings in a cost-effective manner; their compliance with this principle may influence the arbitrator's fees and costs.[18] The VIAC Secretary General may also modify the arbitrators' fees by 40%, depending on, among other things, the case's complexity and the tribunal's efficiency.[19] This last amendment is likely to encourage arbitrators to conduct proceedings efficiently.[20] Furthermore, arbitrators are now expressly authorised to order a claimant to provide security for costs as well as to terminate the proceedings if the claimant fails to comply with the order.[21]

12. Lastly, as a signatory to the Equal Representation in Arbitration Pledge, VIAC aims to improve gender diversity. The new Rules, thus, provide that terms referring to natural persons such as "claimant" or "arbitrator" shall apply to all genders and shall be used in a "gender-specific manner" in practice.[22] In 2017, 50% of institutional appointments by VIAC were of women arbitrators.

13. Last year, the legal framework in **Russia** went through significant changes aimed at increasing transparency and stability in arbitration. One of the notable novelties was the introduction of a requirement for arbitral institutions to obtain a licence from the Ministry of Justice. Among the institutions that have fulfilled this prerequisite is the Russian Arbitration Center ("**RAC**"; formerly the "**Arbitration Center at the Institute of Modern Arbitration**").[23] RAC has recently opened divisions in Kaliningrad,[24] a Russian province in the Baltic, and Vladivostok,[25] in the country's Far East. It has also signed cooperation agreements with SIAC and HKIAC, thereby laying the foundations for expansion and collaboration on conferences, training and research opportunities.[26] The current Rules of RAC were adopted in 2017 and encompass rules on domestic, international and corporate disputes.[27] Some of the noteworthy provisions address issues of joinder and consolidation, emergency relief and fast-track arbitration.[28] The new Rules have also decreased arbitration fees.[29] While not explicitly stated in the Rules, RAC requires sole arbitrators and tribunal presidents to be qualified lawyers.[30]

14. Other arbitral institutions in Russia have likewise revamped their rules in accordance with the new legislation.[31] On January 27, 2017, a new set of rules of the Maritime Arbitration Commission at the Chamber of Commerce and Industry ("**MAC**") entered into force.[32] While the requirements regarding content and structure of the parties' pleadings have been toughened,[33] certain conditions regarding form have been relaxed. Parties may now agree on a language(s) of the arbitral proceedings, and written documents may be submitted in their original language.[34] Similar to a number of other institutions, MAC has introduced provisions on expedited arbitration if the total amount in dispute is less than USD 15,000 and the parties do not agree otherwise.[35]

15. The final group of countries consists of those that have changed their domestic arbitration regime and have amended the rules of their domestic arbitration institutions. In **Hungary**, Act No. LX of 2017 ("**Hungarian Arbitration Act**") replaced the previous Arbitration Act LXXI of 1994. The new law, which entered into force on January 1, 2018, mirrors the 2006 version of the UNCITRAL Model Law and purports to increase the jurisdiction's appeal to foreign investors.[36] Changes have been made to the structure of the Hungarian permanent arbitration courts, and rules on intervention and participation of non-contractual parties, interim measures and preliminary orders, and review of arbitral awards have been introduced.[37]

16. Under the new law, third parties who have a legal interest in the outcome of an arbitration may intervene on behalf of the party whose interest they share, subject to the arbitrators' approval. Moreover, unless otherwise agreed by the parties, even non-contractual parties may join the proceedings if the claim submitted by or against them can only be decided along with the claim that is before the arbitral tribunal. Another significant novelty is the possibility of retrial within one year of the award date. A party may request a retrial if, for reasons not attributable to that party, it was prevented or otherwise unable to present a fact or evidence during the arbitration proceedings, and if the consideration of that fact or evidence would have resulted in an award in that party's favour.[38] Lastly, legal successors of the parties are bound by an arbitration clause, unless the parties agree otherwise.[39]

