Kluwer Arbitration Blog

Paris Arbitration Week Recap: Do and Don’t’s When Choosing a Seat and Enforcing in CEE/CIS/Russia: State of Play

Ioana Knoll-Tudor (Jeantet) · Tuesday, July 14th, 2020

The third edition of the Jeantet “Arbitrating in CEE and CIS” roundtable was held virtually during the Paris Arbitration Week on Wednesday, 8 July 2020. The topic of this year’s edition laid stress upon “Do and Don’t’s When Choosing a Seat and Enforcing in CEE/ CIS/ Russia: State of Play”.

Because of both the significant legal and practical effects it carries, the choice of an arbitral seat requires careful consideration of the peculiarities attached to the national system where it is found. Jeantet’s 2020 “Arbitrating in CEE and CIS” roundtable thus aimed at providing the perspective of arbitrators, academics, lawyers, and in-house counsels all acting in this region. The panelists were: *Crina Baltag (Senior Lecturer, Stockholm University), Alice Fremuth-Wolf (Secretary General, Vienna International Arbitration), Maria Hauser-Morel (Counsel, Hanefeld),* and *Michael McIlwrath (Global Litigation Counsel, Baker Hugues GE)*. The debate was supplemented by the interventions of *Metodi Baykushev (Managing Partner, Dimitrov, Petrov & Co), Andras Laszlo (Partner, Laszlo Fekete Bagamery*) and *Davis Lasfargue (Partner, Jeantet)* on their respective jurisdictions (Bulgaria, Hungary and Russia, respectively). The roundtable was once again moderated by *Ioana Knoll-Tudor (Local Partner, Jeantet).*

Three topics of particular interest had been chosen for discussion to best highlight the variety of questions which may arise when contemplating the choice of an arbitral seat in the CEE/Russia/CIS region: (1) the arbitrability of disputes, (2) the monopoly of national arbitral institutions, and (3) logistical as well as procedural issues.

Arbitrability

Rules relating to the arbitrability of disputes often constitute a real challenge for arbitrators seating in CEE/ Russia/ CIS arbitrations. Various reasons may explain this, not the least of which is that some States in the region demonstrate a rather protective approach when it comes to adjudicating certain types of disputes.

As the panel pointed out, there is, in particular, a thread of disputes that are not arbitrable in the region.

First of all, parties and arbitrators should be mindful of the arbitrability of their disputes when dealing with **State entities or subject matters**. In Hungary, for instance, and pursuant to the 2012

Act on State Assets and the 1994 Arbitration Act amended, no arbitration procedure could take place in matters relating to national assets or any relating rights, claims or demands. Although this approach was abolished from both Acts in 2015, the question remains open with regard to arbitration agreements concluded between 2012 and 2015. Similarly, in Romania, there is a presumption that public entities may not enter into arbitration agreements unless they exercise commercial activities, whether by law or by statutes.

Second, certain jurisdictions such as Czech Republic or Russia do not allow disputes regarding **insolvency** matters to be referred to arbitration. With respect to **real property**, while only certain property rights are arbitrable in Bulgaria (e.g. tenancy agreements), Romanian law imposes broader restrictions which, for example, will require an arbitral award concerning the property rights of immovable assets to be taken before a public notary or before a court in order to be opposed to third parties.

Third, local restrictions have also extended to matters of pure **contract law**. By way of illustration, in Bulgaria, Article 1(2) of the International Commercial Arbitration Act (ICAA) has been interpreted so as to indicate that disputes about filling gaps or adaptation of a contract to new circumstances must be *explicitly* provided for in the arbitration agreement, or risk the award being set aside if the arbitration clause is too "general" or "standard".

Finally, the arbitrability of **corporate issues** in the CEE/ Russia/ CIS region is not precisely defined and remains heterogeneous. For instance, while intra-corporate disputes (shareholders' decisions, shareholders' exclusion from the company) are not arbitrable in Romania and Poland, local courts in other jurisdictions such as Ukraine are sometime unable to provide straightforward answers as to the arbitrability of corporate disputes. By contrast, the 2016 Arbitration reform brought some clarity in Russia: since 1 February 2017, all "corporate disputes" (i) must be administered by accredited "Permanent Arbitration Institutions" only, (ii) subject to special corporate rules, and (iii) with a seat of arbitration in Russia. However, neither the HKIAC nor the VIAC – the only foreign accredited arbitration institutions – have yet implemented such special corporate rules, as those rules prescribe the publication of the identity of the parties as well as of the matters of the dispute and thus risk thwarting the confidentiality of arbitration.[1)]

Monopoly of national arbitral institutions

In view of the fact that, following the parties' will, many disputes involving CEE/ Russia/ CIS parties are arbitrated outside of the CEE/ CIS region, some States have tried to implement, either contractually or by way of legislation, monopolies favoring local arbitral institutions. As emphasized by the panel, the existence of these monopolies must be carefully examined when choosing a seat and enforcing in the region.

