

Kluwer Arbitration Blog

2024 PAW: The Evolution of Arbitration in the Central Eastern Europe and Central Asia Regions: A Roadmap for the Future

Ioana Knoll-Tudor (Addleshaw Goddard LLP) · Friday, March 22nd, 2024

The eighth edition of the Paris Arbitration Week (“PAW”) started this Monday with Addleshaw Goddard hosting a roundtable event on “The Evolution of Arbitration in the Central Eastern Europe and Central Asia Regions: A Roadmap for the Future”. The discussion included experts from various background: [Sébastien Jean](#) (Associate Director of the Geoeconomics and Geofinance Initiative, French Institute for International Relationships (Ifri)), [Alice Fremuth-Wolf](#) (Market Head of Austria and the CEE region, Nivalion AG), [Hjordis Birna Hjartardottir](#) (Counsel, ICC), [Peter Rižnik](#) (Independent Arbitrator) and [Diora Ziyaeva](#) (Partner, Dentons). The event was moderated by Addleshaw Goddard’s Paris-based partner, [Dr. Ioana Knoll-Tudor](#), and introduced together by partners [Dr. Felix A. R. Dörfelt](#) (Hamburg) and [Dr. Markus Perkams](#) (Frankfurt).

The event continued Dr. Knoll-Tudor’s well-established tradition of hosting Central and Eastern Europe (“CEE”) related events during the PAW. This edition, however, introduced two novelties: the inclusion of a geoeconomics expert and an extended focus on Central Asia (“CA”). The discussion spanned more than 30 countries and 170 million people, assessing the current state of arbitration through a unique geopolitical lens.

Geoeconomic Shift: From Isolation to Interdependence and Intervention

Sébastien Jean set the stage for the discussion by drawing attention to the dramatic shift in the geoeconomic landscape over the past 15 years. He contrasted the previous era, where countries resisted isolation, with the present day, where economic sanctions and trade restrictions have become commonplace. Additionally, there is an observable surge in economic policies that contradict WTO law.

However, Jean argued against the notion of deglobalisation. He pointed out that the high level of global interdependence and the increasing fragmentation of economies suggest otherwise. These trends are further fuelled by an unprecedented level of rivalry and hostility between countries and regions, as well as the growing leverage of individual countries’ economic power.

Jean also highlighted the disconnect between the political discourse and the economic reality. While the former embraces the idea of decoupling and lauds the evolving shape of the international economy – evidenced also by the decreasing trade volumes between the US and China – the latter

paints a different picture. The global economy remains interdependent, but its efficiency is undermined by attempts at decoupling. This disparity between narrative and reality puts a strain on the multilateral trade system, which is already overwhelmed and experiencing a loss of legitimacy.

The complexity of the situation is further exacerbated by climate change. As Jean explained, climate change is driving an industrial and trade revolution, disrupting key sectors (such as energy) and reshaping the global economy. However, current efforts to counteract climate change are insufficient, prompting a reassessment of the role of states in the economy and a call for greater interventionism.

Arbitration Dynamics in the Two Regions

Hjordis Birna Hjartardottir was the first to provide an arbitration analysis of the region, noting that, in 2022, the CEE and CA regions accounted for 10.5% of the ICC's total caseload. This figure is only marginally less than North America's 10.7%, but considerably lower than Western Europe's 28%. The ICC's statistics for 2023 have yet to be published.

In the past year, Hjartardottir's team observed the impact of international sanctions against Russia from two distinct angles with regard to CEE arbitrations. From an administrative perspective, when dealing with compliance-sensitive cases impacted by sanctions, they have encountered delays in the processing of payments due to, in part, the need for approvals from public authorities and the compliance policies of the banks themselves. However, receiving an extended OFAC license in 2023 covering certain sanctions against Russia has greatly facilitated the ICC's administration of these cases and allowed them to proceed. Moreover, from the perspective of the disputes themselves, sanctions have affected the subject matter and substantive issues of the disputes, with parties increasingly relying on *force majeure* provisions, arguing that their non-performance is justified by the existence of sanctions.