17. With respect to permanent arbitration courts, the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry ("**HCCI**", alternatively known as the Commercial Arbitration Court) remains the most notable arbitration institution in Hungary.[40] Apart from empowering arbitrators to grant interim relief,[41] the new HCCI Rules,[42] effective as of February 1, 2018, introduce a number of mechanisms for improving the efficiency of proceedings.[43] The first one concerns a preliminary case management conference, which is held within 30 days of the tribunal's constitution. During this meeting the tribunal will come to terms with the parties as to the procedural rules, the means of evidence expected to be applied, and the desirability of an oral hearing.[44] Second, following the practice of other arbitral institutions, HCCI Rules provide for consolidation in cases where parties to all proceedings that are sought to be consolidated unanimously request so.[45] Another trend that HCCI embraced concerns rules on fast-track arbitration. Provided that the parties have expressly so agreed, their dispute will be governed by the Sub-Rules of Expedited Proceedings. A sole arbitrator will decide on the basis of the parties' written submissions within 15 days of the close of proceedings, unless either party requests an oral hearing, or the sole arbitrator considers this reasonable.[46]

18. The past year has also seen changes in the legal framework in **Ukraine**. The legislative reform that started in 2016 resulted in the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine.[47] The reform covered issues including arbitrability, enforcement of arbitration agreements and awards (discussed below). The reform also inspired a change of institutional arbitration rules. The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry ("**ICAC at the UCCI**") and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry ("**MAC at UCCI**")[48] have updated their Rules, which are in force since January 1, 2018. Innovations concern provisions on the Rules' applicability, expedited proceedings, interim measures, determination of the amount of the claim, and procedural succession.[49] Given that amendments to the Rules of MAC at UCCI[50] largely resemble those of the Rules of ICAC at the UCCI, only the latter will be discussed in greater detail.

19. The amendments increase the likelihood that the Rules of ICAC at the UCCI will be applied, because they will govern the proceedings whenever the parties have agreed to submit the dispute to the ICAC.[51] This holds true even if parties have not specified an arbitral institution or have inaccurately or incompletely specified the name of the ICAC.[52] Another arguably pro-arbitration, but also controversial, amendment to the Rules is a provision regarding procedural legal succession. In case of death, termination of legal entity or a similar event, the ICAC President or the arbitral tribunal (if such has been constituted) may engage a legal successor of the respective party in arbitral proceedings. This successor will be bound by all acts committed in the course of the proceedings prior to joining.[53]

20. In line with the trend of including provisions on fast-track arbitration, the new Rules also envisage expedited arbitral proceedings.[54] Similar to other institutions, a sole arbitrator will conduct expedited proceedings under ICAC at the UCCI, unless otherwise agreed by the parties. However, unlike many other institutions, which tie the application of special rules to the amount in dispute, the UCCI at the ICAC opts for a solely consensual basis. Thus, parties may either provide for expedited arbitral proceedings in their arbitration agreement or agree on them until the filing of the response to the Statement of Claim.[55]

21. For such expedited proceedings, the Rules limit the number of parties' submissions to Statement of Claim and Statement of Defence, as well as counterclaim and objections to a counterclaim, when applicable.[56] Deadlines are shortened. For instance, the respondent has 10 days upon receipt of the Statement of Claim to

submit a Statement of Defence and/or to file a counterclaim.[57] The case will be decided solely on the basis of documents, unless either party requests an oral hearing or the tribunal considers it appropriate in light of the circumstances.[58] The tribunal has 20 (rather than 30)[59] days from the date of case completion to render an award.[60]

## III. Arbitrability

22. While approaches to the issue of arbitrability are far from uniform in the CEE region, certain patterns in recent legislative changes appear to emerge, such as exclusion of consumer disputes from the realm of arbitrable matters.

23. **Bulgaria** has recently amended its arbitration legislation by narrowing the scope of arbitrable disputes further than most legislative systems. Claims involving rights *in rem*, possession of real estate, alimony, rights arising out of employment relationships and consumer disputes are non-arbitrable as per Article 19 of the amended Civil Procedure Code.[61] As of January 24, 2017, all pending arbitration proceedings involving consumers have been, therefore, terminated.[62] Furthermore, all arbitration agreements providing for arbitration between consumers and commercial parties are deemed null and void, unless the dispute is referred to an alternative dispute resolution procedure under the Consumer Protection Act.[63] If an arbitral tribunal renders an award in a non-arbitrable dispute, the award is *ex lege* deemed void, and the arbitrators are sanctioned with a fine by the Inspectorate.[64]