As an example, ICC awards relating to FIDIC contracts have been annulled by Romanian courts because the contractual reference to "the Court of International Arbitration" was interpreted as referring to the CCIR-CICA Court (Romanian national court of arbitration) instead of the ICC Court even when specific reference was made to the ICC Rules. The ICC tribunals had upheld their jurisdiction, but ultimately saw their awards annulled. Similarly, the Bucharest Court of Appeals annulled an ICC award on the basis that the parties had not stated in full the name of the ICC, even though they had expressly referred to FIDIC in their contract (which is most often

associated to the ICC Court of Arbitration).[2)] Moreover, the Government Decision 1/2018, replaced the former standardised public procurement contracts based on FIDIC Conditions of Contract with new ones, extending at the same time their applicability to all investment objectives financed by public funds of which the total estimated value is equal to or exceeds € 5 million, and including a mandatory arbitration clause which provides that disputes shall be settled by the CCIR-CICA.

In Hungary, Article 59(1) of the 2017 Arbitration Act provides that "[a]*s institutional Arbitration Court in Hungary, the Commercial Arbitration Court or the panel of arbitration formed according to its rules of arbitration shall proceed."* This provision has stirred an important debate as to whether it constitutes an exclusion of jurisdiction or a mere rule distributing jurisdiction. As it stands, and as acknowledged by the panel, the possibility for parties to provide for Budapest as the seat of their arbitration dispute seems very unlikely.

Involvement of State courts in the arbitration procedure

More indirectly, in Bulgaria, the reformed ICAA now empowers the Ministry of Justice to scrutinize the work of arbitration institutions and provide compulsory instructions to achieve compliance with the law (as previously discussed on the blog), while in Belarus, under the July 2011 Law on Arbitration Courts, a State registration is needed for permanent arbitral tribunal, even when they are created as separate units of legal persons.

Comparable monopoly measures have been introduced in Slovakia, where only entities empowered by the 2002 Arbitration Act (as amended in 2015) are allowed to establish permanent arbitration institutions. It is therefore doubtful whether foreign institutions would be able to maintain a permanent presence in Slovakia.

Other noticeable restrictions taken by States and discussed by the panel concerned the impact of such measures on the parties' choice of arbitrators, as for example is the case in Ukraine where the Government has imposed a closed list of arbitrators for national arbitration institutions in order to mitigate the proliferation of rogue institutions.

Logistical issues

- ***Virtual hearings***

While noting that the Covid-19 pandemic has shed light on the logistical aspects of arbitration in the region and that these aspects may also influence parties and arbitrators when choosing a seat and enforcing in CEE/ Russia/ CIS, the panel unanimously concurred that there has been a rapid and excellent response to the pandemic from arbitral institutions in the region, which therefore continue to operate and allowed for procedures to run efficiently.

The panel also observed that, contrary to popular belief, problems that have occurred were neither related to connectivity nor technicalities, but, rather, to time zones or to certain parties refusing to hold virtual hearings. All members stressed that the concern always has to be the fair and equitable treatment of the parties and the respect of due process, which must be assessed by arbitral tribunals in concertation with the parties and their counsels.

In that regard, it is worth mentioning that the VIAC just published a series of guidelines – "*the Vienna protocol*" – of various elements that arbitrators should take into consideration when deciding whether to hold a virtual hearing or not. The panel stressed that, in any event, tribunals shall adopt a thorough reasoning, also putting forward the comments and positions of the parties on the question, thus allowing to significantly mitigate the risks of seeing an award set aside or its enforcement denied.

- ***Original of the arbitration agreement***

Importantly, the requirement to provide the original of the arbitration agreement when seeking to enforce an award is not unanimously applied across the CEE/ Russia/ CIS region. While certain countries require an original or a certified copy of the arbitration agreement *(*e.g. Czech Republic, Finland, Kazakhstan), sometimes even with translation requirements (e.g. Kosovo, Russia), other countries do not, except in some cases, hold it as a prerequisite (e.g. Romania, Austria).

In the end, is it all a question of perception vs reality?