The rise in the number of cases involving Russian parties subject to international sanctions presents unique challenges. Hjartardottir noted that they see a rise in cases involving anti-arbitration injunctions issued by Russian courts on the basis of Article 248.1 of the Russian Procedural Code, providing for the exclusive jurisdiction of Russian courts over parties that are subject to foreign sanctions (see previous discussion on the Blog [here](#)). Another development is challenges against arbitrators based on geopolitical grounds, including challenges against arbitrators coming from jurisdictions that have imposed sanctions against Russia, based on an alleged bias against Russian parties. Finally, Hjartardottir noted that they see an increase in energy disputes which, since the invasion of Ukraine, have evolved to focus more on the alleged failures to deliver necessary quantities of energy sources or under-deliveries, and defences based on *force majeure* provisions.

Alice Fremuth-Wolf supplemented this context with a third-party funder's perspective. She explained that the CEE and CA regions encompass many different jurisdictions, making it impossible to consider them as a homogeneous market and that a knowledge of the specifics of the individual legal systems and their stakeholders is key to do business in this area. According to Fremuth-Wolf, her internal statistics for the CEE region, including Austria, show that in the past seven years, state litigations form 40% of the funding requests received that they finance, followed by investment arbitrations (35%), commercial arbitrations (20%), and finally class actions (5%). The conversion rate of funding requests received and actual fundings in the CEE region is still

below the average 8% rate, with a surprising distribution, given the clear preference for commercial arbitration due to its many advantages in the CEE region, despite struggles in ISDS and a higher win rate for respondent states.

Fremuth-Wolf further elaborated on the specificities of the CEE region from a funder's perspective. She pointed out that there is still a lot of market education to be done as the concept of third-party funding is not yet widely known and largely unregulated in the various jurisdictions. There is a demand to familiarise lawyers and parties with this financing and risk-shifting option, in particular for arbitration proceedings. She observed that while well-established regional institutions have maintained their significance, numerous local arbitral institutions have emerged, and funders are increasingly willing to analyse also cases administered by certain local arbitral institutions. She also noted that in ISDS cases in this region, the ratio between the amount of damages claimed and that awarded by arbitral tribunals is much lower than in the rest of the world and that there is a higher win rate for respondent states, which means that funders have to factor this in their economic analyses. Lastly, Fremuth-Wolf addressed enforcement, noting that it has become a distinct concern, with less voluntary compliance with awards and with funders receiving an increasing number of requests to fund enforcement proceedings exclusively.

Central Asia: The Intersection of Economic Flux, Investment Influx and Arbitration Reform

As the panel shifted its focus to CA, Sébastien Jean began by briefly emphasising the significant transformation in the backdrop of economic activities due to the war in Ukraine. The conflict has heavily impacted CA countries, leading them to redefine their business strategies in response to sanctions. While Russia has fostered stronger ties with the East (China most notably), it still remains to be seen how CA countries will position themselves.

Diora Ziyaeva noted that the recent period has been characterised by an influx of investment in the region and what appears to be a reduction of ISDS proceedings brought against CA countries; for example, no new ICSID cases have been initiated against CA countries since 2022 (based on publicly-available sources), while the case law in this region is of 42 investment disputes to date. While CA states are at different stages of economic development, the current economic climate has created opportunities. Ziyaeva cautioned, however, that these opportunities are not set in stone, especially in a year marked by multiple elections and polarised views of opposing parties worldwide. The geopolitical uncertainty could potentially lead to an increase in disputes if the surge in investment continues but we are yet to see how exactly this will play out.