24. The reason behind this fairly drastic change is an abuse of arbitration proceedings by debt collection corporations, monopolistic companies and public service providers. For a number of years, these entities have been including non-negotiable arbitration clauses in their standard contracts and general terms.[65] While this itself is not abuse, some companies created their own arbitral institutions, or so-called "pocket arbitrations", which rendered awards predominantly in the companies' favour, sometimes without even informing the consumer.[66] The growing number of newly established arbitral institutions dealing mainly with consumer disputes gave rise to further debatable practices, such as "dubious service of documents" to respondents and questionable qualifications of unknown arbitrators appointed by those institutions.[67] For all these reasons, the Bulgarian legislator opted to declare consumer disputes non-arbitrable.

25. The new **Hungarian** Arbitration Act seemingly expands the notion of arbitrability. Under the new Act, disputes arising out of "commercial relationships" are arbitrable. The broad meaning given to the term "commercial", which encompasses all commercial or business matters, whether contractual or not, demonstrates this expansion of the scope of arbitrability.[68] Disputes that may not be submitted to arbitration are those that arise out of family, employment and consumer relations.[69]

26. **Ukraine** has also amended its arbitration legislation with respect to the scope of non-arbitrable disputes. Specifically, the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine[70] identifies the list of non-arbitrable disputes and purports to resolve, to a certain degree, the problem with the non-arbitrability of corporate and public procurement disputes.[71] Article 22 excludes as non-arbitrable disputes arising from privatisation of property,[72] protection of competition and bankruptcy.[73] Disputes regarding corporate relations, including disputes between business entity participants (founders, shareholders, members) or between a business entity and its participant (founder, shareholder, member), including a former participant, regarding the business entity's establishment, activity, management and liquidation[74] are likewise non-arbitrable. However, if corporate disputes arise out of a contract, they may be arbitrated if there is an arbitration agreement between the business entity and all of its participants.[75] Similarly, civil law aspects of the disputes arising from the execution, modification, termination and performance of public procurement agreements are arbitrable.[76]

## IV. Arbitration Agreements

27. The recent amendments introduced by the countries of the CEE region clarify the requirements for consent to arbitration. Some countries went further, by making those requirements more stringent than they used to be.

28. In **Bulgaria**, under the old Article 7(3) of the LICA, a respondent was deemed to have consented to an arbitration agreement if he had not explicitly rejected it.[77] However, this possibility of "tacit consent to arbitration" was seen as a gateway to abuse. Thus, under the new regime, consent can only be evidenced through express statements or unambiguous actions. In particular, if a party participates in the procedure by undertaking specific actions (such as responding to the Statement of Claim, submitting evidence, filing a counterclaim, or appearing in an open hearing related to the case) without objecting to the jurisdiction of the arbitral tribunal, consent to arbitration will be assumed.[78]

29. In March 2017, the **Polish** Supreme Court ruled on an agent's authority to enter into arbitration agreements. The Court refused to recognise and enforce an arbitration award because it found that the agent lacked the requisite authority. The contract was concluded through an exchange of electronic documents, none of which showed that the agent had been authorised.[79] The Court held that, if by no other means, the agent should have at least been authorised in the same manner. While the Court's ruling was specific to arbitration agreements, it has wider implications as it reaffirms that Polish law does not recognise general presumed authority.

30. The Polish Parliament has also made certain changes regarding arbitration agreements, albeit only in the realm of consumer arbitration. On January 10, 2017, in line with the EU Directive 2013/11/EU of May 21, 2013 on alternative dispute resolution for consumer disputes,[80] the Act on the Out of Court Resolution of Consumer Disputes of September 23, 2016 was amended.[81] According to the new Article 1164 of the Code of Civil Procedure, an arbitration agreement relating to disputes involving consumer agreements can only be concluded in writing *after* the dispute has emerged.[82] Any other means of conclusion, such as by reference or through an exchange of communications, are not acceptable. Unlike the Bulgarian legislation, the newly introduced rules in Polish law do not apply to pending arbitral proceedings, but only to disputes that have arisen after the law entered into force.[83]

31. **Ukraine** has also amended its arbitration legislation, making it more arbitration-friendly. The recent changes bring Ukrainian law in compliance with the 2006 UNCITRAL Model Law on Commercial Arbitration, since the "writing requirement" is met by an "electronic communication if the information contained therein is accessible so as to be usable for subsequent reference".[84]

## V. Annulment and Enforcement of Arbitral Awards

32. Legislators across the CEE region have taken different approaches to the issues of annulment and enforcement of arbitral awards.