The particularly active attendees were quick to point out that one could hardly refer to the CEE/ Russia/ CIS region as a whole and aim at presenting an analysis that could encompass the entire region in a uniform manner. The panel agreed to that comment and emphasized the fact that the region suffers to some extent from an ill-placed lack of attraction as a place for arbitration. Many jurisdictions have indeed reformed and modernized their arbitration laws, while arbitration communities in the region are increasingly dynamic, and national courts are taking a positive approach to arbitration. Yet, the common perception of arbitration users towards these jurisdictions is not always positive.

This unfortunate perception was precisely what the panel's online survey to the roundtable attendees revealed.

To the question *"Do you perceive arbitral institutions in the CEE/ Russia/ CIS region as generally neutral and independent?"*, 60% of the attendees answered yes and 40% answered no. To the question *"Would you advise your client/company to incorporate an arbitration agreement to their contracts providing for a seat of arbitration in the CEE/ Russia/ CIS?"*, 48% answered yes and 52% answered no.

Drawing on its survey, and as final word of advice, the panel insisted that the great diversity of seats and legal frameworks within the CEE/ Russia/ CIS region should not lead arbitration practitioners to rely upon their perception of the region but, rather, research and investigate in further details about its peculiarities when contemplating a seat of arbitration located in the CEE/ Russia/ CIS region.

More coverage from Paris Arbitration Week is available here.

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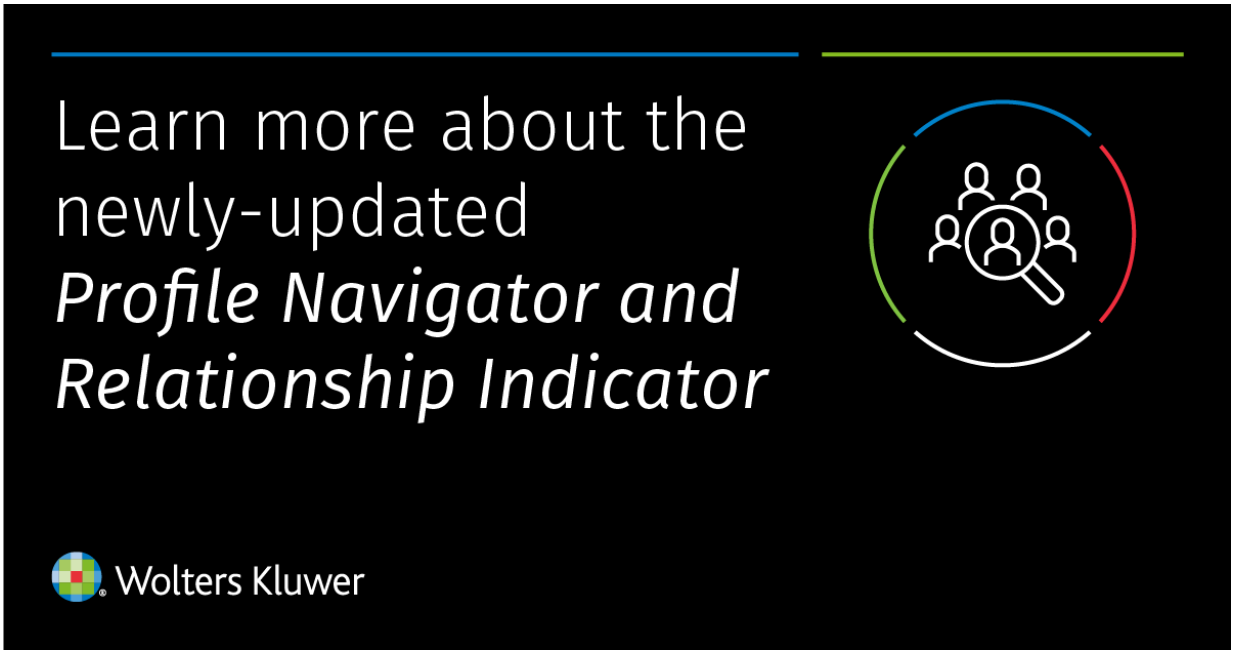

References

?1 In February 2020, the VIAC and the HKIAC jointly applied to the Russian Ministry of Justice and to its Council for the Development of Arbitration for clarification of certain “grey areas” of the Russian Arbitration legislation, in particular regarding the unclear distinction between corporate disputes that are subject to special rules and corporate disputes that are not subject to such rules.

?2 Decisions No. 1747 dated 12 April 2018 and 4119 dated 16 October 2018, Bucharest Court of Appeal.

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