Ziyaeva also examined the relevant treaty frameworks in the region, noting that CA countries have over 200 BITs signed and in force. These treaties have raised a number of interesting issues, for example, those related to jurisdictional issues and treaty interpretation. Following the region's first ISDS experiences, relevant treaty frameworks are currently undergoing modernisation. Commercial arbitration has been increasing in the region, with regional institutions further developing and typically handling a portfolio not exclusively comprised of regional cases. However, the value of the claims varies significantly. As highlighted by Ziyaeva, commercial arbitration is currently benefiting from a developing regulatory framework and the modernisation of arbitration rules. Nonetheless, each CA country is unique in its approach to regulatory reform and thus, each particular approach is specific to the country.

Central and Eastern Europe: Geopolitical Shifts and Economic Dependencies

Sébastien Jean commenced the panel's analysis of the CEE region by highlighting the [EU Commission's first in-depth investigation under the Foreign Subsidies Regulation against Bulgaria](#), which underscores the clash between Chinese ambitions and EU rules within the region, creating a conflict of interests that could potentially impact fair competition and the maintenance of a level playing field.

Peter Rižnik echoed this sentiment, citing the considerable Chinese involvement in large national infrastructure projects in the Balkans, particularly in Serbia and Hungary. He noted that the geopolitical situation is mirrored in the arbitration market, with the war in Ukraine generating hundreds of disputes, predominantly in the agricultural and transportation sectors. However, he also pointed out that arbitration has developed unevenly across the region, with discrepancies in the services offered by regional institutions and the influence of national laws on arbitration. For instance, despite being significantly affected by the war, Moldova has not seen a surge in disputes.

Rižnik also observed that while major institutions like the ICC, VIAC, and SCC are gaining prominence in the region, local institutions are striving to stay competitive. On the topic of enforcement, Rižnik highlighted that 90% of awards are successfully enforced in Poland, a figure that rises to 97% in Ukraine, indicating promising developments. Furthermore, he noted that the issue of gender diversity is less pronounced in the CEE region, with a smaller gender gap in arbitration compared to in Western Europe.

Rižnik concluded his overview by focusing on four specific countries. He recalled Romania's recent backlash against arbitration and its status as one of the first EU countries to terminate its intra-EU BITs, despite its [recent victory in defending the ICSID case brought by Gabriel Resources](#). This contrasts with Hungary's approach, which continues to enter into new BITs and supports the Energy Charter Treaty ("ECT"). Rižnik also referred to Bosnia's modern model BIT, particularly in terms of environmental considerations, and Slovenia's exit from the ECT in light of the numerous ECT-related cases that the country faces.

Shifting Arbitration Landscape and Attitude Towards Enforcement

In response to a question from the audience, Ziyaeva emphasised the attitude shift among CA countries following their experiences with ISDS. Based on publicly-available sources, this shift has led to, among other things, a growing tendency for state-owned enterprises to enter into investment contracts that include dispute resolution clauses. Despite these advancements, Ziyaeva argued for the need for further developments. The need for states to review their BITs is also demonstrated by the discrepancies in the various language versions of dispute resolution clauses of treaties such as the Turkey-Turkmenistan BIT of 1992, which may give rise to further disputes.

The conversation then delved deeper into the issue of enforcement. Fremuth-Wolf mentioned an increasing reluctance towards enforcement, prompting third-party funders to factor in the potential need to enforce awards more heavily, in terms of budget requirements, duration and the need for an asset tracing strategy. Ziyaeva highlighted the challenges of enforcement in Russia, particularly the exclusive jurisdiction of Russian courts over disputes relating to sanctioned individuals or entities.

Conclusion

Both CEE and CA regions have been undergoing a steady evolution. However, their future trajectories are somewhat constrained by current geopolitical events and the interplay between competing powers seeking to broaden their spheres of influence. These processes have bolstered the significance of both regions, a trend further reinforced by the ongoing development of arbitral laws and institutions. Yet, these regions remain diverse in both legal and economic terms. This complexity poses challenges for both investors and third-party funders, necessitating a robust understanding of the market and knowledge of regional specificities.

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