33. While it is not unusual for institutional rules to link the tribunal's performance of their duties to their remuneration (the most recent

example being the new VIAC Rules, discussed above), the new **Hungarian** Arbitration Act goes one step further by expressly linking arbitrators' fees to the outcome of setting-aside proceedings. The new law requires arbitrators to reimburse their fees to the parties if the award they had rendered fails to survive scrutiny by the courts.[85] Hungary seems to be the only state in the CEE region to adopt this approach.

34. A more common occurrence among different states are changes made to the grounds for annulment, on the one hand, and recognition and enforcement, on the other. **Poland**, for example, expanded these grounds. Under Article 1194(3) of the Polish Code of Civil Procedure,[86] consumers cannot be deprived of the protection granted to them by the binding provisions relevant to a certain legal relationship. If a tribunal renders an award, disregarding these provisions, the award may be set aside as being contrary to public policy.[87] Recognition and enforcement may be refused on the same ground.[88]

35. Conversely, **Bulgaria** has narrowed the grounds for annulment. Unlike the old legislation, which allowed parties to set aside awards due to a violation of public policy, the new legislation removes this ground.[89] A domestic award, thus, may be set aside only for reasons that are exhaustively listed in Article 47 of the LICA,[90] whereas a foreign award can still be refused enforcement on public policy grounds (by virtue of Bulgaria's ratification of the New York Convention, 1958).[91]

36. In terms of the enforcement of awards, the Bulgarian Parliament introduced two key changes regarding writs of execution of arbitral awards by domestic courts. The first change relates to the designated body that is empowered to issue such writs. First, the Sofia City Court no longer has exclusive competence to issue a writ of execution for arbitral awards. The amended legislation grants this authority to any competent district court (i.e. a district court at the award debtor's domicile).[92] Second, state courts may now examine whether the case was properly subject to arbitration and whether the dispute in question was indeed arbitrable before issuing the writ of execution. It is suggested that this is a form of state control over arbitration,[93] which adds a second prong to the test that arbitral awards ought to pass in order to be recognised and enforced.

37. In **Ukraine**, the Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine[94] transferred competence on setting-aside and enforcement proceedings from the first instance courts to the Kyiv Appellate Court.[95] Meritless appeals are sanctioned: the reform allows the Appellate Court to dismiss manifestly unfounded appeals or otherwise erroneous motions.[96] The maximum duration of recognition and enforcement proceedings is capped at two months starting from the date of registration of the application with the Court.[97] When recognition is requested by the debtor, an accelerated procedure of 10 days applies. Non-appearance in Court no longer prevents recognition. The list of interim measures, which can be ordered by the Court during the recognition procedure, is expanded.[98]

38. Other states of the CEE region have not made notable changes to their legislation in terms of the annulment and enforcement of awards. An overview of recent case law, however, still proves instructive. The Supreme Court of **Lithuania** recently ruled on the applicability of a statutory limitation period to the recognition and enforcement of foreign arbitral awards. Distinguishing between foreign and local awards, the Court held that the five years' statutory limitation period applied only in the latter case. In case of foreign arbitral awards this period runs from the day the award is recognised in Lithuania.[99]

39. The Supreme Court of **Russia** ruled in favour of an investor, who sought to enforce a USD 112 million award[100] against Ukraine, one of the biggest investment treaty arbitrations in Ukrainian history.[101] Tatneft had initiated arbitral proceedings under the Russia-Ukraine 1998 BIT, alleging that Ukraine had caused Tatneft to lose its corporate rights in Ukrtatnafta, which controlled the biggest Ukrainian oil refinery. After being awarded damages for breaches of fair and equitable treatment ("**FET**"), Tatneft brought an application for enforcement in state courts. In early summer of 2017, the Arbitrazh Court of Moscow (Moscow Commercial Court) dismissed with prejudice Tatneft's attempt to enforce the award using the premises of Ukraine's embassy to Russia and a Ukrainian cultural centre in the city.[102]

40. In August of the same year, the Moscow District Commercial Court overruled that decision, holding that Ukraine had waived its right to jurisdictional immunity.[103] The Court stated that arbitration awards were to be recognised and enforced if recognition and enforcement is warranted by an international treaty of Russia and federal law.[104] According to the Court, by signing the BIT, Ukraine had agreed to be bound by arbitral awards and to be subject to the competence of Russian courts as part of the recognition and enforcement process. In support of its conclusion, the Court noted the grounds for refusing recognition and enforcement envisaged in the New York Convention, to which Ukraine is party.[105]

41. Finally, the Court addressed the question of immunity. According to the Federal Law on Jurisdictional Immunities of Foreign Governments and Property of Foreign Government in the Russian Federation, a state may not invoke immunity if it has publicly consented to the competence of the Russian courts with respect to a dispute concerning an international treaty, an agreement in writing that is not an international treaty, and statements given through diplomatic channels regarding the particular dispute.[106] For all of the above reasons, the Court dismissed Ukraine's immunity argument and remanded the case for reconsideration to the court of first instance.[107]

42. Ultimately, Ukraine sought the opinion of the Russian Supreme Court, which was unsuccessful as well.[108] The Supreme Court examined whether any grounds that warranted a thorough reconsideration existed. Since it could find neither an incorrect application of the norms of substantive law, nor illegality, the Court dismissed Ukraine's appeal.[109]

## VI. Investor-State Arbitration

43. The number of investment disputes involving states from the CEE region has significantly risen in the past year. In fact, 36% of cases registered in ICSID in 2017 concerned states from the "Eastern Europe & Central Asia" region, making this the region at ICSID with the highest number of claims.[110] While there have been recurring respondents,[111] some states, like Belarus, have faced claims for the very first time.[112]

44. A large portion of disputes arose in the energy sector, and states from Central and Eastern Europe have also contributed to the increased Energy Charter Treaty ("**ECT**") case-load.[113] Similar to the claims brought against Spain and Italy[114] for reforms to their solar energy subsidy regimes, investors advanced claims against Bulgaria[115] and the Czech Republic.[116] Although most cases are pending, tribunals in *Wirtgen v. Czech Republic* and *Antaris Solar v. Czech Republic* have rendered awards.

45. On March 6, 2018, in the case of *Slovak Republic v. Achmea BV* (the "**Achmea case**"),[117] the Court of Justice of the European Union ("**CJEU**") held that arbitration agreements concluded between Member States of the European Union in so-called intra-EU BITs had an adverse effect on the autonomy of EU law. The CJEU held that while commercial arbitration proceedings "originate in the freely expressed wishes of the parties",[118] intra-EU BIT arbitration "derives from a treaty by which member states agreed to remove"

disputes over the interpretation of EU law from the jurisdiction of their own courts.[119] As such, the CJEU concluded that the dispute resolution mechanisms provided for in the BITs establish a mechanism that prevents "the full effectiveness of EU law" when it comes to dispute resolution.[120]

46. The CJEU's reasoning, while going against the opinion of the Advocate General, mirrors the European Commission's views as previously expressed on numerous occasions in its *amicus curiae* briefs in various investor-state arbitrations.[121] As such, it is doubtful whether tribunals, in particular under instruments like ICSID and the ECT, will be persuaded to change the long-standing precedent that such tribunals operate independently from EU law and so do not create, with their decisions, any incompatibility with EU law either. Enforcement of awards based on intra-EU BITs will likely become more difficult after *Achmea*, because the CJEU's position may have to be taken into account by EU Member State courts as a matter of public policy exception under the New York Convention, although ICSID offers an independent and directly-applicable enforcement regime that does not allow for a reconsideration of public policy at the enforcement stage.

47. These issues are likely to be at the forefront of investment arbitration in the region for the foreseeable future. Several states in the CEE region have, under pressure from the EU Commission, already proceeded to terminate their BITs with other EU Member States. Almost two years after announcing that it would terminate its 22 intra-EU BITs, Romania finally acted on its promise.[122] While not yet seeking to terminate its intra-EU BITs, **Hungary** appears to have relied on *Achmea* when it requested an ICSID award, ordering it to compensate a Portuguese investor for denial of justice, be annulled.[123] The *Achmea* decision has also prompted at least one investor to withdraw its treaty claims.[124]

48. The CJEU's ruling in *Achmea* also raises questions regarding multilateral treaties, such as the ECT, which appear to fall outside the immediate scope of *Achmea*, not least because the EU itself is a signatory party to the ECT.[125] The ICSID tribunal in *Masdar v. Spain* thus ruled that the CJEU decision in *Achmea* had no bearing on ECT cases.[126]

## VII. Overview of State-to-State Arbitrations

49. The territorial and maritime dispute between the Republic of Croatia and the Republic of Slovenia[127] originated after the break-up of Yugoslavia in 1991, when the former republics omitted to delineate their borders. On June 29, 2017, five years after the start of this highly publicised dispute, the five-member PCA tribunal rendered a final award.

50. Apart from fixing the boundary in more than 20 areas, the tribunal also determined the boundary with respect to the Bay of Piran / Bay of Savudrija. Croatia had argued that the delineation of the border ought to be made along a median line, whereas Slovenia claimed the whole of the Bay. Although the tribunal fixed the boundary along a line situated between the lines advanced by the parties, the larger part of the Bay was passed to Slovenia.[128] Using equidistance principles, the tribunal also created a "Junction Area" of 2.5 nm in Croatia's territorial sea.[129] In an attempt to "guarantee both the integrity of Croatia's territorial sea and Slovenia's freedoms of communication between its territory and the high seas",[130] the tribunal established a special, never before seen under the UNCLOS, usage regime.[131]

51. Specifically, the tribunal prescribed a regime designed to safeguard freedom of communication, which included "freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea",[132] except for "the freedom to explore, conserve or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction Area".[133] Croatia retained the rights "to adopt laws and regulations applicable to non-Croatian ships and aircraft in the Junction Area"[134] and to "respond to a request made by the master of a ship or by a diplomatic agent or consular officer of the flag State for the assistance of the Croatian authorities and also, exceptionally, […] the right to exercise in the Junction Area powers under UNCLOS Article 221 in respect of maritime casualties".[135] While Croatia also retained its rights "to enforce its laws and regulations in all other areas of its territorial sea and other maritime zones",[136] it received no such prerogatives in the Junction Area.

52. Nearly a year has passed since the final award was issued, but it has seemingly not put an end to the dispute. Slovenia has recently threatened to take Croatia to the European Court of Justice for its continuing refusal to comply with the award.[137]

53. Another territorial and maritime dispute, administered by the PCA, arose out of Russia's 2014 annexation of Crimea.[138] Reports state that Ukrainian vessels are unable to access the Ukrainian regions adjoining the occupied areas in the country's eastern region through the Kerch Strait due to safety and other reasons (for example, the construction of a 19 km bridge). Unofficial sources report that the area in dispute covers 2,000 km$^2$ of sea.[139]

54. Historically, the Sea of Azov and the Strait of Kerch have been inland waters of both Ukraine and Russia. Under the agreement signed in 2003 between Ukraine and Russia, "all matters … [were to be] solved only by peaceful means together or by agreement of Ukraine and Russia".[140] Given the current state of affairs, however, that is no longer a viable option. Thus, on September 16, 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim under Annex VII to the 1982 UNCLOS. Ukraine asked the PCA, among other things, to confirm its rights in the Black Sea, Sea of Azov, and Kerch Strait, and order Russia to respect Ukraine's sovereign rights in those waters, cease misappropriating Ukraine's natural resources, and compensate it for damages caused.[141] Unlike in the investor-state arbitrations concerning Crimea, where Russia has objected on jurisdictional grounds, it is actively participating in this case.[142]

### Acknowledgment

The author would like to acknowledge the invaluable contributions of Dina Prokic and Simona Valkova in the preparation of this chapter.

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